

Key Decision Required:	No	In the Forward Plan:	No
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CABINET

24 JULY 2020

REPORT OF THE LEADER OF THE COUNCIL

A.2 NORTH ESSEX GARDEN COMMUNITIES LTD.

(Report prepared by Paul Price & Lisa Hastings)

PART 1 – KEY INFORMATION

PURPOSE OF THE REPORT

To enable the Cabinet to consider and agree the preferred option relating to the future of the Company and note the decision of the Company Board in relation to the three Local Delivery Vehicles.

EXECUTIVE SUMMARY

This report sets out for Cabinet the options for the future of the North Essex Garden Communities Ltd. (the Company) and the three Local Delivery Vehicles (LDVs) following receipt of the Local Plan Inspector’s letter (“the letter”) on 15 May 2020 and focuses on the following points:

- NEGC Ltd – structure and purpose
- Winding up
- Employment implications
- Financial implications

RECOMMENDATION(S)

It is recommended that Cabinet:

- **Notes the decision of the North Essex Garden Communities Ltd Board on 6th July 2020 to take all necessary steps to wind up the three Local Delivery Vehicles, namely Colchester Braintree Borders Ltd, Tendring Colchester Borders Ltd and West of Braintree Ltd;**
- **notes Colchester Borough Council’s disappointing decision not to approve their partnership contribution to the NEGC project and requests the Leader of Tendring District Council to formally write to Colchester to express its concerns with regard to future working arrangements and seeking clarity around remedying their equal share of project responsibilities;**
- **approves, as Shareholder that North Essex Garden Communities Ltd ceases trading with effect from 31st August; and**

- approves the necessary winding up procedures are undertaken; subject to the Leader in consultation with the Section 151 Officer and Monitoring Officer being satisfied around the final accounting processes.

PART 2 – IMPLICATIONS OF THE DECISION

DELIVERING PRIORITIES

The development of the Garden Communities aligns with the following Corporate plan priorities:

- Building Sustainable Communities for the Future;
- A Growing and Inclusive Economy
- Community Leadership through Partnership

FINANCE, OTHER RESOURCES AND RISK

Finance and other Resources

The garden community project had reserves of £882k at 2019/20 year-end. It is expected that these funds would be exhausted by 30 September 2020 if the project continued in its present form. It should be noted that if the decision is not made by the Shareholders in July, the Company is likely to remain beyond existing financial contributions. If the company is wound up promptly this will enable early consideration of the future delivery option.

The Company is an admitted body of the Essex County Council (ECC) Superannuation Fund. As at the 2019 valuation the fund had a deficit of £100,000. This deficit would need to be cleared in the event that the Company ceased to be an admitted body. The redundancy and winding up costs for NEGC should be ringfenced at this stage to ensure that the Company can meet its liabilities going forward.

The winding up costs of the Company are estimated at £150k, the greater part being to ECC pension fund for the deficit set out above.

There was a project balance of £883k carried forward at the end of 2019/20 which has met operational costs incurred to date in 2020/21 with sufficient funding estimated to remain available to meet the winding up costs. Project funds are held by CBC, who effectively act as the accountable body on behalf of the partnership. Any balance remaining will be carried forward for use in any future delivery vehicle or returned to local authorities as agreed between the partners.

The cost of the project has been supported from its inception by a mix of Government funding and contributions from the four Local Authority shareholders. The contributions from the four Local Authorities have to date been based on each Local Authority accepting its equal share of the liabilities of the project. This position was echoed in a letter required by CBC last year where they sought the reaffirmation of this commitment from the other Local Authorities given their accountable body role.

The project budget for 2019/20 therefore continued to be based on an equal share basis, with a contribution of £350k required from each of the Local Authority shareholders. The last tranche of TDC's required contribution of £350k was made in December 2019.

CBC's Cabinet considered a similar report on 8 July 2020 and resolved to take all necessary steps to wind up North Essex Garden Communities Ltd. At the same meeting, they also agreed a recommendation to their Full Council to release their 2019/20 contribution of £350k. However, unexpectedly at the meeting of CBC's Full Council on 15 July 2020, they decided that they would not be paying their contribution of £350k in 2019/20. Notwithstanding the decision to make a contribution or not, the project is accruing costs and liabilities which should be fairly borne by the four authorities in accordance with the partnership arrangements that have been established to date.

As the accountable body, it has been accepted that CBC would incur some costs and overheads as part of supporting the project. At the present time it is understood that these costs total £314k. As they are not looking to charge these costs into the project, it could be argued that their contribution is therefore an 'in kind' contribution rather than via a direct payment. Therefore in principle this could be an effective way of demonstrating that each of the four local authorities have made a fair contribution to the project costs, albeit not always as a cash payment. It is worth noting that Tendring has not charged any officer time to this project.

As part of winding up the company, there will be the need to bring the latest accounting period of NEGC Ltd to a close, with similar activities being required for the wider project, to not only enable any surplus to be considered but also as part of 'cleanly' moving onto the next phase of the TCB project. Therefore as part of these activities, further details will be sought from CBC to provide the necessary transparency around their 'in kind' contribution to the project, which have not been provided to date.

This is important for a number of reasons not least because if the Council was left in the position of making contributions on behalf of another authority, it would be difficult to reconcile locally and it would potentially take money away from delivering our other important priorities within our district such as tackling deprivation and key economic / regeneration projects.

Although CBC have made the decision to not make any further contributions, it is not clear whether they will be exploring further options around how they intend to meet any shortfall in their fair share of the accrued liabilities of the project. With this in mind, it is intended to write to CBC to ask how they intend to remedy the current situation.

LEGAL

If the Council determine that the Company should be wound up, there are a number of procedural steps that the Council will be required to follow. Officers from each of the NEAs will work together to ensure that these are undertaken accordingly.

As Shareholder the Council is entitled to make the decision as to whether the Company should be wound up by passing a special resolution under the Company's constitution.

The Shareholders' Agreement states that such a resolution must not be passed without the consent of all the NEAs. In support of this, each of the councils are proceeding with a similar report through their respective governance process during July.

OTHER IMPLICATIONS

Consideration has been given to the implications of the proposed recommendation in this report with respect of: Crime and Disorder; Equality and Diversity; Health Inequalities; Area or Ward Affected; Consultation and Public Engagement; and any significant issues are set out below:

Evidence demonstrates that there is a direct link between good housing employment, economic prosperity and social equality. The new TCB garden community aims to deliver against all of these criteria and is recognised as a more sustainable mechanism for delivering housing growth via its infrastructure led delivery model than via traditional build mechanisms.

The report does not create any specific equality or diversity impacts; the communities which are ultimately developed will need to take into account these issues in their design, construction and management and this will be an ongoing commitment.

Area or Ward Affected

Ardleigh & Little Bromley
Alresford & Elmstead

Consultation and Public Engagement

N/A

PART 3 – SUPPORTING INFORMATION

BACKGROUND

Following the constructive and supportive partnership working between Essex County Council (ECC), Colchester Borough Council (the Council), Tendring District Council (TDC) and Braintree District Council (BDC) (together known as the NEAs) approved the incorporation of the North Essex Garden Communities Ltd (the Company), and endorsed the formation of three Local Delivery Vehicles (LDV) namely Colchester Braintree Borders Ltd, Tendring Colchester Borders Ltd and West of Braintree Ltd in November 2016.

At that time Cllr Neil Stock OBE was appointed as a Director on the Company Board as the Council's representative.

Ownership of the three LDVs sits with the Company, with each council holding non-voting B shares in the relevant LDV for their areas.

The Company has been a great example of four councils working together across geographic boundaries and political lines with a shared aim to improve housing and infrastructure for residents and businesses. The company co-ordinated the groundwork needed for a project unmatched in terms of scale and ambition in the UK, against a background of the governments Garden Communities Programme to provide new housing, infrastructure, jobs and services in sustainable settlements.

During the past two years NEGC Ltd has successfully secured £3.76m in grant funding from Government and supported NEAs in their successful A120/A133 HIF Bid and provided design input into the link road and Rapid Transit System.

The Company and the NEAs have helped commission work looking into improving standards for future housing delivery, jobs, creation of green and open spaces, and the infrastructure schools, shops, health, leisure and other facilities. A long-term economic

strategy has been developed, and work with SELEP has been undertaken focusing on the central role Garden Communities have on their emerging Local Industrial Strategies.

The Company has showcased the potential of North Essex at various exhibitions, conferences and at networking events. This has created the North Essex Opportunity which promotes North Essex as a place to do business, to learn, to live and work. This work has helped to raise the profile of the region, and has supported growth across the area.

On 15 May 2020 BDC, TDC and CBC received the Planning Inspectors (the Inspector) Letter. The Inspector concluded that two of the three proposed Garden Communities (the Colchester Braintree Borders Garden Community and West of Braintree Garden Community) were not viable or deliverable and therefore the Section 1 Local Plan, in its current form, is not sound. The Inspector did however agree that the Tendring Colchester Borders Garden Community is viable and deliverable and the housing and revised employment targets in the Local Plan are also sound.

The master planning and preparatory work undertaken by the Company to date, especially on strategic conversations with stakeholders (such as utility providers) means that the work puts the Tendring Colchester Borders Garden Community in a strong position to progress efficiently.

Following this finding, BDC, TDC and CBC have received the Inspectors modifications, which set out those modifications to the Local Plan that would be required to make it sound. The Inspector has set out two options on how BDC, TDC and CBC may proceed: 1) to consult on the main modifications to remove the Colchester Braintree Borders and West of Braintree Garden Communities from the Local Plan and other necessary 'modifications'; or 2) withdraw the plan. Each of the councils are considering the way forward on these through their respective governance processes.

However, with the removal of the West of Braintree and Colchester Braintree Borders from Section 1, the NEAs now need to consider the requirement for the Company going forward. Given the constructive working arrangements which have been established between the Councils it is disappointing that the Inspector's findings has placed the Councils in this position.

NEGC Ltd – structure and purpose

Having regard to the findings of the Inspector, the NEAs have determined that any future plans they may have, might be achievable without the use of the Company and/or through an alternative vehicle model. There is no mechanism within the Shareholder Agreement for one council to leave the Company but in practice, this might be possible if the individual council offered up their shareholding. Consequently, the Shareholder Agreement would require variations to reflect the new arrangement with the remaining three councils.

It is important to note that the Company was never set up to be the delivery vehicle, but was established to act as an oversight company of the three LDVs. If the Company were to have any future direct role in the delivery vehicle, the Articles of the Company would require substantive variation with the consent of the Councils, as Shareholders.

Company Liabilities & Resources

Council has confirmed to the other NEA's that the only liabilities the Company has are those of the Managing Director's employment, no other staff are employed by the Company and

all resources are engaged through contracts with consultants, with CBC as the contracting authority. These contracts can be individually reviewed with regards to the on-going requirements for the Tendring Colchester garden community.

The only contractual liability for the Company is the employment contract for the Managing Director, which will need to be determined through TUPE, dismissal or mutual agreement. Employment issues are set out in more detail below.

Winding up the Company

The A shares in the LDVs are held by the Company, practically this means that the LDVs should be wound up first. The Council is asked to note that this was considered by the Company Board on 6th July 2020 and its recommendation is the subject of this report.

Should the decision to wind up the Company be approved by each council, the Company will be required to stop trading from the point of the resolution, except so far as is necessary for winding up, this will include resolving any employment issues.

The Directors of the Company will also be required to make a declaration of solvency if they think the company can pay its debts. If they do this then the winding up is a *members'* voluntary liquidation. If they don't then the winding up becomes a *creditors'* voluntary winding up over which the Council as shareholder has little or no control.

There are consultation processes that will need to be followed as part of the winding up process. If another body had a continuing contract with the Company and was opposed to the closure of the Company, they would be in a position to make it a creditor's voluntary winding up, which would mean that the Shareholders would lose control of the liquidation. The possible types of continuing contracts include:

- Legal claims (by employees or ECC in its capacity as Essex Pension Fund)
- Unpaid tax or NI contributions
- Outstanding contractual liabilities
- Pension liabilities depending on terms of admitted body status.

Should the Council proceed with the recommendations set out in this report, the next steps would be for the appointment of a liquidator. The liquidator has to be an insolvency practitioner (even if the Company Directors have made a declaration of solvency). The liquidator will call in all the assets and arrange for their disposal, before finally transferring the final balance to the Shareholders. Once this has done, the Company will formally be dissolved and ceases to exist three months later.

If the declaration of solvency cannot be given, or the insolvency practitioner concludes that the Company is not solvent, then it will become a creditor's voluntary winding up and the distribution is approved by creditors.

Employment

The NEAs are each guarantors and have guaranteed to underwrite the Company's liability in respect of its participation in the pension scheme. The guarantors indemnify the Administering Authority (ECC) against losses or deficits in the event that the Company cannot meet its liabilities. The guarantors are jointly and severally liable.

To obtain the pension liability information, an actuarial closing report would need to be commissioned. It is understood that this would cost £1,500 plus VAT. The last actuarial information is the March 2020 accounts closing valuation. In addition, Essex Pension Fund have indicated that while pension liability information can be made available, the information would need to be shared equally to all four guarantors due to the nature of ownership and their status in the scheme. If winding up the Company is approved, officers from each of the NEAs will work together to ensure that this information is obtained as part of the winding up process.

If the NEAs approve the decision to wind up the Company, the effect of that decision would result in the Managing Director of the Company being made redundant. The cost of this will be limited to statutory redundancy pay based on service with the Company only. The Company will be required to follow the statutory procedures for redundancy and/or reach an agreement to pay in lieu of notice etc.

Employees will transfer in cases where there is a relevant transfer of an economic entity. Whether TUPE applies in this instance will depend on a comparison of the activities undertaken by the Company and whether they are continued by another entity.

Currently it is not considered that TUPE will apply to the Managing Director or external contractors, but the actions of the Company and the Councils as the project progresses are important in this regard.

There is also an officer working on the project seconded from the Colchester Borough Council. In the event there was no post for this employee to return, redundancy might arise.

The Company's project staff are retained via Hays and it is expected these can be terminated at short notice and no cost in addition to daily rates for work undertaken.

Changing Focus on Delivery

If the NEAs and the Company Board required the Company to remain it would require a change of focus of the Company to delivery. In such instances the following actions will be required:

- Substantially amend the Company's articles and Shareholder Agreement or
- Utilise TCB LDV (an NEGC Ltd company) already in existence but not currently used or
- propose an alternative delivery model – which will require a decision to be made by the Council's following an options appraisal, this will involve ongoing financial contributions.

North Garden Communities Ltd Board

On 6 July 2020, the Company Board, consisting of representatives from each of the NEAs, met to consider the current position and agree the preferred options for the future of the Company and the three LDVs. At that meeting it was agreed that:

- the Company would recommendation to the shareholders to cease operations of NEGC Ltd on 31 August 2020 and thereafter begin activities to close the company down;
- agree the recommendation to the shareholders to consider the closure of the three LDV companies in line with NEGC Ltd closure; and

- agree the recommendation to make the NEGC Managing Director post redundant as of 31 August 2020.

Options

The Councils have worked closely together to consider the options available to each of them as Shareholder, and the following options were identified:

Option 1 - BDC exit and restructure to reflect an alternative purpose;

Option 2 – the Company continues to work on proposals for delivery models for the NEAs to decide upon, this requires substantial ongoing financial contributions;

Option 3 – the NEAs remain within the Company, but restructure to make it fit for purpose, this requires ongoing substantial financial contributions.

Option 4 – Close the Company and three current LDVs

Proposals

Following an evaluation of the current position, the options available and the issues identified within this report, option 4 is recommended.

For the Company to carry on with a view to becoming part of the delivery vehicle would require a company restructure and substantive variations to both the Shareholder Agreements and the Articles.

The Company has not expressed any interest in progressing with its existing company structure, which includes a LDV for TCB.

There are Value for Money considerations of continuing to use a limited company for the establishment of one Garden Community;

TCB garden community can still be delivered through alternative mechanisms and vehicles, and TDC and CBC will need to consider their options around this in due course.

The Company’s only liability and resource is the Managing Director, all project and external resources have been commissioned through CBC.

There is a need to have careful consideration of the pension strain and TUPE implications, if the Company continues to trade with a view to establishing different delivery models.

BACKGROUND PAPERS FOR THE DECISION

None

APPENDICES

None