

Report to Cabinet

Report reference: C-051-2017/18

Date of meeting: 10 April 2018



**Epping Forest
District Council**

Portfolio: Council Housebuilding Cabinet Committee

Subject: Annual Progress Report of the Council Housebuilding Cabinet Committee.

Responsible Officer: Paul Pledger (01992 564248)

Democratic Services: Gary Woodhall (01992 564470)

Recommendations/Decisions Required:

- (1) That the Annual Progress Report of the Council Housebuilding Cabinet Committee on Council housebuilding be noted.

Executive Summary:

Set out in its Terms of Reference, the Cabinet Committee is to monitor and report to the Cabinet on an annual basis progress and expenditure in relation to the Council Housebuilding Programme. This report sets out the progress made over the last 12-months.

Reasons for Proposed Decision:

The Cabinet Committee is required to monitor progress and expenditure in relation to the Council House-building Programme and report to the Cabinet on an annual basis, as set out in its Terms of Reference.

Other Options for Action:

This report is on the progress made over the last 12-months and is for noting purposes only. There are no other options for action.

Report:

Phase 1 (Recovery Phase)

1. Further to the determination of the contract with Broadway Construction Ltd, a contract was awarded to P.A. Finlay and Company Ltd to complete the works on Phase1 as approved by the Committee on the 22 September 2016.
2. The Phase 1 recovery work was completed on the 31 October 2017 with the last two homes on the Red Cross site being handed over and occupied. The homes built are now in the defects liability period (a 2 year period where the Contractor retains responsibility for contractual defects reported). The defects liability period for Phase 1 will end on the 31 October 2019.
3. The original contract with Broadway Construction Ltd was let on the 27 October 2014 with completion expected on the 13 November 2015. With the delays that built up under the contract with Broadway Construction, together with the Council determining the contract and the subsequent procurement of a new contract with P.A. Finlay and Company Limited meant an overall delay of 102 weeks on the original anticipated handovers.

4. The determination of the contract with Broadway Construction Limited also led to a significant increase in costs with the works costs rising from £2,331,170.02 to £5,852,557.98 overall. However, the recovery project costs with P A Finlay did increase by 66% from the original contract mainly due to significant additional works relating to the remediation works that were necessary, in particular the costs of having to relay the drainage and mains services laid during the original contract, that was later found to be necessary as a result of having to remove the contaminated soil that was not addressed by BCL. This can be seen as the premium paid for appointing a contractor to take on another contractor's unfinished work and all the risks associated with the project.

Notice of Adjudication from Broadway Construction Ltd

5. On 22 November 2017 the Council received a notice of Adjudication, which was referred by Broadway Construction Ltd (BCL). The dispute concerned the termination of the contract by the Council on 1st June 2016. BCL maintained and claimed that the termination was wrongful and constituted a repudiatory breach of contract.

6. In April 2016, the Council served a default notice on BCL claiming that BCL was not proceeding with the contract works regularly and diligently. Later on 1 June terminated the Contract on the ground that BCL had continued with the default specified in its notice served in April 2016. BCL assert that this is contrary to the true facts and progress of the works on the Project, and that they do not accept the validity of the default notice or the termination of the Contract.

7. BCL therefore gave notice to refer the dispute to adjudication in accordance with the Contract.

8. BCL were seeking the following relief and decision from the Adjudicator:

- (a) that the Council wrongfully terminated the Contract;
- (b) that the Council were liable for repudiatory breach of contract;
- (c) that the Council were liable to pay Broadway the costs, damages and expenses that were proven to have been incurred by Broadway as a result of the wrongful termination of the Contract and repudiatory breach of contract;
- (d) that the Council had no entitlement to retain or withhold liquidated damages improperly withheld prior to and following the termination of the Contract because no demand for payment of liquidated damages had been made in accordance with the Contract; and
- (e) that the Council should pay the Adjudicator's costs and expenses incurred in the adjudication.

9. The Council has appointed Trowers and Hamlins as its expert Solicitors to defend the adjudication. The Adjudicator reached his decision on 2 February 2018.

Post Cabinet Committee update on the outcome of the adjudication:

1...Of the 18 delay events advanced by BCL, the adjudicator has found that all were the responsibility of BCL with the exception of (i) the approval by the warranty provider of the internal housing of the gas service at Harveyfields and (ii) the front canopies;

2...EFDC was justified in serving the Default Notice as a result of BCL's failure to proceed regularly and diligently;

3...BCL did increase its level of resources following the Default Notice however, BCL failed to increase the labour levels to a level to address the remaining works on the critical path and thus continued the specified default of failure to proceed regularly and diligently for 14 days;

4...Epping therefore was entitled to terminate pursuant to Clause 8.4.2;

5...The termination was not unreasonable or vexatious;

6...BCL is liable to EFDC for damages pursuant to clause 8.7.4;

7...EFDC is not prohibited from retaining or withholding liquidated damages prior to and following the termination of the Contract; and

8...As BCL has been unsuccessful in this adjudication, notwithstanding the parties' ongoing joint and several liability, the adjudicator has found that BCL shall be primarily liable for the adjudicators fees and expenses in their entirety.

10. This is a comprehensive judgment in favour of Epping.

11. A previous adjudication served on the Council by BCL in February 2017, which was contested at the time, centred on the final payment made to BCL at the time of the contract termination. The key points in that claim were:

(a) whether the second payless notice was given beyond the permissible date set out in the Contract;

(b) whether the second payless notice failed to explain how the proposed sum of £0 had been calculated;

(c) whether the Council through previous correspondence had derogated from the payment mechanism under the Contract and guaranteed payment of £74,494.02 to Broadway; and

(d) whether the Council had a contractual entitlement to serve a second payless notice.

12. The adjudicator found in favour of the Council on the first three points but on the fourth he found in favour of Broadway, namely that the Council was not entitled to serve more than one pay less notice in relation to a payment notice, which resulted in the Council being ordered to pay BCL £74,494.02 (plus £2,985.88 interest) along with the adjudicators fees (£3,107) bringing the total to £80,586.90.

Phase 2 - Burton Road, Loughton – 15 x 3 bed houses, 2 x 2 bed houses, 23 x 3 bed flats & 11 x 1 bed flats

13. Works on site are progressing at various stages across the site. It should be noted though that due to additional works that were not anticipated at the point the contract was let, that a 17 week extension of time has been granted to the contractor taking the contract completion date to 25 June 2018. The extension of time that has been granted also incurs a loss and expense amounting to around £680,000 (see below). The Contractor is currently forecasting a further 9 week delay with completions expected at the end of August 2018.

14. The issues that have led to the extension of time noted above have also contributed to significant additional costs. The two most significant cost increases have related to:

- contamination remediation – additional costs of £443,504.11; and
- utilities and cable disconnections - additional costs of £237,531.13.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Burton Road	Mullally & Co. Ltd	7 March 2016	103 weeks	26 February 18
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
27 August 18	+ 26 weeks	£9,582,179.00	£10,534,354.85	+ £952,175.85

Phase 3 - Bluemans End, North Weald - 2 x 3b houses, 1 x 2b Flat & 1 x 2b flat

15. The contract is close to completion, with handovers expected by the end of January 2018. The two week delay reported was caused by the discovery of further asbestos in the ground and delays to the installation of a water main.

16. The cost variation of £47,758.77 is due to additional works required to provide permeable block paving; additional clearance of the watercourse on the developments boundary; boundary wall works; further soil contamination remediation and further asbestos removal.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Bluemans End	TSG Building Services Ltd	2 May 2018	36 weeks	17 January 18
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
31 January 18	+ 2 weeks	£753,034.23	£800,793.00	+ £47,758.77

Stewards Green Road - 4 x 2b houses

17. Works at Stewards Green Road are at an advanced stage, with works focusing on internal and external finishes. A six week delay was reported at the last site meeting due to a dispute between the Contractor and the Architect. The Contractor disputing the EA's assertion that the stairs were not fitted as per the drawings. In addition, further asbestos was found in the ground, which added to the delay.

18. The variation in costs relates to additional works required to make alterations to the MVHR system, alterations made to party wall insulation and alterations made to the kitchen windows.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Stewards Green Road	TSG Building Services Ltd	22 May 2017	34 weeks	24 January 18
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
7 March 2018	+ 6 weeks	£752,340.41	£777,430.22	+ £25,089.81

London Road – 1 x 3b House

19. Construction work is proceeding well at London Road, with works on target to be completed by the contract completion date.

20. There has been an increase in costs of £20,415.00 which is due largely to the changes needed to ensure that the completed homes meet Code for Sustainable Homes Level 4.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
London Road	VSN Enterprises Ltd	19 June 2017	36 weeks	17 March 2018
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
17 March 2018	Nil	£235,695	£261,485.00	£20,415.00

Parklands, Coopersale – 2 x 2b Houses & 2 x 1b Flats

21. The work is progressing well, with just a 1-week delay being reported by the Contractor. This is due to inclement weather over the contract.

22. The variation in costs relates to additional works required to the boundary of the site.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Parklands	Denmark and White Ltd	18 th April 2017	56 weeks	24 th May 2018
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
31 st May 2018	+ 1 weeks	£716,756.74	£721,756.74	+ £5,000,00

Springfield and Centre Avenue – 1 x 3b House, 5 x 2b Houses & 2 x 1b Bungalows

23. Springfield and Centre Avenue are two separate sites which due to their proximity are being managed under one contract. The work is progressing well, with just a 1-week delay being reported by the Contractor, which is due to an initial problem determining the ownership of some garages/sheds.

24. The variation in costs mostly relates to additional works required to the boundary wall of the site.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Springfield and Centre Avenue	Denmark and White Ltd	18 April 2017	60 weeks	21 June 2018
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
28 June 2018	+ 1 weeks	£1,408,126.30	£1,573,126.30	£165,000.00

Centre Drive – 1 x 3b House

25. Construction work is proceeding well at Centre Drive, with works on target to be completed by the contract completion date.

26. There is no cost variations noted on this project to date.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Centre Drive	VSN Enterprises Ltd	30 October 2017	36 weeks	27 June 2018
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
27 June 2018	Nil	£300,285.00	£300,285.00	£0.00

Queens Road, North Weald – 10 x 3b Houses & 2 x 2b Houses

27. Due to the nature of the site a package of initial enabling works needs to be completed, including the relocation of a UKPN substation, before construction works can commence.

28. A letter of intent was issued to Storm Building Ltd up to a works value of £250K to allow them to undertake the enabling works. The enabling works are expected to take three months to complete.

29. Construction works are expected to commence on 5 March 2018 giving a completion date in October 2019.

30. The cost variations are related to the contract uplift previously reported to and approved by the Portfolio Holder in October 2017 and represent the increase in construction cost indices due to a delay of almost a year.

Scheme	Contractor	Start on site date	Contract Period	Contract comp. date
Queens Road	Storm Building Ltd	5 March 2018	82 weeks	30 Sept 19
Anticipated completion date	Variation	Contract Sum	Anticipated Final Account	Variation
TBC	TBC	£2,320,493.00	£2,441,240.00	£120,747.00

Phase 4 - 6

31. In September 2017, East Thames, who are the Council's Development Agents, gave notice of their intention to invoke Schedule 8 (Exit Management Plan) of the Housing Development Agency Services Agreement that they no longer wish to act as Development Agents on behalf of the Council. Whilst a 3-month exit management term is set out in the Agreement, East Thames have agreed to extend this term to 6-months, ending on 9 March 2018 to enable as smooth a hand-over as possible.

32. Outside of the 6-month Exit Management Plan, East Thames has agreed to continue to assist the Council with the on-going adjudication claim submitted by Broadway Construction Ltd, until such time as the claim is either withdrawn or settled.

33. In order to achieve this hand-over deadline, and to ensure no disruption in service or deterioration in quality of the service, the following actions are required:

(a) To novate the appointment of Pellings LLP for each of the contracts that are currently on site, which makes up Phases 1-3 inclusive (Pellings LLP have acted as Employers Agent across the Council House Building Programme since its inception). This will involve transferring all of the contract terms and fees previously agreed between East Thames and Pellings LLP to the Council. These have been reviewed by the Council's Solicitor who has not expressed any adverse concerns.

(b) To amend each of the Building Contracts that are currently in existence across each of the sites making up Phases 1-3 inclusive, removing East Thames and substituting with either Pellings LLP or the Council as appropriate.

(c) To engage site inspection (Clerk of Works) services to undertake weekly site visits to ensure that the Contract Specification and Employers Requirements are being adhered to, as well as monitoring progress on site and advising the Employers Agent/EFDC on construction and programme matters requiring intervention.

(d) To take over the IMS Login details to the Homes England (formerly the Homes and Communities Agency) development progress checker database from East Thames and to put in place arrangements to complete the quarterly progress updates.

(e) To ensure that there are procedures in place to manage the Defects Liability Period on each contract. It is important that the Council is able to provide a good level of service to its customers moving into their new homes and the management of defects is crucial to this as it is likely to be one of the first interactions that customers have with the Council.

(f) To set up OJEU compliant Frameworks to allow for the selection of Contractors and Consultants on Phases 4, 5 and 6 and any future developments yet to be identified. The Council has already appointed Cameron Consulting as specialist Procurement Consultants who are already working on these appointments. The intention is to have the necessary frameworks in place by May 2018.

(g) To introduce a financial appraisal model, which will enable the Council to undertake its own financial feasibility studies as well as being able to consider financial risks to projects prior to approval?

34. On the whole, the projects that make up the future phases 4-6 of the Council House-building Programme have continued to be progressed up to the point of achieving Planning Permission. A full list of these sites is reproduced from the Planning Tracker at Appendix 1 of this report. From this, it can be seen that 24 sites have achieved planning consent, which will deliver 74 new affordable homes. There is a separate report on the options the Council may wish to adopt for the 13 sites that have so far failed to achieve planning consent.

Resource Implications:

Estimated expenditure for Phase 1 (inc. fees) - £6,263,985
Estimated expenditure for Phase 2 (inc fees) - £11,438,325
Estimated expenditure for Phase 3 (inc fees) - £7,451,175
Estimated expenditure for Phase 4 - 6 (inc fees) - £16,500,000

Legal and Governance Implications:

It is set out in its Terms of Reference that the Cabinet Committee is to monitor progress and expenditure in relation to the Council House-building Programme and report to the Cabinet on an annual basis.

Safer, Cleaner and Greener Implications:

None.

Consultation Undertaken:

- Ward Councillors have been consulted on each feasibility study that falls within their respective Ward.
- Local Residents, Town and Parish Councils and other statutory bodies have been consulted as part of the planning process where planning applications have been submitted.

Background Papers:

- Decisions of the Cabinet committee associated with the feasibility studies for each of the sites that make up Phases 1-6 inclusive.
- Decisions of the relevant Area Planning Sub-Committee, Cabinet, District Development Management Committee or Council associated with the Planning process for each site already approved up to and including Phases 1-3 inclusive.
- Decisions of the Cabinet Committee in respect of Policies or progress monitoring for each of the phases.

Risk Management:

There is a comprehensive risk register that has been compiled and is being monitored in respect of the house-building programme. Each risk, where appropriate has a risk mitigation action plan.

Equality Analysis

The Equality Act 2010 requires that the Public Sector Equality Duty is actively applied in decision-making. This means that the equality information provided to accompany this report is essential reading for all members involved in the consideration of this report. The equality information is provided as an Appendix to the report.