

Wiltshire Council

Cabinet

20 April 2010

Subject: **Housing PFI Scheme – Appropriation
of Land for Planning Purposes**

Cabinet member: **Councillor John Brady – Economic Development,
Planning and Housing**

Key Decision: **No**

Executive Summary

The PFI bidder's due diligence work on the PFI development sites to be provided by the Council has identified a number of title issues. While these would not normally be problematic for housing developments, they are perceived as having an increased level of risk within the PFI contractual framework, which is not acceptable to the bidder without resolution.

In relation to two sites affected by rights and covenants, the proposal is to appropriate that land for planning purposes. This has the effect of overriding a party's rights or covenants in favour of a party to prevent development of that land in accordance with the planning permission. It does not remove their right to compensation for interference with such rights or covenants, but it removes the potential for excessive claims and the potential for the development being frustrated by the grant of an injunction to prevent the interference with such rights.

Proposal

That Cabinet:

- a) appropriates land at Broad Street car park, Trowbridge (as shown on the indicative plan in Appendix 1 of the report) for planning purposes under section 122 of the Local Government Act 1972;
- b) appropriates land at Paxcroft Mead, Hilperton (as shown on the indicative plan in Appendix 2 of the report) for planning purposes under section 122 of the Local Government Act 1972;
- c) agrees to dispose of such land at Broad Street car park, Trowbridge under section 233 of the Town and Country Planning Act 1990, subject to the Secretary of State's consent for disposal at less than best consideration and

d) agrees to dispose of such land at Paxcroft Mead, Hilperton under section 233 of the Town and Country Planning Act 1990, subject to the Secretary of State's consent for disposal at less than best consideration.

Reason for Proposal

To ensure the risks, in respect of rights and covenants affecting two PFI development sites to be provided by the Council, can be resolved.

Graham Hogg
Service Director, Housing

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**Cabinet member: Councillor John Brady – Economic Development,
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Key Decision: No

Purpose of Report

1. To seek Cabinet's agreement to appropriate and dispose of land, as identified in the report, for planning purposes, for the housing PFI scheme.

Background

2. An update report on progress of the scheme was provided to Cabinet on 23 March 2010. As set out in that report, the PFI bidder, Silbury Housing Ltd (SHL), has recently completed its due diligence work on the PFI development sites to be provided by the Council.
3. SHL's due diligence work has identified a number of title issues. While these would not normally be problematic for housing developments, they are perceived as having an increased level of risk within the PFI contractual framework, which is unacceptable to SHL without resolution.
4. We have been working with SHL to resolve these issues. The preferred way forward involves a combination of appropriation, planning amendments and site fencing works.
5. This report considers the proposed appropriation of two Council owned sites, for planning purposes, where it has been identified that the PFI development proposals will interfere with certain rights and covenants attached to the land. The principle of appropriating these sites has been endorsed by the Housing PFI Project Board on 15 March 2010.

Main Considerations for the Council

Site specific issues

6. In relation to Broad Street car park, Trowbridge (see Appendix 1 for an indicative site plan), there are entries on the title register for part of the site relating to a 1960 conveyance, referring to rights and easements, if any,

and a 1955 deed of exchange containing a covenant limiting the use of part of the site to use as either a single residential dwelling house or a public house. The re-development will breach the covenants in the 1955 deed, since the site will be re-developed for flats. In relation to the 1960 conveyance it is not clear whether there are any rights and easements that would affect the re-development of the site and, if so, the nature of them. Therefore, it is not possible to assess the likelihood that they will be breached.

7. In relation to land at Paxcroft Mead, Hilperton (see Appendix 2 for an indicative site plan) there is an assent dated 10 July 1953, which relates to part of the site. This states that that part of the site is subject to any tithe redemption annuity, stipulations, restrictions and to all easements and covenants made on the part of the deceased and the personal representatives and provisions binding on any of them or rights granted by any of them. Again, without knowing the terms of the covenants it is difficult to assess whether or not they would be breached.
8. In order to deal with these title issues and having taken external legal advice, it is proposed that the above sites be appropriated for planning purposes. SHL has confirmed this to be its preferred solution.

Legal powers

9. "Appropriation" is a term given in local government legislation to an internal process of a council designed to allow that council flexibility in its use of land. It allows a council to use land that has been acquired for one purpose for a different purpose. Under local government legislation, a council must acquire land under statutory powers.
10. Under section 122 of the Local Government Act 1972, the Council can appropriate land for any statutory purpose for which we are authorised to acquire land. Under section 226 of the Town and Country Planning Act 1990, the Council is authorised to acquire land if the Council thinks that either the acquisition of the land will facilitate the development, re-development or improvement of the land or the land is needed for some other reason that is necessary to the proper planning of the area.
11. Where land is appropriated for planning purposes, it will then be held by the Council under the statutory provisions within Part 9 of the Town and Country Planning Act 1990. The practical consequence of this (by virtue of Section 237 of the Town and Country Planning Act 1990, as amended) is that the erection, construction or carrying out of any maintenance of any building or work on the land and subsequent use of the land is authorised under those planning powers, if the works are done in accordance with planning permission, even if they interfere with third party rights.
12. The purpose of Section 237 of the Town and Country Planning Act 1990 (as amended) is to ensure that where land has been appropriated for planning purposes, then existing rights, which could prevent the development of that land from proceeding in accordance with the planning

permission, can be overridden. The rights will be overridden whether the Council or a party deriving title from us undertakes the development.

13. The power contained in Section 237 of the Town and Country Planning Act 1990 (as amended) does not remove the legitimate rights of parties to compensation, which may arise from the interference with their rights, but it does remove the potential for excessive claims and it also removes the potential for such parties to frustrate the development by obtaining an injunction to prevent the interference with their rights.
14. If any affected parties claim compensation, then the Council will be liable to pay such compensation. It may be possible to obtain insurance against compensation claims, if required.
15. Once the land has been appropriated for planning purposes, the Council will need to use an appropriate power to dispose of the land, when required. Section 233 of the 1990 Act authorises the disposal of land that is held by the Council for planning purposes, subject to the Secretary of State's consent for any disposal at less than the best consideration that could reasonably be achieved.
16. Any decision of the Council can be judicially reviewed. Any judicial review must be lodged as soon as possible after the decision is made and, in any event, not later than three months after the date of the decision. Housing PFI guidance is that judicial review periods should have expired before the contract is entered into. The earliest date for signing the PFI contract will therefore be three months after this decision to appropriate the land.

Environmental Impact of the Proposal

17. There are no known environmental impacts of the proposal.

Equalities Impact of the Proposal

18. There are no significant equalities impacts of the proposal.

Risk Assessment

19. By appropriating the land the Council is, in effect, transferring risk from the PFI scheme to the Council's general risks. However, in doing so, the overall level of risk is significantly reduced and this is considered to be the appropriate course of action. As stated above, it may be possible to obtain insurance for the Council's retained risks.

Financial Implications

20. If any owners do claim compensation under Section 237 of the Town and Country Planning Act 1990 (as amended), then the Council is liable to pay such compensation. However, the power removes the potential for excessive claims and it may be possible to obtain insurance against compensation claims, if required.

Legal Implications

21. The Council has taken external advice on its legal powers for appropriating and then disposing of land for planning purposes. Those powers are summarised in the body of the report.
22. There are no significant human rights or ethical governance implications affecting this report.

Options Considered

23. The alternative to appropriating land as set out in this report would be for SHL to seek insurance in the event of any beneficiaries of the rights or covenants preventing or delaying development of the sites. Within a PFI scheme this would have significant consequential impacts in terms of loss of income as well as, potentially, of breaking the funding agreement or leading to contract termination.
24. However, any such insurance could not prevent the worst case scenario of homes being lost from the scheme and, therefore, the appropriation route is preferable.

Conclusions

25. The proposed appropriation and disposal, for planning purposes, of two PFI development sites to be provided by the Council is the recommended way of resolving the risks, in respect of rights and covenants, affecting those sites.

Graham Hogg
Service Director, Housing

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20 April 2010

Background Papers

None.

Appendices

Appendix 1 – Broad Street car park, Trowbridge indicative site plan

Appendix 2 – Paxcroft Mead, Hilperton indicative site plan