

## Legal Appendix

This Appendix provides advice on the following:

- Legal form
- Governance
  - At JVCo level
  - The interface between JVCo and WCHT and WBC respectively
- Council's role as landowner and land disposals
- WCHT's role as landowner and land disposals
- Council's ability to provide financial assistance and finance
- State aid
- Procurement compliance
- Best value compliance
- Supply of services from GE(W)L and JVCo profit sharing

### I Legal form

I.1 Form should follow function. The purpose of JVCo is to:

- Generate additional income for WCHT and the Council;
- Further WCHT's aim of continuing to deliver new rented (whether affordable or market) and low cost home ownership properties; and
- Carry out commercial development.

I.2 Clearly JVCo will be carrying out commercial activities. Both parties have the legal powers to trade commercially and to invest in a commercial enterprise. This is a more important distinction for WBC. There is a choice to be made of company form and this will come down to council vires, familiarity of form and tax treatment.

I.3 WBC has the vires under the General Power of Competence ("GPoC") to be a joint owner of JVCo as a company limited by shares (a "CLS"). The CLS as JVCo would carry out commercial activities. The council's vires for trading commercially is derived from the power to trade under s95 of the Local Government Act 2003 as supplemented by the GPoC.

- I.4 WBC also has the vires under s12 of the Local Government Act 2003 to invest in a commercial enterprise such as a Limited Liability Partnership (“**LLP**”). This is different to the CLS approach not least because there would need to be a revised group structure to enable this to happen. The council as an investment partner would be a partner in a “top line” LLP (“**the Investment LLP**”). The Investment LLP would not carry out any of the proposed commercial activities. Instead there would need to be a subsidiary LLP between WCHT and the Investment LLP (the “Commercial LLP”). The Commercial LLP would distribute its profits back to its owners, WCHT and the Investment LLP. The council would derive its return on its investment through the Investment LLP rather than the Commercial LLP.
- I.5 The advantage to the council is the tax treatment of a LLP. It is transparent. This means the partners to a LLP pay any tax due unlike a CLS which can only distribute profit to its shareholders after tax has been paid. As the council does not pay corporation tax the council would derive greater profit from a LLP.
- I.6 A disadvantage of a LLP for the council is the management of State aid to ensure that if the council reinvests all of its profit share that this does not create state subsidy. Another is the complexity of a multi-tiered structure just to address vires.
- I.7 WCHT is more familiar with the company form than the LLP form. This is a matter to take into account. Tax issues are addressed through the structure of transactions as per Mazars’ advice.
- I.8 In addition to the Memorandum of Association there will be a Shareholders Agreement. This is a confidential document which sets out the following:
- The purposes and objectives of JVCo;
  - A statement as to how the parties intend to work together as a strategic partnership and in good faith;
  - A reasonable endeavours commitment to promote and develop the purposes and objectives of JVCo;
  - Finances – the level of commitment, if any, from each party;
  - The resources from each party, if any;
  - Reserved Matters – this is where WCHT and WBC reserve significant matters to themselves for agreement rather than delegate to the directors

(the directors of the JVCo have a duty in company law to act in the best interests of the JVCo and not of their shareholders);

- The project approval process and how this links into the overall business planning for JVCo. The project approval process should take the form of a business case which considers three elements: (1) is it commercially viable? (2) is it value for money? And (3) is it regulatory compliant? This will also assist the council to discharge its Best Value duty.
- The governance arrangements; namely the inter-face between the shareholding members and their nominees, the operation of the Board and separation of decisions as reserved matters to the shareholders and decisions reserved to the directors. Further administrative detail as to number and timing of meetings at board level and at shareholder level;
- Conflicts of interest;
- Dispute resolution;
- Exit and termination provisions;
- The ability to allow additional shareholders to join JVCo;
- The usual boiler plate provisions

## 2 Governance

### *Board Membership of JVCo*

- 2.1 We recommend that the Board of JVCo will consist of 4 directors, two each from WCHT and the Council. This will create a deadlock JV. The shareholders agreement will contain a robust escalation resolution process for decision deadlock at board level and shareholder level. In the event that the parties cannot resolve their disputes internally it is likely that the JVCo will simply cease to embark on new projects and will continue solely for the benefit of existing projects.
- 2.2 We recommend that the Board Members are selected from each parties' senior officers. Councillors will undertake the role of nominees at shareholder level.

- 2.3 For WCHT, there needs to be put in place:
- A chain of delegation from the Board to the nominee to attend shareholder meetings (i.e. representing WCHT);
  - Approval under WCHT's [Standing Orders] to appoint two officers as company directors.
- 2.4 For both parties, there should be a clear understanding of where conflicts of interest may arise. Company law will require those appointed as company directors to act in the best interests of JVCo.

### 3 The Council's role as landowner

- 3.1 The Council's role as landowner involves a consideration of its various disposal powers. The appropriate disposal power and price required to be obtained will be determined by the powers under which the Council holds the land/buildings involved.
- 3.2 Where the land is held for general purposes the appropriate power is under Section 123 of the Local Government Act 1972. This requires land to be sold at the best price reasonably obtainable unless the Secretary of State consents to a disposal at an undervalue. There is a general consent which allows for the land to be sold at an under-value of up to £2,000,000 where there are social, economic or environmental justifications to do so. This does not override State aid considerations.
- 3.3 Where the land is held for planning purposes the appropriate power is under Section 233 of the Town and Country Planning Act 1990. This also requires the best price reasonably obtainable to be obtained for the land unless the Secretary of State consents to a disposal at an undervalue.
- 3.4 Where land is designated as public open space, there are additional requirements to be satisfied prior to any disposal and care must be taken to comply with these in order to avoid any challenge by way of judicial review.
- 3.5 In each case, the Council should obtain an independent valuation of the site to ensure that it can demonstrate that the price obtained is in accordance with the appropriate statutory power.

3.6 Disposal of occupied and vacant HRA land has its own valuation and consents regime. State aid is not an issue where the disposal is for social/affordable housing as a Service in the General Economic Interest (“SGEI”).

#### 4 [WCHT’s role as landowner](#)

4.1 WCHT has the legal power to dispose of land and buildings under a combination of statutory and constitutional provisions. These are contained in Section 172 of the Housing and Regeneration Act 2008, Section 26 of the Co-Operative and Community Benefit Societies Act 2014 and WCHT’s Rules.

#### 5 [Powers to provide financial assistance](#)

5.1 WBC has power under s 24 Local Government Act 1988 to provide "financial assistance" in connection with the provision of "privately let housing". This support can be given by grant, loan or “in kind” such as through the provision of “free land”. All rented housing that is not let by the Council is regarded as “privately rented housing”, so housing rented out by JVCo would fall within this definition.

5.2 Under this power, the use of either the specific power to provide financial assistance or any other power to provide financial assistance or any gratuitous benefit (which includes a transfer of land/property for less than full market value) requires the consent of the Secretary of State. We mention this for completeness in case any gratuitous benefit is intended to be supplied. This could raise State aid issues because of the nature of the funding and the nature of the economic activities of JVCo.

5.3 JVCo may require additional grant funding where the sites are contaminated or are known to be within a flood risk area. Government grant may be available and the State aid implications would need to be addressed once more detail is known on a case by case basis.

5.4 WBC may provide funding through its reserves, on-lending from PWLB and/or LG municipal bonds.

## 6 State aid

6.1 There are 2 main areas where the issue of State aid will arise these are:

- the sale of land and buildings by the council to JVCo and
- funding for JVCo as a CLS.

6.2 State aid law forbids the transfer of State resources to an economic undertaking where it confers a selective advantage which distorts or potentially distorts competition and affects trade between EU member states. JVCo will be an economic undertaking for these purposes. The council must therefore make its actions State aid law compliant either by eliminating any presence of State aid or by bringing it into an exemption.

6.3 For land disposals the council should obtain the market value of the site(s) through an independent valuation or sell it by auction. Clearly the latter option is unlikely to be chosen as the council will want to ensure JVCo acquires the land. By doing this the council will comply with the EC Communication on State aid elements in sales of land and buildings by public authorities.

6.4 It is being proposed that the council provides funding to the JVCo by way of loan. It is crucial that any loan from the council is State aid compliant. A loan can be compliant where it meets the market economy investor principle (“**MEIP**”).

6.5 Essentially, for the State aid to fall within the MEIP exemption, it depends on how the money is put in and this needs further discussion. For a loan, the terms of the loan have to be on a commercial arms-length basis.

6.6 To ensure that the terms of the loan from the Council falls within the MEIP exemption, financial advice is needed to benchmark what the interest rate should be for a loan on commercial terms to an entity such as the JVCo based on the level of security and that it has no credit history. The EC have provided guidance on rate referencing.

## 7 Procurement

- 7.1 Procurement issues could arise because WCHT and WBC are contracting authorities for the purposes of the Public Contract Regulations 2015 (the “PCR”). However, it is not intended that JVCo is awarded any public works or services contracts. Instead, WCHT will facilitate JVCo to carry out its activities. This will be through services supplied by WCHT via G(E)WL to JVCo. As JVCo will not be a contracting authority for the purposes of the PCR, JVCo can contract directly with WBC and/or G(E)WL without having to follow the PCR. This will also apply to third parties and we would recommend that JVCo does have a competitive process for procurement in order to assure WCHT and WBC of best value and value for money.
- 7.2 The Council will be disposing land to JVCo and can do so without triggering a public works contract where the disposal is a pure land disposal without any requirements attached to it. This would also apply to any land disposals by WCHT to JVCo. Both parties can seek comfort from its role as parents and joint shareholder and ability to approve JVCo’s business plans. In addition, the Council would have some control in its statutory role as Local Planning Authority.

## 8 Supply of services from WCHT and/or WBC to JVCo

- 8.1 JVCo will not be a contracting authority for the purposes of the PCR and as such can buy services and enter contracts without having to comply with the PCR.

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