

'CALL IN' OF DECISIONS OF THE CABINET

This form is to be used for the 'calling in' of decisions of the above bodies, in accordance with the procedure set out in Part 4 Section H.2 of the Constitution.

TITLE OF MEETING	Cabinet Committee
DATE OF MEETING	February 14, 2017
MINUTE No. AND TITLE OF ITEM	Minute 184 - Approval Of Preferred Bidder For The Haringey Development Vehicle

1. Reason for Call-In/Is it claimed to be outside the policy or budget framework?

This Cabinet decision is to agree to:

- The selection of Lendlease as preferred bidder with whom the Council will establish the joint venture HDV.
- Proceed to the Preferred Bidder Stage ('PB Stage') so the preferred bidder's proposal can be refined and optimised, in particular to formalise the structure of the vehicle, finalise legal documents and further develop site and portfolio business plans, as required to establish the HDV; and gives Delegated Authority to the Director of Regeneration, Planning and Development after consultation with the Leader of the Council to agree any further documentation as is required at the PB Stage.

There are a number of grounds for this call-in with the following being the most significant:

- **The potential breach of the Council's Public Sector Equality Duty;**
- **The potential legal risks of the decision being challenged in the High Court;**
- **The construction exclusivity clause proposed for the preferred bidder possibly representing a conflict of interest;**
- **The legal question of whether a varying of the terms of the partnership to reflect recent commitments which are beyond those set out in the original agreed procurement process requires a re-opening of the procurement process itself.**

Introduction and Background

The proposal to establish a Haringey Development Vehicle Limited Liability Partnership (HDV) is the biggest decision Haringey Council is ever likely to make. This decision, which sets the framework for Haringey Council to enter into a 50/50 partnership with a single private company to which at minimum, £2 billion of the Council's land and other capital assets, will transfer, will affect thousands of residents, tenants, leaseholders, and taxpayers and hundreds of businesses in the borough. The size and scale of this proposed joint venture is unprecedented,

which, along with the duration of the partnership was seen as a major risk by the Housing and Regeneration Scrutiny Panel. (HRSP)

With a proposed partnership agreement for 20 years, the HDV will have an impact for that period, and possibly decades to come. This joint venture was prioritised by the Housing and Regeneration Scrutiny panel for examination due to its size, scale, duration and implications. . The in-depth review of the governance arrangements for this proposed joint venture, and an examination of the evidence from other authorities' experiences, led the Housing and Regeneration Scrutiny Panel to call for a halt to the process for reasons which are set out in the panel's report presented to Cabinet on February 14. The central recommendation for a delay and for further scrutiny work to be undertaken, emerged from the panel's view – based on evidence gathering and factual research – that **'very significant risks with the proposed HDV remain. What the Council, and by extension, its tenants and residents, gain from the proposed HDV is far less clear than what it and they stand to lose.'** The report raised concerns about:

- the fundamental democratic deficit ' inherent in any such proposed structure and one of such size and scale';
- the 'absence of any sufficient contingency plans to mitigate the risk of a scheme of such size and scale'

In the body of the report, factors were detailed, including financial, legal and the reputational risks of proceeding too early and before sufficient due diligence was undertaken.

The report went on to refer to:

- **lack of published evidence regarding the success and effectiveness of delivery vehicles in achieving the desired regeneration and outcomes;**
- **uncertainty caused by Brexit;**
- **paucity of decision making;**
- **paucity of consultation undertaken with affected tenants within both the commercial portfolio and on prospective estate regeneration sites.**

Amongst the key reasons for recommending a halt to the process was the proposal for *'a new and updated risk assessment on the Business Case , a risk assessment and consultation with groups directly affected by the transfer of Council-owned land to the HDV'*. In recommending a halt to the process, the Panel called for further scrutiny of the proposals to be undertaken.

Despite the detailed work undertaken by the Housing and Regeneration Scrutiny Panel, the Cabinet agreed unanimously to go ahead with the process and approved the selection of Lend Lease as preferred bidder with whom the Council will establish the joint venture HDV, and it decided to proceed to the Preferred Bidder Stage ('PB Stage'). Although the Cabinet did accept a majority of the recommendations within the HRSP report, it did not accept recommendation 1 which set the context for the report as a whole and called for delay, and for further scrutiny work to take place.

Why is this decision being called in?

In deciding to proceed to the Preferred Bidder stage the Cabinet has, in our view, given insufficient or perhaps minimal weight to the evidenced recommendations of the HRSP, as ratified by the Overview and Scrutiny Panel. (O&SP) and issued by the Council. The Cabinet is therefore proceeding despite:

- Not having consulted fully, transparently or properly with affected tenants, leaseholders and businesses regarding the crucial and specific details regarding transfer of the land where they reside; or, relating to businesses not having regard to the impact of choices they face concerning the business which they lease, rent or have on license
- There being a lack of transparency in newsletters and communications issued by the Council to tenants and leaseholders, on the named estates, regarding what exactly 'estate renewal' and/or 'regeneration' in this context could mean for their current homes.
- A lack of clarity and consistency regarding the verifiably deliverable security of tenure and conditions on which tenants will be able to return to their homes. This is evidenced by the clear commitments in para 2.4 of the report - ***'to do our utmost to rehouse council tenants in the area where they currently live and on similar terms'***. This contrasts with **guarantees and commitments regarding security of tenure and rent levels which have been made elsewhere, including the minuted response to Cllr Bevan's question regarding Council tenants' rents on HDV property. These minutes make clear the Cabinet position that there was a 'Clear commitment to Council tenants on rent rates, ensuring the rents on the new estates match rents for equivalent Council homes'**.
- The above assurances, although demonstrating the utmost good intentions, nevertheless from the viewpoints of tenants, do not constitute a legally binding guarantee; nor do they reflect either the Council's own Estate Renewal, Rehousing and Payments Policy para 7.30, or the agreed terms within the procurement process to which the appointment of a development partner will be subject.
- Despite assurance being given verbally that there will be no loss of equivalent council housing, i.e. that the new estates will contain at least an equivalent equal number of council homes at target rents and secure tenancies, there is no written and legally enforceable guarantee of this.
- Having no completed and detailed risk assessment which sets out the liabilities and benefits of such a venture in a clear and transparent way for councillors, in order for them to make an informed decision, and so Haringey residents have assurance that their elected councillors have fully considered impact and risks.
- Not having conducted a full and complete due diligence regarding the companies bidding to become the preferred bidder, including their record with regard to trade union activities, blacklisting of certain workers, previous contracts and legal disputes regarding public sector contracts
- Issues being identified regarding the preferred bidder's company structures and tax arrangements which should form part of any due diligence
- Not having conducted detailed and specific Equality Impact Assessments (EQIAs) of the impact this decision will have on key groups such as black and minority ethnic individuals and families; older people; lone parents; people with physical and or mental ill health and other vulnerable groups, despite already having publicly named particular sites, land and assets to

be transferred in Category 1, and potential assets to be transferred in Category 2. The official paperwork refers to EQIAs being done when sites are identified, yet, as evidenced from the Council's own documentation, they have been named already. This may be in contravention of the Public Sector Equality Duty to which all local authorities are subject.

- Case law indicates that these assessments should be done before decisions are made, and that a written record is useful for demonstrating compliance, as per the Equality and Human Rights Commission guidance.
- Relying on a business case some eighteen months out of date which has no reference to the potential impact of Brexit on the economy, or other current economic indicators, and which appears to minimise the risks of the overarching joint venture recommended as the way forward when compared to the risks highlighted for the other five (rejected) options.
- Selecting a preferred bidder about which very clear and evidenced concerns have been raised including their development of the Heygate Estate in Southwark, with a huge loss of social homes and very poor outcomes for tenants and leaseholders, as well as the recent legal case brought against the developer by the District Attorney in New York City.
- Providing no verifiable evidence that this private partnership would achieve the regeneration outcomes or indeed generate income/profit for the council. The Cabinet report asserts that this will be the case – para 4. 7 of the report provides an example of this , stating ***'the Council accepts a degree of risk in that it will commit its commercial portfolio to the vehicle, and will (subject to the satisfaction of relevant pre-conditions) also commit other property, as its equity stake in the vehicle. It has also to bear the costs of the procurement and establishment of the vehicle, and a share of development risk. However, in return, the contribution to its Corporate Plan objectives, including high quality new jobs, new homes, including affordable homes, and economic and social benefits, would be at a scale and pace that would otherwise be unachievable. The Council will also receive a financial return, principally through a share of profits, that it can reinvest in the fulfilment of its wider strategic aims as set out in the Corporate Plan'***. There is no verifiable evidence to back up these claims, although there is written evidence from other authorities that in fact, similar partnerships have been dissolved, with significant losses to the public purse. In addition, accounts filed at Companies House from such joint ventures disclose losses to local authorities.
- Opacity regarding the equity which the Haringey Development Vehicle partner would be providing to match the Council's transfer of assets. In response to clear questions about this, the Cabinet minutes record that the HDV partner was ***'not expected to write a cheque on the day that land transfers to the Haringey Development Vehicle, but commit cash or make a binding guarantee to commit the cash when the vehicle needs it.'*** This answer raises many questions with regard to the contributions being made by the private partner, and the financial model being pursued.
- Admissions, not known until the meeting, that the preferred bidder would also have exclusive status as a contractor within the partnership. This raises questions regarding the financial model and the assertions throughout the report that the Council will make profits from these joint venture developments. This may also create a conflict of interest which has not been adequately addressed, in that the development partner will have the right to both vote at board meetings on decisions to allocate sites for development and also act as paid construction contractor on those same

sites.

- Lack of clarity about what the Council can legally seek to achieve within the preferred bidder stage given that key assurances which have recently been made were not specified or agreed during the procurement process itself
- There being delivered to the Council a sixteen page Letter before Action. This was confirmed as being received prior to the Cabinet meeting and is in the public domain, setting out the legal risks the Council may now face of the Cabinet decision being challenged in the High Court.
- Cabinet members making a number of promises and commitments during the Cabinet meeting which may not be deliverable or enforceable due to potential tensions with the plans and approaches set out in the Housing strategy as indicated above (bullet point 3) and below in the section on the Policy Framework

In addition, Recommendation 3.5 of Cabinet Report on the Appointment of the Preferred bidder says:

“[Cabinet] Agrees to proceed to the Preferred Bidder Stage („PB Stage”) so the preferred bidders proposal can be refined and optimised, in particular to formalise the structure of the vehicle, finalise legal documents and further develop site and portfolio business plans, as required to establish the HDV...”

However, this appears to contrast with the Legal Advice set out in the previous report agreed at the same Cabinet meeting (*Governance Arrangements for the HDV [Item 8]*) which states:

Under Regulation 30 of the Public Contracts Regulations 2015 any further negotiations between the Council and the preferred bidder must not have the effect of materially modifying the essential aspects of the procurement (including the needs and requirements set out in the contract notice or the descriptive document) and does not risk distorting competition or causing discrimination. So any proposal that would have such an effect on the Members Agreement or any other legal agreements relating to the HDV would be in breach of these Regulations and must therefore be avoided

Therefore, aspects of the decision made by Cabinet might possibly be legally unsound and/or unenforceable, and should hence be revisited by Cabinet.

The Cabinet report itself, makes several references to risk, and the acceptance that there is risk, yet these are never quantified or detailed. Neither are the benefits set against the liabilities and risks in an objective and clear structure which is necessary for an informed decision on such a huge and complex project.

Consequently, we the undersigned contend that the decision to select Lendlease as preferred bidder with whom the Council will establish the joint venture HDV, to ‘proceed to the Preferred Bidder Stage (‘PB Stage’) and to give Delegated Authority to the Director of Regeneration, Planning and Development after consultation with the Leader of the Council to agree any further documentation as is required at the PB Stage,’ is premature and should be reconsidered by Cabinet with a view to more extensive scrutiny work taking place beforehand.

Policy Framework

The HDV is included within the Housing Strategy and it is accepted that this is within the policy framework. However, the HDV is promoted as the means of 'unlocking the considerable growth potential of the Council's own land and meeting a number of core Council ambitions' and it is asserted within the Housing Strategy that this will contribute to achieving the Council's goals. However, there is no substantiating evidence to back up these assertions and aspirations. Indeed, the Housing Strategy makes no clear commitments to Council tenants regarding their future homes should their estates be subject to estate renewal. Moreover, it states there may be a loss of social homes and promotes private renting and affordable housing as options, along with working with private sector partners including the HDV.

This is in contrast to recent public statements issued regarding right to return, housing terms and tenancies for current council tenants living on, for example, the Northumberland Park estate. The work undertaken so far by the HRSP raises fundamental concerns as to whether the HDV can indeed achieve these new commitments to provide homes at equivalent social rents, on equivalent tenancies, and at the number needed to provide equivalent homes for all the families who are displaced.

There are significant risks associated with the joint venture in relation to governance, as well as with regard to investment of Council land and assets as equity in this project. In summary, we are concerned that despite well-intentioned assurances and promises, there is, and can be, no legally enforceable guarantee that the HDV proposal in its current form will provide an equivalent number of social homes for rent, given identified issues of viability, density, cost, land assembly, demolition, contractor costs (with the preferred bidder acting as construction contractor) and the need to ensure profit. Indeed this is confirmed by the wording and aspirations in the Housing Strategy.

2. Variation of Action Proposed

To refer the appointment of the preferred bidder back to Cabinet with a view to the decision being delayed in order that further scrutiny work can take place in relation to the significant risks as outlined, including:

- concerns regarding the preferred bidder for the HDV having exclusivity rights over construction contracts;
- unresolved issues regarding financial and legal risks; consultation and EQIAs of insufficient depth which could potentially render the Council in breach of its Public Sector Equality Duty;
- the possibility of action in the High Court;
- the questions relating to how any assurances recently made over housing and tenancy offers for stakeholders can be achieved or enforced without having to return to the formal procurement process.

Signed:

Councillor:Stuart McNamara.....(Please print name):
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Countersigned:

1. Councillor: ...Zena Brabazon.....(Please print name):
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2. Councillor: ..Gina Adamou..... (Please print name):
.....
3. Councillor: ...Gideon Bull..... (Please print name):
.....
4. Councillor: ..John Bevan..... (Please print name): ..
5. Councillor Noah Tucker..... (Please print name):
6. . Councillor Vincent Carroll..... (Please print name):.
7. . Councillor Mark Blake..... (Please print name)
8. Councillor Pat Berryman..... (Please print name)
9. Councillor Isidoros Diakides..... (Please print name)

Date Submitted: 24th February, 8.09 am by email

Date Received :

(to be completed by the Democratic Services Manager)

Notes:

1. Please send this form to:
Michael Kay (on behalf of the Proper Officer)
Democratic Services and Scrutiny Manager
5th Floor
River Park House
225 High Road, Wood Green, London N22 8HQ
Tel: 8489 2920
Fax: 020 8881 5218

This form must be received by the Democratic Services and Scrutiny Manager by 10.00 a.m. on the fifth working day following publication of the minutes.

2. The proper officer will forward all timely and proper call-in requests to the Chair of the Overview and Scrutiny Committee and notify the decision taker and the relevant Director.

3. A decision will be implemented after the expiry of ten working days following the Chair of Overview and Scrutiny Committee's receipt of a call-in request, unless a meeting of the Overview and Scrutiny Committee takes place during the 10 day period.
4. If a call-in request claims that a decision is contrary to the policy or budget framework, the Proper Officer will forward the call-in requests to the Monitoring Officer and /or Chief Financial Officer for a report to be prepared for the Overview and Scrutiny Committee advising whether the decision does fall outside the policy or budget framework.