

Wichelstowe Joint Venture – NHBC Guarantee

Cabinet

Date: 5th February 2020

Author: Cabinet Member for Strategic Planning
Corporate Director Communities and Housing

Wards: Wroughton and Wichelstowe

Parishes Affected: Wroughton

1. Purpose and Reasons

- 1.1 This report sets out the benefits and risks of the Council of providing an indemnity to the National House Building Council (NHBC) in relation to housebuilding and sales activity undertaken by Wichelstowe LLP (JV).
- 1.2 In order to provide purchasers with NHBC guarantees, the Council is required to enter into an indemnity agreement and an associated variation to the JV Members Agreement.
- 1.3 Whilst authority was provided to complete the necessary contractual arrangements for the JV, together with associated documentation, on such terms as considered necessary to protect the Council's interests (Cabinet Minute 54, 18th October 2019) it is considered prudent seek additional authority due to the commercial implications.
- 1.4 The delivery of housing via the JV is a requirement of Pledge 6b – 'Working with Barratt Homes through the Joint Venture, we will deliver the District Centre facilities including a public house, the next phases of housing, a retirement complex and education facilities – whilst also delivering new sections of canal'

2. Recommendations

Cabinet is recommended to:

- 2.1 Authorise the Chief Legal Officer, in consultation with the Corporate Director of Communities and Housing and the Cabinet Member for Strategic Planning to complete the necessary contractual arrangements with the JV and the NHBC on the terms as set out in the body of the report.

3. Detail

- 3.1 Wichelstowe LLP is a joint venture between the Council and BDW Trading Ltd (BDW) established in December 2017 in order to deliver the development of land at Wichelstowe. The first residential occupations are due to take place in Summer 2020 and it is proposed that purchasers are provided with guarantees from the NHBC to protect against construction defects.
- 3.2 As the JV is a new company with no track record and in order to benefit from the advantageous rates which BDW as a large company has obtained, it was intended that the JV be linked with BDW's NHBC guarantee.

Further information on the subject of this report can be obtained from Steve Jorden, : 01793 464377, sjorden@swindon.gov.uk.

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- 3.3 A condition of NHBC agreeing to provide the JV with the benefit of the NHBC Agreement on preferential terms and rates is that the Council and BDW Trading Limited (BDW) (in their capacity as the members of the JV Company) also enter into the NHBC Agreement. The terms are such that they shall both be equally liable in the event that the JV fails to satisfy any claim made against it.
- 3.4 The implication is that both the Council and BDW will be assuming direct liability and in so doing 'piercing the corporate veil' protection afforded via the JV (i.e. the Council only be liable to the extent of its member interest in the JV).
- 3.5 The table below sets out the claims covered by the indemnity. These relate to the Buildmark guarantee, which deals with new build houses. A similar provision is set out in the Buildmark Apartments guarantee for Apartment blocks.

Type of Insurance	Cover to Purchaser	Claim Period	Financial Limits
Section 1 Insolvency	For loss of deposit or additional monies required to complete where contractor insolvent or commits fraud prior to completion	From exchange of contract up to the completion date	Maximum paid is 10% of the original purchase price or £100,000, whichever is lower.
Section 2 Contractor Warranty	If contractor fails to build in accordance with NHBC requirements and does not repair under warranty the NHBC will fund repairs and look to recover from builder.	Two years from completion (three years for shared parts)	<u>Individual Home</u> Maximum for all claims under Sections 2 and 3 (insurance after warranty period) original purchase price up to £1,000,000 <u>Continuous structure containing 2 or more homes (e.g. terrace)</u> Maximum for all claims for any continuous structure is cumulative total of individual home limits, up to a maximum of £25,000,000 for new builds or £5,000,000 for newly converted homes.

- 3.6 In addition, the guarantee offers a further 8 years of protection for homeowners if there is physical damage to a home because the builder failed to build a limited list of elements to NHBC requirements. These include structural elements such as foundations, walls, cladding, balconies, floor decking, retaining walls, double glazing etc. This additional 8 years of protection is not covered by the SBC / BDW indemnity and SBC are not exposed to any risk for this further period.

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Mitigation Measures

3.7 There are three key mitigation measures in place to mitigate the risk to the Council:

3.7.1 The aim of the JV is to address any issues arising within the initial two / three year period. An allowance has been set aside under the financial model to cover the costs associated with this. For Phase 0, the allowance was £218k. This mirrors the approach taken by BDW, which looks to rectify issues both to ensure positive feedback from purchasers (maintaining 5 star builder status) and to ensure NHBC premiums remain low. This sum is an indicative value of the expected cost of works in this period based on BDW's many years of housebuilding experience.

3.7.2 NHBC inspectors visit the site regularly to ensure that build requirements are being met. This allows issues to be spotted and rectified as soon as possible. This reduces the risk that problems are discovered post build during the 2/3 years where the Indemnity would step in should the JV cease operating.

3.7.3 Provisions are included within all contracts between the JV and the contractors undertaking the construction activity that will allow the JV to make a claim against the contractor if work has not been done in accordance with the required specifications. Retention money is also held for a period to ensure defects are rectified.

Risk Profile

3.8 Officers' professional judgement is that the risk to the Council is considered relatively low. BDW has extensive experience of housebuilding and consider that it has made sufficient provisions within the financial model to cover the expected level of construction defects within the initial claim period.

3.9 In the eventuality that a more serious issue was encountered and the JV is still in existence, the liability would fall to the JV and would result in a loss of profits.

3.10 BDW trading has a very strong credit score with a Credit Safe rating of 97 (out of 100) which indicates a very low risk. BDW has a Net Worth of £3.3bn as at 30th June 2019 and made a pre-tax profit of £911m in the year to June 2019. The risk of insolvency at this point is therefore considered to be low.

3.11 The risk to the Council occurs in the eventuality that the JV is wound up during the initial 2 to 3 year period following completion and it is not able to cover the costs. In this situation, the NHBC could ask the Council / BDW to fund repairs or repay deposits.

3.12 It is likely that in the eventuality the JV is wound up provision would be set aside to fund any repairs rather than being distributed amongst the parties to mitigate

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this. In this case it is considered likely that BDW will want to protect their reputation and standing with the NHBC and would likely support a request from SBC to set aside appropriate mitigation sums.

Variation to the Wichelstowe LLP Agreements

- 3.13 In order to complete the NHBC Agreement a variation to the JV Members' Agreement is required to acknowledge entry by the parties into the NHBC Agreement and to specifically provide for:

3.13.1 The parties only to be liable in respect of any claim under the NHBC Agreement to the extent of their culpability for the circumstances that gave rise to the claim. Where the responsibility for the claim is a shared between the Council and BDW then the liability will be shared equally. This provision is to be underpinned by a reciprocal indemnity to be provided by the Council and BDW (respectively) in favour of one another. For the avoidance of doubt construction activity is being carried out by Wichelstowe LLP and related claims are therefore a shared liability; and

3.13.2 The inclusion of a new 'event of default' under the Members' Agreement entitling the innocent party to terminate the Members' Agreement in the event the other party fails to assume responsibility for its proportion of any claim under the NHBC Agreement.

4. Alternative Options

- 4.1 Cabinet could request that the JV does not offer a guarantee to new purchasers. This would be very unusual for a housebuilder, leave purchasers unprotected and would be unlikely to be acceptable to BDW.
- 4.2 Cabinet could request that the JV registers as a separate entity with the NHBC. The NHBC has advised that by linking the guarantee with the existing BDW version there is a saving of in the region of 65% and the premium would reduce from £2.5m to £1.5m. The cost of the premium is applied against the Council's land value reducing the Council's overall returns. In this scenario, the NHBC has confirmed it would also require a form of security from the parent organisations indicating that this could for example be provided as a £200k cash deposit or bond.

5. Implications, Diversity Impact Assessment and Risk Management

Financial and Procurement Implications

- 5.1 Under the JV mechanism, the cost of the NHBC guarantee is deducted 100% from the Council land value.
- 5.2 Should the JV take out the NHBC warranty in its own name this is expected to increase by £1.0m, which would be recovered from the Council through the

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reduced land value. The NHBC has also confirmed that if the NHBC warranty was in the JV's own name, it would in addition also require a form of security from the parent organisations indicating that this could be provided as a £200k cash deposit or bond.

- 5.3 The indemnity covers two risks, firstly the loss of a buyer's deposit between exchange and completion, and secondly the cost of remediation works to a property during the first 2 to 3 years post construction. These would only be called upon if the JV was not able to fulfil its obligations.
- 5.4 BDW requires around a 10% deposit on exchange and the risk to the Council/BDW around the loss of a deposit would therefore be £40,000 on a typical £400,000 purchase price if the JV were unable to fulfil its obligations during this short period of time (to a maximum of £100k per property).
- 5.5 The indemnity also covers the repairs to property in the first 2 to 3 years after completion should the JV not be able to fulfil these. These are capped at £1m per property, but this paper sets out the mitigations around this risk at section 3.8 as well as detailing that the JV has set aside £218k to cover these costs based on their significant experience of housebuilding.

Legal and Human Rights Implications

- 5.6 The Council is being advised in relation to the Wichelstowe LLP Pinsent Masons.

Climate Change Impact

- 5.7 The proposals would not bring a change in service delivery and Officers believe that there is no expected effect on the Council's carbon footprint.

All Other Implications (including Staff, Sustainability, Health, Rural, Crime and Disorder)

- 5.8 No further implications

Diversity Impact Assessment

- 5.9 A diversity impact assessment has not been completed in relation to this report. It is not considered that there would be any impact in relation to any diversity groups as a result of implementing the recommendation.

Risk Management

- 5.10 The risks related to the implementation of this recommendation are set out in the body of the report.

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6. Consultees

6.1 The Corporate Director of Finance and Assets (s151 officer) and Chief Legal Officer (Monitoring Officer) are consulted in respect of all reports. However, as the Corporate Director is also member of the Joint Venture board, the consultee for this report was the Head of Finance (Deputy s151 Officer).

6.1.1 The Head of Finance (Deputy s151 Officer). cleared this report for publication on 28th January 2020.

6.1.2 The Chief Legal Officer (Monitoring Officer) cleared this report for publication 28th January 2020.

7. Background Papers

7.1 None

8. Appendices

8.1 None

9. Key Decision/Decision in Cabinet Work Programme and Forward Plan

9.1 This is not a Key Decision and is not included in the Cabinet Work Programme and Forward Plan for February 2020.