

# **CHESHIRE EAST COUNCIL**

## **REPORT TO: CABINET**

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**Date of Meeting:** 14 June 2010  
**Report of:** Strategic Director - Places  
**Subject/Title:** Options for Delivery of Affordable Housing  
**Portfolio Holder:** Cllr Jamie Macrae

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### **1.0 Report Summary**

- 1.1 This report identifies the need for additional measures to be taken to achieve development of new affordable housing in Cheshire East including the identification of sites which are in the ownership of Cheshire East Council and are suitable for the development of 'Affordable Housing'. It outlines ways in which the Local Authority can increase the provision of affordable house within Cheshire East by disposing of any identified sites in a variety of ways, either at nil value to a Registered Social Landlord (RSL) or through an agreement based on a joint venture model where receipts are deferred. These models offer alternatives to disposal such as long lease whereby Cheshire East Council retains ownership of the land, but is able to maximise benefits and income from it.
- 1.2 The delivery of affordable housing is one of Cheshire East's priorities as stated within the Sustainable Community Strategy, Corporate Plan, Planning and Policy Business Plan, Sub-Regional Housing Strategy and the Strategic Housing Business Plan. There is currently a combined waiting list (Congleton, Macclesfield and Crewe and Nantwich areas) for social rented housing of 7,800 applicants. This is against relets of 909 during 2008/09 demonstrating that need far outstrips supply.
- 1.3 The recent CAA Inspection identified '*availability of affordable housing is a significant issue in Cheshire East*'. The initial report also stated '*it is unlikely that the identified need for affordable housing in Cheshire East Borough can be met because of the level of housing capital allocations and limited availability of suitable development sites*'.
- 1.4 Availability of regional funding for housing is likely to decrease substantially in the future, hence the need to be increasingly creative in the provision of affordable housing. Cheshire East Council is currently working with Cheshire West and Chester and Warrington Council's on a sub-regional investment plan incorporating housing; economic development and infrastructure needs in partnership with the Homes and Communities Agency (HCA), Enterprise Commission and the North West Development Agency. The purpose of this is to identify the priority areas for investment in the three Local Authority areas. The HCA sees their role as an investment partner with Local Authorities who are also able to contribute towards the costs of development often through the contribution of land.

## **2.0 Recommendations**

- 2.1 That officers identify a list of potential sites from sources such as Strategic Housing Land Availability Assessment (SHLAA) and information held by the Council's Assets service which could be suitable for the development of affordable housing.
- 2.2 That approval is given to officers to explore the opportunities, in relation to these sites, from the options described in the report and any other new initiatives that arise, consistent with the objectives of providing more affordable housing.
- 2.3 That officers start a process of identifying preferred partners for development of housing sites, in conjunction with the HCA.
- 2.4 That further reports be received, by Cabinet or the relevant Portfolio Holders, on the outcomes of the various assessments and business cases for land use and affordable housing developments.

## **3.0 Reasons for Recommendations**

Provision of affordable housing is one of the priority National Indicators in the Local Area Agreement. Funding for affordable housing is likely to decrease substantially at the end of the current financial year. The Government is looking to Local Authorities to be increasingly creative and one of the priorities for the HCA is to help Local Authorities achieve this. Provision of suitable and affordable housing has been proved to be a major factor in contributing to sustainable communities.

## **4.0 Wards Affected**

- 4.1 All Wards

## **5.0 Local Ward Members**

- 5.1 N/A

## **6.0 Policy Implications including - Climate change - Health**

- 6.1 Climate Change  
New housing will need to comply with HCA's Design and Quality Standards and their policy guidance in relation to this. As a key partner of Cheshire East Council the HCA is committed to supporting new and emerging Government sustainability policy – particularly in response to the zero carbon targets of 2016 and the Code for Sustainable Homes.
- 6.2 Health  
The provision of decent homes contributes towards better health as it is well documented that poor housing can have a detrimental impact on health. Use of Council land in this way can help the Council achieve its objectives in relation to

regeneration, place making, increased housing supply, design standards, education and employment as well as increasing supply of affordable housing.

## **7.0 Financial Implications 2009/10 and beyond (Authorised by the Borough Treasurer)**

- 7.1 If land is disposed of at nil or less than market value this will mean a loss in capital value, capital receipt or other opportunity cost. The extent of the loss may be mitigated, depending on which options are applied. For example, leasing some sites at a peppercorn rent would mean that they remain assets of Cheshire East Council (though both the risks and rewards of ownership will be transferred for a lengthy period of time) and other options might mean that in the long term there could be a return for the authority from sales of houses.
- 7.2 If the Council chooses to set up a Local Housing Company there will be initial costs associated with setting it up and the Council will need to contribute to these (estimate £100,000). As this is a complex area with no in-house expertise available this figure includes all legal costs to fund external legal advice including preliminary advice on the suitability or otherwise of setting up a LHC.

## **8.0 Legal Implications (Authorised by the Borough Solicitor)**

- 8.1 This report recommends exploring options for the disposal of land at various sites, and states that all options should be explored. The Council's actions in disposing of land are subject to statutory provisions, and the Councils Asset and Facilities Services Code of Practice for the Disposal of Council Property.
- 8.2 Under section 123 and section 127 of the local Government Act 1972, the Council has wide powers for the disposal of its property assets. The overriding requirement is to obtain the best consideration that can be reasonably obtained for the land. The Act does not apply to the disposal of a short-term tenancy of less than seven years.
- 8.3 The duty to seek best consideration is subject to certain exceptions. These are conveyed in the local Government act 1972: General disposal consent 2003, which makes provision for the Council to dispose of land where the consideration is less than the best that can be reasonably obtained, known as an under-value. The Council may dispose at an undervalue where it considers that the disposal is likely to contribute to the achievement of the promotion or improvement of the economic, social, or environmental well being of the whole or any part of its area. In these circumstances, the council must obtain specific consent from the Secretary of State.

Consent is not required where the difference between the unrestricted value (or market value) of the land to be disposed off and the consideration accepted (the under-value) is £2 million or less. However the Council must be able to demonstrate that it has acted reasonably in agreeing a transaction at an undervalue, and that the outcome will be at least as beneficial as the opportunities foregone by agreeing a reduced receipt. In addition to confirmation that any proposed disposal will contribute positively to agreed Council policy priorities, any report recommending a sale at an undervalue should set out the benefits that residents will derive, and state that these benefits cannot be achieved unless the sale takes place at an undervalue. Confirmation should also be provided that there is no alternative means of funding available.

- 8.4 In complying with its duty to obtain the best consideration where land is sold at an undervalue. The Council must also test whether an offer is the best that can reasonably be obtained having regard to any restrictions or the effect on value of any conditions placed on the use of the land, the basis of relevant professional advice including whether the offer under consideration is reliable, advice on possible changes to the price that may flow from changes to the planning situation and other evidence.
- 8.5 The Council has a general fiduciary duty, and must be able to demonstrate that it has acted reasonably in agreeing undervalue transactions. It is unlikely that aggrieved unsuccessful or potential purchaser's, or local residents will in all cases accept the decision. A fundamental issue will be the ability to demonstrate reasonableness having regard to applicable policy, and it should be noted that any decision to dispose at an under-value utilising the 2003 Consent does not preclude Judicial Review.

## **8.6 Public procurement considerations.**

- 8.6.1 Until recently it was generally accepted that land disposal was outside the public procurement legislation. Case law, notably *Jean Auroux v Commune de Roanne* (Auroux) 2009 and cases subsequent to this have brought this into question and it is now necessary to consider the possibility that a sale of public land, where the values involved trigger the EU threshold, and in circumstances where there is a development agreement or the grant of a lease associated with the disposal may trigger the need for an EU tendering exercise.
- 8.6.2 If when disposing of land, the Council is involved in determining the scope of the future development of its land and its intention is to impose on the purchaser certain obligations as to the nature of the development and also perhaps the standards to which the works must be constructed, then it is likely that any such arrangement may be construed as a public works contract and subject to the EU procurement rules.
- 8.6.3 The decision in *Aroux* therefore provides a wide definition to the meaning of a public works contract and thus increases the risk of transactions falling within that definition. There may, however, be exceptions to this depending on the nature of the transaction, how it is structured and its detailed provisions. As a general principle, the risk will be higher the more the Council specifies its requirements for any full development and conversely will be lower the more the Council is willing to take a hands-off approach.
- 8.6.4 The office of Government (OGC) has issued preliminary guidance on the application of the public procurement rules to development agreements with the proviso that the applicability or otherwise over the public procurement rules will depend on the particular facts and therefore universal guidance is not feasible, and that it's understanding is subject to change depending on future arguments from the European commission. The OGC also emphasises that the European authorities are likely to take a view of the intent and purpose of activities and agreements entered into by a public body and artificial arrangements intended to circumvent the application of the rules are unlikely to be persuasive. The Council must therefore give due consideration to the possibility of public procurement rules applying to any

particular disposal of land and obtain case specific legal advice before entering into any agreement.

## **8.7 State Aid Considerations**

- 8.7.1 If the Council disposes of land at an undervalue this will be regarded as unlawful state aid unless the requirements of the European Commission's sale of land guidelines are met.
- 8.7.2 The guidelines require, in the absence of an open and unconditional bidding process, (which could include an EU procurement process), that the disposal is made for the market value of the land as determined by an independent valuer. A disposal of less than the valuers' assessment of market value will be regarded as unlawful state aid. The amount of the aid being the difference between the market value and the sale price.

## **8.8 The interaction of best consideration, procurement and state aid obligations.**

- 8.8.1 Each of the above three obligations is separate and independent of the others. The fact that the Council has met its section 123 obligations for the disposal of any land does not necessarily mean that its public procurement regulations have also been met. If the Council carries out a full EU procurement exercise it is certainly easier to demonstrate that its obligations in relation to state aid and to obtain best consideration have been met. This is not to say, however, in the absence of an EU procurement process (where such a process is not required) that the Council will not be able to demonstrate state aid compliance and/or compliance with its best consideration obligations as this may still be possible by other means and the above guidance must be applied in light of the specific circumstances and the reasons recorded in writing.
- 8.8.2 Whether or not the EU threshold is triggered there is now a requirement for all local authorities to act under the general EU principles of transparency, proportionality, non-discrimination, equality of treatment, transparency public disclosure. Those principles usually imply an obligation to research the market, interview partners and to enter into agreements via non-discriminatory procedures including effective debriefing after the award of any contract.

## **8.9 Other Statutory Provisions**

### **8.9.1 Housing Act 1985, as amended**

Under section 32 the Council has the power to dispose of land and dwellings held for housing purposes. Secretary of State Consent will be required unless the disposal is covered by one of the General Consents relating to disposal of

Vacant dwellings for owner occupation.

Occupied dwelling houses to secure tenants.

Dwellings to tenants who have the right to buy acquiring with others.

Dwellings on shared ownership terms.

Housing Authority land.

Reversionary interests in houses and flats.

Disposals are to be at market value, but discounts may be applicable to qualifying applicants.

### **8.9.2 Local Government Act 1988.**

Under section 25, a local authority may provide a RSL with any financial assistance or gratuitous benefit of land for development as housing accommodation subject to conditions. This includes.

Land for development or access, easements and rights.

Dwelling Houses for refurbishment.

Financial assistance for prevention of homelessness

Loans to RSL's.

The aggregate value of financial assistance or gratuitous benefit provided by the disposal or grant shall not exceed £10 million, and must comply with the conditions attached to the Consent.

## **9.0 Risk Management**

9.1 If the Cabinet does not agree to the sale of some of its land holdings at an undervalue, there is a risk for the Council of there being a significant impact on the ability of the Council to:

- Deliver affordable housing for local people
- Secure additional funding from the HCA
- Secure future, borough wide funding from the HCA for regeneration

## **10.0 Background and Options**

10.1 Demand for affordable housing in England is increasing faster than the supply of new affordable homes and traditional methods of delivering affordable housing are failing to deliver sufficient numbers of new units. This position applies to Cheshire East where house prices are high compared to many other areas in England and there are problems accessing affordable housing and insufficient rented accommodation. During 2009, prices in Cheshire East have increased from a low of £150,000 in Q1 to £175,000 by Q3, representing an increase of 16.7%. This varied across the Authority with average house prices in the old districts of Congleton at £189,757, Crewe and Nantwich £163,891 and Macclesfield £290,399. Rural areas around Crewe and Macclesfield had lower quartile prices exceeding £200,000 in 2008/09. Whilst we have seen a drop in house prices since 2007 in Congleton and Crewe and Nantwich, Macclesfield has experienced an increase of just over 1% from the average house price of £287,357 in 2007. In terms of relative affordability,

Cheshire East is ranked 8<sup>th</sup> least affordable District in the North West (out of 39 Authorities).

- 10.2 The ability to access a property across the Authority is now out of the reach of even those on reasonable incomes and is increasingly difficult in the current economic downturn, where lenders are requesting a minimum of a 20 percent deposit. When considering affordability, the relationship between lower quartile house price and low quartile gross earnings has to be considered to establish the income to house price ratio. The draft Strategic Housing Market Assessment (SHMA) indicates that across Cheshire East 6.7 times income would be required to enable a resident to access the lowest priced houses. This is above the level that Lenders use to calculate the level of mortgage which is now usually 4 or 5 times income. Cheshire East, in terms of affordability, is ranked the 8<sup>th</sup> least affordable district in the North West.
- 10.3 In 2008/09, 370 new affordable homes were delivered across Cheshire East compared to a target of 344. In 2009/10, there was a target of 364 against which 444 homes were delivered. In 2010/11, Government Office North West have agreed to revise the target of 526 down to 379 because of the slow down in development in the current economic climate. On the face of it, we are meeting our targets however as demonstrated by the recent SHMA there is a enormous underlying need for affordable housing in the borough identified in the SHMA as an **annual** requirement for 1,243 affordable dwellings in Cheshire East. This in conjunction with a climate of decreasing availability of public funds means Local Authorities need to be more creative if they are to meet their targets for affordable housing.
- 10.4 One of the areas of focus of the recent CAA by the Audit Commission was the delivery of affordable housing and they were keen to learn what measures this Council had put in place to do everything it could to achieve this target. Unless we have a robust action plan to bring forward additional affordable housing, through mechanisms other than the reliance on Section 106 agreements, the Council will not deliver on desired outcomes.
- 10.5 Cheshire East is able to deliver some affordable housing through planning policy and resulting section 106 agreements. However, this has become increasingly difficult in the current economic climate because of the reduction in housebuilding and because of the variation in planning policy on some sites leading to a reduction in delivery of affordable housing on these sites.
- 10.6 Cheshire East has in its ownership properties and land and this report presents options for the Council to consider which will enable it to make use of their assets to maximise provision of affordable housing. Information from the Strategic Housing Land Availability Assessment (SHLAA) is now available and will help with identification of public land which is appropriate for development of affordable housing. In addition, a review is currently being carried out of all properties in the ownership of Cheshire East Council.
- 10.7 This section of the report outlines the options which are currently available. The report will then look at the applicability of these options in Cheshire East and the benefits and drawbacks to taking these courses of action. In order to progress with these options, the Council will also need to carry out an exercise to determine which RSLs are going to be its preferred partners.

## 10.8 Affordable Housing Options

### 10.8.1 Gift Land to a Housing Association (RSL) (Option 1)

Local Authorities can dispose of land at a reduced or nil price in return for the right to make nominations from its housing waiting list and this has become one of the most common methods by which Local Authorities assist housing associations to provide housing for rent and other tenures. This can be achieved by the Local Authority approving land for sale at an undervalue providing that the legal implications are considered as set out in para 8.

This course of action will be more suitable for some sites in the Council's ownership than others.

<b>Gift land to RSL</b>	
<b>Advantages</b>	<b>Disadvantages</b>
Often attracts HCA funding as match funding from local authority provided as land	Local authority loses an asset permanently
Local authority retains control over what is developed on land and which RSL is development partner	One off transaction no possibility of money being gained to provide additional housing
Low risk	

### 10.8.2 Local Housing Companies (LHC) (Option 2)

LHCs are local delivery vehicles described in the 2007 Housing Green Paper as 'Local Authority-promoted housing development and management organisations possibly with wider regeneration initiatives'. Their role is to unlock the potential for the development of underused, surplus public sector land by releasing sites that will achieve at least 50% affordable housing. They are also known as Special Purpose Vehicles or Joint Venture Companies.

When setting up a LHC, Local Authorities contribute land and assist with planning consent. Private developers and other investors provide funding to an equivalent amount. The venture is then jointly owned with a 50:50 split. Both sides of the venture share risks and rewards such as uplifts in land value. There is a long lead in period therefore this is not one for quick wins.

LHCs just for affordable housing are usually not viable so part of the company needs to make money perhaps by providing properties for intermediate rent or market sale. An alternative purpose of the company could be to refurbish poor condition private sector stock by buying empty properties in poor condition and bringing them up to the decent homes standard bearing in mind if this is the case another part of company will need to make money.

The findings from the SHMA will provide the evidence base to help determine the priorities for company.



<b>Local Housing Company</b>	
<b>Advantages</b>	<b>Disadvantages</b>
Sale and leaseback land and property arrangements can be put in place	Cost of land initially
Leverages in public and private investment through the use of council assets without putting them at risk	Cost of setting up company (approximately (£100,000))
No requirement for the host council to offer guarantees on the loans	Higher risk as little testing of this option so far

### **10.8.3 Strategic Land Assembly and Enabling (Option 3)**

Cheshire East Council can achieve its objectives in relation to new affordable housing in other ways than setting up a local housing company. This is because its land has such high values compared to many other areas of the country that it does not necessarily need to utilise extensive borrowing to facilitate new house building. However, if the Local Authority does decide to carry out its own land assembly it will need a much greater resource.

As with LHCs, this initiative is about minimising risk for developers so they are encouraged to work with local authorities. They also want handover of units to RSLs to be made simpler and some guarantees to minimise risks if market units aren't sold - such as them being bought for affordable housing – HCA are offering gap funding to cover this but also expect other public sector partners to do this.

Cheshire East could obtain planning permissions itself thereby substantially increasing value of land. If however an s106 agreement is required in order to secure the provision of affordable housing, it would not be appropriate for the Council to enter into such an agreement with itself. In those circumstances, the issuing of the planning permission should be deferred until the developer has an interest in the land, for example under a contract to purchase it and then the developer can enter into a s106 agreement which would bind him if he completed his purchase. The s106 agreement could include a requirement for the developer to use an RSL for the affordable housing. The Council would be able to use the procurement process that HCA has already been through for appointment of preferred developers. Where the Local Authority sells land with planning permission this capital should then be ring fenced to buy further land or assets. HCA will act as equity partner either continuing in partnership or choosing to take money out

In areas where regeneration is needed, the Local Authority can work with HCA who can buy the land necessary to facilitate development rather than give grant.

The Homes and Communities Agency (HCA) is currently making £53m available through its **Public Land Initiative (PLI)** to help bring publicly owned housing sites forward using a different approach to procurement and delivery. The Initiative will

deliver over 1,250 new homes over the next three years, 500 of which will be affordable homes. The PLI is designed to bring new construction players into the housing market using land in public ownership. Funding for the PLI was announced as part of the Building Britain's Future Pledge in June 2009. Developments need to meet the following standards:

- Code for Sustainable Homes Level 4
- Building for Life
- minimum space requirements

Government provides the public land and takes out the upfront costs and risks involved in site purchase and preparation as contractors pay for the land only once the completed homes are sold. A panel of approved partners have now been selected, reducing the contract bidding and procurement costs for public agencies that want to build homes this way. But in exchange for this reduced risk, developers take a smaller profit.

Developments need to bring in local labour markets and apprenticeships. The HCA are looking for sites 21/2 hectares minimum and minimum 100 units with first phase of around maximum 250 units 40% of which should be affordable, where the baseline data has already been gathered and preferably outline planning permission is in place. Size of sites partly relates to use of volume methods of construction and economies of scale realised from this.

The framework is for the HCA, but is also open to Regional Development Agencies, Local Authorities, Urban Regeneration Companies, Urban Development Corporations, Registered Social Landlords and other contracting authorities involved in housing and regeneration within England. Opportunities for work through the Panel may be subject to mini-competition.

Advice has been taken from Cheshire East's procurement officers and they are comfortable that the HCA's procurement process meets their requirements.

<b>Strategic Land Assembly</b>	
<b>Advantages</b>	<b>Disadvantages</b>
Potential to recover value of land through sale of homes	Loss of immediate income because land not sold on open market
Market is not likely to continue to fall therefore risk is minimised	Cost of procuring partners
Benefit of working in partnership with HCA throughout whole process, their staff have extensive experience in this area of work and access to funding	Will need extensive internal support from Planning, Legal, Finance,
HCA will possibly offer gap funding if properties do not sell	
Will be popular with RSLs and developers in current climate of reduced activity	

- 10.9 Extensive work has already been carried out to gain the information contained in this report. Housing staff have met with the HCA, GONW and other Local Authorities who have taken this route in order to identify best practice. Meetings have taken

place with strategic planning, regeneration and assets who are currently carrying out an exercise to value appropriate pieces of land in the ownership of the Council and checking that there are no restrictive covenants or other restrictions that would prevent its use for housing. If land identified is not held for housing purposes and it is to be retained, then the Council will need to appropriate it for that purpose under section 122 of the Local Government Act 1972 and if there is to be a disposal of land that is held as open space then s123 of that Act must be complied with and the proposed disposal advertised and objections considered.

10.10 In reality, it will probably be most appropriate to make use of options 1 and 3 for the delivery of affordable housing through use of Council land, however the Council would not wish to be restricted to only being able to make use of these options as this is a dynamic area and new funding opportunities are often made available by the HCA. Gifting land to an RSL maybe a better solution for some small pieces of land. Larger areas of land will be more suitable for one of the other options such as Strategic Land Assembly. All options should be explored openly at this stage.

#### 10.11 Next Steps

Sites in the ownership of the Council and suitable for the development of affordable housing should be identified. This will take place in conjunction with officers from Spatial Planning and Assets.

A series of Workshops to examine potential uses of any identified sites needs to take place with all internal services affected and also external partners such as HCA and other regional partners.

There needs to be a through assessment and appraisal of all delivery options for appropriate areas of land

An informed Business Case will need to be prepared . The main areas the Council will need to address are:

- Objectives
- Indicative outputs and outcomes
- Site assessment/viability
- Identify Business model / delivery vehicle options
- Financial options appraisal with a VFM case in support of preferred delivery option
- Comparison of the various structures
- Legal & taxation implications
- Funding implications
- Risk assessment
- Soft market testing
- Implementation Strategy – What are the timescales / Work programme / Critical path
- Partners

## 11.0 ***Access to Information***

The background papers relating to this report can be inspected by contacting the report writer:

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