



CABINET

Subject Heading:

Regeneration Programme – Council Structure to support Capacity, Delivery and Management

Cabinet Member:

Cllr Roger Ramsey
Cabinet Member Regeneration and Leader of the Council

SLT Lead:

Andrew Blake-Herbert, Chief Executive

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Policy context:

**Havering Housing Strategy
Havering Economic Development Strategy
HRA Business Plan
Rainham and Beam Park Planning Framework, 2016
Havering Proposed Submission Local Plan 2017**

Financial summary:

Growth implications are factored into the Council's MTFS

Is this a Key Decision?

YES

When should this matter be reviewed?

Autumn 2020

Reviewing OSC:

Towns and Communities OSC

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

Communities making Havering
Places making Havering
Opportunities making Havering
Connections making Havering

[X]
[X]
[X]
[X]

SUMMARY

1. The Council is embarking on an ambitious regeneration programme, and is likely to enter into three joint ventures (“JV”) with private sector partners (which were the subject of Cabinet papers and approvals in November and December 2017), and a further paper to this January 2018 Cabinet. It also has a wholly-owned development company, Mercury Land Holdings Ltd, which has its own extensive development programme. This paper provides a context for the overall programme, sets out the cumulative governance implications for the Council, identifies key issues to be considered and recommends a governance structure to ensure that the Council’s best interests are protected.

RECOMMENDATIONS

That Cabinet:

1. **Notes** the Chief Executive’s proposed changes to the Councils senior management structure.
2. **Approves** the Governance structure and arrangements described in section 6 of this Report.
3. **Agrees** to delegate to the Leader, after consultation with the Chief Executive, the appointment of the Council’s officer nominees to represent the Council on the three JVLLP boards.
4. **Agree** to delegate to the Leader, after consultation with the Chief Executive, any future changes to the appointment of nominees to represent the Council on the JVLLP boards or as its directors on the Mercury Land Holdings Limited board.
5. **Agrees** to indemnify its nominees to the JV LLP Boards (once the JVLLPs are set up) and the directors of Mercury Land Holdings Limited under the Local Authorities (Indemnities for Members and Officers) Order 2004.
6. **Notes** the budget implications of these changes as detailed in section 10 of this report, and that they are reflected in the Council Medium Term Financial Strategy for agreement in the February Council Tax setting meetings.

REPORT DETAIL

2. Background and Context

2.1 Between November 2017 and January 2018 the Council's Cabinet will have received proposals relating to:

- **Bridge Close JV** (See November 2017 Cabinet paper entitled "Bridge Close – Entering into a Limited Liability Partnership") – a 50/50 joint venture being set up with First Base BCR to deliver a circa 1070 unit residential scheme in central Romford. The joint venture ("JV") will be a Limited Liability Partnership in which the Council will hold a 50% stake and have 50% of the voting rights (the partner having the other 50%). The Members' Agreement envisages the parties sharing risk and reward equally under the project. Draft legal documentation for the JV is currently at an advanced stage and Cabinet approval to establish the JV was obtained at the November Cabinet.
- **Rainham JV** (See December 2017 Cabinet paper entitled "Rainham and Beam Park Housing Zone – Appointment of a Joint Venture Development Partner") - a 50/50 joint venture being set up with Notting Hill to deliver a circa 766 unit residential scheme. The JV will be a Limited Liability Partnership in which the Council will hold a 50% stake and have 50% of the voting rights (the partner having the other 50%). The Members' Agreement envisages the parties sharing risk and reward equally. Draft legal documentation for the JV is currently at an advanced stage and Cabinet approval to establish the JV was obtained at the December Cabinet.
- **12 housing sites JV** (A Cabinet paper is scheduled for January 2018) - a 50/50 joint venture is to be set up with a development partner still to be selected (the procurement process remains in progress at the time of writing this Report) to undertake 12 separate housing renewal schemes on HRA housing estates. The JV structure and risk and reward sharing will be on the same general basis as Bridge Close and Rainham.
- **Mercury Land Holdings (MLH)** (See November 2017 cabinet paper entitled "Mercury Land Holdings Business Plan") – an arms-length wholly-owned subsidiary of the Council, set up to develop a portfolio of homes for market rent (its primary focus) and sale. Its current development programme includes Cathedral Court and North Street Hornchurch, with other sites identified within its pipeline and noted in its Business Plan. The Board of Directors appointed by the Council (as approved by Cabinet at the November 2017 meeting) is made up of the Council's Chief Executive (acting as the Managing Director of the MLH Board), the Head of Property Services at OneSource, the MLH Development Manager, the MLH Project Manager, the MLH Finance

Officer, and an independent expert. MLH was established in November 2015 and to date has delivered 65 fully let PRS rental units in Romford and obtained planning permission for another 44 units in Hornchurch.

2.2 Collectively, the three JVs and MLH are anticipated to:

- Deliver over 4,700 new homes, including 1,790 affordable homes.
- Generate up to £28.9m in profits and land receipts to the Council between 2017/18 and 2025/26, and £27.8m for the Housing Revenue Account over the same period.
- Require the Council to invest up to £96.24m (of which £33m is for the 12 estates HRA scheme) alongside its development partners (see Financial Implications section at paragraph 9 below).
- Enable difficult to deliver sites to be brought forward with Council intervention, using CPO powers, and various funding sources, including GLA funding.
- Enable the Council to influence the quality of the developments carried out, in its capacity as 50% owner of the JV LLPs or as sole shareholder (in the case of MLH), as well as in its capacity as planning authority. This is key to ensuring high design standards and quality place-making, ensuring that the JVs and MLH deliver neighbourhoods that people will aspire to live in, not just when they are new but when the neighbourhoods are 30 years old.

3. Governance Arrangements

3.1 The individual Cabinet papers provide summaries of the legal structure of each JV partnership and the legal agreements that establish them. Each of the JV LLPs will have a Board made up of nominees appointed by the LLP Members, and on a basis that means equal representation and voting rights (with no casting vote). These LLP Boards will be responsible for:

- Developing and approving business plans which detail how the LLP will undertake the developments each has responsibility for. These plans, and any material amendments to them, will be subject to approval by each of the LLP members (and in the case of an overarching plan, not less than annually). The JV LLPs will appoint a development manager to prepare and then implement the business plans (and undertake certain operational actions within the scope of the relevant approved business plan).
- Any activity which falls outside the scope of the approved business plans (or which, under the terms of the LLP Members' Agreement needs to be referred back to the LLP members) will require the approval of the LLP

members and, in the case of the Council, be dealt with in accordance with the Council's delegations arrangements.

- Preparing and approving scheme viability appraisals, and agreeing changes to these during the development process (within the tolerances set by the Business Plan).
- Dealings with the Council in respect of the terms upon which JV Co acquires land from the Council.
- Dealings with the Council in respect of the terms of any State aid compliant loans from the Council to JV Co.
- Decisions in relation to the key steps in the development process, such as purchase of property, entering into key contracts, submission of planning applications, appointing professional consultants, undertaking tenders, entering into building contracts, sale of property, marketing, PR and communications, delivering programmes to support local labour and apprenticeships etc.
- Monitoring and reporting performance against key performance indicators (or equivalent) set out in the relevant Business Plan.
- Preparing accounts.
- Distributing proceeds from the development to meet development costs, make repayment of LLP member loans (if any), etc. prior to distribution of any surplus on a 50/50 basis.

3.2 In the case of MLH, its role is similar, with the notable difference that there is no joint venture partner and the development management function is either drawn from the Council or more typically by way of appointment of external consultants. It is subject to its Articles and a shareholder agreement which regulates the extent to which it may operate without reference back to the Council.

4. Issues for Consideration

- 4.1 The Council will need to appoint nominees to sit on each of the joint venture LLP Boards. As nominees, they will have a responsibility to act in the best interests of the JV LLP. Likewise, the Council appoints directors to the Board of MLH and they have similar statutory duties to act in the best interests of that company.
- 4.2 At times, and in relation to any LBH officer nominee or director, this obligation could conflict with their duty (as LBH officers) to act in the best interests of the Council. The 4th and 5th bullets in paragraph 3.1 above are examples of this, but the conflict could arise on other matters.

4.3 This “conflict of interest” consideration arises both in relation to officers and elected members appointed as nominees or directors. The legal implications section of this Report explains this in detail (including the important distinction between officers and elected members in that regard), and also addresses how such conflict is best managed. Moreover, in relation to the JV LLPs the Members’ Agreement entered into between the Council and its partner expressly recognises and deals with potential for a conflict of interest at LLP Board level. In other words, the challenge of managing and avoiding “conflicting interests” is an important factor in how the Council establishes its governance arrangement for the JV LLPs and MLH.

4.4 Equally important in considering the most suitable governance arrangement are four further factors, namely:

- (i) **Disputes and deadlock** – ensuring that where a dispute or deadlock arises between the parties in the JV LLPs, or between the JV LLP and the Council, there are senior representatives of the Council able to act in the resolution of that dispute prior to it being referred externally. A similar consideration applies to MLH. In brief, the Council should take into account the desirability of having officers/members of sufficient standing to be able to engage in the resolution of a dispute to which they have not been a party. Against this should be balanced the desirability of having senior officers of the Council acting as its nominees so as to minimise the likelihood of disputes/deadlock occurring in the first place.
- (ii) **Pre-determination and bias** – as a matter of law, and as good practice, the Council must avoid (and be seen to have avoided) the pre-determination of matters on which it should exercise an unfettered discretion, or a bias in the way matters have been addressed. The most obvious example of this being decisions in relation to planning applications made by a JV LLP or MLH to the Council. The Council would be at risk of legal challenge if it could be shown that a decision has been subject to “bias or pre-determination” due to the overlapping and conflicting duties of those appointed to a JV LLP Board (or MLH Board).
- (iii) **Competing objectives of the JV LLPs and MLH** – there may be occasion where the JV LLPs (and/or MLH) are all seeking Council decisions on a matter which overlaps two or more of them. For example, the JV LLPs and MLH may be seeking financial support from the Council in some form, or may be competing with each other at an operational level (the most salient example being where they may be offering housing units to the market in actual or notional competition with each other).
- (iv) **Intelligent client** – the means by which the Council engages with the JV LLPs and MLH, including how it supports the nominees and

directors appointed to them, as “client”, is an important factor and has a bearing on where roles and responsibilities are best allocated.

- 4.5 In summary, whilst the commercial interests of MLH and the JV LLPs are largely aligned with those of the Council, they may sometimes conflict slightly with the wider regeneration objectives of the Council. High quality place-making and affordable housing provision are two examples of issues where the Council might seek a more optimum solution than independent commercially-driven companies or the JVLLPs might naturally seek.
- 4.6. Notwithstanding the governance structure put in place, residents will see the regeneration programme as a Council-sponsored programme and will expect the Council to be in control of it. They will expect the programme to deliver the best results for residents. Where tension exists between commercial drivers and the best results for residents, the Council, within the governance framework adopted, needs the ability to seek the best outcome.
- 4.7. In addition, the Boards of the JV LLPs and of MLH will need to be resourced. They will probably each meet monthly. Papers will need to be prepared, circulated, read and understood by the Nominees/Directors, minutes taken and actions monitored. Senior officers and lead members need to fully understand the legal agreements that exist, including JV LLP Members' Agreements and the associated agreements, such as land assembly agreements and CPO Indemnity Agreements, as well as the important agreements that the businesses themselves will enter into (e.g. for development management services, construction, finance, and so on). These can sometimes be quite complex and there will be a lot of them.
- 4.8 Section 10 of this Report sets out the legal implications and risks. It has bearing on how the recommended governance structure has been designed.
- 4.9 Tax implications, including corporation tax, stamp duty, VAT (on land transactions and construction costs) need considering and will be subject to the detailed agreements reached on each project. Further advice may be needed as legislation changes and there will be a need for ongoing specialist financial and tax advice.

5. Overarching Council Capacity and Structure

- 5.1 The Council is clearly entering into a new area of joint ventures that it has not participated in previously, as well as development activity via MLH, and the value of the developments to be undertaken will be in excess of £2.5 billion over a ten year period. It is necessary to ensure that the right levels of capacity as well as capability and appropriate skills, are in place to support and deliver these significant programmes.

- 5.2 It is therefore proposed to create a new Directorate focused on regeneration programmes to help create the capacity to focus on these schemes, without the distraction of day to day services delivery.
- 5.3 There may also be perceived conflicts of interest within the current Regeneration service, with responsibility for Planning as well as Regeneration sitting alongside each other. Although all the right controls are in place, there may be a perception that there might be a conflict, so to further protect the Council's reputation it is felt appropriate to remove any risk of this perception and further separate the two functions.
- 5.4 It is also an opportunity to realign some of the other service areas which are not currently felt to be under the right Directorates, to create the right synergies going forwards. This new structure is set out in Appendix B.
- 5.5 Cabinet is asked to note the Chief Executive's proposed structural changes. Such changes are within the delegated authority of the Chief Executive.

6. Proposed structure to support the individual regeneration schemes

- 6.1. The structure proposed deals with three key areas, namely:
- (i) The arrangements in respect of appointment of directors to MLH and of nominees to the JV LLPs;
 - (ii) The establishment of a Client Board to act as formal interface between the Council and the JV LLPs and MLH;
 - (iii) A Steering Board to act as a member forum for more general strategic oversight and reporting.
- 6.2 In respect of the matters on which the Council has to make formal decisions and give its approval or consent (i.e. those matters which cannot be decided by the Boards of the JV LLP or the Board of MLH and are "reserved" to the Council as shareholder of MLH or which require the consent of the JV LLP Members), the structure would operate as follows:
- (i) in the case of each JV LLP, by way of referral to Cabinet unless capable of decision under an existing delegation or powers pursuant to the Council's Constitution; and
 - (ii) in the case of MLH, within the parameters of the Cabinet's decisions at its November 2017 meeting.

As such, the Council's formal decisions or approvals would be given by way of delegated powers or reference to Cabinet as appropriate in each case. The Cabinet's delegation of decision-making on MLH (as approved at the November Cabinet), reflects that the annual MLH Business Plan will be approved and will have had input from the MLH Board (appointed by the Council as sole shareholder). In the case of the JV LLPs, however, there will

be significant influence from the private sector partner's Board nominees, and from the development managers appointed by the LLP, and a consequent benefit in, and need for, Cabinet consideration of material matters requiring Council approval or consent.

Nominees on the JV LLPs

- 6.3 It is proposed that three senior officers should be nominated to sit as Nominees on each of the three JV LLP Boards. These Nominees would be granted the ability by the Council to act in the best interests of the JV LLP in compliance with their appointment to the JV LLP Board (and with the Members' Agreements), to avoid being technically in breach of their employment contracts.
- 6.4 Consideration has been given to having the same three officers on each JV LLP Board. This approach would help to create synergy and ensure that the joint ventures are run to the same standards, and that systems and processes are broadly the same. The Council Nominees will be then able to ensure that performance management and reporting is done in a consistent way across the programme, reducing the pressure on Council departments (finance, legal, and performance management) and on Lead Members, who could otherwise be overwhelmed by the complexity of managing three very different joint ventures.
- 6.5 However, there may be occasion where the interests of one JV LLP are not aligned with those of another, in which case identical representation may give rise to an actual or perceived "conflict of interest". This difficulty could be removed by having entirely different officers on each of the JV LLP Boards, however that presents a resources hurdle. On balance, the benefit of having the same Nominees on each JV LLP Board outweighs this potential issue. On any occasion where the JV LLPs have competing interests, the Nominees would declare that at the Board meeting and the issue would then be dealt with by referral up to the JV LLP Members (as a Consent Matter). Ultimately, the private sector partners in the three JV LLPs have to recognise and accept that there may be occasions where the Council, as stakeholder and investor in each JV, may have to reconcile and make decision on competing requests from the joint ventures.
- 6.6 In order to avoid conflicts of interest and accusations of pre-determination and bias (see paragraph 10.3), it is recommended that the Nominees to the JV LLP Boards should not be officers holding direct responsibility for matters on which the Council needs to retain its unfettered decision-making ability. The key areas where this will attach being planning, housing, and finance – where a quasi-regulatory function is involved and/or decisions require clear separation of function (e.g. decisions which may impact on the Council's budget or on Council tax for example).

Non-Executive Nominees/Directors

- 6.7 It is possible for Nominee places taken up by the Council on the JV LLP Boards to be external non-executive appointments, and the same is true with regard to the Directors appointed to MLH, if it is felt certain external expertise would be of benefit to the Council.

Client Board

- 6.8 It is proposed that a Client Board should be established within the Council. This Board will consist of at least three senior officers. This Board will be responsible for monitoring the performance of the joint ventures, undertaking or overseeing negotiations where necessary between the Council and the JV LLPs, and ensuring that the best interests of the Council are protected. The officers who sit on the Client Board will not be the same officers who sit on the JV LLP Boards. The Client Board will not have entirely equivalent responsibility for MLH, but will take account of any activity of MLH which may overlap with that of the JV LLPs.
- 6.9 It is envisaged that at least two of the Client Board members will attend each of the JV Board meetings as observers. They will not be entitled to vote, but they will speak at the invitation of the Board. Care will need to be taken to avoid this attendance creating a risk that the observers are acting as “shadow directors”, as that may give rise to personal liabilities on their part (which would be uninsured). Accordingly, the observers’ attendance would be strictly at the invitation of the Board, as would ability to speak. The JV LLP Boards should operate on a basis that means that any such attendance right may be dis-applied where a matter requires consideration without observers being present.
- 6.10 It is further envisaged that at least two of the Council’s JV LLP Board Nominees will attend the Client Board meetings. This will enable them to give consideration to matters going to, and give feedback on, the JV LLP Board meetings.
- 6.11 The key function of the Client Board will be to act as a forum for consideration of matters which may require a Council decision or approval in its capacity as JV LLP Member. This is because certain decisions, as set out in each of the Members’ Agreements, will be so-called “Consent Matters”, being matters which the JV LLP Board may not decide and which must be referred up to the JV LLP Members. There may be further occasions where matters are referred to the JV LLP Members in this way, such as where the Board is “deadlocked” and cannot reach agreement (bearing in mind the 50/50 block voting arrangement).
- 6.12 In relation to the making of actual decisions, the Client Board will act in advisory capacity only. Certain decisions may be made by an officer under the Council’s Scheme of Delegation in accordance with the Executive Procedure Rules. Key matters will generally be referred to Cabinet for

decision, such as the annual business plan of each JV LLP, and the site business cases as they emerge, together with any other such strategic decisions that may be required. In due course, it may be desirable to identify and approve a more detailed delegation scheme for how matters referred to the Council as JV LLP member are to be dealt with. This can be done after the three JV LLPs are established and early operational experience has been gained.

Regeneration [Board]

- 6.13 It is also proposed that a Regeneration Board should be established, consisting of elected members of the Council. This Board will meet not less than quarterly and will receive updates from the Client Board on progress across the programme. Officers will also update the Regeneration Board on any regeneration activity being undertaken by the Council outside of MLH and the joint ventures. The Regeneration Board will not have decision-making powers but will be made up of members of the executive. It will act as a forum in which the Council is able to consider and give direction to the Client Board and officers on the overlap between the activities of the JV LLPs, the work of MLH, and other projects being undertaken. This will help to ensure that the various housing, employment and skills, education, transport, health, and other social value synergies are being fully taken into account in how these businesses operate and each development scheme is undertaken.
- 6.14 The diagram below illustrates the structure:



Havering

LONDON BOROUGH

Cabinet approvals – e.g. annual business



Lead Member Executive decision sign-off under delegation regime.

Regeneration Board

Member group with overarching role to set strategy across programme, consider synergies between the JV LLPS, MLH, and other projects. Considers and reviews business plans and business cases and the recommendations made to Cabinet.



Performance updates – on timescales, deliverables, and budget position.

Ensures that Council policy requirements and outcomes are being sought and clearly expressed, both on individual JVs and across programmes.

Client Board

Officer group to carry out the client-side function and to ensure the JV LLPS and MLH are delivering to time lines and respective business plans.

Also considers matters which are referred to the Council as "reserved" or "consent" matters under relevant Articles or Members' Agreement (or otherwise referred for decision).

Approves funding in line with approved annual business plan or site business cases.



Feedback from JV LLP Board and MLH Board.

Considers performance, programme, finance, and delivery.

Provides or procures technical advice and support to the Council's Nominees/Directors.

Council external interests

Council nominees/directors sit on respective Boards of JV LLPS and MLH. They represent the Council, but act in the best interests of each LLP/Company.



6.15 It is currently proposed that the appointments and representation under this structure will be as set out below. However, Cabinet is asked to delegate the appointment of nominees to the JV LLP boards, and of directors to the MLH board, to the Leader, after consultation with the Chief Executive. Likewise, Cabinet is asked to delegate to the Leader in consultation with the Chief Executive, any changes in the composition of the Client and Regeneration Boards. This is to allow changes to be made as necessary without reverting to Cabinet.

- **MLH Board:** The Articles provide for a minimum of 4 directors (see paragraph 2.1).
- **Bridge Close:** The Members' Agreement allows for the Council provides for a minimum of 2 and maximum of 3 nominees from both of the LLP members. It is intended that officers will be appointed as the Council's nominees, or (as one of them) a non-executive appointee.
- **Rainham and Beam Park:** The Members' Agreement will provide for 3 nominees from both of the LLP members. It is intended that officers will be appointed as the Council's nominees. The recommended delegation to the Leader (in consultation with the Chief Executive) of the appointment of nominees to all three JV LLP Boards will, if approved, include appointments to Rainham and Beam Park JV LLP, and therefore be in substitution for the approved recommendation in the December 2017 Cabinet Report whereby this was delegated to the Leader in consultation with the Director of Neighbourhoods.
- **12 Sites:** The Members' Agreement provides for three nominees from both of the LLP members. It is intended that officers will be appointed as the Council's nominees.
- **Client Board:** This officer group will comprise (as a minimum) the S151 Officer, Monitoring Officer, Director of Neighbourhoods, Director of Asset Management, and Communications Officer, plus their necessary officers in support and external advisers from time to time. As noted in paragraph 6.11, at least two of the Council's JV LLP Board Nominees will attend the Client Board meetings. The Director of Regeneration Programmes, or AD Development, will be on the Client Board if not appointed as a Council nominee on the JV LLP Boards.
- **Regeneration Board:** This Board will comprise three Cabinet members, with senior officers attending, drawn from the Client Board and with the JV LLP nominees in attendance. The initial composition will be; Leader, Lead Member Housing, and Lead Member Housing Development Company & oneSource Management.

6.16 In the case of both the Nominees to the JV LLP Boards and Directors appointed to MLH, the Council may give an indemnity pursuant to the Local Authorities (Indemnities for Members and Officers) Order 2004, and this is

recommended. This gives each such Officer (or elected member should that be the case) protection from personal liability when acting in their capacity as nominee/director, except where fraudulent or criminal activity is involved.

- 6.17 The will be annual report to Cabinet refreshing the business cases for each of the regeneration vehicles, and twice year all member briefing, to ensure all Councillors are kept up to speed with progress.

REASONS AND OPTIONS

7. Reasons for the decision:

- 7.1 By entering into joint ventures with the private sector the Council is able to harness the commercial expertise of an experienced partner and participate in the risks and rewards of property development. By appointing the proposed nominees to the JV LLP Boards, the Council can best seek to avoid the risk of accusations of pre-determination and bias when exercising decision-making as the Council. The nominees proposed have the necessary skills and seniority to act as Council nominees. However, if any of these officers are, for whatever reason, conflicted from making decisions in their capacity as officers, the Council is still able to rely on other suitably skilled officers to report and make recommendations. Moreover, these nominees ensure that the Client-side function is carried out by other senior officers.
- 7.2 The establishment of a Client Board will ensure that the Council's interests are protected, and that there is an effective interface between the JV LLPS (and MLH) and the Council, including where reserved or consent matters require decision. The Client Board will also ensure that the nominees and directors are properly supported and equipped to reflect the Council's position and make decisions when attending Board meetings.
- 7.3 The Regeneration Board will ensure that the Council has an ability to oversee and influence the strategic direction of its programme of regeneration, whether via the JV LLPS, MLH or through other projects. This will also mean that matters referred to Cabinet for decision, have had detailed prior scrutiny and that the overall synergies between each of the regeneration initiatives are being taken into account.

8. Other options considered

- 8.1 There are other permutations possible but certain factors which remain constant, namely:
- The Council has the right to appoint nominees to the Boards of each of the three JV LLPs and if it failed to do so would be allowing the private

sector partner to run these businesses without Council input. Therefore, under any model, these appointments need to be made;

- Likewise, MLH would be incapable of operating as a business without a Board of Directors;
- The nominees and directors need to have the necessary skills and support to perform their duties;
- The Council nominees and directors will have obligation to act in the best interest of the business they serve and to declare conflicts of interest;
- A conflict of interest could require certain officers and elected members with responsibilities inside the Council not to take part in a decision being made by the Council;
- At all times the Council must manage its position so as to avoid legal challenge based on “bias and predetermination”.

8.2 For that reason, the options considered but discounted are:

- i. Structures in which there is no clear distinction between officer/member functions as nominee/director on the one hand, and as Council decision-maker on the other; by way of simple example, a MLH Director should not be considering and approving a planning application to be submitted by MLH and then acting as the reporting officer recommending the grant of that permission.
- ii. Structures in which there is no adequate or properly resourced client-side function to enable arms-length engagement with the JV LLPs or MLH, and to support to the Council nominees/directors;
- iii. Structures in which there is no forum for regular and meaningful reporting to elected members and opportunity for dialogue on strategic matters;
- iv. Structures which fail to recognise and address the levels at which decisions should be made by the Council, balancing the need for timely decision-making with the need for decisions to be taken after the right degree of scrutiny and detailed assessment.

8.3 Consideration has also been given to whether Mercury Land Holdings should act as the Council’s holding company and whether it should enter into the JV partnerships on the Council’s behalf. It is considered however that given MLH is an arms-length company with its own board (as opposed to a shell company), this would create a complex structure and would dilute the Council’s ability to participate directly in decision-making within the joint ventures. It is therefore proposed that the Council should itself enter into the joint venture partnerships.

IMPLICATIONS AND RISKS

9. Financial implications and risks:

- 9.1 Financial matters are dealt with in the exempt part of this report (Appendix A).
- 9.2 The new staffing structure of the Regeneration Directorate, including the creation of the Director and the necessary roles to support the individual JVs will be funded from existing regeneration budgets, contributions from each of the schemes and the HRA, and growth in the Council base budget of £400K. This has been factored into the Councils Medium Term Financial Strategy for agreement at the Council Tax setting meeting in February.

10. Legal implications and risks:

Conflicts

- 10.1 Under the Local Government Act 1972 and Localism Act 2011, officers and members of a local authority are under certain obligations in respect of the declaration of conflicts of interest. Elected members are subject to the Havering Code of Conduct (adopted by the Council under the Localism Act 2011), and officers are subject to their contracts of employment. There is also a general principle of “pre-determination and bias” which is an important factor as explained below.

Members’ Code of Conduct

- 10.2 The Members’ Code of Conduct, among other things, deals with the notification and declaration of interests. In relation to the JV LLPs and MLH it is highly unlikely that any disclosable pecuniary interest will arise, but the Code expressly deals with other interests, including where a member has an interest by virtue of holding a position of general control or management of a body to which that member is appointed by the Council. Whilst it is legally possible for a member to continue to vote on matters before the Council in respect of a body on which they serve as nominee or director, this will not remove the risk of accusations of bias and pre-determination.

Pre-determination and Bias

- 10.3 The law on bias and predetermination is part of the general legal obligation on councils to act fairly. Predetermination arises where a person closes their mind to any other possible course of action, to the extent that they no longer apply proper judgment to the matter in question. Section 25 of the Localism Act 2011 seeks to avoid this being applied in an unreasonable way, and allows for the expression of opinion before an actual decision is made. In the case of the JV LLPs and MLH, there would be great difficulty in relying

on Section 25 where a Board decision had been made to pursue, for example, a planning application, and the same person was then involved in consideration of that application at a planning committee.

Directors' Duties

- 10.4 Equally important is the law on directors' duties, and the equivalent position in relation to LLP nominees. Under the Companies Act 2006, a director of a company must (i) act in accordance with the company's constitution and only exercise powers for the purposes for which they were conferred, (ii) act in a way in which he/she considers, in good faith, would be most likely to promote the success of the company for the benefit of its members (which will be the Council), (iii) exercise independent judgment (this means that they are not able to merely act on instructions from the Council), (iv) avoid a situation in which he/she has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. By virtue of his/her status as an elected member or officer, a director appointed by the Council would not be able to avoid this conflict of interests arising in every situation.
- 10.5 The problems this may give rise to can be dealt with by way of an authorisation under Section 175 of the Companies Act, or pre-authorised under the company's articles. However, this will not avoid the pre-determination and bias factor mentioned above.

LLP Nominees

- 10.6 LLPs are governed by the Limited Liability Partnerships Act 2000, and under case law the nominees appointed by the LLP members will owe a duty of care to the LLP by virtue of the wording of the Members' Agreement. This will mean they owe a duty to the LLP in decision-making not different in character to that of a company director.

Officer duties

- 10.7 In relation to officers, S117 of the Local Government Act 1972 means that an officer is required to disclose to the Council any interest he may have in any contract or other matter, which would include contracts with a company where he is a director.
- 10.8 Unlike the Localism Act 2011 in relation to elected members, the requirement to act in the best interests of the Council and withdraw in the event of a conflict is purely contractual (through the contract of employment). The Council can therefore waive that requirement and instead direct the officer to act in the best interests of the company in the event of a conflict, and to authorise him or her to continue to act within the Council even though they hold an outside interest as a director. This waiver will be applied in the case of the Council officers appointed to the MLH Board and the nominees appointed to the three JV LLP Boards.

- 10.9 Again, this will not avoid the possible accusation of pre-determination and bias where an officer is both a nominee/director and, when acting as an officer of the Council, deciding on a matter which affects the JV LLP or company. In short, great care must be taken to make sure that undue influence is not seen to be exercised by an officer when matters affecting the company are being decided within the Council. Where matters are decided by elected members (i.e. at a council committee, such as the planning committee) who are not themselves connected to the JV LLP or company (for example, through being directors or nominees), this should be less of an issue. That is so provided the officers making recommendations to those members are not wholly conflicted by being both a director/nominee and the reporting officer seeking approvals.

Summary

- 10.10 There are a number of overlapping factors to take into account but the critical legal element is the avoidance of conflicts of interest and of accusations of pre-determination and bias. This is especially important in respect of quasi-judicial or regulatory functions such as the grant of planning consent.

Risks

- 10.11 The main risks are:
- 10.12 Pre-determination and bias, as explained above, giving rise to a legal challenge in respect of a decision, especially where that decision has bearing on third parties, such as in relation to planning, compulsory purchase, or the like.
- 10.13 Equally, there is a risk that the JV partners may see a conflict of interest as between the JV they are party to and the other JVs (or MLH). This risk is not entirely avoidable so far as the Council itself is concerned, but could be an issue where the same persons are serving on more than one JV LLP Board. This risk is unlikely to occur frequently, if at all, and can be addressed by reserving those decisions to the JV LLP Members.
- 10.14 Even short of actual legal challenge, it will be important to maintain public confidence in the Council's approach to running or participating in MLH and the JV LLPs. This requires a separation of function and clear lines of decision-making and engagement with these businesses. Whilst MLH is a wholly owned company of the Council, it is a separate legal entity and operating as a business. Its directors will owe a duty to act in the best interests of the company. When the Council deals with matters as sole shareholder, it may do so with its "investment" in mind. However, this must not interfere with the exercise of statutory discretions, for example in relation to planning applications made by MLH. Officers and elected members must therefore always be mindful of the capacity in which they may be acting,

avoiding conflicts of interests and actions which may give rise to accusations of pre-determination or bias.

11. Human Resources implications and risks:

11.1 Operating the joint ventures will require:

- Each of the three JV Directors to dedicate circa 20 hours per month to preparing for meetings, reviewing papers, attending meetings and engaging in strategic discussions across the three joint ventures and MLH
- The Director of Regeneration Programmes will dedicate the majority of their time to preparing for meetings, reviewing papers, attending meetings and engaging in strategic discussions across the three joint ventures and MLH.
- The AD Development will dedicate circa 40 hours per month to managing the client function.
- The other members of the Client Board will each need to dedicate circa 20 hours per month to preparing for meetings, reviewing papers, attending meetings and engaging in strategic discussions.
- Each vehicle will require 2 FTE officers (8 FTE in total including MLH) to undertake support work in relation to the JV. This will include monitoring performance, analysing scheme proposals and advising the Client Board, preparing papers for the Client Board, managing LBH-appointed consultants, coordinating input from Legal and Finance, supporting the Development Manager in dealing with Council-related matters such as land transfers, managing Member enquiries and managing stakeholder engagement. A restructure of the regeneration service will be required to establish this.
- The Client Board will require ongoing support from oneSource in the form of legal, finance and property advice.
- The Client Board will require professional support from external consultants including lawyers and accountants.

12. Equalities implications and risks:

12.1 The equality implications of the various schemes are addressed in the individual reports to Cabinet and the governance of those schemes proposed by this report seeks to ensure that those equality objectives are achieved. There are no equalities issues arising from the proposed structure for the management of those JV and company interests as set out in this report.

BACKGROUND PAPERS

Appendix B

