

## Cabinet & Executive Template

<b>REPORT TO:</b>	<b>Cabinet 30<sup>th</sup> November 2022</b>
<b>SUBJECT:</b>	<b>Brick by Brick Croydon Ltd Update Report</b>
<b>LEAD OFFICER:</b>	<b>Jane West - Corporate Director and Section 151 Officer  Nish Popat - Interim Head of Corporate Finance</b>
<b>CABINET MEMBER:</b>	<b>Mayor Jason Perry – Executive Mayor Cllr Jason Cummings – Cabinet Member for Finance Cllr Lynne Hale – Cabinet Member for Homes and Statutory Deputy Mayor</b>
<b>WARDS:</b>	<b>All</b>

### **SUMMARY OF REPORT:**

The report provides Cabinet with an update with regards to Brick by Brick Croydon Ltd (BBB), a wholly owned housing development company. Progress has been made by Directors and Management at the company since the reviews carried out in 2021. The Company has reached Practical Completion on all their development sites except Lion Green Road and Kindred House and BBB continues to make good progress with disposing of the developments in the open market and to the Council.

The Council holds Option Agreements on 6 undeveloped sites of which the Council is considering exercising its buy back option for the Regina Road site and the others, subject to further due diligence of the sites for Council use.

Brick by Brick have also repaid to the Council £30.04m of the principal loans with a net balance of £142.5m outstanding as at end of October 2022.

### **FINANCIAL IMPACT:**

The Council is the sole lender to Brick by Brick and had lent a total of £145m by end of March 2021 (excluding Fairfield Halls) and BBB had accrued £18.051m in interest. During 2021/22 BBB incurred further interest costs of £9.8m and the Company paid back £30.04m to the Council in March 2022. This covered all accrued interest and contributed £2.19m towards repayment of the loan. Interest continues to be charged on the outstanding loan and as at end of October 2022 a total of £147.5m (loan principal and interest) was outstanding to be paid.

Any loan balance not paid by Brick by Brick will result in an impairment of the loan by the Council which will need to be paid for through the Council's Minimum Revenue Provision. Additional write off will not result in additional costs to the Council as the MRP for BBB loans is already provided in current financial plans. However, any non-repayment of the loan by BBB will result in continued provision of MRP as alternatively the loan repayments could have been used to pay down the Council's own debt balance.

The Council has not directly provided any further funding to BBB since those agreed in 2020/21.

**KEY DECISION REFERENCE NO.: YES 7922EM**

The Executive Mayor in Cabinet is Recommended to:

**RECOMMENDATIONS:**

1. Note the progress on delivery of key developments by Brick by Brick Croydon Ltd.
2. Note the progress on BBB finances as provided within Part B of the report. This has been included as Part B to ensure management financial information remains commercially confidential.
3. Delegate authority to the Corporate Director of Resources and Section 151 Officer, in consultation with the Monitoring Officer and the Cabinet Member of Finance, to enter into a Letter of Comfort to be provided to Brick by Brick Croydon Ltd, under the Council's shareholder function. Information has been included within the Part B report.
4. Consider the PwC review, including recommendations, within the Part B report, agree to proceed with the option set out in Part B.
5. Note that under delegated authority the Corporate Director of Resources and Section 151 Officer, in accordance with paragraph 9 of the Financial Regulations, has approved to vary the Option Agreements on Regina Road, Malton House and Belgrave & Grosvenor Road to include an option for the Council to purchase those sites instead of setting off against the loan agreement and to extend the buy back option period for Regina Road and Malton House. The Council is currently working with BBB to varying the Option Agreements. This is further detailed within Section 2 of this report.
6. Delegate authority to the Corporate Director of Resources and Section 151 Officer, in consultation with the Monitoring Officer and the Cabinet Member for Finance, to exercise buy-back option(s) under the relevant option agreement(s) for the undeveloped sites earmarked by BBB for disposal, should these be required. The value of any such buy backs shall either be paid to BBB or be set off against the Loan agreement, as varied within the option agreement(s).
7. Delegate to the Corporate Director of Resources and Section 151 Officer, acting as lender, in consultation with the Monitoring Officer to vary the Loan agreement with BBB to permit set off values under recommendations 5 and 6 above if required.
8. Delegate authority to the Corporate Director of Resources and Section 151 Officer, acting as shareholder, in consultation with the Monitoring Officer

and Cabinet Member for Finance to instruct BBB not to dispose of the undeveloped 5 sites on the open market if the Council decides to consider exercising its buy back option(s) in accordance with recommendation 6 above.

9. Delegate authority to the Corporate Director of Resources and Section 151 Officer, in consultation with the Monitoring Officer, Executive Mayor and the Cabinet Member for Finance, to approve that BBB may dispose of developed properties in the open market at less than 95% of red book value (including where this a key decision and above Corporate Director delegations within the Financial Regulations) on the request of BBB as in accordance with the Loan Facility Agreement.
10. Delegate authority to the Corporate Director of Resources and Section 151 Officer in consultation with Cabinet Member for Finance and Corporate Director of Housing and subject to any final due diligence, whether to purchase 12 new properties at the Trellis Mews development as detailed in Section 6 of this report with a further recommendation within Part B.
11. Approve updated amendments to the Terms of Reference of the Brick By Brick Shareholder Mayor's Advisory Board (formerly Brick by Brick Shareholder Cabinet Advisory Board) as set out at Appendix C to reflect changes to appointments and to confirm the governance model as set out in the November 2021 Cabinet report (attached as a background paper), including delegations as follows:
  - a. Delegate to the members of the Brick by Brick Shareholder Mayor's Advisory Board the authority to exercise limited shareholder functions on behalf of the Council when making recommendations to Brick By Brick relating to risk in accordance with Section 5 of this report (recognising, however, that Brick By Brick shall make its own independent decisions).
12. Approve the process for appointment and removal of directors from the Brick By Brick board of Directors in accordance with Section 5 of this report; and delegate authority to the Corporate Director of Resources & S151 Officer in consultation with the Executive Mayor, Cabinet Member for Finance and Chief Executive on appointments and removals of Directors of the board of Brick by Brick Croydon Ltd, who shall have authority to exercise shareholder functions on behalf of the Council to approve such appointments and removals (any such appointments or removals shall be notified as part of the next scheduled report to the Executive Mayor in Cabinet).

## **1. BACKGROUND**

- 1.1 This report updates Cabinet on the progress of Brick by Brick Croydon Ltd since the start of this financial year and follows on from the update that was provided to the March 2022 Cabinet.

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- 1.2 Brick by Brick continues to pose significant challenge for the Council due to legacy matters previously identified in various reports to Cabinet. The recent change in housing market conditions have further complicated delivery however careful engagement and management by the BBB Directors is helping to manage difficulties.
- 1.3 Other key areas of update include:
- i) Progress on Disposal of the six sites that have not entered into development contracts as agreed within the July 2021 Cabinet report.
  - ii) Progress on delivery of the 23 sites the Council had requested BBB to complete as detailed within March 22 Cabinet Update report.
  - iii) Update on the amount of Capital Receipts generated by the Company and the amount that has been recycled since the start of the financial year.
  - iv) Update on the drawdown of the additional working capital facility that was awarded as part of the May 2021 Cabinet report.
  - v) Updating governance arrangements to reflect changes to appointments and to confirm the governance model as set out in the November 2021 report
- 1.4 Part B of this report also provides Cabinet with an update on the company's finances and attaches draft unaudited accounts within Appendix A. Further details are provided in Part B of the report to protect the commercial position of BBB. The Part B report contains exempt information as defined in paragraph(s) 3 and 5 of Schedule 12a to the Local Government Act 1972 (as amended): "Information relating to the financial or business affairs of any particular person (including the authority holding that information)"; and "Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings". In all the circumstances, the public interest in maintaining the exemptions outweigh the public interest in disclosing the information.

## **2. DISPOSAL OF SIX SITES**

- 2.1 The February 2021 Cabinet agreed that Brick by Brick would be funded by the Council to build out 29 sites, the majority of which were expected at that time to be completed by October 2021. At that time, it was assumed that works would commence on all sites. However, as indicated within the July 2021 update report there were six sites where work had not commenced on site. These sites are: Academy Gardens, Belgrave and Grosvenor, Coombe Road, Eagle Hill, Malton House and Regina Road. It was therefore agreed that the six sites should not progress to development.
- 2.2 Of the six sites indicated in paragraph 2.1, Belgrave and Grosvenor, is the largest and is likely to generate a significant value. However, this is still under consideration by the Council for its own use so has not yet been marketed for potential sale by BBB.
- 2.3 All 6 sites are bound by Option agreements that the Council and BBB previously entered into. Those agreements include an option for the Council to buy back

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undeveloped sites within a certain amount of time. Since the decisions were made with regards to the disposal of the six sites, as a result of wider regeneration proposals at the Regina Road Housing Estate the Council is considering these sites.

- 2.4 At the time of writing the report these agreements are being reviewed and the Regina Road and Malton House Option Agreements are in the process of being varied and extended. The Option agreements for Regina Road, Malton House and Belgrave & Grosvenor Road are also being considered to vary to include the option of purchasing the site instead of setting off against the loan agreement, to allow the Council to have greater flexibility regarding how it may buy back those sites for future development and regeneration opportunity, if required.
- 2.5 Brick by Brick have made progress with regards to the disposal of the other sites and currently have an offer for some sites and are currently being reviewed for best consideration.
- 2.6 It is important that decisions in respect of these undeveloped sites are made quickly. This is because BBB have offers on some sites and the Council will need to consider this alongside any support these sites could offer for wider proposals in relation to the Regina Road Housing Estate. As such the Executive Mayor is recommended to delegate authority to the Corporate Director of Resources & S151 Officer, in consultation with the Monitoring Officer and Cabinet Member for Finance, the ability to direct BBB not to market those sites and for the Council to exercise its buy back option under its option agreements.

### **3. PROGRESS UPDATE ON DELIVERY OF 23 SITES**

- 3.1 Brick by Brick continue their work on delivering their schemes with 21 of the 23 sites have reached practical completion.
- 3.2 The company remains projected to deliver 778 residential units, 339 are affordable homes. The table below provides details for the 23 sites along with their practical completion dates (PC) and type of tenures each development has delivered
- 3.3 BBB are in conversations with potential buyers looking to bulk buy Lion Green Road and Kindred House developments but at the time of writing this report the agreements have not fully been confirmed. The Council in its Shareholder and Lender capacity is working closely with the BBB team to ensure that best consideration is achieved.
- 3.4 Since the start of the new financial year, Brick by Brick have progressed well and improved their delivery particularly with their construction and sales plan and have not experienced significant issues going to market with their completed units. This has provided the company with consistent cash flow, which has resulted in not needing extra Council funding.

### **4. CAPITAL RECEIPTS GENERATED BY THE COMPANY**

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- 4.1 As part of the May 2021 Cabinet report on Brick by Brick, the Council under its Lender role, approved that BBB can recycle the receipts the company generates from the disposal of residential units from the 23 sites. These receipts would then support the completion of the remaining sites and would not require the Council to provide further funding.
- 4.2 Since May 2021 BBB has recycled £89.1m in receipts into completion of the agreed developments. £85.2m of these have been directly applied to complete the developments and the rest has been applied to overheads such as staff costs, ICT, general legal costs and office running costs.
- 4.3 In July 2021 the Council agreed to extend a further £10m loan to BBB to support ongoing working capital needs at the time it was identified that further funding may be required. This funding has not been needed and has not been lent to BBB. Continued improvement within the company with regards to operations and disposals has meant BBB have been able to deliver their operations within recycled receipts.

## 5. COMPANY GOVERNANCE

- 5.1 The Council continues to hold regular Brick by Brick Shareholder Advisory Board (Advisory Board) meetings as advised to Cabinet in November 2021 under the report titled Governance of Brick by Brick Croydon Ltd. The Council is updated on progress with regards to each of BBB's developments and key financial and commercial considerations are presented and reviewed by the Board.
- 5.2 The Terms of Reference for the Brick By Brick Shareholder Mayor's Advisory Board (formerly Brick by Brick Shareholder Cabinet Advisory Board) and delegations within the November 2021 Cabinet report require updating due to changes to appointments. The proposed amendments to the Advisory Board's Terms of Reference are set out at Appendix C of this report and the updating delegations are set out below.

### **Decision making and shareholder functions:**

- 5.3 The Advisory Board is not intended to exercise shareholder reserved matters (as defined in the Articles of Association of Brick By Brick), it is recommended that, where appropriate, the Advisory Board (in the Council's capacity as Shareholder) should have the ability to highlight issues to Brick By Brick where doing so will promote the values of Brick By Brick and does not interfere with the legitimate rights of the Directors of Brick By Brick to exercise their general authority. Therefore, a specific delegation to the Members of the Advisory Board is recommended in order to carry out this function (recommendation 11a). In exercising this function the Members shall recognise that Brick By Brick will make its own independent decisions.

**Director appointments and removals:**

- 5.4 At present, there are three non-executive Directors of Brick By Brick and one executive Director. In accordance with the Articles of Association of Brick By Brick (as amended), this is the maximum number of Directors and there can be a minimum of two Directors (though this can be changed by ordinary resolution). The Board of Directors may comprise of an Executive Director (if appointed), Finance Director (if appointed) and Non-Executive Director(s).
- 5.5 It is likely that Director appointments will need to be considered in future. As such, it is recommended that the Executive Mayor approve a process to appoint Directors; and delegate authority to the Corporate Director of Resources & S151 Officer in consultation with the Executive Mayor, Cabinet Member for Finance and Chief Executive on appointments and removals of Directors. Any such appointments or removals shall be notified as part of the next scheduled report to the Executive Mayor in Cabinet.
- 5.6 The process for the appointment of Directors is recommended to be:
- Brick By Brick Directors and the Director of Commercial Investment & Capital, consult to consider what expertise and skills are required;
  - Brick By Brick draft a role description, to be approved by the Director of Commercial Investment & Capital;
  - The Director of Commercial Investment & Capital shall approve any proposed remuneration (in a shareholder representative capacity);
  - Brick By Brick advertise the role and run a recruitment process;
  - Brick By Brick consult the Director of Commercial Investment & Capital regarding candidates and shortlisting;
  - The Director of Commercial Investment & Capital shall be included on interview panels on behalf of the Council (in a shareholder representative capacity);
  - Brick By Brick and the Director of Commercial Investment & Capital agree any offer;
  - Appointment of Director following articles of association (by ordinary resolution of the shareholder) and the Executive Mayor's delegation (as set out in this report, if approved)
  - Outcome reported to the Executive Mayor in Cabinet as part of the next scheduled Brick By Brick quarterly report
- 5.7 This recommended process ensures that there is a rigorous selection procedure and that both the Council and Brick by Brick collaborate. As part of this process, the Director of Commercial Investment & Capital and Corporate Director of Resources & S151 Officer may, where relevant, exercise shareholder functions on behalf of the Council.

**6. TRELIS MEWS**

- 6.1 Trellis Mews is a new residential development comprising of 12 homes over three floors located close to South Norwood station and the existing Regina Road and Belgrave and Grosvenor housing estates.

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- 6.2 The properties being considered for purchase have been built by BBB and formed part of the original tranche of developments. The scheme comprises of a single block containing 12 homes. Ten are one bed properties (one of which is wheelchair accessible) and two are two bed homes. The ground floor units all have private gardens to the rear. The properties have been constructed to meet modern energy efficient requirements with air source heat pumps and solar panels.
- 6.3 The intention is that the properties will be purchased within the Housing Revenue Account (HRA) and held as social housing. As with other council accommodation, they will be managed by the Housing team for allocations and tenancies as well as responsive repairs as necessary.
- 6.4 The Council have purchased a number of properties from BBB under earlier decision, the most recent having been the purchase of 104 properties approved by Cabinet in May 2021. This development was not included within the latest purchases as it was not as financially beneficial compared to the other acquisitions and the mix of predominantly 1 bed properties did not compliment the overall portfolio being considered at the time. These properties are now being considered specifically to help support the wider Regina Road estate regeneration proposals due to their geographic location and the size of the units within Regina Road blocks.
- 6.5 The Council have secured grant funding (£100k per unit) for the purchase of these units under a wider bid to the GLA following their application under the Building Council Homes for London Programme submitted on 31 August 2019. The Council entered into a Grant Agreement with the GLA in 2019 in relation to this programme and will comply with the terms of this agreement in relation to this proposed purchase.
- 6.6 This funding can only be used by registered providers for the provision of affordable social housing. The GLA have approved the inclusion of these properties as being in line with their funding requirements and were included within the Council's successful grant application. This funding has been taken into account when assessing the valuation for the units as the other registered providers would have also considered such funding when submitting their bids albeit that their funding would have been at a lower level up to a maximum of £67,500 per affordable unit.
- 6.7 As the Council is still considering whether the purchase these properties, this report recommends that authority is delegated to the Corporate Director of Resources and Section 151 Officer in consultation with Cabinet Member for Finance and Corporate Director of Housing to decide whether to purchase the Trellis Mews properties, with a further recommendation within Part B.

## **7. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS**

- 7.1 The Council has an exposure of £142.5m in principal loans outstanding with BBB as at end of October 2022 and is the sole lender to company. The loans were provided to fund the development activity within the company and support the delivery of residential properties in the borough. In addition to the loans a

total interest of £5.04m has been accrued in 2022/23 as at end of October 2022. Previous interest charged to BBB has been repaid in 2021/22.

7.2 The Council charges a commercial interest rate on these loans and a revised consolidated loan agreement was entered into in May 2021. The Council's budget has an income target for interest income in 2022/23 of £6.908m and it is expected that BBB will be able to meet this income target and cover its interest costs in 2022/23.

7.3 Costs to deliver the work so far including the advisory support from PwC and Browne Jacobson has been paid from a contingency earmarked reserve.

Approved by Jane West Corporate Director of Resources

## 8. LEGAL CONSIDERATIONS

8.1 The Council has taken legal advice from Browne Jacobson LLP in relation to the matters addressed under, and recommendations made in, this report. Legal implications are addressed under the following headings.

### **Powers**

8.2 Section 1 of the Localism Act 2011 states that a local authority "*has power to do anything that individuals generally may do*". This enables a local authority to act as though an individual with full capacity, unless otherwise expressly prevented or restricted by some other statutory provision. This power, in conjunction with the powers and duties of the Council in relation to the provision of housing, have underpinned prior decisions to establish and support BBB. Where the general power is relied on to carry out a commercial purpose of a local authority, that must be pursued through a limited company.

8.3 Therefore, under this general power the Council:

- may exercise its rights as Lender to BBB under the consolidated Facility Agreement to take the steps identified in this report; and
- may exercise its rights as the sole shareholder in BBB to take the steps identified in this report.

8.4 In doing so, the Council must be mindful of the Council's financial position, its fiduciary duty (see below) and the requirement to have regard to all relevant factors and to disregard irrelevant ones. In short, the Council must act in accordance with the principles of Wednesbury reasonableness, meaning to make decisions that a rational person might make, having regard to all relevant considerations. The Council, as Lender and Shareholder in BBB, should also have full regard to its fiduciary duties and act prudently.

8.5 The fiduciary duty of a council, exercised by its elected members, derives from case law (e.g. *Credit Suisse v Allerdale Borough Council*) such that 'fundamental to a public body's accountability is the care it exercises in handling public monies'. In a local authority context, this 'takes legal shape in the principle

of their fiduciary duty to local taxpayers'. This is not a statutory requirement but an important principle of common law and one that is especially pertinent in this context.

### **BBB Articles of Association**

8.6 Notwithstanding the fact that the day to day management of BBB is vested in the Board of Directors under BBB's articles of association, that function is subject to matters reserved to the Council for decision under the company's articles of association. It is reserved to the Council to decide on the disposal of a BBB asset unless catered for in the Business Plan of BBB. Although the disposal of the remaining 5 sites may be covered by the Business Plan, it is nonetheless open to the Council (as sole shareholder) to make the direction contemplated by recommendations 6 & 8, and to reference and rely on its buy-back rights under the Option Agreements. That decision would be subject to the general decision-making factors referred to in this section of the Report, in particular to be based on consideration of relevant factors, and made with the Council's fiduciary duty in mind.

### **8.7 Subsidy Control**

8.8 The Council needs to have regard to its obligations under the subsidy control regime when deciding on the recommendations in this Report.

8.9 The Subsidy Control Act 2022 (the **Act**) will provide a new framework for the provision of subsidies within the UK and Government has recently announced that the majority of the Act will come into force on the 4 January 2023. Until this date, the subsidy control regime in the UK is governed by the UK's international obligations in relation to subsidies, and in particular the EU-UK Trade and Co-operation Agreement (**TCA**), which was incorporated into UK law through s.29 of the European Union (Future Relationship) Act 2020.

8.10 Under the TCA, a subsidy:

- is financial assistance which may include the forgoing of revenue that is otherwise due;
- that confers an economic advantage on one or more economic actors (in this case BBB);
- is specific, insofar as it benefits, as a matter of law or fact, certain economic actors over others in relation to the production of certain goods or services; and
- has, or could have, an effect on trade or investment between the parties (meaning the UK and the EU).

8.11 However, the Market Economy Operator Principle (MEOP) (referred to as the Commercial Market Operator Principle under the Act) is the principle that where a public authority does something on the same terms as a comparable

economic actor would, then no subsidy arises because there is no specific 'economic advantage' to any other economic actor as a result.

- 8.12 Therefore, the potential buy-back of the undeveloped sites by the Council, will not represent a subsidy to BBB provided that the Council is only writing off a proportion of the loan outstanding under the Facility Agreement which is no more than the market value of the relevant site. No subsidy control risk will be present in relation to BBB selling sites to third parties provided it can demonstrate that the sale prices obtained reflect a market value and the sales are enacted on market terms. If sites are disposed of in bulk and, therefore, are sold at slightly below the total open market value of the individual units, this will not give rise to a subsidy provided the pricing is still within the range of prices that a private seller in BBB's position might accept to dispose of the properties in bulk. The market price for a bulk sale may well be lower than the sum of the market value of the individual properties.
- 8.13 Further legal implications are detailed in Part B of this report to protect the commercial position of BBB, the Council and to maintain legal professional privilege (please see section 4 of the Report).
- 8.14 This report also includes recommended delegations and, if approved, any subsequent decisions will require consideration of any legal implications.

Approved by Kiri Bailey, Head of Commercial & Property Law on behalf of the Director of Legal Services & Monitoring Officer

## **9. HUMAN RESOURCES IMPACT**

- 9.1 There are no immediate human resources impacts arising from the recommendations in this report for Croydon Council employees or staff. Should any impacts arise, these will be managed in accordance with the Council's HR policies and procedures.

Approved by: *Gillian Bevan, Head of HR Resources and Assistant Chief Executives* on behalf of the Chief People Officer

## **10. EQUALITIES IMPACT**

- 10.1 There are no specific equalities issues set out in this report.
- 10.2 The Council has a statutory duty to comply with the provisions set out in the Sec 149 Equality Act 2010. The Council must therefore have due regard to:
- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

(Approved by: Denise McCausland – Equality Programme Manager)

**11. ENVIRONMENTAL IMPACT**

11.1 None

**12. CRIME AND DISORDER REDUCTION IMPACT**

12.1 None

**13. DATA PROTECTION IMPLICATIONS**

**13.1 WILL THE SUBJECT OF THE REPORT INVOLVE THE PROCESSING OF 'PERSONAL DATA'?**

**NO**

**13.2 HAS A DATA PROTECTION IMPACT ASSESSMENT (DPIA) BEEN COMPLETED?**

**NO**

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**CONTACT OFFICER:** *Nish Popat – Interim Head of Corporate Finance*

**APPENDICES TO THIS REPORT:**

*Appendix C – Updated Brick By Brick Shareholder Advisory Board ToR*