

BODY: Eastbourne Cabinet
DATE: 22nd March 2017
SUBJECT: Establishment of a Joint Housing Investment Partnership with Lewes District Council
REPORT OF: Ian Fitzpatrick, Director of Service Delivery

Ward(s): All Wards

Purpose: To up-date Members on progress with the establishment of a joint housing and regeneration investment vehicle with Lewes District Council as previously approved.

To update on the progress of Eastbourne Housing Investment Company (EHICL).

Contact: Ian Fitzpatrick, Director of Service Delivery, Telephone 01323 415935 or internally on extension 5935. Email: ian.fitzpatrick@eastbourne.gov.uk

Recommendations:

- 1 To incorporate and agree the governance structure for the new Eastbourne & Lewes Joint Investment Partnership (JHIP) in line with section 2 of this report and to authorise the Director of Service Delivery and the Assistant Director of Legal & Democratic Services to take all such step as are necessary to establish the same Limited Liability Partnership (LLP)
- 2 Allocate up to £30m as in section 4 in the Council's capital programme and approve delegated authority arrangements to progress the first phase of delivery for both EHICL and the new JHIP.

1.0 Introduction

1.1 On 13th December 2016 Cabinet approved a recommendation to delegate authority to the Director of Service Delivery and the Assistant Director of Legal and Democratic Services, in consultation with the Lead Member for Housing and their counterpart at Lewes District Council to undertake work to set up a joint Lewes District Council/Eastbourne Borough Council wholly owned housing investment partnership (JHIP).

- 1.2 Work to set up the new joint vehicle has been ongoing with a target incorporation date of 1st April 2017. In parallel Lewes District Council have also been taking steps to establish their own housing investment company – Lewes Housing Investment Company (LHICL).
- 1.3 With EHICL this means that, across the two authorities, there would be three similar wholly owned subsidiaries working in association to each other:
- Eastbourne Housing Investment Company (EHICL)
 - Lewes Housing Investment Company (LHICL)
 - Joint Housing Investment Partnership (JHIP)
- 1.4 The relationship between the three new housing investment vehicles has been further explored and external legal advice obtained to ensure that the potential benefits of the new vehicles can be best realised.
- 1.5 This report provides:
- the business case to support the proposal for the two new vehicles
 - detail on how the joint partnership and EHICL will operate
 - an explanation of their respective primary focus and inter-relationship
 - for approval an associated set of governance arrangements and financial delegations so that first phase delivery can be progressed.

2.0 Business Case

- 2.1 LDC has also agreed to work to set up a new joint housing investment vehicle and a similar report with details of the future governance arrangements is going to their Cabinet on the 20th of March 2017. In parallel Lewes District Council are also reviewing in that Cabinet report how a joint investment vehicle would operate in relationship to a new solely owned housing investment company (LHICL) which will mirror Eastbourne's existing EHICL.
- 2.2 Across the two authorities the most recent specialist and legal advice is that three similar wholly owned subsidiaries would provide the best overall structure as illustrated in Appendix 1 i.e;
- i. A joint Limited Liability Partnership between the two Councils (Joint Housing Investment Partnership, JHIP)
 - ii. The existing Eastbourne Housing Investment Company Ltd (EHICL)
 - iii. A new Lewes Housing Investment Company (LHICL)
- 2.2 Working together the two councils can support respective housing delivery by having three such vehicles and the advice is that this will:
- i. maximise housing investment and funding opportunities
 - ii. create a corporate framework which optimises the allocation and retention of internal funding.

The proposed structure also simplifies the sharing of necessary officer skills in managing and delivering future projects, allows the councils to choose to share risk on larger ventures and provides a stronger financial platform for new activities.

2.3 The business case for the proposed structure is that:

- Through EHICL and LHICL each Council can individually undertake more commercial development, place shaping activities and hold associated respective assets, in a way which meets legal and regulatory requirements and ensures that each authority has distinct control over such assets.
- The JHIP can act as the asset holding vehicle for affordable housing properties developed through the EHICL and LHICL commercial development programmes. It will enable both councils to progress housing and regeneration opportunities where combining scale or operating efficiencies improves the feasibility and business cases

2.4 The joint Member and Director level joint strategic co-ordination Board would have a programme level oversight and make recommendations that ensure the most efficient placing of assets and utilisation of internal funding.

3.0 Risk Management

3.1 The risks and issues of EHICL are monitored by the EHICL Board and considered within the company business plan.

3.2 Further work to ensure due diligence will be undertaken and reported back to Cabinet at the point that JHIP becomes active with future schemes.

4.0 Financial Appraisal

4.1 The initial cost of setting up the proposed JHIP, developing the business case and investment proposals was estimated to be £30,000 per authority. This was approved to be funded from the General Fund budget for service priorities. Actual costs are still projected to be £30,000 at present.

4.2 The scale of potential new housing development requires new vehicles, and a new structure, if the Council wants to maximise housing delivery and associated regeneration beyond the constraints of the HRA.

4.3 Over the last 3 years we have brought forward and largely completed a 97 unit mainly affordable programme of new housing via the HRA which has utilised available headroom capacity. This has placed the Council ahead of many authorities in terms of experience and associated resources.

4.4 The potential for a much more ambitious programme of new housing delivery in Eastbourne has been assessed by the EHIC Board and set out in pipeline programme form to indicate the potential scale of forward delivery. This comprises:

- An EHICL 5 year development pipeline to incorporate approved schemes such as Bedfordwell Road and potential future developments of 265 new homes with a projected gross development cost of £51m

and a net borrowing requirement of £18.7m

- Transfer to JHIP of the affordable housing elements of EHICL delivery required under planning policy, Section 106 and delivery of affordable schemes beyond the capacity of the HRA where the Council wants to take a direct enabling and place shaping role. 70 new homes with a projected gross development cost of £13m and a net borrowing requirement of £5.5m.

4.5 The pipelines have provided an indication of potential schemes, tenure mix and the level of funding required to support delivery. The scale and focus of overall investment, and decisions on larger individual schemes, will remain matters for Cabinet approval.

4.5 Previous delegations gave the Executive authority to deliver different elements of the new housing as follows:

- Feb 2013 Cabinet delegation of £20m of borrowing within the 5 year capital programme for the delivery of the new HRA housing – the new HRA housing has been delivered for around £10m because of higher than anticipated grant, sales receipts and internal funding
- March 2016 Cabinet approval to purchase the Bedfordwell Road site for a maximum acquisition value of £2.45m – site acquired for £1.45m
- November 2016 Cabinet delegation of £5m by way of loan to EHICL for the purchase and repair of street properties to alleviate temporary housing demand.

4.6 In addition in December 2016 Cabinet gave delegated approval, by way of it's capital programme of £30m for the acquisition of commercial assets based on yield targets some of which include an element of new housing and which may be held in EHICL.

4.7 Appendix 1 provides a diagram to illustrate, in summary form, the relationship between the 3 x housing investment vehicles and links back to Cabinet via the proposed Joint Housing Investment Board.

The operational arrangements for delivery, programme development, financial and risk control are also set out to include a more formal role for PRSO, the Director led Project Review and Sign Off Group, tasked with undertaking detailed risk appraisal and financial due diligence for all schemes

4.8 The new structure provides a clearer and more robust framework for risk management and the exercise of various Cabinet delegations. Delegations have been determined to date by the requirements of individual schemes or housing strategy priorities. They have not created programme level capacity or acted as a programme control mechanism.

4.9 If the new structure of companies and governance is approved it is proposed that more general delegations are made to enable the relevant programmes of housing to be brought forward most effectively:

a) EHICL: £ 20m by way of loan for the delivery of new mixed tenure homes

and associated activities

b) JHIP: £10m by way of loan for the delivery of new mixed tenure homes and associated activities

The lending to the companies and/ or partnerships will form part of the Councils treasury management strategy and create a revenue income stream for the General Fund.

4.10 The joint housing investment board will exercise delegated control on overall levels of development, individual loan tranches and larger transactions and will also determine which schemes are brought back to respective Cabinets for separate approval.

5.0 Legal Implications

5.1 The principal overarching power which the Councils will rely on to form and participate in an the proposed Limited Liability Partnership (LLP) is Section 1 Localism Act 2011 ("General Power of Competence").

The Council may in addition rely on a number of other powers in relation to specific aspects of its arrangements with the LLP over time, such as its housing powers, its powers to acquire and dispose of land, its powers to borrow and to invest, its powers to provide financial assistance for privately let housing and its powers to provide advances to persons to acquire or erect buildings. Some of these powers are subject to the need for the consent of the Secretary of State and where a general consent does not apply a specific application will be made.

5.2 The General Power of Competence (GPC) gives a local authority the power to do anything that individuals generally may do. The power applies to things that an individual may do even though they are in nature, extent or otherwise unlike anything the authority may do or unlike anything that other public bodies may do. Where the GPC is conferred on the Council to do something, it can do it in any way whatever, including for, or otherwise than for, the benefit of the Council, its area or persons resident or present in its area.

There are however limitations to the extent of the GPC and in particular those set out in Section 2 of the Act are:

(a) if the exercise of the GPC overlaps with a pre-existing power then GPC is subject to the same restrictions as that power;

(b) GPC does not enable the Council to do anything which it is unable to do because pre-existing law prohibits it;

(c) GPC does not enable the Council to do anything which it is unable to do because more recent law prohibits it.

Where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company as defined by the Act and this does not include a Limited Liability Partnership (LLP).

"Commercial purpose" is not defined in the Act. However a "company" is only be required if the primary or dominant purpose of the actions of the council reliant on the GPC is commercial. Furthermore, the fact that some profit or surplus is made by the authority, does not mean it is acting for commercial purpose under the GPC. Whilst the LLP itself will have a "view to a profit" the Councils' primary purpose in setting up the LLP in this instance is not commercial. The Council's primary purposes are to undertake their public tasks and duties in relation to housing, place shaping and regeneration and are driven by socio-economic objectives for the benefit and improvement of their areas.

A number of local authorities have relied upon the GPC to form and participate in LLPs primarily for housing and regeneration purposes although these usually include a private sector development/investment partner.

Limited Liability Partnership

Section 2(1) of the Limited Liability Partnerships Act 2000 describes an LLP as an association of "two or more persons ... for carrying on a lawful business with a view to profit". Persons for this purpose can include two corporate bodies such as a local authority.

"Business" is defined as including "every trade, profession and occupation".

5.3 The key features of an LLP are that:

- It is a body corporate and a legal entity separate from its members
- Although not a company an LLP is incorporated by registration at Companies House
- An LLP has unlimited capacity and can do anything that a legal person can do - it does not have shareholders nor directors as in a company but "members".
- Members are those who subscribe to the incorporation document (must be two) and those who become members by agreement of the existing members. Members may be individuals or corporate bodies. In this case the members would be the two councils.
- LLP members have limited liability in that, generally, they do not need to meet the LLP's liabilities. The members act as the LLPs agents and are only liable up to the amount they have contributed to the LLP.
- It is taxed as a partnership and so is "tax transparent". This means that for tax purposes the business of the LLP is treated as carried on by its individual members and not by the LLP as a separate entity so the tax treatment of any profits will depend on the nature of the entities who are members. This tax transparency can only be switched off in limited circumstances, such as the failure of an LLP to carry on a business with a view to profit or when an LLP is in liquidation or is being formally wound up by order of the court. Where transparency is turned off the LLP will be taxed as a company.
- The LLP, rather than its members, will normally be liable to register for VAT as, in HMRCs view; the LLP constitutes a body corporate for this purpose.
- An LLP has the organisational flexibility of a partnership. The members are free to agree:
 - how to share profits;

- who is responsible for management and how decisions are made;
- when and how new members are appointed;
- exit arrangements.
- Any members' agreement (LLP agreement) is a private document that is confidential to the members. It does not need to be publicly filed. The member's agreement will set out the rights and duties as between themselves. In the absence of an agreement default provisions apply.
- It has no share capital. There are no capital maintenance requirements and, unless otherwise agreed between the members, there is no obligation for members to contribute capital to the LLP
- Its accounting and filing requirements are broadly the same as those of a company.
- An LLP may issue debentures and give fixed charges and floating charges over its assets in the same way as a company.

6.0 Conclusion

- 6.1 This report seeks to provide clarity on future investment vehicles that will facilitate and expedite housing delivery across the District meeting key strategic ambitions of the Council.

Appendices

Appendix 1 Housing Investment Structure Chart