Havering
LONDON BOROUGH

Notice of Non-key Executive Decision

Subject Heading:	**HRA New Build proposals. Procurement of JV partner for 12 HRA Estates Regeneration Programme.**
Cabinet Member:	**Councillor White**
SLT Lead:	**Steve Moore**
Report Author and contact details:	**Neil Stubbings** 01708 432970
Policy context:	**HRA Business Plan and Policies Asset Management Plan and Homelessness strategy. HRA and GF budgets.**
Financial summary:	**The HRA business plan reported to Cabinet in February 2017 identified the liquidity of the 30 year period. The 12 Estate Regeneration over a 10 year period will require an investment of circa £161m through setting up a joint venture agreement and buying back the affordable homes. Based on current estimates this is affordable within the HRA business plan however will be monitored and updated as the procurement progresses.**
Relevant OSC:	**Towns and Communities.**
Is this decision exempt from being called-in?	**This is a non-key decision taken by a member of staff.**

The subject matter of this report deals with the following Council Objectives

Communities making Havering	x
Places making Havering	x
Opportunities making Havering	x
Connections making Havering	[]

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Part A – Report seeking decision

DETAIL OF THE DECISION REQUESTED AND RECOMMENDED ACTION

This decision is to agree to start an EU procurement law compliant procurement process of a Joint Venture Partner(for the delivery of the HRA 12 sites regeneration project and potentially other sites in the borough owned and acquired by the Council (including through the JV) during the joint venture period. The Concession Contracts Regulations 2016 apply and the process followed will be similar to the Competitive Dialogue procedure in the Public Contracts Regulations 2015 (as amended).

AUTHORITY UNDER WHICH DECISION IS MADE

This decision enables decisions already taken at Cabinet in June 2016, October 2016 and February 2017 to be progressed.

STATEMENT OF THE REASONS FOR THE DECISION

The Cabinet decisions made at the meetings referenced above [redacted] have agreed that 12 HRA sites be put forward for regeneration in order to reduce poor quality HRA housing and to increase the supply of modern affordable homes for local residents. This housing also includes housing for older persons that has been identified as needing improvement and modernisation of the offer available in Havering.

There are two basic forms of JV structure that could be utilised for the delivery of 12 Estates Regeneration Sites redevelopment:

Option 1 - Joint Venture Agreement (with equity participation)
This would involve the creation of a joint venture vehicle usually a limited company or an LLP such that any profit would be split between the participants in the vehicle (ie the Council and the developer)

Option 2 –Joint Venture Agreement (without equity participation)
This would be a straightforward development agreement between the Council and a developer

It is recommended the Council enters into a JV with 50% equity participation. This option (option 1) provides the Council with the required controls over development, allows the creation of long term income but also provides the opportunity for the Council to invest in the regeneration programme with the further opportunity of receiving significant returns which can be recycled to create further regeneration benefits.

The Concession Contracts Regulations 2016 applies to the procurement procedure to award the contract. The Council will be following a process similar to the Competitive Dialogue procedure described in the Public Contracts Regulations 2015 (as amended). However, it reserves the right to deviate from the formalities of the Public Contracts Regulations 2015 (as amended) (in conducting the competition due to the flexibilities permitted by the Concession Contracts Regulation 2016).

As part of that process a Business case will made out for the creation of the joint venture and its purpose.

OTHER OPTIONS CONSIDERED AND REJECTED

The original options for the sites over the past 5 years or so had identified limited improvement work and infill development in order to improve the condition of the properties, reduce the on-going maintenance liabilities and increase the number of affordable homes available for local residents. These options have resulted from extensive work:

Complete review of the HRA Business Plan to identify significant resources available to deliver new affordable home.

Completed review of the HRA Asset Management Plan to review poor performing buildings and reduce the on-going maintenance commitment to existing home.

Review of the increasing supply and demand gap for affordable housing ion the borough.

The original in-fill opportunities originally agreed as part of the HRA Pipeline proposals and GLA Housing Zone bids were those financed through the HRA BP and Asset Management Plan in place at the time.

The reviews of those documents enabled a wider regeneration proposal to be considered in order to greatly increase the level of affordable homes provided on the sites by up to 100%, subject to the outcome of the final assessment of bids.

Viability assessments have been produced over the last 12-18 months to show the financial viability of regeneration rather than infill increasing the number of houses for rent, Icho and private sale both on the general needs sites and the sheltered housing sites.

The 12 sites have been packaged together following that work to:

Deliver a positive viability over the entire portfolio.
Increase the amount of affordable housing available to reduce homelessness.
Reduce the negative asset management value of the stock.
Achieve estate regeneration on the lease desirable council estates to deliver sustainable missed tenure communities.

The AMP and strategy identified several negative value or low value sites that impacted on the HRA BP, through poor condition or poor quality and therefore difficult to let properties. The sites did not therefore provide viable refurbishment opportunities that increased the supply of affordable homes.

Do nothing was not financially viable and did not create new homes.

This option not only provides positive contributions to the HRA Business Plan financially, by removing low or negative value assets, it increased revenue to the HRA and increases housing numbers. Any overall surplus from this partnership will be used to fund additional provision of the HRA of affordable housing, either on the 12 sites or other estates.

The options for the delivery of this procurement and delivery model that were considered were either a corporate JV partner or a contractual development partner route. Financially the 12 sites are not all positive and the 12 sites could not be delivered on a site by site basis under a contractual route without "pump priming" by the Council for those sites which are not viable. Including all 12 sites in the procurement enables the more valuable sites to cross fund the less valuable sites. It wouldn't be impossible to do this through a contractual route, but it is easier to do so through a corporate approach as it is intrinsically more flexible in the way phases are bundled and timed for delivery. In addition, the JV route enables a longer term partnership to be developed that enables more sites to be added to this arrangement in future, using the value in the sites to cross subsidise future regeneration possibilities. This approach would not be as readily feasible via the contracting route.

This approach also enables the council to replenish affordable homes lost via the RTB regime which again would not be possible via a more traditional contracting approach where a RSL is likely to require the ownership of the affordable housing.

PRE-DECISION CONSULTATION

Significant consultation has already been undertaken with councillors, residents and all key stakeholders, as detailed in the cabinet papers.

NAME AND JOB TITLE OF STAFF MEMBER ADVISING THE DECISION-MAKER

Name: Neil Stubbings

Designation: Housing and Regeneration

Signature: N Stubbings. Date: 12th May 2017

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Part B - Assessment of implications and risks

LEGAL IMPLICATIONS AND RISKS

1. Cabinet on 12 October 2016 received a report that explained the justification for the decision to pursue a corporate joint venture rather than a contractual arrangement. That report also contains the details of the key sites included within the regeneration project along with the Council's ambitions for the project.

2. Since the last Cabinet Report, much work has been undertaken in shaping the commercial deal that is to be offered to the market. It is important that before issuing the OJEU Notice that the Council has a clear idea of what its requirements are for the redevelopment of the 12 Estates. The purpose of the competitive dialogue process will then be to identify the best solution for those requirements from competing bidders.

External legal advice

3. External legal advice has been obtained on various aspects of the project from Bevan Brittan LLP, in particular in relation to the Legal Structure and Procurement

Legal Structure

4. The commercial arrangements that are agreed with the preferred bidder will be structured via a corporate joint venture model. The opinion of Bevan Brittan is that the nature of what is being procured (principally housing); the number of separate sites (at least 12); the need to bundle sites together to enable less valuable sites to be developed, and the long term nature of the regeneration all suggest that a corporate route is an appropriate legal structure, subject, of course, to the Council being comfortable with the commercial and financial consequences (the taking of development risk and financial modelling).

5. Heads of Terms for the proposed commercial arrangements are set out at Appendix 1.

6. At this stage it has not been determined whether the form of the corporate JV would be a company limited by shares or a Limited Liability Partnership. The latter would be more favourable from the Council's perspective, as the tax position is better (as explained in the section below), but the form of corporate JV will be explored with the prospective bidders during the procurement process.

7. There are a number of powers that enable the Council to enter into these arrangements including the Housing Act 1985, the Housing and Regeneration Act 2008 and the general power of competence in section 1 of the Localism Act 2011, which enables the Council to undertake any activity an individual could undertake, subject to any statutory constraints on the Council's powers. Since an individual would be able to participate in a corporate joint venture, in the same way the Council would be able to participate, by subscribing equity and providing loans and other financial investment.

8. In due course the Council will need to make decisions about the JV arrangements including who will make decisions on behalf of the Council in relation to the JV, when and on what basis the land will be transferred to the JV, who will represent the Council's interests on the JV

Board, and as well as agreeing the business plan and financial arrangements for the JV.

Disposal of Land

9. An important statutory constraint relates to the disposal of land.

10. The Council has powers under section 123 Local Government Act 1972 to dispose of non-housing land.

11. The Council has power to dispose of housing land under the provisions of the Housing Act 1985. In the event of disposal of land under the Joint Venture arrangements, it will be necessary to consider the appropriate powers for disposal.

Procurement

12. As the Council wishes to either, influence, shape or direct the development arrangement, then the EU Procurement Rules will need to be followed.

13. This decision is to commence a procurement exercise under the Concession Contracts Regulation 2016, following a process similar to the Competitive Dialogue procedure described in the Public Contracts Regulations 2015 (as amended) and reserving the right to deviate from the formalities of the Public Contracts Regulations 2015 (as amended) (in conducting the competition due to the flexibilities permitted by the Concession Contracts Regulation 2016).

14. Bevan Brittan advice is that Concession Contracts Regulations 2016 (rather than the Public Contracts Regulations 2015 (as amended)) would apply because of the investment risk on the private sector partner which is a key characteristic on a concession contract.

15. The reason for adopting the Competitive Dialogue approach to the competition is because it involves a multi-stage competition involving negotiation and development of bidder solutions which is necessary for the complex commercial and technical requirements of the scheme. It also has the benefits of being a familiar form of competition for complex projects in the market.

16. The Council has been advised by both Bevan Brittan on the format and required contents of all the procurement documentation with Savills advising on the technical and commercial aspects.

Obtaining Vacant Possession

17. Under the Heads of Terms referred to in paragraph 3 above vacant possession of the 12 Estates will be needed.

18. Where possible interests at the site (principally residents) will be acquired by agreement.

19. Where this is not possible then ultimately the Council will have to consider exercising its powers to compulsory purchase leasehold/freehold interests. In relation to secure tenancies separate consultation as regards to decanting tenants is necessary pursuant to section 105 of the Housing Act 1985 (consultation on matters of housing management). Where a secure tenant refuses to move, or has refused the offer of other suitable alternative accommodation, the Council has the legal right to gain possession of the property for decanting/redevelopment

purposes. The two grounds for possession relevant to regeneration are Grounds 10 and 10A under Schedule 2 of the Housing Act 1985. Notices may be served on these grounds to ensure vacant possession of the properties. The Court has discretion on whether to order possession, and needs to be satisfied that suitable alternative accommodation is available at the date of the hearing.

20. It may be necessary to appropriate parts of the 12 Estates to town planning purposes (following the grant of planning permission but before final disposal). This would enable the Council to take advantage of Section 203 Housing and Planning Act 2016 (formerly Section 237 Town and Country Planning Act 1990). This effectively 'cleans the title' by converting any third party rights (other than those belonging to public utilities) to a right to compensation, which would then be picked up as an additional project cost.

FINANCIAL IMPLICATIONS AND RISKS

The HRA Business plan was last presented to Cabinet in February 2017 and specifically the capital programme to Council. The report identified that over the 30 year period the housing revenue account was financial viable based on the current planning assumptions and commitments made. At the time of reporting to Cabinet the housing revenue account had sufficient funding within it's 'debt cap' to borrow as necessary up to a potential further £41.189m.

The 12 estate regeneration procurement would require the housing revenue account to invest approximately £161.373m over a ten year period to fund the joint venture arrangement and buy back the properties for the housing revenue account. This includes a £16.695m loan agreement between the housing revenue account and the joint venture directly. This will be financed by the housing revenue account. The £161.373m has been modelled within a revised 30 year business plan and is affordable based on current assumptions and commitments made and allows the housing revenue account to remain within its debt cap and will be reported at an appropriate stage of the procurement to Cabinet.

The investment into the joint venture will be funded fully by the housing revenue account to support the social and affordable housing objectives. The overarching objective of the procurement is to regenerate the 12 estates. As such, the Council's share of any financial returns will be reinvested in the future provision of affordable housing.

The housing revenue account 30 year business plan is continually being reviewed in line with assumptions, operational activities including the 2016/17 outturn and other regeneration initiatives being developed. Until the competitive dialogue for the 12 estate regeneration programme has progressed, the final financial impact will not be able to be modelled. However, based on current assumption this is affordable within the housing revenue account.

In terms of financial risk, with the creation of an LLP (or other corporate entity), the Council's financial liability is limited to the value of its equity stake. The Council would grant a building licence to the JV to develop the HRA land whilst retaining the freehold interest. In the event of a default, the Council therefore retains the right to either retain the land or dispose of the land to a third party.

This is a housing revenue account investment and needs to be incorporated into the Councils overall Treasury Management Strategy.

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As is required on an investment of this scale, independent financial and tax consultants will be engaged to ensure the appropriate level of financial due diligence is achieved.

HUMAN RESOURCES IMPLICATIONS AND RISKS (AND ACCOMMODATION IMPLICATIONS WHERE RELEVANT)

Non directly.

EQUALITIES AND SOCIAL INCLUSION IMPLICATIONS AND RISKS

A full EIA has been made in relation to this project and is available for consideration. Individual site EIAs will be produced as site specific proposals develop.

BACKGROUND PAPERS

NONE

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Part C – Record of decision

I have made this executive decision in accordance with authority delegated to me by the Leader of the Council and in compliance with the requirements of the Constitution.

Decision

Proposal agreed

Details of decision maker

Signed

Name: Steve Moore

Cabinet Portfolio held:
CMT Member title: Director of Neighbourhoods.
Head of Service title:
Other manager title:

Date: 12th May 2017.

Lodging this notice

The signed decision notice must be delivered to the proper officer, Andrew Beesley, Committee Administration & Interim Member Support Manager in the Town Hall.

For use by Committee Administration

This notice was lodged with me on 12 MAY 2017

Signed

Non-key Executive Decision

Appendix One

LONDON BOROUGH OF HAVERING

12 ESTATES RENEWAL

HEADS OF TERMS

SETTING OUT THE LEGAL AND COMMERCIAL STRUCTURE INCLUDING (1) THE DEVELOPMENT AGREEMENT AND (2) THE MEMBERS AGREEMENT[1]

PART A - INTRODUCTION

1 OVERALL STRUCTURE

1.1 The London Borough of Havering (the "**Council**") proposes to establish a joint venture structure with a private sector partner ("**PSP**") to undertake the redevelopment of Council-owned sites throughout the Borough (including but not limited to the initial portfolio of 12 sites) and potentially other sites acquired by the Council (or the JV) during the joint venture period (the "**Portfolio**"). The PSP will be selected through a competitive dialogue procurement.

1.2 These heads of terms ("**HoT**") are not legally binding but rather set out the basis on which the Council wishes to structure the proposed joint venture. The content of the Schedules is indicative and will be tested through dialogue.

Joint Venture Company

1.3 The Council proposes a joint venture limited liability partnership ("**JVLLP**") owned 50% by the Council and 50% by the PSP. The JVLLP will undertake the proposed redevelopment of the Portfolio and will require a long term commitment of 15 years, which can be extended up to 3 times by a further 5 years each time by mutual agreement of the Council and the PSP prior to the expiry of the initial 15 year period and the expiry of each subsequent 5 year period. The maximum term of the commitment would therefore be 30 years. The JVLLP will be governed by a Members Agreement. **See Part C** below.

1.4 The proposed operational structure of the JVLLP will need to represent a tax efficient approach.

1.5 At a minimum, the PSP will be required to contribute to the JVLLP a level of equity to match the Council's equity interest and the JVLLP will then obtain funding on a debt basis.

Proposed development

1.6 The Council and the JVLLP will enter into a Development Agreement ("**Development Agreement**") which will set out the respective obligations of the parties in relation to the redevelopment of the Portfolio. See **Part B** below. It is envisaged that a separate Development Agreement will be entered into for each Phase (see below) as and when each Phase is approved pursuant to the Business Case of the JVLLP (see Section C10 below). There will therefore be no "exclusivity" for future Phases, save for the Sites that comprise the initial Phase that is sampled through the procurement process.

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[1] This overview summarises the key commercial provisions, but is not an exhaustive summary, of the Development Agreement and Members Agreement.

1.7 The JVLLP, as developer, will develop the Portfolio on a phase by phase basis ("**Phase**") with each Phase containing one or more sites ("**Sites**").

1.8 The price ("**Price**") to be paid to the Council by the JVLLP for each Site will be calculated on a residual land value basis with a pre-agreed appraisal methodology ("**Development Appraisal**") and separately approved by an independent third party valuation based on the same methodology ("**Valuation**"). The Price will be satisfied by the issue of a loan note to the Council.

1.9 The JVLLP will build and provide the Council's affordable homes requirement ("**AHS**") (including both social rented and low cost home ownership) at each Site. The AHS requirement will as a minimum be the replacement of the AHS currently on each Site. In addition the JVLLP will build homes for sale on the open market ("**OMS**") and also homes for the private rented sector ("PRS").

1.10 The JVLLP will be required to undertake a continuing programme of engagement and consultation with the local community regarding its proposals for the redevelopment of the Portfolio.

Legal Structure and estate management

1.11 Upon the satisfaction of certain agreed conditions precedent, the Council will grant a building licence ("**Building Licence**") for each Site to the JVLLP, which will then carry out the agreed development.

1.12 Upon completion of the social rented element of the Council's AHS requirement, the Council will pay the JVLLP for such requirement in accordance with the agreed pricing mechanism and the social rented element of the AHS requirement will remain within the Council's freehold.

1.13 In relation to the low cost home ownership element of the Council's AHS requirement, the Council will have a right to pay the JVLLP for such requirement at market value and if such right is exercised the low cost home ownership element of the AHS requirement will remain within the Council's freehold.

1.14 Upon completion of the OMS, the JVLLP will agree to sell individual units direct to purchasers. As the Council will still be the freehold owner it will join in individual transfers to effect such transfers at the request of the JVLLP. Sale proceeds from the individual sales will of course remain with the JVLLP (subject to any overage arrangements).

1.15 Upon completion of the sale of the final OMS unit, the Council will grant a 250 year Lease ("**Long Lease**") to a management company put in place by the JVLLP which will be responsible for the estate management of the OMS. The Long Lease will require the payment of ground rents from individual owners to be passed up to the Council as freeholder.

1.16 The Council will retain responsibility for estate management of the Council's AHS requirement.

PART B – DEVELOPMENT AGREEMENT

2 CONDITIONALITY

2.1 The Development Agreement will contain a number of conditions precedent to be satisfied before a Building Licence for a Site can be granted to the JVLLP.

2.2 **Timetable and Programme**

2.2.1 It is essential that each Site is built out in a timely manner once commenced and in accordance with the programme agreed when the Site is drawn down. The Development Agreement will contain a number of agreed milestones and failure to meet them as a result of JVLLP default will allow the Council to withhold drawdown of future Sites by the JVLLP.

2.2.2 A phasing plan ("**Phasing Plan**") will need to be agreed as part of the overarching Business Case (see Section C10 below) setting out the order in which the Sites will be developed to ensure the Council's priorities are met and a fair mix between Sites which are immediately viable and those which are not so attractive and will generate a lesser, or possibly, nil return.

2.2.3 The parties shall agree a development programme ("**Programme**") to be annexed to the Development Agreement which will be consistent with the programme set out in the relevant Site Viability Plan (see Section C10 below).

2.3 **Ground Conditions**

The JVLLP shall be liable for all environmental and other site conditions including flooding and will be required to satisfy itself as to the physical state and condition of each Site.

2.4 **Vacant Possession**

2.4.1 The Council will be responsible for obtaining vacant possession of each Site at its own cost. The Council acknowledges that it may need to exercise its powers of compulsory purchase where a sale by private treaty cannot be achieved.

2.5 **Planning**

2.5.1 The JVLLP will be responsible for obtaining all planning permissions required for the development of the Portfolio.

2.5.2 The Council will have a number of key requirements ("**Key Requirements**") to be taken into account including the number of units to be built, the tenure of those units, the split between residential and commercial (if any), and the provision of public realm and community facilities. In addition, the Council will require some control over design and quality which it will exercise through appropriate Design Codes and a Design and Quality Statement ("**Design Requirements**").

2.5.3 The Council will require approval of any planning applications in advance.

2.5.4 The JVLLP will be required to diligently pursue each planning application and keep the Council fully informed at all times. There will be a long stop date by which a satisfactory planning permission must be achieved and where an application is refused or granted subject to unacceptable conditions, the JVLLP will need to appeal where it is clear there is a reasonable chance of success.

2.6 **Viability**

Prior to the grant of the Building Licence for a Site (save for the first Phase which will have been bid on the basis of it being viable) a Development Appraisal must be undertaken and agreed viable. Please see paragraph 3.2 for further details.

2.7 **Funding**

The availability of funding for each Site will be a condition precedent to the grant of the Building Licence.

2.8 **Consents**

All consents required for the development of a Site must be obtained by the JVLLP.

3 **OBLIGATIONS ON THE PARTIES**

3.1 **Equity**

The land value of the Sites (see paragraph 3.2 below) will represent the Council's equity stake and will treated as an interest-free loan by the Council to the JVLLP. To the extent that the land value does not represent 15% of the development costs (assuming a 70:30 debt to equity ratio and a full 50:50 contribution to equity by the Council and PSP) the Council will make up the 15% contribution in cash. "A" loan notes will be issued in respect of equity contributions (see paragraph 12).

3.2 **Land value and Valuation**

3.2.1 The residual land value for each Site (other than the first Site) will be calculated on the basis of a Development Appraisal undertaken once the various conditions precedent (including grant of planning consent) have been satisfied. There will be no need for a separate Development Appraisal for the first Phase as this will have been produced as part of the PSP's bid. There will be a minimum acceptable residual land value for the first Site of one pound (£1.00).

3.2.2 The residual land value for each Site will need to be confirmed by an independent third party valuation using the same development appraisal methodology. In the event that there is any difference between the residual land value and the Valuation the matter will be referred to third party determination.

3.2.3 Sites will be "bundled" so that the residual land value for each Phase is always positive.

3.2.4 In terms of development value, the PSP's bid will set out its required rate of return on capital.

3.2.5 The Council will wish to include in the initial viability appraisal for the first Site (and, where necessary to ensure viability for the first Site, later Sites) various sunk costs it has incurred at a level appropriate to that Site (and where relevant, later Sites).

3.2.6 A Building Licence for a Site will be granted once the various conditions precedent have been satisfied and viability is confirmed by the Council and the JVLLP in accordance with the Development Appraisal, but before development commences.

3.2.7 The Council will require the JVLLP to pay overage at a percentage bid by the PSP based on a final development appraisal after units have been sold. This will benefit the Council if, for example, sales exceed target values or costs are reduced.

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3.3 **Construction**

3.3.1 The JVLLP will appoint the PSP or a third party as contractor in accordance with the **"Procurement Policy"** set out in the Members Agreement.

3.3.2 The development of each Phase will be undertaken by a subsidiary of the JVLLP incorporated for that purpose, so that any potential losses on a Phase remain with such subsidiary and do not affect the balance sheet of the JVLLP (assuming that non-recourse funding is available).

3.3.3 The JVLLP will develop and construct each Site complying with:

(a) the Key Requirements and Design Requirements; and

(b) the Programme. Failure to build out by the agreed long stop date for each Site (or earlier abandonment) will lead to the default provisions applying. Please see paragraph 4 in this regard.

3.4 **PSP Guarantor**

The Council reserves the right to require the PSP to provide a parent company guarantee from the entity tested through the pre-qualification process.

4 **DEFAULT AND STEP-IN**

4.1 **Events of Default**

4.1.1 The following events of default shall apply:

(a) an insolvency event;

(b) abandonment;

(c) failure to rectify a serious default within 20 business days of written notice;

(d) failure to complete a Site within the agreed Programme, subject to extensions for force majeure or other circumstances outside the reasonable control of the Developer;

(e) failure to complete a Site by an agreed long stop date regardless of whether the reasons are beyond the reasonable control of the Developer.

4.2 **Step-in**

External funders with security will have priority over the Council in terms of step-in rights.

4.3 **Joint Liability**

4.3.1 In relation to the Development Agreement, the JVLLP will be principally liable and neither Member will be expected to guarantee the obligations of the JVLLP. However the Council will want to take advantage of any PCG offered during the bid process, by structuring the Development Agreement so that the PCG guarantees personal obligations of the PSP given to the JVLLP and the Council.

4.3.2 In relation to the Members Agreement (see Part C below) the Council and the PSP will each be liable to the JVLLP for their individual default or breach of obligation, and in this way that a Member can take action against a defaulting Member. It is expected that the JVLLP will be financed on a non-recourse basis so individual Members will not be required to guarantee the obligations of the JVLLP to any third party such as a funder.

5 BOILERPLATE PROVISIONS

5.1 VAT

In practice, this will not be an issue if the Council, the PSP and the JVLLP can all recover their VAT, in which case each party will pay any VAT it is bound to pay, on prior receipt of a valid VAT invoice.

5.2 Dispute Resolution

All matters of dispute to be initially referred to senior project managers and thereafter to Chief Executive level. Thereafter, all matters to be referred to an appropriate independent person to determine as expert and not arbitrator.

5.3 Council Requirements

There are several clauses a local authority will need to include in a Development Agreement:

5.3.1 no bribery or corruption

5.3.2 FOI

5.3.3 the Council acting as landowner only

PART C – MEMBERS AGREEMENT

6 PARTIES AND STRUCTURE

6.1 The parties to the Members' Agreement will be the Council and the PSP as the "**Members**" and the JVLLP. Any decision to amend the Members' Agreement requires the agreement of all three parties and no deadlock can arise under the Members' Agreement for failure to agree an amendment.

6.2 To the extent the PSP requires a parent company guarantee, a separate deed of guarantee will be entered into by the guarantor, the JVLLP and the Council.[2]

6.3 The name and registered office of the JVLLP will be agreed with the preferred bidder.

6.4 The party or parties incorporating the JVLLP will give warranties in the Members' Agreement to the effect that:

6.4.1 it has not traded or carried on business prior to completion other than to prepare for completion; and

6.4.2 it has no assets, liabilities or commitments.

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2 The terms of the required guarantee will be made available to bidders shortlisted to participate in the tender stages of the competitive dialogue procedure.

7 COMPLETION

7.1 Exchange and completion of the Members Agreement will be simultaneous. On completion:

7.1.1 the parties will enter into various legal agreements, including:

(a) the parent company guarantee given in respect of the PSP's obligations under the Members' Agreement;

(b) the Development Agreement;

(c) Service Agreements;

7.1.2 the following will be adopted/approved as agreed form documents:

(a) the first Business Case;

(b) Site Viability Plans for Phase 1;

(c) a JVLLP "A" loan note instrument for the issue of "A" loan notes to the Council and/or the PSP from time to time (see paragraph 12);

(d) a JVLLP "B" loan note instrument for the issue of "B" loan notes to the Council and/or PSP from time to time (see paragraph 13);

(e) security agreements in favour of the Council and the PSP in respect of debt funding provided to the JVLLP from time to time;

(f) a deed of priority between the Council, PSP and the JVLLP to regulate the rights of the parties in respect of the security agreements;

7.1.3 the Council and the PSP will pay to the JVLLP their respective equity contributions;

7.1.4 the first appointments to the JVLLP Board, including the Chair, will be made/confirmed;

7.1.5 "administrative" arrangements in respect of the JVLLP will be approved, including:

(a) the auditors; and

(b) the bankers to the JVLLP.

8 MEMBERSHIP

8.1 The Council and the PSP shall be designated members but shall not receive any remuneration or reimbursement in connection with their status as designated members. The Council and the PSP will delegate to their respective Board members the responsibility for delivering any document to the Registrar of Companies in connection with the JVLLP.

8.2 No new equity interest shall be issued to any person (other than by way of an increase in an existing Member's interest in accordance with the Members' Agreement) without the prior written consent of the Members.

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8.3 A Member may not resign or unilaterally withdraw from the JVLLP except with the approval of the other Member.

8.4 As conditions of any transfer of equity, the transferee must:

8.4.1 be resident in the UK for the purposes of UK taxation; and

8.4.2 not be an unsuitable person (broadly, a person who, in the Council's discretion, would not be an appropriate counterparty to a contract with the Council because:

(a) the transferee would not satisfy the qualification requirements for a PSP in the SQ;

(b) the transferee's business or its parent's business is substantially concerned with the sale, distribution or manufacture of arms, tobacco, alcoholic beverages, gaming or pornography; or

(c) the transferee would not be fit and proper person for the Council to contract with having regard to the Council being a public sector body).

8.5 As a condition of any transfer of equity, the transferee must execute a deed of adherence to the Members' Agreement.

8.6 A Member will not be permitted to transfer its equity interest in the JVLLP without the consent of the other Member, except where:

8.6.1 the transfer is intra-group to a person with sufficient financial covenant strength (in the opinion of the Council), who is resident in the UK for taxation purposes and provided that if the transferee ceases to be a member of the same group as the original transferor and/or non-resident in the UK for taxation purposes, then the transferred equity shall be transferred back to a member of the transferor's group meeting those requirements; or

8.6.2 the transferor is the Council and the transferee is another public sector body; or

8.6.3 paragraph 8.7 applies.

8.7 If a Member is in default of its obligations under the Members' Agreement, the other Member will have the right (but not the obligation) to buy out the defaulting Member's equity and debt interests in the JVLLP for 90% of the aggregate of the fair value of the equity interest and the par value of the debt. If the non-defaulting Member does not wish to buy out the defaulting Member, then the JVLLP will be wound up. Default events would include:

8.7.1 a change of control of the PSP or the PSP's guarantor;

8.7.2 the net asset value of the PSP or the PSP's guarantor in respect of its obligations under the Members' Agreement falls below an agreed level;

8.7.3 insolvency;

8.7.4 material or persistent breach of the Members' Agreement by either a Member or, in the case of the PSP, its guarantor.

8.8 Whilst a breach remains unremedied (if it is remediable), the defaulting Member and any Board members appointed by it are excluded from decision-making and may not receive any distributions of profits referable to the period of the default subsisting.

9 OBJECTIVES

9.1 The JVLLP's objectives for the regeneration of the Portfolio are to achieve the following:

9.1.1 regeneration;

9.1.2 optimising the value of the Portfolio;

9.1.3 creating a joint venture partnership to enable the Members to share costs and long term financial risk whilst retaining a degree of control, ensuring that social and economic benefits remain a focus and, over time, enabling a revenue return to the Members which, in the case of the Council, will be reinvested in services;

9.1.4 creating stable, sustainable, diverse and balanced communities who are actively engaged;

9.1.5 greener, cleaner, well-connected neighbourhoods providing direct access to the wealth of employment and leisure opportunities available in Havering and beyond;

9.1.6 achieving the highest quality of design and place-making throughout the Portfolio;

9.1.7 creating a significant number of new mixed tenure homes;

9.1.8 creating a minimum number of new jobs across a range of sectors with the ability to provide higher paid employee salaries;

9.1.9 achieving speed of delivery;

9.1.10 utilising smart technology;

9.1.11 achieving a positive return on the Members' financial investment;

9.1.12 creating a legacy to be proud of that contributes and enhances the London Borough of Havering;

9.1.13 creating an environmentally sustainable Portfolio; and

9.2 Any of the above objectives may be revised, replaced or removed and an additional objective may be added to the above list, in each case with the unanimous agreement of the Members. However, no such alteration to the objectives will be permitted if, by doing so, the objectives (as altered) fall outside the parameters of the original OJEU notice.

9.3 No deadlock will be capable of arising in relation to any decision to revise, replace, remove or add an objective. If the Members cannot agree, then the status quo (i.e. the existing objectives at the time of the vote on the matter) shall remain in force.

10 BUSINESS PLANNING

10.1 There will be an overarching **Business Case**, approved by the Members, which sets out how the JVLLP anticipates delivering the JVLLP's objectives over the following five years. This will be updated every six months and as required.

10.2 Each Site will have its own **Site Viability Plan**, again approved by the Members, which sets out in more detail how the JVLLP will develop a given Site. These will be updated every six months and as required.

10.3 The business of the JVLLP will be:

10.3.1 to undertake such business as is set out in the Business Case;

10.3.2 to undertake such business as is set out in a Site Viability Plan; and

10.3.3 to undertake such other business as the Members may from time to time unanimously agree (for example, development of a site outside the Portfolio).

10.4 Any business or business opportunity, including opportunities existing outside the Portfolio, will be assessed against the objectives set out above.

10.5 The Members' Agreement will set out the content required in both the Business Case and any Site Viability Plan. An indicative list of what will be required in the Business Case and any Site Viability Plan is contained in Schedule 1. The "day one" Business Case and Site Viability Plans for the first Phase will be tested and agreed with the PSP through dialogue and adopted by the JVLLP on completion.

10.6 Any material updates to the Business Case or Site Viability Plans (in each case whether scheduled or occasional) will require the unanimous approval of the Members. Non-material updates may be approved by the JVLLP Board provided that if all Representatives appointed by the same Member vote to refer the relevant update(s) to the Members, then the update(s) shall be referred to the Members for approval. If an update to the Business Case or Site Viability Plan is not approved, then the Business Case or Site Viability Plan in force at that time shall continue to apply.

10.7 The preparation of any update to the Business Case or any Site Viability Plan shall be funded by the JVLLP from its own resources or, if those resources are insufficient, by the Members equally.

10.8 The JVLLP will not, and will procure (so far as it is able) that its sub-contractors, agents and/or representatives will not, knowingly do or knowingly omit to do anything which either:

10.8.1 brings the standing of the JVLLP or any of the Members into disrepute;

10.8.2 (so far as is practicable having regard to the JVLLP's objectives and its contractual obligations) attracts material adverse publicity to the JVLLP or any of the Members.

10.9 The JVLLP will be required to demonstrate transparency and value for money in procuring any internal and external resources, both initially and during the life of the JVLLP.

10.10 The JVLLP, when entering into any direct or indirect contractual arrangements for the supply of works or services to the JVLLP, will comply with the Procurement Policy. Subject to the terms of that policy, it is envisaged that services shall be competitively tendered by the JVLLP.

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10.11 Where the JVLLP is proposing to enter into or vary an existing a contract with a Member or person connected with a Member (a **Related Party Contract**), that entry into or variation of the Related Party Contract must be:

10.11.1 in accordance with the Procurement Policy;

10.11.2 approved at a Board meeting;

10.11.3 subject to a written report, provided at least 5 business days before that Board meeting, which:

(a) summarises the material terms of the Related Party Contract (or the proposed variation); and

(b) confirms that the proposed Related Party Contract (or the proposed variation) is, in the reasonable opinion of the Board members appointed by the other Member, on arm's length commercial terms.

11 FUNDING: GENERAL

11.1 The Council and the PSP will test and agree a funding strategy in respect of the JVLLP's working capital requirements through dialogue. The JVLLP will be obliged to operate on the most efficient funding model possible which minimises the amount to be contributed by the Members as equity.

11.2 Members' funding obligations will be agreed and set out in the Business Case and Site Viability Plan. As an overarching principle, it is envisaged that:

11.2.1 "A" loan notes will be issued in respect of equity/capital (see paragraph 12);

11.2.2 "B" loan notes will be issued in respect of debt funding (see paragraph 13);

11.2.3 pre- and post-phase transfer working capital will be provided by the Members on a 50:50 basis (although if one Member does not agree to an increase in any funding or fails to contribute working capital when required, the other Member may contribute the shortfall, such shortfall funding to carry an annual interest rate of [15]% but otherwise to be on the same terms as the B loan notes); and[3]

11.2.4 working capital in respect of later Sites will be met, as far as possible, from the receipts of earlier Sites, albeit the profit may need to be distributed and then reinvested..

12 FUNDING: CAPITAL ("A" LOAN NOTES)

12.1 At completion, the Members will each contribute a nominal amount of capital to the JVLLP.

12.2 A Member will not be required to contribute any additional capital to the JVLLP unless unanimously agreed by the Members and both Members simultaneously contribute such capital.

12.3 No interest will be payable on any capital.

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[3] To be tested in dialogue.

12.4 No Member will have a right to a return of capital except as otherwise unanimously agreed by the Members or in the course of winding up.

12.5 A Member's liability will be limited to the aggregate amount of the capital it has agreed to provide.

13 FUNDING: JUNIOR DEBT ("B" LOAN NOTES)

13.1 In relation to an individual Phase, junior debt funding will be provided by the Members by way of subscription for loan notes of the JVLLP in accordance with the Business Plan then in force and the Site Viability Plan.

13.2 Loan notes issued by the JVLLP will be secured against the rights, property and assets of the JVLLP. The respective rights of the Members (as subscribers for those loan notes) will be regulated by a deed of priority and subordinate to senior debt.

13.3 Loan notes will be interest-bearing.

13.4 The loan notes shall not be transferrable except (a) where a Member proposes or is required to transfer its equity in the JVLLP, in which case that Member shall also be required to transfer its holding of loan notes; or (b) where required pursuant to the rights of a senior funder.

14 RETURNS

14.1 Save to the extent otherwise expressly agreed by the Members, receipts in respect of a Site shall be utilised in the following order:

14.1.1 servicing of existing senior debt by a Member or third party;

14.1.2 payment to the Council as landowner of any deferred consideration in respect of any previous Sites which has yet to be paid;

14.1.3 payment to the Council as landowner of any deferred consideration in respect of that Site;

14.1.4 payment of development and sunk costs;

14.1.5 the JVLLP's developer priority return;

14.1.6 payment of overage;

14.1.7 repayment of any subordinated debt funding provided by one Member (but not the other) together with accrued interest thereon;

14.1.8 repayment to the Council and the PSP of any other outstanding debt funding together with interest accrued thereon;

14.1.9 any remaining receipts after the operation of clauses 15.3 and 15.4, shall be apportioned between the Members in proportion to their equity contributions.

14.2 Any distribution of profit, after the operation of clauses 15.2 and 15.4, will be made by reference to the audited accounts of the JVLLP for the accounting period in question and be paid to the members (or credited to their respective current accounts) within 20 business days of the annual accounts of the JVLLP being approved.

14.3 Before making any distribution, the Board will consider what amount (if any) of the profits available for distribution need to be retained by the JVLLP in respect of:

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14.3.1 reserves for general working capital requirements of the JVLLP for the following financial year; and/or

14.3.2 reinvestment back into the JVLLP in accordance with the Business Case.

14.4 The JVLLP will not make any distribution of profits (to the extent proposed) if:

14.4.1 there is insufficient cash available;

14.4.2 it would render the JVLLP insolvent;

14.4.3 the Board resolves that the JVLLP would be left with insufficient funds to meet any current or future contemplated obligations or contingencies; and

14.4.4 it would be a distribution in specie.

15 GOVERNANCE

15.1 A number of matters will be reserved for approval by the Members. These will be the strategic decisions in relation to the continued existence of the JVLLP (e.g. whether to wind up the JVLLP). All remaining matters and day to day management of the JVLLP will vest in the JVLLP's Board, which itself may delegate responsibility to committees, steering groups or persons, including in accordance with agreements entered into by the JVLLP (for example the development manager). A delegation policy will be included in the Members' Agreement and will be made available to bidders shortlisted to participate in the tender stages of the competitive dialogue procedure.

15.2 The Board does not want to be too big nor too small to manage to the business of the JVLLP. The right commercial people need to be appointed to the Board so that the Board is a viable commercial decision-making entity. The Board will be a naturally deadlocked decision-making forum. To that end, it is envisaged that:

15.2.1 each Member may nominate up to three individuals to the JVLLP's Board. No payment shall be made to either a Member or its nominee(s) for services provided as by the nominee(s) as Board member(s);

15.2.2 the Chair of the Board will be a role occupied by a Council nominee or a PSP nominee to the Board appointed on an annual rotating basis. The Chair has no second or casting vote;

15.2.3 the quorum for any Board meeting will be four (i.e. two Board members appointed by each Member);

15.2.4 each Board member will have one vote on any matter. A resolution of the Board shall be passed by a majority of those eligible Board members voting;

15.2.5 the Members will be equally represented on any committees or steering groups; meetings and decisions of those committees or steering groups will be taken in a manner similar to that of the Board;

15.2.6 where a committee or steering group, by reason of equal votes for or against a resolution, cannot agree on a course of action, the matter will be escalated to the Board;

15.2.7 where the Board, by reason of equal votes for and against a resolution, cannot agree on a course of action, the matter will be escalated as set out below:

(a) to senior persons within the Members;

(b) if not agreed, to mediation;

(c) if not agreed, to an expert for determination (depending on nature of deadlocked matter and whether the deadlocked matter can ultimately be resolved);

(d) if not agreed (or the expert cannot/will not determine the deadlocked matter), to winding up the JVLLP.

15.2.8 Members will be entitled to appoint alternates in circumstances where their nominated Board members are unable to attend.

16 MEMBERS' MEETINGS

16.1 Members' meetings will be held at least quarterly.

16.2 Except where paragraph 17 applies, the quorum at Members' meetings will be both Members and any resolution of the Members shall only be passed by unanimity.

17 CONFLICTS OF INTEREST

17.1 The Members' Agreement will contain provisions relating to conflicts of interest to ensure, as far as possible, that the JVLLP is at an arm's length to the Members (and their respective corporate groups). This will include enabling the "non-conflicted" Member or its nominees on the Board being empowered to hold Member and Board meetings and to vote without the "conflicted" Member or its nominees on the Board attending or voting at the relevant meeting.

18 DURATION OF THE JVLLP

18.1 Unless terminated early, and subject to any extensions agreed (see paragraph 1.3), the JVLLP will last for 15 years at which point it will be wound up.

18.2 Winding up will occur if:

18.2.1 both Members agree;

18.2.2 the JVLLP is insolvent;

18.2.3 the Members cannot resolve a deadlock;

18.2.4 there is a change in law making continued participation in the JVLLP unlawful, impractical or inadvisable.

18.3 Winding up event will also terminate any outstanding options granted to the JVLLP and entitle the Council to repurchase Sites out of the JVLLP at their then market value. At the same time, the parties shall use all reasonable endeavours to procure the novation of any supply or works agreements relating to the Sites being repurchased.

18.4 Prior to any winding up, any properties vested in the JVLLP to which development has been contractually committed, funded and has commenced will be developed out/completed and (if applicable) sold in the ordinary course of business in accordance with the Business Plan.

18.5 After payment of all expenses and third party creditor costs in line with the agreed waterfall, any surplus will be distributed to the Members in proportion to their equity contributions, provided that the surplus asset distribution shall be subject to a 10% discount (payable to the non-defaulting Member) where the termination arises as a result of an event of default by the other Member.

Non-key Executive Decision

SCHEDULE 1 – BUSINESS CASE AND SITE VIABILITY PLAN

Part 1 - Business Case

To be updated every six months and covering a five year period, where the immediate term is more detailed than the medium and long term.

JVLLP's objectives

Priority and minimum number of objectives to be met
Role and activities of the JVLLP

Approach to Partnering

Partnering principles
Continuous improvement
Local engagement and consultation
Communications strategy
Collaboration to provide local economic and social benefits

Short term (0-x years) development opportunities

Short term development opportunities overview
Appraisal of developments and phasing

Medium term (x-y years) development opportunities

Short term development opportunities overview
Appraisal of developments and phasing

Long term (y-z years) development opportunities

Short term development opportunities overview
Appraisal of developments and phasing

Overview of Site Development Plans

[At different stages of development]

Development strategy

Planning and environmental issues

Third party land
Valuation of Sites
Design strategy
Construction strategy

Supply Chain Management

Value for money
Parent company guarantees and performance bonds

Resourcing of the JVLLP

Structure and required management support
What the PSP will provide
Responsibility for delivery of Partnership Business Plan
Responsibility for day-to-day management

Developing the Business

Financial appraisal for the JVLLP

Budget
Sensitivity analysis
Taxation assumptions
Indicative Drawdown Profile

Risk appraisal

Policies and procedures of the JVLLP

Part 2 - Sample contents of Site Viability Plan - by stage of preparation (three stages currently envisaged: Draft Indicative SVPs, Approved Indicative SVPs and Adopted Site Viability Plans)

Draft Indicative SVPs and Approved Indicative SVPs

A Draft SVP shall include:

- a location plan and outline scheme drawings to RIBA Stage B (where possible and if appropriate);
- a review of existing site and/or building survey reports;
- an initial development appraisal;
- relevant title information;
- an assessment of the risks of achieving funding commitment and settling and satisfying viability;
- a strategy, which includes any planning and environmental considerations, programme and proposals on infrastructure works, phasing, sales and marketing;
- a budget with fee estimates for each professional consultant and technical study foreseen for satisfaction of all site conditions;
- a development programme to include pre-construction, construction and post-construction activities; and
- proposals for procuring works and services for the site development in accordance with the Procurement Policy.

Adopted Site Viability Plans

An Adopted Site Viability Plan shall include a copy of the full planning permission for the development of the Site, a copy of any relevant planning agreement, and copies of any other statutory consents and/or approvals required to commence development of the Site, together with a detailed development appraisal with a summary report to demonstrate whether the project is viable which shall include:

- a final agreed construction price (to be a fixed price contract unless otherwise agreed by the JVLLP);

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- final agreed project team costs;
- final gross and net building areas;
- other costs (e.g. section 106 agreements, claw back by grant providers, etc.) together with details of the funding terms available in relation to the carrying out of development works on the Site;
- any amendments to the Approved Indicative SVP that may significantly affect the development profit or overall internal rate of return; and
- fully co-ordinated architectural, structural, landscape and building services designs to RIBA Stage E as a minimum.