



## London Borough of Croydon

Report in the Public Interest concerning the refurbishment of Fairfield Halls and related governance arrangements

# London Borough of Croydon

## Report in the Public Interest concerning the Council's refurbishment of the Fairfield Halls and related governance arrangements

### Executive Summary

#### Background

Grant Thornton are the external auditors to the London Borough of Croydon (the Council). We are issuing this Report in the Public Interest under section 24 and Schedule 7 of the Local Audit and Accountability Act 2014.

The Council owns Fairfield Halls, an arts, entertainment and conference centre in Croydon which originally opened in 1962. By 2010, the Council had identified a need to update and develop Fairfield Halls and place it on a more sustainable footing. By 2014 the Fairfield Halls became part of the development of a new Cultural Quarter. By 2016 the need to refurbish Fairfield Halls had become urgent and the venue closed in July 2016 for refurbishment, with a planned re-opening date of June 2018 and an initial Cabinet approved investment of £30 million for the refurbishment project (the project).

The project was delivered in September 2019 (over a year late) with a final cost of £67.5 million incurred up to that date (more than double the initial budget).

Our review leading to this report arose after we issued a report in the public interest on 23 October 2020 concerning the Council's financial position and related governance arrangements. The Council has reported considerable improvements since then and is continuing to respond to the matters in that report (as detailed below) and other areas of concern the Council has itself identified. One such matter related to the historical decision making and governance relating to the refurbishment of Fairfield Halls. The Council raised their concerns with us (Grant Thornton UK LLP), as the Council's external auditor, in late December 2020. We considered the concerns raised to represent a significant risk to the value for money conclusion and commenced an initial review in January 2021. Our initial findings required further investigation, the results of which are set out here.

Following the closure of Fairfield Halls during the pandemic in 2020, the Council sought to reopen Fairfield Halls [Although the refurbishment was awarded the RIBA London Award 2021, and the Highly Commended Civic Trust Award 2021] issues relating to the building were reported to the Council. Initial surveys commissioned by the Council indicate the need for additional expenditure to rectify the reported issues. The Council considers that the additional works should have been addressed during the refurbishment and this is disputed by Brick by Brick. The Council raised concerns on the historic governance of the project and, in discussion with current officers, we identified a significant risk to the value for money conclusion.

Our initial work in 2021 identified areas for further investigation, the results of which are set out here.

This report covers the Council's decision making and governance processes in the period from June 2016 - when the decision was made to bring forward a wider regeneration scheme - up to the reopening in September 2019, and references to the Council or to individuals in particular roles during that period should be read accordingly.

#### Legal arrangements

##### *Engaging Brick by Brick to refurbish Fairfield Halls*

In June 2016, the Cabinet approved a proposal to use Brick by Brick (Croydon) Limited (Brick by Brick), its wholly owned housing development company, to bring forward elements of the College Green scheme, which encompassed a house building scheme, public realm improvements and the regeneration of Fairfield Halls. The proposal involved the transfer of land interests (not including Fairfield Halls) to Brick by Brick in order for Brick by Brick to develop residential property on them and to carry out a refurbishment of Fairfield Halls "under licence", with the financing of the works to Fairfield Halls being an estimated £30 million. It was decided that Brick by Brick would be loaned money to fund part of the refurbishment by the Council, which Brick by Brick would need to repay but would be compensated for through the profits made from the sale of 2,000 houses (built by Brick by Brick) on the College Green land transferred.

It is not uncommon to use a land transfer option for development of public land for residential housing: this route allows a public body to transfer land to a developer on terms which permit, but do not require, the developer to develop the land, with the public body instead being able to achieve its objectives by retaining a right to re-acquire the land should the development not occur. Such an arrangement may not, depending on how it is executed, engage rules around public procurement (broadly in place with a view to ensuring fair and equitable awarding of contracts, and securing value for money) because it may not involve the public body imposing enforceable obligations on the developer. This type of arrangement can be appropriate where houses are being built as there is less need for detailed specification and timing of delivery of housing, as compared to a public amenity which the public body requires to be built.

However, a decision to include the Fairfield Halls refurbishment in such a land transfer added complexity to the College Green scheme. The challenges and expertise needed to manage a complex refurbishment were very different to the challenges of managing a house building scheme and there was a lack of recognition in the Cabinet paper and minuted discussion of these differences, the risks and how these would be mitigated. While the June 2016 meeting did not explicitly use the land transfer option for Fairfield Halls, it has been suggested by the Council in contemporaneous submissions that this was the intention; this is supported by the fact that later the Council produced a draft conditional sale agreement which would (if properly executed) effect a land transfer in respect of Fairfield Halls.

Some months after the decision, in November 2016, the Council took legal advice which suggested that a land transfer arrangement as described above could work by selling the relevant land to Brick by Brick, with the Council providing lending to Brick by Brick secured with a charge over the land; prior to the land transfer, a licence would be required to enable Brick by Brick to carry out initial works, and such a licence was issued on 1 August 2016.

The legal advice showed that if the land transfer option was properly implemented, it was possible to avoid any public procurement process, although it highlighted risks. In our view these risks were significant. The key to avoiding a public procurement process, it was said was that there was no positive obligation on Brick by Brick to do the works (as the arrangement would rely on the Council's ability to take back the land if the refurbishment were not to occur), but conversely flagged that there was nonetheless a risk of challenge from other potential bidders if the Council set out a detailed specification of works which might amount to giving rise to enforceable legal obligations. It was explained that so doing might require a public procurement process; in the event, one was not carried out on the basis that there were no such enforceable obligations. The legal advice also flagged that Brick by Brick would need to act as an independent company on a commercial basis and avoid acting as if it were a department of the Council, in order for this land transfer option without a public procurement process to be workable and in line with public procurement and state aid law.

The licence issued by the Council to Brick by Brick on 1 August 2016 enabled, but did not require, Brick by Brick to carry out the refurbishment of Fairfield Halls in line with a detailed specification (the licence). The Council also made payments to Brick by Brick for the costs of the refurbishment and treated these payments as lending.

Neither the Council nor Brick by Brick have been able to provide a properly executed written conditional sale agreement (which would have been in place had Fairfield Halls been transferred to Brick by Brick in line with the land transfer option) or properly executed loan agreements covering the funds provided by the Council. Without properly executed written agreements key elements of the legal advice were not met. Further, it is our view that the Council's arrangement was at risk of challenge under procurement law as Brick by Brick was given a detailed specification of works (effectively amounting to a positive obligation to carry out the refurbishment) and the Council did not assess whether Brick by Brick was not acting as an independent company, in line with the legal advice.

In obtaining external legal advice and not fully considering or implementing that advice, it is our view that the Council failed to ensure it was acting lawfully. We have not been provided with evidence of senior statutory officers updating Cabinet formally on the legal risks emerging, considering how the emerging risks could be effectively mitigated or of the anticipated shortfall in funding (covered below) and the foreseeable implications.

In our view, it is likely that the licence did not reflect the underlying reality of the arrangements. Rather it is our view that the licence was (at least in part) intended to circumvent procurement law and competitive tendering, albeit in a way that was believed to be lawful; the licence provided that Brick by Brick was allowed, but not obliged, to carry out the works, but in our view the reality was Brick by Brick was committing itself to carrying out the refurbishment works which the Council wished to see carried out and was doing so in return for economic compensation which had been informally agreed albeit not recorded in binding properly executed contracts. As the Council was specifying the works it wished to see carried out, and the true objective of the licence was to oblige Brick by Brick to carry out those works, for the benefit of the Council, a public procurement process should have been carried out, and the entry into a licence without one did not reflect this underlying

reality and in our view is therefore likely to have been found to have been a breach of public procurement law had it been challenged in court.

Regardless of whether the arrangements were a breach of procurement law, the arrangements clearly did not allow the Council to protect its interests and secure economy, efficiency and effectiveness in its use of resources in relation to the project. In our view the eventual outcome was that the Council could not properly exercise control or oversight of the refurbishment, because Brick by Brick was not obliged to carry out the refurbishment to any particular specification and did not have assurance that it had engaged the most appropriate developer for the complex refurbishment in terms of capacity, costs or other factors (as it would have done had it carried out a public procurement process).

#### *Funding Brick by Brick to refurbish Fairfield Halls*

While it is our understanding that the project was intended to be cost neutral, the Council intended to fund the project in the short term through a loan drawdown agreement with Brick by Brick. The legal powers the Council intended to rely on would have required Brick by Brick to own the land on which it was carrying out the work, and the loans either to be secured by mortgages or subject to an agreement to oblige Brick by Brick to construct residential units on the land. While draft conditional agreement of sale and draft loan agreements are available, neither the Council nor Brick by Brick can provide properly executed written versions of these documents.

There therefore appears to be no clear contractual basis at all for the project (and we note that while it is technically possible for unsigned written contracts to give rise to enforceable legal obligations, where the parties are acting in accordance with their terms, this will not always be the case, so even in a best case scenario, with absent properly executed written contracts the Council was subject to a material risk that in the event of an action to enforce the loans, a court could find that there was no enforceable contract).

We therefore do not consider that the Council properly exercised its powers to make payments to Brick by Brick. This is a serious concern as to the Council's financial and corporate management and also calls into question the lawfulness of the Fairfield Halls payments and suggests that the Council has not made proper arrangements for securing economy, efficiency and effectiveness in its use of resources. Without properly executed written contracts, there was a material risk that the Council did not have any right (save perhaps under the law of restitution) to obtain reimbursement of the monies paid or to control its use (appreciating that, had the Council been able to control the expenditure, its approach to the application of the public procurement and state aid rules would have differed).

#### *State aid*

Without properly executed written contracts for the loan payments, and in light of the circumstances, the payments to Brick by Brick also give rise to a significant state aid risk (state aid being where the public sector gives aid which distorts cross border competition). The legal advice to the Council flagged the risk of unlawful state aid, and it is not clear that this risk was appropriately considered or managed as current officers responding on behalf of the Council have been unable to provide this consideration by their predecessors.

#### *Challenge from another local authority*

As part of the project the Council sought to apply for grant funding from the Local Enterprise Partnership, Coast to Capital, where the accountable body was another local authority. Correspondence seen indicates the other local authority raised serious concerns on how the arrangement complied with procurement rules with the Council's then senior statutory officers and the then Executive Director of Place. We do not consider that these officers properly reflected on the challenge presented by peers from another local authority and considered whether the Council's approach was reasonable.

#### *Other legal considerations – record keeping*

The absence of records documenting the rationale for decisions in relation to a significant project is a failure to keep the records required and creates legal uncertainty and risk. Throughout the project there are elements where record keeping has been insufficient:

- Documentation setting out the implementation of decisions delegated to officers was not systematically retained or stored to allow retrieval
- Financial analysis supporting decisions taken by the Cabinet is not available

The lack of formal consideration of the external legal advice, the lack of completed legal land transfer documentation and the lack of properly executed written legal arrangements covering the provision of funding to Brick by Brick is in our view a very serious matter and demonstrates fundamental failings by the Council.

## Governance

We have already raised significant concerns over the governance culture and reporting mechanisms between the Council and Brick by Brick (in the Public Interest Report published on 23 October 2020) and the PwC review of companies dated 13 November 2020 also raised concerns. The issues in respect of the oversight of the Fairfield Halls Refurbishment reflect many of these concerns.

### *Governance arrangements for Brick by Brick*

The Cabinet paper approving the establishment of Brick by Brick in March 2015, delegated governance arrangements to the then Executive Director of Place (with the holder of that post in March 2012 later becoming the Chief Executive in 2016) in consultation with the then Portfolio Holder for Homes and Gateway Services, the then Section 151 Officer and the then Monitoring Officer. The June 2016 Cabinet paper sets out the governance arrangements in place between the Council and Brick by Brick including presenting the Brick by Brick Business Plan to Cabinet and the appointment of Council nominated Board members and observers. The Brick by Brick Business Plan has been presented each February since 2017. However, there was no formal documented mechanism through which Council nominated Board members or observers reported back to the Council and therefore it is unclear how the Council sought to exercise governance over Brick by Brick through the nominated Board members or observers.

In October 2018 the then Section 151 Officer provided the then Chief Executive with proposed improved governance arrangements for Brick by Brick. A draft terms of reference for a Brick by Brick monitoring group was proposed at the first meeting in April 2019 with final terms of reference being agreed at the September 2019 meeting some four years after the original decision to establish Brick by Brick. This timeline demonstrates a lack of urgency to implement appropriate governance arrangements over Brick by Brick which was in our view ultimately the responsibility of the then Chief Executive as Head of Paid Service with responsibility for establishing proper arrangements.

### *Governance arrangements for the Fairfield Halls refurbishment project*

Initially project oversight was through the Council's Growth Board from 2015 when this was a Council run project. After the project was transferred to Brick by Brick in June 2016 reporting continued to the Growth Board until May 2017. In May 2017, the Fairfield Programme Board (the Board) was set up to provide oversight of the project. In structure, the terms of reference should have been sufficient to manage the project with an escalation route to the Growth Board which itself had escalation to the Corporate Leadership Team or other Council process as it 'sees fit'.

From a wider Council perspective, the governance of the project was not in our view effective (as demonstrated by financial position of the project, set out below) as the only formal reporting to Members was through the Brick by Brick Business Plan which only included high level details on the project, there were no documented mechanism for Council appointees/observers to report back and the Member steering group was not set up until after the Fairfield Halls reopened.

The Scrutiny and Overview Committee (the Committee) was active in attempting to scrutinize the project, its progress and related costs. Reports presented to the Committee, in our view, did not highlight the known increase in costs.

### **Financial position of the project**

The June 2016 Cabinet decision referred to a £30 million investment in the project; we have found that the final expenditure on the project was £67.5 million. Despite the June 2016 Cabinet report referring to a financial appraisal, the Council has been unable to provide any such financial appraisal without which we are unable to conclude whether the project additional spend in excess of the budget was caused by inadequacies in the original budget setting or in controlling costs or in changes in the scope of the work during the project. With no subsequent Cabinet decision recorded on the project budget we consider the original Cabinet-approved budget to be £30 million. During the project there were variations agreed (although not at Cabinet level), which is not unusual for a complex capital project. The variations and expected additional expenditure were reported through the Fairfield Programme Board and the project additional spend was reported to the Growth Board. We have not been able to identify explicit formal reporting to the Cabinet of the project additional spend. Allowing the project costs to more than double from the original budget without explicit formal reporting to the Cabinet represents a fundamental failing by the Council.

[The idea that variations to the project were agreed by the Council also adds to the likelihood that Brick by Brick was obliged to carry out the project, at odds with the Council's approach to the application of the public procurement rules.]

In the absence of the original financial appraisal our understanding is that the project was intended to be cost-neutral to the Council with Brick by Brick using expected profits from the College Green scheme to cover the costs of the project. Under section 123 of the Local Government Act 1972 the Council has a duty to achieve best value in land disposals. We have not

been able to obtain the Council's assessment of whether £30 million for the land provided to the College Green projects represent best value and therefore we cannot conclude on whether the Council achieved this duty.

The Council funding (itself borrowed from the Public Works Loans Board) provided to Brick by Brick was intended to be loan funding, repayable to the Council. The Council did not charge Minimum Revenue Provision (MRP) on this borrowing as Brick by Brick was charged a higher interest rate than the Council was paying for the borrowing with the difference being intended to offset the statutory MRP charge. As there are no properly executed written loan agreements it is not definitive that the Council would have been able to enforce any right to recover the loan or its related interest and there is no off set for the MRP charge.

Regardless, the Council has written off the loans receivable of £61.3 million and the accrued interest of £9.1 million (noting that in the group accounts the entries would be subject to consolidated processes) and will need to charge MRP, which we estimate to be an average of £1.5 million per annum adding to the financial pressures already faced by the Council.

### **Council action since September 2019**

Fairfield Halls reopened in September 2019 and was closed during the pandemic in 2020. As the Council sought to reopen Fairfield Halls issues relating to the building were reported. Initial surveys commissioned by the Council indicate there is a need to spend further public monies to rectify the issues identified. The Council considers that the additional works needed should have been addressed during the refurbishment and this is disputed by Brick by Brick. A properly executed written agreement obliging Brick by Brick to carry out the work would have clarified responsibilities in this dispute and the absence of such a properly executed written agreement (as noted above) makes a resolution more challenging. The Council is left with the need to spend further public monies on the Fairfield Halls.

The Council has responded to the previous reports (in the public interest published on 23 October 2020 and the PwC review of companies dated 13 November 2020) including reporting to Cabinet in November 2020, February, July and November 2021 on the actions taken to address governance concerns relating to Brick by Brick and other Council companies. The latest report to Full Council on 13 December 2021, the Council reported that it had implemented 62 of the 99 actions planned in response to the first report in the public interest. The actions taken by the Council includes addressing the governance arrangements in relation to Brick by Brick and the processes for loan agreements. The commentary in this report reflects the arrangements that were in place up to September 2019. There has however been significant turnover in the Council's senior officers and Portfolio Holders since the period this report covers.

In reaching our view on the legality of the arrangement we discussed with and challenged the current Senior Statutory Officers who reviewed the position.

The Council has, in light of the matters reported upon here and their views as set out in this report, decided to account for the expenditure on the project as if it had been direct capital expenditure and has proposed amendments to the draft 2019/20 financial statements which in their view correct the accounting for this arrangement. We understand that the Council is now also in the process of considering future options for Brick by Brick, while in the meantime making other changes to the related governance arrangements.

### **Conclusion**

The Fairfield Halls refurbishment project was a complex project which was delivered late and with significant additional spend beyond the amount approved by Members; the entirety of the project spend has now been accounted for as capital expenditure. The Council's historical arrangements failed to ensure the legality of the arrangements for the project and allowed governance gaps which prevented monitoring of the project, oversight, and wider scrutiny and challenge that may have allowed corrective action to have been taken. Throughout the project there were individuals with both the knowledge of the many issues with the project and who had duties and responsibilities which we would expect to require action to address the known issues. The lack of appropriate action, in our view, represents a failure to discharge the duties expected from a small group of senior officers (the then three Senior Statutory Officers and the then Executive Director of Place). This group reported to the then Portfolio Holders (the then Portfolio Holders for Homes and Gateway Services, for Finance and Resources and the Leader) who were either not briefed by officers and should have requested briefings on the project given what they appeared to know or did not take effective action in response to concerns raised by the officers.



## Recommendations

This report makes a number of recommendations for the Council to address, with the statutory recommendations highlighted in bold.

- R1 The Chief Executive supported by the Monitoring Officer and the Section 151 Officer should ensure that Cabinet papers for major projects set out clearly**
- R1.1 the legal powers to enter into a particular arrangement and attendant risk**
  - R1.2 how the Council can protect its interests and secure economy, efficiency and effectiveness.**
- R2 The Monitoring Officer should ensure that**
- R2.1 contracts are properly executed before entering into arrangements with third parties**
  - R2.2 the properly executed documents are stored robustly to allow future scrutiny.**
  - R2.3 key requirements underpinning the legal advice are in place before progressing with the arrangement**
- R3 The Monitoring Officer should ensure that where legal advice changes after a Cabinet decision that the consideration of the implications of the changes is documented and where the Monitoring Officer considers additional legal risks are identified that the Cabinet is updated on the impact on the original decision made.**
- R4 The Section 151 Officer should ensure that prior to making payments to third parties that appropriate legal documentation is in place such as a properly executed contract or a properly executed loan agreement**
- R5 The Monitoring Officer and Section 151 Officer should ensure that arrangements are in place to properly consider public procurement rules and UK obligations on subsidy control rules before entering into arrangements.
- R6 The Chief Executive, Monitoring Officer and Section 151 Officer need to consider how to respond appropriately to challenge on decisions and be prepared to take corrective action where necessary.
- R7 The Chief Executive should improve record keeping arrangements so that**
- R7.1 the records supporting key decisions including financial analysis are maintained**
  - R7.2 a standard approach to record keeping with monitoring of which decisions have been implemented**
  - R7.2 tolerances are established for reporting back changes to Cabinet**
- R8 The Chief Executive, as Head of Paid Service, should ensure appropriate governance arrangements are implemented in a timely manner particularly for strategic developments such as Brick by Brick including where appropriate that there is clear guidance for nominated representatives on the expectations of the role including reporting back to the Council
- R9 The Chief Executive should work with the Leader to continue to embed**
- R9.1 a clearly understood distinction between the different roles and responsibilities of Members, officers and representatives of entities akin to Brick by Brick.**
  - R9.2 clear responsibilities for officers and Portfolio Holders in challenging reports presented to Cabinet and other committees for balance, accuracy and consistency in terms of knowledge**
- R10 The Chief Executive should review the terms of reference for officer and member/officer boards that oversee significant projects and capital/revenue expenditure and clarify the escalation routes for significant additional expenditure in excess of the budget
- R11 The Section 151 Officer should ensure financial reporting on significant capital projects is enhanced so that**
- R11.1 a clear agreed budget for the project is identified and the underlying financial analysis is maintained**
  - R11.2 a clear agreed project expenditure amount can be reported through appropriate governance processes**
  - R11.3 where there are changes in the original financial assumptions that there is an assessment on the project's financial viability with appropriate reporting**
  - R11.4 the revenue impact of any changes in the capital project are addressed in future budget setting**
- R12 The Chief Executive should put in place arrangements to consider inherent conflicts of interest for executive officers.

## Full Report

### Introduction

Grant Thornton are the external auditors to the London Borough of Croydon (the Council). We are issuing this Report in the Public Interest under section 24 and Schedule 7 of the Local Audit and Accountability Act 2014.

We issued a report in the public interest on 23 October 2020 concerning the Council's financial position and related governance arrangements. The Council has continued to respond to the matters in that report (and the PwC review of companies dated 13 November 2020). The Council has reported progress in implementing agreed actions to Cabinet in November 2020, February, July and November 2021. The December 2021 report to Full Council set out that the Council has implemented 62 of the 99 actions planned. The actions taken by the Council includes addressing the governance arrangements in relation to Brick by Brick and the processes for loan agreements.

Fairfield Halls closed in 2020 during the pandemic, when the Council sought to reopen Fairfield Halls issues related to the building were reported. Initial surveys commissioned by the Council indicate there is a need to spend further public monies to rectify the issues identified as well as matters related to the historical decision making and governance relating to the refurbishment of Fairfield Halls. The Council discussed their concerns with Grant Thornton, as the Council's external auditor, in late December 2020. We considered the matters raised represented a significant risk to the value for money conclusion and commenced an initial review in January 2021. Our initial findings required further investigation, the results of which are set out here.

### Background and chronology

The Council owns Fairfield Halls, an arts, entertainment and conference centre in Croydon which originally opened in 1962. In March 2013 the Council adopted the Fair Field masterplan as interim planning guidance with the aim of creating a phased long term framework for delivering the transformation of the area to be:

'Croydon's cultural and learning centre; an innovative and inspiring area with a lively and sustainable mix of residential, cultural, educational, commercial uses and a well-connected and high quality public realm.'

The masterplan included improvements to the setting of the Fairfield Halls and its immediate environment and referred to a £27 million refurbishment to be done by 2016. Initial preparatory work on the design was undertaken by the Council including an asbestos survey. In September 2014, the Council's Cabinet approved the development of a Cultural Quarter, including the integrated College Green which encompassed a house building scheme, public realm improvements and the regeneration of Fairfield Hall which by then had a projected capital budget of £33.75 million.

In January 2015, the officer led Growth Board was set up to oversee the monitoring and delivery of capital projects linked to regeneration which at that time included the Fairfield Hall refurbishment. The Council ran a competitive process and appointed a contractor to undertake the Fairfield scheme development and design which included the development and design of, but not physical construction and completion of, the Fairfield Halls refurbishment.

The need to refurbish the Fairfield Halls became urgent and in June 2016, the Council approved a proposal for the Council's wholly owned company, Brick by Brick (Croydon) Limited, to bring forward elements of the integrated College Green scheme which included:

'a £30 million package of improvement works to Fairfield Halls, a c200,000sqft new college/university building and approximately 2,000 new residential units alongside new public realm, retail and leisure space'.

The proposals involved a transfer of land interests (not including Fairfield Halls) to Brick by Brick for development as residential property, with Brick by Brick to complete the £30 million package of improvement works to Fairfield Halls under a licence. In Brick by Brick's view, the exact costs were intended to be confirmed at a later stage however this was not documented in the Cabinet paper and there were no further documented Cabinet decisions on the approval of the budget for the refurbishment of Fairfield Halls. We therefore consider the Council's properly approved budget to have been set at £30 million.



In July 2016, the venue closed for refurbishment with an original completion date of June 2018. The decision to close and deliver the refurbishment quickly rather than a phased closure over a longer time period was subject to political debate. A licence was issued on 1 August 2016, enabling Brick by Brick to enter the property in order to carry out the works. This arrangement amounted to commissioning by the Council was not subject to a public procurement process. We do not consider that this structure, analysed below under 'Legal arrangements', was satisfactory.

By May 2017, issues had emerged that presented a risk to the successful delivery of the project for example the discovery of additional asbestos and Croydon College no longer being in a position to sell a portion of land to the Council. The reduction in land impacted the number of residential units Brick by Brick had planned which impacted the financial viability of the wider College Green scheme.

Brick by Brick commissioned the main works contractor for the refurbishment with works commencing in September 2017. This commissioning was also not subject to a public procurement process, as Brick by Brick was not deemed to be subject to the public procurement rules.

From 1993, a charity had operated the venue with a grant from the Council. In July 2016, the charity went into administration and the Council needed to secure a new operator. A separate exercise was undertaken by the Council, as a public procurement, and a new operator for the Fairfield Halls was appointed in June 2017. By November 2017 the new operator expressed concerns about the delays would impact on the operator's ability to deliver its services and generate the necessary commercial revenues previously agreed with the Council. In addition, the operator had a number of requirements that needed to be factored into the refurbishment. The delays impacted the operator with the Council making a payment of £1.7 million to the operator in respect of the delays.

By the end of 2017 the project had run into a number of major problems that changed the risk profile of the project. The original engineering consultant appointed by the Council left the project and was in dispute with Brick by Brick, Croydon College were no longer part of the scheme with a significant impact on the housebuilding element of the wider College Green scheme (which had initially factored in a purchase of land from Croydon College which would be used to build residential property for sale, being one of the key sources of projected profit for Brick by Brick), costs were escalating due to additional changes in the work required and a new engineering consultant had to be procured. At this point delivery of the project was delayed to November 2018.

Letters between Brick by Brick and the Council in October 2018 outlined that the College Green expenditure projections exceeded income by £28.8 million with the Fairfield Halls expenditure figure being £51.6 million and a revised deadline of June 2019 was agreed. This deadline was again revised to September 2019 which was met after further additional costs were incurred to accelerate the works. We do not consider that these increases in costs were appropriately escalated or approved within the Council, and this is covered in the 'Financial governance' section below.

The venue re-opened in September 2019 and was closed during the pandemic in 2020. Although the refurbishment was awarded the RIBA London Award 2021, and the Highly Commended Civic Trust Award 2021,] as the Council sought to reopen Fairfield Halls later in 2020, issues relating to the building were reported. Initial surveys commissioned by the Council indicate there is a need to spend further public monies to rectify the issues identified. The Council considers that the additional works needed should have been addressed during the refurbishment and this is disputed by Brick by Brick,

### **Background context**

The matters within this report in the public interest date back a number of years and key people are no longer in role at the Council and have therefore not been able to access their files from the time. We have relied on records the Council has retained but recognize the limitations in this.

During the project's time frame there were a number of significant matters that the Council was responding to including the September 2017 report from Ofsted assessing children's services as inadequate, other complex programmes and the wider financial pressures experienced by the Council (covered in the Public Interest Report published on 23 October 2020). The Chief Executive also had a lead operational role in relation to the response to the tram crash in November 2016. The Council had been under considerable pressure.

For full disclosure we set out Grant Thornton's position. Grant Thornton was the external auditor of the Council over the period of the matters in this report and conducts the audit under the Local Audit and Accountability Act 2014. The matters of concern identified in this report developed over the years and the exact picture only became clear once the matter was identified as a significant risk to the value for money conclusion and work was undertaken to address that risk.

Where a local authority has a group structure the consideration of value for money would include the local authority's governance arrangements over its group structure. Grant Thornton was also the external auditor of Brick by Brick (part of the Council's group structure) until 31 March 2019 with the audit conducted entirely separately and by different personnel under the Companies Act regime. It is common practice that audit firms working in the public sector have commercial clients and for the parent and subsidiary auditors to be from the same audit firm. As the group auditor, the Grant Thornton team acting as auditor under the Local Audit and Accountability Act 2014 had access to the audit working papers of the Grant Thornton team acting as Companies Act Brick by Brick auditor for the limited purpose of the consolidation of the group accounts. Audits under the Companies Act are carried out to a different standard than audits under the Local Audit and Accountability Act 2014 in particular the value for money consideration is not a requirement of an audit under the Companies Act. That regime does not call for the same approach as for a public sector audit. [Brick by Brick's auditors would not be expected to pick up or give rise to the concerns raised in this report given the different approach of a Companies Act audit and the particular circumstances including that the parent was the company's sole funder and that the Council had given third party acknowledgement of the loans such that their auditors would not expect to call for the executed documentation.]

Finally, by way of introductory comment, we note that in this report, references to 'officers' are to the Council's staff, while members or Portfolio Holders refer to elected members (Councillors).

## Legal arrangement

### Legal arrangements – engaging Brick by Brick to refurbish Fairfield Halls

First, we consider the legal arrangements for the refurbishment of Fairfield Halls.

It is incumbent upon local authorities, including the Council, to have arrangements to secure value for money. They are in addition subject to the Public Contract Regulations 2015, which govern public sector procurement in England & Wales. Broadly, the effect of these regulations is that when awarding a relevant contract that is subject to the regulations (i.e. one which is over certain financial thresholds), the local authorities are required to advertise that contract (previously on the Official Journal of the European Union, and now on the UK's new Find a Tender Service) and then to follow certain, specific procedures for choosing to whom to award the contract, broadly with a view to ensuring fair and equitable awarding of contracts, and securing value for money. The nature and granularity of the specific procedures depends on the subject matter and value of the contract, with the default for relevant contracts being that a competitive tender process must be carried out, unless an exemption applies which enables an authority to use another route. We refer to a process that is subject to the regulations as a 'public procurement process'.

In June 2016, the Cabinet approved the proposal to use Brick by Brick to bring forward elements of the College Green scheme including the refurbishment of Fairfield Halls. The proposal involved the transfer of land interests (not including Fairfield Halls) to Brick by Brick in order for Brick by Brick to develop residential property on them, and to carry out a refurbishment of Fairfield Halls "under licence", with the financing of the works to Fairfield Halls being an estimated £30 million. The proposal intended that Brick by Brick would be loaned money to fund part of the refurbishment by the Council, which it would need to repay, but would be compensated for the refurbishment through the profits made from the sale of 2,000 houses (built by Brick by Brick) on the College Green land transferred.

The Council's records show that it was thought that this structure would allow the Council to dispose of the College Green land in return for housebuilding and to bring forward the refurbishment of Fairfield Halls, without a public procurement process. It is not unprecedented to use a land transfer arrangement such as this and in November 2016, four months after the original decision, the Council took legal advice which suggested that this type of land transfer arrangement could work (and be lawful) as follows:

- The Council would sell relevant land to Brick by Brick;
- The Council would be able to avoid *any* public procurement process by avoiding imposing enforceable obligations on Brick by Brick to develop the land into residential property or to refurbish Fairfield Halls (instead retaining control through an ability to take back the land if the work was not carried out). Further control could be exercised by securing lending from the Council to Brick by Brick with a charge over the land. The lack of an enforceable obligation was key to avoiding requirements to carry out a public procurement.
- There was a risk that other potential bidders or others might challenge the arrangement, arguing that there was in fact a legally enforceable obligation on Brick by Brick to carry out the development or the refurbishment, which would mean that a public procurement process should have been carried out. This was said to be a particular risk if the Council set out a detailed specification of works or otherwise exercised management control of the works.

- Further, Brick by Brick would need to avoid acting as if a department of the Council, and should act independently and on a commercial basis (because, referring implicitly to earlier legal advice given on the establishment of Brick by Brick, it followed if Brick by Brick were acting as if a department of the Council, it might *itself* need to carry out a public procurement process when engaging sub-contractors for work including the project).

We refer to this as the “land transfer option”.

It is not uncommon to use a land transfer option for development of public land for residential housing: this route allows a public body to transfer land to a developer on terms which permit, but do not require, the developer to develop the land, with the public body instead being able to achieve its objectives by retaining a right to re-acquire the land should the development not occur. Such an arrangement may not, depending on how it is executed, engage rules around public procurement, because it may not involve the public body imposing enforceable obligations on the developer. This type of arrangement can be appropriate where houses are being built as there is less need for detailed specification and timing of delivery of the houses, as compared to a public amenity which the public body requires to be built. However, a decision to include the Fairfield Halls refurbishment would add complexity to the College Green scheme.

Although the June 2016 meeting did not in our view decide explicitly to use the land transfer option for Fairfield Halls, it has been suggested by the Council and then officers in contemporaneous submissions that this was the intention; this is supported by the fact that later, the Council produced a draft conditional sale agreement, which would (if properly executed) effect the land transfer, although neither the Council nor Brick by Brick have been able to provide a properly executed written copy of it, and the land was not transferred. If it was the Council’s intention to use the land transfer option for Fairfield Halls, there was a lack of recognition that the challenges and expertise needed to manage the complex refurbishment were very different to the challenges of managing a house building scheme. The downside risks of adding a complex refurbishment to a housebuilding scheme were not appropriately assessed.

As set out in the legal advice taken by the Council, the land transfer option did not permit, if it was to avoid the need for public procurement, the Council to obligate the developer (Brick by Brick) to deliver a defined specification of works. Without a defined specification of works, the Council could not insist that the intended improvements and developments were completed or require them to be completed to a particular standard. In our view the restrictions of the land transfer option were unsuitable for a complex refurbishment of this nature.

Further, it is as noted above unclear whether the Council intended to use the land transfer option to enable Brick by Brick to carry out the development of Fairfield Halls, as well as the wider development. While the June 2016 Cabinet minutes refer to a wider land transfer for the College Green development, the Fairfield Halls venue was not included in that land transfer but was instead referred to as to be developed by Brick by Brick “under licence” in the Cabinet Report considered at that meeting (although as noted above the Council did later prepare sale documentation).

In line with this, the Council issued a Licence for Access to Carry out Works (the licence) for the project, dated 1 August 2016. While this licence does not reflect the land transfer option discussed in the legal advice, it does reflect a preliminary step outlined in the legal advice (to enable initial works ahead of a land transfer). This appears to be the licence referred to in the June 2016 Cabinet Report.

The licence permits Brick by Brick to enter Fairfield Halls to carry the works set out in a detailed specification in the accompanying schedules and includes a clause that allows the works to be extended beyond the schedule where this is agreed between both parties; the licence does expressly not oblige Brick by Brick to carry out the project and did not cover the funding arrangements for the project. We recognize therefore that there is again an argument that this approach does not engage the public procurement rules, because it does not impose enforceable obligations on Brick by Brick (which could trigger a public procurement process). Our view however is that taken in the round, this did not reflect the underlying reality, as set out below.

As a result of the use of the licence:

- The Council was not properly able to exercise control or oversight over the refurbishment as it would have been had this been under a service contract.
- The arrangement was at risk of challenge because Brick by Brick was given a detailed specification of works, which the legal advice had suggested might make the land transfer option subject to challenge (because it might be viewed in the round as giving rise to an enforceable obligation which would then have made the arrangement subject to a public procurement process).

- The Council did not have assurance that it had engaged the most appropriate developer in terms of capability, costs or other factors, which it would have had, had it conducted a public procurement process.

We refer to the licence arrangement that was pursued instead of the land transfer option as the “**development licence option**”.

The November 2016 legal advice had also ruled out other methods of compliance with procurement law noting that:

- Brick by Brick was a commercial company that did not qualify for the “Teckal’ exemption, that may have allowed works to be legally awarded to a company which is essentially a Council entity without a public procurement process, where it is treated as equivalent to an internal arrangement.
- There were no unique technical characteristics that would prevent other developers doing the work (which would again mean that no public procurement process was required).

The November 2016 legal advice had also flagged, as above, that Brick by Brick would need to avoid acting as if a department of the Council, and should act on a commercial basis – that is, as an independent third party (because, if Brick by Brick were acting as a department of the Council, it might itself need to carry out a public procurement process when engaging sub-contractors for the refurbishment). In considering whether Brick by Brick was acting as an independent third party we consider that, appreciating that Brick by Brick has significant discretion as a commercial company, the following factors should have challenged the Council’s view of Brick by Brick’s independence in line with the legal advice obtained:

- An independent company would be very unlikely to enter into an arrangement to deliver a complex refurbishment project without the protection of properly executed written contract to ensure the company received payment for the work undertaken, and to manage the relationship between it and the commissioning body (for example in relation to disputes)
- The Council would be very unlikely to provide significant funding to an independent company without a legal arrangement being in place to safeguard public monies

Brick by Brick is of the view that there was contextual assurance that it would be paid based on the discussions, verbal assurances and intent of the Council through the draft agreements and the fact the Council processed and paid contractor and consultant invoices through the financial management arrangement with Brick by Brick. In addition Brick by Brick is of the view that as the Council is ‘its one hundred percent shareholder... the ultimate implications of any detriment to Brick by Brick arising from there being no signed contract with the Council would fall upon the Council’. Brick by Brick’s views show how it satisfied itself of its responsibilities. However the Council’s legal advice was that for the proposed land transfer arrangement to be lawful the Council needed to ensure Brick by Brick acted as an independent company and we remain of the view that the independence of Brick by Brick is open to challenge from the Council’s perspective, as there were no properly executed written contract or loan documents and therefore the Council has not ensured that its own legal advice was followed, or that it could secure value for money.

In obtaining external legal advice and not acting on that advice, it is our view that the Council failed to ensure it was acting lawfully. We can find no evidence of senior statutory officers updating Cabinet formally on the legal risks emerging, consideration of how the emerging risks could be effectively mitigated or of the anticipated shortfall in funding and the foreseeable implications.

In our view, it is likely that the licence did not reflect the underlying reality of the arrangements. Rather, it is our view that the arrangements were (at least in part) intended to circumvent procurement law and competitive tendering, albeit in a way that was believed to be lawful; the licence provided that Brick by Brick was allowed, but not obliged, to carry out the works, but in our view the reality was that Brick by Brick was committing itself to carrying out the refurbishment works which the Council wished to see carried out and was doing so in return for economic compensation which had been informally agreed albeit not recorded in binding contracts, so a licence which purported not to place enforceable obligations on Brick by Brick to carry out the refurbishment did not reflect this reality. As the Council was specifying the works it wished to see carried out, and the true objective of the licence was to oblige Brick by Brick to carry out those works, for the benefit of the Council, a public procurement process should have been carried out, and the entry into the licence without one would in our view be likely to have been found to have been a breach of public procurement law had it been challenged in court..

(While the land transfer option was not in the end pursued for Fairfield Halls, we note that the mere entry into the draft conditional sale agreement, which would have effected the land transfer option, would not necessarily have meant that there was no breach of public procurement law; the Council’s legal advice in November 2016 highlighted (as set out above) that with the land transfer option there would be a risk that other potential bidders or others might challenge the arrangement,

arguing that there was in fact a legally enforceable obligation on Brick by Brick to carry out the development, which would mean that a public procurement process should have been carried out.)

Further, regardless of whether the arrangements were a breach of procurement law, the arrangements clearly did not allow the Council to protect its interests and secure economy, efficiency and effectiveness in its use of resources in relation to the project: even if it had been clearly in compliance with public procurement law, the licence arrangement meant that the Council did not have control over the budget (see further below), specification or delivery of the project, as would have been appropriate for a project of this nature.

While Brick by Brick did itself carry out a competitive procurement process when appointing its own contractors, this was not one in compliance with the Public Contracts Regulations: the issue of whether Brick by Brick itself should have carried out a *public* procurement process when engaging contractors is outside the scope of this public interest report.

### **Legal arrangements – funding Brick by Brick to refurbish Fairfield Halls**

We have also considered the basis on which the Council funded the project (which was not covered in the licence).

#### *Power to lend*

The Council intended to fund the project in the short term through a loan drawdown agreement with Brick by Brick. The Council has relied on two powers to make the payments to Brick by Brick: Section 3 of the Local Authorities (Land) Act 1963; and Section 24 of the Local Government Act 1988. We do not consider either to have been available to the Council in the circumstances.

For the Council to advance a loan to Brick by Brick in accordance with section 3 of the Local Authorities (Land) Act 1963 for Brick by Brick to develop land, Brick by Brick would need to own the land on which it was carrying out the work, and the loans would need to be secured by mortgages. Individuals involved at that time assert that there were legally executed documents. However, while drafts of each of a Conditional Agreement of Sale and loan agreement have been provided, and this power may have been relevant had these been properly executed, neither the Council nor Brick by Brick have been able to provide properly executed written contracts. We do not therefore consider that the Council properly exercised this power to make payments to Brick by Brick.

For the Council to advance a loan to Brick by Brick in accordance with section 24 of the Local Government Act 1988 the Council would need to have had agreements in place which legally obliged Brick by Brick to construct residential units as part of the arrangement. Whilst this intention is clear as part of the wider College Green scheme, again, without properly executed written legal documentation there is no evidence that monies lent for the Fairfield Halls refurbishment were lent for the purpose of constructing residential property, and so no evidence that this power was available to the Council in respect of Fairfield Halls. We do not therefore consider that the Council was able to rely on this power to make payments to Brick by Brick.

Setting aside the legal powers which could have been deployed to fund the project, there appears to be no definitive contractual basis at all for the payments, since no properly executed written relevant loan agreements have been found. While it is possible for unsigned contracts to give rise to enforceable legal obligations, where the parties act in accordance with their terms, this will not always be the case, meaning that at best the Council was subject to a material risk that in the event of an action to enforce the loans, a court would find that there were no enforceable obligations. It therefore appears that very substantial amounts of money have been expended by the Council without any formal written basis at all, and without the Council having any right to exercise control and oversight over the use of those monies or (save perhaps under the law of restitution) to obtain reimbursement of those monies, unless a court were to find that, notwithstanding the lack of proper execution, the draft loan agreements had given rise to enforceable obligations. Representations from the then section 151 officer state that the terms of lending and interest rates were agreed at the time. While the then Leader and then Portfolio Holder for Finance and Resources have contended that there were appropriate protections and financial controls in place at all times for the funds, without properly executed written loan agreements the Council's legal position is at best open to challenge.

Even if the Council had had the statutory powers to make the payments, there appear to be no formal documents in which the Council has clearly taken a decision to make the Fairfield Halls payments and recorded its reasons and legal basis for its decision. This is a serious concern as to the Council's financial and corporate management and also calls into question the lawfulness of the Fairfield Halls payments and suggests that the Council has not made proper arrangements for securing economy, efficiency and effectiveness in its use of resources.



### *State aid*

The payments to Brick by Brick which should have been pursuant to loan agreements which were not completed also give rise to a significant state aid risk (state aid being where the public sector gives aid which distorts cross border competition, now replaced in UK law by the new subsidy control regime).

We note that the land transfer option also engaged a risk of being unlawful state aid, as flagged in the legal advice taken by the Council, and it is not clear that this risk was appropriately considered or managed.

It was reasonable to expect the senior statutory officers of the Council to have documented their consideration of how to fund a shortfall in funding for the Fairfield Halls project (flagged in the November 2016 advice as a particular state aid risk) and how to ensure compliance with state aid rules. Current officers have been unable to provide this consideration by their predecessors.

### *Challenge from another local authority*

As part of the project the Council sought to apply for grant funding from the Local Enterprise Partnership, Coast to Capital, where the accountable body was another local authority. We have seen correspondence dated March 2018 between officers of that local authority and the Council's then Monitoring Officer, then Chief Executive and then Section 151 Officer where the legal basis of the arrangement was challenged. Despite assurances from the Council's then Monitoring Officer that they were confident in the Council's approach, the conclusion from the other local authority was:

'The Accountable Body is therefore unable at this time to provide Coast to Capital with the assurance in relation to the scheme. Passing monies to an arm's length third party in the absence of a written contract and/or a compliant procurement process is inconsistent with Coast to Capital's Assurance Framework and the national assurance framework.'

The correspondence references discussions with the Council's then Chief Executive before agreeing a meeting with the Accountable Body involving the Council's then Section 151 Officer, the then Executive Director of Place and a representative of the then Monitoring Officer.

The serious concerns expressed by another local authority reflect our concerns regarding the legal powers being used, how the arrangement was compliant with procurement regulations and the absence of a properly executed written contract. From the correspondence we have seen it is clear that the then senior statutory officers and the then Executive Director of Place were aware of the other local authority's concerns. The situation was resolved through providing the grant to the Council who then provided the grant to Brick by Brick and through the Council providing a letter from its external legal advisors. The letter highlights the lack of enforceable obligation on Brick by Brick to undertake the work and does not address the absence of a signed written contract. We consider it would be reasonable to have expected these officers to reflect further on the informed challenge presented by peers from another local authority and consider whether the Council's approach was reasonable. Representations received from the then section 151 officer express the view that on the basis that the grant monies were received the Council's approach was reasonable. Our view continues to be that the level of challenge and concerns raised were significant and the Council could have taken the opportunity to reflect further on their own arrangement at that stage. We have not seen any evidence that these officers reconsidered the Council's approach.

### **Other legal considerations**

#### *Minimum Revenue Provision*

The Council is required by statute to make a prudent provision for the repayment of its debt and to have regard to Department for Levelling Up, Housing and Communities' guidance in calculating the Minimum Revenue Provision (MRP) and to publish its policy annually. (Statutory guidance issued under section 21 (1A) of the Local Government Act 2003 and the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003). As we reported in our 23 October 2020 Report in the Public Interest, the Council made changes to its 2019/20 MRP policy in respect of how much MRP is charged for borrowing related to loans to third parties. The policy means that no MRP has been set aside for the borrowing amounts related to the project.

To comply with state aid rules the draft loan agreements set out a commercial interest rate for Brick by Brick to pay. The Council's funding to Brick by Brick relied on the Council borrowing from the Public Works Loans Board (PWLB). PWLB charge the Council a lower interest rate than the commercial rate the Council charged to Brick by Brick. The Council's argument was that the difference in interest rates offsets the required MRP. The absence of properly executed written loan agreements means that the Council's right to receive interest on the funding provided to Brick by Brick is at best questionable and therefore



the borrowing related to the project requires MRP to be set aside. As the Council was not providing MRP against the borrowing in respect of its own asset, it is our view that the Council was likely breaching the statutory guidance.

Following discussion with the Council on our findings, the Council is now recording the project expenditure as direct capital expenditure. As a result, the Council has agreed to charge MRP on the borrowing related to the project from 2020/21. This is the year after the refurbishment reopened which is in line with the Council's existing policy and would appear to meet the requirements of the statutory guidance.

#### *Record keeping*

The Information Commissioner's Office "Section 46 Code of Practice – records management" issued under Section 46 of the Freedom of Information Act 2000 states 'Authorities should ensure they keep records they will need for business, regulatory, legal and accountability purposes' and that 'Authorities should define how long they need to keep particular records, should dispose of them when they are no longer needed and should be able to explain why records are no longer held'. The record keeping requirements of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulation 2012 and the Openness of Local Government Bodies Regulations 2014 are also likely to have applied.

The absence of records documenting the rationale for decisions in relation to a significant project is a failure to keep the records required and creates legal uncertainty and risk. Throughout the project there are elements where the Council's record keeping has been insufficient:

- Delegated decision implementation documentation is not systematically retained or stored to allow retrieval
- Financial analysis supporting decisions taken by the Cabinet is not available

#### **Recommendations**

**R1 The Chief Executive supported by the Monitoring Officer and the Section 151 Officer should ensure that Cabinet papers for major projects set out clearly**

**R1.1 the legal powers to enter into a particular arrangement and attendant risk**

**R1.2 how the Council can protect its interests and secure economy, efficiency and effectiveness.**

**R2 The Monitoring Officer should ensure that**

**R2.1 contracts are properly executed before entering into arrangements with third parties**

**R2.2 the properly executed documents are stored robustly to allow future scrutiny.**

**R2.3 key requirements underpinning the legal advice are in place before progressing with the arrangement**

**R3 The Monitoring Officer should ensure that where legal advice changes after a Cabinet decision that the consideration of the implications of the changes is documented and where the Monitoring Officer considers additional legal risks are identified that the Cabinet is updated on the impact on the original decision made.**

**R4 The Section 151 Officer should ensure that prior to making payments to third parties that appropriate legal documentation is in place such as a properly executed contract or a properly executed loan agreement**

**R5 The Monitoring Officer and Section 151 Officer should ensure that arrangements are in place to properly consider public procurement rules and UK obligations on subsidy control rules before entering into arrangements.**

**R6 The Chief Executive, Monitoring Officer and Section 151 Officer need to consider how to respond appropriately to challenge on decisions and be prepared to take corrective action where necessary.**

**R7 The Chief Executive should improve record keeping arrangements so that**

**R7.1 the records supporting key decisions including financial analysis are maintained**

**R7.2 a standard approach to record keeping with monitoring of which decisions have been implemented**

**R7.2 tolerances are established for reporting back changes to Cabinet**

## Governance

Significant concerns over the governance culture and reporting mechanisms between the Council and Brick by Brick have already been raised to the Council (in the Public Interest Report published on 23 October 2020 and the PwC review of companies dated 13 November 2020) and the issues with oversight of the Fairfield Halls Refurbishment reflect many of these concerns.

### Governance arrangements for Brick by Brick

The Cabinet paper approving the establishment of Brick by Brick in March 2015, delegated authority to agree the board structure and membership, human resourcing arrangements and to agree the processes and governance for monitoring the performance of the company and approving future Business Plans to the then Executive Director of Place (who became the acting Chief Executive in April 2016 and permanent from July 2016) in consultation with the Cabinet Member for Homes and Gateway Services, the then Section 151 Officer and the then Monitoring Officer. The delegated decision paper was signed in February 2016.

The June 2016 Cabinet paper sets out the governance arrangements in place between the Council and Brick by Brick which requires a detailed business plan to be prepared annually and reviewed by the Council and for there to be Council nominated Board members on Brick by Brick together with Council observers. The Council nominated Board members changed during the period and included the then Section 151 Officer until January 2016, when the then Deputy Section 151 Officer (who became the then Section 151 Officer in February 2019) was appointed until January 2019, when the then Executive Director of Place was appointed until September 2020. In January 2016 the Brick by Brick Board minutes record that the then Section 151 Officer 'will continue to attend board meetings as a shareholder representative, with 'observer status' from January 2016 and subsequent minutes refer to their attendance as the 'observer representing the funder'.

The first Brick by Brick Business Plan was presented in February 2017 and in February of subsequent years. There was no formally documented mechanism through which Council nominated Board members or observers reported back to the Council and therefore it is unclear how the Council sought to provide governance over Brick by Brick through the nominated Board members or observers.

The focus and the effectiveness of actions taken by the Council through its internal monitoring arrangements for Brick by Brick between establishment and November 2018 is unclear. Records indicate that the Council's need to improve its governance arrangements was recognized, for example:

- In November 2018 the then Section 151 Officer sent the then Chief Executive (the former Executive Director of Place) a draft paper on improving governance arrangements in relation to Brick by Brick.
- Meeting notes from the then Executive Director of Gateway, Strategy and Engagement (who joined the Council in August 2018 and took on that role in January 2019) show 'clienting' arrangements for Brick by Brick were discussed and identified as priority to develop.
- In April 2019 the then Executive Director of Gateway, Strategy and Engagement presented a formal terms of reference for the Brick by Brick Monitoring Group at its first meeting. [The Executive Director of Gateway, Strategy and Engagement has contended that she had also offered to undertake a governance review of the arrangements for Brick by Brick, but that this offer was not taken up.]
- At the September 2019 an updated terms of reference were finalised led by the then section 151 officer when they took on the chair role. At the same time other core group terms of reference were agreed including land, legal and finance and quality assurance.

The proposed reporting and escalation arrangements were changed between April and September 2019 and in August 2019 the responsibility was transferred from the Executive Director of Gateway, Strategy and Engagement to the then Section 151 Officer. (The terms of reference in April 2019 show that this was an officer only governance meeting and in September 2019, the terms of reference show that the Portfolio Holder for Homes and Gateway Services was included in the distribution list for papers and attended some meetings as an observer.). In our view the changes weakened the reporting and escalation routes however the rationale for the changes in responsibilities or in the reporting and escalation routes is unclear. We have seen correspondence requesting the views of both the Managing Director of Brick by Brick and the Portfolio Holder for Homes and Gateway Services on the terms of reference and the correspondence indicates that the views offered in response were considered although there is no record of the relative weight given to their contributions. It is our view that an officer led internal monitoring arrangement should not involve Members, although we appreciate that this view is based on our view of best practice in these particular circumstances and not upon a legal or regulatory requirement. There should have been a clear

distinction between the different roles and responsibilities of Members and officers. The Shareholder Investment Board, established in October 2019, is the governance arrangement for Members to hold Brick by Brick to account together with the formal approval of the Brick by Brick Business Plan.

What is clear is that Cabinet delegated authority for establishing governance arrangements for Brick by Brick in March 2015 with a further decision in June 2016 and over two years later in Autumn 2018 officers continued to discuss the need for governance and monitoring arrangements with these being put in place in Autumn 2019. This timeline suggests a lack of urgency by the Council to establish appropriate effective governance arrangements over Brick by Brick.

The Council needed to clearly distinguish between the different roles and responsibilities of Members, officers and Brick by Brick representatives in the governance arrangements so that real and perceived conflicts of interests could be managed transparently.

### **Governance over the Fairfield Halls refurbishment project**

Initially the Council's oversight of the project was through the Council's Growth Board from 2015 when this was a Council run project and then through the governance arrangements established for Brick by Brick. Early in 2015 a competitive tender was used to appoint a contractor for the scheme design and development. In June 2015, a Project Initiation Document for the College Green housing development and Fairfield Halls refurbishment was drafted and reviewed by the Growth Board. Based on the initial design there was a high-level plan and initial costings for the project. Updates on the College Green and Fairfield Halls refurbishment project were taken to the Council's Growth Board until May 2017 with the Brick by Brick Managing Director attending after the project was transferred to Brick by Brick in June 2016.

In May 2017, the Fairfield Programme Board was set up when it was recognised that the Growth Board did not have sufficient agenda time to provide oversight of the Fairfield Halls refurbishment which was a complex and challenging project in its own right. This decision was influenced by an Internal Audit review that indicated the need for a dedicated programme board to meet regularly (as envisaged in the Project Initiation Document).

The Fairfield Programme Board (the Board) terms of reference included responsibility to:

- Provide formal input into the Fairfield Halls refurbishment and works packages including public realm aspects.
- Oversee the procurement and mobilisation of the new operator.
- Manage the delivery relationship with Brick by Brick.
- Approve any project or scope changes to be requested by the Council.
- Agree any new allocation of resources from new or existing capital and revenue budgets.
- Escalate significant risks to the Growth Board.
- Ensure that all significant risks are recorded and managed in line with Council policy.
- Manage the Council's external and internal communications about Fairfield Halls.

The then Executive Director of Place, who was the project sponsor, chaired the monthly Board meetings as the senior responsible officer on the project. The then Executive Director of Place continued to chair the Growth Board.

The available notes show that the meetings did discuss key issues such as delays, financial spend in excess of the budget and risks such as impact of the delays on the operator. There are instances where the meeting records note actions taken for example the December 2018 meeting noted the financial spend in excess of the budget on the project covered in the letters exchanged between the then Section 151 Officer and the Managing Director of Brick by Brick.

In theory, the structure put in place including the terms of reference should have been sufficient to manage the project.

As the project was a significant strand of Brick by Brick's activities, the wider Council could have expected its governance arrangements over Brick by Brick to identify matters of concern over the project through the Brick by Brick Business Plan, the presence of Council appointed members of the Brick by Brick Board and observers together with a proposed member steering group. The governance arrangements were not effective however as:

- The Brick by Brick Business Plan only included high level details of the Fairfield Halls project
- There was no formal documented mechanism through which Council nominated Board members reported to the Council and

- The member steering group was not set up until October 2019, a month after the Fairfield Halls reopened.

By November 2017 the [Fairfield Halls Programme] Board minutes note emerging budget pressures relating to the identification of additional asbestos and the construction contractor indicating that the £30 million estimate may need to be more. The Fairfield Halls Board monitoring papers have a total budget of £34.5 million despite the June 2016 Cabinet decision being for a £30 million investment.

In December 2017 the Brick by Brick Board received a report setting out the financial appraisal of the College Green programme which included the project cost, related public realm works costs, payments to the operator (BH Live), interest on additional borrowing which were offset by the projected profit from the Fairfield Homes development and expected grant funding from Coast to Capital leaving an expected College Green (which included the project) loss of £10.5 million. The financial appraisal appears to have been reported to the Brick by Brick Board only. The notes of the meeting show that apologies were received from the then Executive Director of Place, the then Section 151 Officer and their deputy and we have been provided with the email where the related papers were sent to these officers at that time. The then Section 151 Officer disputes having received these papers.

At the end of 2017 key elements of the issues with the project were known in particular

- the main works contract had not been let
- Croydon College were no longer part of the scheme impacting the land available for house building which was an important strand in the financial case for the wider College Green scheme
- The original engineering consultant had left the scheme necessitating the procurement of a primary engineering consultant
- Additional costs were incurred dealing with asbestos and meeting the needs of the operator that the Council had agreed in a separate contract
- The wider College Green scheme which included the project had a projected loss of £10.5 million

In October 2017 the project was called in by the Scrutiny and Overview Committee (the Committee) and in February 2018 the Brick by Brick Business Plan was presented to Cabinet. The 2018/19 Brick by Brick Business plan had a cover report which detailed the then Executive Director of Place as the relevant Lead Officer, and the then Portfolio Holders for Homes and Gateway Services and for Finance and Resources as relevant Cabinet Members. On neither occasion (the Committee and the Cabinet) were the extent and depth of the known issues highlighted formally to Members instead the impression given was all was progressing well. We consider that the transparency expected in both documents was missing. In particular we consider that:

- The Brick by Brick Business Plan should have highlighted to the shareholder the projected loss of £10.5 million on the overall College Green scheme which included the project and notwithstanding that it did not, the then Executive Director of Place, the then Section 151 Officer and their deputy, were they aware of this (on the basis that the related papers would have been provided to them in December 2017, as set out above), should have flagged this in the cover report to the Cabinet together with any action; [we have seen no evidence that the Portfolio Holders were aware of the projected loss]. Instead, the Cabinet report makes reference to the risk for existing schemes from escalation of cost estimates and time delays with the conclusion that Brick by Brick is *'currently projecting to achieve a profit of £21 million on its existing development activity in addition to the £30 million investment into the refurbishment of Fairfield Halls'*.
- One of the original assumptions of the wider College Green scheme was for the Council to purchase land from Croydon College to be made available for house building. Early in 2018 Croydon College rejected the offer for the land and progressed with an alternative purchaser. We have not seen evidence of the financial impact of a change in a key assumption being reassessed by the Council or that the Cabinet was updated formally on this change.

Brick by Brick is of the view that the detailed financial models were provided to officers to support all funding requests. Neither the business plan nor the cover report presented to the Cabinet however provided the detailed financial modelling. Brick by Brick is of the view that the Council had the relevant information to challenge the business plan and that there was no request to provide greater clarity on the project within the business plan. In our view, the projected increased project cost at that time was known by the Brick by Brick Board and the then Executive Director of Place, as a member of Brick by Brick's Board, and the then Section 151 Officer, as the Council appointed observer of the Brick by Brick Board. All were aware of the increased

project cost and the known increased costs should have been highlighted to both the Cabinet and the Scrutiny and Overview Committee either by requiring Brick by Brick to highlight the known increase or identifying the amount in the covering report to the Cabinet. The absence of reporting the known loss to a formal Member meeting did not enable scrutiny by the wider Council.

By June 2018 the project monitoring documents showed the expected project spend being £42.8 million. In September 2018, the Brick by Brick Managing Director sent a copy of the financial monitoring reports to the then Chief Executive highlighting the additional spend in excess of the budget. The main works contract was not let by Brick by Brick until October 2018, three months after the original project completion date, and the project cost was £42.7 million. Brick by Brick confirmed the contract amount to the then Executive Director of Place on 9 October 2018. At this point the project cost clearly significantly exceeded the amount approved by Cabinet in June 2016 of £30 million and it would be reasonable to expect officers to formally report back to the Cabinet. Brick by Brick informs us that the contract was let in line with the strategy agreed with the Council and the increased costs reflect the 'constantly changing brief' indicating that both the delay and the increased costs were known within the Council however we have not been able to identify any formal reporting to the Cabinet.

In October 2018 Brick by Brick wrote to the Council's Section 151 Officer setting out a shortfall of £28.8 million on the College Green scheme (which included net expenditure of £49.2 million on the refurbishment project) setting out the proposed strategy to cover the increased costs. The then Section 151 Officer replied in November 2018 noting the proposed actions which were:

Source	Amount	Description
Brick by Brick	£18.3 million	Full value profit from the scheme (£17 million) and ongoing revenue generation from the energy centre (£1.3 million)
Council*	£7.6 million	Unforeseen asbestos removal costs and additional costs for delivery of the operator requirements
Coast to Capital**	£3 million	Redirected grant funding from the Arnhem Gallery part of the project into the general project
	£28.8 million	

\* The then Section 151 Officer agreed that the Council would contribute £1.6 million for the operator fit out costs and proposed to flex the overall repayment to manage the remaining gap of £6 million.

\*\* The Local Enterprise Partnership, Coast to Capital, provided grant funding to the project including £3 million for the refurbishment of the Arnhem Gallery. As the project spend grew, the Council was granted permission from Coast to Capital to divert the grant funding into the wider scheme.

In our view, the solutions were problematic in that:

- Brick by Brick's proposal to 'attribute the full value of Brick by Brick profit' from the College Green scheme (estimated to be £17 million at that time) to meet the additional costs of the project is a significant decision for any company to make. We note Brick by Brick wrote to the Council, its shareholder, setting out the proposed action and received an acknowledgement from the then Section 151 Officer. Brick by Brick is of the view that its financial viability model was based on profits generated by the College Green scheme to fund the project and that its involvement in the project was important to Brick by Brick as it gave 'the opportunity to be involved in a high-profile project with enormous value potential'. We remain of the view that the decision to attribute the full value of profit at £17 million from one project to another is an unusual decision for an independent company to make and is a decision that opens the Council to the challenge of whether Brick by Brick was operating as an independent company which is a key requirement of whether the Council's arrangement is legal.
- In addition, the decision to attribute the full value of profits from one element of the College Green scheme to fund additional project expenditure is significant to the Council as it would impact the Council's receipt of future dividend from Brick by Brick and as such it would be reasonable to expect the then Section 151 Officer to report the decision formally to the Council. We have found no such evidence. The then Section 151 Officer is of the view that as the dividends were not included within the Medium-Term Financial Strategy (MTFS) there was 'a very minimal impact' and 'a lower estimated future profit would have no immediate impact'. We acknowledge at that time the MTFS did not

include future dividends from Brick by Brick. It is our view that a decision impacting £17 million is significant to both the Council, even where it is not included in the MTFs, and Brick by Brick and therefore Members should have been informed formally by both the then Section 151 Officer and by Brick by Brick in their next business plan. Brick by Brick is of the view that they met their responsibilities in informing their shareholder and Brick by Brick was not asked to provide more detail in their business plan. The then Section 151 Officer asserts that Cabinet members were briefed on the actions although we have not been able to obtain evidence to support this. The arrangement opens the Council to challenge of the soundness of its investment in Brick by Brick.

- The Council's proposal to transfer a car park associated with the project to Brick by Brick at its carrying value of £6 million was not supported by an assessment of the best value of that land as required by section 123 of the Local Government Act 1972. The proposal was not co-ordinated within the Council as another contract was issued to the operator with the associated income being included in the Council's budget and this income would not have been receivable by the Council if ownership of the car park was transferred. In addition the Council's legal transfer documents for the car park and heads of term for the lease were drafted but remain unsigned.

The Fairfield Halls Board terms of reference include 'all significant risks are recorded and managed in line with Council policy' and 'escalate significant risks to the Growth Board'. From the Council's perspective the view was that the financial risk would be managed in that any spend in excess of the budget would be the responsibility of Brick by Brick and would be covered by their profits. However as the licence (and the land transfer– although this was not followed through in full) gave Brick by Brick full control over the specification of the Fairfield Halls works, the response by Brick to Brick to the additional costs was to cover these through 'value engineering' adjustments. It is clear that the Council did not set out a clear understanding of the legal aspects of the intended land transfer approach with Brick by Brick as the Brick by Brick Managing Director has responded by saying that 'there was an obligation on Brick by Brick to work in partnership with the Council to define and agree the specification for the works. Had Brick by Brick had full control over the specification, we could have delivered £30m worth of improvements of our choosing to the building without any recourse to the needs or desires of the Council'.

The Growth Board exception report for October and November 2018 highlights the project as an area of concern with the spend in excess of the budget noted as £15.89 million, indicating that the significant risk on project spend was reported to the Growth Board. The Growth Board's terms of reference require escalation to the officer led Executive Leadership Team or via other Council processes 'as it sees fit' for breaches outside of specified tolerances. The tolerances included:

- overspends of the greater of £50,000 or 0.1% of the project overspend
- project delays past the financial year into another year

The approval decision in June 2016 was for a £30 million project to be completed by June 2018. In October 2018 the tolerance of a £50,000 / 0.1% of the project budget overspend (as reported to the Growth Board) and delayed project into a future financial year had been significantly breached. It is not clear whether the significant additional spend was escalated to an officer led leadership team or via another Council process. In our view, the then Executive Director of Place, as Chair of the Growth Board, had a responsibility to escalate a reported spend in excess of budget of £15.89 million to a formal Cabinet. We have been unable to identify any evidence of the escalating risks being reported to Cabinet formally.

The December 2018 Fairfield Halls Board minutes refer to the exchange of letters on the financial position. We consider that the letters and the minuted reference to the letters indicates that then Executive Director of Place, as chair of the Fairfield Halls Board, the then section 151 officer and Brick by Brick were all aware of the known additional spend and had a duty to escalate the increased spend formally. We have seen no record of the significant increased spend being escalated to the Cabinet formally.

The 11 December 2018 Scrutiny and Overview Committee included an item on Fairfield Halls which would have provided an opportunity for the known additional spend in excess of budget to be highlighted to Members for their consideration and challenge however the presentation focused on questions to the operator. (We have no evidence that the operator was aware of the additional spend in excess of the budget.) This was a missed opportunity to highlight to Members the scale of the known additional spend at that point.

The 16 January 2019 Growth Board notes record that

'Council as a shareholder and funder allowing BBB longer to pay back on equity so it won't emerge as a capital over spend. The financial impact on Council is that our company makes less profit over the medium term'

The then Executive Director of Place and the then Section 151 Officer are recorded as being present for the meeting and could be considered to have knowledge of the discussion. Based on the January 2019 Growth Board notes the rationale



appears to be that 'the equity in Brick by Brick would be sufficient to cover the known overspend'. We consider the rationale to be fundamentally flawed as:

- the Council had not to date provided any equity funding to Brick by Brick
- Brick by Brick at that time had not made a profit and therefore it would not be in a position to cover the additional spend of £15.89 million

These facts should have been known by the then Executive Director of Place as a Brick by Brick Board member and the then Section 151 Officer as a Brick by Brick Board observer. The then Section 151 Officer has expressed the view that the intention was for equity to be provided at the end of the project which had not been reached at that point. We have not been provided with evidence of how the intended equity was included in the Council's forward financial plans.

The 2019/20 Brick by Brick Business Plan was presented to the February 2019 Cabinet meeting. The College Green scheme is identified in the Business Plan, one table shows that the projected profit for the College Green was £0 against a sales income of £177.5 million. The presentation, the Council covering report and the Business Plan did not provide a clear or transparent update on the College Green £28.8 million increased spend set out in the exchange of letters between Brick by Brick and the Council or the mitigating actions agreed. Respondents assert that the increased spend was included within the financial modelling that supported the Brick by Brick Business Plan which could be considered to have met Brick by Brick's responsibilities. The then Executive Director of Place and the then former Section 151 Officer (having passed the role onto their deputy on 1 February 2019) were aware of the significant increased spend and could reasonably have been expected to be aware that Brick by Brick's business plan did not provide clarity to the Cabinet on the potential financial risks associated with the College Green project. In not providing that clarity or challenging the lack of clarity these officers failed in their responsibilities to the Council.

We have received representations from officers that the lack of estimated profit for a significant scheme was included in the report and 'could have been open to question at the meeting'. We accept that the position of a £177.5 million scheme delivering £0 profit is included within the Business Plan; in our view, as acknowledged by respondents, this 'is clearly an unusual for a company'. In our view the significance of the lack of estimated profit on the College Green scheme should have been highlighted by officers to draw attention to the matter in the covering report to the Cabinet to provide greater clarity on the potential financial risks associated with the College Green project. The matter was known to the then previous Section 151 Officer (who ceased to be section 151 officer on 1 February and remained employed by the Council until March 2019) and their successor\* and the then Executive Director of Place.

\*The section 151 officer changed on 1 February 2019, the previous Section 151 Officer who signed the November 2018 letter to Brick by Brick remained in the Council's employ until March 2019 and continued to have a duty to ensure the significant additional spend was reported formally to Members. The Section 151 Officer from 1 February 2019 was a Director of Brick by Brick Board member from January 2016 until January 2019 and we therefore consider they could reasonably have been expected to be aware of the additional spend at that point, which they have acknowledged; however, they have asserted they were not aware that the known additional spend had not been formally agreed with the Cabinet.

At the June 2016 Cabinet, the original delivery date for the project was June 2018 and the actual reopening of Fairfield Halls was September 2019. The June 2016 Cabinet decision approved a £30 million investment for the project that has had a final expenditure of £67.5 million. Both the delays and the escalated costs were known by the then Executive Director of Place, the then Section 151 Officer and the then Chief Executive and there is no evidence of the emerging risks being reported to the Cabinet formally. All had the position and experience to understand their responsibilities to escalate the concerns and there is no formal record of any of this small group of officers doing so. The responsibilities are particularly clear for the senior statutory officers: the Chief Executive and Section 151 Officer as these are set out in statute\* and the Council's Constitution. Representations received from this group of officers indicate that in their view concerns were raised to the relevant Portfolio Holders however we have not been able to obtain a written record of the concerns, who they were raised to or at which meeting. There is an onus on the relevant Portfolio Holders (for Homes and Gateway Services, for Finance and Resources and the Leader) to ask appropriate questions of senior officers and to require clear reporting to Cabinet on the progress of a complex project. Representations received from the relevant Portfolio Holders indicate that in their view concerns were not reported to them [and that there is in their view no evidence of a failure to ask appropriate questions]. Without evidence to support either viewpoint, [and in particular without detailed evidence of what questions were put to senior officers by the relevant Portfolio Holders in this regard], it is clear that there were known issues and effective action was not taken. In our view these officers and Portfolio Holders failed to exercise their functions and responsibilities adequately.

As chair of the Board and the senior responsible officer for the project, the then Executive Director of Place was responsible for ensuring the effective operation of the Board. The fact that the project was delivered late, overbudget with the current view from the Council that additional works are required indicates that the then Executive Director of Places was not effective in delivering the agreed terms of reference. There is evidence of the delays and additional costs being reported at the Growth Board, also chaired by the then Executive Director of Place. We would have expected the Growth Board to have considered the scale of the additional spend to require reporting to Cabinet.

The failure in governance appears to stem from the viewpoint that the project was for Brick by Brick to manage and any risks and cost overruns were for Brick by Brick to address. This viewpoint has been expressed by the then Chief Executive, the then Section 151 Officer, the then Leader, the then Cabinet Portfolio Holder for Finance and the Managing Director of Brick by Brick. In our view that viewpoint is flawed in that Brick by Brick was both:

- Wholly owned by the Council meaning any profits or losses would be consolidated into the Council's group accounts and ultimately impact the Council's financial position; and
- at that time the sole source of funding for Brick by Brick was from the Council.

*\* Statutory responsibility for the Chief Executive is Local Government and Housing Act 1989 section 4 and for Section 151 Officer is the Local Government Act 1972 section 151.*

#### *Role of Scrutiny and Overview Committee*

The Scrutiny and Overview Committee (the Committee) were active in considering the refurbishment of Fairfield Halls on at least six occasions between 2016 and 2020. Members of the Committee raised pertinent questions including on project management and the potential additional spend on the project. The magnitude of the financial additional spend on the project was not reported to the Committee and the lack of transparent reporting prevented adequate scrutiny as noted above.

At the 10 February 2020 Committee, the Brick by Brick representative confirmed that the current estimated cost for the project was £42.6 million. The then Executive Director of Place was also present at that meeting. Members on the Committee have a reasonable expectation that the figures reported are accurate. Both the Brick by Brick representative and the then Executive Director of Place were in a position where they could and should have known that the project cost exceeded £42.6 million in that:

- The mains work contract was let in 2018 for £42.7 million
- The October 2018 Brick by Brick Board minutes note the project spend was £50 million.
- The letter from Brick by Brick to the Council in October 2018 highlighted that the total project costs were £50 million (The £50 million was for Fairfield Halls alone with the letter including separate amounts for other elements of the College Green scheme including the car park and public realm).
- As at January 2020, the Council's records show that the Council had provided cash drawdowns to Brick by Brick in respect of Fairfield Halls project of £59.9 million.

Brick by Brick has expressed the view that 'it was not the role of Brick by Brick's representatives to offer contradictory advice to Members'. The reason for the gap between the known project expenditure and the amount reported to the Committee is unclear. In our view the gap was significant and as such the Committee was hampered in its role to scrutinize the project expenditure.

Between 2016 and 2020 the Committee also questioned the then Leader on the project on at least five occasions during the same period, although as above it is unclear whether concerns had or had not been raised to the Leader by the senior officers regarding the project, in light of representations received.

#### **Financial position of the project**

The monitoring of financial outcomes is intrinsically linked to the project progress and therefore financial governance is impacted by the weakness in governance over the project section.

#### *Original project budget setting*

The September 2014 Cabinet paper had the original project budget of £33.75 million. By October 2015 the Cabinet report indicates that the Council intended to provide Brick by Brick with loan finance to fund the costs of the project and to fund the costs of building the residential units. The June 2016 Cabinet report refers to a £30 million investment in Fairfield Halls and the confidential report states

‘the financial appraisal and development assumptions for the land at College Green proposed to be transferred to Brick by Brick have been tested by the Council and found to be prudent for this stage of the development process.’

We have not been able to obtain the financial appraisal and development assumptions referred to in the confidential June 2016 Cabinet report and are therefore unable to comment on the robustness of that appraisal. We consider the financial appraisal supporting a decision to invest £30 million to be a key document that should have been maintained by the Council to enable subsequent scrutiny and the absence of such a document is a weakness in record keeping. Respondents have stated that £30 million was not the original budget. We have been unable to identify any Cabinet report after June 2016 which approved a budget for the project and we therefore consider £30 million to be the original budget. The February 2020 Scrutiny and Overview Committee meeting referred to a £30 million original budget.

Without the detailed financial appraisal, it remains unclear whether the additional expenditure over the original budget reflects issues in the original budget setting or issues in managing the project’s expenditure or a mix of both. A detailed scope for the refurbishment of Fairfield Halls was provided by the original engineering contractor in September 2015 which was costed at £73 million. There is evidence that this detailed scope was discussed by officers at that time as would be expected. It is not clear from the evidence available to us how the September 2015 scope connects (or if it connects at all) to the project presented to the June 2016 Cabinet.

In the absence of the original financial appraisal our understanding is that the project was intended to be cost-neutral to the Council with Brick by Brick using expected profits from the College Green scheme to cover the costs of the project. This understanding is based on

- The November 2017 Fairfield Halls Board minutes which note that the budget gap identified at that time was ‘Financial risk minimal for council it will be Brick by Brick issue’
- The December 2017 Brick by Brick Board report which sets out that ‘the expectation for delivering the wider College Green projects was that the land value for the homes development would be £nil (acting as a barter transaction to fund the refurbishment of Fairfield Halls).’

Under section 123 of the Local Government Act 1972 the Council has a duty to achieve best value in land disposals. We have not been able to obtain the Council’s assessment of whether £30 million for the land provided to the College Green projects represent best value and therefore we cannot conclude on whether the Council achieved this duty.

#### *Final cost of the project*

The Council provided funding to Brick by Brick through drawdowns and recorded those amounts in its financial statements. The Council has maintained records of the requests however as noted earlier there are no related properly executed written loan agreements providing a legal basis for making payments to Brick by Brick.

According to the underlying financial records:

Financial year	Council Funding provided to Brick by Brick for Fairfield Halls refurbishment	Expenditure incurred by Brick by Brick (from financial ledger)
2016/17	£1.2 million	£1.5 million
2017/18	£9.5 million	£7.5 million
2018/19	£19.9 million	£30.3 million
2019/20	£37.2 million	£27 million
2020/21	-	£1.2 million
Total	£67.8 million	£67.5 million
Adjustments – late VAT and invoices	(£0.3 million)	
Spend on Fairfield Halls refurbishment	£67.5 million	£67.5 million

\* Funding provided includes Coast to Capital grant funding

It is a serious financial control and legal failing that payments in excess of £60 million were made to a third party without sufficient clarity as to the powers relied upon or any properly executed written contracts. Both the then Monitoring Officer and the then section 151 officer had a responsibility to ensure that the legal loan agreements were properly executed prior to making payments. In our view, officers treated Brick by Brick as an extended department of the Council in terms of the financial payments made, and did not ensure the level of rigour we would have expected. Had the legal agreements been entered into and monitored, it is likely that the Council could have monitored the position of the loans provided for the project and this would have enabled the Council to have ceased to make loans beyond the original budget or to have invoked loan covenants or to have escalated that the project's financial viability had been breached. In the absence of properly executed written contracts, the payments described as loans do not appear to have been subject to any such oversight.

The actual cost of the project has been difficult to establish which in itself is a serious failing that the Council's financial arrangements are not sufficiently robust to monitor the expenditure on a significant project. The Council was able to demonstrate the amounts the Council provided (recorded as loans) to Brick by Brick for the project. The actual spend by Brick by Brick has taken the Council's finance team longer to determine. The final cost of the project at £67.5 million is significantly greater than the £30 million originally approved at the June 2016 Cabinet. There are a number of factors to explain the spend in excess of the original budget including a lack of Council arrangements in the:

- robustness of the original budget setting
- clear financial monitoring
- monitoring the complexity of co-ordinating contractors on a complex project leading to a dispute with the original engineering contractor (note that although this is disputed by Brick by Brick the relationship ended and the Adjudicator's decision on the financial resolution was found in favour of the contractor with the Council having to pay the contractor's and Adjudicator's cost.)
- effective risk mitigation
- project oversight and scrutiny
- implementing the governance arrangements in the June 2016 Cabinet report

Brick by Brick expressed the view that 'the principal cause of cost increase relates to contract variations and specification delays by the Council and other essential unforeseen works (such as asbestos and structural issues)'. Brick by Brick's view implies that there was both a 'contract' and a 'specification'. We have not seen contractual variations supporting Brick by Brick's view. As noted above, we have not seen properly executed written contracts obliging Brick by Brick to carry out the work in accordance with any specification or enabling the Council to vary the specification; the idea that there was a 'specification' highlights the risk identified by the Council's legal advice that a specification would engage a risk of challenge in the licence / land transfer option route which it pursued.

The Council as the owner of Fairfield Halls would have had knowledge of both the structure of the building and the presence of asbestos and the costs related to these aspects should have been foreseeable by the Council in setting the original budget.

A number of respondents expressed the view that the financial impact was for Brick by Brick to manage. The Council as owner of Brick by Brick has always been required to account for any losses or profits made by Brick by Brick and this is shown through the group accounts. Therefore the Council had a responsibility to understand significant financial risks impacting Brick by Brick which we would argue the project represented. As ultimately the Council would need to account for any significant loss we remain of the view that the Council's arrangements to manage the risk of any increase in cost were not sufficient. The increase in costs was known, it was reported through the Fairfield Board and the Growth Board. The lack of transparency of the increased costs being reported to formal Member meetings has led to the position where it is unclear whether effective action at the time could have been taken to mitigate the financial risk to the Council.

In establishing the financial position of the project there were changes in financial record keeping during the project that contributed to the lack of clarity. The Council changed its financial system from 1 April 2019. Brick by Brick has provided representations that there was a period of five months in 2019 where Brick by Brick had to manage its finances without access to the system with a delay in migrated data being made available.

Taken together the Council missed opportunities to manage the causes of the increasing costs and has, as noted in our 23 October 2020 Report in the Public Interest, again imposed on council tax payers of Croydon an increased borrowing burden.

### *Impact on the Council's financial position*

As noted earlier in the report given the uncertainties in the properly executed written contract and properly executed written loan agreements as a basis to make payments in relation to the project has led to the Council reconsidering its accounting treatment of the project expenditure. In the absence of a clear lawful basis for making payments to Brick by Brick for the refurbishment of Fairfield Halls, the Council is now recording the project expenditure as direct capital expenditure in the 2019/20 financial statements. The uncertainty on the lawfulness of the arrangement led to the Council's revised approach.

The majority of the adjustments to the 2019/20 financial statements impact the capital reserves position however there are some key revenue impacts on interest receivable and the minimum revenue provision which impact on the Council's General Fund position which is already under significant pressure. Key adjustments include:

- Loans receivable – without properly executed loan agreements the Council cannot account for the £61.3 million funding provided to Brick by Brick as receivable and the amounts have needed to be written off in the Council's accounts (noting that in the group accounts the entries would be subject to consolidation processes)
- Interest receivable – The Council has access to low interest rate borrowing from the Public Works Loans Board and part of the financial rationale for lending monies to Brick by Brick was that the Council would charge Brick by Brick a commercial interest rate. The Council has accrued interest of £9.1 million as at 31 March 2021 which will need to be written off as the amounts are no longer considered to be receivable without properly executed loan agreements, and as the Council's approach has now changed with the underlying loans being classified as capital expenditure.
- Minimum revenue provision (MRP) – as noted earlier the Council needs to account for MRP in future years' budgets and we estimate that the charge would be approximately £1.5 million per annum over the life of the refurbishment depending on the Council's assessment of how long the refurbishment will remain useful. The Council has included this in future budgets.

The view of the then Section 151 Officer was that the strategy of providing the last 25% funding of the project as equity would have included MRP. The unsigned loan agreement documents show that the intention was for funding to be split 75% debt and 25% equity funding. At the time of the then Section 151 Officer's departure no equity had been provided to Brick by Brick on the project or indeed on any other Brick by Brick project.

The Council's failure to establish and manage the project appropriately has led to further financial pressure on the Council's challenging financial position.

### **Recommendations**

**R8** *The Chief Executive, as Head of Paid Service, should ensure appropriate governance arrangements are implemented in a timely manner particularly for strategic developments such as Brick by Brick including where appropriate that there is clear guidance for nominated representatives on the expectations of the role including reporting back to the Council*

**R9** *The Chief Executive should work with the Leader to continue to embed*

**R9.1** *a clearly understood distinction between the different roles and responsibilities of Members, officers and representatives of entities akin to Brick by Brick.*

**R9.2** *clear responsibilities for officers and Portfolio Holders in challenging reports presented to Cabinet and other committees for balance, accuracy and consistency in terms of knowledge*

**R10** *The Chief Executive should review the terms of reference for officer and member/officer boards that oversee significant projects and capital/revenue expenditure and clarify the escalation routes for significant additional spend in excess of the budget*

**R11** *The Section 151 Officer should ensure financial reporting on significant capital projects is enhanced so that*

**R11.1** *a clear agreed budget for the project is identified and the underlying financial analysis is maintained*

**R11.2** *the clear agreed project expenditure amount can be reported through appropriate governance processes*

**R11.3** *where there are changes in the original financial assumptions that there is an assessment on the project's financial viability with appropriate reporting*

**R11.4** *the revenue impact of any changes in the capital project are addressed in future budget setting*

## Other auditor concerns

As part of our work, we have also identified further areas of concern which impact on the delivery of the project.

### **Project management - Co-ordination of contractors**

The project involved a number of contractors and relied heavily on successful co-ordination of the design, build and operator elements, each of which lay with a separate contractor. An additional complexity was the subcontracting of project management responsibilities by Brick by Brick to a fourth contractor. There was a highly complicated series of interdependencies and the deficiencies in co-ordination between contractors (including the need to replace one contractor during the project) being a contributor to the delays, additional costs and quality of delivery issues.

Delays in the establishment of the dedicated Fairfield Board until May 2017, meant that the procurement of the Operator by the Council, and the main works provider by Brick by Brick lacked an effective mechanism to co-ordinate both contractor requirements at an early stage. The Council was limited in terms of what it could require of Brick by Brick due the Council's original decision to use the development licence option (although we note the outcomes would equally have been limited if the proposed land transfer option had been completed). Therefore, there was no effective mechanism to mitigate the co-ordination risk that became critical in the latter stages of the project, contributing to delays, additional cost and contractor disputes.

The relationship between Brick by Brick and the original engineering consultant broke down with the resolution of increased costs being decided by the Adjudicator. The need to assimilate a replacement engineering consultant mid-project and in a short period of time, was highly challenging and is likely to have contributed to the delays and cost implications.

As there was not a competitive tendering process by the Council to support the appointment of Brick by Brick to manage the project, there is no evidence that the credentials and suitability of Brick by Brick to manage a complex refurbishment project were assessed by the Council prior to selection. At the time the licence was granted, Brick by Brick was newly established without a track record of delivery. We acknowledge that Brick by Brick's articles of association allow commercial developments and not solely housing developments and that the Brick by Brick Board was in a position to assure itself of its ability to manage the project; however the Council did not have appropriate methods of oversight in place. There is also no evidence of how other factors such as value for money and risk were assessed by the Council. Representations received from Brick by Brick state that from Brick by Brick's perspective the financial viability of the project was linked to the wider College Green scheme which was in the best interests of Brick by Brick. Their view is supported by Brick by Brick Board discussions of external advice received at that time.

In our view it was not appropriate for the Council to include the refurbishment of Fairfield Halls within a housing development scheme as the projects are very different and require different mechanisms for the Council to be able to secure value for money. The complex interdependencies were foreseeable for the Council and the Council's decision to use Brick by Brick with an arrangement that prevented a legally enforceable obligation to comply with detailed specification for the project should have been supported by a more detailed risk assessment and more robust governance arrangements that responded as risks emerged.

### **Value for money**

In relation to how the Council was able to protect its interests and secure economy, efficiency and effectiveness in its use of resources in relation to the Project, the Council's overall approach was intended to be that the transfer of land to Brick by Brick for development with the value of the land being the same as the estimated cost of refurbishment. Based on representations received, the intention was for the Council to secure the refurbishment of Fairfield Halls and to receive future dividends from Brick by Brick generated from profit as part of the wider College Green scheme.

The Council's detailed financial analysis at that time (June 2016 Cabinet) cannot be found by current Council officers and we are unable to conclude on whether the underlying assumptions were reasonable or not. Brick by Brick did obtain advice on the financial viability of the wider College Green scheme however as would be expected this advice was from a Brick by Brick perspective.

Notwithstanding, the failure to secure legality in the arrangement through a properly executed written contract, the intended arrangement involved a licence to access the building which would only require method statements to address how work would be carried out. The intended approach prevented the Council from issuing a detailed specification with which Brick by



Brick would be obliged to comply. It is difficult to see how the Council's intended approach would have secured economy, efficiency and effectiveness in relation to the project.

The Council did establish governance arrangements which required additional spend reported to the Fairfield Hall Board to be escalated to the Growth Board and where tolerances for additional spend are breached for further escalation to the Corporate Leadership Team or via other Council process as it sees fit. The additional costs exceeded the budget by £15.89 million, which breached the tolerances, and was reported to the Growth Board. The costs in excess of the budget was not reported in a clear and transparent manner to a formal Cabinet meeting. Representations received and meeting notes indicate the view at the time was that 'any overspend was for Brick by Brick to manage'.

In our view the governance arrangements did exist to identify and report the known additional spend however the governance did not operate as intended due to the Council's viewpoint at that time which was the financial risk remained with Brick by Brick. We consider this viewpoint misunderstands how any profits and losses of Brick by Brick impact the Council as the shareholder.

It is unclear whether informal mechanisms were used to raise concerns about the project. We have received representations from former officers stating that 'Lead Members' were briefed and that concerns were either not listened to or support was not provided and we have received representations from the three Members consulted that concerns were not raised. In the absence of documented discussions, it is difficult to reach a view on this point. It is however clear that senior officers (namely the then Executive Director of Place, the then Section 151 Officer and the then Chief Executive) should have been aware that the project's original approval of £30 million had been exceeded as this was reported in emails, Fairfield Hall Board papers and Growth Board papers.

### **Conflicts of interest**

There were inherent conflicts of interest in managing a complex project through a wholly owned company. As noted in Internal Audit's review of Fairfield Halls in December 2020, there was a lack of an assessment of the real or perceived conflicts of interest. At one point the then Executive Director of Place was the project sponsor, chaired the Growth Board, chaired the Fairfield Board and was also the Council appointed Director on the Board of Brick by Brick. The inherent conflicts of interest of delivering each of those roles simultaneously should have been visible to both the then Executive Director of Place and the then Chief Executive who was their line manager, however these conflicts were neither addressed nor mitigated.

### **Delegated decision making**

It is within the Council's Constitution to delegate decisions from Cabinet to named officers in consultation with Cabinet Portfolio Holders and in October 2015 the Cabinet delegated to officers, in consultation with relevant Cabinet Portfolio Holders, the authority to enter into relevant commercial agreements to progress the vision. In June 2016 a further paper was brought to Cabinet which approved the proposal to use Brick by Brick to bring forward elements of the College Green scheme including the refurbishment of Fairfield Halls.

There are a number of related issues

- Record keeping - There is a template to record the action taken in implementing delegated decisions which sets out the actions and is signed by the relevant Executive Director and relevant Portfolio Holder. During our work it has become evident that the retention of the formal documentation rests with individual Executive Directors and their local support arrangements. As personnel have changed, the retrieval of signed delegated decision sheets together with supporting documentation has become problematic and this gap in record keeping has led to gaps in demonstrating how delegated decisions were implemented. The lack of systematic and robust record keeping undermines the Council's governance arrangements, creates legal uncertainty and risk and fails to meet the good practice recommendations in the Information Commissioner's Office "Section 46 Code of Practice – records management" issued under section 46 of the Freedom of Information Act 2000.
- Reporting back to Cabinet – where decisions are delegated to officers in consultation with relevant Portfolio Holders there is an expectation that the decision will be implemented in line with the business case which Cabinet approved. With the Fairfield Hall refurbishment project there were fundamental changes that impacted the underlying assumptions for example the additional spend and the withdrawal of the Croydon College land. The decision was delegated to the then Section 151 Officer in consultation with the Portfolio Holder for Homes and Gateway Services and for Finance and Resources and we have not seen evidence that any of these individuals formally updated the Cabinet on the change in circumstances (although the Portfolio Holder for Finance and Resources has made

representations that in his view there was no need to formally update the Cabinet, as the additional spend was a matter for Brick By Brick, while the withdrawal of the Croydon College land was in the public domain and subject to questions by full Council). However, in our view, the lack of formal update to Cabinet did restrict wider scrutiny of the project by other members of the Cabinet or other members.

- Delays in implementing delegated decisions – It is important that where there are delays in implementing delegated decisions that updates are provided to Members to allow consideration of changes in circumstances. There is currently no guidance on what an appropriate time period is to implement a delegated decision or when a review of change in circumstances should be undertaken.

In our view, the Council should develop its governance arrangements to include clarity on record keeping standards (taking into account the statutory Code of Practice), time limits where there are delays in implementing delegated decisions and guidance on when changes in the known facts or risk profile require reporting back to the original decision maker.

### **Recommendations**

*R12 The Chief Executive should put in place arrangements to consider inherent conflicts of interest for executive officers.*

### **The Council's position**

The Council has acknowledged the difficulties arising from the arrangement, stating, in a letter from the then Section 151 Officer on behalf of the Council during the value for money review, as follows:

*“The Council sought and obtained legal advice subsequent to the June 2016 Cabinet decision in relation to the public procurement regime and its application to the Fairfield Halls scheme. [...] Although the advice assumed an actual land transfer under an option agreement (with buy back and security) the Council elected to grant licences to carry out demolition and other works to the Halls. This was consistent with legal advice, insofar as it meant that there was no enforceable obligation to carry out works. It is recognised however that the overall procurement law position was dependent on the company remaining truly independent and that, as you identify, this was not given sufficient weight. Equally, the Council has not been able to locate all documents entered into by way of licence to carry out works on Council land.*

*In relation to how the Council was able to protect its interests and secure economy, efficiency and effectiveness in its use of resources in relation to the Project, the Council was reliant on the commercial incentive on the Company to control costs and maximise returns. As sole shareholder, as might be expected, the Council had an ability to monitor and control this. No contractual mechanism was applied however, given that no loan agreements were entered into and that the terms of any licence would only require method statements to address how work would be carried out. The external legal advice did make the point that although the Company was not subject to procurement law, it would still be expected to be interested in securing value for money through conducting a competitive tender process for works/services.*

*In summary, whilst the Council did take advice it is recognised that the Council should have sought that advice earlier and in greater depth, and should have then acted on that advice.”*

The Council has, in light of the matters reported upon here and their views as set out above, proposed to account for the expenditure on the project as if it had been direct capital expenditure by the Council (as if the Council had initially merely spent the money on the refurbishment itself, rather than providing a loan the Brick by Brick to carry out its own refurbishment).

## Conclusions

The Fairfield Halls refurbishment project was a complex project which was delivered later and at a higher cost than the original Cabinet approval in June 2016. and overspent. The Council failed to ensure the legality of the arrangements for the project combined with governance gaps which restricted wider scrutiny and challenge that may have allowed corrective action to have been taken. Whilst we have been provided with interview information and written assertions that the matters in this report were raised with by officers to the Portfolio Holders they reported to, we have not been able to obtain evidence to verify the content of informal briefings by officers or the questions Portfolio Holders asked of officers.

Representations received from the relevant Portfolio Holders assert that they did not receive any such briefings or updates. In these circumstances, what is notable is a lack of agreement on this point and the fact that there was a failing somewhere. The then Senior Statutory Officers together with the then Executive Director of Place had both the experience and the position to understand their duty to brief Members and in not recording or escalating formally their concerns they have been left open to challenge on their actions.

In summary, throughout the project there have been examples of a failure to discharge duties from a small group of senior officers (the then Senior Statutory Officers and the then Executive Director of Place). These senior officers were responsible for reporting to the then Portfolio holders (the Portfolio Holder for Homes and Gateway Services, for Finance and Resources and the Leader) who were either not briefed by officers and failed to request briefings on the project or did not take effective action in response to concerns raised by the senior officers.

In our view, key senior officers had the following responsibilities:

- The then Monitoring Officer (January 2016 to June 2021) had a responsibility to report on matters they believe to be illegal or amount to maladministration (Local Government and Housing Act 1989 section 5). In not ensuring that the external legal advice received in November 2016 was adhered to, the then Monitoring Officer's actions are open to challenge.
- The Section 151 Officer at that time (January 2015 to January 2019, at which point they moved into another role until March 2019) – under section 151 of the Local Government Act 1972, the Section 151 Officer is required to make arrangements for the proper administration of the Council's financial affairs and to have responsibility for those arrangements. Whether or not the then Section 151 Officer knew the loan documents were not properly executed, they had a duty to confirm appropriate documentation was in place before allowing the funding transactions to be authorized. The then Section 151 Officer also had a duty to escalate financial matters of concern to Cabinet which in our view included the project expenditure exceeding the budget approved by Cabinet. This duty also applied to the subsequent Section 151 Officer (February 2019 to February 2021) in respect of payments authorised from February 2019 although we accept the representations from the subsequent Section 151 Officer that as an ongoing project there was an assumption that appropriate arrangements were in place.
- The then Executive Director of Place was the project sponsor, chaired the Growth Board and the Fairfield Hall Board. Their objectives included
  - establishing 'new client side arrangements to hold Brick by Brick to account in the delivery of the business plan' and to 'oversee the opening of Fairfield Halls',
  - ensuring that their 'department understands and complies with corporate policy and accountability frameworks including those that relate to financial, people and procurement and commissioning processes and procedures'
  - being 'accountable for the robust management of the budget ensuring forecasting is accurate and take immediate action to deal with any unplanned pressures to deliver a balance budget'

In not ensuring the known project additional spend was reported to Cabinet formally they did not meet their objectives.

- The then Chief Executive Officer (June 2016 to September 2020) as Head of Paid Service has a duty to, where they consider it appropriate, to prepare a report on: (a) the manner in which the discharge by the authority of its different functions is co-ordinated; (b) the number and grades of staff required by the authority for the discharge of its functions; (c) the organisation of the authority's staff; and (d) the appointment and proper management of the authority's staff. (Local Government and Housing Act 1989 section 4). The Chief Executive Officer also had a

responsibility as Chief Executive to effectively manage senior officers reporting directly to them and to do so in line with the Council's Constitution.

In addition, in our view the relevant Portfolio Holders for each of these areas should have been aware of the escalating risks in a complex project (and representations received from relevant senior officers indicate that in their view concerns were raised to the relevant Portfolio Holders, although as noted we have not seen evidence of this, and this is disputed by the relevant Portfolio Holders). In representations made during the drafting of this report some Portfolio Holders have suggested that that the project was Brick by Brick's responsibility and not the Council's; in our view, this demonstrates a misunderstanding of the relationship between the parent entity and its wholly owned company structure (which as some respondents have acknowledged is very different to that with an external company) and the development licence option for the refurbishment which was pursued. It was a political priority. We consider the relevant Portfolio Holders at the time to be the Finance and Resources, Homes and Gateway Services and the Leader

The Council's key failures in the project were:

- receiving external legal advice in November 2016 that raised concerns over the possibility of challenge to the legality of the Council's approach to the project and failing to properly pass these legal concerns on to Cabinet or act upon that advice
- failing to ensure that legal documents were properly executed and retained
- not escalating the known delivery delays and escalating costs
- allowing the lack of transparency of reporting the known issues with the project in the Brick by Brick 2018/19 Business Plan to remain unchallenged
- allowing significant amounts of public money to be incurred on a scheme where the formal written legal documents had not been finalized.
- allowing significant additional expenditure beyond the original budget to remain unreported to Cabinet
- allowing the 2019/20 Brick by Brick's Business Plan to remain unchallenged when it was clear that the public version did not accurately reflect the facts known to the officers
- not responding to direct Member questions with the known project spend at that time in February 2020

As a last resort any of these individuals named above could, and in our view should, have raised their concerns directly with the Scrutiny and Overview Committee (which had sought assurances over the project) or the General Purposes and Audit Committee or the Head of Internal Audit or External Audit. The individuals could, and in our view should, also have used whistleblowing if they did not feel management or Portfolio Holders were acting appropriately.

The Council has responded to the previous reports (in the public interest published on 23 October 2020 and the PwC review of companies dated 13 November 2020) including reporting to Cabinet in November 2020, February, July and November 2021 on the actions taken to address governance concerns relating to Brick by Brick and other Council companies. In a report delivered on 18 October 2021, the Council announced that it had implemented 62 of the 99 recommendations from the first report in the public interest, and we are told that further progress has been made since; there has been significant turnover in the Council's senior officers and Portfolio Holders since the period this report covers.

In reaching our view on the legality of the arrangement we discussed with and challenged the current Senior Statutory Officers who reviewed the position. The Council has, in light of the matters reported upon here and their views as set out above, decided to account for the expenditure on the project as if it had been direct capital expenditure. The Council has proposed amendments to the draft 2019/20 financial statements that correct the accounting for this arrangement

We understand that the Council is now also in the process of considering alternative options with Brick by Brick, while in the meantime making other changes to the related governance arrangements.

Between 2016 and 2020 the Council spent nearly £67.5 million on the Fairfield Halls refurbishment scheme. In a drive to get the scheme implemented, the Council's then statutory and other chief officers did not ensure there was an appropriate legal basis for the engagement of Brick by Brick to carry out the works (by the licence and proposed land transfer) which would avoid legal challenge and enable proper scrutiny and oversight of the project and its costs; did not properly advise members about the independent expert legal advice received or act on that advice; did not secure adequate financial governance for the loans; did not formally and publicly advise members of the risks and changes to the project; and did not seek proper formal authority from members for the expenditure.

## Appendix: Timeline

Date	Source	Fairfield Halls spend	Comment
Jun 2016	Cabinet paper	£30m	Initial Cabinet approval
Oct 2017	Scrutiny & Overview Committee		Minutes record: <i>Progress on the main contract had completed. Council is within original budget they set contractor</i>
Nov 2017	Fairfield Hall Board highlight report	£34.5m	Budget per monitoring reports with no explanation of variation from initial budget of £30m
Dec 2017	Brick by Brick Board report	£34.5m	Board report of forecast project spend including overall £10.5m loss on the wider College Green scheme
Feb 18	Cabinet paper – Brick by Brick Business Plan 2018/19 for shareholder approval	£30m	Officer report to Cabinet refers to Brick by Brick making profits and the £30m investment on Fairfield Halls  Business Plan refers to c£30m refurbishment on Fairfield Halls and no reference to the £34.5m budget in the monitoring reports
Feb 18	Fairfield Halls project monitoring report	£38.95m	Forecast project spend increased to £38.95m per monitoring reports
Jun 18	Fairfield Halls Board report	£42.8m	Forecast project spend increased to £42.8m per monitoring reports  Brick by Brick confirmed increase in spend in separate email to then Chief Executive who forwarded the email to the then Section 151 Officer
Sept 18	Fairfield Halls Board report and emails	£42.7m	Main works contract let in September 2018 at £42.7m
Oct 18	Letters between Brick by Brick and Council	£49.1m	Net spend on Fairfield Halls refurbishment identified as £49.1m  Total College Green projected loss of £28.8m
Oct 18	Brick by Brick Board report	£50m	Forecast project spend on Fairfield Halls refurbishment increased to £50m
Nov 18	Growth Board report	£15.89 m overspend	Reported project spend in excess of the budget included in monitoring report and no detailed explanation i.e., project spend was now £50.39m based on Budget £34.5m + overspend £15.89m
Dec 18	Scrutiny and Overview Committee		No commentary on the known additional spend in excess of the budget  Focus of presentation was progress of operator readiness for re-opening
Feb 19	Cabinet paper – Brick by Brick Business Plan 2019/20 for shareholder approval		Officer report to Cabinet has no commentary on Fairfield Halls project spend despite internal reports to the Growth Board showing a forecast spend of £50m which is in excess of the £30m investment approved by the June 2016 Cabinet.  Brick by Brick Business Plan reports £0m profit on College Green project. This includes the impact of the financial position on the Fairfield Halls project.
Jan 20	Scrutiny and Overview Committee	£42.6m	First reporting to formal meeting with members on Fairfield Halls refurbishment spend since approval in June 2016. Amount reported to members for spend on project was £42.6m
Mar 20	Financial ledger	£59.9m	Council record of funding provided to Brick by Brick for Fairfield Halls. No additional funding provided by the Council to Brick by Brick in January or February 2020.
Mar 21	Financial ledger	£67.5m	Total spend on Fairfield Halls

