

Agenda Item No: 9.3 **Report No:** 53/17

Report Title: Establishment of a Joint Housing Investment Partnership with Eastbourne Borough Council

Report To: Cabinet **Date:** 20th March 2017

Cabinet Member: Councillor Ron Maskell

Ward(s) Affected: All

Report By: Ian Fitzpatrick, Director of Service Delivery

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

To propose the establishment of a Lewes Housing Investment Company to make sure the Council has the right overall capacity to maximise housing investment and funding opportunities.

Officers Recommendation(s):

1. To note progress made under previous delegation 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 Eastbourne Borough Council to undertake work to set up a joint Lewes District Council/Eastbourne Borough Council wholly owned housing investment vehicle (JHIP).
2. Approve, under the same delegation, work to set up a solely owned Lewes Housing Investment Company (LHICL) to make sure the Council has the right structure to maximise housing investment and funding opportunities.
3. Incorporate and agree the governance structure for the two new investment vehicles in line with section 6. of this report.
4. Allocate up to £20m as in section 4 in the Council's capital programme and approve delegated authority arrangements to progress the first phase of delivery for both companies.

Reasons for Recommendations

- 5.** At the 16th November 2016 meeting Cabinet approved that work be undertaken to set up a joint LDC/EBC wholly owned housing investment company and that consideration also be given to an LDC solely owned housing investment company in the event that the establishment of a joint company was not considered appropriate or was not agreed by EBC
- 5.1** Since November 2016 further specialist advice has been received which has indicated that it would be most advantageous for the Council to have both;
- i. joint Housing Investment Partnership (JHIP) vehicle with EBC
 - ii. a solely owned housing investment company (LHICL)
- 5.2** This report provides:
- the business case to support the proposal for the two new vehicles
 - detail on how the joint partnership and Lewes company will operate including legal advice on the best forms of company
 - 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.

Information

- 6.0** EBC have also agreed to work to set up a new joint investment vehicle. Detailed discussions with EBC have been based on a target incorporation date of 1st April 2017. In parallel Eastbourne Borough Council have been reviewing how a joint investment vehicle would operate in relationship to its already established solely owned housing investment company (EHICL).
- 6.1** 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;
- A joint Limited Liability Partnership between the two Councils (Joint Housing Investment Partnership, JHIP)
 - The existing Eastbourne Housing Investment Company Ltd (EHICL)
 - A new Lewes Housing Investment Company (LHICL)
- 6.2** Working together the two councils can support respective housing delivery by having three such vehicles and the advice is that this will:
- maximise housing investment and funding opportunities
 - create a corporate framework which optimises the allocation and retention of internal funding.

- 6.3** 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.
- 6.4** 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
 - The joint Member 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 such as right to buy receipts.
- 6.5** EHICL is already established as a wholly owned subsidiary of EBC. It is a company limited by shares with 5 directors on the company board. (2 x EBC officers at Director level, 2 x Members 1 x independent Chair) It is proposed that LHICL is established on an equivalent basis with a target incorporation date of 1st April 2017.
- 6.6** It is proposed that the best model for the JHIP is that it should be established as a Limited Liability Partnership (LLP) with joint membership comprising Eastbourne Borough Council and Lewes District Council.

Financial Appraisal

- 7.** 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.
- 7.1** 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.
- 7.2** Whilst the Council has already started developing new housing again, through the HRA, this has been at a modest level; over the last 2 years a small programme of 22 new homes has been delivered on a number of garage and infill sites. These schemes are nearing completion.
- 7.3** A next phase of new housing delivery is being brought forward through the HRA within headroom constraints and to utilise RTB receipts with more

imminent payback deadlines. (43 new affordable homes on similar sites with a net borrowing requirement of around £5m.)

- 7.4** The potential for a much more ambitious programme of new housing delivery in Lewes has been assessed and set out in pipeline programme form to indicate the potential scale of:
- Delivery via LHICL to make sure the Council can progress larger mixed tenure schemes often with a wider regeneration benefit. 109 new homes with a net borrowing requirement of in the region of £10m.
 - Transfer to JHIP of the affordable housing elements of LHICL 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.
- 7.5** 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.
- 7.6** 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:
- LHICL: £ 10m by way of loan for the delivery of new mixed tenure homes and associated activities
 - JHIP: £10m by way of loan for the delivery of new mixed tenure homes and associated activities
- 7.7** 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.
- 7.8** 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.

Legal Implications

- 8.** The principle overarching power which the Councils will rely on to form and participate in an the proposed LLP is Section 1 Localism Act 2011 ("General Power of Competence").
- 8.1** 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.

- 8.2** The General Power of Competence (GPC) gives a local authority has 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.
- 8.3** 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-commencement 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 of a pre-commencement limitation;
 - (c)** GPC does not enable the Council to do anything which it is unable to do because of a post commencement limitation which is expressed to apply to GPC.
- 8.4** Whilst the existence of an overlapping existing power does not limit the generality of the general power, if a pre-commencement power is subject to restrictions, those restrictions apply also to exercise of the general power in so far as it is overlapped by the pre-commencement power. On the other hand an existing power is not limited by the existence of the general power.
- 8.5** The general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in exercise of the general power, do otherwise than for a commercial purpose.
- 8.6** A local authority may not, in exercise of the general power, do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to the person.
- 8.7** Where a local authority provides a service to a person otherwise than for a commercial purpose, and its providing the service to the person is done, or could be done, in exercise of the general power. The general power confers power to charge the person for providing the service to the person only if the service is not one that a statutory provision requires the authority to provide to the person, the person has agreed to its being provided, and ignoring this section and section 93 of the Local Government Act 2003, the authority does not have power to charge for providing the service.
- 8.8** 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).
- 8.9** "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.

8.10 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”.

8.11 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 it 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. However, in some circumstances a member may have to contribute to the LLP’s assets, for example, if a member is guilty of misfeasance or falls within special clawback provisions under the Insolvency Act 1986 (see Insolvency)
- 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 members 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.

Risk Management Implications

9. The risks and issues of a council-owned HIC will be considered within the company business plan.

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

Equality Screening

10. This report is not thought to require an equality assessment at this stage.

Background Papers

11. None.

Appendices

12. Appendix 1. Housing Investment Structure Chart