



dated 14 October 2016

Babergh and Mid Suffolk District Councils

Capital investment strategy options paper

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Trowers & Hamblins LLP
3 Bunhill Row
London
EC1Y 8YZ
t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

trowers & hamblins

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1 Context/background

1.1 The Councils remain two sovereign councils with two separate budgets and differences in their financial positions but with a shared senior management team, shared services and a joint Medium Term Financial Strategy and business model agreed and adopted in February 2016 which seeks (in addition to other objectives) to generate increased revenue for the Councils from investments funded by borrowing.

1.2 The Councils are proposing to implement a Capital Investment Strategy to deliver sustainable long term income flows from investing in commercial property opportunities and to guide future investment decisions and the management of an investment fund.

1.3 The purpose is to support the delivery of medium term financial sustainability in light of reduction and cessation of revenue support grant and to regenerate local areas. It is proposed that the capital investment fund will be comprised of £50 million in total derived from each Council borrowing £25 million from the PWLB and it is proposed that the fund will concentrate on direct commercial property investments by buying existing buildings with predictable returns.

1.4 There are three principal options to consider:

1.4.1 an unincorporated model where the joint investment board remains within the Councils' constitutional structure which could be set up as a newly constituted Board or as a newly constituted formal joint committee (**Option 1**);

1.4.2 an incorporated single special purpose vehicle (**Option 2**); and

1.4.3 an incorporated group structure (**Option 3**),

each of these Options is illustrated in the diagrams in Appendices 1, 2 and 3 and explained in detail below.

2 Summary of recommendations

We recommend Option 3 (an incorporated group structure) as the model with the most potential for flexibility to adapt to future changes in circumstances, to accommodate future growth and to enable the Councils to isolate potential risk and liability and/or transfer or sell on their investment to another party should they wish. Appendix 4 contains a summary of some of the distinctions between Options 1, 2 and 3. Appendix 5 contains a glossary of terminology.

3 **Option 1 - Unincorporated model**

3.1 **Description**

This model would involve the two Councils putting in place contractual and governance arrangements to agree to ringfence their respective investment contributions of £25 million for an agreed period and to jointly agree decisions as to how each investment would be made. Effective investment in property to realise a commercial return requires swift, streamlined and often confidential decisions to be made with regard to acquisitions and disposals in order to maximise negotiation positions in light of market conditions which can be volatile. Therefore, if an unincorporated model were chosen, the Councils would need to establish and delegate authority to a separately constituted Investment Board to make and act upon investment decisions. There would also need to be a legally binding agreement between the Councils (an inter-authority agreement) which set out the rights and obligations of each of the Councils to each other including division of liabilities, a mechanism for resolving potential disputes and exit arrangements. The Investment Board could also be constituted as a joint committee of the authorities but this would have governance implications (see 3.3 below).

3.2 **Legal powers/vires**

3.2.1 The Councils have received previous legal advice from Counsel with which we broadly concur and which confirmed that the Council would be acting within its powers in entering into this initiative. This paper does not therefore propose to reiterate in detail how powers will be deployed. However, the precise powers on which the Council can rely will differ depending on the form (unincorporated or incorporated) that the model will take. In all cases, the Council will be relying on its broad borrowing powers in section 1, LGA 2003 provided it does so within the relevant limits and in accordance with the CIPFA Prudential Code [and it is understood that the Councils' section 151 officer(s) will be able to confirm that this indeed is the case]. The Councils will be borrowing the funds from PWLB for the purposes of investing in commercial property and under section 12 LGA 2003 the Councils have a clear power to invest for any purpose relevant to their functions or for the purposes of the prudent management of their financial affairs provided the Councils have regard to the current Secretary of State's Guidance (the Guidance on Local Government Investments, Second Edition, 11 March 2010) to which it is understood that the Councils' section 151 officer(s) will be having regard.

3.2.2 The Councils have general powers to acquire and dispose of land pursuant to sections 120 and 123 LGA 1972. The purpose of any acquisitions must be

either for the Council's functions (in which case the relevant "function" would be investment) or for the benefit or improvement or development of the relevant Council's area in which case, the relevant Council would need to explain how the acquisition would benefit or improve or develop its particular area. If the latter justification were to be relied upon then the relevant property could not be owned by both authorities unless it was of relevance to the benefit/improvement/development of both their areas and necessarily, the funds used to purchase that property would need to derive from the same relevant authority.

3.2.3 The Councils will also have duties to act in accordance with their common law fiduciary duty to obtain value for money and to make decisions in a business-like manner that does not unduly favour on particular section of the Council's tax payers.

3.2.4 It is assumed that the Councils will be acquiring commercial properties only and that this will not involve property within either Council's housing revenue account in which case separate and distinct legal powers will be relevant.

3.3 **Governance**

3.3.1 In this model the Investment Board would not be a separate legal entity from the Councils and will therefore be subject to the Council's constitutional requirements and governance arrangements. However, it would be advisable in order to ensure that the necessarily expeditious decisions can be made in order to act quickly on market intelligence, respond to market conditions in order to make a profit on property investments. Therefore we would recommend that a bespoke/customised "scheme of delegation" would be formally adopted by both Councils allowing the Investment Board freedom to act within parameters defined by both Councils with appropriate checks and balances to enable scrutiny of investment performance and accountability.

Separately Constituted Board/Joint Committee

3.3.2 This unincorporated option could be established either as a Board (which would need to have a defined status within the Council's constitution as a formally constituted meeting which would have the ability to make formal decisions) or as a joint committee.

3.3.3 The Councils would need to consider whether to constitute the Joint Investment Board as a formal joint committee under section 101(5) of the LGA 1972.

Although theoretically, the unincorporated option does not have to be a joint committee, in effect it would need to be a formally constituted and given formal decision making powers by each Council and a joint committee would be the clearest way to achieve this. A joint committee is not a separate legal entity but is a formal committee of both Councils which would need to comply with the political balance requirements set out below which can sometimes impede the joint committee's ability to act swiftly in the event of unavailability or incapacity of a particular elected member and this would inevitably have an inhibitory effect on the Investment Board's ability to act expeditiously and be responsive to market conditions thus potentially compromising the level of profit that might be achieved.

3.4 A joint committee is established pursuant to section 101(5) of the LGA 1972 (**LGA 1972**) which provides that:

"Two or more local Councils may discharge any of their functions jointly and, where arrangements are in force for them to do so, -

- (a) They may also arrange for the discharge of those functions by a joint committee of theirs or by an officer of one of them and subsection (2) above shall apply in relation to those functions as it applies in relation to the functions of the individual Councils; and
- (b) Any enactment relating to those functions or the Councils by whom or the areas in respect of which they are to be discharged shall have effect subject to all necessary modifications in its application in relation to those functions and the Councils by whom and the areas in respect of which (whether in pursuance of the arrangements or otherwise) they are to be discharged."

3.5 The joint committee has no separate legal identity and no corporate status and so cannot own property or enter into contracts in its own right. Therefore it is usual for an inter authority agreement to also address issues (e.g. with one authority acting as a "lead" or for the responsibilities being shared between participating Councils, following agreed principles, dependent upon the nature of the issue arising).

3.6 Sections 101 and 102 of the LGA 1972 (and in the case of Executive Functions sections 19 and 20 of the LGA 2000 and relevant Regulations made under these sections) enable the work of Councils to be discharged through a variety of internal arrangements, and, in this context, external arrangements involving, and working with, another Council. In particular these powers include the ability of two (or more) Councils to discharge any of

their functions jointly, and where this occurs, to do so via a joint committee, and/or by their officers.

- 3.7 Where Councils agree, these functions may also be discharged (in whole or part) by sub-committees of the joint committee set up for the purpose.
- 3.8 It should be noted in particular that a joint committee may only be formed where it relates to the discharge of a **function** (as distinct from for example, just the delivery of a service). In this case, we would suggest that the relevant functions would be sections 120 and 123 of the LGA 1972 (acquisition and disposal of property) and section 12 of the LGA 2003 (investment).
- 3.9 These investment functions should be kept distinct from and exercised separately from the Councils' policy-making functions with regard to development control and scrutiny as there may be potential for conflict of interest between the two functions (for example, where adoption of a particular policy might have an impact on the dividend distributable to the Councils). This separation of functions should be implemented whether or not the investment board is formed as a joint committee.
- 3.10 The Secretary of State has made Regulations¹ which set out delegation of functions to a joint committee by Councils operating executive arrangements. For councils with an executive leader then the leader or the executive may approve the delegation to a joint committee.
- 3.11 Whether or not the investment board is to be formally constituted as a joint committee or not, both Councils will need to ensure that its existence and constitution is accommodated within their constitution and scheme of delegation.

4 **Political balance and voting rights**

- 4.1 If the investment board were constituted as a joint committee then one key differentiating feature is the fact that as a formal committee of the Councils, it would be subject to the political balance requirements in the LGHA 1989, schedule 1 and the Local Government (Committees and Political Groups) Regulations 1990.
- 4.2 Moreover, if the investment board is to be constituted as a formal joint committee then voting rights should be allocated according to the provisions of schedule 1 of the LGHA 1989. There are also specific provisions in LGHA section 13 with regard to the status of a person who is not an elected member of any of the Councils but is appointed a member of the joint committee. The disadvantage of a joint committee in this case is that a person

¹ The Local Councils (Arrangements for the Discharge of Functions) (England) Regulations 2012

who is appointed as a member of the joint committee but who is not an elected member of the Councils does not have a vote (section 13(1) LGHA 1989).

- 4.3 The precise extent to which Councils wishing to work with each other delegate their functions into a joint committee tend in our experience to vary and be an issue for agreement recognising the reality of local circumstances. The Councils may wish to circumscribe the extent of the functions that may be jointly exercised by reference to specified parameters (e.g. investment decisions above a set threshold or certain designated reserved matters such as change in asset class in the inter authority agreement) would need to be a matter to be decided outside the joint committee arena and referred back within each Council.
- 4.4 The Councils might also decide on joint arrangements where certain closely specified types of decisions taken by the joint committee or investment board (eg a major decision to invest in a different asset class but preferably not an "everyday" decision to invest in a particular property) might be able to be the subject of a review by any of the Councils, following certain defined procedural steps. The Councils could also agree that defined matters requiring an urgent decision in the interests of the business may be dealt with in a certain way. These issues, together with the constitutional establishment of the joint investment board (whether or not constituted as a joint committee) (e.g. numbers of members each Council may appoint; their terms of office; any co-option arrangements of third parties; which Council will lead in servicing and supporting the committee(s); running costs and so on) should be addressed in a formal agreement between the Councils involved, and endorsed and agreed by the Full Council (and the Executive if such functions are also subject to joint working) of each authority.
- 4.5 Clearly as any controls (and their complexity increase) on the ability and authority of the investment board to function then the potential for the overall joint objectives to be undermined may also increase, so a sensible balance needs to be struck between on the one hand (a) control, or on the other hand (b) empowerment of the investment board.
- 4.6 Membership would be fixed by each Council. If formed as a joint committee, the joint investment board may include co-opted individuals who are not members of an authority, but such co-opted members cannot have a vote (pursuant to s102(3) LGA 1972 and also s13 LGHA 1989).
- 4.7 If the Councils appoint one of their Council as the lead authority, the inter authority agreement will need to recognise this. As the lead authority will need certain protection that the consequences of certain actions taken in its name are shared (e.g. through indemnities and financial compensation mechanisms) and conversely that the other Council is protected from the unauthorised actions of the lead authority.

4.8 If the joint investment board is not to be formally constituted as a joint committee, then any appointments and voting rights will need to be agreed and allocated in accordance with each Council's procedural Standing Orders.

5 **Scrutiny**

A joint committee would also be subject to the scrutiny requirements. These may (depending on each Council's constitution) not apply if the joint investment board were not constituted as a formal committee.

6 **Members' allowances**

6.1 The joint committee as a committee of the Councils would entitle elected members appointed and attending the joint committee to claim their allowances in the normal way.

6.2 If the joint investment board were not a joint committee then members' allowances would also apply in the normal way.

A joint committee would require a set of governance arrangements that would need to adhere to financial management arrangements. One option is for the joint committee's financial affairs to be "hosted" by one Council, with that Authority's Chief Finance s151 officer taking responsibility for making payments, book-keeping and so on. The joint committee's governance arrangements should set out how costs are to be divided. This might be on the basis of per capita population or there may be another better measure. The host authority would be responsible for billing the other Council from time to time for their share of the joint committee's costs.

6.2.1 With any unincorporated model, all potential investment/acquisition/disposal considerations and decisions would be susceptible to public disclosure by the application to the Councils of the public access to information requirements to which Councils are subject albeit subject to the usual exemptions with regard to commercial sensitivity (which can be overridden in the event of overriding public interest) and/or confidentiality. This whilst having the benefit of transparency would inevitably compromise the Councils' bargaining power and ability in some circumstances to negotiate the best commercial terms on the market. Furthermore, the fact that the decisions to acquire, invest and dispose will be being made by the Councils as public authorities would potentially give aggrieved third parties public law rights in addition to normal private law rights to exercise against the Councils (such as judicial review or failure to have regard to the public sector equality duty) which again, may inhibit the ability to

act expeditiously and competitively on decisions to acquire or dispose of certain properties and thus depress profit.

- 6.2.2 It should also be borne in mind that in the event it is decided to apply for planning permission in order to enhance land value, the Councils would have to comply with the special procedural requirements relating to applications for planning permission for land owned by the relevant authority which will tend to extend timescales and increase the potential for scrutiny and/or complaints and challenges by aggrieved/hostile parties.

6.3 Public procurement

- 6.3.1 Both local authorities are "contracting authorities" which means that in certain circumstances they need to comply fully with the public procurement rules which are contained in the PCR 2015 and the Concession Contracts Regulations 2016.

Acquisition and disposal of interests in land and loans

- 6.3.2 Contracts for the acquisition or rental of interests in land are expressly exempted from public procurement – PCR 2015, Reg. 10(1)(a) as are loans – PCR2015, Reg 10(1)(f). Contracts for the disposal of land interests alone are also not within the ambit of the public procurement rules.
- 6.3.3 However, one has to consider the "main object" of any contract/transaction. This is particularly relevant if the Councils considered that to increase the value of a commercial property it would be a good idea to develop that property, perhaps by entering into a development agreement with a developer, builder or infrastructure partner. In the context of potential development agreements, we would need to bear in mind that if a Council enters into a "public works contract" (defined below) or a "public works concession contract" (as also defined below) above a current threshold value of £4,104,394 (excluding VAT and due to change in January 2017), then that Council has a legal duty to comply with certain requirements, in particular an advertisement in the OJEU and to conduct a competitive tendering exercise unless an exemption is applicable. Recent case law² has indicated that in certain circumstances Councils entering into agreements with the private sector for the development of land might be exempt from the public procurement rules but this will be highly dependent on the circumstances of the case and the nature of the obligations (if any) imposed on the developer.

² (*R v West Berkshire Council and St Modwen Developments Limited*)

- 6.3.4 Public works contracts, public works concession contracts and subsidised works contracts all require prior advertisement in OJEU and competitive tendering unless an exemption is applicable.
- 6.3.5 The uncertainty as to whether certain transactions might or might not fall within the ambit of the public procurement regime may cause potential delay in the operations of the investment fund and in the event the public procurement rules were breached then there is a potential risk of the procurement challenge being brought directly against one or both of the Councils.

6.4 **State Aid**

- 6.4.1 The unincorporated model requires the two Councils to enter into transactions directly. These will include, principally, the purchase of land and buildings and the letting and management of tenancies. The Councils are also likely to need to commission other services in order to comply with their duties as landlords. The key requirement to prevent State Aid is that the Councils should behave entirely commercially and without regard to policy or other public interest factors.
- 6.4.2 If the Councils were to purchase the site at a premium over its market value it is possible that the purchase price may include an element of State Aid. If this were ever to be successfully challenged, the seller of the site may be required to reimburse the Councils for the excess price paid. The Councils would, in any event, wish to obtain the best deals possible when buying land, and this type of State Aid would arise only if there had been a failure to achieve the best use of the Council's resources. The Councils can protect against this with professional valuation advice.
- 6.4.3 When letting sites for income, if the terms of the lease (including but not limited to the rent) were more favourable to the tenant than would be expected from a commercial landlord operating in the market then State Aid would arise. Again, the remedy if State Aid were proven would consist of the tenant repaying any aid received. This is likely to be more disruptive as it would affect the ongoing relationship with the tenant and, possibly, its continued solvency. Professional advice as to market rents should be sought. The Councils should consider whether State Aid compliance may itself have reputational implications: a tenant may, for example, seek to publicise a decision of the Councils to aggressively pursue late instalments of rent even though a commercial landlord may behave similarly.

6.4.4 When making other purchases (such as maintenance services), the public procurement regime will apply. As explained above the PCR 2015 apply to all purchases by the Councils themselves (subject to the thresholds and exemptions therein) even if they relate to commercial activities. So long as purchases are tendered in accordance with those regulations, the prices paid by the Councils should accord to market prices and State Aid should not arise.

6.5 Initial tax implications

6.5.1 The rental income generated by the Councils would be exempt from corporation tax. Any gain accruing on the sale of the properties would also be free of corporation tax.

6.5.2 The Councils would be jointly liable for SDLT on the purchase price of the property acquired. The first £150,000 of purchase price would be free of SDLT, the next £100,000 (i.e. up to £250,000) would be taxed at 2% and the part of the purchase price above £250,000 would be taxed at 5%. The purchase price includes any VAT payable but we would expect that the purchase of a let property would be outside the scope of VAT (see below).

6.5.3 The VAT position will depend on what the seller of the property has done and the VAT status of the tenant and so it would need to be considered for each acquisition on a case by case basis. Typically we would expect the Councils to have to opt to tax the properties and confirm to the seller that the option to tax will not be disapplied in advance of completion in order to secure a VAT-free purchase. As mentioned above, this has the advantage of reducing the purchase price for SDLT purposes (as SDLT is paid on the VAT inclusive price) and also producing a cash-flow saving (as the VAT does not have to be paid to the seller and then reclaimed from HMRC). In that case the Councils would have to charge VAT on the rent and on any sale of the properties.

6.6 Advantages

6.6.1 The responsibility for governance and administration remains within the Councils and is subject to all the legal and financial controls affecting local authorities (this could also be regarded as a disadvantage).

6.6.2 A benefit of the Councils directly acquiring land is that a Council may also use its powers to acquire and/or dispose of land for planning purposes under sections 227 and 233 Town and Country Planning Act 1990 and provided the relevant local planning policies would justify acquisition or disposal for planning

purposes (i.e. the relevant Council has relatively good grounds to demonstrate that the acquisition/disposal is required for a purpose for which it is necessary to achieve in the interests of proper planning of the area within which the land is situated) then there is a useful power under section 203 Housing and Planning Act 2016 which gives a Council the power through acquisition, disposal or appropriation for planning purposes to override third party rights (such as easements or restrictive covenants) and to convert those rights into a right of compensation against the Council and thereby "cleansing" the land from third party rights thus potentially increasing its development value. However, there are a number of limits to this "cleansing" power, including the fact that the acquisition/disposal/appropriation needs to be pursuant to planning permission and the land has been acquired/appropriated/disposed of by the relevant Council for planning purposes and that Council would have been entitled to acquire the land by CPO. There are also associated issues with ensuring proper separation of the relevant Council's functions (i.e. the relevant considerations to be taken into account for a Council making a decision to grant planning permission using its local planning authority/development control powers must be kept strictly separate from the same authority's decision as to whether to acquire or dispose of a piece of land for investment purposes).

6.6.3 Councils are not subject to corporation tax on profits.

6.7 **Disadvantages**

6.7.1 An unincorporated model is less resilient to political and governance/constitutional changes in the Councils because it is embedded within the Councils' constitutions.

6.7.2 The Councils incur potentially unlimited liability for example, if the Council acquires a property which is dangerous and causes injury to a third party (perhaps because of a defect such as asbestos or faulty heating giving rise to carbon monoxide emissions) or causes damage to another party's property (for example a leak affecting adjoining premises) then the **Council** as owner and/or landlord will have the primary duty to comply with relevant legislation affecting the property and to compensate parties suffering injury or loss as a result of their breach of statutory or common law duty.

6.7.3 The investment properties purchased will need to be held in joint or common ownership which will mean it is more difficult to transfer the properties into or out of the entire investment portfolio.

- 6.7.4 From a legal powers viewpoint, local authorities are required when either trading or exercising their power of general competence for a commercial purpose to do so through a company therefore arguably, the Councils would not be acting within their legal powers given the aim of the Capital Investment Strategy is "profit for purpose".
- 6.7.5 In the event the Councils wished to undertake development activities then these may fall within the public procurement rules and require prior advertisement and competitive tender (subject to exemptions).
- 6.7.6 There is also a risk that the Councils themselves could be classed as 'undertakings' for the purpose of State Aid law due to their aim of competing on the property investment market. This would mean that, in theory, any advantages received by the Councils from state resources (including the low-interest loans from the Public Works Loan Board) in connection with this commercial activity could be tested for State Aid. We are not aware that PWLB loans to local authorities have been challenged in this way in the past but, as local authorities become more commercially focussed (due to financial necessity and their expanded powers under the Localism Act 2011) this type of challenge may be considered in the future.
- 6.7.7 The joint investment board will be subject to all the legislative, administrative and financial controls that affect local authorities. On the other hand, this structure will not in our experience be sufficiently "fleet of foot" to be competitive and respond quickly to market opportunities or changes in market conditions and thus may thwart the Councils' objectives to act commercially and achieve a profitable return on their investments. From an operational viewpoint, the establishment of a new investment board whether or not as a joint committee will require and engage the associated administrative machinery including compliance with formal requirements of advance publication of agenda papers, voting and publicity. This could be perceived as adding transparency and accountability.

6.8 **Conclusion**

We would not recommend this Option as the bureaucratic machinery involved with an unincorporated joint investment board which will have to comply with both Councils' constitutional requirements would not be appropriately streamline to enable it to compete effectively in the market place and respond to market opportunities in order to generate a profit. Furthermore, it is arguable that local authorities do not have the power to act commercially other than through the medium of a company.

7 **Option 2 - Incorporated single special purpose vehicle**

7.1 **Description**

- 7.1.1 This model is illustrated in the diagram in Appendix 2.
- 7.1.2 The incorporated model with a single special purpose vehicle would involve each of the Councils taking a 50% equal shareholding in a company limited by shares which they would therefore jointly own. The company is known as a "special purpose vehicle". The Councils would invest in and/or lend the funds to the company and the company would purchase and sell commercial properties which would be owned by the company as the registered proprietor.
- 7.1.3 The Councils could secure loans to the company through holding a charge such as a debenture over the company's assets which will comprise the properties and any funds the company has. The Councils' liability as shareholders in the company would be limited to the amount the Councils subscribe for shares (usually a nominal amount).
- 7.1.4 The company would be managed to a day-to-day basis by a Board of Directors who could comprise Council-appointedees and/or independent directors provided they have the requisite skills and understanding of the commercial property market to run the company. If the company were wholly or jointly owned by the Councils then it would be a local authority "controlled" company and subject to propriety controls which help ensure accountability (see further section 7.3.2) below).

7.2 **Legal powers/vires**

- 7.2.1 The Councils' powers to undertake prudential borrowing, to invest in property and to acquire and dispose of property are as set out in section [3.2] above. The Councils would need to rely on additional powers to either establish a new property investment company or to participate in an existing property investment company.
- 7.2.2 Any decision to participate in an existing commercial property investment company would need to be subject to operational, legal and financial due diligence and would need to take into account the relevant company's current composition, constitution and previous and planned activities.
- 7.2.3 We have assumed that both Councils would wish to start afresh and establish a new company.

- 7.2.4 Nowadays, the Councils have clear powers to establish or participate in a company or registered society when exercising either the Councils' trading powers under section 95 LGA 2003 or pursuant to the Councils' general power of competence for a commercial purpose under sections 1 and 4 of the Localism Act 2011. Although a number of local authorities have set up limited liability partnerships (**LLP**) for similar purposes and which have certain potential corporation tax avoidance advantages, there is no current legislation which in our view clearly bestows a power on a local authority to enter in a limited liability partnership yet. We would therefore recommend that the most legally robust foundation for any corporate vehicle to be established by the Councils should take the form of a company or registered society.
- 7.2.5 Given companies limited by guarantee and registered societies are not generally suitable for investment purposes and in order to maximise potential future flexibility for either Council to transfer all or some of its shares or to wind up the company, we would recommend a company limited by shares as the most appropriate and potentially flexible type of company in this instance.

7.3 **Governance**

- 7.3.1 A local authority's participation in a company inevitably gives rise to governance issues to ensure adequate checks and balances to ensure public money is being wisely spent and there is reasonable accountability and transparency in relation to the company's business whilst not unduly hampering the company's need to act commercially. This can give rise to potential conflicts of interest which we explain further below but with reasonable planning, preparation and appropriate training and understanding of the relevant legal parameters, conflicts of interest can be prevented and their impact mitigated.

Propriety controls

- 7.3.2 If the Councils are the only shareholders in the company, the company will be regarded as "controlled" by the Councils for the purposes of Part V of the LGHA 1989, and will be subject to the regulatory and propriety provisions of the Local Authorities (Companies) Order 1995 (as amended) - these impose certain public accountability safeguards. For example, the company's paperwork has to identify the fact that it is local authority controlled/influenced, the remuneration of local authority representative directors is limited, the company has to provide information to the Councils' external auditors of the company has to answer elected members' questions on company affairs, the company's

external auditor appointment has to be approved by and the minutes of the company's meetings have to be available for public inspection.

- 7.3.3 The company will be treated as a "subsidiary" of the Councils and will need to be treated as such in the Councils' accounts. Furthermore, if the Council makes a guarantee in respect of any of the company's liabilities (for example if the Council were to guarantee rental payments under a lease) then that liability should be accounted for in the relevant Council's accounts under the Prudential Code.

Conflict of Interest

- 7.3.4 Council-appointed directors (especially if they are officers and above all, if they are elected members) should be aware that their position as company director can place them in a position of potential personal or professional conflict of interest with their duties as an employee/elected member of the Council. Company directors are under a personal statutory duty to act in the best interests of the company (rather than the interests of the entity who appointed them or any individual shareholder) and company directors may sometimes be under confidentiality obligations pursuant to non-disclosure agreements in respect of company transactions. This can put an individual who is a Council-appointed director in a difficult position. Typical examples are where that individual who is a company director is also involved in making decisions or recommendations with regard to planning applications (for example either as a member of the development control committee or an officer advising that committee) or the situation where it would be in the interests of the community which the elected member represents for a particular asset to be acquired or developed and/or where the officer or elected member has a role in the financial affairs of the Council which might involve recommending or deciding whether the Council's investment in the company is value for money and should be continued/discontinued. Where such an individual appears to be involved in making a decision where he or she has a conflict of interest then this can lead to potential personal and (in the case of a disclosable pecuniary interest) criminal liability.

- 7.3.5 To prevent such potential embarrassments or liabilities arising therefore, individuals who are proposed to act as directors should ensure that they have a full briefing and professional training as to their potential legal responsibilities and clearly set out mandates as to the parameters of their role. The Councils

can indemnify their appointed directors against most non fraudulent personal liabilities and obtain insurance.

7.3.6 However, company directors can be personally liable under wrongful and fraudulent trading where they are on the board while the company is trading and unable to pay its debts.

7.3.7 Elected members who act as Council-appointed company directors would not be entitled to remuneration above and beyond normal members' allowances.

7.3.8 It may be advisable to appoint one or more non-executive directors who have relevant experience in commercial property investment.

7.3.9 It should be noted that any individual who instructs the company can incur liability as a shadow director.

7.4 **Public procurement**

7.4.1 Given the Councils are "contracting authorities" under the public procurement regime, if the Councils enter into contracts for works, services, supplies or concessions above the relevant applicable procurement threshold levels with any other entity, then that contract has to be advertised in OJEU and competitively tendered. Similarly, if the company is constituted as a "body governed by public law", then the company will be a "contracting authority" and will have to comply with the public procurement regime in respect of any such contracts the company wishes to enter into (for example, for building works, financial services and IT software).

7.4.2 However, in these circumstances, Councils and the company can benefit from certain exemptions from public procurement. The principal relevant exemptions are explained below.

Teckal exemption

7.4.3 If the company is wholly owned by one or both of the Councils, has no private sector shareholders and carries out over 80% of its work (measured by its annual turnover) for its shareholding Councils, then any public contracts which either or both of the Councils wishes to award to the company (such as a contract for the provision of property acquisition, disposal and development services) is exempt from public procurement and need not be advertised in OJEU or competitively tendered.

7.4.4 However, the ongoing operations and sources of revenue for the company should be carefully monitored as should the governance and shareholdings as if the company strays beyond the parameters of the Teckal exemption then the Councils are potentially exposed to risk of public procurement challenge (which are becoming increasingly common). For example, if the company were to derive 20% or more of its annual turnover from fees paid by third parties or the Councils were to invite a private sector developer to take a shareholding or the Councils do not control the company in a way which is similar to that which the Councils exercise over their own council departments, then the company would fall outside the parameters of the Teckal exemption.

7.4.5 In practice, if the amount of turnover likely to be sourced from third parties becomes an issue, this can be addressed by establishing a separate company which is not exempt.

Body governed by Public Law

7.4.6 As mentioned above, if the company is a "body governed by public law" then it will also have to comply with the public procurement rules.

7.4.7 Alternatively, provided the company is carefully established solely for a commercial purpose and the company has a commercial character then it will not be a body governed by public law and can award contracts as it wishes without reference to the public procurement regime.

Reverse Teckal

7.4.8 Teckal companies which are owned by a single authority benefit from a further exemption (sometimes known as "reverse Teckal") which means that the companies can purchase services, works or goods from their parent authorities without the company itself having to advertise in OJEU and competitive tender under the public procurement regime. However, this express exemption does not automatically apply to joint Teckal companies, i.e. companies which are owned by more than one authority. However, we are aware of a number of joint Teckal companies which are purchasing services from their parent shareholding authorities for above threshold contract value limits and we are not aware (yet) of any procurement challenge on this basis being brought to date but the Councils should be aware that if they enter into above public procurement threshold contracts with the company without procurement, this is a potential area of vulnerability for procurement challenge by an agreed party against the company.

7.4.9 As far as the other contracts that the company might enter into, if the company is a body governed by public law and thus a "contracting authority" then the same rules and exemptions as set out in section 7.3 onwards above will apply.

7.5 State Aid

7.5.1 In this model, the company would be an 'undertaking' for the purpose of State Aid law. Therefore aid provided to it by the Councils is likely to constitute unlawful State Aid.

7.5.2 The principal financial relationship between the Councils and the company will be the granting of loans. We understand that the company is likely to be 'capitalised' through loan finance rather than through subscribing for shares. The Councils will therefore wish to avoid aid being present in those loans.

7.5.3 The purpose of State Aid law is to prevent the granting of aid (i.e. subsidy) to businesses. The law is not designed to prevent public bodies from carrying out economic activities or doing business with the private sector.³ EU law is officially agnostic about whether public bodies should engage in commercial transactions (such as loans) with the private sector, leaving that decision up to the law of individual member states.

7.5.4 Therefore, granting a loan does not, in itself, constitute State Aid so long as the recipient does not receive an economic advantage which it would not have obtained under normal market conditions.⁴ This is calculated by looking at the actions of the public body and, in particular, whether it has operated in the same way as a market operator would have done. This is therefore often called the *market economy operator principle* or the *market operator test*.

7.5.5 In short, if a court or the European Commission were to examine the grant of a loan for suspected State Aid, they would need to consider whether the transaction carried out by the public body was one that a rational private market operator might have entered into, taking into account the information available at the time and reasonably foreseeable developments.⁵ Unlike many decisions of the Council generally, a rational private market operators would generally be unconcerned with public policy considerations.⁶

³ Case T-565/08, *Corsica Ferries France v Commission*

⁴ Case C-39/94, *SFEI v La Poste*

⁵ Case C-124/10P, *Commission v Electricité de France*

⁶ Commission draft notice on the notion of State Aid, section 4.2.2

- 7.5.6 A court may consider all factors relevant to the individual decision, including how the loan might fit into other commercial circumstances. For example, in *R (Sky Blue Sports & Leisure Ltd) v Coventry City Council*⁷, the court found that a council was acting as a rational market operator (and therefore not providing State Aid) by granting a low-cost loan because it had invested heavily in the borrower and it considered that a loan was required to prevent the borrower from becoming insolvent and causing the council to lose its equity investment.
- 7.5.7 Usually, however, the market operator principle requires a public authority to grant a loan on terms no more generous than those which the borrower might achieve at a bank or other financier.
- 7.5.8 There are three methods that may be used to test whether a particular transaction contains State Aid:
- (a) the pari passu rule, where the Council's loan is made alongside other loans;
 - (b) tender exercises; and
 - (c) benchmarking the transaction (usually with expert advice) to test its comparability with market transactions.

Pari passu transactions

- 7.5.9 In some transactions, a loan from a public body may be obtained alongside other funding from private-sector sources. The European Commission calls this a 'pari passu transaction'.⁸
- 7.5.10 In most cases, a pari passu transaction suggests that there is no aid component in the loan, because it has demonstrably proved acceptable for a private sector lender. This is not a wholly decisive test, however. The Commission has stated that the following matters would need to be considered to be sure that a pari passu transaction really did contain no aid:
- (a) were the private- and public-sector loans granted at the same time?
 - (b) were the terms and conditions of the loans all the same?
 - (c) did the private-sector loan have real economic significance or was it merely symbolic?

⁷ [2014] EWHC 2089 (Admin)

⁸ Commission draft notice on the notion of State Aid, section 4.2.3.1

- (d) did the private- and public-sector lenders come at the loan from the same position and with the same rationale?
- (e) did the private-sector lender only commit to the project because the public sector had participated in this way? Would it have done so if another private sector lender had provided the other funding requirements?

7.5.11 However, the pari passu rule can operate unhelpfully in reverse. That is, if the Councils loans were offered alongside further, more expensive, funding from the private sector for the same purpose, it would be difficult to infer that the Councils' loans did not constitute State Aid.

7.6 Tender exercises

7.6.1 In State Aid law generally, a tender exercise may provide very good evidence that the transaction in question is on market terms and therefore contains no State Aid.

7.6.2 The test is less useful in the context of loan transactions because they tend to be individually negotiated rather than competed.

7.7 Benchmarking the transaction

7.7.1 If neither the pari passu nor the tender exercise routes are applicable, the third option is to simply reassure oneself that the loan being proposed is at market rates. This typically requires an examination of the market at the time of granting the loan – looking both at the rates typically charged in the intended circumstances of the loan and at other factors such as the level of security (collateralisation) required and the maximum appetite for exposure.

7.7.2 This benchmarking exercise will typically require expert involvement. The Department for Business, Innovation and Skills (which is the lead central government department for State Aid) states that at least one independent report should be commissioned:

"The most robust and strongly recommended way of demonstrating that a state investment is on MEO terms is by ensuring that there is a matching (pari passu) investment by an actual commercial entity, provided at the same time or earlier than the state investment and that the risks and rewards are genuinely the identical.

Otherwise if there is not a co-investor, proposals that cite MEO as justification should be supported by at least one independent report from a reputable source."

Department for Business, Innovation and Skills State Aid manual⁹

- 7.7.3 To assist with the process of benchmarking, the European Commission has issued a Communication which sets out how a 'reference rate' may be calculated.¹⁰ This involves taking a country-specific base rate published by the Commission each month¹¹ and then adding a margin as described in the Communication. This depends upon the creditworthiness and collateralisation offered by the borrower.
- 7.7.4 The company to be established for this project will be a new, limited liability entity. Therefore, in accordance with the Communication, the margin would need to be 400 basis points or more.
- 7.7.5 Whilst the Communication is a useful tool for identifying the amount of aid that is potentially present in a transaction, it does not produce a definitive answer and, unfortunately, cannot itself replace the need for a professional benchmark. The State Aid manual issued by BIS states, in bold, that "the reference rate plus the margins in the reference rate communication should be treated as a minimum rate."¹²
- 7.7.6 In addition to the loan injections, the Councils should also consider what other support may be provided to the company. This might include the hosting of its registered office, administrative support, the secondment of staff, and central services such as IT and payroll. To avoid State Aid entirely, these services should be provided to the company on a commercial basis, which means that the Councils should aim to make a normal market profit.
- 7.7.7 Alternatively, the Councils may grant limited assistance to the company by relying on the *de minimis* exemption. This covers aid where the amount of aid provided is considered to be sufficiently low so as not to have a negative effect

⁹ <https://www.gov.uk/government/publications/state-aid-manual>, paragraph 3.14

¹⁰ Official Journal 2008/C 14/02, [http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0119\(01\)](http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0119(01))

¹¹ http://ec.europa.eu/competition/state_aid/legislation/reference_rates.html

¹² See footnote 9.

on cross-border trade. The *de minimis* aid limit is an aggregate of €200,000 over any period of three fiscal years.¹³

7.7.8 Importantly, this applies to all aid from any public source. Therefore, any amount of aid provided by way of a loan which is cheaper than market rate (say) will deplete the amount of *de minimis* aid available to be claimed by the company from other sources, whether from the Councils or from other public bodies.

7.7.9 Unfortunately, the *de minimis* exemption cannot be claimed retrospectively. In order to use the exemption, it must be clearly cited at the time of granting the aid.

7.8 Initial tax implications

7.8.1 The company would be liable for corporation tax on its rental income and on any gain accruing on a sale of the properties. The current corporation tax rate is 20% but this is reducing to 19% from 1 April 2017 and to 17% from 1 April 2020.

7.8.2 The Councils would not pay corporation tax on a disposal of the shares in the company as the Councils are exempt from corporation tax. If the entire portfolio was being acquired by the same buyer then a disposal of the shares in the company rather than a sale of the properties would be attractive for a buyer as that would not be subject to SDLT.

7.8.3 In order for costs to be deductible against rental income the costs must be incurred wholly and exclusively for the property business. As the Councils do not pay corporation tax but the company will, any services provided to the company by the Councils should be charged for.

7.8.4 Please note that the UK transfer pricing rules effectively require that transactions between connected parties (such as the Councils and the company) should be undertaken on arm's length terms for tax purposes. In effect, in relation to the payment of interest to a connected party, this means that a tax deduction is denied for excessive interest payments.

7.8.5 If, therefore, a loan from a Council exceeds the amount which a third party would lend (based on the terms of the loan from the Council) then the interest on the excessive amount of the capital lent to the company would be denied.

¹³ Commission Regulation (EU) No 1407/2013 of 18 December 2013, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=urisrv:OJ.L_.2013.352.01.0001.01.ENG

Furthermore, if the rate of interest was too high the excessive amount would, again, be denied.

7.8.6 The transfer pricing rules would also apply to any management fee, or other fee, charged to the company by the Councils so that any excessive payment would not be fully deductible in the company.

7.8.7 It is important that any interest deduction claimed is supported by contemporaneous documentary evidence to establish the arm's length position which will likely involve obtaining further advice.

7.8.8 The company would be liable for SDLT on the purchase price of the property acquired. The first £150,000 of purchase price would be free of SDLT, the next £100,000 (i.e. up to £250,000) would be taxed at 2% and the part of the purchase price above £250,000 would be taxed at 5%. The purchase price includes any VAT payable but we would expect that the purchase of a let property would be outside the scope of VAT (see below).

7.8.9 The VAT position will depend on what the seller of the property has done and the VAT status of the tenant and so it would need to be considered for each acquisition on a case by case basis. Typically we would expect the company to have to opt to tax the properties and confirm to the seller that the option to tax will not be disapplied in advance of completion in order to secure a VAT-free purchase. As mentioned above, this has the advantage of reducing the purchase price for SDLT purposes (as SDLT is paid on the VAT inclusive price) and also producing a cash-flow saving (as the VAT does not have to be paid to the seller and then reclaimed from HMRC). In that case the company would have to charge VAT on the rent and on any sale of the properties.

7.9 **Advantages**

7.9.1 The Councils' liability as shareholders in a company is limited (contrast 6.7.2 above).

7.9.2 The company rather than the two Councils will directly own the property assets which means that on full or partial exit by one or both Councils it will be easier to attribute the value of the respective Councils' shares and it will also be easier for the Councils to transfer their shares to another party or to invite another party (such as another local authority, public sector body or private sector investor) to participate.

- 7.9.3 The company will be a separate legal entity from the Councils and therefore more resilient in the event of potential political, constitutional, governance or organisational/corporate change for example, in the event of devolution and the establishment of a combined authority or a change in one or more of the Councils' constitutional arrangements.
- 7.9.4 The company can be formed to have solely commercial purposes and depending on its composition, management and funding could be constituted in such a way so as not to be subject to the requirements of the public procurement rules which means that it would not need to advertise and competitively tender its contracts for works or services.
- 7.9.5 If the Board of Directors included directors recruited from outside the Councils because of their special skills and experience, those individuals would owe personal duties as company directors in their individual capacities to act in the best interests of the company which would be an enhanced duty beyond that of a pure advisor to an unincorporated Investment Board.
- 7.9.6 The establishment of a company would also be an appropriate fit with the Councils' powers to act for a commercial purpose and/or trade and would, therefore could, provide a solid legal foundation for an investment strategy.

7.10 **Disadvantages**

- 7.10.1 A company has to be run in accordance with company and general law and imposes personal legal duties on its directors including to act in the best interests of the company rather than in the interests of an individual shareholder. This can give rise to potential conflicts of interest for Council-appointed directors particularly where the directors are also elected members who will have duties and a mandate to act on behalf of electors, the Council in its corporate capacity and local businesses.
- 7.10.2 Companies require both administration and management for example the preparation and submission of annual returns and accounts.

7.11 **Conclusion**

An incorporated structure is preferable to an unincorporated structure because it is clearly within the Councils' powers to engage in these activities through a company, an incorporated vehicle helps to insulate the Councils from liabilities (including those as landlord of the properties) and liabilities for non-guaranteed debts that the company might enter into. A company is also an easier way to hold assets jointly because the company

can be the registered proprietor of the properties and then the Councils can jointly hold shares in the company. However, a single special purpose vehicle structure may not be appropriate to accommodate future potential growth or subsequent changes in the Councils' constitutions or transfer of functions to other public bodies in the event of devolution or local government reorganisation.

8 **Option 3 - Incorporated group structure**

8.1 **Description**

8.1.1 This model is illustrated in the diagram in Appendix [3].

8.1.2 This model involves both Councils setting up their own wholly-owned companies which then take a 50% equal shareholding in a jointly owned company limited by shares. Each of the Councils' own companies would be a holding/parent company which could also hold shares in other corporate vehicles that either Council may wish to establish later for example, regeneration companies, trading companies, limited liability partnerships, community interest companies, etc.

8.1.3 Although this structure seems at first sight to be more complex, in fact it affords maximum flexibility for the Councils and is highly resilient to potential political, corporate, constitutional or governance changes because shares in companies can be transferred to other parties (such as another local authority, a combined authority, a private sector investor, employees), assets and potential liabilities are "hived off" within separate legal entities, companies can be wound up in the event of a desired exit and new subsidiary Companies can be established relatively quickly to fulfil different objectives companies can also be merged in the event that it is felt desirable to amalgamate/ consolidate operations. It also allows different companies to have different characteristics and legal and financial characteristics and treatments. Many other local authorities have established groups of companies (just two examples being, Essex County Council and Cheshire East Council).

8.2 **Legal powers/vires**

8.2.1 The vires considerations for this arrangement would be similar to those set out in paragraph 4.2 above. However, there are two additional advantages which are that the use of a holding company to participate in a company for a commercial purpose under section 4 of the Localism Act 2011 is regarded by

some lawyers as more compliant with that legislation than the Council itself having a direct shareholding in a commercial company.

8.2.2 Secondly, a holding company with a group corporate structure allows each council more flexibility to establish specific corporate vehicles for specific purposes on an arms length basis. For example, each local authority could use its holding company to hold shares in a local housing company or a company providing regulatory services or even a limited liability partnership because it would be the powers of the holding company which would be of relevance for participation in those corporate vehicles rather than the powers of the local authority.

8.2.3 Thirdly, depending on the nature of the company and its functions, a company is likely to be less susceptible to applications for judicial review than a Council making similar decisions.

8.3 **Governance**

The governance considerations are similar to those set out in section 4.3. We would suggest that although there can be some commonality of individuals acting as directors between the holding company and one or more of any subsidiaries, it is advisable not to have a complete overlap/commonality of individuals acting as directors in case the holding company has to call the subsidiary to account. (In the event, it is assumed that this is unlikely to be a problem as both Councils are likely to want to have representatives on the jointly held property investment company and presumably each Council will designate its own representatives to be directors on its holding company.

8.4 **Public procurement**

8.4.1 The implications (with regard to the Teckal exemption and whether or not the company is to be categorised as a "body governed by public law") are similar to those set out in paragraph 7.4 above. However, the advantage of a group corporate structure is that it enables either one or both of the Councils to establish separate trading vehicles in the event that a Teckal – exempt company starts to generate revenue from third party sources which would jeopardise its exempt status. Sister companies may also benefit from the Teckal exemption and reverse Teckal exemption (as explained in paragraph 7.4 above) when contracting with each other, provided each of them meets the Teckal exemption tests set out in Regulation 12 of the PCR 2015.

8.4.2 In the event the Councils wish to involve another local authority or public sector body which is also a contracting authority (for example a registered provider or a NHS body), then the group structure may facilitate the establishment of further special purpose vehicles to achieve other joint objectives.

8.5 State Aid

The State Aid considerations for this arrangement would be similar to those set out for Option 2 in paragraph 4.5 above. If reliance is placed on the *de minimis* exemption, the Councils should note that the €200,000 limit applies at the level of the company (and its group members). There is not a separate limit for each Council.

8.6 Initial tax implications

The tax comments set out in paragraph 7.6 under Option 2 (the single SPV model) also apply to the incorporated group structure. The only difference is that any gain accruing on a sale of the jointly-owned company would be subject to corporation tax as the seller of the company would be the Holdco rather than the Councils. However, it may be possible to restructure the group so that the company is held by the Councils so that the Councils sell the shares with the result that any gain accruing on the shares is exempt from corporation tax. This would need to be explored in more detail at the time of an exit from the fund.

8.7 Advantages

8.7.1 This model allows the most flexibility to accommodate future political, corporate, organisational, budgetary and legislative change because the vehicles which are subsidiary to the Councils' holding companies can easily be transferred in whole or part to another entity (whether public or private) or wound up (subject to usual shareholder consent procedures).

8.7.2 A group structure also allows flexibility for future growth or reduction and the Councils to hive off (separate) distinct assets and/or liabilities into specific special purpose vehicles.

8.7.3 This structure allows the Councils the widest choice with regard to form of legal vehicles in which to participate because the Councils will be holding their interests through the intermediate holding company rather than directly.

8.7.4 This is the model that is potentially most resilient to change.

8.8 Disadvantages

8.8.1 There may be a perception that a group structure is complex.

8.8.2 Each company will usually need to file its own accounts and returns to Companies House.

8.8.3 There can sometimes be confusion about which company is doing what, but this can be largely prevented/mitigated by ensuring each company has a distinctive name and clear and public mandate.

8.9 **Conclusion**

We recommend Option 3 (an incorporated group structure) as the model with the most potential for flexibility to adapt to future changes in circumstances, to accommodate future growth and to enable the Councils to isolate potential risk and liability and/or transfer or sell on their investment to another party should they wish.

Trowers & Hamlins LLP

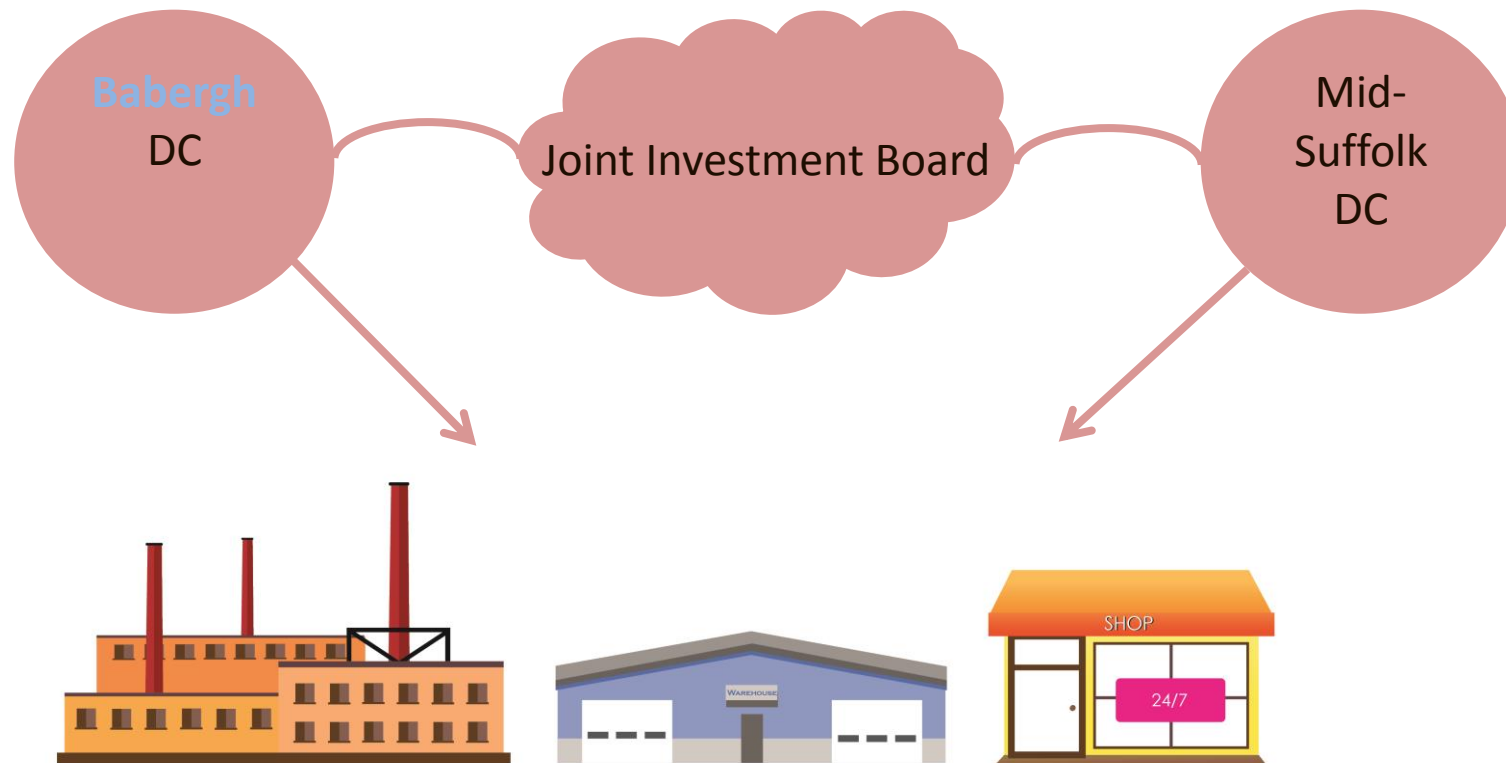
14 October 2016

Note

This advice is for the benefit of Babergh and Mid Suffolk Councils (the **Councils**) only and not be disclosed without T&H's prior consent to any other party and we do not accept responsibility to any third party who may seek to rely on this advice. This is not to be construed as investment advice. It is based on the law as at the report's date and does not take account of future changes in the law.

Appendix 1

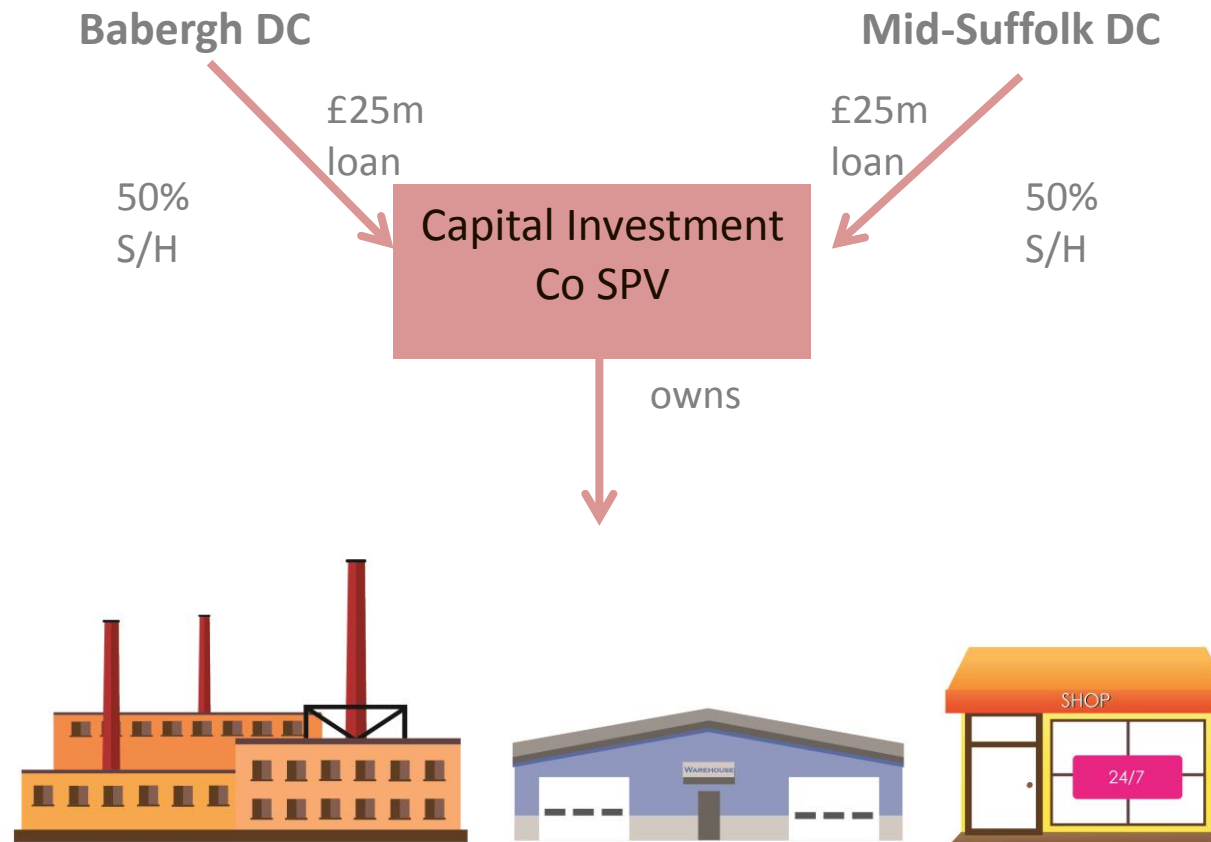
Unincorporated Structure (Option 1)



Both LAs jointly purchase and jointly own commercial properties on recommendation of Joint Investment Board

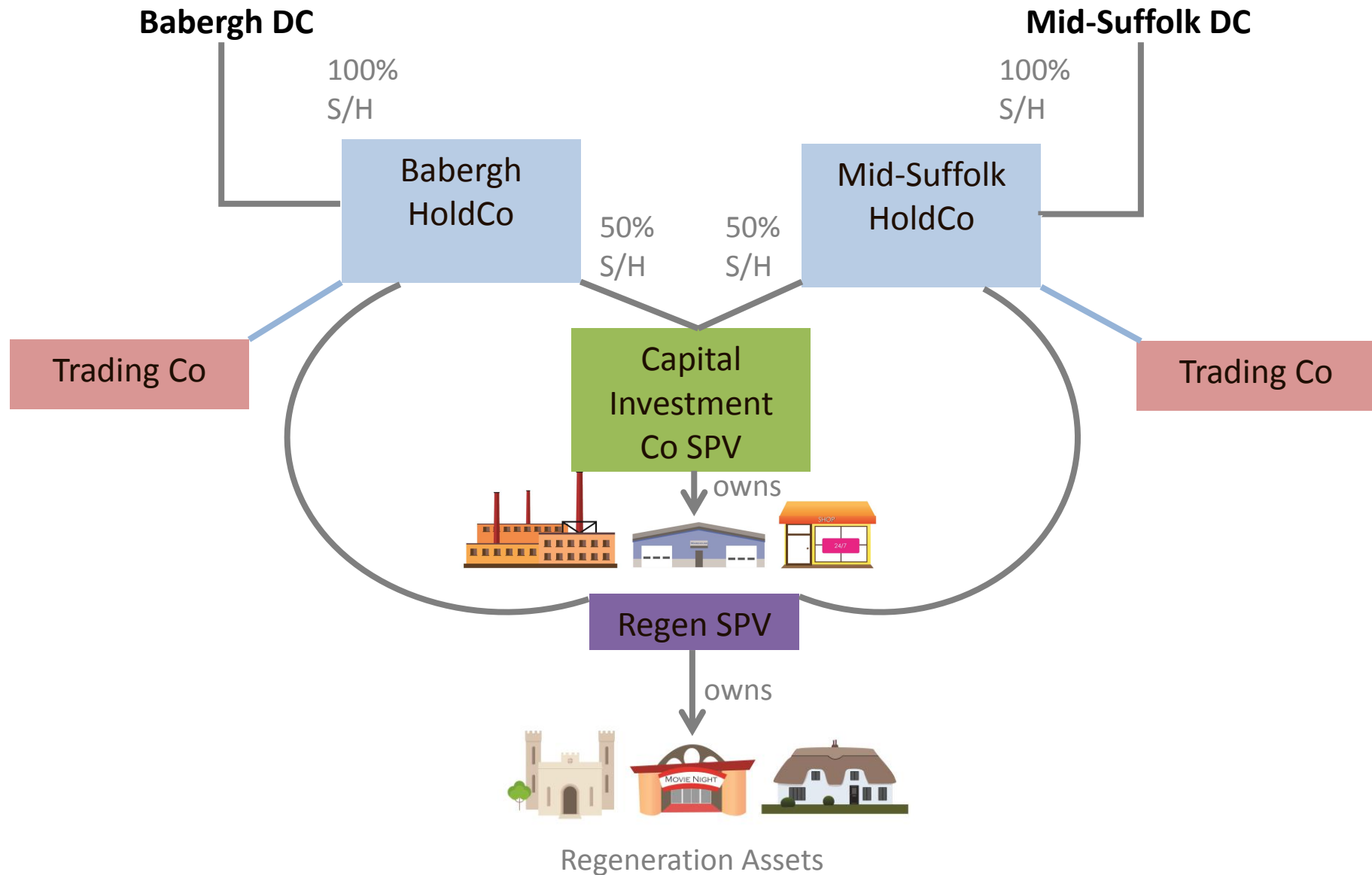
Appendix 2

Single Jointly Owned Special Purpose Vehicle (Option 2)



- Both LAs have 50% shareholding in SPV and thus jointly own/equal shares in SPV
- SPV purchases & own properties

Holding Companies with Subsidiary Special Purpose Vehicle(s) (Option 3)



Appendix 4

**High Level Comparison of Options
Pros & Cons**

Feature/Issue	Unincorporated (1)	Single SPV (2)	Incorporated Group Structure (3)
Clear legal powers	Arguable	Yes	Yes
Can benefit from Teckal procurement exemptions	No	Yes	Yes
Can benefit from procurement exemption as a commercial entity	No	Yes	Yes
Resilient to devolution	No	Partially	Yes
Subject to judicial review, public sector equality duty, LG access to info	Yes	No	No
Subject to Council's constitution, standing orders and governance procedures	Yes	No	No
Limited Liability	No	Yes	Yes
If one LA changes its constitution/governance then will need to change	Yes	Yes	No
Pays corporation tax on its profits	No	Yes	Yes
Can acquire/appropriate land and cleanse 3rd party rights	Yes	No	No
Has an exemption from VAT	Yes	No	No
Can participate in a LLP	No	Yes	Yes

(Note not a complete summary)

Appendix 5
Glossary and definitions

Defined term	Definition/explanation
Body governed by public law	an entity established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; with a legal personality; and financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; and/or subject to management supervision by those authorities or bodies; and/or with an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
CIPFA	The Chartered Institute of Public Finance and Accounting
HMRC	Her Majesty's Revenue & Customs
LGA 1972	Local Government Act 1972
LGA 2003	Local Government Act 2003
LGHA 1989	Local Government and Housing Act 1989
OJEU	Official Journal of the European Union
PCR 2015	Public Contracts Regulations 2015
Public Works Contract	<p>public contracts which have as their object any of the following:</p> <p>(a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;</p> <p>(b) the execution, or both the design and execution, of a work;</p> <p>(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work.</p>
Public Works Concession Contract	(a) a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or utilities entrust the execution of works to one or more economic operators, the consideration for which consists either solely in the right to exploit

Appendix 2 to Paper C/99/16

Defined term	Definition/explanation
	<p>the works that are the subject of the contract or in that right together with payment; and</p> <p>(b) that meets the requirements of paragraph (4).</p> <p>The requirements of paragraph 4 are:</p> <p>(a) the award of the contract shall involve the transfer to the concessionaire of an operating risk in exploiting the works or services encompassing demand or supply risk or both; and</p> <p>(b) the part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.</p>
PWLB	Public Works Loan Board
Subsidised Work Contract	<p>(a) works contracts which are subsidised directly by contracting authorities by more than 50% and the estimated value of which, net of VAT, is equal to or greater than the sum specified in Article 13(a) of the Public Contracts Directive, where those contracts involve any of the following activities:</p> <p>(i) civil engineering activities as listed in Schedule 2;</p> <p>(ii) building work for hospitals, facilities intended for sports, recreation and leisure, school and university buildings and buildings used for administrative purposes.</p>
State Aid	Any aid granted by an EU member state or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods insofar as affects trade between member states (Article 107(1) TFEU)

Appendix 2 to Paper C/99/16

Defined term	Definition/explanation
SDLT	Stamp Duty Land Tax
Teckal	A specific exemption from the requirements of public procurement where a company is wholly owned and controlled by one or more contracting authorities, has no private sector capital participation and carries out over 80% of its work for its contracting authority shareholders as defined in Regulation 12 of the PCR 2015.