

YORK CITY COUNCIL
Housing delivery advice
3 August 2017



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1 INTRODUCTION

- 1.1 The Council has asked a number of legal questions concerning how it can develop housing for (1) market sale and rent (2) below-market sale and shared ownership, and (3) affordable rent within the HRA. Our responses are set out below. To help explain our advice, we have also included in Schedule 3 an overview diagram of the legal structure that appears most likely to help the Council achieve its objective.

2 EXECUTIVE SUMMARY

- 2.1 The Council would like to bring forward a number of sites to develop housing and generate a long term revenue stream to support the provision of wider Council services. Although a variety of tenures will be created, the focus will be on private rental sector housing in order to generate the revenue stream.
- 2.2 The Council could seek to develop properties directly without using a housing delivery vehicle. However, the most robust and appropriate approach is to do so through a company limited by shares. If this model is used, the Council will have the statutory power to borrow and lend to the company. There will be greater flexibility over the type of tenures that the vehicle may offer. The right-to-buy rules will not apply to it unless there is a change in the law.
- 2.3 A company limited by shares will be able to pay a dividend to the Council as its only shareholder. It will be structured around the two key roles of shareholder and director, and can be established so that the Council retains strategic control over how it operates.
- 2.4 The potential for conflicts of interest for members and officers who are appointed to act as directors of a company must be taken into account, and clear arrangements will need to be put in place about how they will be managed.
- 2.5 A company limited by shares can be set up to allow the Council to award contracts to it without first running a tender (the Teckal exemption). It is possible to structure the company to sit outside of the procurement rules, but it is very difficult to set it up with the ability to achieve both.
- 2.6 The Council may dispose of land to a company set up for these purposes for market value. Doing so will comply with the State aid rules. It can also dispose of land at an undervalue in certain circumstances.
- 2.7 The Council is unlikely to be able to use retained right-to-buy receipts to purchase completed units unless the form of retention agreement has been amended.

3 CONTEXT

- 3.1 The Council's Housing Delivery Programme Board has agreed the following broad objectives, listed in order of priority:
- 3.1.1 to accelerate the delivery of at least 500 new homes, with at least 100 of those being affordable housing;
 - 3.1.2 to deliver a capital and revenue receipt to support Council services;
 - 3.1.3 to facilitate the delivery of houses across all tenures of the type of housing that people in the city need;
 - 3.1.4 to facilitate the delivery of good quality homes which are well designed, meeting people's needs whilst being affordable to maintain, heat and light in the long term.
- 3.2 In delivering these objectives, the Council would like to create a new revenue stream of approximately £1 million a year by 2020 / 21, primarily by developing residential property for letting in

the private rental sector (**PRS**). As part of the project, units will also be developed for market and below-market sale, as well as for affordable rent to meet planning requirements.

- 3.3 Five initial Council sites have been identified as suitable for development, and planning permission may be applied for one of them in September. Further sites will be identified as the project proceeds. The Council expects to develop around 600 homes on the five initial sites; up to 20% are likely to be affordable to meet planning requirements. It is likely that the Council will transfer the affordable units to the housing revenue account (**HRA**).
- 3.4 The Council is also exploring the possibility of property-based joint ventures, including with the MOD, and separate discussions are taking place to progress those proposals. Once terms are agreed, the Council is keen to be able to implement the joint ventures within the structure to be put in place to deliver the existing proposals. The new structure must therefore be flexible enough to accommodate this.

4 VIRES ISSUES

Can the Council via its General Fund build homes to sell for profit and to let at market rents?

- 4.1 The Council could seek to develop homes for market sale and rent in the general fund, but there are a number of factors that potentially mean it may be more suitable to do so through a Council-owned housing delivery vehicle (**HDV**). This is particularly the case in light of the scale of the proposed developments. The factors are considered below.
- 4.2 Although the Council has the power to do anything individuals may do (the general power of competence),¹ activity undertaken for a "*commercial purpose*" must be carried out through a company or a community benefit society.² Commercial purpose is not defined in the legislation, but it would be reasonable to assume that developing a minimum of five sites to create up to 600 units to generate long term revenue from the PRS would fall within the definition, even allowing for the fact that up to 20% will be to meet affordable housing requirements. As a result, although the Council could potentially seek to exploit the lack of clarity in the legislation about exactly what constitutes "*commercial purpose*", in our view the most robust and appropriate approach would be to act through a company (additional reasons for using a company are considered in section 5 - governance).
- 4.3 In addition, the Council is a local housing authority³ with a retained housing stock. Subject to what is said below about relying on an alternative statutory power, the starting point for developing and holding residential property is therefore the statutory powers to provide social housing (which comprises property for low cost rent or shared ownership). However, relying on these powers would result in the units sitting within the HRA and not the general fund, which would mean the income would have to be used within the confines of the HRA rules.
- 4.4 It would theoretically be possible to rely on the general power of competence as an alternative to the Council's statutory housing powers referred to above; this could allow it to build homes outside of the HRA for market sale and rent. However, careful thought would need to be given to whether this would be an improper use of the power, particularly in relation to the rental units. In any event, the secure tenancy (and consequently the right-to-buy) rules would be likely to negate any advantages of relying on the general power of competence as they would still apply; the general power is subject to pre-existing limitations.
- 4.5 When letting properties in the HRA, the Council would be obliged to comply with DCLG's Guidance on Rents for Social Housing dated May 2014 (see [here](#)). Under the Guidance, the Council would only be allowed to charge what is defined as social rent, unless it can rely on an exemption. None of these are likely to help the Council achieve its objective. One permits the charging of affordable rent, and although another does allow a higher amount to be charged to households with an income

¹ Section 1, Localism Act 2011.

² Section 4, Localism Act 2011.

³ Sections 1 and 4, Housing Act 1985.

over £60,000 a year, the additional income over the social or affordable level must be reinvested in social housing. It could not therefore be returned to the general fund.

- 4.6 A further factor to be taken into account is that the rental units would also be subject to the secure tenancy rules, whether held in the HRA or the general fund. The consequence of this is that tenancies could not be ended without a court order and, perhaps more importantly for this project, right-to-buy would apply. The test as to whether a tenancy is secure does not turn on whether it is held in the HRA or the general fund, but on whether the landlord and tenant conditions are met. In broad terms, this will be the case where the Council is the landlord and the tenant is an individual who occupies the property as his or her only or principal home (discussed in section 11 - tenure). Classification as a secure tenancy, and therefore the application of right-to-buy, would be likely to impact on the Council's income generation objective as there would be a reasonable prospect of tenants exercising the right and reducing stock.
- 4.7 There is limited scope to build and rent units for certain purposes that are excluded from the secure tenancy rules. For example, providing temporary accommodation in compliance with the prevention of homelessness duties or to asylum seekers.⁴ The Council's brief does not envisage developing units for these purposes, presumably because they would not generate the level of income required and so we will not explore this area further unless it would be helpful for us to do so.

Can the Council via its General Fund borrow in order to develop homes for sale and / or to retain and let at a profit?

- 4.8 The Council has wide legal powers to borrow for "*any purpose relevant to its functions*⁵ ... or for the purpose of the prudent management of its financial affairs".⁶ If it borrows specifically for the purpose of developing homes for sale or rent then these powers are broad enough to justify doing so. This is distinct from the question of whether the Council would need to act through a company to do so, or from the question of borrowing to invest in new sites to develop for profit.
- 4.9 The use by local authorities of Public Works Loan Board borrowing to invest⁷ directly in third party property for profit has caused some auditors to voice concerns about whether it is lawful for them to do so. The argument derives from the qualification in the Prudential Code, which states that "*Authorities must not borrow more than or in advance of their needs purely in order to profit from the investment of the extra sums borrowed*".
- 4.10 In our view, it would be very difficult to challenge the Council successfully on this basis even if it decided to acquire third party sites for development. This is because the Council would not need to rely on its investment powers as it could use the alternative power to acquire land by agreement.⁸ In addition, the Council has clear housing and income generation objectives in these circumstances that demonstrate a close link between the justification for borrowing and the "need". This could be strengthened further by obtaining specific internal approval for each site acquired.

5 GOVERNANCE

Guided by the vires considerations, what governance structures will be needed to operate Council led development activities? Should a company structure be required, we would wish this to be as efficient to operate as possible. Are there models for the Shareholder Agreement, Memorandum of Understanding and Articles of Associations which we should use?

Type of vehicle

⁴ Schedule 1, Housing Act 1985.

⁵ This term has been widely interpreted by the courts to mean all powers and duties of local authorities.

⁶ Section 1, Local Government Act 2003.

⁷ Section 12, Local Government Act 2003: "*A local authority may invest: (a) for any purpose relevant to its functions under any enactment, or (b) for the purposes of the prudent management of its financial affairs.*"

⁸ Under section 120, Local Government Act 1972 a principal council may acquire by agreement any land, whether situated inside or outside their area for the purposes of (1) any of their functions under this or any other enactment, or (2) the benefit, improvement or development of their area.

- 5.1 For the reasons outlined above, there are reasonable grounds for concluding that the Council should use a separate vehicle to achieve its objective of a long term revenue stream. There are additional reasons for using the company limited by shares (**CLS**) model, rather than, for example, a community benefit society or a company limited by guarantee. The most important of these in light of the Council's objective are:
- 5.1.1 the ability for a CLS to distribute net profits by the payment of dividends to the Council as shareholder. This is key where the primary objective is to generate long term income;
 - 5.1.2 the ease with which third parties can invest in the equity of a CLS by acquiring a shareholding. This is also key because of the proposed joint ventures that are being developed;
 - 5.1.3 the familiarity of the market with the CLS model;
 - 5.1.4 the relative ease with which a CLS can be set up, often on a same-day basis;
 - 5.1.5 the additional flexibility around exiting the arrangement, for example, disposing of one or more properties held within it, or some or all of the shares to a third party.
- 5.2 As a potential alternative to the CLS model, the Council could consider using a limited liability partnership (**LLP**). The principle reason why local authorities use LLPs is tax transparency, which means that profits are assessed for tax in the hands of the local authority owner. The Council's share of profits would not therefore be subject to corporation tax as it is exempt from such tax.
- 5.3 To use the LLP model, local authorities often rely on their regeneration / housing, their investment powers or a combination of both as an alternative to the general power of competence. However, an LLP requires there to be two or more parties.⁹ In the absence of a genuine third party partner and because the project's primary objective is income generation, this model would be likely to create a risk that its use was artificial / improper.

Governance

- 5.4 The governance structure for an HDV established as a CLS will be based around the two roles of shareholder and director. Although we are aware that the Council is familiar with its role as a shareholder because of experience in relation to other companies, we have explained both below in headline terms for ease of reference, and to ensure that the key areas within each are covered.

Shareholders

- 5.5 Shareholders own and control a CLS through the appointment and removal of directors and certain statutory rights. In addition, shareholders may exercise control in accordance with rights given to them either in the articles of agreement (discussed below) or a separate contract with the company: a shareholder's agreement.
- 5.6 A shareholder's agreement is commonly put in place to provide a local authority owner with strategic control over the operation of the company through (1) the right to approve a business plan, and (2) the requirement that certain decisions, referred to as "reserved matters", are referred back to it as shareholder rather than being within the discretion of the board of directors. Please see the example list of reserved matters in Schedule 1 to understand the type of issues that are commonly reserved by the shareholder, although this can be varied to reflect an authority's individual requirements.
- 5.7 The approach to a shareholder's agreement and the level of control that is appropriate is likely to vary depending on whether the company is being structured as a:
- 5.7.1 Teckal company (considered in section 9);

⁹ Section 2, Limited Liability Partnerships Act 2000.

- 5.7.2 within, or outside of, the procurement rules (also considered in section 9).
- 5.8 The overall position typically achieved is that the authority approves the business plan, and the board of directors then has the remit and discretion to implement it, subject to the reserved matters. The level of discretion given to the board depends on the framing of the business plan – i.e. how prescriptive or flexible it is – and what the reserved matters are.
- 5.9 As well as considering how prescriptive or flexible an approach it would prefer, the Council would need to decide how it wishes to exercise its shareholder function. Given the function is about strategic control over the company's activities, it is usually exercised by members. This could be:
- 5.9.1 through all shareholder decisions going to the Executive;
- 5.9.2 a committee of the Executive being established to undertake some or all decisions; or
- 5.9.3 certain decisions being delegated to specific members (for example, a portfolio holder) and / or senior officers.
- 5.10 We note the Council's Executive report dated 29 September 2016 which recommends establishing a Shareholder Committee, and suggests how the Council's responsibilities as shareholder should be divided between the Executive and the Committee. This is a combination of the first two options listed in the previous paragraph, and is one commonly used by local authorities. The Council could explore incorporating the arrangements for a new CLS within these to avoid duplication.

Directors

- 5.11 Directors control the operation and management of a CLS. Choosing the most suitable individuals for this role is critical to success. There is no set size or composition of a board of a local authority company, but there are a number of issues that the Council would need to consider thoroughly:
- 5.11.1 the appropriate size of the board for the circumstances, so that it is not unwieldy and can make decisions quickly where necessary;
- 5.11.2 the appropriate mix of skills and experience required;
- 5.11.3 the extent to which the board will be executive or non-executive – executive being directors who are employees of the company, and non-executive being those not employed, being either officers or members from the Council and / or independent directors;
- 5.11.4 the need to demonstrate sufficient control when required for a Teckal company, or independence if required to achieve non-contracting authority status;
- 5.11.5 the potential conflicts of interest that could hinder the effective operation of the board, or present issues for individuals when acting within the Council (considered in section 7).
- 5.12 What is appropriate is likely to vary between companies depending on what each one is doing and other structural considerations, such as whether it is to be a Teckal company.

Documentation

- 5.13 The Council would like to ensure that any company it establishes can operate as efficiently as possible, and has asked what documentation should be used to achieve this. Although there are no standard documents available for these exact circumstances, we have well developed constitutional documents that can be used as the starting point. We are familiar with what works best, and can tailor these so that the CLS can operate as efficiently as possible. We would be happy to provide drafts of the articles of association and shareholder's agreement should the Council decide to use

the CLS model, and have provided the Council with a separate proposal about how to take forward structuring and establishing such a model to achieve its objectives.

Regulated companies

- 5.14 A CLS wholly owned by the Council will be classed as a regulated company, subject to the legal and practical implications explained in Schedule 2. These rules apply regardless of whether a CLS is established as a housing delivery vehicle or for another purpose, and it is important to be aware of the restrictions they contain, particularly around publicity, the provision of information and payments to members who act as directors. For example, a regulated company must ensure that company documents make it clear that it is owned by a local authority to ensure that there is transparency. This includes making it clear on business letters and all other forms of business correspondence and documentation.

What, if any, governance constraints are required to allow the General Fund to operate a Private Rented housing portfolio?

- 5.15 The key constraints are those outlined in section 4 (the application of right-to-buy, the protection given to secure tenancies and the possibility of being challenged for improperly using a power to hold property outside of the HRA).
- 5.16 If, in light of these, the Council chooses to act through a company, it would also be obliged to recover the costs of providing staff, premises or other facilities to the HDV, and prepare a formal business case before trading can begin.¹⁰ These are both tasks that it would be usual for any party pursuing a similar course of action to undertake, and they are therefore not particularly onerous or difficult to comply with.

What powers and restraints must guide the Council in its decision making regarding housing development?

- 5.17 In addition to the obligations around cost recovery and preparation of a business case, as with the exercise of any power, the Council is subject to the public law principles of acting reasonably, for a proper purpose and taking into account only relevant considerations.
- 5.18 It would therefore need to be clear that the Council was not setting up the HDV to avoid right-to-buy, but to comply with the obligation to use a company when engaging in commercial activity: the development of PRS property. As a natural consequence of acting through a company, right-to-buy would not apply to these properties, but this would not have been the guiding principle for choosing the structure. On our understanding of the proposals, there would as a result be little merit in bringing a challenge on this basis.

What consideration must be given to the Council's fiduciary duty?

- 5.19 The Council is under an overarching duty to act in the best interest of its ratepayers, and this will apply in relation to the decision-making process for this project. The duty is not defined in statute, for example, there are no specific consultation requirements that must be met to comply with it. Although it is difficult to bring a challenge on this basis alone, it is often used to bolster a claim based on other grounds.¹¹
- 5.20 If the Council follows its usual governance procedures and complies with the constraints outlined above, including the general public law principles, there should be little risk of breaching the fiduciary duty. The Council will have prepared a business case and proceeded on the basis that it demonstrated there were reasonable grounds for doing so i.e. that the financial returns justified the resources and risk involved.

Does the Council have the power to borrow for this General Fund housing development activity?

¹⁰ Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 (SI 2009/2393).

¹¹ *Bromley LBC v Greater London Council* [1983] 1 AC 668.

- 5.21 Please see our answer to the earlier question in section 4.8. In summary, the Council has wide statutory powers to borrow that could be relied on to fund general fund development activity.

Should a Company Structure be required, does the Council have the power to borrow for this General Fund housing development activity?

- 5.22 Yes, the Council does have the power to borrow, and it could also rely on the general power of competence as authority for lending to the HDV. This is a commonly used approach and there is no reason why the Council could not take it here, particularly as it will reduce the risks that would be created by undertaking the activity directly. For example, around breaching the obligation to act through a company when undertaking something for a commercial purpose, or seeking to develop and hold housing outside of the statutory housing powers.

6 TAX

In light of the vires and governance advice, and potentially to guide the most economically efficient development structure, what are the Stamp Duty Land Tax, VAT, Corporation Tax and other taxation implications?

- 6.1 The implications are set out below in general terms, and this will need to be developed in more detail in light of the financial modelling and related advice that the Council is also obtaining.

SDLT

- 6.2 SDLT group relief applies to transfers between bodies corporate, rather than a more restricted definition of "company" (para 1, Schedule 7, Finance Act 2003).

- 6.3 A group, for SDLT group relief purposes, consists of a parent body corporate and its 75% subsidiaries. A "75% subsidiary" for these purposes is a company in which the parent body corporate owns (directly or indirectly) at least 75% of the ordinary share capital, and in which the parent is beneficially entitled to at least 75% of the distributable profits and at least 75% of the assets available for distribution on a winding up (para 1(2)(b) Finance Act 2003).

- 6.4 Accordingly, a local authority can be the parent entity of an SDLT group, as it is a body corporate, but it could not be an intermediate entity as it has no share capital (for regulatory reasons, it would also be the case that a local authority could not be a subsidiary of another entity, of course).

- 6.5 A transfer of property to a company (with share capital) which is beneficially owned (directly or indirectly through a holding company) at least 75% by the Council should be capable of benefiting from SDLT group relief, as would be transfers of property between group companies.

- 6.6 It should be noted that HMRC have occasionally disputed that a local authority can be a member of a group for SDLT purposes, although such disputes have been less frequent in recent years.

VAT

- 6.7 VAT will be incurred on goods and certain services used in the construction or conversion of property to be used in the residential property rental business. The letting of residential property is an exempt supply for VAT purposes, so that the purchase of goods and certain services in relation to the rental properties by a property rental business which owns those properties and lets them out is unlikely to be recoverable. A subsidiary of a local authority cannot recover VAT under the local authority provisions in s33 VATA 1994; it is restricted to the normal rules for recovery of VAT.

- 6.8 The construction of residential property, or the conversion of commercial property to residential use, could, therefore, give rise to irrecoverable VAT if directly undertaken by the company which will be the landlord of the properties.

- 6.9 However, if another entity undertakes the construction / conversion work and then transfers the residential properties to the landlord company, it may be possible for the developer entity to recover VAT incurred on conversion costs without creating irrecoverable VAT for the landlord company.
- 6.10 This is because the first grant of a major interest in a building by a person converting a non-residential property to residential use (or constructing such a property) is zero-rated for VAT purposes. Accordingly, the rate of VAT charged on the grant of the interest is 0% and so, as the supply is not exempt, the person undertaking the conversion and then granting the interest will generally be able to recover VAT incurred on the conversion costs.
- 6.11 If a separate company undertakes the conversion / development work, it should therefore be able to recover VAT on its costs of doing the work. The grant of an interest over the property to the company thereafter would be zero-rated so that the company would not incur irrecoverable VAT on the acquisition.

Corporation tax

- 6.12 Any companies created by the Council will be subject to corporation tax on their profits; the Council's exemption from tax is not extended to a subsidiary company of the Council.

Corporate tax – group relief

- 6.13 If it is anticipated that losses and profits may arise at the same time, in different vehicles, it would be appropriate to consider interposing a holding company so that the Council does not own the subsidiaries directly. This is because the Council cannot form part of a group for corporation tax purposes as such a group must consist of companies (including the parent company) and, for the purposes of corporation tax, the term "*company*" specifically excludes local authorities from the definition (s1121 Corporation Tax Act 2010). Note that the definition of "*company*" differs for other tax purposes, and is not a consistent definition.
- 6.14 If a holding company is used, then the vehicles and that holding company together should be able to be regarded as a corporation tax group such that they can surrender trading losses and property business losses between themselves.

7 MEMBER AND OFFICER LIABILITY

In light of the vires and governance advice, please advise on any Member or Officer liability issues, how best these can be managed and implications relating to indemnity insurance?

Directors' and officers' liability insurance

- 7.1 Directors are subject to a large number of duties and obligations as set out in the articles of association of the company, statute and common law. These fall into the following three broad categories:
- 7.1.1 general duties under the Companies Act 2006;
 - 7.1.2 duties under other legislation;
 - 7.1.3 insolvency legislation.
- 7.2 A director can in limited circumstances be personally liable under these duties, for example, in relation to wrongful or fraudulent trading. The Council should therefore consider indemnity arrangements for officers and members acting as directors to decide how best to protect those it appoints to this role.

- 7.3 There is a general statutory indemnity under Public Health Act 1875 that will be available where the officers or members have acted in good faith. In addition, local authorities sometimes provide specific indemnities for officers or members appointed to external bodies.
- 7.4 Insurance can also be obtained by the company or by the Council (assuming cover is not included as part of its existing corporate policy). If independent directors are to be appointed, the Council should raise with the prospective directors what expectations they have in respect of indemnities, and whether the Council would be expected to provide anything over and above the insurance obtained by the company.

Conflicts of interests and how best to manage

- 7.5 A further governance issue that the Council must consider is conflicts of interests. The potential for conflicts arises because officers or members appointed as directors of a company will have separate duties and interests (1) as company directors, and (2) as Council employees or members. This needs to be considered in respect of decisions within the company and within the Council.

Decisions within the company

- 7.6 The duty under company law to avoid conflicts of interests requires a director to avoid a situation in which he or she has, or can have, a direct or indirect interest that conflicts, or may conflict, with the interests of the company. The fact that a director is appointed by, and may also be a member or officer of, the Council is likely to place him or her in a position of potential conflict between his or her loyalty to the Council and his or her duties to the company.
- 7.7 This can be dealt with by drafting the company's articles to allow any conflicts of interest arising purely by virtue of a director being a member or officer of the Council to be automatically authorised, and for that director to be able to participate in discussions on the matter in question and to vote on decisions concerning the matter.

Decisions within the Council

- 7.8 The issue of conflicts is more acute in relation to decisions made within the Council. An officer has a duty to his or her employer and a member has a duty to the Council. Both have duties in terms of appropriate decision making within a public body – for example, not being biased or predetermined.

Officers

- 7.9 The Council can agree to officers continuing to act despite potential conflicts; agree not to take action against them where they are required to act contrary to the interests of the Council due to their role as director; and agree to their remuneration as a director.
- 7.10 Managing conflicts is more problematic for officers if they are involved in making material decisions about the company wearing their Council officer hat. This can create a risk of challenge on the basis that the decision is influenced by bias because of their role at the company, and / or by pre-determination i.e. that they have made their mind up because of the company role and are not making the decision objectively and fairly.
- 7.11 This risk is best mitigated by not putting Council officers who are responsible for material decisions relating to a company as directors of the company, and this is the approach commonly taken by other authorities. If such officers are required to be on the board, steps should be taken to mitigate the impact within the Council. For example, by carving out responsibility for decisions that relate to the company from the remit of the statutory officer and a suitable alternative role having such responsibility.
- 7.12 We would also advise that authorities consider not appointing statutory officers (monitoring officer, s.151 officer and the head of paid service) as directors because they may at some stage be required to undertake their statutory roles in relation to the company, which would raise difficult conflicts. If

statutory officers are appointed, we recommend keeping the issue under review with a view to making any changes that may be required if significant conflicts arise.

- 7.13 The Council should also consider the "retained client" role i.e. if all officers who know anything about the services being delivered are either seconded or transferred to the company to run them and / or on the company board as a director, who is left to advise the Council on decisions about the company, and about decisions in relation to the company in their capacity as owners.
- 7.14 It is a criminal offence for officers, under colour of their office, to accept anything other than their proper remuneration. Consequently, where officers are appointed as directors by reason of their post within the Council, they may not accept any payment from the company for services as a director, unless the Council agrees that the additional payment shall form part of their proper remuneration. It is therefore recommended that officer directors should formally notify the Council (the chief executive and the monitoring officer or any alternative requirements of the Council) of their interest, and this should be kept on the officer declaration file. An alternative approach that is sometimes taken where there is a desire for the director role to be remunerated is for the officer to have a separate contract with the company (i.e. not as part of the officer's contract of employment with the authority) and receive remuneration through this. In these cases, the employing authority will need to provide approval for the individual to take on the separate role.

Members

- 7.15 The conflicts issues for members relate both to the code of conduct, and also to the risk of decisions made by members who are also directors being challenged on the basis of bias or predetermination or bias.
- 7.16 Directors who are members must disclose any potential conflicts of interests and observe the requirements of the code of conduct of the Council.¹² Such directors must also be careful (when undertaking their Council role) to behave in ways which avoid suggestions of bias or predetermination. This can be difficult, and more so for more senior members, for example, Cabinet members. Despite the potential for the Council to approve dispensations to authorise the conflict from a councillor standards perspective, it could remain difficult in practical terms for the member to deal with a matter in a satisfactory way, and it could lay both the member and the Council open to allegations of bias and challenge.
- 7.17 For example, take a scenario where the Council has invested say £10m in a housing vehicle for development. A councillor on the board of the company is aware that the development is not going well and that the company is at risk of becoming insolvent; a board meeting is held where they agree to approach the Council to restructure the financing to improve the financial position. In this situation, a councillor or officer who made the decision to approach the Council with the proposal in light of the company's best interests would then be in a difficult position if the individual was then responsible for considering the proposal and making a decision in the best interests of the Council. In such situations, questions of bias, predetermination and general probity around public decision making could be difficult to satisfactorily manage satisfactorily.
- 7.18 Where the Council is seeking to establish a company that is not caught by the procurement rules, the position would typically be stronger without members on the board. This is because it would help create greater distance between the company and the Council, and reduce the perception or risk that the vehicle has a policy purpose rather than being purely an investment / financial purpose.
- 7.19 Directors' remuneration (if any) for members is restricted in law. This means that they cannot receive any additional remuneration from the company for acting as a director which is beyond the special responsibility allowance they would have received had the activities of the company been discharged by the Council. Any remuneration they receive will be deducted from the special responsibility allowance that they receive within the Council, and they may only claim mileage and subsistence at the rates that apply to members.

¹² Localism Act 2011.

8 STATE AID

Will the activities proposed satisfy the State Aid rules?

- 8.1 Yes, provided they are structured to fit within one of the permitted exemptions. In these circumstances, the most commonly used is the MEOP (explained below).

Overview and analysis

- 8.2 The State aid rules prohibit the Council from transferring its resources to a third party, including an HDV, in a way that could distort competition and affect cross-border trade in the European Union. A successful challenge could result in an order by the UK courts or the European Commission to repay the aid plus interest. A claim can also be brought by a body that has not received the same favourable treatment, with there being a ten-year limitation period for challenges.

- 8.3 There are four potential types of aid in this project:

- 8.3.1 the transfer of land by the Council to the HDV;
- 8.3.2 the provision of a soft loan by the Council to the HDV i.e. on less than market terms;
- 8.3.3 the provision of a guarantee in favour of a commercial lender to support lending to the HDV;
- 8.3.4 the provision of support services by the Council to the HDV on less than market rates, for example, staff, premises or back office services.

- 8.4 The simplest way of ensuring that the rules are met is for the Council to charge the market rate in each of the above circumstances. This is the approach commonly used by local authorities in similar circumstances. Doing so will mean that the Council is relying on the market economy operator principle (**MEOP**), which treats as not creating aid transactions where the State is providing the "benefit" on market terms, and acting as a rational market operator faced with similar circumstances. There are other grounds that can potentially be relied, for example, in relation to supporting the provision of social and affordable housing, and we can advise about these if the Council does not want to use the MEOP.

9 PROCUREMENT

In light of the vires and governance advice, what public procurement regulations and rules apply to the purchase of works, services and assets?

- 9.1 If the Council itself awards contracts to deliver the project then it will be subject to the Public Contracts Regulations 2015 in the usual way. However, there is more discretion available to an HDV, and the Council must therefore consider:

- 9.1.1 whether it would like the HDV to be established as a contracting authority subject to the procurement rules;
- 9.1.2 whether it would like to structure the HDV to meet the Teckal exemption in the procurement rules. This would allow the award of contracts without a tender (1) by the Council to the HDV (2) by the HDV to the Council and (3) by the HDV to another Council subsidiary (if any).

- 9.2 There is a natural tension between an HDV established to sit outside of the procurement rules while also structuring it to fit within the Teckal exemption. Although the two tests are different (as explained in more detail below), they are closely related. The consequence of this is that it is very difficult to claim non-contracting authority status whilst also seeking to rely on the Teckal exemption,

which would require the HDV to be subject to Council control and limited to providing 80% of activities to it.

- 9.3 The disadvantage of not having Teckal status is that the Council would be unable to award works or other contracts to the HDV without a compliant tender under the procurement rules. It could still retain a certain degree, for example, by granting the HDV an interest in a site that would allow development, but without there being an enforceable obligation to do so, in conjunction with the proper exercise of the Council's planning function. In addition, it could also retain control under a loan agreement, a resourcing contract and by reserving approval of the business plan to the Council (indirectly via a holding company, if there is one). However, this would in overall terms still give less control than would be possible through a contractual mechanism.
- 9.4 There is no correct answer as to whether it is best to set up an HDV to sit outside of the procurement rules and lose the advantages of the Teckal exemption or the other way around, and it is a case of weighing up the Council's priorities in light of any other factors that may be of concern to it. For example, one commonly cited advantage of complying with the procurement rules is that it enables the local authority to demonstrate objectively that the HDV, and so by extension the authority, has obtained value for money.
- 9.5 The practical effect of this is that the Council should consider which of the two is more important in the long run i.e. which will best help achieve its objective of long term revenue generation: being able to keep a close relationship and control over the activity and developments by the HDV through contractual terms, or giving it the freedom to contract outside of the constraints of the procurement rules.
- 9.6 The rest of section 9 explains the underlying legal detail around setting up an HDV to sit outside of the procurement rules and the Teckal exemption to give the Council a better understanding of the issues involved in both and how they interact.

HDV as a contracting authority

- 9.7 The Council is defined as a "*contracting authority*" in the procurement rules. The definition of contracting authority has been drafted broadly, and can include not only local authorities but also subsidiary companies classified as "*bodies governed by public law*".
- 9.8 The Council could seek to structure the operating model of an HDV (including for these purposes, a holding company) to avoid it being a body governed by public law. This would allow the HDV to buy goods, services and works without undertaking public procurement processes, which means the process can be faster and completed with fewer resources. In order to achieve this, the HDV would have to:
- 9.8.1 avoid having a dependency upon the Council;
 - 9.8.2 avoid meeting needs in the general public interest; and
 - 9.8.3 have a commercial or industrial character.
- 9.9 If the Council structures the HDV this way, in the event of a challenge the burden of justifying why it was not a contracting authority would fall firmly on it and the HDV. There are a number of factors that the courts will consider in the event of a challenge. In broad terms, these can be reduced to:
- 9.9.1 whether the close dependency test is met. This has a low threshold, which would, for example, be met if the Council could appoint more than half of the directors;
 - 9.9.2 whether the body meets needs in the general interest. This also has a low threshold and has been interpreted widely enough to catch not only public serving activities, but also commercial activities that have an indirect economic benefit. It is likely this threshold would also be met here;

- 9.9.3 whether the body has an industrial or commercial character. This part of the test gives the Council the best opportunity to structure the HDV so that it is not a body governed by public law, and reflects the principle that an entity that is genuinely industrial or commercial will be subject to market conditions and so not subject to the influence of the Council when awarding contracts. The case law suggests that a subsidiary will be classed as industrial or commercial if it:
- (a) operates in normal market conditions;
 - (b) aims to make a profit;
 - (c) bears the losses associated with its activity; and
 - (d) faces significant competition.
- 9.10 In order to reflect these commercial principles, and strengthen the grounds for arguing that the HDV is not a contracting authority, the following actions should be considered:
- 9.10.1 making it clear in the Council's decision-making process that it is setting up the HDV to generate profit, rather than pursue policy objectives, by relying either on the general power of competence, and for this reason is using the company limited by shares model, with unrestricted articles of agreement and its ability to distribute profits;
 - 9.10.2 providing all financial and other support from the Council on market terms, documented by suitably commercial terms and conditions supported where appropriate by security;
 - 9.10.3 having a clear audit trail acknowledging that the Council does not intend to step in and provide support on non-commercial terms in the event of insolvency or similar financial difficulty;
 - 9.10.4 appointing one or more directors who are not officers and who have relevant commercial experience;
 - 9.10.5 appointing no members as directors unless there is a strong commercial reason for doing so. Doing so would suggest a close on-going political or policy focus rather than one focussed on generating a financial return;
 - 9.10.6 recruiting an operational manager on the open market with suitable commercial experience rather than seconding someone from the Council. Both this and the previous two suggestions would lend more of a commercial feel to the structure than would otherwise be the case;
 - 9.10.7 not establishing the subsidiary as a Teckal company.
- 9.11 The grounds for claiming non-contracting authority status would be even stronger if the Council did not have the right to appoint the majority of the board of directors because there would be no relationship of close dependency. However, it is recognised that this is unlikely to be an acceptable position.
- 9.12 There will remain a residual risk that an HDV set up this way could be classified as a body governed by public law because of the broad way the court has interpreted the term in the past. For example, if a challenge were brought under the procurement rules on the basis that a contract had been awarded directly without a compliant tender, or by way of judicial review. Any challenge would be considered on the specific facts, which means that it is important to document thoroughly the structure to reflect the subsidiary's industrial or commercial nature.
- 9.13 As the test of whether a body is a contracting authority is an ongoing one, we recommend that an HDV set up this way is monitored regularly to see if any of the facts, and so its status, have changed.

If it becomes clear that a change might have occurred then this can be addressed. Regular monitoring would also provide an audit trail that the issue has been considered properly should a challenge be brought.

Awarding contracts: Teckal

- 9.14 If the Council needs to contract directly with the HDV, it would in most cases only be able to do so after the HDV has successfully bid under a compliant procurement. However, it could structure the arrangement to fall within what is known as the Teckal exemption.

Teckal

- 9.15 The Teckal exemption allows a contracting authority to award a public contract to a controlled legal person without first tendering it under the procurement rules. This is a body:

9.15.1 over which it exercises a degree of control which is similar to that which it exercises over its own departments (**control limb**);

9.15.2 where more than 80% of the activities of the body are entrusted to it by the controlling authority (**activities limb**); and

9.15.3 where there is no private participation in its capital.

- 9.16 If the Council wishes to use the Teckal exemption then the governance framework will also need to be designed and implemented to ensure compliance with the control limb of the test. This is usually achieved through:

9.16.1 a right to appoint and remove specified number of board directors;

9.16.2 sign off a periodic business plan – this may be an annual plan or a multi-year plan updated on a rolling basis; and

9.16.3 exercise control over key decisions through the requirement for unanimous approval of certain reserved matters.

- 9.17 Please note that if the Council establishes a group structure then the holding company would itself need to be a Teckal company in order for any of its subsidiaries to meet the test to achieve this status.

10 DISPOSALS

In light of the vires and governance advice, what regulations [and] legislation applies to the disposal of assets including the sale of properties at market value and at less than market value?

- 10.1 The rules concerning the disposal of land, including completed residential units, will apply to the Council whether it is disposing on the market or to an HDV.

- 10.2 The Council can dispose of land any way that it wishes subject to complying with the legal duty to obtain the best consideration reasonably obtainable.¹³ This is a broad duty that does not specify an exact procedure to be followed, but instead reflects the underlying principle of achieving the best financial consideration possible in the circumstances. If the Council wishes to transfer land into the HDV without going to the market, it will need to obtain a Red Book valuation as evidence that it is receiving market value. Such a valuation will also assist if the Council is seeking to rely on the MEOP to comply with the State aid rules.

¹³ Section 123(1), Local Government Act 1972.

- 10.3 The Council can also dispose of land for less than market value if it can meet the requirements of the general disposal consent issued by the Secretary of State.¹⁴ This is a wide reaching consent that allows disposal at an undervalue to promote economic, social or environmental well being.¹⁵ The difference between the market value and the consideration must not exceed £2 million. A "professionally qualified valuer" must also give a view as to the likely amount of the undervalue. If open space will be disposed of then there are additional publicity requirements.¹⁶ The consent does not remove the need to comply with the State aid rules, and so there could be aid implications that would need to be addressed. For example, although the MEOP is unlikely to be available, it would be possible to fall within the exemption for services of general economic interest, which can include the provision of affordable housing if structured correctly.
- 10.4 A disposal at less than market value would also need to comply with the consent regime that prevents the Council from providing financial assistance or a gratuitous benefit to a third party who is providing privately let accommodation.¹⁷ A failure to comply with this regime would render a transaction void. There are a number of general consents issued by the Secretary of State, and it would be necessary to work through these in light of the specific circumstances to establish which if any could be relied on in those circumstances. If none are suitable then it is also possible to apply to the Secretary of State for specific consent.
- 10.5 There are separate rules in place that apply to land held in the HRA. Although these are not relevant here as the five sites identified are in the general fund, in broad terms:
- 10.5.1 land held in the HRA cannot be disposed of without the consent of the Secretary of State unless sold under right-to-buy,¹⁸
 - 10.5.2 the Secretary of State has issued a number of general consents, and it would be necessary to work through these in light of the individual circumstances to decide if any of them could be relied on;
 - 10.5.3 although the Council would be permitted to dispose of HRA land which includes dwellings at market value under one of the general consents, it cannot do so to a vehicle owned wholly or partly by it. However, vacant HRA land and assets that are not dwellings can be disposed of at any price determined by the Council, including to a vehicle in which it has an interest;
 - 10.5.4 specific consent can be applied for from the Secretary of State if none of the general consents are suitable.

11 HOUSING TENURE OPTIONS AND ISSUES

Can the Council via its General Fund issue Assured Shorthold Tenancies? We wish to retain the flexibility to issue variable length tenancies based on market demand.

- 11.1 No. Under the relevant legislation,¹⁹ a tenancy is a secure tenancy when the "*landlord condition*" and "*tenant condition*" are satisfied. The "*tenant condition*" is that the tenant is an individual and occupies the property as his or her only or principal home. The "*landlord condition*" is that the interest of the landlord belongs to one of the types of public authorities in the Act, which includes local authorities.

¹⁴ Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can be reasonably obtained.

¹⁵ It is issued under section 128(1), LGA 72.

¹⁶ Section 123(2A), LGA 72.

¹⁷ Local Government Act 1988 (s.24 - power to provide financial assistance for privately let accommodation, and s.25 - consent required for provision of financial assistance and gratuitous benefit).

¹⁸ Section 32, Housing Act 1985.

¹⁹ Housing Act 1985.

- 11.2 The HDV will, however, have more flexibility and would be able to grant assured short hold tenancies. It could also potentially grant assured (non-short hold) tenancies, but it is not obliged to do so.

If homes are let via the General Fund on Assured Shorthold Tenancies, do any of the statutory provisions regarding Right to Buy, etc. apply?

- 11.3 Yes. The right-to-buy and secure tenancy rules apply when the landlord and tenant conditions referred to above are met. In contrast, if the HDV acted as landlord then the rules would not apply (discussed in 4.6). Unless the arrangement is structured to meet one of the statutory exemptions (considered in 4.7), the application of the right-to-buy and secure tenancy rules therefore limits the attractiveness of developing by way of the general fund.

12 TRANSFER OF HOMES FROM THE GENERAL FUND TO THE HOUSING REVENUE ACCOUNT

Please describe the regulations and valuation procedures which determine how and at what price homes can be transferred (or "sold") to the Housing Revenue Account when they have initially be built or purchased via the General Fund.

- 12.1 The answer to this question will depend on whether the Council develops the homes directly or through an HDV. Each scenario is considered below in headline terms.

- 12.2 The Council has a broad power to appropriate land into the HRA from the general fund, and could potentially rely on this to transfer the new homes.²⁰ The amount paid by the HRA will depend on the Council's appropriation policy and practices. In our experience, a common approach would be for the appropriation to take place at market value, with related adjustments being made to the general fund and HRA capital accounts.

- 12.3 Alternatively, if these homes are built specifically to meet planning conditions then the Council may be obliged to transfer them to the HRA without payment as the alternative to making section 106 payments. In such circumstances, the transfer would be governed by overarching planning obligations and procedures.

- 12.4 If the Council wishes the HDV to transfer properties to the HRA, the price would normally reflect market value, but would be at the discretion of the HDV's directors, unless a reserved matter for the Shareholder Committee.

In light of the advice regarding transfer of homes from the General Fund to the Housing Revenue Account, how will the Right to Buy cost-floor be calculated and, in particular, what costs relating to building and/or acquisition will be taken into account?

- 12.5 The cost floor rules,²¹ the key elements of which are set out in DCLG's Right to Buy Guidance (available [here](#)), allow the calculations to take into account various broad items. For dwellings purchased from the HDV, the rules allow the following to be taken into account:

- 12.5.1 the acquisition costs;
- 12.5.2 the cost of works initially required after acquisition to put dwellings into good repair or deal with any defects;
- 12.5.3 the cost of works for planned repair/maintenance to deal with any defect where the aggregate costs exceed £5,500;
- 12.5.4 the cost of other works not listed above.

²⁰ Section 19, Housing Act 1985: A local housing authority may appropriate for the purposes of this Part any land for the time being vested in them or at their disposal; and the authority have the same powers in relation to land so appropriated as they have in relation to land acquired by them for the purposes of this Part.

²¹ The Housing (Right to Buy)(Cost Floor) (England) Determination 1999.

- 12.6 The cost floor would therefore be calculated by reference to these rather than the development costs of the HDV. It would then be used in combination with the market value of the dwellings to calculate the sale price by the Council should the right-to-buy be triggered i.e. the sale price would be the market value less the allowable discount, as adjusted to reflect the cost floor calculation. This can result in the sale price being increased (because the discount has been decreased) if the cost floor amount is higher than the sale price. If the cost floor amount is higher than the market valuation then the Council would lose the difference between the two.
- 12.7 In contrast, the rules are not detailed enough to state how they should be applied where properties are transferred from the general fund to the HRA, and if such transfers are proposed then it may be prudent to discuss the issue with DCLG to understand its position. We have discussed similar issues on a no names basis before and found it to be informative.
- 12.8 The answer is likely to reflect whether the Council appropriates the properties into the HRA for market value or something else. It would be reasonable to interpret the rules as requiring the calculation to be on the basis of the development costs if that is the amount paid by the HRA, and the acquisition costs if market value. However, the cost floor rules do list various excluded costs, which include those incurred in acquiring dwellings from a local authority. The lack of detail in the rules means that it is unclear if this would extend to where an authority's HRA acquires dwellings from the general fund.
- 12.9 If no payment is made because they are received as section 106 contributions then the calculation will be limited to works required to put them into good repair and similar, although we would not expect these items to be relevant where new homes are acquired.

13 PLANNING

Will housing developments built by the Council be required to adhere to the planning policies regarding provision of affordable housing?

- 13.1 The Council's policies regarding affordable housing seek to ensure that proposals for all new housing developments include the delivery of affordable housing. This includes development advanced by, or on the behalf of, the Council itself, hence the Council will be required to adhere to the relevant affordable housing policies.

Can section 106 payments held by the Council for the purpose of providing affordable housing be used by the Housing Revenue Account to "purchase" homes built via this route?

- 13.2 It is standard practice that a section 106 agreement that secures an affordable housing payment will contain a restriction ensuring that the affordable housing contribution can only be spent on the provision of affordable housing in the area, in lieu of the affordable housing planning policy requirement for that development. A commuted sum would usually be secured as a last resort in lieu of on-site or off-site affordable housing provision, for example, where it is not possible for on-site or off-site affordable housing provision to be made. The Council's Affordable Housing Advice Note 2005 states at paragraph 20 "...commuted payments will need to provide sufficient funds to be able to produce affordable housing in lieu of the opportunity missed onsite".
- 13.3 The HDV's schemes would give rise to their own planning policy requirement for the delivery of affordable housing, and if section 106 payments from other schemes are used towards the provision of affordable housing within the HDV's mixed market / affordable housing scheme, there could be a deficit in the amount of affordable housing being delivered overall, when considered against planning policy requirements, for example, where a non-HDV site and an HDV site each have a planning policy requirement for two affordable units (four units in total), and a commuted sum is paid in lieu in respect of the non HDV site, if the Council used the said commuted sum to pay for the delivery of the required two units on the HDV site, there would in effect be a net loss in the delivery of two affordable housing units.
- 13.4 If the Council was delivering a pure affordable housing scheme, it follows that section 106 payments could be used towards the cost of such a scheme as this housing would make up the shortfall for

sites where affordable housing has not been delivered. Where market and affordable housing is being delivered, however, in order to remain planning policy compliant section 106 payments should be used in respect of any affordable housing units that are being provided in addition to the planning policy requirement. If the Council's section 106 obligations in respect of affordable housing commuted sums are not tightly worded, so as to specify that the payments should only be used for the delivery of additional housing in the area, there may not be a breach of the requirements of obligation but there is a risk that a third party could challenge the Council's approach if it is not planning policy compliant.

14 USING RIGHT-TO-BUY RECEIPTS

14.1 The Secretary of State (**SOS**) has issued regulations requiring capital receipts from housing land to be pooled centrally (**Regulations**).²² Local housing authorities were offered the ability to retain a proportion of these receipts if they entered into a retention agreement with the SOS,²³ and we assume that the Council has entered into such an agreement. The Council has asked for our view on whether right-to-buy receipts could be used by the HRA to acquire units.

14.2 The standard retention agreement requires receipts to be spent on development costs incurred in providing social housing, which include development costs associated with acquiring dwellings, land and constructing dwellings. Although there is a lack of clarity in the standard retention agreement, the overall intention appears to be that the receipts must be used to develop new units rather than acquire completed units, for example, from the HDV or from the general fund. It is not clear why this restriction appears to be included when the net effect would be to increase the supply of social housing. We would be happy to discuss this with DCLG to understand the rationale and what scope there may be to amend the standard retention agreement.

14.3 For the sake of completeness, the Council should be aware that the standard retention agreement permits receipts to be transferred to a third party who will use them to provide social housing. However, there is a restriction in the agreement that would prevent the Council from transferring them to the HDV. We have copied the relevant text below and highlighted the key part in bold:

*"The **amount spent** on the provision of **social housing** is the amount spent by the Authority or by a **body** which the Authority has **paid** some or all of the **retained amounts** (such **body must not** be a **body** in which the Authority holds a **controlling interest**) on the development costs associated with the provision of social housing in the Authority's area".*

14.4 The Council will have a controlling interest over the HDV as it will be wholly owned by it. There is therefore little scope to argue that it could transfer receipts to the HDV unless DCLG is willing to agree otherwise.

15 HOMES AND COMMUNITIES AGENCY FUNDING

The Council is registered with the Homes and Communities Agency to receive housing development grant/funding. Can HCA grant / funding be used directly by the development vehicle or must this only be directed via the HRA?

15.1 The Homes and Communities Agency (**HCA**) can provide a range of support to third parties who wish to provide low cost rental accommodation.²⁴ However, it is a condition of the support that the landlord of the units is a registered provider. An HDV set up by the Council would therefore only be able to receive HCA grant from the Council, or direct from the HCA, if formally registered.²⁵

15.2 Subject to reviewing the grant agreements with the HCA, the Council should be free to commission an HDV under a works contract to construct any affordable units that it is funded to provide. This is

²² The Local Authorities (Capital Finance and Accounting) (England) Regulations 2003 (as amended), issued under section 11(1) of the Local Government Act 2003.

²³ Under section 11(6) of the Local Government Act 2003.

²⁴ Section 31 (7)-(8), Housing and Regeneration Act 2008.

²⁵ Registration is dealt with under chapter 3 of the Housing and Regeneration Act 2008.

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distinct from grant funding the vehicle, and would be similar to commissioning a third party developer in the usual way.

SCHEDULE 1– EXAMPLE RESERVED MATTERS

Number	Reserved Matter
	Constitution of the HDV
1	Varying in any respect the articles or the rights attaching to any of the shares or memberships (as applicable) in the HDV.
	Officers and Shareholders of the HDV
2	The appointment and the appointment terms (including any remuneration terms) of any Council Directors.
3	The appointment and the appointment terms (including any remuneration terms) of the chief executive officer.
4	The removal of any Council Directors (including any terms on which such Directors are removed from their office as Directors).
5	The admission of further shareholders or members to the HDV or agreeing any rights or restrictions attaching to any shares or memberships allocated to such new shareholders or members as applicable).
	Future direction and development of the HDV
6	Forming any subsidiary or acquiring shares in any other company or participating in any partnership or incorporated joint venture vehicle
7	Amalgamating or merging with any other company or business undertaking.
8	Selling or disposing of any part of the business of the HDV.
9	Adopting or amending the Business Plan of each respective HDV and any in-year changes.
10	Undertaking any business or action which is inconsistent with the Business Plan then in force or omitting to undertake any action which is required by that Business Plan except with the prior written consent of the Council
11	Passing any resolution for its winding up or presenting any petition for its administration (unless it has become insolvent).
12	Agreeing or approving any other material services the total value of which exceeds £● per annum to be provided by the HDV to a third party not approved under the Business Plan.
13	Appoint any agent (not being a subcontractor) to conduct the whole or any part of the business of the HDV, other than the appointment of an agent to conduct an area of the business of a HDV
14	Apply for the listing or trading of any shares in its issued capital or debt securities on any stock exchange or market (where applicable).
	Management of the business of the HDV

Number	Reserved Matter
15	Changing the HDV's registered office.
16	Changing the HDV's name.
17	Creating or agreeing to create a charge, security or Encumbrance over the HDV's assets, shares or income
18	Approving any matter that is reasonably likely to have an adverse effect on the reputation of the Council.
19	Changing the nature of the business or commencing any new business which is not ancillary or incidental to the business of the HDV.
20	Agreeing to enter into or entering into any acquisition or disposal of any material assets by the HDV the total value of which exceeds £● per annum
21	Giving notice of termination of any arrangements, contracts or transactions the total value of which exceeds £● per annum or materially varying any such arrangements, contracts or transactions and such termination or variation is likely to have an adverse impact on the financial status of a HDV.
22	Granting rights (by licence or otherwise) in or over any intellectual property owned or used by the HDV.
23	Changing the HDV's auditors.
24	Agree to make or making any loan (otherwise than by way of a deposit with a bank or other institution, the normal business of which includes the acceptance of deposits or in the ordinary course of business) or granting any credit (other than in the normal course of trading or the granting of trade credit to a company which has been approved under the Business Plan) or giving any guarantee or indemnity (other than in the normal course of trading).
25	Changing the Financial Year of the HDV.
26	Increase or reduce the amount of its issued share capital, grant any option over or in its share capital, redeem or purchase any of its own shares or otherwise alter, or effect any reorganisation of, its share capital (where applicable).
27	Declare or pay any end of year dividend of the HDV (where applicable).

SCHEDULE 2 – REGULATED COMPANIES

Accounting

- 1.1 The Council must include the HDV's assets and liabilities in its accounts, and the assets / liabilities of the HDV would become relevant for the Council's prudential borrowing regime. Although this is a requirement on local authorities rather than regulated companies, the HDV would have a number of obligations under Part V, Local Government and Housing Act and the Local Authorities (Companies) Order 1995, including to:
- 1.1.1 provide members of the Council such information about its affairs as members reasonably requires for the proper discharge of their duties;
 - 1.1.2 provide to the Council's auditors any information as required by the auditors to audit the Council's accounts; and
 - 1.1.3 provide to any person authorised by the Audit Commission / its successor any information as required by that person to carry out their duties.
- 1.2 The Council may also require the HDV to comply with specific accounting processes to assist the Council with its prudential borrowing responsibilities.

Trading Disclosure

- 1.3 As a regulated company, the HDV must ensure that certain company documents display information about its local authority owner. The primary purpose behind the requirement is to ensure transparency as regards to the governance structure of regulated companies. The HDV must display information which sets out the fact that it is a company controlled by the Council. This information must be displayed on the following documents:
- 1.3.1 business letters, notices and other official publications;
 - 1.3.2 bills of exchange, promissory notes, endorsements and order forms;
 - 1.3.3 cheques purporting to be signed by or on behalf of the company;
 - 1.3.4 orders for money, goods or services purporting to be signed by or on behalf of the company;
 - 1.3.5 bills of parcels, invoices and other demands for payment, receipts and letters of credit;
 - 1.3.6 applications for licences to carry on a trade or activity; and
 - 1.3.7 all other forms of the company's business correspondence and documentation.
- 15.3 HDV must also disclose its registered name on its website (if it has one).

Company directors

- 1.4 Remuneration for directors who are also members of the Council cannot exceed the remuneration figure paid by the Council for equivalent director duties (i.e. what the member would have been paid were he or she engaged within the Council in relation to the project). This includes travelling or subsistence expenses.
- 1.5 Company directors who are disqualified from Council membership must also be removed as company directors and are barred from directorship.

Politics

- 1.6 The HDV could not publish, or arrange to have published, any material which appears to be designed to promote or support a political party.

SCHEDULE 3- OVERVIEW OF POTENTIAL STRUCTURE

