



<u>Committee and Date</u>
Council 22 <sup>nd</sup> September 2022

<u>Item</u>
<u>Public</u>

## **Update on Cornovii Developments Contracting Arrangements**

### **Responsible Officer**

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### **1 Synopsis**

The purpose of this report is to update Council on the procurement and contracting arrangements of its wholly owned development company, Cornovii Developments Limited (CDL).

### **2 Executive Summary**

- 2.1 In July 2019 CDL was incorporated further to the final approval and delegations in the Council report of the 28<sup>th</sup> February 2019, *Addressing Unmet Housing Need – Establishment of a Wholly Owned Local Housing Company*. Based on the legal advice received prior to incorporation of the company, the Council proceeded on the basis that CDL would not have the status of a 'contracting authority' and therefore not be subject to Public Contracts Regulations 2015 ("the PCR"). In other words it would not be subject to the public procurement regime.
- 2.2 Since its establishment however, CDL has grown as an organisation moving into direct delivery phase, supported through a strengthened board and staff team. Alongside this the Council strengthened its shareholder function, providing oversight and monitoring of the Company's activities. The evolution of these structures and the relationship between CDL and the Council has set the context for a review.
- 2.3 In response to a query raised by CDL about its procurement position as a local authority owned company and the need to undertake formal procurement processes, the Council and CDL appointed

Counsel to provide an opinion on the matter, as an initial legal review concluded that the issue was finely balanced on the circumstances.

- 2.4 The subsequent opinion provided by Counsel has concluded, that whilst the issue is not clear cut, on balance CDL probably does have the status of a body governed by public law and is therefore a 'contracting authority' that is subject to the Public Contracts Regulations 2015 when it lets contracts for goods, works and services.
- 2.5 Furthermore, Counsel has provided an opinion on the current management supervision arrangements in place between the Council and CDL, concluding that it is more likely than not that current management supervision of CDL would meet the definition of 'control' similar to that which the Council exercises over its own departments, such that CDL would be classified as a controlled legal person.
- 2.6 This creates an exemption from PCR, sometimes referred to as the 'Teckal Exemption', and may mean that the Council is able to award contracts to CDL without meeting the obligations of PCR in future.
- 2.7 This report sets out the basis upon which Counsel has reached his conclusions and the implications of his opinion.
- 2.8 CDL have assessed the implications and specifically the requirement to undertake formal procurement processes as a "Contracting Authority" in accordance with PCR. and has confirmed that there would be no impact on its current Business Plan, its anticipated delivery and expected returns.
- 2.9 The reports notes that the outcome of Counsel's opinion does not change the objectives of CDL, its current Business Plan or the arrangements and structure in currently in place between the Council and the Company. Although there will be no material change to the way in which CDL operates, or to its arrangements with the Council, its recognised procurement status is changed from that envisaged when the Company was established and that this needed to be brought to the attention of members of the Council.

### **3 Recommendations**

#### **That members:**

- 3.1 Agree the position that Cornovii Developments Limited is subject to public procurement obligations, meaning that it must meet the requirements of Public Contract Regulations, when procuring, works, goods and services (noting the arrangements in place between the Council and the Company also gives rise to the potential for a 'Teckal' arrangement in the future).

- 3.2 Authorise, as required, the Executive Director of Place, in consultation with the Assistant Director of Legal and Governance; and Portfolio Holder for Digital, Data Insight and Built Housing, to determine and approve any appropriate amendments to the detailed governance or operation of Cornovii Developments Ltd identified as a result of Counsel's advice.

## **REPORT**

### **4 Risk Assessment and Opportunities Appraisal**

- 4.1 As a 'Contracting Authority' CDL will be required to engage in formal procurement arrangements in accordance with the PCR. CDL have taken independent legal advice on this matter, reviewing their financial regulations and standing orders accordingly. CDL have confirmed that they do not consider the obligations imposed upon them as a Contracting Authority will impact their ability to deliver the outputs contained within the current Business Plan, either housing numbers or expected return to the Shareholder.
- 4.2 As a Contracting Authority CDL will be bound by the PCR when it lets contracts for goods, works and services, and whilst this is a matter of compliance for CDL and its board of directors, the Council, through the Housing Supervisory Board, and its Client function will seek assurance that all obligations are being met. To this end CDL will work with Shropshire Council's Procurement Team and independent procurement advisors to take advice and guidance on all procurement activity which may meet the 2022 PCR thresholds. Procurement activity of the company will be audited as part of the Company's Internal Audit Programme. Under the terms of the Shareholder Agreement the Company is obliged to share the findings of all internal audit reports with the Housing Supervisory Board.
- 4.3 As a 'Contracting Authority', where CDL also satisfies all conditions of Regulation 12 of the PCR (see further below), this would present an opportunity for the Council to contract directly with CDL (without itself undergoing a formal procurement exercise), enabling the expertise and resources of the Company to be utilised to support the Council's wider residential and development ambitions. Appropriate advice would be obtained from the Council's procurement team or from an independent procurement specialist before considering the letting of any contracts to CDL directly to ensure that the requirements of Regulation 12 are met at the relevant time the Council wishes to let a contract to CDL.
- 4.4 As the commissioner of services, the Council, prior to the award of any contract to CDL would need to be satisfied that it delivered best

value, with alternatives, both internal and external, also considered and discounted alongside the option of delivery by CDL.

- 4.5 Whether or not CDL is a contracting authority and whether it satisfies all conditions under Regulation 12 of the PCR is a fluid classification. This means that the circumstances of CDL which mean it fulfils the conditions to enable the Council to contract with the Company, without first going through a competitive tendering process, are subject to review. Continued monitoring of the arrangements between the Council and the Company and the operations of CDL will be undertaken to ensure that the conditions against which its status has been determined remain unchanged, or not changed to the extent that the conditions are no longer met.

## **5 Financial Implications**

- 5.1 CDL does not expect that financial returns to the Council, as predicted within its current Business Plan, will be impacted negatively by its status as a Contracting Authority
- 5.2 CDL's funding arrangements are unchanged. The company remains financed through loans provided by the Council at commercial rates and equity investment, currently provided through the exchange of land at Crowmoor and Ifton for shares in the company.

## **6 Climate Change Appraisal**

- 6.1 There are no direct Climate Change implications arising from this report. CDL's proposals to deliver against the Council's Climate Change ambitions remain unchanged and continue in line with the 2022 approved Business Plan.

## **7 Background**

- 7.1 CDL was established by Shropshire Council as a wholly owned company in July 2019. The Council's intention at that time, based upon legal advice from Trowers and Hamlin LLP, was to establish a commercial company to help address unmet housing need in its administrative area. The Council decision-making reports, in respect of the establishment of CDL noted that the Company would not be subject to public procurement obligations, this was based upon legal advice received at the time and the Company structure being proposed.
- 7.2 The Council's intention was that the Company was established as a legal entity with an 'industrial or commercial character' and as such was deemed not to meet all of the criteria relating to a 'body governed by public law' as defined in Regulation 2 of the PCR and

was therefore not a Contracting Authority for the purposes of the PCR.

- 7.3 Since its establishment CDL has developed as an organisation, growing its portfolio of schemes, and strengthening its board and staff team. The Council has also developed its shareholder function through regular meetings of the Housing Supervisory Board, development of an officer group, the CDL Monitoring Board, and appointment of a Clienting and Commissioning Manager to oversee its activities. The evolution of these structures and relationships has set the context for a review of the company's original structure and has given rise to queries as to whether the company still has a 'industrial and commercial character'.
- 7.4 In response to a query raised by CDL in respect of its status as a Contracting Authority, the Council and the Company took Counsel's advice to clarify the status so that any relevant and compliant procurement process can be followed going forwards. In addition to Counsel's advice on CDL's procurement status, advice was also sought as to whether, if the Council is deemed to have 'management supervision' of the Company, this would satisfy the control requirement of the PCR, enabling the Council to contract directly with CDL.
- 7.5 Counsel offered an opinion based on the actual operations of the Company and the substance of the arrangements between the Council and the Company. This has allowed for a review of the substance of the arrangements and structures as they have developed in a way that was perhaps not anticipated when the Company was established.

## **8 Counsel's Advice**

- 8.1 Counsel was requested to advise on the following matters:
- a. Does the Company fall within the definition of a Contracting Authority for the purposes of Regulation 2 of the Public Contract Regulation 2015?
  - b. If the answer to a) is yes, including where the Council is deemed to have 'management supervision' of the Company through its governance arrangements, then does this amount to the Council control over the company (equivalent to that it would exercise over its own departments) so as to satisfy the 'control' requirement under Regulation 12 of the Public Contracts Regulations?

- 8.2 In providing their opinion in respect of matter (a), Counsel has concluded having considered the facts that CDL “probably has the status of a body governed by public law under Regulation 2 of the Public Contract Regulation” and therefore is a Contracting Authority, subject to public procurement obligations. CDL is therefore deemed to be bound by the obligations of PCR when tendering for goods, works and services and issuing contracts.
- 8.3 In respect of matter 8.1 (b), Counsel’s opinion was that the current management supervision arrangements in place between the Council and the Company, would satisfy the definition of ‘control’ under Regulation 12 PCR. This exemption from PCR is sometimes referred to as the ‘Teckal Exemption’. It should be noted that ‘management supervision’ forms one condition of the test and that all conditions, as outlined below, be met before this exemption can be applied.
- a. The contracting authority exercise over the legal person concerned a control which is similar to that which it exercises over its own departments
  - b. More than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority; and
  - c. There is no direct private participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Retained Treaties, which do not exert a decisive influence on the controlled legal person
- 8.4 If satisfying all of the above conditions, the Council is able to award contracts to CDL without meeting the obligations of Part 2 PCR which would require a full procurement process to be undertaken. Appropriate advice would be obtained from the Council’s procurement team or from an independent procurement specialist before considering the letting of any contracts to CDL directly.
- 8.5 It is the opinion of Counsel that it is more likely than not that current management supervision of CDL would meet the definition of ‘control’ similar to that which the Council exercises over its own departments, such that CDL would be classified as a controlled legal person.
- 8.6 In reaching this view Counsel took account of the Council’s control of the Company through the Articles of Association, and the terms of the Shareholder Agreement, to include the requirement for CDL to gain Shareholder consent for such matters as the approval of the Business Plan and approval for the acquisition of land or assets at a low financial threshold. Counsel analysis of the Shareholder Agreement concluded that the activities of CDL are exclusively

carried out in the performance of tasks entrusted to it by the Council, furthermore, that the arrangements and structures in place means that the Council controls CDL's strategic objectives and significant decisions.

## **9 Additional Information**

- 9.1 CDL's objectives remain unchanged, the Company will continue to trade commercially, building homes to meet unmet housing need and generating financial returns for the Council.
- 9.2 CDL does not expect that the outputs for financial return or housing deliver, as predicted within its current Business Plan, will be impacted negatively by its status as a Contracting Authority.
- 9.3 The current governance structures in place to monitor the activities of the Company remain unchanged. The Shareholder Agreement (unchanged) will continue to regulate the relationship between the Council and the Company. The Housing Supervisory Board's Terms of Reference remain unchanged with continued support provided by the CDL Monitoring Board and the Homes and Communities Clienting function.
- 9.4 CDL will continue to work as a separate company, with its own financial regulations, standing orders, policies, branding, funding arrangements and board of directors. This will ensure CDL retains its commercial edge, best position the company to move forward development sites and support Shropshire Council with the delivery of the Shropshire Plan.

## **10 Conclusions**

- 10.1 Council is asked to receive the report setting out the contracting status of CDL, raising as appropriate any issues.

### **List of Background Papers (This MUST be completed for all reports, but does not include items containing exempt or confidential information)**

Meeting Unmet Housing Need in Shropshire. Cabinet Report of 7<sup>th</sup> November 2018

Report: <http://shropshire.gov.uk/committee-services/documents/s20261/Meeting%20Housing%20Need%20in%20Shropshire.pdf>

Addressing Unmet Housing Need -OBC to Establish a Wholly Owned Local Housing Company. Council Report of 13<sup>th</sup> December 2018

Report:[http://shropshire.gov.uk/committee-services/documents/s20628/Addressing Housing Need - OBC to Establish a Wholly Owned Local Housing Company.pdf](http://shropshire.gov.uk/committee-services/documents/s20628/Addressing_Housing_Need_-_OBC_to_Establish_a_Wholly_Owned_Local_Housing_Company.pdf)

Addressing Unmet Housing Need – Establishment of a Wholly Owned Local Housing Company. Council Report 28<sup>th</sup> February 2019

Report:<http://shropshire.gov.uk/committee-services/documents/s21380/AUMHN%20-%20Establishment%20of%20a%20Wholly%20Owned%20LHC%20-%20FINAL.pdf>

**Cabinet Member (Portfolio Holder)**

**Cllr Rob Gittins** Portfolio Holder Digital, Data & Insight and Built Housing

**Local Member All**

**Appendices**



