

**ACTION TAKEN UNDER DELEGATED POWERS BY OFFICER**

**Subject** **West Hendon Deed Of Variation**

**Officer taking decision** Pam Wharfe, Strategic Director for Growth and Environment

**Date of decision**

**Summary**

The report seeks final approval on authority delegated by the Cabinet Resources Committee on 18 April 2013 to the Director for Place, in consultation with the Leader of the Council, to agree the Deed of Variation to the Principal Development Agreement for the West Hendon Regeneration Scheme. This will enable both the Council and Barratt Metropolitan Limited Liability Partnership to commence the next phase, known as Phase 3a of the West Hendon Regeneration scheme delivering circa 216 units of which 74 are affordable by March 2015. The report also seeks authority to grant Barratt Metropolitan Limited Liability Partnership an access Licence to commence Phase 3a as set out in schedule 42 of the Principal Development Agreement. A plan outlining the designated area and hoarding line is edged in blue on the attached plan 716\_00\_SK\_12. During this period the Council will exercise its powers to use Ground10a and Compulsory Purchase Order consents to achieve vacant possession of properties if required. Since 18 April 2013 the Regeneration Service has been in legal negotiations with Barratts and its lawyers and has concluded the revisions to the PDA to commence this next phase. A copy highlighting key changes is attached to the Executive summary.

**Officer Contributors** Abid Arai, Regeneration Manager Strategic Planning & Regeneration

**Status (public or exempt)** Public with no separate Exempt Report

**Wards affected** West Hendon

**Function of (Council/Executive)** Executive

**Enclosures** Appendix A Legal Executive Summary  
Access License - Land disposal and Hoarding line

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## **1. RELEVANT PREVIOUS DECISIONS**

- 1.1 Planning and Environment Committee, 27 July 2005 (Decision item 8); Outline planning consent for the West Hendon Regeneration Scheme (W13937/04), subject to an agreed Section 106 Agreement.
- 1.2 Cabinet, 30 August 2005 (Decision item 5); West Hendon Regeneration Scheme – Approval to enter into a Principal Development Agreement
- 1.3 Cabinet, 11 October 2005 (Decision item 7); West Hendon Regeneration Scheme – resolved that the final arrangements for entering into the Principal Development Agreement be subject to approval by the Leader of the Council.
- 1.4 Planning and Environment Committee, 25 January 2006 (Decision item 7) - approved amendments to Outline Planning Consent (W13937/04), to vary the Section 106 Agreement Heads of Terms by inclusion of additional planning obligations relating to Energy Strategy and Accessibility and Inclusive Design.
- 1.5 Cabinet, 3 April 2006 (Decision item 8) – approved the final arrangements for entering into the Principal Development Agreement for the West Hendon regeneration project.
- 1.6 Cabinet Resources Committee, 28 November 2006 (Decision item 15) – resolved to make a Compulsory Purchase Order for the acquisition of all non-Council owned property and other proprietary interests in the West Hendon regeneration area as shown on the attached plan and that the appropriate Chief Officers be authorised to take all necessary action to secure the confirmation and implementation of the Compulsory Purchase Order.
- 1.7 Planning and Environment Committee, 19 March 2008 (Decision item 8) - approved amendments to Outline Planning Consent (W13937/04) to vary phasing; reconfigure the central square; make general changes to the alignment of building blocks and vary the layout of block 'L' and surrounding road layout.
- 1.8 Planning and Environment Committee, 22 December 2008 (Decision item 8) - approved Reserved Matters Application to develop Phase 2A of the development.
- 1.9 Delegated Powers Report, 7 August 2009 (number 870) – the Leader of the Council approved and agreed a Deed of Variation to extend the expiry date on the Principal Development Agreement and to make amendments to the provisions for the TUPE agreement and information on the Masterplan.
- 1.10 Delegated Powers Report, 15 February 2010 (number 993) – the Leader of the Council approved the extension of the Principal Development Agreement expiry date by four months to 15 June 2010, and to enter the Deed of Variation to the Principal Development Agreement for commencement of the Initial Phase (Pilot and Phase 2A).
- 1.11 Delegated Powers Report, 16 June 2010 (number 1092) – the Leader of the Council approved the extension of the Principal Development Agreement expiry date by six months to 15 December 2010.

- 1.12 Cabinet Resources Committee, 30 November 2010 (Decision item 7) - approved the extension of the Principal Development Agreement by twelve months to 15 December 2011 and authorised officers to grant a further extension of up to twelve months to 15 December 2012 .
- 1.13 Delegated Powers Report, 3 October 2011 (number 1444) – the Interim Director of Environment, Planning and Regeneration approved an extension of the West Hendon Principal Development Agreement expiry date by 12 months to 15 December 2012 to review feasibility options.
- 1.14 Delegated Powers Report, 22 December 2011 (number 1524) – the Leader of the Council authorised that officers can undertake a mini tender competition to select external legal advisers for the West Hendon Regeneration Scheme. DLA Piper was the external legal advisors appointed under this tender exercise.
- 1.15 Cabinet Resources Committee, 28 February 2012 (Decision item 19) – approved that the Deputy Chief Executive be authorised to negotiate revised terms for the West Hendon Principal Development Agreement to enable the West Hendon regeneration scheme to progress with a new master plan that guarantees scheme viability, consulting relevant stakeholders as necessary and to report back to the Committee later this year on the result of these negotiations and any proposed changes.
- 1.16 Cabinet Resources Committee, 7 November 2012 (Decision item 7) – approved the extension to the Principal Development Agreement for a period of 6 months to June 2013.
- 1.17 Cabinet Resources Committee, 18 April 2013 approved the recommendation to conclude the Heads of Terms to the Principal Development Agreement and delegate authority to the Director of Place in consultation with the Leader and the Chief Operating Officer to agree the final terms of the Deed of Variation.
- 1.18 Planning and Environment Committee 27 July 2013; Approved Outline consent for construction of 2,000 homes, a two form entry primary school, nursery and new community facilities and detailed approval to phase 3a for the regeneration project.

## **2 CORPORATE PRIORITIES AND POLICY CONSIDERATIONS**

- 2.1 The regeneration of the West Hendon estate supports the Corporate Plan 2013-2016
  - To maintain a well designed, attractive and accessible place, with sustainable infrastructure across the borough.
  - To maintain the right environment for a strong and diverse local economy.
  - To create better life chances for children and young people across the borough.
  - To sustain a strong partnership with the local NHS, so that families and individuals can maintain and improve their physical and mental health.
  - To promote a healthy, active, independent and informed over 55 population in the borough to encourage and support our residents to age well.
  - To promote family and community well-being and encourage engaged, cohesive and safe communities.

2.2 The regeneration scheme also complies with strategic objectives in the Council's Housing Strategy 2010-2025 which include:

- Increasing housing supply, including family sized homes, to improve the range of housing choices and opportunities available to residents; and promoting mixed communities and maximising opportunities available for those residents wishing to own their own home.

2.3 The regeneration of the West Hendon regeneration estate also supports the Sustainable Community Strategy for Barnet 2010–2020 through the following objectives:

- A new relationship with citizens - the new developments will offer more choice and promote independence by providing a number of different housing options such as shared ownership to residents and to other people in the wider community.
- A one-public-sector approach - the Council is working together with other public sector partners to ensure the delivery of the schemes.
- A relentless drive for efficiency - the Council is working with development partners to ensure that the scheme is delivered in the most cost effective way.

### **3 RISK MANAGEMENT ISSUES**

3.1 The delivery of a residential led housing scheme over a period of 17 years could give rise to a level of market risk for the development partners and the Council. The relationship between house price inflation and construction inflation is likely to impact the future viability of the scheme. If construction cost inflation exceeds house price inflation, there is a risk that the project may become unviable. The partners have sought to manage this risk by seeking to adopt a revised phasing strategy that enables the development partner, in consultation with the Council, to continue work by implementing smaller development phases.

3.2 Re has financially evaluated the accounts of each party that is signatory to the principal development agreement, the following should be noted.

- Barratts PLC – The Experian report shows a strong 5 star rating with a very low risk. The Financial evaluation was carried out by calculating certain key ratios resulting in a weighted average score of 158 out of 300. The Organisation has scored zero for solvency ratio which is used to measure an organisation's ability to meet its short and long term obligations. It is a measure of its ability to service its debts. It also scored very low on liquidity ratio which shows it cannot meet its current obligations well. Please note that the liquidity ratio does not meet the procurement criterion which is 1. (they have scored 0.33). It achieved maximum scoring for its turnover and gearing ratios.
- Barratt Metropolitan LLP – Experian report shows a rating of 2 and is above average risk. However the accounts used in the Experian report are as at 30 June 2012. The accounts as at 30 June 2013 show a significant improvement. The

financial evaluation was carried out by calculating certain key ratios using 2013 accounts and it scored 263 out of 300 and achieved maximum score for liquidity, solvency, profitability and gearing ratios.

- Metropolitan Housing Trust - Experian report shows a strong rating of 5 star rating with a very low risk. The financial evaluation carried out by calculating certain key ratios gave a weighted average score of 135 out of 300. The Organisation have met the procurement criteria on liquidity but have scored zero on solvency which shows that it has a poor ability to meet its short and long term obligations and does not have the ability to service its debts. It achieved maximum scoring for its turnover and gearing ratios.

In conclusion, entering into a DOV with BMLLP taking into consideration this evaluation does not pose a risk to the Council; however Barratt PLC position should be noted as they will be acting as guarantor to the scheme.

- 3.3 If the regeneration of the estate fails to proceed the Council will need to ensure that the homes continue to be free from Category 1 Hazards as defined in the Housing Health and Safety Rating System (HHSRS) under the Housing Act 2004. The HHSRS sets out the minimum standard for housing. The properties in Council ownership would require major investment to ensure that they remain habitable in the longer term. There is currently no financial provision to upgrade these homes and therefore funding sources would need to be identified. This could have significant financial implications for the Council due to the poor state of repair of many of the dwellings within the estate. On a similar regeneration scheme the cost of evaluating this work was calculated at circa £53,000 per dwelling.
- 3.4 The Principal Development Agreement enables the Council to recover costs of up to £100,000 per annum during the development period. These Council costs can be recovered when the Principal Development Agreement goes unconditional. If the Principal Development Agreement terminates, the Council will no longer be able to recover these costs.
- 3.5 Given the market exposure, whilst the economy is still fragile the scheme is likely to need external funding. External funding sources that have been explored thus far include an application to the Greater London Authority (GLA) <sup>1</sup> for Get Britain Building funding along with a bid to Transport for London for infrastructure improvement works along the A5. Under the previous grant funding provisions Metropolitan Housing were awarded £5.5m, which has been allocated to the West Hendon Scheme and will deliver 43 Affordable units by March 2015. Any further delays in commencing the next development phase will jeopardise this funding.
- 3.6 Ground 10A approval - a successful land assembly exercise which is required to facilitate the regeneration of the scheme area is partly dependent upon tenants relocating from their existing properties to other suitable alternative premises. There is a risk that should consent /scheme approval by the Secretary of State for Communities and Local Government not be granted, tenants may decide not to relocate. Extensive consultation continues to be carried out with residents and

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<sup>1</sup> As of April 2012, the Homes and Communities Agency's London functions have been devolved to the Greater London Authority.

consent from the Secretary of State will enable the Council to serve Ground 10A notices under the Housing Act 1985 to gain vacant possession of homes. In order to further mitigate this risk, it is also proposed that all tenures, including premises occupied under a secure tenancy on the estate, would be included within the proposed Compulsory Purchase Order for the Scheme.

- 3.7 Prior to the commencement of each development phase, a financial assessment will be undertaken to ensure the phase minimum return as set out in the existing Principal Development Agreement can be met. In the event that it is below the threshold the financial delay provision in the Principal Development Agreement may have been triggered, resulting in programme delays. Under the revised Heads of Terms officers have mitigated this risk with respect to the next development phase where the phase can commence in the event the minimum return is below the threshold.
- 3.8 Phase 3 of the West Hendon Regeneration scheme is dependent upon Barratts Metropolitan Limited Liability Partnership acquiring the former Perryfields site from Catalyst Housing Limited. Should negotiations via private treaty fail, the site would need to be acquired by the Council through its Compulsory Purchase powers and could result in program delays.
- 3.9 As part of the Regeneration proposals for West Hendon significant infrastructure works are necessary, these works include the widening of Station Road and improving the pedestrian access route to the station. However, these works can only progress with the acquisition of some land owned by a third party. On the 4 September 2013 the Council received a purchase notice from Chateaux Holding Limited & Nofax Enterprise Limited owners of The Deerfield's site 1-3 Station Road NW4 4PR. The Notice relates to a planning application that was presented to the Planning and Environment committee on the 21 December 2012, and was declined. Whilst we consider the notice there remains a risk to the Council in that should the Secretary of State confirm the notice the Council may be required to pay compensation in part or whole. Council Officers are in discussion with Barratts LLP with regards to recovering these costs through the Compulsory Purchase Order Indemnity Agreement, (CPOIA)

#### **4 EQUALITIES AND DIVERSITY ISSUES**

- 4.1 The Council is committed to improving the quality of life and wider participation for all in the economic, educational, cultural, and social and community life of the Borough. The West Hendon Regeneration Scheme will provide a mix of affordable and private sale properties. The new mixed tenure housing will improve the community cohesion in an area with a highly diverse population. It will provide increased choice and opportunity for Barnet residents. This supports the overall aim of the Council's Equalities Policy and the Council's duties under the Equality Act 2010.

#### **5 USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)**

- 5.1 There is no monetary consideration for the land transfers that would result from the implementation of the scheme, however, certain costs incidental to the scheme including the cost of land assembly will be met by the developer. Barratt

Metropolitan Limited Liability Partnership will also be required to meet all the Council's fees, costs and any tax liability applicable to this transaction, with provision being made for this in the Deed of Variation.

- 5.2 Under the existing Principal Development Agreement (PDA) the Council was only able to recover £500,000 of its historic costs from the development partners. An apportionment of these costs was recovered through the Initial phase Deed of Variation. Under the amended PDA, Officers have negotiated the full recovery of costs covering the period between 2002-2013 circa £1.1m. These will be apportioned across each development phase over the next 17 years. The first payment of historic cost will be made upon the completion of Phase 3.
- 5.3 As mentioned earlier the Principal Development Agreement also enables the Council to recover costs of up to £100,000 per annum during the development period. These Council costs can be recovered when the Principal Development Agreement goes unconditional and will be reviewed in line with Council budgets ensuring that any costs incurred over this threshold can be fully recovered.
- 5.4 As there is an overall net increase of circa 1500 properties, Council Tax revenue will increase. Under band D the potential additional Council Tax income generated from the West Hendon Estate is likely to be £3.1m.
- 5.5 Under the Government's New Homes Bonus grant, the Council is projecting an income of circa £11m to be generated by the new properties built at West Hendon.

## **6 LEGAL ISSUES**

- 6.1 As the original PDA was negotiated and concluded on the basis that it constitutes a public works contract, the Council has had to have regard to the legal constraints arising under both European Union and UK procurement law as regards variations to existing public works contracts.
- 6.2 Wherever a PDA is varied there will always be some risk of the deed of variation constituting a new public works contract and/or being challenged by an aggrieved party claiming that this constitutes a new procurement. If the Deed of Variation and Restated PDA were successfully challenged the court has powers to set aside the Restated PDA for "ineffectiveness" and to award damages against the Council. Accordingly, the Council has throughout the process sought to limit the changes which have been tabled to the existing PDA in order to minimise risk of legal challenge.
- 6.3 Neither the original EU Directive nor the UK legislation (the Public Contracts Regulations 1996) provide a definitive statement on how far an existing contract can be varied without triggering the need to run a new procurement. However, there is established case law from the European Court which provides some useful guidance. In the leading case of *Pressetext v Republik Osterreich (Bund)* the European Court indicated that amendments to an existing contract can trigger the need for a new procurement where they are materially different in character from the original deal and demonstrate the intention to renegotiate the essential terms of the original contract. As examples of what would constitute material variations



(triggering the need for a new procurement) the court quoted the following illustrations:

- new conditions which, if introduced in the original procurement, would have allowed for the admission of additional bidders to the contract;
- new terms which, had they been part of the original procurement, would have allowed for the acceptance of a tender other than the original bid accepted;
- provisions which extend the scope of the contract to cover other services; and/or
- clauses which alter the economic balance of the contract in favour of the successful bidder and not originally covered in the original procurement.

6.4 It is a question of judgement on how far the Council can go in amending the original PDA, but having regard to the case law and the fact that the essential terms of the PDA are largely unchanged we believe the Council's position in proceeding can be justified and that the risk of a successful challenge would be relatively low.

## **7 CONSTITUTIONAL POWERS**

7.1 At its meeting on 18 April 2013, the Cabinet Resources Committee resolved to authorise the Director of Place (now Strategic Director for Growth and Environment) in consultation with the Leader and the Chief Operating Officer to agree the final terms of the of the Deed of Variation.

7.2 In accordance with the Council's Constitution, Paragraph 7.1 of Responsibility for Functions permits Chief Officers (e.g. the Strategic Director for Growth and Environment) to take decisions where it involves the implementation of policy or earlier decision of Council, Cabinet, or Committee.

## **8 BACKGROUND INFORMATION**

8.1 As reported to Committee in February 2012, the original masterplan for the West Hendon Regeneration scheme was not financially viable. With the agreement of the Council, Barratt Metropolitan Limited Liability Partnership undertook a review of the masterplan, led by a professional team appointed in September 2011. The team was appointed to produce a strategy that could be supported by the Council for the viable and complete regeneration of the West Hendon Estate.

8.2 The master plan review considered five options, of which Option '3' was recommended as the favoured option to be taken forward. This option included 1,977 new homes, retention of Ramsey Close, minimum Compulsory Purchase Order costs, creating a new town centre focus (but not redeveloping The Broadway commercial space) and highways junctions, highways capacity and pedestrian improvements. Following the Committee meeting, a public consultation event was held on 27 March 2012 on Option '3', whereby approximately 70 local residents, business owners and community group members attended the exhibition. The details of this proposal were also presented to members of the West Hendon Residents' Regeneration Forum.

8.3 Since February 2012 the professional team, in consultation with the Council, developed the design further which enabled the submission of a hybrid planning application for the regeneration of the West Hendon estate comprising a detailed planning application for the next phase of the development (approximately 358 new

homes) and an outline planning application for the remainder of the West Hendon Regeneration Scheme (approximately 1,642 new homes). On the 15 March 2013 the Council received the hybrid planning application for the West Hendon estate. This was approved at the 27 July 2013 Planning & Environment Committee. Consultation with residents and local stakeholders will continue throughout the design, planning and development period.

- 8.4 Since approval of the Heads of Terms, Council officers and their legal representatives have concluded contract negotiations with BMLLP and the Deed of Variation has been agreed. During this process 43 schedules appended to the PDA have also been reviewed and re-negotiated including the project financial model that was scrutinised with input from external advisors appointed by the Council reviewing both construction costs and sales revenues.

## **9 LIST OF BACKGROUND PAPERS**

- 9.1 Executive Summary appendix A

## **10 DECISION TAKER'S STATEMENT**

- 10.1 *I have the required powers to make the decision documented in this report. I am responsible for the report's content and am satisfied that all relevant advice has been sought in the preparation of this report and that it is compliant with the decision making framework of the organisation which includes Constitution, Scheme of Delegation, Budget and Policy Framework and Legal issues including Equalities obligations.*

## **11 OFFICER'S DECISION**

**I authorise the following action**

**Signed**

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**Date**

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