

To: All Members and Substitute Members of  
the Overview & Scrutiny Committee -  
Value for Money & Customer Service  
(Other Members for Information)

When calling please ask for:  
Amy McNulty, Democratic Services Officer

**Policy and Governance**

E-mail: [amy.mculty@waverley.gov.uk](mailto:amy.mculty@waverley.gov.uk)

Direct line: 01483 523492

Date: 1 March 2019

**Membership of the Overview & Scrutiny Committee - Value for Money & Customer Service**

Cllr David Beaman (Chairman)	Cllr Nabeel Nasir
Cllr Stephen Mulliner (Vice Chairman)	Cllr David Round
Cllr Brian Adams	Cllr Richard Seaborne
Cllr Mike Band	Cllr Bob Upton
Cllr Nicholas Holder	

**Substitutes**

Cllr Liz Townsend	Cllr John Ward
Cllr Tony Gordon-Smith	

**Members who are unable to attend this meeting must submit apologies by the end of Monday, 4 March 2019 to enable a substitute to be arranged.**

Dear Councillor

A Special meeting of the OVERVIEW & SCRUTINY COMMITTEE - VALUE FOR MONEY & CUSTOMER SERVICE will be held as follows:

DATE: MONDAY, 11 MARCH 2019

TIME: **6.00 PM**

PLACE: COMMITTEE ROOM 1, COUNCIL OFFICES, THE BURYS,  
GODALMING

The Agenda for the Meeting is set out below.

Yours sincerely

ROBIN TAYLOR  
Head of Policy and Governance

Agendas are available to download from Waverley's website  
([www.waverley.gov.uk/committees](http://www.waverley.gov.uk/committees)), where you can also subscribe to

updates to receive information via email regarding arrangements for particular committee meetings.

Alternatively, agendas may be downloaded to a mobile device via the free Modern.Gov app, available for iPad, Android, Windows and Kindle Fire.

Most of our publications can be provided in alternative formats. For an audio version, large print, text only or a translated copy of this publication, please contact [committees@waverley.gov.uk](mailto:committees@waverley.gov.uk) or call 01483 523351

This meeting will be webcast and can be viewed by visiting [www.waverley.gov.uk](http://www.waverley.gov.uk)

---

## **Waverley Corporate Strategy 2018 - 2023**

**Priority Theme 1: People**

**Priority Theme 2: Place**

**Priority Theme 3: Prosperity**

---

### **Good scrutiny:**

- is an independent, Member-led function working towards the delivery of the Council's priorities and plays an integral part in shaping and improving the delivery of services in the Borough;
  - provides a critical friend challenge to the Executive to help support, prompt reflection and influence how public services are delivered;
  - is led by 'independent minded governors' who take ownership of the scrutiny process; and,
  - amplifies the voices and concerns of the public and acts as a key mechanism connecting the public to the democratic process.
- 

## **NOTES FOR MEMBERS**

Members are reminded that contact officers are shown at the end of each report and members are welcome to raise questions etc in advance of the meeting with the appropriate officer.

## **AGENDA**

### 1. APOLOGIES FOR ABSENCE AND SUBSTITUTES

To receive apologies for absence and note any substitutions.

**Members who are unable to attend this meeting must submit apologies by the end of Monday 4 March 2019 to enable a substitute to be arranged, if applicable.**

### 2. DECLARATIONS OF INTERESTS

To receive Members' declarations of interests in relation to any items included on the agenda for this meeting, in accordance with Waverley's Code of Local Government Conduct.

### 3. SETTING UP A COMMERCIAL COMPANY (Pages 5 - 30)

To seek the Committee's comments on the proposed decision-making process and company structure for property acquisitions.

#### Recommendation

**It is recommended that the Value for Money and Customer Service Overview and Scrutiny Committee reviews the proposals, including and taking into account the legal advice received, and submits its comments on the proposals to the next meeting of the Investment Advisory Board on 26 March 2019.**

### 4. EXCLUSION OF PRESS AND PUBLIC

To consider the following recommendation on the motion of the Chairman:

#### **Recommendation**

That pursuant to Procedure Rule 20 and in accordance with Section 100A(4) of the Local government Act 1972, the press and public be excluded from the meeting during consideration of the following items on the grounds that it is likely, in view of the nature of the business to be transacted or the nature of the proceedings, that if members of the public were present during the items, there would be disclosure to them of exempt information (as defined by Section 100I of the Act) of the description specified in the appropriate paragraph(s) of the revised Part 1 of Schedule 12A to the Act (to be specified at the meeting).

#### **Officer contacts:**

**Yasmine Makin, Scrutiny Policy Officer**

**Tel. 01483 523078 or email: [yasmine.makin@waverley.gov.uk](mailto:yasmine.makin@waverley.gov.uk)**

**Amy McNulty, Democratic Services Officer**

**Tel. 01483 523492 or email: [amy.mculty@waverley.gov.uk](mailto:amy.mculty@waverley.gov.uk)**

This page is intentionally left blank

**WAVERLEY BOROUGH COUNCIL**

**VALUE FOR MONEY AND CUSTOMER SERVICE OVERVIEW AND SCRUTINY  
COMMITTEE**

**11 MARCH 2019**

---

**Title:**

**SETTING UP A COMMERCIAL COMPANY**

**[Portfolio Holder: Councillor Ged Hall]**

**[Wards Affected: All]**

---

**Note pursuant to Section 100B(5) of the Local Government Act 1972**

Annexes to this report contain exempt information by virtue of which the public is likely to be excluded during the item to which the report relates, as specified in Paragraph 5 of Part I of Schedule 12A to the Local Government Act 1972, namely:-

5. Information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

**Summary and purpose:**

To seek the Committee's comments on the proposed decision-making process and company structure for property acquisitions.

---

**How this report relates to the Council's Corporate Priorities:**

This report relates to all three of the Council's corporate priorities (People, Place and Prosperity) as the Council's Property Investment Strategy is designed to bring about income generation, through property purchases.

**Equality and Diversity Implications:**

There are no equality and diversity implications associated with this report.

**Financial Implications:**

There are no direct financial implications associated with this report.

**Legal Implications:**

These are set out within the body of the report.

---

**Background**

1. At its meeting on 15 October 2018, the Investment Advisory Board (IAB) considered a report regarding the Council's proposed property company and discussed the earlier

recommendation of the Executive on 11 July 2017 which was approved by full Council on 18 July 2017, at which the Council agreed to set up a property company and:

“to delegate the final details of the matters set out in paragraph 27.10 above, in relation to the initial set up of the company, to the Investment Advisory Board, after consideration by the Value for Money and Customer Service Overview and Scrutiny Committee.” The matters referred to above are:

- Structure
  - Authorisation
  - Scope of activity and types of investments
  - HRA interface (in particular the use of revenue from disposals to the company for affordable housing)
  - On-lending (i.e. any restrictions around the Council’s ability to loan money to the company).
2. A copy of the report to the 11 July 2017 meeting of the Executive, including the annexe to that report setting out legal consideration of the potential company structure, is attached as Annexe 1. It should be noted that the Council has previously received advice that if it wishes to borrow in order to purchase commercial property *outside of the borough* to generate income, then it would need to do so via a company. Other local authorities have taken the opposite approach – of not channelling such purchases through a company – but this Council has decided that as a general principle it would consider making such purchases via a company. Nevertheless, in line with the Property Investment Strategy, advice would be taken on each purchase on a case-by-case basis in order to decide on the appropriate purchase vehicle.
  3. In April 2018 the Council approved Waverley’s Property Investment Strategy, which had been developed with significant input from the Value for Money Overview & Scrutiny Committee, and the IAB report to Council stated that “The Investment Strategy covers all property acquisitions whether this be by the Council direct or by a subsidiary company”.
  4. After lengthy discussion at its 15 October 2018 meeting, the IAB tasked the Legal Services team with developing options for a company structure and decision-making process, and clarifying the scope of the activity the company would undertake.
  5. The IAB raised a number of issues that would need to be addressed when considering options. Amongst those were the following:
    - Any structure and decision making process would need to be acceptable to the full Council.
    - What is the composition of the shareholder function?
    - How many individuals would sit on the company board, and how would the board be comprised? (The Value for Money and Customer Service Overview & Scrutiny Committee had previously been of the view that it should not be comprised entirely of Executive members).
    - What is the Investment Advisory Board’s role in the company structure?

- Where does the Executive sit in this structure? The IAB was primarily concerned that transactions were not entered into without any form of Executive involvement.
6. A number of different approaches were considered by officers and presented to the meeting of the Investment Advisory Board on 26 November 2018. It was noted that since July 2017, the Property Investment Strategy had been agreed by Council and the membership and terms of reference of the IAB had been broadened to provide a greater balance of Executive and non-Executive members.

## **Proposals**

7. The IAB agreed the following as the basis for seeking further legal advice on the emerging governance arrangements. The IAB's conclusions are set out in bullet points with any further officer comment below those.
8. Council decision-making
- All property investment opportunities should be considered in the first place by the IAB.
  - Proposals that the IAB were able to put forward to the Executive, would be recommended for either the Council to pursue or for referral to the Property Company.
  - It would follow that opportunities that fell outside the scope of the delegation to the Executive would be recommended to Council, for either direct investment by the Council or via the Property Company.
  - Executive (or Council) decisions to proceed with an investment would be subject to a delegation to the S151 Officer in consultation with the Chairman of the IAB and one other IAB member.
  - Decisions on day-to-day matters relating to property held by the Council (e.g. letting decisions, wayleaves, etc.) to be delegated to the Head of Finance and Property.
  - The role of shareholder for the Property Company to be exercised by the IAB, with at least one meeting a year of the IAB to be a dedicated shareholder meeting.

### *Additional Officer Comments*

This is acceptable, and the advice at (Exempt) Annexe 2 confirms this, but may need to be reviewed at a future date should the Company expand to incorporate other commercial aims of the Council (see section 10 below). In circumstances where the Company's commercial activities moved beyond pure property investments, it is recommended that a sub-committee of the Executive is established to act as shareholder with the IAB continuing its role in recommending specific investments.

## 9. Company Decision-making and Composition

- Board of Directors to comprise 2 Councillors (1 Executive, 1 non-Executive) and 2 Officers.

### *Additional Officer Comment*

The Committee is asked to note that the Company's Articles would not stipulate the Officer/Councillor delineation, as the Company must be blind to any outside roles that are fulfilled by its Directors. Instead the Council would only *nominate* Officers or Councillors to the Company that fulfilled and maintained those numbers.

The directors would not need to be Council Officers or Councillors, but outside appointments would likely require remuneration and therefore increase cost. We are not proposing to make outside appointments at this time.

In terms of directors' remuneration, this would be zero. Advice will be sought regarding indemnity insurance for the directors.

The advice at (Exempt) Annexe 2 states that it would not be advisable for the Company board to be a committee of the Council. Officers would go further and conclude that the IAB must not act as a board, otherwise its members would need to accept the same responsibilities and liabilities that the Company's board will need to accept (see the next bullet point for further comment on the board directors' responsibilities).

- The Councillor Directors should not be members of the IAB.

### *Additional Officer Comment*

Officers' advice is that the quorum for the Board of Directors must be 3 in order to ensure that the quorate board never consists solely of either Officers or Councillors.

A decision as to which roles would need to be filled on the Board, and by whom, such as the Managing Director and Finance Director, will be made at a later date.

The role of Company Secretary is a critical role, and not one that must be performed by a director. They would need to be suitably qualified and therefore consideration will be given as to which Officer would fulfil this role, at a later date.

Training will be required for all directors in order for them to be confident in understanding their role and obligations to act in the best interests of the Company and not the Council as shareholder. This will include training regarding directors' personal responsibilities and liabilities.

The advice at (Exempt) Annexe 2 sets out issues that the Council will need to consider when nominating its Officers to roles within the company. There are clear risks associated with statutory officers being appointed to company roles, and careful thought will need to be given by officers as to which senior officers are nominated.



## 10. Scope of activity and types of investment

- The company structure should provide maximum flexibility for the Council in terms of the scope of activity that could be pursued, and if necessary a holding company and subsidiaries be established to enable:
  - Acquisition/development of commercial land and property
  - Acquisition/development of property for market housing for sale or rent
  - Entering into joint ventures to deliver either of the above

### *Additional Officer Comment*

Officers agree with this aim, and indeed want to see as much flexibility as possible built into the Company's Articles of Association in order to avoid the need to set up multiple companies to deliver the strategic aims the Council has to deliver quality services and generate income.

Officers therefore conclude that the company should not be restricted solely to property investment transactions and should, subject to any advice that would prevent this, operate as the Council's commercial entity in order to deliver on those wider strategic aims.

## 11. HRA interface (in particular the use of revenue from disposals to the company for affordable housing)

- Flexibility to allow Waverley's HRA to retain ownership and management of any affordable housing element of housing or joint venture functions of the company, that may entail HRA capital receipts and other resources being invested in the affordable element via the company.

## 12. On-lending (i.e. any restrictions around the Council's ability to loan money to the company)

- Primary source of the Property Company's debt and working capital will be loan finance from the Council.
- This will normally require the Council to borrow, probably from the PWLB, and on-lend to the Property Company at a market rate.

### **Next Steps following the IAB Meeting**

13. Based on the decisions of the IAB, Officers undertook to obtain external legal advice on the proposed arrangements set out above, to confirm their acceptability from a legal perspective, and to advise generally, prior to seeking comments from the Overview & Scrutiny Committee.
14. External legal advice has been sought and is produced as (Exempt) Annexe 2.
15. The advice addresses the points raised above and confirms that the Council can proceed as recommended by the IAB, subject to certain caveats around the need for clear distinction between the Council and its bodies, including the IAB, and the company itself.

---

## **Recommendation**

It is recommended that the Value for Money and Customer Service Overview and Scrutiny Committee reviews the proposals, including and taking into account the legal advice received, and submits its comments on the proposals to the next meeting of the Investment Advisory Board on 26 March 2019.

---

## **Background Papers**

There are no background papers (as defined by Section 100D(5) of the Local Government Act 1972) relating to this report.

---

## **CONTACT OFFICER:**

**Name:** Daniel Bainbridge, Borough Solicitor

**Telephone:** 01483 523235

**E-mail:** [daniel.bainbridge@waverley.gov.uk](mailto:daniel.bainbridge@waverley.gov.uk)

## **WAVERLEY BOROUGH COUNCIL**

**EXECUTIVE - 11 JULY 2017**

---

**Title:**

**CREATION OF A PROPERTY COMPANY**

[Portfolio Holder: Cllr Tom Martin]

[Wards Affected: All]

---

**Summary and purpose:**

The Investment Advisory Board is exploring the advantages and opportunities that would be offered should the Council set up a property company. Most important amongst these is the ability of a company to pursue opportunities to acquire commercial properties that are beyond the Council's powers i.e. solely for income generation purposes.

The Executive is requested to consider these advantages and the opportunities and challenges such a vehicle might offer and to approve the creation of a company as set out below.

---

**Background**

1. The primary objective of the Council's Investment Strategy, and therefore of the Investment Board, is to contribute to offsetting the overall budget deficit. The Council is currently constrained under s.1 of the Localism Act 2011 when it comes to acquiring property for investment purposes.
2. Should the Council wish to do so it has the ability to establish a 'Local Authority Trading Company' via section 95 of the Local Government Act 2003. Such a company would in effect be a subsidiary company of the local authority and as such the shareholder (i.e the Council) would have ultimate control over activity and operational matters).
3. The company as a property vehicle would target a specified minimum return with funding either from loans from the Council or commercial sources. The aim would be to maximise the opportunities within the existing portfolio where there is a clear business case and an acceptable level of risk, and to bring in new opportunities to increase the assets the Council already owns in cases where this falls outside of the Council's legal powers. Every property option would be looked at on its own merits to decide whether to purchase through the Council or the Company dependent upon the business case and legal implications of the opportunity concerned.
4. It is the intention that the company has enough flexibility to acquire and work on a commercial basis across a range of activities if appropriate. This may include joint ventures, special purpose vehicles, operating existing council assets and possibly the development of management agreements.
5. Initially, the focus of the company would be to concentrate on property investment and development work both inside and outside of the Borough which is needed to provide a valuable income stream to the Council. The company would mainly operate in situations where the Council can't or where there is a need to respond more quickly and effectively to market opportunities where the Council is more

disadvantaged by the regulations on decision making which affect speeds of response.

### **Legal Implications**

6. The detailed legal implications are included in the Annexe which was the information reported to the recent Investment Advisory Board Meeting. A summary of the main points is below.
7. An appropriate governance structure will be needed to ensure sound and robust management alongside protection of the Council's financial and reputational investment. The Council as shareholder would control the company and delegate operational matters via a Shareholder's Agreement.
8. The company would be subject to the Local Authorities (Companies) Order 1995. The order sets out regulations that are specific to controlled companies and start from the basis that the public should be aware that the company they are dealing with is controlled by the local authority. It should be noted that the company would be liable to corporation tax in the normal manner on profits, and would need to charge VAT.
9. The Council would also need to consider how the support services required by the company will be contracted out. This would include legal services for property acquisition and accounting services provided by local authority staff (and re-charged to the company).
10. The following documentation is required to complete the establishment of a company and associated governance arrangements.
  - Articles of Association
  - Shareholder Agreement.
  - Loan Agreements
  - Director Appointments
  - Appointment of Company Secretary and an Auditor.
  - Business Plan

### **Financial Implications**

11. The company would need significant funding to purchase property in the open market. Therefore, as well as the council having the powers to form the company it would also need to be able to provide it with the necessary loans (which it can do via the Localism Act 2011 and also s24 of the Local Government Act 1988) and equity funding. The Company would also need working capital and this is likely to be provided by way of short term loans from the council.
12. The creation and operation of a company by a local authority is a complex matter. It is however, an action that a number of other local authorities have taken successfully. To ensure that the council maximises the opportunities from having a company and manager the associated risks effectively to safeguard the council's finances, and it will be necessary to seek specialist advice. This advice will aim to cover Waverley's specific aspirations and include advice on:

- Structure, including subsidiaries if appropriate.
- Tax.
- Raising finance, including borrowing from the Council.
- Support costs and other overheads.
- Investment criteria.
- Further scope for the company's activities in future.

## **Conclusions**

13. The creation of a Company presents opportunities to the Council that could otherwise not be realised. Subject to the Council approving the creation of the company, the following matters will be resolved by the Investment Advisory Board after taking specialist external advice.

- Governance arrangements
- Structure
- Authorisation
- Scope of activity and types of investments
- HRA interface (in particular the use of revenue from disposals to the company for affordable housing)
- On-lending (i.e. any restrictions around the Council's ability to loan money to the company).

14. Subject to the comments of the Overview and Scrutiny Committee, the Council is requested to approve the creation of a company which should be ready to operate in the autumn.

## **Comments of the VFM Overview and Scrutiny Committee**

15. The Value for Money and Customer Service Overview and Scrutiny Committee was supportive of the proposal for creating a property company as it would provide more flexibility for the Council. However Members felt that a clear system of monitoring and reporting needed to be put in place so that the Members could be updated on progress with property acquisitions.

16. It was noted that the matters set out in paragraphs 12 and 13 of the report would be delegated to the Investment Advisory Board for final approval and the Committee requested to have sight of the precise details of this delegation.

## **Recommendation**

It is recommended that:

1. the Overview and Scrutiny Committee be thanked for their consideration and comments;
2. the Council be recommended to create a company as described in this report, after the consideration of detailed legal advice; and
3. the Council agree to delegate the final details of the matters set out in paragraphs 12 and 13 above, in relation to the initial set up of the company, to the Investment Advisory Board, after consideration by the Value for Money and Customer Service Overview and Scrutiny Committee.

---

**CONTACT OFFICER:**

**Name:** David Allum

**Telephone:** 01483 523338

**E-mail:** david.allum@waverley.gov.uk

**Name:** Graeme Clark

**Telephone:** 01483 523099

**E-mail:** graeme.clark@waverley.gov.uk

**Creation of a Property Company – Information provided to Investment  
Advisory Board May 2017**

1. As previously advised by its external legal advisors, under section 120 of the Local Government Act 1972 the Council may acquire by agreement any land inside or outside its area for the purpose of (a) any of its statutory functions or (b) the benefit, improvement or development of its area.
2. The Council has a number of statutory functions in relation to its financial affairs. For example, sections 25 to 29 of the Local Government Act 2003 impose a statutory responsibility on the Council to set and arrange its affairs to remain within prudential limits for borrowing and capital investment. These provisions also require the Council to make prudent allowance for the risk and uncertainties in its budget and regularly monitor its finances during the year, leaving it to the Council's discretion as to the allowances to be made and action to be taken. In particular, section 28 of the LGA 2003 requires the Council, upon reviewing its budget, to take any action it considers necessary to deal with any deterioration in its financial position.
3. The objective of the Council's Investment Strategy is to offset the budget deficit that has been identified by the Council. To the extent that the purpose of acquiring any property is to deal with the deterioration in the Council's financial position by way of income generation, the Council could rely on section 120 LGA 1972 on the basis that the acquisition is for the purpose of fulfilling its statutory functions. This will need to be documented and it should be explained how an acquisition will specifically help remedy that deterioration.
4. Similarly, when justifying any property investment within its area on the basis of "the benefit, improvement or development of its area", the Council will need to clearly document the specific benefits (economic or otherwise) that the Council area will benefit from as a result of purchasing property.
5. External advice has also confirmed that it is likely the acquisition of the property in order to generate income will constitute an activity for a commercial purpose. The Council will therefore be unable to rely on the general power of competence under s.1 of the Localism Act 2011 in acquiring the property, unless it forms a company for the purposes of property investment. The Council may be able to rely on the section 1 Local Government Act 2003 power to borrow. However, the Council should be mindful that borrowing purely to invest at a profit is likely to be considered unlawful. In order to rely on this power the Council will need to clearly document how the acquisition is for the purpose of the prudent management of its financial affairs, explaining how it forms part of a range of financial management measures and why the acquisition of the Centre is necessary for that purpose. Borrowing under section 1 of the 2003 Act may also be possible

on the basis that the acquisition is for the purpose of dealing with the deterioration of the Council's financial position. Again, this will need to be clearly documented with reasons. When assessing the suitability of the Centre and the acquisition in more detail, the Council should consider whether the acquisition would meet any other statutory functions (for example, development or regeneration duties).

6. The position therefore is that a company is not required in order to invest in property outside of the Borough, provided that the Council can justify the investment as falling within one of the Council's statutory powers, and the most appropriate of these would be the preservation of the Council's financial position.
7. Having said that, should the Council wish to set up a company in order to invest in property, then the Council is able to establish a 'Local Authority Trading Company' (LATC) through the powers in section 95 of the Local Government Act 2003. A local authority is permitted to trade in anything that it is authorised to do under its ordinary functions.
8. Such a company would likely be a controlled company as defined in the Local Government and Housing Act 1989 as it would be a subsidiary company of a local authority and as such the shareholder (the Council) would have ultimate control over the activities and operational matters of the company.
9. Typically, property investment and development acquisitions within the scope of the proposed company are expected to be high, and will include a diverse range of use types. The property vehicle would normally target a specified minimum return with funding from Council's reserves, Public Works Loan Board or commercial sources. The aim would be to maximise the opportunities within the existing portfolio and bring in new opportunities to increase the mixed and balanced portfolio the Council already owns.
10. It is important that the company has enough flexibility to buy considered opportunities and work on a commercial basis. This may include joint ventures, special purpose vehicles and possibly development management agreements. A LATC could enter into and have subsidiary companies to be able to trade effectively in the property market place e.g. special purpose vehicles for particular projects.

### **Company Structure and Governance**

11. The purpose of the company would be to concentrate on property investment and development work both inside and outside of the Borough which is needed to provide a valuable income stream to the Council. Its focus would be on responding more quickly and effectively to market opportunities where the Council is more disadvantaged by the regulations on decision making which affect speeds of response.



12. As a company wholly-owned by the Council, it would be imperative for an appropriate governance structure to be put in place to ensure the sound and robust management of the company alongside protection of the Council's financial and reputational investment in the company.

### **Shareholder Function**

13. The company shareholder would have ultimate control over the company and would control the company in a variety of ways, including the appointment of directors, provision of funding and the Articles of Association, but operational matters could also be included in a Shareholder's Agreement as described below.
14. The most appropriate avenue would be for the Shareholder function of the Council to primarily be executed through a dedicated Sub-Committee of the Executive comprising members appointed by the Leader, with a minimum of three Members. If further appointments were required these will be made by the Leader.
15. The Shareholder will, through a Shareholder Agreement, set out the performance levels required for the company and the tolerances (e.g. financial and decision making) within which the Company may operate.
16. The Council as Shareholder can change the make-up of the Board of Directors and can change the Company Secretary in the same way.
17. The Articles of Association can make provision for the Shareholder to appoint Directors by serving notice in writing to the company and to appoint any other person to be a Director in place of a Director who leaves office by whatever means. This can take immediate effect on service to the Company Secretary.
18. As stated above, the company would be a 'controlled company' as defined by the Local Authority Government and Housing Act 1989 and as a result would be subject to the Local Authorities (Companies) Order 1995. The order sets out regulations that are specific to controlled companies and start from the basis that the public should be aware that the company they are dealing with is controlled by the local authority. The Council must provide information about the affairs of the company to any Member of the local authority as they shall reasonably require for the proper discharge of the Member's responsibilities, and they must also provide information required by the Council's auditors.

### **Board of Directors**

19. The Board of Directors would be responsible for delivery of the expected outcomes within the Business Plan. They would have oversight of the performance, financial and operational management of the company within the parameters agreed with the Shareholder.

20. The Board would usually be comprised of senior Council officers, and whether any Councillors would also be appointed as Directors would be for the Council to decide. Both Officers and Councillors would be unpaid. Some local authorities appoint Councillors onto the Board, but this is not a requirement and there are no hard rules governing this. The Articles of Association would need to be drafted in such a way as to ensure that a Councillor's appointment would terminate should they be disqualified or fail to be returned at an election.
21. Some local authorities have appointed an independent non-executive director to each company, with that director being chairman of the Board. The non-executive director would be remunerated, and would be recruited following an advertisement and interview. This would also bring commercial experience to the Board.
22. A Company Secretary would be appointed but would not be a Director. Many local authorities have appointed their senior legal officer or monitoring officer to this position.
23. The typical areas for the Directors to consider and approve include:
- Specific investment transactions – acquisitions, sales, letting, agreement for leases, surrenders, borrowing and other key transactions.
  - Appointment of service providers – accountants, solicitors, agents, valuers, architects, property managers, and other professionals as deemed appropriate.
  - Reporting – reporting arrangements to an Executive Sub-Committee (annexe 1) and the appropriate Overview and Scrutiny Committee.
24. In making appointments to the Board, the Council would need to be extremely mindful of, and put in place measures to eliminate, any conflicts that could arise between the duties of the statutory Council officers, such as the Section 151 Officer and the Monitoring Officer, in providing their advice to the Council as the Shareholder, and the duties of the Directors to the company.
25. The statutory duties for directors of a company are set out in sections 171 – 177 of the Companies Act 2006. Those duties are, in summary:
- The duty to act within powers
  - The duty to promote the success of the company
  - The duty to exercise independent judgement
26. The Council would need to consider how the support services which will be required by the company will be contracted out to the company. This would include legal services for property acquisition and accounting services provided by local authority staff (and re-charged to the company).

## **Documentation required to establish a company**

27. The following documentation is required to complete the establishment of a LATC and associated governance arrangements.

- Articles of Association – the company constitution setting out the rules governing the running of the company
- Shareholder Agreement – this will be a key document as it will capture how the Council as Shareholder will exercise its control over the Company and the expectations for performance delivery.
- Loan Agreements – these set out the details of the funding arrangements between the Council and the company.
- Director Appointments – the terms upon which Council officers who will be appointed as directors to the Company will need to be agreed.
- Appointment of Company Secretary and an Auditor.
- Business Plan – the business plan would be developed to cover a rolling 20 year period of investment activity and would outline the company's planned operations. The Business Plan would be reviewed and agreed annually and would cover the following:
  - Company objectives (as established in the Shareholder Agreement) but these are expected to develop over time.
  - Governance arrangements - sufficiency of the arrangements and any planned changes to the Board.
  - Operational plans.
  - Financial model and assumptions.
  - Investment strategy.
  - Rents, sales and development assumptions.
  - Distribution Policy – is all trading profit to be returned to the shareholder or is any retained for future investment and/or running capital.
  - Fees, on-costs and tax.
  - Funding profile and sensitivity analysis.

## **Articles of Association**

28. The Articles of Association would be agreed by the Executive Sub-Committee but would likely comprise the following:

- The articles are for a company limited by shares
- There will be one shareholder – the Council
- The liability of the Council is limited to the nominal value of its share
- If a Director ceases to be employed by the Council then he will ordinarily cease to be a Director of the company and a replacement sought
- Quorum for a meeting of the Directors and to be able to vote on the decisions of the company.
- Some decisions can only be taken at a general meeting by the Council as Shareholder. For example, to allocate extra shares, to reappoint the directors, to declare a dividend, to change the articles of association, etc.

- Requirements to sign documents on behalf of the Company
- The Company is obliged to comply with all the requirements that form part of it being a wholly owned subsidiary of a Local Authority.
- The Company needs to make arrangements to have the accounts audited.

### **Objects**

29. Since 2009 most companies do not have objects clauses relying on the fact that the objects of the Company are generally unrestricted. The Company can then reflect the wide powers granted to the Council under the Localism Act 2011 to use a company to do anything commercially that individuals may generally do.

### **Shareholder Agreement**

30. A Shareholder Agreement would operate in addition to the Articles of Association. The Shareholder Agreement would regulate the actions of the company and give rights to the Council that would not be appropriate to be included in the Articles. It represents a finer level of detail and control:

- The setting of investment targets each year and the associated budget
- Approving and / or removing auditors
- Agreement of any borrowing arrangement and giving security in respect of borrowing
- Considerations before making a planning application or lodging an appeal
- Any matter that the Council shall advise the company of in writing.

### **Tax liability**

31. The Company would be liable to corporation tax in the normal manner on profits, and would need to charge VAT.

32. Every property opportunity would be looked at on its own merits to decide whether to purchase through the Council or the Company dependent upon the taxation and legal implications of the opportunity concerned.

### **Risks**

33. Councillors will be concerned to ensure that all risks of operating in a new way have been thoroughly considered.

34. Each acquisition would be considered in the light of investment and development appraisals, the overriding economic conditions prevailing, occupational and investment demand as well as the associated due diligence. These appraisals would be provided to members of the Executive Sub-Committee. Each acquisition would be subject to these assessments as well as the normal legal and survey due diligence required. Therefore each acquisition would be considered in light of this information.

35. Certain checks and balances are built into the above structure so as to ensure that the company operates within agreed parameters and can assure Councillors that there is no greater financial risk to the Council than at present:

- The Articles of Association would set out the powers available to Directors.
- The Shareholder Agreement would set out further controls around dealings with properties.
- The Executive Sub-Committee would hold the Directors accountable for delivery of the business plan. This is no different to the current arrangement whereby officers are held to account by Councillors.
- Funding provided by the Council and properties to be subject to development by the Council would need to be agreed by the Executive Sub-Committee. Funding from the capital programme and/ or funding from prudential borrowing would need to be agreed by Council.
- Any asset transferred to the company by the Council would be subject to the usual requirements of best value and section 123 of the Local Government Act 1972. The Council would need to obtain up-to-date valuation advice before any transaction were to proceed.
- Assets transferred to the company by the Council would also be subject of charge by way of legal mortgage to protect the Council's interests should the company face financial difficulties.
- There will be ongoing liaison (as exists at present) between officers and councillors to ensure there are clear channels of communication and that councillors remain comfortable at all times with proposed deals.
- The Executive Sub-Committee would be scrutinised by the appropriate Overview and Scrutiny Committee in the same way as any other Executive function.
- Any project which poses more of a commercial risk, for instance an out of borough joint venture, can be contained in a subsidiary company (if appropriate) so as not to risk the company. This is a normal way of containing risk in property transactions and it applies here as it would in the general property market
- The company will have its own auditors and will be subject to the requirements of company law and filing at Companies House

### **State Aid**

36. EU regulations ensure that the company could not be subsidised by the Council. This means the Council must recover the costs of any accommodation, goods, services, employees or any other support it supplies to the company. State Aid would also include loans to the company and the rate of interest that loans to the company would need to be charged. This would be reviewed on an ongoing basis. Specialist advice would need to be sought when making acquisitions or receiving loans from the Council in order to ensure that State Aid regulations are complied with.

## **Company Loan Facilities**

37. As set out above the company would seek loans from the Council that comply with State Aid requirements. Loans would include draw-down provisions that meet the need of the business case. Where property acquisitions are made by the company, loans from the Council would be secured against the property by way of a legal charge (or mortgage) in favour of the Council.
38. Loans could be sourced from the Council's capital reserves - where the Council would loan some equity – and/or from the banking sector or through Public Works Loan Board.

## **Powers to fund the Company**

39. The company would need significant funding to purchase property in the open market. Therefore, as well as the Council having the powers to form the company it would also need to be able to provide it with the necessary loan and equity funding.
40. The Council has the power to borrow under the Local Government Act 2003 for the purposes of the prudent management of their financial affairs, or in connection with any of their functions. The borrowing would need to be prudent and comply with the Prudential Code.
41. The Council could borrow monies and in turn support the company through the provision of loans and subscription to share capital. This would be permitted by virtue of the Localism Act 2011. In addition the Council has a power to provide financial assistance to a company providing privately-let accommodation under section 24 of the Local Government Act 1988.
42. Where it were appropriate for the company to develop Council-owned land, the Council would be entitled to dispose of land to the Company provided it complied with Section 123 of the Local Government Act 1972, which is the duty to obtain best value for property disposals.

## **Procurement**

43. In the above circumstances the Council would be establishing the company for a commercial purpose. It would be funded from a variety of sources, including Council money, other public money and private funding. It would be intended that the company would have a commercial character so as not to count as “a body governed by public law” for the purposes of the Public Contract Regulations. This would mean that the requirements of the Regulations would not apply to the company.

## **Executive Sub-Committee**

### **Background**

The Council would establish an Executive Sub-Committee specifically to discharge the functions of the Council as regards its corporate shareholding in the company. The Sub-Committee would meet once a year to receive an annual report and annual accounts from the company, but otherwise meetings would be called on an 'as and when required' basis to deal with company business.

### **Membership**

To be determined by the Leader of the Council from time to time. Only members of the Executive would be able to sit and vote on the Committee. A minimum number of three Executive Members would be needed to undertake the shareholder function. Substitutes would be permitted at the discretion of the Leader.

### **Purpose**

To exercise the function of the Council as a shareholder in relation to the Council's property company.

### **Remit**

To undertake all functions of the Council as a shareholder under the Company Act 2006 in relation to the Council's company, which would include without limitation:

- To determine the Shareholder Agreement between the Council and the company including the Business Plan
- To appoint and dismiss directors of the company (where power is reserved to the Shareholder)
- To agree any Directors' Service Agreements (if required)
- Appointment and removal of a Company Secretary and Auditor
- To agree any Resourcing Agreement between the Council and company for the use of Council staff and facilities and reimbursement for the same
- To agree any loan agreements or draw-down of Council financing (subject to funds being made available by Council)
- To agree any reserved matter required by the Articles of Association or Shareholder Agreement
- To agree the Articles of Association or any amendment thereof.

This page is intentionally left blank



By virtue of paragraph(s) 5 of Part 1 of Schedule 12A  
of the Local Government Act 1972.

Document is Restricted

This page is intentionally left blank