

DOCUMENTS REVIEW

1. BACKGROUND

- 1.1 Colchester Amphora Homes Limited (“CAHL”) is a wholly owned subsidiary of Colchester Commercial (Holdings) Limited (“CCHL”) which in turn is wholly owned by Colchester City Council (“the Council”). It has been decided for CAHL to be made dormant as part of a restructuring.
- 1.2 The objective is for the benefit of CAHL’s assets and existing agreements to be transferred ideally to the Council or possibly to CCHL. The Council has asked for various lease agreements, a building contract and grant agreement to be reviewed and for AC to set out the actions needed to achieve the objective.
- 1.3 There are two legal terms used in this report which describe how arrangements which have previously been made by CAHL may be “transferred” to the CCHL or the Council:
 - 1.3.1 An “assignment” is where the legal benefit is transferred to a party where there are no actions or live obligations to be fulfilled under the contract. The party to whom the benefit has been transferred can then use that benefit – for example a benefit of most contracts is to be able to enforce them if a supplier has not complied with its obligations.
 - 1.3.2 A “novation” is where all the parties must agree (the supplier, CAHL and the Council) to change the “customer” from CAHL to CCHL or the Council. This is to be used where CCHL or the Council needs to continue to order services or goods from the same supplier.
- 1.4 The recommendations for the reviewed agreements are either to assign, novate, or terminate. Each agreement needs dealing with properly to ensure that there are no questions left about CAHL’s obligations or the Council’s rights and responsibilities in future.
- 1.5 This advice does not factor in tax issues, and you have confirmed that the Council and Amphora group of companies will obtain separate advice about progressing the objective in a tax efficient manner. If a tax adviser has any comments on our proposals for each of the agreements, AC will gladly collaborate with them to ensure that the most efficient result is achieved. This is particularly relevant and important in relation to the proposed property transfers where SDLT, capital taxes and potentially VAT will be relevant.

2. CREFFIELD ROAD

- 2.1 Documentation has been provided showing that there are six flats at Creffield Road within the Freehold property under title number EX399347. It is understood that of those flats, one is still for sale, three have been privately sold, and two are Council housing.
- 2.2 CAHL could attempt to sell the remaining flat at auction or continue to attempt to sell on the market in the usual manner. Unless auction is actioned very quickly, it is highly unlikely that any sale by private treaty would now be progressed before the target date for making CAHL dormant.
- 2.3 Until such time as a lease is granted of that flat upon its sale, the flat will continue to form part of the freehold title. The Council is unable to hold open market “for sale” housing as this would not be within the Council’s powers.
- 2.4 For this reason and others, it would be best to transfer the freehold title to CCHL for at least the time being, because this would enable the options for disposal of the remaining flat to be considered. In addition, the Council may wish to explore selling the freehold title to a management company which would be owned by the leaseholders. This could not be achieved by the target date for making CAHL dormant, so it would appear to make sense to transfer the land to CCHL to give time for this to be considered.

3. CREFFIELD ROAD BUILDING CONTRACT

- 3.1 An unamended JCT ICD 2016 agreement was signed between CAHL and T.J Evers Limited on 13 July 2020 for the “*refurbishment and alteration of existing house into 6 flats and construction of 2 new houses at 60 Creffield Road, Colchester...*” (“the Building Contract”). The Building Contract appears to have been correctly executed via a deed.
- 3.2 The works associated with the Building Contract have all been completed, and therefore we suggest that CAHL assigns the benefit of it to CCHL. This is to preserve the right to be able to make a claim against the Contractor under the Building Contract in the instance(s) that defects are discovered. It is best for the rights to enforce the Building Contract to follow the ownership of the building.
- 3.3 Under clause 7.1 of the building contract, CAHL requires the Contractor’s consent in order to assign the benefit. Whether the Contractor is willing to grant this is difficult to predict, but it will be worth asking. If the Contractor is unwilling, there is a “work around” which would involve granting an indemnity from CAHL to CCHL on transfer of the land. Further advice can be provided about this as necessary in future.
- 3.4 Although we have not had sight of these, if there are any collateral warranties associated with the project from sub-contractors, these should also be assigned to CCHL.

4. 10 YEAR BUILDING WARRANTIES

- 4.1 Two sets of 10 year latent defect home insurance policies have been provided for review. An AEDIS policy has an initial certificate to the benefit of CAHL at 60 Creffield Road. An LABC policy documentation lacks such a certificate, but we assume similarly benefits CAHL, and benefits the freehold properties on Inglis Road.
- 4.2 AEDIS and LABC would usually have required CAHL to enter into agreements where CAHL indemnifies AEDIS and LABC in the event that CAHL does not effect repairs to a property, causing a claim against the building warranty by a leaseholder. These indemnities were either not demanded, or cannot be found. Potentially the indemnities could have been novated to CCHL to avoid the risk of having to remove CAHL from dormancy to deal with any claims under the indemnities. However, this is a double edged sword, because a novation would have exposed CCHL to potentially significant claims in the event of a property defect.
- 4.3 On this basis, it is suggested that no further action is taken unless the indemnity documents are found in due course, in which case further advice can be provided in the event of any claim.

5. NORTHERN GATEWAY GRANT AGREEMENT

- 5.1 As part of the Northern Gateway scheme, a grant agreement was entered into between the Council and Homes England (“HE”), dated 4 October 2019 which was later varied on 4 March 2020 (“the Grant Agreement”).
- 5.2 The Grant Agreement provided £3.56 million for enabling works and £1.94 million for infrastructure to allow CAHL to develop 560 residential units at the Northern Gateway. As CAHL is not a party to the Grant Agreement, there is no need to assign, novate or terminate this agreement and it can be left in place during any dormant period.
- 5.3 Prior to the End Date, under clause 19, the Council must advise HE of any changes to the project. Changing the entity delivering the required number of residential units under the wider project milestones (as specified under Schedule 3) would be caught by this requirement.
- 5.4 As the Grant Agreement named CAHL as the entity to carry out the development work, we would recommend that either a variation is agree with HE or at the very least an update is send to HE to reflect the change in circumstances.

6. BLOOM APPOINTMENT

- 6.1 CAHL and Bloom Procurement Services Limited (“Bloom”) entered into a call-off contract dated 17 February 2022 for the provision of specialist professional services in relation to the Northern Gateway scheme (“the Bloom Contract”).

- 6.2 Bloom had been appointed for the delivery of specialist professional services under a framework agreement by the North East Procurement Organisation. This framework agreement was dated 1 September 2019 with an initial period of four years, with potential extension options.
- 6.3 It appears that CAHL has issued a work order to Bloom to provide initial services under the Bloom Contract.
- 6.4 Clause 22.1 of the Bloom Contract allows for either party to terminate the Bloom Contract without cause by providing one month's written notice. On review of Clauses 22.5 and 22.6, it is unclear whether terminating the Bloom Contract under Clause 22.1 also terminates any work orders.
- 6.5 Clause 14.2 of the Bloom Contract states that neither party shall be liable to the other party *"for indirect special or consequential loss or damage in connection with this Agreement which shall include, without limitation, any loss of or damage to profit, revenue, contracts, anticipated savings, goodwill or business opportunities whether direct or indirect."*
- 6.6 If the work order is terminated by CAHL without CAHL having the right to do this, then Bloom would be unable to claim loss of profit or any other consequential losses against CAHL. However, it might attempt to claim direct losses of terminating the work order. This might include, for example, unproductive time if it cannot redeploy any resources which were assigned to the work order. However, if little or no work is currently being progressing under the Bloom Contract, and little or no work is anticipated as being required in the short to medium term, it may be best to negotiate termination with Bloom. If a clean termination cannot be agreed rapidly, it is likely to be best to ask Bloom to novate the contract to the Council. The Northern Gateway contracts from Colchester Amphora Energy Limited have been or are being novated to the Council so this would work from a consistency perspective.

7. OVERVIEW

- 7.1 The table below summarises at high-level the recommendations for each of the agreements reviewed.

7.2

AGREEMENT	RECOMMENDATION
CREFFIELD ROAD PROPERTY INTERESTS	Transfer to CCHL then dispose from CCHL.
CREFFIELD ROAD BUILDING CONTRACT	Assign benefit to CCHL
NORTHERN GATEWAY GRANT AGREEMENT	Possible variation with or notification to Homes England
BLOOM APPOINTMENT	Negotiate termination – although if difficult or time consuming, novate to Council

8. NEXT STEPS

- 8.1 It is suggested that the implications of the decision to place CAHL into dormancy should now be documented so that all matters can be contained into one report for governance purposes. That report will then be the basis upon which the recommendation will be made.
- 8.2 We would be happy to support the Council and CAHL to implement some or all of the suggested courses of action above once necessary governance is completed. It might be useful to discuss the conclusions and we could attend a brief meeting to check you are in agreement with our advice.
- 8.3 If requested we would be happy to draft the necessary resolutions and cover reports if required from a governance perspective.
- 8.4 Please do not hesitate to contact us with any queries or if any further information is required.

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