

Southend-on-Sea City Council

Agenda
Item No.

**Report of Interim Director Regeneration & Growth
to
Shareholder Board
on
23rd August 2022**

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

**Porters Place Southend-on-Sea LLP: Consent for Change of Control of Swan BQ Ltd
and Swan Housing Association**

Place Scrutiny Committee

Cabinet Members – Councillors Ian Gilbert & Stephen George

A Part 1 Public Agenda item

1 Purpose of Report

- 1.1 This report seeks formal 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 of Swan Housing Association in favour of Orbit Group Limited.

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 Orbit Group Limited.
- 2.2 That the Executive Director of Finance & Resources be authorised to finalise and authorise the execution of any legal documentation (if required) with Orbit Group Limited, 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 the time periods referred to in resolutions 1 and 2 of Cabinet of the 22nd March 2022 (Minute 836) be extended beyond the 31st December 2022 until

such time as the revised Business Plan budget and viability assessment is approved.

3 Background

3.1 Orbit - Swan Merger

- 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) has entered discussions with the Board of Orbit Group Limited (“Orbit”) (including Orbit Capital plc), to form a mutually beneficial partnership. It is expected that the transaction will be completed late 2022”.
- 3.1.3 Swan HA and Orbit have subsequently progressed their discussions on the merger process with the intention that Swan HA becomes a subsidiary of Orbit. Whilst the merger was anticipated for later in the year, the target date for the merger has been brought forward and is now 1st October 2022.
- 3.1.4 As part of their due diligence Orbit are reviewing contracts entered into by Swan HA (and its subsidiaries) and seeking the necessary consents to a change of control in favour of Orbit. The Council has been asked by Orbit 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 Better Queensway 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 that is proposed for Swan HA's merger with Orbit is for it to become a subsidiary, 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, Orbit now sit above Swan HA in the group structure, and therefore could exert various levels of control over the arrangements.
- 3.2.6 Orbit 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. The Council has received an assurance from Orbit that they will not use its legal control to prevent Swan HA from complying with its obligations under the legal agreements.
- 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.

Sharpe Pritchard LLP

- 3.2.9 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 Ltd and Swan HA.
- 3.2.10 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.
- 3.2.11 Corporate control of both Swan BQ and Swan HA will change on the acquisition of Swan HA by Orbit. In anticipation of the acquisition, Swan BQ notified the Council of the forthcoming change of control and to request the Council's consent. Swan BQ has done this correctly in accordance with the provisions of clause 23.2.4(c) of the LLP Partnership Agreement.

- 3.2.12 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. Orbit may look to amalgamate Swan BQ and Swan HA into the Orbit 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 Ltd / Orbit group reorganisation. This applies to all Council protections, including that the Council contractual right to approve each Porters Place business plan, a further document that contains important protections for the Council.
- 3.2.13 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. Under the proposed post-acquisition corporate structure provided to the Council by Swan HA, Swan HA sits directly underneath Orbit Group Limited, the group's ultimate parent company. The Council may take assurance from Orbit being a larger and more financially robust organisation than Swan. This should therefore result in lower legal risk from a funding perspective.

4 Other Options

- 4.1 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. This is a question that will need to be considered on the basis of the existing facts. If the Council does not give consent and believes that it has reasonable grounds to do so 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. It could then choose to progress a direct delivery route, subject to funding, or seek an alternative partner. However, given the more robust financial standing of Orbit and the wider circumstances, the Council's advisors' view is that 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 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 Orbit is larger and more financially robust than Swan HA, as demonstrated by recent credit agency assessments that characterise Orbit 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 has to deliver up until such time as a new business plan is approved by the Council and Swan BQ/Orbit in the coming months. It may therefore be relatively straightforward for Orbit and Swan BQ to argue that the Council was being unreasonable in refusing to give consent if the Council exercised this option.

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 Orbit Group. The contractual entities for Porters Place 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 Orbit Group. There are two main financial implications to consider at this point:
- Financial strength – At face value the merger with Orbit brings potential additional financial strength to the Council's partner as Orbit are a stronger financial entity than Swan HA, however, this is dependent on Orbit providing appropriate financial support to the joint venture;
 - Control – Orbit, as Swan HAs 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, current 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 merger is now set to complete in October 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 with a new business plan expected in the new year, if not this, hence the reason for recommendation 2.3 above

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 of assurances from Orbit confirming that it will not use its legal control to prevent Swan HA from complying with its obligations under the legal agreements, 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 Orbit 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 merger 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 As detailed in the Shareholder Board report of the 6th December 2021 and in accordance with the Cabinet report of the 12th February 2019 three senior officers have been appointed to the Porters Place board: Andrew Lewis, Alan Richards and Lee White.
- 6.4.2 The Council continues to retain and utilise 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 836 of Cabinet of the 22nd March 2022