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SOUTHEND-ON-SEA CITY COUNCIL

The Shareholder Board

Date: Tuesday, 8th November, 2022

Time: 10.00 am

Place: MS Teams

Contact: Robert Harris

Email: committeesection@southend.gov.uk

A G E N D A

- 1 Apologies for absence**
- 2 Declarations of Interest**
- 3 Porters Place Southend-on-Sea LLP - Change of Control (Pages 1 - 8)**
Report of Director of Regeneration & Growth attached

4 Exclusion of the Public

To agree that, under Section 100(A)(4) of the Local Government Act 1972, the public be excluded from the meeting for the item of business set out below on the grounds that it involves the likely disclosure of exempt information as defined in Part 1 of Schedule 12A to the Act, and that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

- 5 London Hire Community Services (LHCS) and Southend Travel Partnership (Vecteo) Share ownership update**
Confidential report of Executive Director (Neighbourhoods and Environment) to follow

Chair & Members:

Cllr K Buck, Cllr T Cox, Cllr M Davidson, Cllr C Mulroney (Vice-Chair), Cllr L Burton, Cllr S George (Chair), Cllr K Mitchell and Cllr M Terry

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Southend-on-Sea City Council

**Report of Interim Director Regeneration & Growth
to
Shareholder Board
on
8th November 2022**

Report prepared by: Better Queensway Programme Team
On behalf of the Better Queensway Partnership Board

Agenda
Item No.
3

Porters Place Southend-on-Sea LLP: Change of Control

Place Scrutiny Committee

Cabinet Members – Councillors Stephen George & Ian Gilbert

A Part 1 Public Agenda item

1 Purpose of Report

- 1.1 This report seeks approval to give Southend-on-Sea City Council's consent under the Porters Place Southend-on-Sea LLP Partnership Agreement for a change of control in preparation for the proposed acquisition of Swan Housing Association (Swan HA) by Sanctuary Housing Association (Sanctuary).

2 Recommendations

- 2.1 **That approval is given for consent, under the Porters Place Southend-on-Sea LLP Agreement, to a change of control of Swan BQ Limited to reflect the proposed acquisition of Swan Housing Association, together with its subsidiaries, by Sanctuary Housing Association.**
- 2.2 **That the Executive Director of Finance & Resources be authorised to finalise and authorise the execution of any legal documentation (if required) with Sanctuary, and any relevant other party, to comply with the terms of the legal suite and to effect the approval of the change of control.**
- 2.3 **That as per the recommendations of Shareholder Board on 23 August 2022 and the subsequent decision at Cabinet 24 August 2022 (minute 227), that the deadline for receipt of the revised Business Plan remains the end of December 2023.**

3 Background

3.1 Sanctuary Housing Association - Swan Acquisition

- 3.1.1 In April 2019 the Council entered into a Limited Liability Partnership (LLP) Partnership agreement with Swan BQ Ltd (“Swan BQ”), Swan Housing Association (“Swan HA”) and Porters Place Southend-on-Sea LLP for the delivery of the Better Queensway Project, (“the Project”) forming the 50:50 joint venture partnership Porters Place Southend-on-Sea LLP (“Porters Place”).
- 3.1.2 In December 2021 Swan HA informed Southend-on-Sea City Council (“the Council”) that, “The Board of Swan Housing Association Limited (including Swan Housing Capital plc) had entered discussions with the Board of Orbit Group Limited (“Orbit”) (including Orbit Capital plc), to form a mutually beneficial partnership. The intention was that Orbit would complete the acquisition of Swan HA by 1 October 2022. The Council granted change of control in favour of Orbit in August 2022.
- 3.1.3 On 29 September 2022 following a detailed due diligence process, it was confirmed that the acquisition of Swan by Orbit would not proceed, and that Swan HA had entered into detailed discussions with Sanctuary regarding a potential transaction which, if agreed, would involve Swan HA becoming a subsidiary of Sanctuary. The target timetable for completion of this transaction is 30 November 2022.
- 3.1.4 As part of their due diligence Sanctuary is reviewing contracts entered into by Swan HA (and its subsidiaries) and seeking the necessary consents to a change of control in favour of Sanctuary. The Council has been asked by Sanctuary to formally confirm its consent to the change of control of Swan BQ under the LLP partnership agreement (“LLP Partnership Agreement”). A change of control of Swan BQ will also mean a change of control of Swan HA.

3.2 Assurance

3.2.1 Advisors’ Assurances

31ten Consulting

- 3.2.2 31ten Consulting (31ten) is the Council’s financial advisor for the Project, and as such has reviewed the request for the change of control along with the other considerations articulated in this paper.
- 3.2.3. The key financial considerations as part of this review relate to the interactions between Porters Place, Swan BQ and its parent Swan HA around the ongoing funding of Porters Place. The current arrangements provide for three significant elements:
- the advancement of a Junior Loan facility of c. £15m from Swan HA that is matched by the Council. This is drawn down in line with the agreed Business Plan for Porters Place; and
 - The effective guarantee provided by Swan HA to support certain funding commitments of Swan BQ; and

- A series of agreements providing a spectrum of services to Porters Place from different Swan HA entities.

- 3.2.4 The new corporate structure proposed for Swan HA is for it to become a subsidiary of Sanctuary, with Swan BQ remaining a subsidiary company of Swan HA. As a result, the above funding arrangements would simply follow this corporate structure with the funding obligations and service agreements remaining with the same entities. As such, no changes to the funding elements of these arrangements would be necessary.
- 3.2.5 However, whereas previously the effective guarantee from Swan HA to Swan BQ was from the top entity in the group, Sanctuary now sits above Swan HA in the group structure, and therefore could exert various levels of control over the arrangements.
- 3.2.6 Sanctuary is a larger and more financially robust organisation than Swan HA, and as such is in a position to provide more financial support than Swan HA; this could provide added financial assurance.
- 3.2.7. The legal arrangements between the parties also provide a key control for the Council in the form of a reserved matter being the Porters Place Business Plan which means no further funding commitments by the Council, or a revised Business Plan, can be made or agreed without Council approval.
- 3.2.8. This review therefore concludes that the change of control as currently presented does not result in significant additional financial risks to the Council.
- 3.2.9. While there has been no formal feedback from Orbit, the Council understands that previous acquisition discussions between Orbit and Swan ceased following concerns raised during the financial due diligence assessment of Swan by Orbit. Swan subsequently issued an update to the stock market, highlighting its relatively low cash balances and stating that these were only sufficient to fund the operation of the group until early December 2022. These factors highlight the financially challenging position that Swan is currently experiencing, and the acute need for it to address these issues quickly. The Sanctuary transaction is a potential solution to this issue which has the full weight of the Social Housing Regulator behind it. However, if this does not progress Swan will be in a very challenging position in terms of its going concern status.

Sharpe Pritchard LLP

- 3.2.10 Sharpe Pritchard LLP is the Council's retained legal adviser for the Project and has considered this request for a change of control in the context of the legal arrangements in place between the Council, Porters Place, Swan BQ and Swan HA.
- 3.2.11 Clause 23.2 of the LLP Partnership Agreement contains a list of events that if committed by Swan BQ constitute a default event (a default event is an event that can give rise to the Council invoking certain contractual rights, further details of which are set out in the legal implications section below). One of these default events is the occurrence of a change of control of Swan BQ *unless* the Council

has given its consent to such a change. The Council must not unreasonably withhold or delay such consent.

- 3.2.12 Corporate control of both Swan BQ and Swan HA will change on the acquisition of Swan HA by Sanctuary. In anticipation of the acquisition, Swan BQ notified the Council of the forthcoming change of control and requested the Council's consent.
- 3.2.13 If the transaction proceeds and the Council agrees to the change of control, the suite of documents that capture the legal arrangements relating to Porters Place will not need to be amended to accommodate it. Swan BQ will still be the Council's partner in Porters Place. Upon completion of the transaction, Swan HA will remain the parent organisation of Swan BQ. Sanctuary may look to amalgamate Swan BQ and Swan HA into the Sanctuary Group in time (at their discretion), but any change to the contracting party to the LLP Partnership Agreement will always require the consent of the Council. The Council can therefore be assured that it will not lose any corporate control following this change or any future Swan HA and/or Swan BQ / Sanctuary reorganisation. This applies to all Council protections, including the Council contractual right to approve each Porters Place business plan, a further document that contains important protections for the Council.
- 3.2.14 Under the LLP Partnership Agreement and connected loan agreements, Swan HA has various funding obligations, including advancing sums under the loan agreements. It is also effectively a guarantor of certain of Swan BQ's funding obligations and contractual liabilities under the LLP Partnership Agreement the group's ultimate parent company. The Council may take assurance from Sanctuary being a larger and more financially robust organisation than Swan. This should therefore result in lower legal risk from a funding perspective.

4, Alternative Options

- 4.1 Granting consent to the Sanctuary transaction, whereby Swan HA becomes a subsidiary of Sanctuary HA is one potential option open to the Council, however, there are other options to consider. In the main these other options depend on whether the Council chooses to refuse to give consent to the change of control request.
- 4.2 The Council has a contractual right to refuse consent to the change of control. However, the Council's consent cannot be unreasonably withheld (or delayed). Whether other options exist therefore rests on whether the refusal of consent by the Council would be unreasonable.
- 4.3 This is a question that will need to be considered on the basis of the existing facts. One consideration in assessing this would be the termination of the Orbit acquisition option, followed by the emergence of Sanctuary, and the timeline for the Sanctuary transaction being completed. The Council would need to consider if this approach and timeline is "reasonable" in this context.
- 4.4 If the Council were to decide that this was not reasonable, and therefore refused the change of control consent then it can take control of the whole LLP by acquiring the interest of Swan BQ at a fair market value - effectively buying back

Swan BQ's ownership interest and work in progress. The Council would then have a series of potential options open to it, including, but not limited to:

- Direct Delivery – Directly deliver the scheme itself, in its current form, by taking on the developer role and procuring construction contracts for the works. It could then retain the affordable homes itself and operate them within the HRA, or sell these homes to a Registered Provider and sell private units to private occupiers
- Alternative Partner – Procure an alternative partner to continue with the scheme in its current form, or develop a new scheme
- Alternative Scheme – Design an alternative scheme on the site that could consider alternative solutions, including the delivery of a different number of homes on site, refurbishment works to existing properties and alternative solutions for major infrastructure works such as the Queensway highway

4.5 Each of these options, and the spectrum of alternatives that exist, will have different financial, legal and risk implications for the Council including funding risk, procurement risk, construction risk, sales risk and health and safety risks. Each of these would need to be assessed in detail through a business case options appraisal process to establish the most appropriate approach to deliver on the Council's objectives.

4.6 Given the more robust financial standing of Sanctuary, and the fact that the approach in place through Porters Place was procured as the most effective way to deliver the Council's objectives, the decision to pursue an alternative approach at this juncture would not appear prudent.

4.7 On balance, it would be difficult for the Council to make the case for refusal of the request for consent to the change of control as such a refusal, if challenged, may well be considered to be unreasonable.

5. Reasons for Recommendations

5.1 Consent to Change of Control

5.1.1 The recommendation is that the Council give its consent to the change of control.

5.1.2 The Council cannot act unreasonably when it comes to giving consent in these circumstances. By consenting to the change of control the Council should not be in any worse position than it is with Swan HA, not least because Sanctuary is larger and more financially robust than Swan HA, as demonstrated by recent credit agency assessments that characterise Sanctuary as 5A financial strength (the highest rating from Dun & Bradstreet) and 1, Minimum Risk (the lowest risk rating). The current business plan continues to be the one that Porters Place must deliver until such time as a new business plan is approved by the Council and Swan BQ/Sanctuary. As these approval gateways exist to provide protection for the Council and the current business plan continues to apply, it may be difficult for the Council to argue that refusing consent was reasonable.

6. Implications Section

6.1 Corporate Implications

Contribution to the Southend 2050 roadmap and outcomes:

- 6.1.1 The delivery of Better Queensway is a specific outcome identified in the Opportunity and Prosperity theme and is reflected in a number of milestones on the roadmap. The first of these has already been met in the signing of the legal agreements. The Project contributes towards a number of the Southend 2050 outcomes:
- 6.1.2 **By 2050 Southenders are fiercely proud of, and go out of their way, to champion what our City has to offer.** A regenerated Better Queensway at the heart of the City with a high quality new development with large new parks and clean and inviting streets will achieve this.
- 6.1.3 **By 2050 We are well on our way to ensuring that everyone has a home that meets their needs.** Better Queensway is centred on delivering more and better-quality homes, including an increase in the number of affordable homes.
- 6.1.4 **By 2050 Southend on Sea is a successful City, and we share our prosperity amongst all of our people.** Better Queensway will have been delivered and it is an integral part of a thriving city centre providing a mix of affordable and private sale homes, jobs and aspirational places to live and play for all sections of Southend's community.
- 6.1.5 **By 2050 people can easily get in, out and around our City and we have a world class digital infrastructure.** Better Queensway will have improved connectivity with a new Queensway boulevard that reconnects the town centre to the rest of the City, new cycle and pedestrian routes and a variety of digital improvements.
- 6.1.6 **By 2050 people in Southend feel safe in all aspects of their lives and are well enough to live fulfilling lives.** Better Queensway will have a new green neighbourhood with a variety of homes which have been designed with safety at its heart. It has overlooked streets and active new parks as well as improved connectivity between the town centre and North Eastern Southend.
- 6.1.7 **By 2050 we will have a thriving, active and involved community that feel invested in our City.** The new neighbourhood will have residents at its heart. Swan will be running a new community concierge service overseeing and managing active parks and open spaces with a range of activities funded by the Better Queensway community fund.

6.2 Financial Implications

- 6.2.1 The change of control request moves Swan HA and its subsidiaries into the Sanctuary Group. The contractual entities for Porters Place LLP remain intact, and as such the funding arrangements continue within the new structure.
- 6.2.2. The key change is that Swan HA now has a parent company, in the form of Sanctuary. There are two main financial implications to consider at this point:

- Financial strength – At face value the acquisition by Sanctuary brings potential additional financial strength to the Council's partner as Sanctuary are a stronger financial entity than Swan HA, however, this is dependent on Sanctuary providing appropriate financial support to the joint venture;
- Control – Sanctuary, as Swan HA's parent could exert various levels of control over Swan HA in the future.

6.2.3 At this stage of the process the current Business Plan remains live until a new Business Plan is agreed. This will include a new budget, updated scheme and financial appraisal. Given the global and national economic uncertainties that currently exist there will need to be oversight and due diligence undertaken by Porters Place and its advisers, the Council's advisers and Council officers to ensure a robust, deliverable and viable Business Plan is produced for Council consideration and sign off. Given that the transaction is now set to complete in November with the completion of this due diligence to follow, Swan HA has advised that this new business plan will not be completed and ready to present until all that due diligence has been completed. A revised business plan is expected in spring 2023.

6.3 Legal Implications

6.3.1 If the Council refuses consent for the change of control, it must have reasonable grounds for doing so. Following receipt an assurance from Sanctuary that it will support Swan HA's short term financial commitments in relation to the LLP (support that would not be available if the transaction was not to proceed), there are likely to be no reasonable grounds for refusal. Notwithstanding the above, if the Council refused consent, Swan BQ / Swan HA could challenge the basis of that decision under the provisions of the LLP Partnership Agreement, specifically that refusing consent was unreasonable and therefore that the Council is in breach of the LLP Partnership Agreement. The likelihood of Swan adopting this approach is unknown but would represent a risk to the Project.

6.3.2 The acquisition of Swan HA by Sanctuary is unlikely to be contingent on the Council providing its consent. It is therefore possible that the transaction will simply proceed as planned if the Council does not give consent. At this point, two scenarios present themselves (if we contend that refusing consent was reasonable): (i) the planned acquisition proceeds putting Swan BQ in breach of the LLP Partnership Agreement (but the Council carries on without intervention, effectively affirming the breach) or (ii) the Council takes the occurrence of the default event to acquire at fair value the membership interest of Swan BQ. Taking the first course of action effectively sees the status quo continuing. Taking the second option would necessitate the Council considering alternative delivery options; whether this is procuring an alternative partner or delivering the scheme itself. Each alternative delivery option would impact on the legal risk profile.

6.4 People Implications

6.4.1 Three senior officers have been appointed to the Porters Place board: Alan Richards, Lee White and Andrew Lewis. Andrew resigned in late October 2022 and the vacancy created by his departure will be filled in due course.

6.4.2 The Council continues to retain and use its procured specialist advisors alongside officers.

6.5 Property Implications

6.5.1 As detailed in the December 2021 report and are unchanged.

6.6 Consultation

6.6.1 As detailed in the December 2021 report and are unchanged.

6.7 Equalities and Diversity Implications

6.7.1 As detailed in the December 2021 report and are unchanged.

6.8 Risk Assessment

6.8.1 Section 3.2 “Assurance” sets out assurances, risks and mitigations where appropriate.

6.9 Value for Money

6.9.1 As detailed in the December 2021 report and are unchanged.

6.10 Community Safety Implications

6.10.1 As detailed in the December 2021 report and are unchanged.

6.11 Environmental Impact

6.11.1 As detailed in the December 2021 report and are unchanged.

7 Background papers

Report to the Shareholder Board: Porters Place LLP Final RMA Proposals December 2021 (“the December 2021 report”)

Minute 227 of Cabinet of 24 August 2022