

North Essex Garden Communities Ltd		Agenda No: 5b
Portfolio	Overall Corporate Strategy and Direction Environment and Place Planning and Housing Economic Development Finance and Performance Corporate Services and Asset Management	
Corporate Outcome:	A sustainable environment and a great place to live, work and play A well connected and growing district with high quality homes and infrastructure A prosperous district that attracts business growth and provides high quality employment opportunities Residents live well in healthy and resilient communities where residents feel supported A high performing organisation that delivers excellent and value for money services Delivering better outcomes for residents and businesses and reducing costs to taxpayers	
Report presented by:	Councillor Graham Butland, Leader of the Council	
Report prepared by:	Kim Cole, Head of Governance	
Background Papers:	Public Report	
Cabinet Reports and Minutes dated 4 February 2016 , 29 November 2016 and 6 September 2017		Key Decision: Yes
Council Reports and Minutes dated 12 December 2016 and 9 October 2017 .		
Executive Summary:		
<p>This report sets out the options for the future of the North Essex Garden Communities Ltd (the Company) and the three Local Delivery Vehicles (LDVs) following receipt of the Local Plan Inspector's letter ("the Letter") on 15th May 2020 and focuses on the following points:</p> <ol style="list-style-type: none"> 1. NEGC Ltd – structure and purpose 2. Winding up 3. Employment implications 4. Financial implications 		

Recommended Decision:

That Cabinet:

1. Note the recommendation of the North Essex Garden Communities Ltd Board on 6th July 2020 to take all necessary steps to wind up the three Local Delivery vehicles, namely Colchester Braintree Borders Ltd, Tendring Colchester Borders Ltd and West of Braintree Ltd, as set out in paragraph 7 below.
2. Approve, as Shareholder, that the Council take all necessary steps to wind up North Essex Garden Communities Ltd.

Purpose of Decision:

To enable the Council to consider and agree the preferred option relating to the future of the Company and note the decision of the Company Board in relation to the three LDVs.

Any Corporate implications in relation to the following should be explained in detail.**Financial:**

The garden community project had reserves of £883k at 2019/20 year-end. It is expected that these funds would be exhausted by 30th September 2020 if the project continued in its present form. It should be noted that if a decision is not made by the Shareholders in July, the Company is likely to remain beyond existing financial contributions.

The estimated winding up costs for the Company can currently be met from within the funds held by CBC in the garden community project reserve. Any balance remaining will be carried forward for use in any delivery vehicle or returned to the respective councils as agreed between the partners.

Legal:

As Shareholder the Council is entitled to make the decision as to whether the Company should be wound up by passing a special resolution under the Company's constitution. If the Council determine that the Company should be wound up, there are a number of procedural steps that the Council will be required to follow. Officers from each of the NEAs will work together to ensure that these are undertaken accordingly.

Safeguarding:	No matters arising out of this report
Equalities/Diversity:	The report does not create any specific equality or diversity impacts; the communities which are ultimately developed will need to take into account these issues in their design, construction and management and this will be an ongoing commitment.
Customer Impact:	No matters arising out of this report
Environment and Climate Change:	No matters arising out of this report
Consultation/Community Engagement:	No matters arising out of this report
Risks:	No matters arising out of this report
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1. Background

- 1.1 Following the partnership working between Essex County Council (ECC), Colchester Borough Council (CBC), Tendring District Council (TDC) and Braintree District Council (the Council) (together known as the NEAs) approved the incorporation of the North Essex Garden Communities Ltd (the Company), and endorsed the formation of three Local Delivery vehicles (LDV) namely Colchester Braintree Borders Ltd, Tendring Colchester Borders Ltd and West of Braintree Ltd in November 2016.
- 1.2 At that time Councillor Graham Butland was appointed as a Director on the Company Board as the Council's representative.
- 1.3 Ownership of the three LDVs sits with the Company, with each Council holding non-voting B shares in the relevant LDV for their areas.
- 1.4 The Company has been a great example of four Councils working together across geographic boundaries and political lines with a shared aim to improve housing and infrastructure for residents and businesses. The company co-ordinated the groundwork needed for a project unmatched in terms of scale and ambition in the UK, against a background of the Government's Garden Communities Programme to provide new housing, infrastructure, jobs and services in sustainable settlements.
- 1.5 During the past two years NEGC Ltd has successfully secured £3.76m in grant funding from Government and supported NEAs in their successful A120/A133 HIF Bid and provided design input into the link road and Rapid Transit System.
- 1.6 The Company and the NEAs have helped commission work looking into improving standards for future housing delivery, jobs, creation of green and open spaces, and the infrastructure schools, shops, health, leisure and other facilities. A long-term economic strategy has been developed, and work with SELEP has been undertaken focusing on the central role Garden Communities have on their emerging Local Industrial Strategies.
- 1.7 The Company has showcased the potential of North Essex at various exhibitions, conferences and at networking events. This has created the North Essex Opportunity which promotes North Essex as a place to do business, to learn, to live and work. This work has helped to raise the profile of the region, and has supported growth across the area.
- 1.8 On 15th May 2020 CBC, TDC and the Council received the Planning Inspector's (the Inspector) Letter. The Inspector concluded that two of the three proposed Garden Communities (the Colchester Braintree Borders Garden Community and West of Braintree Garden Community) were not viable or deliverable and therefore the Section 1 Local Plan, in its current form, is not sound. The Inspector did however agree that the Tendring Colchester Borders Garden Community is viable and deliverable and the housing and revised employment targets in the Local Plan are also sound.

- 1.9 The master planning and preparatory work undertaken by the Company to date, especially on strategic conversations with stakeholders (such as utility providers) means that the work puts the Tendring Colchester Borders Garden Community in a strong position to progress efficiently.
- 1.10 Following the Inspector's findings, CBC, TDC and the Council have received the Inspector's modifications, which set out those modifications to the Local Plan that would be required to make it sound. The Inspector has set out two options on how CBC, TDC and the Council may proceed: 1) to consult on the main modifications to remove the Colchester Braintree Borders and West of Braintree Garden Communities from the Local Plan and other necessary 'modifications'; or 2) withdraw the plan. Each of the councils are considering the way forward on these through their respective governance processes.
- 1.11 However, with the removal of the West of Braintree and Colchester Braintree Borders from Section 1, the NEAs now need to consider the requirement for the Company going forward.

2. NEGC Ltd – structure and purpose

- 2.1 Having regard to the findings of the Inspector, the NEAs have determined that any future plans they may have, might be achievable without the use of the Company and/or through an alternative vehicle delivery model. There is no mechanism within the Shareholder Agreement for one council to leave the Company but in practice, this might be possible if the individual council offered up their shareholding. Consequently, the Shareholder Agreement would require variations to reflect the new arrangement with the remaining three Councils.
- 2.2 It is important to note that the Company was never set up to be the delivery vehicle, but was established to act as an oversight company of the three LDVs. If the Company were to have any future direct role in the delivery vehicle, the Articles of the Company would require substantive variation with the consent of the Councils, as Shareholders.

3. Company Liabilities & Resources

- 3.1 CBC has confirmed that the only liabilities the Company has are those of the Managing Director's employment, no other staff are employed by the Company and all resources are engaged through contracts with consultants, with CBC as the contracting authority. These contracts can be individually reviewed with regards to the on-going requirements for the Tendring Colchester garden community
- 3.2 The only contractual liability for the Company is the employment contract for the Managing Director, which will need to be determined through TUPE, dismissal or mutual agreement. Employment issues are set out in more detail below.

4. Winding up the Company

- 4.1 The A shares in the LDVs are held by the Company, practically this means that the LDVs should be wound up first. The Council is asked to note that this was due to be considered by the Company Board on 6th July 2020.
- 4.2 Should the decision to wind up the Company be approved by each council, the Company will be required to stop trading from the point of the resolution, except so far as is necessary for winding up, this will include resolving any employment issues.
- 4.5 The Directors of the Company will also be required to make a declaration of solvency if they think the Company can pay its debts. If they do this then the winding up is a *members'* voluntary liquidation. If they don't then the winding up becomes a *creditors'* voluntary winding up over which the Council as shareholder has little or no control.
- 4.6 There are consultation processes that will need to be followed as part of the winding up process. If another body had a continuing contract with the Company and was opposed to the closure of the Company they would be in a position to make it a creditor's voluntary winding up, which would mean that the Shareholders would lose control of the liquidation. The possible types of continuing contracts include:
- Legal claims (by employees or ECC in its capacity as Essex Pension Fund)
 - Unpaid tax or NI contributions
 - Outstanding contractual liabilities
 - Pension liabilities depending on terms of admitted body status.
- 4.7 Should the Council proceed with the recommendations set out in this report, the next steps would be for the appointment of a liquidator. The liquidator has to be an insolvency practitioner (even if the Company Directors have made a declaration of solvency). The liquidator will call in all the assets and arrange for their disposal, before finally transferring the final balance to the Shareholders. Once this has done, the Company will formally be dissolved and ceases to exist 3 months later.
- 4.8 If the declaration of solvency cannot be given, or the insolvency practitioner concludes that the Company is not solvent, then it will become a creditor's voluntary winding up and the distribution is approved by creditors.

5. Employment

- 5.1 The NEAs are each guarantors and have guaranteed to underwrite the Company's liability in respect of its participation in the pension scheme. The guarantors indemnify the Administering Authority (ECC) against losses or deficits in the event that the Company cannot meet its liabilities. The guarantors are jointly and severally liable.
- 5.2 To obtain the pension liability information, an actuarial closing report would need to be commissioned. It is understood that this would cost £1,500 plus

VAT. The last actuarial information is the March 2020 accounts closing valuation. In addition, Essex Pension Fund have indicated that while pension liability information can be made available, the information would need to be shared equally to all four guarantors due to the nature of ownership and their status in the scheme. If winding up the Company is approved, officers from each of the NEAs will work together to ensure that this information is obtained as part of the winding up process.

- 5.3 If the NEAs approve the decision to wind up the Company, the effect of that decision would result in the Managing Director of the Company being made redundant. The cost of this will be limited to statutory redundancy pay based on service with the Company only. The Company will be required to follow the statutory procedures for redundancy and/or reach an agreement to pay in lieu of notice etc.
- 5.4 Employees will transfer in cases where there is a relevant transfer of an economic entity. Whether TUPE applies in this instance will depend on a comparison of the activities undertaken by the Company and whether they are continued by another entity.
- 5.5 Currently it is not considered that TUPE will apply to the Managing Director or external contractors, but the actions of the Company and the Councils as the project progresses are important in this regard.
- 5.6 There is also an officer working on the project seconded from Colchester BC. In the event there was no post for this employee to return, redundancy might arise.
- 5.7 The Company's project staff are retained via Hays and it is expected these can be terminated at short notice and no cost in addition to daily rates for work undertaken.

6. Changing Focus on Delivery

- 6.1 If the NEAs and the Company Board required the Company to remain it would require a change of focus of the Company to delivery. In such instances the following actions will be required:
 - 6.1.1 Substantially amend the Company's articles and Shareholder Agreement or
 - 6.1.2 Utilise TCB LDV (an NEGC Ltd company) already in existence but not currently used or
 - 6.1.3 propose an alternative delivery model – which will require a decision to be made by the Council's following an options appraisal, this will involve ongoing financial contributions.

7. North Garden Communities Ltd Board

- 7.1 On 6th July 2020, the Company Board, consisting of representatives from each of the NEAs, met to consider the current position and agree the preferred options for the future of the Company and the three LDVs. At that meeting it was agreed that:

- 7.1.1 the Company would recommend to the shareholders to cease operations of NEGC Ltd on 31st August 2020 and thereafter begin activities to close the company down;
- 7.1.2 agree the recommendation to the shareholders to consider the closure of the three LDV companies in line with NEGC Ltd closure; and
- 7.1.3 agree the recommendation to make the NEGC Managing Director post redundant as of 31st August 2020.

8. Options

- 8.1 The Councils have worked closely together to consider the options available to each of them as Shareholder, and the following options were identified:
 - Option 1 - BDC exit and restructure to reflect an alternative purpose;
 - Option 2 – the Company continues to work on proposals for delivery models for the NEAs to decide upon, this requires substantial ongoing financial contributions;
 - Option 3 – the NEAs remain within the Company, but restructure to make it fit for purpose, this requires ongoing substantial financial contributions.
 - Option 4 – Close the Company and three current LDVs

9. Financial Considerations

- 9.1 The garden community project had reserves of £883k at 2019/20 year-end. It is expected that these funds would be exhausted by 30th September 2020 if the project continued in its present form. It should be noted that if the decision is not made by the Shareholders in July, the Company is likely to remain beyond existing financial contributions.
- 9.2 The Company is an admitted body of the ECC Superannuation Fund. As at the 2019 valuation the fund had a deficit of £100k. This deficit would need to be cleared in the event that the Company ceased to be an admitted body. The redundancy and winding up costs for NEGC should be ringfenced at this stage to ensure that the Company can meet its liabilities going forward.
- 9.3 The winding up costs of the Company are estimated at £150k, the greater part being to ECC pension fund for the deficit set out above.
- 9.4 The winding up costs can be met from within the funds currently held by CBC in the garden community project reserve. Any balance remaining will be carried forward for use in any delivery vehicle or returned to the respective councils as agreed between the partners.

9.5 The table shows NEGC project expenditure to 31st March 2020.

NEGC 2014/15 to 2018/19 All £k	14/15	15/16	16/17	17/18	18/19	19/20	Total
NEGC expenditure	66	92	752	1,647	2,322	2,001	6,880
NEGC income		-742	-1,498	-1,846	-1,959	-1,969	-6,774
Deficit/(-surplus)	66	-650	-746	-197	613	32	-883
Cumulative Reserve	66	-584	-1,330	-1,527	-914	-883	

10. Legal Implications

- 10.1 If the Council determine that the Company should be wound up, there are a number of procedural steps that the Council will be required to follow. Officers from each of the NEAs will work together to ensure that these are undertaken accordingly.
- 10.2 As Shareholder the Council is entitled to make the decision as to whether the Company should be wound up by passing a special resolution under the Company's constitution.
- 10.3 The Shareholders' Agreement states that such a resolution must not be passed without the consent of all the NEAs. In support of this, each of the councils are proceedings with a similar report through their respective governance process during July.

11. Conclusion

- 11.1 Following an evaluation of the current position, the options available and the issues identified within this report, option 4 is recommended.
- 11.2 The Council currently does not have a garden community within its borders, and therefore no longer has any purpose for the Company at this time.
- 11.3 For the Company to carry on with a view to becoming part of the delivery vehicle would require a company restructure and substantive variations to both the Shareholder Agreements and the Articles.
- 11.4 The Company has not expressed any interest in progressing with its existing company structure, which includes a LDV for TCB.
- 11.5 There are Value for Money considerations of continuing to use a limited company for the establishment of one Garden Community;
- 11.6 TCB garden community can still be delivered through alternative mechanisms and vehicles, and TDC and CBC will need to consider their options around this in due course.
- 11.7 The Company's only liability and resource is the Managing Director, all project and external resources have been commissioned through CBC.

- 11.8 There is a need to have careful consideration of the pension strain and TUPE implications, if the Company continues to trade with a view to establishing different delivery models.