

GOVERNANCE AND THE LLP MODEL

1. OVERVIEW

- 1.1. The Council and Sovereign are considering establishing a joint venture formed as limited liability partnership (LLP) to acquire and develop property to meet the housing needs of West Berkshire.
- 1.2. This note explains the proposed governance model. Schedule 1 diagrammatically summarises the governance framework of the LLP.

2. GOVERNANCE FRAMEWORK

- 2.1. The Council will interact with, and be able to exercise control over, the LLP's activities in three principal ways:
 - 2.1.1. as a landowner, with contractual rights governing what sites the Council wants to transfer to the LLP and on what terms;
 - 2.1.2. as a member of the LLP, which in broad terms is equivalent to being a shareholder of a company (i.e. an owner of the vehicle);
 - 2.1.3. through appointees to the management board, which is comparable to company's board of directors.
- 2.2. In addition to the LLP the parties may establish subsidiaries for risk management and commercial purposes. These subsidiaries would be controlled by and within the governance arrangements for the LLP.

3. LANDOWNER FUNCTION

- 3.1. The Council will enter into a contract with Sovereign and the LLP to set out the rights of the Council as landowner (referred to in the heads of terms as an Overarching Strategic Land Agreement (OSLA)). This will provide the Council as landowner with control over what property is put into the LLP and in what circumstance property is released to the LLP.
- 3.2. The OSLA will have a set of conditions that will need to be met in order for the identified land to be drawdown. Usual conditions would include land assembly, vacant possession, third party consents, site conditions, supply chain approval, satisfactory planning permissions, funding availability and viability. Only when all of these conditions are met the LLP would be able to trigger land draw down and then only in respect of land that the Council had agreed to put in the joint venture. This approach is essential for achieving best value and achieving a maximum independent valuation using the RICS Red Book.
- 3.3. The initial decision to enter Phoenix and Chestnut sites into the OSLA would be an Executive decision. Thereafter the Council would need to agree on the level of delegation to officers to make decisions on behalf of the Council in relation to the OSLA.

4. LLP MEMBER – STRATEGIC CONTROL

- 4.1. The Council, and Sovereign, will retain strategic control over the LLP's operation through their rights as members of the LLP. This will be achieved through the Council having the right to approve the LLP's annual business plan and the requirement that certain listed decisions, referred to as **reserved matters**¹, will have to be referred back to it rather than being within the discretion of the management board. For example, this would typically include any change of business, creating security over the LLP's assets or transactions over a specified value.

¹ See Head of Terms – schedule 1

- 4.2. The business plan would include a list of sites that the LLP expects to use for development which could include drawdown of identified sites from the Council or purchase of sites from the market. Approval and adoption of the business plan would be a reserved matter and therefore would need the consent of both the Council and Sovereign. Where either the Council or Sovereign wished to bring forward a new site not listed in the approved business plan this activity would be a reserved matter and therefore require the consent of the Council and Sovereign.
- 4.3. It is proposed that this level of strategic control, i.e. the right to make decisions as member of the LLP, is retained by councillors. This will reflect the role of councillors within the Council i.e. a role focused on leadership and strategic control rather than the task of operational delivery.
- 4.4. The Council's role and rights as member will be set out in a members' agreement, a contract between the Council, Sovereign (by way of its trading subsidiary) and the LLP. This is the LLP's constitution and performs similar functions to a company's articles of association and shareholders' agreement.

5. OPERATIONAL CONTROL – LLP MANAGEMENT BOARD

- 5.1. The Council and Sovereign will, as the members of the LLP, have the right to appoint a management board. The board will be given a role equivalent to a company's board of directors meaning the individuals will have duties to manage the activity of the LLP acting in the best commercial interests of the LLP for the benefit of the Council and Sovereign as its members.
- 5.2. The management board will have the task and remit of implementing the business plan set by the Council and Sovereign and subject to those matters / decisions reserved to the members.
- 5.3. The level of discretion given to the management board will depend on the business plan – i.e. how prescriptive or flexible it is – and the reserved matters. By way of example, these could include approving transactions above a specified value and subjecting the LLP's assets to security. Matters within the remit of the business plan would not need to be referred back as reserved matters as well.
- 5.4. The proposal is for a board of six, three to be appointed by Sovereign and three by the Council. The Council will appoint senior officers. The relatively low number of management board members should ensure that the LLP is focussed and operationally flexible.

6. CONFLICTS AND THE MANAGEMENT BOARD

- 6.1. The governance structure of the management board has been developed to minimise conflicts of interests issues both for decisions made within the LLP and decisions made within the Council. This is being achieved through:
- 6.1.1. councillors exercising control and influence through the Council's role as a member (owner) of the LLP; and
- 6.1.2. officers appointed as board members not being statutory officers and / or the officer with ultimate responsibility for matters directly relating to the LLP.
- 6.2. This approach is a sensible and commonly-used approach for local authorities seeking to minimise conflicts of interests in respect of wholly owned or joint venture entities. Given the role of the proposed joint venture - operating as a developer including applying for planning permission – the potential for conflicts of interests is significant which places additional emphasis on the need for a robust governance structure.
- 6.3. The proposed approach to board composition, however, is not the only way and there are also examples of councillors being appointed to housing joint venture boards. Schedule 2 provides some different examples of approaches taken.
- 6.4. The principal reasons for the proposed approach are:

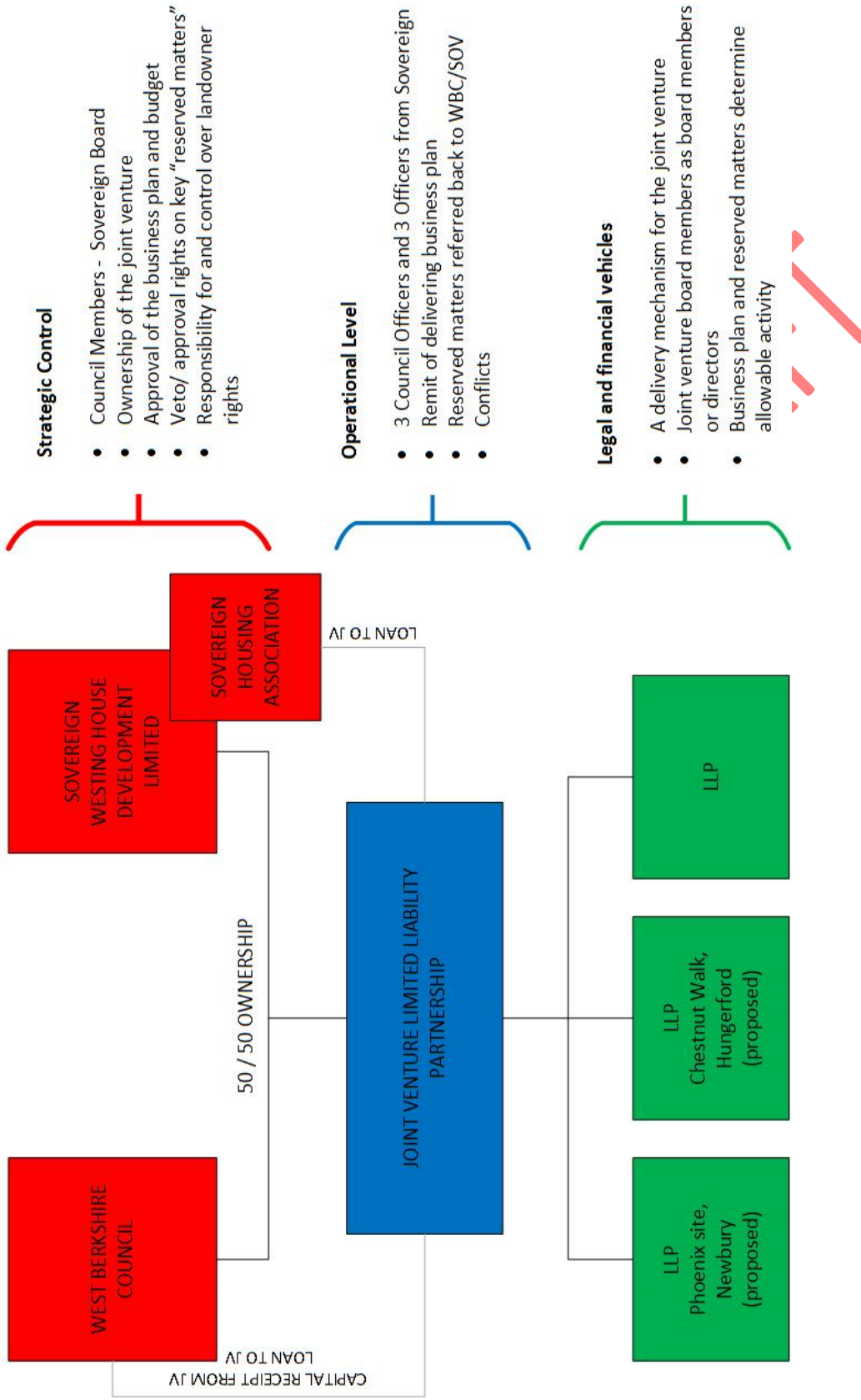
- 6.4.1. If the Council were to appoint a councillor as a management board member, the individual would have to disclose any potential conflicts of interests and observe the requirements of the Code of Conduct of the Council. The councillor would also need to be careful (when undertaking their Council role) to avoid acting in a way that suggested bias or predetermination. This can be difficult to achieve in practice.
- 6.4.2. Whilst the Council could grant a dispensation under the Members' Code of Conduct to allow a councillor to continue to take decisions relating to the LLP within the Council, it is not possible for the Council to avoid accusations of bias or predetermination. This is particularly the case if the councillor is senior. Participation on the board of the LLP could therefore preclude a councillor from being involved in discussions and decisions within the Council relating to it.
- 6.4.3. The risks around conflicts for officer board members are hard to manage where officer directors are also responsible within the Council for decisions materially affecting the vehicle. This risk is best mitigated by not putting Council officers who are responsible for decisions relating to vehicles as directors of those vehicles. For this reason, the most senior officers including statutory officers (monitoring officer, s.151 officer and the head of paid service) should not be appointed as board members as they may be required to undertake their statutory roles in relation to the vehicle at some point which would raise difficult conflicts.
- 6.4.4. The Council can consent to the officer continuing to act as an officer despite potential conflicts, and can agree not to take action if the officer acts contrary to the Council's interests as a result of their appointment as board member.
- 6.4.5. It is Sovereign's preference for the LLP board to be operationally focused without the need to manage the added complexities that would come with a structuring including councillor board members. Sovereign are adopting a mirror approach to their appointments.

7. OBSERVERS AND THE MANAGEMENT BOARD

- 7.1. It would be possible for the members (i.e. Sovereign and the Council) to agree that they have a right to appoint a specified number of observers to the management board, i.e. individuals who are not board members but who are entitled to attend board meetings for the purposes of sharing information and contributing where invited to do so. This is an approach sometimes used in joint ventures by minority partners who do not have full board appointees. It would not be typical for a joint venture partner who does have board appointees but would still be possible.
- 7.2. Care would need to be taken in respect of any such observer that the person did not become treated as a shadow or de facto board member. This could happen if in practice the individual acted and was treated in the same way as the appointed board members. In such cases the individual could have the duties and liability associated with board membership, for example potential liability associated with insolvency, without the indemnities and insurance that protect the duly appointed board members. This would be a risk for both the individual and the appointing member, i.e. Council and /or Sovereign. The risk could be mitigated through very clear protocol, documentation and practice around the role, rights and limitations of the observer role.
- 7.3. The Council and Sovereign would need to work through and be satisfied that the practical implications of such appointments were satisfactory, for example whether such presence would inhibit discussions/ operations of the board in any way, whether issues of confidentiality may arise and the size of the group meeting.

SCHEDULE 1 DIAGRAM

DRAFT CORPORATE AND GOVERNANCE STRUCTURE



SCHEDULE 2 – EXAMPLES OF LOCAL AUTHORITY HOUSING / PROPERTY JOINT VENTURE GOVERNANCE ARRANGEMENTS

Local Authority	Housing Association / Developer JV Partner	Joint Venture Remit	Governance Arrangements
Slough Council	Morgan Sindall Investments Ltd	Property Regeneration and housing	Board of 6 Council 3 (1 councillor, 2 officers)
Sheffield City Council	Keepmoat Great Places Housing Group	Housing	Board of 6 Council 3 (3 officers)
Birmingham City Council	Places for People Canal and River Trust	Housing regeneration and	Board 6 Council 2 (2 officers)

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