

WELWYN HATFIELD BOROUGH COUNCIL
CABINET – 2 AUGUST 2016
REPORT OF THE DIRECTOR (GOVERNANCE)

WELWYN GARDEN CITY ESTATE MANAGEMENT SCHEME

1 Executive Summary

- 1.1 Cabinet considered a report on the Welwyn Garden City Estate Management Scheme in July 2015 (Appendix 1) which sought to resolve on-going problems with its administration and enforcement. The main thrust of the recommendations was to replace the Scheme with Article 4 Directions and to apply to the High Court Land Tribunal to vary or terminate the Scheme, and these were agreed by Cabinet.
- 1.2 In the proceeding months officers have successfully progressed some of the recommendations, notably discussions with appropriate organisations as to whether another body might be prepared to manage the Scheme (with no such interest being expressed given the acknowledged problems) and a town-wide review to establish the merits of removing certain permitted development rights as part of an Article 4 Direction. Unfortunately progress was slowed by the resignation and replacement of the lead planning officer.
- 1.3 In recognition of the fact that a sound case would need to be presented to the High Court if the Council was ultimately minded to vary or terminate the Scheme, officers sought legal advice on the merits of the intended way forward. That advice is set out in detail below but in summary it was that an Article 4 Direction would need to provide at least equivalent protection as the existing Scheme and that issues that cannot be satisfactorily covered by an Article 4 Direction should be retained as part of the Scheme. In addition, the Council should publicly consult on this and alternative options and analyse any responses before proceeding. This is in response to a growing area of case law concerning consultation by local authorities, and the risks of challenge if it is not done from an objective start point.

2 Recommendations

- 2.1 That Cabinet agrees an 8 week period of public consultation on alternative options for the future of the Welwyn Garden City Estate Management Scheme. This will take the form of a letter to all residents within the Scheme area, a slightly different letter to all other residents who live in Welwyn Garden City but are not within the Scheme area and less targeted consultation via the Council's website and other communication channels such as newspaper adverts to other residents and bodies who may have an interest in the Scheme. Agreement of the consultation letter(s) will be with Counsel to mitigate any later challenges.
- 2.2 That Cabinet receives a future report which sets out the responses to the public consultation and recommends a preferred way forward as a consequence of those responses.

3 Explanation

- 3.1 In recognition of the importance of the Welwyn Garden City environment and in order to protect the amenities and values of the area and residents, in 1973 the High Court imposed a Scheme of management under the Leasehold Reform Act 1967. This is known as the Estate Management Scheme.
- 3.2 The aim of the administration of the Scheme is:
- “for the purpose of maintaining and enhancing amenities and values in Welwyn Garden City with due regard to the convenience and welfare of persons residing, working and carrying on business there”*
- 3.3 The Scheme does not cover the whole of Welwyn Garden City and was agreed by the Secretary of State in January 1971 and approved by the High Court in 1973. The Scheme does not apply to commercial properties and, for the avoidance of doubt, only covers residential properties where the freehold has been purchased under the Leasehold Reform Act, and it is understood including Right to Buy (RTB) properties. This means that it does not apply to leasehold properties, Housing Trust properties or newly built properties. The effect of this is that properties of different tenure types are located next door to each other, each subject to different controls and enforcement procedures.
- 3.4 The Scheme has the effect of applying similar controls to residential freehold properties as originally existed under the terms of the majority of leases of leasehold properties. The Scheme requires householders within the Scheme area to obtain consent from the Council for a range of improvements or alterations to their properties. It would have originally been the case that the Estate Management Scheme was seen as an appropriate tool for increasing the levels of protection afforded to freehold properties in line with the level of protection which existed for leasehold properties. Leasehold powers of the Council are derived from case law in this area and this has meant that the levels of protection that exist have become unequal.

Challenges of the current Scheme

- 3.5 The challenges of dealing with the current Scheme have been well rehearsed and are set out in detail in the report to Cabinet in July 2015 (Appendix 1). Whilst many of the key issues are interlinked, the substantive issue remains the ability of the Council to enforce the requirements of the Estate Management Scheme across all tenure types. When dealing with applications under the Estate Management Scheme, it is acknowledged that a strong set of policies to guide the determination of such applications already exists. These policies provide a sound basis for making decisions on these applications.
- 3.6 However, it is also acknowledged that the enforcement regime, that exists to back up the policy guidance and maintain the integrity of the Scheme, is less than satisfactory. In respect of freehold properties, enforcement of unauthorised alterations to properties follows an established process of negotiation, formal arbitration and, if necessary, court action. With regard to leasehold properties, the Council’s powers have become somewhat different.

Freehold Enforcement

3.7 The Council has undertaken formal enforcement procedures in dealing with unauthorised alterations to freehold properties. Once a breach has been identified the Council will always seek to negotiate on an informal basis with a property owner in the first instance. This will normally mean explaining what the problem is and what could be done to rectify it, or if the property owner does not wish to make any change, then inviting a retrospective application for Estate Management Consent. Should a retrospective application be refused, or where no other agreement between the parties can be reached, then the matter can be referred to arbitration. This means that the Council can appoint an independent arbitrator who can make a binding decision that is enforceable by the Courts. The costs of arbitration will normally be approximately £2,500 and is generally paid by the losing party. It should be noted that this route has been used very infrequently and is seen as a last resort. Following arbitration, if the matter remains unresolved, it can then be taken to the Courts for enforcement. As can be seen, this process is not only potentially quite lengthy, but also presents a financial risk to the Council.

Leasehold Enforcement

- 3.8 Enforcement is more challenging for leasehold properties and, arguably, less effective. In the circumstances where unauthorised works are undertaken to a property within the Scheme area, and that property is leasehold, the Council as the lessor has three options. These options are included in the provisions of the Law of Property Act 1925. Firstly, the Council can write to the lessee to require the breach to be remedied, where it is capable of remedy. If it cannot be remedied, the Council can seek compensation for the damage to the value of the Estate as well as the administrative costs associated with this process. The third and final option is for the Council to seek the forfeiture of the lease, i.e. evict the occupiers of the property. This final option is considered extreme and would be very unlikely to be an appropriate course of action to deal with unauthorised works under the Law of Property Act 1925. In conclusion, it can be seen that the enforcement options available when dealing with leasehold properties are of limited effect and make this process very challenging for the Council.
- 3.9 Other challenges to effective enforcement come from properties which are managed by the Housing Trust. Housing Trust properties are generally not subject to the Estate Management Scheme but are subject to their own individual covenants. Alterations to Trust properties are not subject to any formal application.
- 3.10 The disparity between the different tenures, the assessment of any applicable application under adopted Scheme policies and the differing forms of enforcement each introduce additional layers of complexity.
- 3.11 Alongside the issues surrounding effective enforcement set out above, other factors of the existing scheme to be considered include the cost of administering it which is currently estimated to be £80,000 - £90,000 per annum. It should be noted however that these figures do not include any costs associated with the enforcement of the Scheme, or covenants and relate solely to the processing of approximately 600 applications per year that are submitted under the Estate Management Scheme.

Tenure	Covered by EMS	Current Department for Consent for Development Proposals	Enforcement Options	Enforcement Outcome (Ultimate Sanction)
Leasehold (from WHBC only)	No	Development Management	Action under the Property of Law Act 1925 by the Council.	Potential forfeiture of lease resulting in the loss of the property via the High Court. Breach potentially still not rectified
Freehold	Yes	Development Management	Action under the Estate Management Scheme by Development Management	Demolishing any unauthorised extension (for example); replacing any original feature(s) lost - via the High Court. Breach rectified
Council Houses (Trust)	No	Housing Trust	Action under the lease by the Housing Trust	Potential forfeiture of property. Breach potentially still not rectified
Right to Buy	Yes	Development Management	Action by the Council	Demolish any unauthorised extension (for example); replacing any original feature(s) lost. In the event of failure to comply – action via the Magistrates Court

- 3.12 The main conclusion to be drawn from this is that, despite the relatively strong policy position of the Council in relation to the Estate Management Scheme (i.e. those properties that fall under the Leasehold Reform Act 1967), this is not supported by truly effective enforcement abilities when it comes to Leasehold, Housing Trust and possibly Right to Buy properties (legal advice will be sought in relation to Right to Buy). This is due to the differing legislation that they each fall under, which in turn results in the enforcement of the Estate Management Scheme being piecemeal in its effect. The above discussion is summarised in the table above.
- 3.13 Whilst other issues with the Scheme can, and have, been identified, it is the ability to take timely and effective action which remains the most important issue.

What are the options available to address this situation

- 3.14 The Cabinet report of July 2015 set out in detail a number of options available to the Council. These were:
- Maintain the status quo
 - Find another body to administer Scheme
 - Terminate but without alternative controls
 - Replace with an Article 4 Direction and the use of other legislation
 - Other options

Maintaining the status quo

- 3.15 Were the Council to maintain the status quo and continue to administer the Scheme in the way that it currently does this would continue to present the challenges that have been highlighted above. There would be on-going financial costs of administering the Scheme and additional resources may also be required to increase staff capacity. It would continue to be the case that the Scheme would not apply equally to the different property tenures within the Estate Management Scheme area. Anecdotal evidence also suggests that, for some residents, the Scheme is a burden that restricts what they can do with their property.
- 3.16 Conversely, there may be some benefits to keeping the status quo. The Council can maintain full control of aspects such as hedges and trees for freehold properties only as part of a single Scheme, and the Scheme provides an additional level of control for maintaining the quality environment of Welwyn Garden City.

Transfer the Scheme to another organisation

- 3.17 Following the July 2015 report to Cabinet officers have, on behalf of the Council already considered and investigated the possibility of transferring the Scheme to a third party, for example Letchworth Garden City Heritage Foundation (who administer a similar scheme for Letchworth), the Town and Country Planning Association (the charitable body that helped build Letchworth and Welwyn Garden Cities) or a local group such as the Welwyn Garden City Society or Welwyn Garden City Heritage Trust. However, feedback suggests that this is unlikely to be a viable proposition. A third party

operator would have to be formally constituted and funded, and the Council would have to transfer the administration of the Scheme and potentially also lease covenants to the selected body in order for the Scheme to be effective.

Terminate the Scheme, without alternative controls

- 3.18 Were the Scheme to be terminated, without effective alternative controls in place, a range of outcomes could result.
- 3.19 It would result in a financial saving for the Council and allow a greater focus of resources towards dealing with planning application matters, which in turn can benefit the borough economically. Furthermore, a perceived burden for some homeowners would be removed and public confusion as to whether or not certain areas are covered by the Scheme would be addressed.
- 3.20 The negative outcomes would be the potential impact on the amenities and values of Welwyn Garden City. The increasing liberalisation of the planning system at a national level has the potential to have serious consequences for planned settlements such as Welwyn Garden City. Permitted development rights are extensive and growing and now enable large additions and significant alterations to be made to residential properties. The Estate Management Scheme provides an effective, if imperfect, control to this form of development. In addition, should the EMS be varied in any way, the restrictive covenants contained in the sale documents will come into effect. For the majority of properties, covenants may also be reflected within the title deeds. Consent would therefore be required under these which would be a similar amount of work as dealing with them under the EMS. As covenants outside the EMS are currently dealt with by Corporate Property it would be sensible for this responsibility to pass to them and resourced accordingly.
- 3.21 It is also anticipated that the Council could be subject of legal challenge if it pursued this option.

Replace the Scheme with Article 4 Direction

- 3.22 The replacement of the Scheme with an Article 4 Direction would bring the aims of the Scheme within the mainstream planning system and this would have a number of positives associated with it. This is because an Article 4 Direction removes permitted development rights, so that householders have to apply for planning permission to make changes to their property.
- 3.23 Firstly, and most importantly having regard to the shortcomings of the existing situation, it would bring all tenures under the same controls as well as enforcement of these matters within the mainstream planning enforcement regime. This is a well established and understood regime which would enable the Council to instigate more timely action. An Article 4 Direction could also result in a much clearer understanding for the general public. There would no longer need to be two separate applications for permission and consent as all matters would be dealt with under the planning system. Applicants would also have the opportunity to appeal a decision to the Planning Inspectorate if they so wished.

- 3.24 Potential challenges of this approach include the requirement for compliance with the National Planning Policy Framework and that the Council would still be left to deal with the challenges of properties of different tenure type. As noted above, Council decisions on applications could be appealed to the Planning Inspectorate and this has the potential to set precedents for certain types of development within the Article 4 Direction area. It would also be the case that the elements of the Estate Management Scheme that deal with trees, hedges and other landscaping would have to be retained as they cannot be controlled by an Article 4 Direction. If this is the case, these matters would still be subject to all of the difficulties which are already being experienced.
- 3.25 This approach is likely to take at least two years to be fully implemented at some significant financial cost and, in the meantime, the status quo would prevail.

Other Options

- 3.26 It may also be the case that there are other options of which the Council is yet to be made aware. This is why a consultation exercise is important in order to give the general public an opportunity to consider the options set out above, as well as any other options which may emerge.

Legal Advice

- 3.27 In considering the various options that may be available to the Council to progress this matter, specialist legal advice has been sought from Counsel. In particular advice has been given in respect of the potential to replace the existing scheme with one or more Article 4 Direction. This advice has been clear in that, if the Council wishes to convince the Lands Tribunal in the High Court that the existing Scheme should be deleted or modified, then the replacement for it should be at least as effective in achieving the aims as originally set out and, that those matters which cannot be controlled by an Article 4 Direction, should be retained within the Estate Management Scheme. The Council is advised that, in the first instance, consideration should be given to an Article 4 Direction that covers the existing Scheme area only. The reason for this is that to extend the Article 4 Direction to areas beyond this has the potential to introduce a greater number of variables, and potential objections, which could delay or derail the process. It was advised that the Council should only consider widening the Article 4 Direction once it can demonstrate that the first phase is being managed effectively, and that it is demonstrably in the public interest to do so.
- 3.28 Legal advice also suggests that the Council could consider whether an Article 4 Direction could be drafted so as to allow some limited forms of development to be permitted in some specifically identified areas, meaning that those permitted development rights would still exist. It is also noted that a design guide would be needed to accompany any Article 4 Direction, providing advice and guidance on the type of development which may normally be acceptable within the controlled area.

- 3.29 Finally, advice has been given in respect of the consultation process that would need to be undertaken. Firstly, the Council is advised to undertake an initial minimum 8 week initial consultation setting out both the detail of the preferred approach of implementing an Article 4 Direction, but also the alternative approaches which could still be considered. This consultation is needed in order to give the public a full opportunity to influence the Council's choice of solution to this issue.
- 3.30 Subject to the outcomes of this initial consultation, should the Council still consider that introducing an Article 4 Direction is the most appropriate way forward, a 12 month consultation on the proposed Article 4 Direction would then have to take place. Following this the matter would be presented to the Lands Tribunal in the High Court for consideration. Counsel has advised that this process could be truncated by seeking the agreement of the Lands Tribunal to a 'conditional modification' of the Estate Management Scheme. This would, in effect, mean that the Council would be seeking agreement to the modification of the scheme on the basis that the Article 4 Direction is successfully implemented upon the expiry of the 12 month period.
- 3.31 Finally, Counsel has advised that, once a preferred way forward has been identified, it would be most welcome if this was endorsed by Full Council. This in turn will provide additional weight to the Council's position when it is being considered at the Lands Tribunal.

Next steps and timescales

- 3.32 As is touched on in the preceding paragraphs, the proposed next step is for the Council to undertake an 8 week consultation on both the preferred option of an Article 4 Direction and the other options. This consultation would take the form of two different letters being sent to residents of Welwyn Garden City: one letter to those properties within the Estate Management Scheme area and who would be directly affected by any change, and a slightly different letter to those who are not within the Estate Management Scheme area. It is intended to write to every residential property in Welwyn Garden City. Alongside this, the consultation will be publicised in the local press and on the Council's website, and local estate agents and property professionals will also be contacted. It is anticipated that these consultations will begin by the end of this summer.
- 3.33 Once this initial consultation has been completed the responses would be reported to Cabinet along with a recommendation on the preferred way forward.
- 3.34 If an Article 4 Direction is agreed as the preferred way forward then a 12 month consultation would take place considering both the proposed Article 4 Direction area and the accompanying design guidance. Subject to the completion of this consultation, the Article 4 Direction could then be implemented and an application made to the High Court to vary the Estate Management Scheme.
- 3.35 As a further stage beyond this, the Council could then consider widening the Article 4 Direction to include other parts of Welwyn Garden City.

Other matters to consider

- 3.36 Since the report to Cabinet on this matter in July 2015 a number of initial concerns and opinions have been expressed by interested parties. These include how this matter will relate to the Local Plan, issues related to the Conservation Areas and procedural matters.
- 3.37 It is noted that there is a desire for the principles of the Estate Management Scheme to be embedded within the Local Plan for the borough. As such, a vision and objectives for Welwyn Garden City will be included within the plan when it is published. There has also been a question as to whether a proposed Article 4 Direction and the existing Conservation Areas could be combined to form a single entity. Because Conservation Areas are designated on their own merits however, they cannot be extended to supplement the Estate Management Scheme area or vice-versa.

4 Link to Corporate Priorities

- 4.1 The subject of this report is linked to the Council's Corporate Priorities 2 (to protect and enhance the environment), 3 (to meet the borough's housing needs), 4 (to help build a strong local economy) and 5 (to engage with our communities).

5 Legal Implications

- 5.1 The legal advice regarding the Estate Management Scheme is set out within the body of this report. The Council is at legal risk if it does not consult on options for the future of Scheme before pursuing any particular option.

6 Financial Implications

- 6.1 The cost of writing to all residential properties in Welwyn Garden City and advertising the public consultation through other means such as newspaper adverts is estimated to be £15,000. This will be paid from the budget previously approved of £40,000 for 2016/17.
- 6.2 The cost of implementing an Article 4 Direction, if that is ultimately considered to be the best option, is in the region of £132,000. This includes officer time and legal advice and support throughout the process including at the High Court. It should be noted that there is no charge for making a planning application for a permitted development right that has been removed by an Article 4 Direction.
- 6.3 The Planning Service will continue to administer the existing Estate Management Scheme and the properties not covered by the EMS but within the boundary of the EMS in the meantime, at an estimated cost of £80,000 - £90,000 per year (equivalent of 2 full-time equivalent staff).

7 Risk Management Implications

- 7.1 The Council has a responsibility to administer the Estate Management Scheme, but this is increasingly difficult given the different enforcement rules for freehold and leasehold properties. There is a risk management implication

if the Council does not consider alternative options. A period of consultation demonstrates that the Council is seeking to resolve the current problems with the Scheme but wants to understand the views of the community and those who are affected by the current Scheme and will be affected by any changes before pursuing any particular option.

8 Security and Terrorism Implications

8.1 There are no security or terrorism implications associated with this report.

9 Procurement Implications

9.1 There are no procurement implications associated with this report.

10 Climate Change Implications

10.1 There are no climate change implications associated with this report.

11 Policy Implications

11.1 There are no policy implications associated with this report.

12 Equalities and Diversity

12.1 An Equality Impact Assessment (EIA) has not been carried out in connection with the recommendations in this report. Please note however that the letter to all residential properties in Welwyn Garden City will include an advisory paragraph that it can be made available in alternative languages and large print version.

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Background Papers:

- Review of the Welwyn Garden City Estate Management Scheme, Cabinet, 7 July 2015