

AGENDA ITEM NO. 4

ARUN DISTRICT COUNCIL

URGENT REPORT TO AND DECISION OF CABINET ON 4 MARCH 2019

PART A : REPORT

SUBJECT: Report to consider appropriate action regarding the non-payment of a Section 106 Agreement for affordable housing - land at St Michaels and All Angels, Queens Field East, West Mead, Bognor Regis, West Sussex, PO21 5RN

REPORT AUTHOR: Nigel Lynn – Chief Executive

DATE: 27 February 2019

EXTN: 37600

PORTFOLIO AREA: Chief Executive

EXECUTIVE SUMMARY:

Planning Permission AW/295/10 was granted, following receipt of a Unilateral Undertaking for the payment of monies to the Council towards public open space and affordable housing, on 23 May 2011 by Mildren Homes Limited. The payments should have been made on the date the development was commenced by Mildren Homes Limited. The payments were not made on that date and only some monies have been paid. As of 20 April 2017, the Company owed £81,459.77.

It was subsequently discovered that the Company had been placed in to administration. The Agreement is enforceable against any successor and this could include the purchasers of the individual residential properties that were built under the planning permission. Therefore, it is necessary to decide whether to enforce the debt against the current owners.

The Cabinet Member for Planning has exercised his right under Part 3 (Responsibility for Functions), Section 2 (The Cabinet), Rule 2.6 to refer this report to Cabinet for a decision. The reason for this is to increase transparency by the decision being taken in a public forum.

The report being presented has been revised since it was considered by the Cabinet Member as ICM/058/310119 to take account of responses received from the consultation now undertaken.

In taking this view, it has been recognised that there is no further planned meeting of the Cabinet in this municipal year prior to the District Elections on 2 May 2019. For this reason, this report is being presented as a matter of urgency as it is considered that it is in the interests of those members of the public affected by this proposal to see a decision taken quickly that clarifies any responsibility they may have and reduce unnecessary distress by delaying the decision being taken.

In line with Responsibility for Function Rule 2.3, the proposal to present this report as a matter of urgency to Cabinet has been agreed with the Chairman of the Overview Select Committee.

RECOMMENDATIONS:

1. That Members determine the way forward based on the two proposal options available within the report.

1. BACKGROUND:

- 1.1 In 2010 an application was made to the Council, by Christ for the Nations UK Limited for planning permission in respect of land at St Michaels and All Angels, Queens Field East, West Mead, Bognor Regis, West Sussex, PO21 5RN. The planning permission was granted following receipt of a Unilateral Undertaking dated 23 May 2011.
- 1.2 A Unilateral Undertaking is a deed made by an owner of land, under Section 106 of the Town and Country Planning Act 1990 and is a promise to undertake certain works or pay monies to the Council and possibly other parties, to make a planning permission that would otherwise be unacceptable due to its impact, acceptable. A Unilateral Undertaking is enforceable against the party who made it and any subsequent owner of the land to which it applies.
- 1.3 The Unilateral Undertaking was amended by a Deed of Variation dated 5 June 2014 ("the Agreement"), following a further planning application in respect of the site for 10 dwellings with a total of 32 bedrooms. The Agreement provided for payment to the Council of two sums, namely:
 - a) £10,000.00 towards public open space to serve the Development; and
 - b) £108,320.00 towards Affordable Housing Provision within the area of the Development. And there is provision for interest at 4% above the Bank of England base rate for late payment
- 1.4 The development of the site was completed in 2014/15 and occupations commenced in October 2014. The monies should have been paid to the Council on the date on which the Development commenced.
- 1.5 It wasn't until December 2016 that the Council chased Mildren Homes for the outstanding amount. As a result of receiving no response from them, the Council issued an invoice to the Company on 20 April 2017, but no payments were received, and the matter was passed to Legal Services to take legal action in respect of the debt. In July 2017 it was passed to the Legal Department to progress recovery. However, no action had taken place by November 2017 and it was then ascertained that the Company, on 3 July 2017, had gone into administration and that there was little likelihood of the Council recovering any of the debt.

- 1.6 The Council issued an invoice to the Company on 20 April 2017, but no payments were received and the matter was passed to Legal Services to take legal action in respect of the debt. It was then ascertained that the Company, on 3 July 2017, had gone into administration and that there was little likelihood of the Council recovering any of the debt.
- 1.7 In late November/December 2017 the owner of one of the individual residential properties contacted the Council because they had become aware of the Agreement and wished to clarify the position. It appears that the presence of the undischarged Agreement was causing a problem in relation to the sale of the property as it was accepted that the current Owners may be liable for the monies. In January 2018, the Council confirmed in writing that the residents of the individual properties were technically liable for the outstanding contribution. At this time, WSCC confirmed that they were writing off their outstanding contributions.
- 1.8 In March 2018, CMT agreed to the principle of action to pursue the individual properties subject to a conclusion being reached in discussions with the company's administrators.
- 1.9 Following investigations, the Council contacted the Administrators and by a letter dated 24 July 2018 were informed by the Administrators that the debt had been lodged in the Company records. The Administrators progress report dated 2 August 2018 indicated that unsecured creditors, such as the Council, would possibly receive a payment of 0.2p in the pound, which amounts to £162.92 at some future date, if no further debts were identified. The Council, therefore, is not able to recover the full sum of £81,459.77 from the Company.
- 1.10 It is acknowledged that the monitoring processes were not satisfactory and that resources were insufficient to be able to adequately monitor planning obligations. This was recognised at that time by the Director of Planning & Economic Regeneration as changes were being considered to improve matters. It should also be recognised that there are around 650 planning obligations that either require obligations to be complied with or contributions spent. The task of monitoring all of these is huge. It was recognised in 2016 that resources needed to be directed to this area of work to significantly improve. Discussions with the Cabinet Working Party in mid-2016 included directing more resources to monitoring of strategic sites. Following this, Cabinet agreed in January 2017 to fund two delivery and monitoring posts within the Strategic Development Team. These were funded, in part, through the receipt of Planning Performance Agreement money (which the Council has sought in recent years). Further, as a result of the Group Head of Planning's restructure after his April 2017 appointment, there is now one post dedicated to s106 data and monitoring (where previously this post was also responsible for planning policy work as well). Therefore, such delays and oversights are less likely now.
- 1.11 Due to the provisions of Section 106 of the Town and Country Planning Act 1990, which provides, at Subsection (3) "Subject to subsection (4) a planning obligation is enforceable by the authority identified in accordance with subsection 9(d)-

- a. Against the person entering into the obligation; and
- b. Against any person deriving title from that person.

1.12 Generally, where there are large developments the owners, applicants and developers ensure that the individual owners will not be made liable for the obligations, if the owners, applicants or developers fail to fulfil them. This is, probably, because the size of the contributions required under the obligations would deter any potential purchaser during the period the site is being developed and before all of the obligations had been discharged.

1.13 The Agreement is a local land charge and will appear on the local search when a person is considering purchasing one of the individual residential properties and they should have been advised as to the meaning of the Agreement and the possible consequences if the Company did not pay the monies at the time that the person purchased the individual residential properties. This is confirmed by the approach by the owner of one of the individual residential properties in 2017.

1.14 The Council is sympathetic to the owners of the properties in that they have all probably instructed solicitors in the purchase of their properties and have taken the information from those solicitors in good faith before purchasing the properties. It is unlikely that anyone would have purchased their property with the knowledge that a significant payment by way of a legal obligation was required from them once they had purchased the property – this information would have appeared on a search in respect of those properties.

1.15 It is not appropriate to allocate the total outstanding figure equally to every individual residential property, but it could be allocated based upon the number of bedrooms. This would mean the following sums would be invoiced to the owners:

- a) £3,415.47 for a 1 bed dwelling;
- b) £6,830.94 for a 2 bed dwelling; and
- c) £10,246.41 for a 3 bed dwelling.

1.16 Officers are satisfied that it has the legal power to raise such invoices and to pursue the debt through the Courts should payment not be received. Officers are aware that there is no certainty that the debts would be recovered but are of the opinion that any application could be successful. However, monies should have been collected from the Company at the time the Development was commenced (2014) and there has been a substantial delay in pursuing the debt.

1.17 Consequently, a complaint may be made to the Local Government Ombudsman (“LGO”) and that the LGO may find that there has been maladministration in the way that this matter has been handled by the Council. For the LGO to find against the Council, however, it also must find that the complainant has suffered an injustice. If the Owners complain, the LGO may be satisfied that if the Council had acted promptly the monies would have been collected from the Company, who probably included the cost of meeting the obligations under the Agreement in their own costings and in the price at which they sold the individual residential properties, therefore the current Owners will have paid their portion for monies twice.

1.18 Officers are of the opinion that balancing:

- a) the needs of the community for Affordable Housing;
- b) need, therefore, to collect in the monies due under these agreements;
- c) the fact that the Agreement, with its obligations, are registered as a Local Land Charge and, therefore, should have been brought to the attention of each purchaser by their Solicitor when they purchased their property;
- d) the fact that at least one owner is aware of the potential payment; and
- e) the fact that the amounts that will be claimed are not considered excessive

Against:

- i) the risk of adverse publicity;
- ii) the risk of a complaint, which would be likely to end up with the LGO, leading to a finding of maladministration against the Council;
- iii) the assumption that the Developer included within his costings when selling the properties, the cost of fulfilling the obligations, and the probability that the individual owners will end up paying twice for the obligations;
- iv) the delay in this matter

it would be appropriate to either:

- a. write off the invoice to Mildren Homes Limited
- b. write the invoice off back to the grant code; this should take the form of a charge against the property whereby the payment is due at the point of sale of the property from the seller
- c. authorise action, including court action, to recover the outstanding sums from the individual owners should payments not be made at that time
- d. take no further action against the current home owners

Consultation

1.19 The views of the two Ward Councillors have been sought. Both support the view that no further action should be taken against the current owners.

2. PROPOSAL(S):

1a) That the invoice 8133051629, issued on 20 April 2017 payable by Mildren Homes Limited (a company in administration) in the sum of £81,459.77 is written off against the Planning cost centre.

If 1a is agreed then one of the following two options is agreed

- 1b) That Cabinet agree to raise invoices against the Owners residential properties proportioned according to the number of bedrooms in the property as approved in the planning permission, or,
- 1c) That Cabinet agree to take no further action on the matter and the invoice is written off entirely.

- 3. OPTIONS:**
1. Agree to proposals 1a but determine not to pursue the Owners (1c). The consequences of which would be that the Council would lose £81,459.77 to provide affordable housing in the District.
 2. Not agree to 1a and continue to pursue the administrators for Mildren Homes for the outstanding monies. As stated above, this is only likely to secure £162.92 and would not be worth officer time in perusing.

4. CONSULTATION:

Has consultation been undertaken with:	YES	NO
Relevant Town/Parish Council		x
Relevant District Ward Councillors	x	
Other groups/persons (please specify)		
5. ARE THERE ANY IMPLICATIONS IN RELATION TO THE FOLLOWING COUNCIL POLICIES: (Explain in more detail at 6 below)	YES	NO
Financial	x	
Legal	x	
Human Rights/Equality Impact Assessment		X
Community Safety including Section 17 of Crime & Disorder Act		X
Sustainability		X
Asset Management/Property/Land		X
Technology		X
Other (please explain) Monitoring Officer	X	

6. IMPLICATIONS:

Details are legal implications are contained in the body of the report

7. REASON FOR THE DECISION:

Cabinet Members decision is requested.

8. EFFECTIVE DATE OF THE DECISION: 4 March 2019 – As an urgent Decision – Call-In does not apply

9. BACKGROUND PAPERS:

Planning Application AW/295/10 (<https://www.arun.gov.uk/weekly-lists>)

Planning Application AW/139/14/PL (<https://www.arun.gov.uk/weekly-lists>)

Unilateral Undertaking dated 23 May 2011 (<https://www.arun.gov.uk/weekly-lists>)

Deed of Variation dated 5 June 2014 (<https://www.arun.gov.uk/weekly-lists>)