

28 September 2023		ITEM: 7
Planning, Transport & Regeneration Overview & Scrutiny Committee		
Purfleet-On-Thames Regeneration		
Wards and communities affected: West Thurrock and South Stifford	Key Decision: Key	
Report of: Kevin Munnelly, Assistant Director Regeneration and Place Delivery.		
Accountable Assistant Director: Kevin Munnelly, Assistant Director Regeneration and Place Delivery.		
Accountable Director: Mark Bradbury, Director of Place		
This report is Confidential		

Executive Summary

In order for Purfleet Centre Regeneration Limited (PCRL) to fulfil its role as lead developer and deliver the planned programme set out in the Development Agreement (DA) they are required to access sufficient additional levels of funding (equity, debt and grant) to bring the project forward and a well-resourced team able to effectively manage all workstreams. PCRL has insufficient equity funding and have sought investment from a number of third parties.

The persistent failure by PCRL to secure additional funding and advance the delivery programme has resulted in a sixth Reservation of Rights letter (RoR) to be issued by Homes England (HE) to Thurrock Council and the Back to Back Agreement with PCRL, in relation to the Grant Determination Agreement (GDA), covering the £75m Housing Infrastructure Fund grant.

The Council is concerned that there is a material risk that the development milestones as set out in the GDA cannot be achieved. Given the prolonged and continued default position there is a real possibility that Homes England will invoke provisions with the GDA and withdraw the HIF funding and commence legal proceedings against the Council to clawback grant expenditure to date. Officers have assessed, with external legal support, all legal remedies available to the Council to address this default situation and minimise any financial exposure to the Council. Following this assessment it is recommended that the Council agree to mutually withdrawal, with Homes England, from the GDA. This effectively terminates the Purfleet HIF Grant Determination Agreement with Homes England and the Back to Back HIF Grant Determination Agreement with PCRL. Homes England have confirmed in writing that it will not demand or seek repayment of any funding in

connection with the Funding Agreement. This is subject to the Council agreeing to the mutual withdrawal and entering into the appropriate deed to enact this.

PCRL have continued to attempt to address the funding situation and the Council is mindful to examine alternative funding options; the latest being a proposal involving the English Cities Fund, a consortium of Homes England, Legal & General and Muse. Whilst encouraging, the response from PCRL to the current RoR letter does not contain sufficient detail for the Council to realistically conclude that the scheme can be delivered within the terms or timeframe of the current Grant Determination Agreement. However, following early engagement with PCRL and representatives of the English Cities Fund, officers believe there is merit in examining further the current proposal. Officers are therefore recommending that that the Council work with PCRL and ECF, over a period of up to 3 months, to establish whether there are firm proposals that could be taken back to cabinet with a recommendation to proceed. Any proposal would need to be developed and delivered outside of the terms of the current GDA and within the terms of the current Development Agreement.

1. Recommendation

1.1 That Planning, Transport and Regeneration Overview and Scrutiny Committee notes the written legal opinion, and the financial risk assessment and delegates authority to the Director of Place, in consultation with the Director of Law and Governance and the Portfolio Holder for Regeneration, Strategic Planning and External Relationships and Commissioners (1) to endeavour to negotiate a tripartite exit agreement with Homes England and Purfleet Centre Regeneration Limited and if that is not a viable option to agree a mutual withdrawal, with Homes England, from the Purfleet Housing Grant Determination Agreement which will lead to the determination of the Back to Back GDA with Purfleet Centre Regeneration Limited and (2) to take all steps necessary to terminate the Development Agreement and other associated agreements following the termination of the Grant Determination Agreement and the Back to Back GDA.

1.2 That Planning, Transport and Regeneration Overview and Scrutiny Committee notes the development option being proposed by PCRL and English Cities Fund and delegates authority to the Director of Place, in consultation with the Director of Law and Governance and the Portfolio Holder for Regeneration, Strategic Planning and External Relationships to negotiate and bring back to Cabinet an alternative development proposal no later than 13th March 2024 Cabinet Meeting.

2. Background

2.1 The Purfleet regeneration scheme is regulated by a number of legal documents which set out the obligations of the various parties. In summary the key agreements are

- Homes England/Council Grant Determination Agreement ("GDA Agreement"). This is the grant funding agreement under which Homes England has committed c.£75m of HIF grant funding to the Project of which we over £25m has already been spent;
- Council/PCRL Back to Back Funding Agreement ("GDA Back to Back Agreement"). Under this agreement the Council is under an obligation to pass through the HIF funding it receives under the GDA Agreement;
- Purfleet Development Agreement ("Development Agreement"). This is the development agreement under which PCRL has contracted to undertake the development of the Project.
- Council/PCRL Phase 1 Agreement for Leases ("Phase 1 Agreement for Leases"). Under this agreement the Council agrees to grant PCRL building leases over Phase 1 of the site subject to the satisfaction of certain conditions precedent. The majority of these conditions precedent remain outstanding.
- Swan New Homes Limited's funder Step In Agreement ("Swan Step In Agreement"). Swan, now owned by Sanctuary, has step in rights under the Development Agreement and the Phase 1 Agreement for Leases in the event that the Council seeks to terminate those agreement.

2.2 Thurrock Council entered in a Development Agreement with PCRL to deliver more than 2,650 new homes around a new town centre, including a new primary school and integrated medical centre. To date it is probable that only 34 homes will be completed by the end December 2023. It was the intention of PCRL in the role of lead developer, to directly build out all/most of the scheme themselves. They would have constructed the site wide infrastructure and built out the residential and commercial elements of the scheme and sold the completed units to individual purchasers. The Council was to receive its financial return via a sales overage from individual housing units on the completion of each phase. The Council and Homes England are the only parties to the GDA. However, the Council also entered into a back to back Grant Determination Agreement with PCRL which governs the contractual expenditure of £75m of Housing Infrastructure Fund (HIF) grant which had been allocated to the project in December 2020.

2.3 As part of obligations set within the current GDA and to enable the continuation the HIF claim process, Homes England have provided the Council and PCRL with a number of conditions contained within the Grant Determination Agreement that need to be addressed. The main condition being that PCRL are required to procure private sector equity development funding for the Purfleet scheme to continue to the next development phase. However, the Council remains the accountable body under the GDA and if Homes England terminated the agreement it would look to the Council and not PCRL if it wishes to clawback any of the funding already provided. When

the Council's section 151 Officer issued the Notice under section 114 of the Local Government Finance Act 1988, that placed the Council in fundamental breach of the GDA and as a consequence Homes England could terminate the agreement at any time.

- 2.4 The current scheme covers approximately 58Ha (140 acres) of brownfield land, around c60% of which is in Council ownership. In June 2012 Cabinet delegated authority to officers to continue acquiring sites in support of the project set within obligations under the Development Agreement. The majority of the Council landholdings are concentrated in Phases 1-3 of the phased programme. This is made up of: historic land interests, heavily concentrated in Phase 3 industrial sites; legacy land transferred from the Thames Gateway Development Corporation; and subsequent land purchase funded from the Council (£5m), SELEP grant (£5m) and HIF grant (£27m).

3. Current Position

- 3.1 PCRL has consistently struggled to obtain funding (debt and additional equity) for the project and this has been its main obstacle to unlocking delivery. In 2020 the Council restructured the delivery route for Phase 1 by entering into the Phase 1 Agreement for Leases to accommodate the HIF funding and make it easier for PCRL to secure the funding it needed but it has still not managed to obtain funding. It is important to note that a major shareholder in PCRL, Swan Housing, has faced significant financial challenges in recent years which have impacted on their ability to continue to engage effectively and have now merged with Sanctuary Housing.
- 3.2 PCRL appointed Knight Frank Capital Advisory in August 2021 to source an equity investment partner for the Purfleet regeneration project. Owing to viability challenges within the project this exercise was unsuccessful. Legal & General (L&G) were subsequently approached to consider bidding on the project and Heads of Terms were agreed in June 2022 for L&G to acquire the entire issued share capital of PCRL. Following a period of due diligence and against a background of adverse economic conditions L&G withdrew from the proposed sale in December 2022. They have however indicated that they would be willing to consider forward funding a certain percentage of affordable housing in a progressed scheme, but no further details have been offered.
- 3.3 As Grant Recipient and in order to protect Thurrock Council's contractual position within the Grant Determination Agreement between Homes England and Back to Back Agreement with PCRL and the Development Agreement, the Council has sought legal advice regarding how to proceed with mutually dissolving the Grant Determination Agreement between Homes England and the Council and potentially ending its relationship with PCRL.

Default

- 3.4 Homes England (HE) have issued to the Council a sixth Reservation of Rights letter in respect to the Purfleet HIF Grant Determination Agreement

(GDA). HE has expressed significant concerns about the deliverability of the Programme and the failure of PCRL to secure the necessary funding to deliver the project. A general default has occurred in terms of missed milestones and funding conditions, and HE have indicated that they are proposing to exercise their rights under Clause 12 (Events of Default) of the Grant Determination Agreement. However the point made in paragraph 2.3 on the Council being in fundamental breach of the GDA remains material.

- 3.5 Given the severity of the situation HE previously requested in the fifth RoR letter a detailed proposal from PCRL for delivering the Project, which had to be returned to them by 9th April 2023. The information provided by PCRL did not identify an equity funder or address the programme issues and this did not accord to the requirements set out in section 2.7 of the Reservation of Rights letter deadline.
- 3.6 The Council understood from PCRL that the equity funder would be identified prior to the submission to Homes England in response to the fifth Reservation of Rights letter. Failure to do so only highlights the concerns raised over the ability to secure funding. Historically, the specific milestone date to procure equity funding was 31st December 2021 and this was subsequently extended to 30th April 2022 via a Deed of Variation without success.
- 3.7 Homes England (HE) have issued to the Council a sixth Rights of Reservation letter in respect to the Purfleet HIF Grant Determination Agreement (GDA). HE continues to express significant concerns about the deliverability and the failure of PCRL to secure the necessary funding to deliver the project. However, since the last Reservation of Rights letter the Council has received letters from PCRL dated 19 June 2023, which indicate that the English Cities Fund (which is backed by Homes England, Muse and Legal & General) has expressed material interest in funding the Project. The Council have reviewed the letters and the expression of interest from the English Cities Fund, with specific reference to the need to provide a detailed proposal to address the outstanding development funding issues. Whilst encouraging, the response from PCRL does not contain sufficient detail for the Council to realistically conclude that the scheme can be delivered within the terms or timeframe of the current GDA.
- 3.8 The Council is concerned that there is a material risk that the development milestones as set out in the GDA cannot be achieved. Given the prolonged and continued default position there is a real possibility that Homes England will invoke provisions with the GDA and withdraw the HIF funding and commence legal proceedings against the Council to clawback grant expenditure to date.
- 3.9 Even if funding is achieved it is unlikely that the scheme can be delivered within the time frame and structure of the present set of documents. If any changes are proposed, they would need to be considered against the procurement framework set out in the Public Sector Contracts Regulations 2015.

- 3.10 If the GDA and Back to Back agreement are terminated that will not automatically lead to the termination of the Development Agreement. If an event of default does occur and the Council seeks to rely on this ground to terminate the Development Agreement, the Council's right is contingent on Swan (Sanctuary) not exercising its rights to step in under the Swan Step In Agreement to perform the development obligations in the Development Agreement and Phase 1 Agreement for Lease.

4. Reasons for Recommendations

- 4.1 PCRL were appointed by Thurrock Council (TC) to deliver the Purfleet Centre. After several years, PCRL had not secured a funder, other than 34 units of the Phase 1A. In the sixth RoR letter the Council has been given until 30th June 2023 to indicate whether it wishes or is able to deliver the project in accordance with the GDA. The information PCRL have provided to date on funding and the build programme is considered inadequate to address the contractual requirements of HE and there is no realistic chance this position will change.

5. Consultation (including Overview and Scrutiny, if applicable)

- 5.1 This report will be considered by a special meeting of the Planning, Transport & Regeneration Overview and Scrutiny Committee before the September Cabinet meeting.
- 5.2 Early engagement will be required with the Purfleet On Thames Community Forum, Ward Councillors and residents to provide an update and reassurance that the critical social infrastructure to be provided by the scheme is considered in any alternative options. This engagement will also extend to the providers of the infrastructure, including the NHS, Gateway Academy and Network rail.

6. Impact on corporate policies, priorities, performance and community impact

- 6.1 Purfleet Centre is referenced in the Council's Economic Development and Regeneration Strategies and the Local Development Framework. The receipt of HIF is making a significant contribution to achieving the Council's vision for Purfleet and is of great benefit in bringing the programme forward.

7. Implications

7.1 Financial

Implications verified by: **Mark Terry**
Senior Service Accountant

The invoking of the default provision in the GDA and the withdrawal of funding will collapse the GDA and could expose the Council to clawback provisions with the GDA. The table below sets out the HIF Claim spend to date: 03/04/2023

Table 1 HIF Claim spend to date: 03/04/2023

	Overall Claim Value (Net)
1. Land Assembly - Tennants Ltd 2. Land Assembly NRW Tranche 1	£15,862,323
3. Enabling Works, Remediation & Land Reprofilng Package 1 (Sub-Phase 1A)	£2,095,961.59
4. Subsurface Hydrocarbon Remediation & removal (Phase 1) 2	£93,379.87
5. Enabling Works, Remediation & Land Reprofilng Package 2 (Phase 1)	£1,160,149.42
6. Infrastructure Works Package 1 (Sub-Phase 1A)	£522,262.69
7. Infrastructure Works Package 2 (London Road & Bridge, Civil Works) Design- fees & Planning	£563,490.95
8. Infrastructure Works Package 3 (Phase 1 North Civil Works)	£506,201.20
9. Temporary Rail Station Works Design fees - aborted	£195,826.31
10. Permanent Rail Station Works Design fees GRIP 5	£2,051,577.34
Historic Expenditure By PCRL Site / Ground Investigation work Engineering fees Gleeds / Waterman	£4,106,349.80
Total by Claim	£27,157,523.80

- Homes England have confirmed in writing that should the Local Authority decide to proceed with the withdrawal of the Project by mutual agreement, Homes England:

- will not demand nor seek repayment of any funding and/or sums paid to the Local Authority to-date pursuant to the Funding Agreement; and
- will make payment of further claims to the Local Authority (up to a maximum aggregate amount of £1,000,000) in respect of the costs that it has incurred directly in relation to the Infrastructure Works (as defined in the Funding Agreement), provided that supporting evidence is provided satisfactory to Homes England that the relevant costs claimed have been incurred by the Grant Recipient directly in relation to the Infrastructure Works.

The above is conditional on:

- the Local Authority confirming that it wishes to mutually withdraw the Project by mutual agreement, in writing, within 10 Business Days of its Cabinet meeting on 11 October 2023; and
- the Local Authority and Homes England entering into and completing a deed providing for the withdrawal and the ancillary matters outlined in this email by 30 November 2023

7.2 Legal

Implications verified by: **Mark Bowen**
Deputy Monitoring Officer

Legal Remedies Assessed.

Homes England are in a position where they could terminate the agreement at any time. As is set out in paragraph 2.3 above the issue of Notice under Section 114 Local Government and Finance Act 1988 amounted to a fundamental breach of the agreement. There are also other breaches which mainly rest with PCRL. However the Council are the accountable body under the agreement and it is against the Council that Homes England would seek to “clawback” any funding. Termination of the GDA would lead to termination of the Back to Back agreement but it would not automatically lead to the termination of the Development Agreement and associated agreements.

If the GDA Agreement is terminated for Council breach, including Fundamental Default PCRL may have a claim in damages against the Council under the GDA Back to Back Agreement. If Homes England claws back any funding, the GDA Back to Back Agreement allows the Council to claw this back from PCRL. However, if the agreement is terminated for Fundamental Default PCRL would likely be able to prevent any such claw back by making a counterclaim against the Council for causing the breach triggering the Fundamental Default. Homes England has an absolute discretion as to how it chooses to terminate the GDA Agreement.

Rather than risk termination for fundamental default the Council would be best trying to reach a negotiated settlement. If Homes England and the Council conclude the scheme is not deliverable, then the best course of action would be to try to persuade PCRL to agree with this and negotiate a tripartite

withdrawal from all agreements. The Council could seek to negotiate an exit from the GDA by mutual agreement with Homes England and not include PCRL. This is not without risk. Leading Counsel has advised that if the Council agrees to termination of the GDA Agreement without PCRL's consent, which could place the council in breach of its duties to PCRL under the GDA Back to Back Agreement. There are also risks in the Council encouraging Homes England to terminate the GDA Agreement for a PCRL General Default (to the exclusion of any Council breach). Therefore, in the absence of a tripartite agreed termination of the GDA Agreement and GDA Back to Back Agreement, this would be the preferred option in managing the termination of the GDA, it would carry risk of challenge from PCRL .

If it is concluded that the scheme is not deliverable and the Council is not able to negotiate a tripartite exit then given the serious consequences for the Council of Homes England terminating the Council could seek to negotiate a mutual withdrawal from the GDA with Homes England . This would carry risk of challenge from PCRL but would effectively terminate the Purfleet HIF Grant Determination Agreement with Homes England and the Back to Back HIF Grant Determination Agreement with PCRL. It would not terminate the Development Agreement and related agreements and there would need to be breaches of those agreements which carry the sanction of termination to allow this to happen.

7.3 Diversity and Equality

Implications verified by: **Roxanne Scanlon**
Community Engagement and Project
Monitoring Officer

The Development Proposals for this Project support long-term achievement of the Council's equality objectives and specifically those associated with resident's access to services in addition to supporting community integration and cohesion. Through construction to delivery, employment opportunities will be introduced along with the provision of new community facilities and a diverse mixture of housing types in Purfleet. The 2010 Equality Act outlines the provisions of the Public Sector Equalities Duty which requires Public Bodies to have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010
- advance equality of opportunity between people from different groups
- foster good relations between people from different group.

These duties are considered as part of the decision making process and delivery of services.

7.4 Other implications (where significant) – i.e. Staff, Health Inequalities, Sustainability, Crime and Disorder, and Impact on Looked After Children

- None

8. Background papers used in preparing the report (including their location on the Council's website or identification whether any are exempt or protected by copyright):

- None

9. Appendices to the report

- None

Report Author:

Kevin Munnely, Assistant Director Regeneration & Place Delivery