

**WAVERLEY BOROUGH COUNCIL**

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

**11 MARCH 2019**

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**Title:**

**SETTING UP A COMMERCIAL COMPANY**

**[Portfolio Holder: Councillor Ged Hall]  
[Wards Affected: All]**

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**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.

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**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.

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**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.

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## **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.

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## **Background Papers**

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

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