

To:
All members of the
Overview and Scrutiny Committee

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Date: 28 September 2020

Supplementary Agenda

Overview and Scrutiny Committee - Tuesday, 29 September 2020

Dear Councillor

I enclose the following urgent item for the agenda for the Overview and Scrutiny Committee meeting to be held on Tuesday, 29 September 2020:

4. Call-in of Cabinet decisions

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To receive an officer briefing on the matter of affordable housing at the former Brooklands College site, Church Road, Ashford which was considered by the Cabinet at its meeting held on 23rd September 2020 and is open to a call-in of the decision until 1st October 2020.

The Chairman has agreed to this matter being added to the agenda as an urgent item due to the following special circumstances:

To provide an opportunity for members to be fully briefed and ask questions on the matter thereby enabling them to make a reasoned decision as to whether the matter should be subject to call-in, and on the basis that the window of opportunity for a call-in is short.

Yours sincerely

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To the members of the Overview and Scrutiny Committee

Councillors:

V.J. Leighton (Chairman)
O. Rybinski (Vice-Chairman)
C.L. Barratt
J.H.J. Doerfel
J.T.F. Doran

R.D. Dunn
T. Fidler
N.J. Gething
M. Gibson
A.C. Harman

I.T.E. Harvey
N. Islam
T. Lagden
L. E. Nichols
D. Saliagopoulos

Cabinet**23 September 2020**

Title	Affordable housing at the former Brooklands College site, Ashford		
Purpose of the report	To make a Key Decision		
Report Author	David Birley, Housing Strategy & Policy Manager		
Cabinet Member	Councillor Maureen Attewell	Confidential	No
Corporate Priority	Housing		
Recommendations	Cabinet is asked to approve the payment of grant to A2Dominion as detailed in this report, to support the delivery of 26 homes for Affordable Rent, subject to the completion of a legal agreement which will allow the Council to reclaim the grant should Brooklands Helix successfully challenge the Council's decision in relation to the CIL demand.		
Reason for Recommendation	The Council is committed to enabling the delivery of more affordable homes in Spelthorne, and this is an opportunity to secure the delivery of 26 new homes for Affordable Rent in the centre of Ashford, for local residents in housing need.		

1. Key issuesTimeline

- 1.1 Brooklands Helix (a subsidiary of the developer Inland Homes) purchased the former Brooklands College site in Ashford and obtained planning permission in 2016 for 357 dwellings, plus commercial space under application 17/01274/FUL. This application Included 32 affordable homes as a planning requirement under s106 (22 x Affordable Rent and 10 x Shared Ownership), leaving the remaining 325 homes as private sale.
- 1.2 Brooklands Helix was liable for a Community Infrastructure Levy (CIL) across the entire development at £1,252,663.78. CIL is a levy that local authorities can choose to charge on new development in their area. The money raised can be used to fund a wide range of infrastructure projects such as:
 - (a) roads and other transport infrastructure
 - (b) flood defences
 - (c) schools and other educational facilities
 - (d) medical facilities
 - (e) sporting and recreational facilities
 - (f) open spaces.

- 1.3 Parties liable to pay CIL can apply for an exemption under certain circumstances – the main being the delivery of affordable housing. Brooklands Helix successfully applied for this category of CIL relief on the 32 affordable homes. This relief was worth £96,588.17 and was granted in March 2018. This left a balance CIL liability of £1,156,075.61. Brooklands Helix made the first three instalments of this balance on time, leaving a fourth and final instalment of £289,018.90 which was at the time due on 3/8/19.
- 1.4 Officers discovered informally in June 2018 that Brooklands Helix had sold the site to A2Dominion. Brooklands Helix failed to notify us, as it was formally required to do under Regulation 52, until 21/3/19.
- 1.5 A2Dominion, following lengthy discussions with SBC in August 2018, approached Homes England for grant funding to convert the on a number of the private sale homes. The scheme includes 226 Shared Ownership and 26 Affordable Rent. This application, worth £10.08m, was successful, leaving a final tenure mix of:

Tenure	Non-s106	s106
A2Dominion Private Rent	73	0
Shared Ownership	226	10
Affordable Rent	26	22
Total	325	32

- 1.6 Whilst the Council would have preferred a tenure mix including even more affordable rented in lieu of shared ownership, the increase was welcomed in support of the more than 2,000 households waiting for an affordable home on the Council's Housing Register.
- 1.7 SBC was notified of the transfer of ownership of the land under Regulation 52 on 21/3/19. On 26/3/19 Brooklands Helix were advised to also transfer the liability for CIL to A2Dominion as soon as possible. On 26/3/19, Brooklands Helix confirmed that they were to retain the liability for CIL.
- 1.8 On 30/5/19, Brooklands Helix submitted an application for social housing relief on the remaining CIL liability, based upon the 252 'additional' affordable housing. This relief is worth £923,711.79. This was deemed an ineffective application by Officers. In order to claim social housing relief as per Regulation 51 the party claiming relief must be the owner of the relevant land and also the party that has the liability to pay CIL. Whilst Brooklands Helix were liable to pay CIL, A2Dominion were owners of the relevant land.
- 1.9 On 1/8/19 A2Dominion advised SBC that they intended to apply for CIL relief, which was only submitted on 12/9/19. An application to transfer CIL liability was submitted at the end of September.
- 1.10 Given the complexities of the case, Planning Policy carried out a lot of research and consultation with Legal in consideration of the 12/9/19 application.
- (a) Social housing relief
Although the relevant land was now owned by the party claiming relief (A2Dominion), Brooklands Helix remained the party liable to pay CIL.

Therefore this application for CIL relief was also ineffective as it does not satisfy the second requirement of Regulation 51.

(b) Transfer of CIL liability

In order for a transfer of CIL liability to be valid, the applicable form must be received before the due date of the final instalment. In this case, the final instalment date was 3/8/19, however a transfer of liability request was not submitted until the end of September. Not only was the application out of time, it was also invalid as it was not signed.

Therefore, in accordance with the CIL Regulations, liability for this scheme cannot be transferred from Brooklands Helix, who remain liable to pay the final CIL instalment which is now overdue.

- 1.11 A2Dominion were advised on the outcome of the 12/9/19 application on 20/12/19. There are no appeal rights within the Regulations, and A2Dominion cannot request a Judicial Review as there is no decision to be reviewed, given that neither the 12/9/19 nor the 30/5/19 applications were effective to start off with. Legal advice confirmed that the delay in confirming the outcome of the most recent application for social housing relief had not contributed to the situation as the application to transfer liability to A2Dominion was received too late to be considered in any event.
- 1.12 Planning Policy colleagues have followed the appropriate regulations, made best endeavours to seek legal advice and also advice from peers and independent professionals at training seminars. All advice has pointed them to the conclusion that their hands are tied under the Regulations as they are written. Essentially this means that 'someone' needed to pay the remaining instalment of £289,018.90. There was no mechanism or power for SBC to grant relief outside of the Regulations and to do so would be ultra vires.
- 1.13 To confirm the current position, the Council sought Counsel advise which confirmed that *'Spelthorne Borough Council is not the author of the CIL Regulations and has limited discretions available to it in the procedures and machinery of the Treasury approved Regulations. The Council has properly applied the CIL Regulations, as it was required to do, to the orthodox situation where a permitted development ensured 32 affordable housing units. It has also properly applied the Regulations to the unorthodox situation created by the original developer and the new land owner whereby their commercial relationship was not organised so as to ensure potential gateways in the CIL regime remained available to either of them'*.
- 1.14 After much negotiation, the final outstanding CIL instalment was paid by Brooklands Helix on 30/6/2020, although the £8392.64 interest for late payment, which the Council is entitled to charge under the Regulations, remains outstanding. Officers are in active dialogue with both Brooklands Helix and A2Dominion regarding this final outstanding sum.

Current position

- 1.15 A2Dominion state that the Council's demands with respect to the CIL issue mean that the delivery of the additional affordable housing on this site is now unviable. A representative from Housing met with representatives from A2Dominion to understand the issues further, and their development appraisals have been scrutinised by Officers.

- 1.16 Due to the design stage of the current site phasing, the additional shared ownership units are already committed to in terms of design, specification and construction. The only block not yet committed to in the same respect is Block B – the additional 26 affordable rent apartments. It is therefore these units which are now vulnerable as a result of the CIL issue.

2. Options analysis and proposal

- 2.1 A2Dominion are seeking a grant from the Council, equivalent to £16,000 per unit (£416,000 total) to gap fund the development, and secure the additional 26 affordable rent apartments.
- 2.2 If the Council cannot commit to this grant funding, then the A2Dominion Board will need to make a decision on the delivery of Block B based on the revised development appraisal. Given that these units are already subsidised to A2Dominion's self-set cap of £120,000 for an affordable rent home, the Board is highly unlikely to proceed with Block B as affordable rent, and will likely convert it to private rent. This would mean the loss of the only pipeline affordable housing to be delivered by the private sector in 2022/23.
- 2.3 The provision of local authority grant towards the delivery of affordable housing schemes outside of planning obligations is a generally well established principle, although given the low numbers of delivery locally, typically Spelthorne has not been called upon to grant fund schemes of this type.
- 2.4 Whilst it is clearly good news that the Council's CIL balances have been significantly improved as a result of A2Dominion and Brookland Helix's administrative errors in this matter, it is hard to believe that any regulations set by the Government would actively be a barrier to the delivery of affordable housing.
- 2.5 Homeless households forced to live in emergency accommodation are adversely affected socially through issues such as reduced access to schools, GP surgeries, and poor nutritional standards. In addition there is a financial cost of around £6750 per household per year, with the Council typically spending £0.5 M per year in this area. There are huge social benefits of these households being nominated to settled housing. The financial cost of £16,000 of obtaining nomination rights to each property under the proposal would, in effect, be repaid in under three years.

3. Financial implications

The use of CIL

- 3.1 The Council is not easily able to use the money collected via CIL to grant back to A2Dominion. Collections of CIL must be used towards funding 'the provision, improvement, replacement, operation or maintenance of infrastructure' to support growth in the local area. There are two types of CIL spend – Strategic (85% of the fund) and Neighbourhood (15% of the fund). Government guidance explicitly states that Strategic CIL **cannot** be used to fund affordable housing.
- 3.2 There is more flexibility under the Neighbourhood CIL whereby the guidance states 'The neighbourhood portion of the levy can be spent on a wider range of things than the rest of the levy, provided that it meets the requirement to 'support the development of the area'. The wider definition means that the

neighbourhood portion can be spent on things other than infrastructure provided it is concerned with addressing the demands that development places on the local area. For example, the pot could be used to fund affordable housing.'

- 3.3 In order to access Neighbourhood CIL, the Council must go through a bidding process where all bids are reviewed by the CIL Task Group before final submission to Councillors. The governance arrangements for the CIL Task Group are still being finalised. This will be a lengthy process and making a bid for funding via this process is therefore not recommended for this request.

Using existing capital provision

- 3.4 The Council historically held an Affordable Housing Opportunity provision within the Capital Programme of £340,000. Due to a lack of demand on this provision over the course of a number of years – partly due to minimal opportunities to work with affordable housing providers – this amount was removed from the programme from the 2020/21 financial year and the provision redistributed to other projects.
- 3.5 There is provision in the Council's Capital Programme to fund this grant via the £20m set aside for Investment Acquisitions, or £65m set aside for Investments, Management of Assets and Regeneration from which funds could be vired.

Affordable housing commuted sums

- 3.6 The Council would ordinarily have a fund of affordable housing commuted sums, which are payments given to the Council by developers in lieu of delivering affordable housing. All of the Council's funds of this type are being used to deliver the White House and Harper House schemes.

Possibility of clawback of grant

- 3.7 As A2Dominion and Brooklands Helix state that they are actively pursuing options to challenge the Council's demands in respect of the CIL, A2Dominion will agree to a clawback mechanism linked to any repayment of the CIL.

4. Other considerations

- 4.1 The Council has made a commitment in its Housing Strategy 2020-25 to enable the delivery of more affordable homes, and this proposal meets this commitment.
- 4.2 Enabling the delivery of these new affordable homes will also support the Council's stated objectives in its Homelessness & Rough Sleeping Strategy 2020-25 in relation to:
- (a) ending the use of bed and breakfast accommodation, and
 - (b) reducing the length of time which homeless households stay in temporary accommodation.

5. Sustainability/Climate Change Implications

- 5.1 No specific issues are identified in relation to the proposal in this report. The development itself is subject to the Council's sustainability policies as part of the planning consent, and this proposal does not affect this.

6. Timetable for implementation

- 6.1 A2Dominion had asked for a decision by the end of August 2020 in order to make the final decision on whether to convert the specification from Affordable Rent to Private Rent. Officers continue to liaise with A2Dominion to ensure that the Council has the time to make an informed decision on whether to make the grant available.
- 6.2 If approved, the grant will be confirmed to A2Dominion in writing and a legal agreement will be drawn up to secure the grant against development milestones.
- 6.3 The current timescale for the completion of Block B in Q1 2022/23.

Background papers:

Appendices: