

Programme for Growth: Housing Trust – Feasibility Report

1. Introduction and Background

- 1.1 As part of its 'Programme for Growth' the Council has identified housing as a key work strand to help deliver economic growth within the district.
- 1.2 Housing growth supports the building industry, provides homes for people living within or moving into the district, increasing opportunity for job and wealth creation and local spending. It also provides a direct cash incentive for the Council through the Government's 'New Homes Bonus Scheme' and brings in additional Council Tax income, which in turn helps to sustain and grow the Council's service provision.
- 1.3 In recent years new build housing within the district has been delivered through private developers and registered social housing providers. From the Council's point of view, as a result of the financing regime of the HRA, capital investment in housing has concentrated on maintenance and improvement of existing stock rather than new build.
- 1.4 Consequently we have seen the Council's stock of houses deplete over time as properties have been purchased via the 'Right to Buy' scheme. This presents a challenge for the Council, as whilst sales have dwindled in recent years, the increase in discounts available under the scheme since April 2012, means that as the economy improves and lending increases, the pace of 'Right to Buy' is likely to increase.
- 1.5 The Council's housing service is highly valued by our tenants but as our stock reduces over time, the viability of our HRA service is at risk. Furthermore there is growing demand for affordable housing and therefore we are looking for a solution that increases and protects the supply of affordable housing within the district, whilst supporting the Council's own HRA service.
- 1.6 This feasibility report presents the options available to the Council to directly deliver affordable housing growth through new build development, as well as the transfer of empty Council dwellings and potentially bringing empty properties within the private sector back in to use. It identifies the key advantages and disadvantages of alternative delivery models and explores the key issues that will need to be considered in establishing the preferred model.

2. The need for affordable housing

- 2.1 The need for affordable housing within Selby District has been established through the Strategic Housing Market Assessment (part of the Local development framework), and highlighted through work on the Council's Corporate Plan, and HRA Business Plan.

- 2.2 The 2009 Selby Strategic Housing Market Assessment advised that Selby District has a population of around 81,200, and is a high demand area for housing. The population is predicted to increase by 25.2% from 81,100 in 2008 to 101,500 by 2031. Over the next few decades, the number of older people will increase; in particular the number of residents aged 75+ is expected to more than double (from 5,900 in 2008 to 12,600 by 2031).
- 2.3 The vast majority of older people (78.7%) want to continue to live in their current home with support when needed and 26% would consider sheltered accommodation. Households would also consider new forms of older persons' accommodation including older persons' apartments (13.1%) and properties in a retirement/care village (16.3%).
- 2.4 The number of households is expected to increase by 27.3% between 2006 and 2026, most likely fuelled by an increase in one person and multi-person households (e.g. friends sharing) which reflects national and regional trends.
- 2.5 In 2008 the proportion of social rented dwellings was 12.2% compared with a regional average of 18.5%. Lower quartile incomes were slightly below the regional figure, but median incomes were slightly above.
- 2.6 Selby is ranked the 8th least affordable district in Yorkshire and the Humber but the most affordable district in North Yorkshire. For North Yorkshire districts, the provisional estimate of the proportion of new housing that may need to be affordable is over 40%, and our target for negotiation with private developers is up to 40%.
- 2.7 On an annual basis, there is an overall requirement for 1,119 dwellings across Selby District of which 710 (63.4%) is for market housing and 409 (36.6%) for affordable. Analysis indicates that across Selby, there is an annual net shortfall of 378 and a gross shortfall of 409 affordable dwellings.
- 2.8 A key part of developing schemes will be to deliver homes that meet the identified needs of the local community.

3. Delivery models

- 3.1 In broad terms there are 3 options for the Council to enable the development of new build affordable housing:
 - Housing Revenue Account – properties would be developed, and financed via the HRA;
 - Registered Providers (Registered Social Landlords) – land would be sold/gifted to RPs for affordable housing development;

- Housing Delivery Vehicle – a separate body would be established to develop the properties using assets/financing via the Council's General Fund.

The following are the key advantages and disadvantages of each option:

	Advantages	Disadvantages
HRA	<p>Properties sustain/grow the Council's HRA stock</p> <p>Could provide an additional income stream for the HRA service (Access Selby) which could be used sustain and/or provide additional services to HRA tenants</p> <p>The Council has full control over the assets/tenancies</p>	<p>Limitations in types of properties that can be developed and retained long term due to risk of Right to Buy (elderly/disabled accommodation is exempt)</p> <p>Volume of development limited by the 'Debt Cap' applied to the HRA (currently circa £5m headroom)</p>
RP	<p>The Council would have 'nomination rights' through the Choice Based Lettings scheme</p> <p>RPs already established and operating within the district</p>	<p>Completely independent of the Council</p> <p>Increasing RP stock rather than our own</p> <p>Properties would be managed by the RP and would therefore not support our existing HRA service</p>
HDV	<p>Financing subject to Prudential Borrowing regime so no 'Debt Cap' (but must be affordable)</p> <p>Properties would not be eligible for 'Right to Buy' although would still be subject to 'Right to Acquire'¹, if funded by the HCA</p> <p>Potential for additional properties to be managed by the Council to allow shared overheads and make HRA more sustainable.</p>	<p>Independent of Council (although Council representation on the Board)</p> <p>Limitations on control of assets/tenancies (but with nomination rights as RP above)</p>

¹ Right to Acquire applies to tenants of registered providers – it is similar to Right to Buy but the available discounts (between £9k and £16k) are not as high as under the Right to Buy scheme – see <https://www.gov.uk/right-to-acquire-buying-housing-association-home/overview>.

- 3.2 It is clear from the disadvantages of HRA development that there are limitations with this route, although depending on identified housing need and the type of properties developed (elderly/disabled accommodation) it could still provide a useful alternative and make use of the borrowing headroom available within the HRA.
- 3.3 The Registered Provider route has the advantage of ready experience and a possible early start, as some funding may be available in the current programme. But this limits the control the Council has over development and although it increases affordable stock within the district, it provides no benefit to the Council in terms of helping to sustain our own housing service.
- 3.4 The creation of an HDV provides an alternative opportunity to develop properties without the constraints of the HRA, rather than using the traditional RP route. This option could be used to provide stock that can be retained within the charitable social housing sector, whilst supporting the on-going sustainability of the Council's HRA through shared overhead costs.
- 3.5 Clearly there are advantages and disadvantages for both the HRA and HDV options and the most appropriate route would need to be considered on the merits of the individual schemes.
- 3.6 The remainder of this report will consider the HDV option in more detail and explore the practical issues that will need to be considered if the Council is to support this model.

4. Establishing an HDV

- 4.1 The Council's primary objective for the establishment of a new delivery vehicle is to create a model that maximises the financial benefits to increase delivery of affordable homes. It is intended to work in partnership with the private sector not compete with it.
- 4.2 In order to understand the implications of establishing an HDV, the project team commissioned specialist legal advice through Trowers and Hamlins (a national legal firm with extensive experience in this field). The advice is attached at **Appendix A** to this report.

Form of Corporate Body

- 4.3 The types of organisation that are available to the Council include:
- Company limited by guarantee
 - Industrial and provident society
 - Limited liability partnership
 - Charitable incorporated organisation
 - Company limited by shares

- 4.4 There are advantages and disadvantages to each form of corporate body and a combination of structures could ultimately be used by the Council. Section 3 of the legal advice describes the key features of each main model.
- 4.5 The legal advice concludes that a company limited by guarantee is the most appropriate form of governance model given the objectives of the project. Members of the company do not hold shares, but instead each member undertakes to pay a nominal figure (usually £1) if the company becomes insolvent. This model is frequently used for social housing activities as it is not associated with profit making in the same way that companies limited by shares are.
- 4.6 The question of charitable status is also a matter for consideration. Again there are advantages and disadvantages but essentially the decision is a commercial one – weighing up the advantages (no corporation tax, relief from stamp duty) against the disadvantages (independence and restrictions on asset disposals).
- 4.7 Given the intended operation of the HDV (primarily to develop affordable homes on land transferred from the Council at less than market value) and the desire to maximise the financial benefits, it is recommended that the HDV attains charitable status.
- 4.8 The legal advice also concludes that registration with the HCA as a registered provider is likely to be advantageous as this could give access to HCA funding, potentially improving the financial viability of developments.
- 4.9 In summary the establishment of a charitable company limited by guarantee (and registered with the HCA) would enable housing development to be funded via the Council's General Fund and provide tax and other funding benefits for the charity, which in turn would allow additional house building within the district.
- 4.10 Councillors will be aware of Arms Length Management Organisations (ALMOs) – these are simply wholly owned local authority companies. Such companies are set up to manage local authority owned housing stock and can be used as a vehicle for new build. ALMO's provide flexibility over use of surpluses and disposal of assets but as they are in LA ownership there are restrictions on external trading (known as the Teckal exemption²).
- 4.11 Given the objectives of this project a charitable company is considered to be the most appropriate, however, should the Council wish to pursue

² Teckal exemption restricts external trading of a wholly owned Local Authority company to 10% of its total trading.

the ALMO option with regard to managing its own stock then this could be considered at a later date alongside the model recommended in this report.

- 4.12 The possible objects of the HDV are included at Appendix 1 within the legal advice. These objectives have been previously accepted by the Charity Commissioners and should the Council approve the establishment of the HDV, then Trowers and Hamlins will be instructed to draw up the Articles of Association for approval by the Executive.

Board membership structure

- 4.13 For the HDV to achieve charitable status it needs to have a board that is independent from Council control. Legal advice suggests a board of between 5 and 7 directors of which a minority proportion would be nominated by the Council and a majority proportion would have no connection with the Council (or its tenants). For a board of 5 for example, we could expect 2 Council nominated directors and 3 independent directors.

Suggested membership structure

- 4.14 Members of a company limited by guarantee undertake to pay a nominal figure (usually £1) in the event of insolvency on the part of the company.
- 4.15 Legal advice recommends that company membership to be identical to board membership, which significantly eases administration of the HDV.

Should the HDV be a registered provider?

- 4.16 This is recommended as the key benefits associated with registering with the HCA, are access to funding and obtaining the necessary consents from the Secretary of State for the transfer of land from the Council to the HDV.
- 4.17 There are limitations associated with registration however, for example there are limits on rents levels and annual increases and HCA consent is needed before a registered provider can dispose of social housing dwellings.

Finance, Funding and Resources

- 4.18 Financial viability and sustainability will be crucial to the success of the HDV. In simple terms the costs of housing development and the running costs of the HDV will be met from the rental income of the dwellings, although up front development costs are expected to require some combination of grant (s106 receipts or potentially HCA funding), borrowing, or in some cases, asset sales (subject to the rules

governing charities). It must be noted that additional receipts from Right to Buy sales (as defined in the new Right to Buy regime) can not be used to fund assets outside of the HRA.

- 4.19 A key benefit of development via an HDV as opposed to the Council's HRA is the debt cap on the HRA. That said, borrowing via the Council's General Fund would be subject to the Prudential Code and the Council would be required to have regard to its financial commitments [to companies in which it has an interest] when establishing affordability and ensure compliance with the Council's Prudential Limits. In reality this is likely to mean a review and increase of both the Authorised and Operational Limits for borrowing.
- 4.20 In order for the HDV to function it will need staffing resources, although initially these are expected to be on a part-time basis. The main purpose of the HDV will be to deliver new build housing and therefore expertise in the commissioning of such projects will be crucial. Subject to recruiting the right individual, it is suggested that a part time 'Managing/Development' Director post be established although in the first instance it is anticipated that support will be commissioned from another partner charity.
- 4.21 As (and if) the scale of development projects increase, there may also be the potential to share a post with the Council (Access Selby) to support new build development within the HRA. Other staffing resources would be commissioned from Access Selby or other partners as required and there may even be the potential for voluntary support to be established through the Council's Employer Sponsored Volunteering Scheme.
- 4.22 In order to avoid high overheads for the HDV (particularly in its formative years) it is envisaged that the design and specialist input required for the projects would form part of the project commission and would be delivered through the developers.

Local authority controls

- 4.23 The Council will be able to exert controls over the developments undertaken by the HDV to ensure appropriate 'return' on its 'investment' of land and/or borrowing. Typically these will be:
- The type and size of housing to be developed;
 - The development timescales;
 - Design/quality assurance;
 - Covenants on land where appropriate;
 - Overage agreements where applicable;
 - Option/pre-emption agreements;
 - Loan agreements where applicable.

- 4.24 These controls are likely to be specific to individual projects and legal advice will be sought on a project by project basis.

State aid

- 4.25 Provision of financial assistance to the HDV, including the transfer of sites at an under value would on the face of it, constitute state aid. However, there is an exemption in relation to the provision of social housing which would apply in the circumstances recommended in this report. The issue of state aid would need to be kept under review and legal advice would be sought as necessary.

5. The New Build Process

- 5.1 An overview of the development process is presented at **Appendix B**. Essentially developments would be delivered as a result of the Council gifting land to the HDV (subject to approvals and the necessary consents which are covered under sections 12 and 13 of the attached legal advice).
- 5.2 In order to gift land to the HDV the Council would need to identify development sites (and potentially existing dwellings) suitable and available for transfer. Surplus land has been identified as part of the work on the Council's Asset Management Strategy and further work is needed to establish viability of particular sites. As a first stage to this work a list of potential sites is set out at **Appendix C**. There is also the potential for the Council or HDV to acquire new land for affordable housing development (subject to business case).
- 5.3 The HDV would procure new build schemes from private developers (potentially via framework contracts also available to the Council for new build within the HRA) and would fund the schemes via the Council's Prudential Borrowing powers, potential s106 receipts and/or HCA grant.
- 5.4 The letting of a framework contract would allow a number of suppliers to be 'pre-qualified' to reduce the tendering process and allow close working relationships to be built up with a selected number of developers. Such relationships will also enable added 'spin-off' benefits – for example the potential for local apprenticeship schemes to support the Council's jobs work strand.

6. Property management and lettings

- 6.1 It is assumed that the management and lettings of the HDV's stock would be undertaken by Access Selby, although the award of this work would be subject to tender. Such an arrangement would enable economies of scale, the sharing of overheads and cost efficiencies for

the benefit of tenants and sustaining the viability of the Council's HRA, which in turn supports the Council as a whole.

- 6.2 The HDV would require its own allocations policies and any nomination rights agreed between the Council and HDV would have to be in accordance with its charitable status.
- 6.3 The HDV would have its own rent policy and should it become registered with the HCA then its rents would be limited to 'Affordable Rents' (i.e. 80% of market rents), which are currently higher than the Council's own rents.
- 6.4 It is expected that rent modelling and whole life cost forecasts will form part of the business cases for individual schemes.
- 6.5 Detailed work on the necessary policies would follow as part of the implementation phase of this project.

7. Other property acquisitions

- 7.1 As well as new build development it also expected that the HDV will acquire existing dwellings – this may be through private sales/leases or small scale transfers of void (empty) Council dwellings.
- 7.2 Acquisitions would again be subject to business case but it is envisaged that there could be a role for the HDV to play in helping to bring empty properties within the district, back into use.
- 7.3 A successful model working elsewhere in the country sees the HDV investing in the necessary repairs to bring properties up to the required standard in return for a term lease which provides an agreed return on investment for the HDV. There are also cases where the lease is of such a length that a return for the owner can also be achieved.
- 7.4 The transfer of empty Council dwellings to the HDV could also be considered subject to the necessary consents and again a viable business case. Such transfers may for example, be appropriate in circumstances where there is a high need for affordable housing but properties are at risk from Right to Buy and there is no potential for localised replacement. Alternatively there may be 'hard to let' accommodation that could be redeveloped by the HDV.

8. Stakeholder Engagement/Communications strategy

- 8.1 Stakeholder engagement is crucial to the ultimate success of any project. A stakeholder mapping exercise has been carried out and an engagement/communications plan has been developed (**Appendix D**).

- 8.2 With the rising cost of adult social care and the expected cuts to public sector funding, the need for suitable accommodation to allow people to live independently in their homes for as long as possible is crucial. The Council is a member of the North Yorkshire Strategic Housing Partnership and a joint approach with partners such as North Yorkshire County Council will be a key issue.

9. Risk Management

- 9.1 A project risk register, which includes an assessment of the likelihood and impact of each identified risk and their mitigating actions, is attached at **Appendix E**.
- 9.2 In terms of risk to the Council, the recommended approach is considered low risk – the Council will be in control of the schemes put forward for development and each scheme will be subject to an individual business case.
- 9.3 The on-going growth of the HDV (in terms of its property portfolio) is likely to be wholly dependent upon support from the Council and therefore any perceived risks associated with Board independence are not expected to be of significant concern.
- 9.4 There is a risk that the management of the HDV's properties will not be awarded to Access Selby but given Access Selby's existing infrastructure and presence within the district it is anticipated that they will be able to put forward a competitive bid.

10. Budget implications

- 10.1 A budget of £30k has been approved from the 'Programme for Growth' to support the feasibility/set up stage of this project. The set up costs including the legal advice, communications, company registration fees etc can be accommodated within this budget.
- 10.2 Looking ahead it is expected that the on-going running costs of the HDV will be kept to a minimum but it would be reasonable to assume an on-going cost of up to £40k p.a. to cover the resource input required support project development and to sustain the HDV's governance arrangements. However, we would be looking for costs to be covered from future rental income streams.

11. Conclusions

- 11.1 There is a need for additional affordable housing within Selby District and the Council is considering its options for delivering new build developments.

- 11.2 There is an on-going risk to the Council's HRA due to potential Right-to Buy and therefore a solution which seeks to replace, protect and add to the district's affordable housing stock in the most cost effective way is being sought.
- 11.3 There are a number of options to deliver new build affordable homes, including developing within the HRA and working with existing registered providers but there are limitations.
- 11.4 The creation of a Housing Delivery Vehicle in the form of a company limited by guarantee; registered as a charity; and registered with the Homes and Communities Agency, provides a solution which maximises the financial benefits for new build schemes and in appropriate circumstances, provides an opportunity to transfer empty Council dwellings into the charitable housing sector.
- 11.5 Such a solution brings with it the requirement for an independent Board but the risk to the Council is considered low given the need for Council support (in the form of land transfers and financing) to sustain and grow the charity.

12. Recommendations

- 12.1 It is recommended that Council:
- i) Approve the establishment of a charitable company limited by guarantee;
 - ii) Approve the Council as a member of that company and appoint up to 3 Selby District Council members as directors on the Board;
 - iii) Delegate authority to the Executive to approve the governance documents of the company.

dated 15 January 2013

Selby District Council

Report on new build delivery options for affordable/social housing

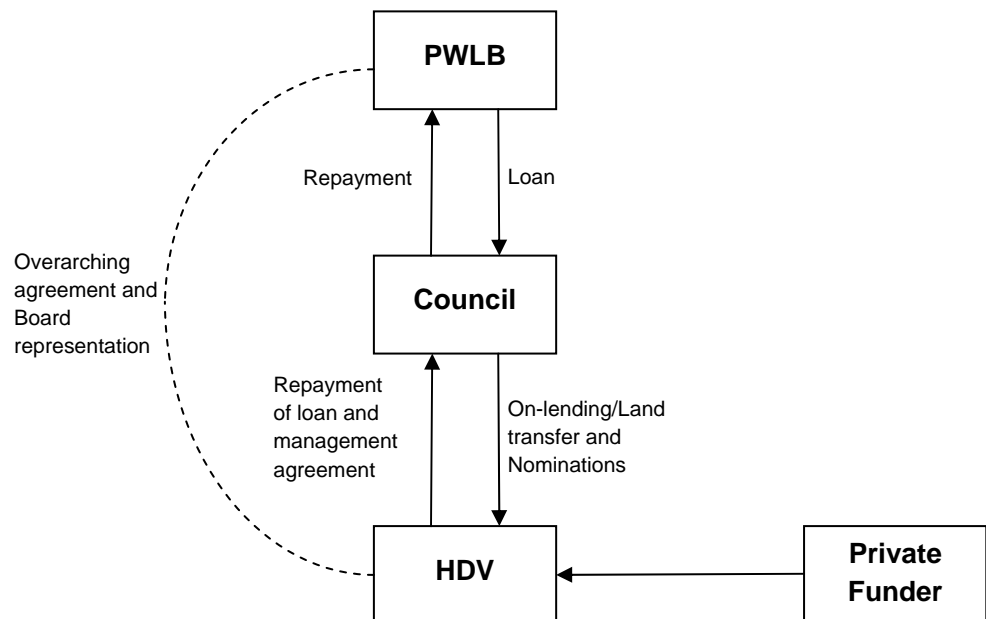
Trowers & Hamlins LLP
3 Bunhill Row
London
EC1Y 8YZ
t +44 (0)20 7423 8000
f +44 (0)20 7423 8001
www.trowers.com

1

Selby District Council - new build delivery options for affordable/social housing

1 Introduction and summary of the Housing Delivery Vehicle model

- 1.1 Trowers & Hamlins have been instructed by Selby District Council (the **Council**) to advise upon the option of setting up a Housing Delivery Vehicle (**HDV**) to deliver new affordable/social housing.
- 1.2 We understand that the Council currently owns around 3,150 units but there would be pressure on revenue if the stock level fell significantly below 3,000 units. This is a particular challenge for the Council since the increase in the Right to Buy (**RTB**) discount and the Council therefore wish to explore options for the delivery of Social Housing that (amongst other issues) protects the Council from the loss of stock under the RTB.
- 1.3 There are alternative models for delivering new build social housing, including direct Council new build (i.e. within the Council's Housing Revenue Account (**HRA**)) and disposal of sites to a registered provider (**RP**) for development (with the Council retaining nomination rights). Clearly there are advantages associated with these two options: direct Council new build would deliver "true" new Council-owned properties and with the second option, RPs have a great deal of knowledge and expertise in housing development. However, if the Council carried out the development and owned the units the RTB would apply and any borrowing by the Council to finance the development would be subject to the HRA debt cap. On the other hand, if an RP carried out the development the Council would lose some degree of control over the development.
- 1.4 We have therefore been asked to advise upon the suitability of a legal structure involving an HDV and the governance arrangements for the HDV.
- 1.5 Effectively an HDV model is structured by the establishment of a separate corporate vehicle which would receive land (and potentially funding) from the Council and which would then develop that land for letting as social housing. Land could be transferred on a freehold or leasehold basis. It would be envisaged that day to day management of the units owned by the HDV would be undertaken by the Council, so keeping the 'core' business of the HRA sustainable. This is shown in diagrammatic form below:



- 1.6 They key advantages of an HDV delivery model are summarised as
- 1.6.1 The tenants of the HDV would be assured tenants rather than secure tenants; that means that the tenants do not have the RTB¹
 - 1.6.2 The borrowing of the HDV is outside of the constraints of the HRA debt cap, so releasing HRA resources for other priorities.
- 1.7 Reference is made in this report to the ALMO model which has been used for a number of years by some local authorities to deliver housing management services (and in a number of cases new build social housing); a summary of the ALMO model is set out in Appendix 2 to this report)
- 2 **Executive Summary**
- 2.1 This report explores
- 2.1.1 The potential corporate form for the HDV;
 - 2.1.2 Board and membership structures for the HDV;
 - 2.1.3 Whether the HDV should be charitable and/or register as a Registered Provider (RP) with the Homes and Communities Agency (and the implications of those decisions);
 - 2.1.4 Sources of funding for the HDV;
 - 2.1.5 The implications of local authority law on the HDV and the legal framework for disposing of land to the HDV and for providing financial assistance to it;
 - 2.1.6 The likely contractual documentation that would be necessary for the Council and HDV to enter into.
- 2.2 The report concludes that
- 2.2.1 A Company Limited by Guarantee is likely to be the most appropriate form of corporate body for the HDV;
 - 2.2.2 It is likely to be beneficial that the HDV is charitable;
 - 2.2.3 On the assumption the HDV is charitable that the HDV's board is established with a strong Council influence but which stops short of absolute control;
 - 2.2.4 it is likely to prove to be advantageous to register the HDV as an RP with the HCA;
 - 2.2.5 funding could be procured by the Council from the Public Works Loan Board (PWLB) and on-lent to the HDV;
 - 2.2.6 there are potentially applicable general consents that would permit the implementation of the HDV structure without a requirement to seek specific

¹ If HCA grant is received for any development by the HDV then tenants of properties funded by HCA grant would have the (significantly less generous) Right to Acquire

consents from the Secretary of State, but that the restrictions associated with the use of those consents need to be carefully thought through.

3 Forms of corporate body

We have set out below a description of the different corporate forms which the HDV could take. The HDV could be set up as either a company limited by guarantee, an industrial and provident society, a limited liability partnership, a charitable incorporated organisation or a company limited by shares.

3.1 Company limited by guarantee

Companies limited by guarantee are frequently used for social housing activities as they are not associated with profit-making in the same way companies limited by shares are. They can be charitable or non-charitable. A company limited by guarantee is a company where the general members do not hold shares, but instead each member undertakes to pay a nominal figure (usually £1) in the event of the company becoming insolvent. A company limited by guarantee can have any number of members and different categories of members with different voting rights. Changing from a single member company to one with many members is also simple.

3.2 Industrial and provident society

An alternative would be to set up the HDV as an industrial and provident society (an **IPS**). An IPS can be charitable or non-charitable but must be not-for-profit and exist for community benefit. The key advantage of an IPS over a company limited by guarantee used to be that charitable IPSs did not need to register with the Charity Commission. However, this has now changed so that charitable IPSs which are not RPs do need to register with the Charity Commission also.

Nevertheless some people like the IPS model. It is a legal form specifically intended for community benefit organisations. They are registered with the Financial Services Authority rather than Companies House and their regulation is rather more benign than that of a company. An IPS has shareholders although the shares carry no financial benefit and it is a good model if the HDV wanted to consider wider community ownership. However, it should be noted that an IPS needs to have at least three shareholders.

An IPS would be required to receive confirmation of its charitable status from HMRC if it is to rely on the charity tax exemption. Because of the relatively small size of HMRC's charities unit, this can be a time consuming and inconvenient process (it is often difficult to obtain updates from HMRC as to when the application will be dealt with once it has been submitted) and it is also worth noting that in the case of novel applications (as the HDV would be) HMRC often refer the matter to the Charity Commission in any event.

3.3 Limited liability partnership

A limited liability partnership (**LLP**) cannot be a charity as it has to be set up with a view to profit. It is particularly attractive for schemes where on-going profits (which would be subject to corporate tax) are anticipated - for example, complex, lengthy schemes involving both residential and commercial development. An LLP requires a minimum of two partners so the Council could not have a 100% interest.

The principal advantage of using an LLP over a limited company is the way in which it is treated from a tax perspective. The LLP is treated for tax purposes as a traditional partnership, and members are also treated as traditional partners. Therefore, unlike a limited company, it is tax transparent and any trade, profession or business carried on by an LLP with a view to profit will be treated as if the LLP were a conventional partnership. Since the tax status of the partners determines how much tax is paid, the Council's share of any profits should be corporation tax free.

However, it should be noted that the use of an LLP for this type of vehicle would raise a vires (powers) issue. The Council cannot set up the HDV as an LLP solely for the reason of tax efficiency: there must also be a commercial reason for using an LLP. Given that there are other corporate models (such as a charitable company) which would also provide tax efficiencies without raising vires issues for the Council, and because the nature of an HDV is not really a "joint venture" which an LLP envisages, we would suggest that an LLP model is not the most appropriate model for this particular project.

3.4 **Charitable incorporated organisation**

The Charities Act 2006 (now absorbed into the Charities Act 2011) introduced a new legal form designed specifically for charities; the charitable incorporated organisation (**CIO**). Company law is drafted primarily with the commercial sector in mind. This is particularly clear in areas such as corporate governance and in the assumption that members have a financial interest in the company. For charities there is also dual registration, regulation and reporting by and to both Companies House and the Charity Commission. The CIO corporate form is designed to simplify all of this.

Although the provisions relating to CIOs in the Charities Act 2011 are in force, they have not yet been implemented. This means that CIOs are not currently available. However, the Charity Commission's indicative timetable anticipates that new charities with an annual income of over £5,000 can be registered as CIOs with them some time between January and March 2013.

Like a company, the CIO will have a constitution and have a separate legal identity from its trustees and members. Again like a limited company, a CIO's trustees and members will benefit from reduced personal liability. A CIO is required to have one or more members.

As CIOs are regulated by charity law and not company law this means they only need to register with the Charity Commission and not with Companies House. CIOs only need to prepare an annual report and an annual return under the Charities Act 2011 and do not need to prepare a director's report or annual return for Companies House.

A CIO's constitution must be in the form of one of the model constitutions or as near to that form as a circumstances permit. The Charity Commission has produced two forms of model constitutions. One is for organisations where the voting members are the trustees (the foundation model) and the second is for organisations with voting members other than trustees (the association model).

Despite the apparent benefits of the CIO there is some concern that there could be limited transparency. This is on the basis that the Charity Commission currently does not plan to provide an accessible register of charges and debentures similar to that provided by Companies House. There could be an impact on a CIO's ability to issue debentures and borrow money against the security of their property. Consequently the CIO structure is

significantly less attractive to the Council than the tried and tested company limited by guarantee model.

3.5 **Company limited by shares**

A company limited by shares is the type of company with which most people are familiar. The corporate structure is tried and tested and is underpinned by an established body of law and practice. Typically, however, a company limited by shares would not be a charity; a company limited by guarantee (which has members rather than shareholders) would normally be used if a company is to be charitable. A company limited by shares would be appropriate if the HDV now or in the future is likely to want to trade for profit and possibly bring in equity funding from third parties. Note that (as would be the case for any corporate body) trading with parties other than the Council could impact on the ability of that company to rely on the *Teckal* exemption from the EU procurement regime (see paragraph 14.3 below).

In terms of overall control and also financial and tax planning, the structure of a limited company provides considerable flexibility through the creation of different types of share and loan capital. It is also simply to admit equity shareholders if the Council wished to make the HDV a joint venture vehicle.

4 **Charitable status**

We would recommend that the Council give early consideration as to whether the HDV should be charitable or not. The prime reason why the HDV should be charitable is that a charity is exempt from Corporation Tax on any surpluses generated by it derived from charitable activities (otherwise the HDV would be subject to Corporation Tax on all surpluses- something that the Council of course does not need to consider). There is also an exemption in relation to Stamp Duty Land Tax (**SDLT**). The decision is a pure commercial one; the disadvantages (in particular the "asset lock" and the burden of registration and ongoing administration) simply need to be weighted up against potential liabilities to Corporation Tax and SDLT. There is no "right or wrong" answer to this; whilst most local authorities that we have worked with have decided to mitigate tax losses by establishing their HDV (howsoever called) as a charity, others have decided that the "price" of paying a small amount of Corporation Tax is worthwhile either to retain closer control over their HDV or to retain flexibility going forward.

In order to qualify for charitable status, the HDV will need to demonstrate that its tenants will be charitable beneficiaries and that its objects are charitable. Since it is to be set up to provide social housing and it is anticipated that its tenants would be those on low incomes, which would preclude them from purchasing or renting on the open market, it is likely to be able to qualify.

4.1 **Advantages and disadvantages of charitable status**

The main advantages of charitable status are:

- (a) No corporation tax would be payable on income derived from charitable activities.

- (b) Relief from Stamp Duty Land Tax (**SDLT**) on any land acquired by it (NB there are similar but more limited reliefs available were the HDV to register as a Registered Provider- see paragraph 8 below.
- (c) Charities are not generally associated with profit-making or risk-taking, which may give confidence to tenants, elected members and other stakeholders.

The main (often perceived) disadvantages of charitable status are:

- (a) A charitable body could not be controlled by the Council as charities must be independent from the state. The Charity Commission would want to be assured that it has a level of independence before it would accept it as charitable

Perhaps the most relevant issue here will be impact on the board of the HDV. This is explored in paragraph 6 below.

The HDV would be required to formally adopt its own allocations policies in respect of properties which it owns. In particular, the HDV's trustees will need to adopt a policy which ensures that dwellings are let to appropriate charitable beneficiaries (this is normally demonstrated by reference to "industry standard" income criteria and/or the applicants being on full or partial housing benefit).

In addition, any nomination rights agreed between the HDV and the Council will need to accord with the published Charity Commission guidance in relation to social housing and, in particular, the HDV will require the contractual ability to reject a nominee in the event that the nominee is ineligible to be housed under the terms of the HDV's allocations policy – this is a common situation and is unlikely to cause any difficulties to the Council in practice.

A further requirement of the Charity Commission is that in order to demonstrate the independence of the HDV, the HDV would be required to adopt a robust policy to deal with potential conflicts of interest relating to board members who are members of the Council.

Although the HDV will need to be operationally independent from the Council, it should be noted that certain "controls" over the HDV's activities can be exerted through the conveyancing documents. For example, the use of the properties and any disposals of the same could be restricted.

- (b) Although it may be of limited relevance to the plans for the HDV in the immediate future, charitable status would also limit the HDV's ability in the future to undertake development for market rent or outright sale. In such circumstances a second (non-charitable) company would be needed or a developer would have to carry out the private sale on any volume, but it is worth noting that in limited circumstances it is possible for a charity to legitimately undertake development for outright sale

where the profit on those sales was necessary to cross-subsidise the affordable elements of that (or a linked) scheme.

- (c) It should be noted that, once the HDV was constituted as a charity, it would not be able to amend its constitution so as to cease to be charitable.

Equally, any assets or proceeds of sale held by a charity cannot subsequently be transferred to a non-charitable organisation. Therefore, if the HDV ceased to exist it would not be possible to transfer the HDV's assets directly to the Council. This is important because some Councils are considering their HDV to be an investment vehicle which could subsequently be sold (or from which individual dwellings could be sold) to generate a capital receipt for the benefit of their general fund; this would not be possible were the HDV to be a charity.

However, it may be possible to draft the constitution of the HDV to allow the Council a (limited) degree of control over the transfer. For example, the constitution could provide that the Council will select (either now or at the time of the HDV being wound up) a charity with similar objects to which the HDV's assets are to be transferred. In effect this means that the Council could set up a new charity to receive the assets. As a temporary measure the Council may be permitted to hold the assets on behalf of the charity. Any of the above steps would need to be agreed with the Charity Commission and would have the potential to delay the registration process.

- (d) The Charity Commission has wide-ranging powers to conduct enquiries into the affairs of registered charities.

- 4.2 If the HDV is set up as a company limited by guarantee it will need to register with the Charity Commission. This is a relatively detailed process, which normally takes between three to six months depending upon the complexity of the organisation. In order to minimise any uncertainty as to whether the HDV's objects are capable of being registered as charitable, we recommend establishing the HDV with conventional housing objects (see **Appendix 1**). This should make the registration process more straightforward and consequently the time period for registration is likely to be shorter. Registration with the Charity Commission is not a prerequisite to commence the HDV's activities, but clearly the HDV is only certain of its status as a charity once its registration is confirmed.

5 **Conclusion on the form of corporate body**

- 5.1 Subject to financial and tax modelling confirming the benefits of charitable status from a tax efficiency perspective and therefore the Council concluding that the HDV should be charitable, we would suggest that either a company limited by guarantee or an IPS would be appropriate. The other corporate forms are either not capable of being charitable or, in the case of a CIO, there are concerns arising from the fact that it is not tried and tested.
- 5.2 The choice between a company limited by guarantee and an IPS is a narrow one. As set out above, the advantage that a charitable IPS does not have to register with the Charity Commission has disappeared for non-RPs (an advantage negated by the need to obtain

HMRC clearance in any event). An IPS takes longer to register than a company and costs about £1,500 to register against £100 for a company.

- 5.3 For these reasons we would suggest a company limited by guarantee would be the more appropriate structure to be chosen.
- 5.4 Assuming that registration is sought as a company limited by guarantee, registration of the HDV with Companies House is relatively straightforward. A Council decision to be a member of the HDV would be required. Details of the first members and directors of the HDV would also need to be supplied to Companies House.
- 5.5 Incorporation is normally complete within one week of the paperwork being completed and, once incorporated, the HDV could proceed to trade, although the taxation advantages of charitable status would not be secured prior to registration with the Charity Commission.
- 5.6 It should also be noted that prior to any "independent" sources of income (during the set-up phase of the HDV), an appropriate contractual indemnity would need to be provided to the HDV by the Council (depending on the nature of the HDV's activities and financial exposure).

6 **Board membership structure**

- 6.1 If (as we suspect) a decision is taken that the HDV should be charitable, then when considering the board composition of the HDV, reference will need to be made to the Charity Commission's publication RR7 (The Independence of Charities from the State) together with the implications of the decision of the Charity Commission in relation to the registration of Trafford Community Leisure Trust and Wigan Leisure and Cultural Trust (which examined the relationship between registered charities and local authorities).
- 6.2 In relation to board size, we would suggest a board comprised of between 5 and 7 directors.
- 6.3 We would suggest that the chair of HDV should be a different individual to the Council's portfolio holder for housing (or similar) to avoid any perceived conflict of interest.
- 6.4 In order to demonstrate to the Charity Commission that there is a suitable degree of independence in decision making between the HDV and the Council, the HDV board should also have a majority of directors who are not connected with the Council. For a board of 5 members we would suggest that 3 of the board members should be independent of the Council or its tenants and the other 2 could be Council nominees.
- 6.5 This does- of course- mean that the HDV is truly at "arms length" from the Council and the ability of the Council to actively control the HDV is lost. Whilst we can build some 'control' solutions into the HDVs constitution the Council do need to appreciate that if the HDV is to be charitable, then there will be an absence of direct control over it. That said, of course, for an HDV whose sole purpose and sole source of funding and land is the Council, it remains probable that its interests will be very closely aligned to those of the Council even where direct constitutional controls are absent.
- 6.6 Clearly if the HDV were not to be charitable then subject to the Council being content that that it was appropriate for the HDV to be a public sector body "on balance sheet" and to there being appropriate arrangements in place to deal with conflicts of interest, the board

of the HDV could be set as the Council saw fit and with significantly greater controls (e.g. as with an ALMO the ability to appoint/remove any or all of the Board).

7 Suggested membership structure

7.1 As set out above, members of a company limited by guarantee do not hold shares in the company but instead each member undertakes to pay a nominal figure (usually £1) in the event of insolvency on the part of the company.

7.2 If the HDV is to be charitable, then the recommended option would be for the membership of the company to be identical to the board membership of the company. This significantly eases the administration of the HDV insofar as this structure would mean having members who are already in regular contact with the organisation (so arranging general meetings should be straightforward and could coincide with board meetings) and who are familiar with the organisation's business and aims.

7.3 As with the board composition, if the HDV were not to be charitable then subject to the Council being content that that it was appropriate for the HDV to be a public sector body "on balance sheet" there is greater flexibility and indeed the Council could be the sole member (again following the ALMO model).

8 Should the HDV be registered as an RP?

8.1 We would recommend that active consideration is given as to whether the HDV should be registered as an RP.

8.2 Becoming an RP may be important to the HDV for the purpose of complying with a Secretary of State general consent for the transfer of land from the Council to the HDV under Section 25 of the Local Government Act 1988 (see paragraph 13) and also in order to be eligible for HCA grant in the future.

8.3 The process for registering with the HCA consists of demonstrating that an organisation is legally capable of being registered and that it meets the HCA's published Regulatory Standards. To be legally capable of being registered, a non-profit provider must provide or intend to provide social housing in England. The HDV would satisfy this requirement as it intends to be the landlord of social housing. It should be noted that there is no minimum amount of accommodation. Once the HCA is satisfied that this (very minimal) level of qualification is met, it will proceed to check that certain requirements in respect of the applicant's constitution have been met and assess the extent to which an applicant meets its 7 published Regulatory Standards. These are classified as Economic Standards (Governance and Financial Viability; Value for Money; and Rent) and Consumer Standards (Tenant Involvement and Empowerment; Home (relating to the Decent Homes Standard and quality of accommodation generally); Tenancy; and Neighbourhood and Community).

8.4 In respect of the HCA's constitutional requirements, the HDV's articles of association would need to include "the provision of social housing" within the objects clause and expressly provide that the HDV is a not-for-profit organisation and will not distribute its assets to members.

8.5 With regard to the Governance and Financial Viability Standard, the requirements as to financial viability must be met from the point of registration. An applicant may be

registered if it can demonstrate a reasonable path to meeting the governance requirements within a reasonable timescale, which will include adopting a code of governance (there is a standard NHF code of governance). As part of the governance assessment the HCA will want the applicant to explain the management arrangements which it has (or will have) in place to see whether these provide a reasonable indication of capacity to meet the other Regulatory Standards. On the assumption that stock owned by the HDV would be managed by the Council this will not be problematic.

- 8.6 RPs are required to restrict the rent they charge tenants in their social housing by reference to the HCA's Rent Standard, which limits both the rents which can be charged and the annual increases which can be applied. The Rent Standard currently requires RPs to charge rents in accordance with the "target rents" regime, which limits annual rent increases to RPI plus 0.5% plus £2 until the target rent level is reached and RPI plus 0.5% thereafter (with the flexibility to set rents at up to plus 5% of the target rent). We would note that properties let at intermediate rent levels are excluded from the Rent Standard so the HDV could, under the current Regulatory Standards, designate some of its properties as intermediate rented if the HDVs business plan required this.
- 8.7 A further and significant restriction on the business of an RP is the requirement for the consent of the HCA before the RP can dispose of, or grant security over, any social housing dwellings (although obtaining this consent is not usually a complicated matter). Given our understanding of the long term aspirations of the HDV to own social housing for long term lettings (as compared to some of the more "speculative" projects alluded to elsewhere in this report) we do not see this disposal restriction to be problematic.
- 8.8 A recent and perhaps decisive issue is that an RPs tenants remain eligible for Housing Benefit rather than Local Housing Allowance (which the HDVs tenants would otherwise receive if it were not an RP). Given the intention of the coalition government (in the autumn statement) to restrict the increase of Local Housing Allowance to a flat 1% this will have a significant bearing on the HDVs business plan.
- 8.9 RPs enjoy a specific exemption from SDLT on transfers of land from local authorities. This may be beneficial if a decision is made for the HDV not to be charitable.

9 Finance/funding

- 9.1 The HDV will need funding in order to meet its running costs and the costs of housing development. We understand that it may receive some Section 106 commuted sums and possibly some additional funding by way of Council prudential borrowing on-lent to the HDV.
- 9.2 We have not seen the relevant Section 106 agreement(s) but the Council will need to ensure that it has the ability under the agreement(s) as local planning authority to allocate the Section 106 funds to the HDV for the proposed development.
- 9.3 Any prudential borrowing by the Council which is on-lent to the HDV would be **general fund** borrowing provided that the freehold or a lease for at least 21 years (with no break clause in the lease before that point) of the development site is transferred to the HDV.²

² This is because, for HRA property to be taken out of the HRA, the Council must dispose of it and if the disposal is a leasehold one it has to be a long lease (see Section 74(5)(b) of the Local Government and Housing Act 1989 and Section 115 of the Housing Act 1985).

The effect of the prudential borrowing on the Council's balance sheet would need to be signed off as complying with the Prudential Code by the Council's s151 officer.

9.4 For completeness, we would mention here that

9.4.1 the Council could not forward its retained RTB receipts under its retention agreement with the Department for Communities and Local Government (**CLG**) to any body in which the Council holds a controlling interest. If the HDV is set up with the governance structure suggested in this report then this will not be an issue but it should be borne in mind as the governance arrangements for the HDV are finalised.

9.4.2 the current HCA Affordable Homes Programme Framework for 2011-2015 takes into account any borrowing undertaken by a public sector body in carrying out its value for money assessment. This would include:

- (a) any borrowing by the HDV if it were set up as a public sector body; and
- (b) any prudential borrowing by the Council which is on-lent to the HDV.

Even if the HDV is a private sector body (i.e. if it were not accounted for on the Council's balance sheet), any borrowing by the Council to be on-lent to the HDV would still increase the public sector debt and would therefore be taken into account in the HCA's current value for money assessment. This may mean that – assuming there were any further HCA grant available for the period from 2011 to 2015 – the HDV might be at a disadvantage in seeking grant if the scheme is to be part funded through prudential borrowing.

Once the HDV is established and has developed its initial schemes it may then need to consider whether any new affordable housing delivery proposal includes borrowing and on-lending from the Council if it is to demonstrate that it is competitive in terms of value for money to the HCA. Of course a judgement can be made at the time of any grant application in the light of any HCA policy at that stage.

10 **Local authority controls**

10.1 The Local Government Act 2003 changed the complex legal framework applying to local authority controlled and influenced companies and replaced them with a more flexible regime.

10.2 Paragraph 33 of the Prudential Code requires that when an "authority has an interest in companies or other similar related entities, the authority needs to have regard to its financial commitments and obligations to those companies/entities" when establishing affordability. Essentially it will be necessary for the Council to take into consideration its commitments in any new vehicle when reviewing its affordability commitments under the Prudential Code and it will be the responsibility of the Council's Section 151 officer to ensure that the Council remains within the limits of its prudential indicators.

10.3 Although the controls which formerly applied under Part V of the Local Government and Housing Act 1989 no longer apply, the proprietary controls set out in the Local Authority Companies Order 1995 continue to apply. If the suggested membership structure is

adopted, over 20% of the membership voting rights would be held by the Council and therefore the current proprietary controls set out in the Local Authorities Companies Order 1995 would apply. These include:

- (a) Identification of the Council on the HDV's documentation;
- (b) Disqualified Councillors barred from directorship;
- (c) A ban on party political publicity;
- (d) Provision of information to auditors;
- (e) Provision of information to Councillors;
- (f) Audit Commission approval of the company's auditors.

11 **Contractual documentation**

11.1 Although the detail is beyond the scope of this report, the Council is likely to require a series of controls over the development to be undertaken by the HDV to ensure that the Council receives the appropriate "outturn" from its "investment" of land and/or borrowing. These controls would be in addition to those controls which the Council is able to exercise in its capacity as planning authority and are also in addition to the nominations agreement which is likely to be put in place between the HDV and the Council. Careful consideration will need to be given to any potential control mechanisms however as many of these mechanisms would be unlikely to find favour with any private lenders to the HDV (as they would be concerned to recover their own investments) and these controls could have the effect of making the HDV a public sector body. We are able, of course, to advise on the appropriate balance.

11.2 We would anticipate that these controls would come in three principal areas. The first set of controls would be imposed by the Council in a contractual arrangement between the Council and the HDV, which would set out in relatively detailed terms the "output" required in return for the "supply" of land. This would include details of the type of housing to be developed, the development timescales and could extend to design/quality assurances. The Council would no doubt wish to consider whether or not these contractual commitments could be further protected by imposing some of these conditions in the land transfer itself.

11.3 Secondly, there are a variety of conveyancing mechanisms which can be used to protect the Council's interests: these are likely to include covenants on the land (for example, such that the land can only be used for social housing), overage agreements (so that if the HDV makes any "developer profits" from the land then the Council has the right to demand a share of such profit), together with option/pre-emption agreements (for example, allowing for the Council to repurchase the land at an agreed price if certain events are triggered, such as a failure to commence development in a specified timescale).

11.4 Thirdly, we would anticipate that there will be a formal loan agreement between the Council and the HDV to document any on-lending of prudential borrowing from the Council and we would anticipate that the loan documentation would include certain conditions and consequences were the HDV to default on its loan repayments.

12 Vires

12.1 The general power of competence – Section 1 of the Localism Act 2011

The principal Council powers to participate in new housing development through the HDV are the general power of competence under Section 1 of the Localism Act 2011 (the **2011 Act**) and the ancillary power of local authorities under Section 111 of the Local Government Act 1972.

Section 1(1) of the 2011 Act provides that, "A local authority has power to do anything that individuals generally may do". It therefore allows the Council to undertake a wide range of activities including (but not limited to) incurring expenditure, providing financial assistance to any person, entering into arrangements or agreements with any person and providing staff, goods and services. However, it should be noted that Sections 2(1) and 2(2) restrict the exercise of this power by providing that if there are any statutory limitations or restrictions or there is another local authority power that is subject to restrictions, which were either in force before Section 1 of the 2011 Act or they are contained in an Act passed before the parliamentary session in which the 2011 Act was passed, then those limitations and restrictions will also apply to the general power. So, for example, if an existing power provides that the Council cannot act without Secretary of State consent, the Council could not use the general power of competence to circumvent the need for such consent.

Further, there are limits on when a local authority can use the general power of competence to charge for its services (Section 3) and when a local authority can do things for a commercial purpose (Section 4). Under Section 4 of the 2011 Act a local authority can only do things for a commercial purpose if they are things which the authority may do other than for a commercial purpose. In addition, an authority must carry out any commercial purpose through a company (which is consistent with the Council's existing power to trade under Sections 93 to 95 of the Local Government Act 2003).

The Council needs to be mindful therefore of the constraints on the powers it is using, particularly with regard to disposals of land, the provision of funding to third parties or any development which might include market rent or sale.

12.2 Ancillary power – Section 111 of the Local Government Act 1972

Whilst the general power of competence in Section 1 of the 2011 Act is a sufficient power of first resort for the Council to participate in the development project and enter into the relevant project documents (subject to the consent requirements referred to in paragraph 13 below), an additional (secondary) power is available under Section 111 of the Local Government Act 1972, which is as follows:

(1) *Without prejudice to any other powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or right) which is calculated to facilitate, or is conducive or incidental to the discharge of any of their functions;*

(2) ...;

- (3) *A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.*

12.3 **Disposal of HRA land – Section 32 of the Housing Act 1985**

If the Council is to transfer any HRA land to the HDV, its power to do so is contained in Section 32 of the Housing Act 1985 (the **1985 Act**). The use of the Section 32 power is conditional upon obtaining the prior consent of the Secretary of State. This power and the requirement for consent is discussed further at paragraph 13.1.

12.4 **Disposal of general fund land – Section 123 of the Local Government Act 1972**

The Council's power to transfer general fund land to the HDV is contained in Section 123 of the Local Government Act 1972 (the **1972 Act**). The use of this power is also conditional upon obtaining the prior consent of the Secretary of State in certain circumstances. This is considered further at paragraph 13.2 below.

12.5 **Financial assistance – Section 24 of the Local Government Act 1988**

Where the Council provides financial assistance to the HDV by granting or loaning it money, guaranteeing its obligations, or transferring land to the HDV at an undervalue, and the financial assistance is in connection with the provision of housing accommodation to be let by the HDV, the Council must use its power under Section 24 of the Local Government Act 1988 (the **1988 Act**) to do so. Again, the exercise of this power is subject to Secretary of State consent (see paragraph 13.3).

It should be noted that this power would not apply to financial assistance provided by the Council to the HDV in connection with land to be developed by the HDV for shared ownership (or outright sale). Reliance would therefore need to be placed on the general power of competence if the HDV were to carry out such activities.

13 **Consent issues**

13.1 **Consent for the disposal of land held for housing purposes**

The relevant power to dispose of HRA land to the HDV is contained in Section 32 of the 1985 Act. However such land cannot be disposed of without the consent of the Secretary of State. Section 33 of the 1985 Act allows the Council to impose "such covenants and conditions as they think fit" on the disposal.

There are some general consents, which are currently contained in "The General Housing Consents 2012". One of these general consents (A3.2) provides that "a local authority may dispose of vacant land". This is likely to apply to the disposal of sites from the Council to the HDV even if the disposal is at an undervalue. If this general consent applies then the specific consent of the Secretary of State under Section 32 would not need to be sought. However, Section 25 of the 1988 Act will need to be borne in mind (see paragraph 13.3).

13.2 **Consent for the disposal of non-housing land**

If the Council is to transfer any general fund land to the HDV this needs to be done in accordance with Section 123 of the 1972 Act. If the land is to be disposed of for consideration that is the best that can reasonably be obtained no consent is required for the disposal. If the land is to be disposed for consideration that is less than the best that can reasonably be obtained the Secretary of State's consent is required but a general consent (the Local Government Act 1972: general disposal consent 2003) will apply if the purpose of the disposal is likely to contribute to the promotion or improvement of economic, social or environmental well-being in respect of the whole or part of the Council's area or of any people in the area and the difference between the unrestricted value of the land to be disposed of and the consideration for the disposal does not exceed £2 million. However, as for HRA land, if the land is to be transferred to the HDV for less than full market value, the Council will also need to comply with Section 25 of the 1988 Act.

13.3 **Consent for the provision of financial assistance for privately let housing accommodation**

Section 24 of the 1988 Act gives the Council the power to provide any person with financial assistance for the purposes of, or in connection with, the acquisition, construction, conversion, rehabilitation, improvement, maintenance or management (whether by that person or by another) of any property which is or is intended to be privately let as housing accommodation. However, the Council is only able to exercise its power to give financial assistance under Section 24 if it obtains the Secretary of State's consent pursuant to the following Section 25.

The Secretary of State has issued general consents in respect of Section 25 – "The General Consents under Section 25 of the Local Government Act 1988 (Local Authority Assistance for Privately Let Housing) 2010". General Consent C provides that, "A local authority may provide any person with financial assistance (other than the disposal of an interest in land or property) ... for the purposes of or in connection with the matters mentioned in Section 24(1) of the 1988 Act". Therefore this general consent could apply where the Council grants its general fund resources or on-lends its prudential borrowing to the HDV, or guarantees the HDV's obligations for the purpose of the HDV developing, maintaining and managing housing for letting.

However, General Consent C would not apply to the disposal of land to the HDV at an undervalue. The only general consent which could potentially apply appears to be General Consent A – but this would require the HDV to register as an RP and would also require a third party manager of the developed units.

General Consent A applies to disposals of vacant land to an RP for development as housing accommodation where the disposal is freehold or a lease of at least 99 years, the development is completed within three years of disposal, the completed units are let by the RP on a periodic tenancy or on certain other permitted bases specified in the consent, the Council is not entitled under any arrangement on or before disposal to manage or maintain the completed units, and the amount of the financial assistance given to the RP by the Council under this general consent does not exceed £10 million in the same financial year.

If none of the Section 25 general consents applies then the Council would need to obtain specific Section 25 consent for the transfer of land to the HDV at an undervalue.

13.4 **Conclusion regarding consents**

Under the current Section 25 general consents the Council could provide the HDV with financial assistance (such as a grant or a loan). If the HDV were to become an RP, the transfer land to the HDV at an undervalue might also fall within a Section 25 general consent.

If specific consent is required to be sought under section 25 and/or section 32 then it will be necessary to formulate a strong 'business case' to put to CLG as to why development should be undertaken via the HDV rather than in the Council's HRA; a rationale based on the negation of the RTB is unlikely to prove persuasive by itself. We can assist in the formulation of that application if the general consent route does not apply.

14 **EU procurement and state aid**

14.1 With regard to the transfer of land by the Council to the HDV, if it is a pure disposal of land then it would not be subject to advertisement under the EU procurement rules – this is known as the "land exemption". However, if the agreement between the Council and the HDV imposes detailed and specific requirements of the Council on the HDV as to what is to be developed on the site, it is likely to be reviewed as a "public works contract" rather than a pure land disposal. We can assist in ensuring that the documentation between the Council and the HDV is capable of falling within the land exemption.

14.2 It likely that the HDV itself would also be a "contracting authority" and, as such, would itself be subject to the EU procurement rules. This means that the HDV would need to procure any construction and housing management which it wishes to outsource in accordance with EU procurement rules. This – critically- includes the contract that is anticipated to be let to the Council in relation to housing management. If the potential sites to be developed are relatively small in size (at least in the short/medium term), it may be that the value of the works/services contract(s) fall below the thresholds set out in the EU procurement rules, in which case a full competitive procurement process would not be required. However, the Council would need to keep these thresholds in mind and we can advise further on the procurement requirements if required. You may also conclude that the risk of challenge is small and that even if a competitive exercise was run, that the Council would be in an extremely strong position to win that work.

14.3 There are potential means of applying the so called *Teckal* exemption to the procurement of housing management services but to fall firmly within the exemption (or more specifically an interpretation of it) the HDV would need to be wholly owned by it or else an ALMO style housing management vehicle would need to be jointly owned by the Council and the HDV. We can of course advise in more detail on procurement issues as the model develops. The *Teckal* exemption can also usefully apply to the provision of services by an HDV back to the Council but again the HDV would need to be wholly owned by the Council in that instance).

14.4 The provision of financial assistance to the HDV (by way of grant or loan) or the transfer of sites by the Council to the HDV at an undervalue would, on the face of it, constitute state aid. However, there is a relevant exemption for the provision of social housing so for so long as the HDV undertakes social housing, state aid is not a concern.

15 **HDV as a recipient of existing stock**

- 15.1 There is no reason why the HDV should not receive existing stock - either from existing Registered Providers (who might be seeking to sell stock in the District) or from the Council itself and the funding structure anticipated by paragraph 9.3 could readily be utilised for such acquisitions.
- 15.2 Any stock acquired by the HDV from the Council would need to be void at the time of transfer from the Council to the HDV as otherwise the statutory ballot requirements of the s283 of the Housing and Regeneration Act 2008 would apply. Void transfers do not require tenant ballots. Once transferred the (new) tenants of the stock would not have the RTB.
- 15.3 Transfer of void stock would still require consent under s24 (if sold at an undervalue) and s32 so the considerations outlined in paragraphs 12 and 13 above would apply equally to such a transfer. We can advise on specific considerations and potential applications of general consents if the Council were minded to explore this option in due course.
- 15.4 If the properties were to be purchased by the HDV from the Council at a "real" value it would seem to us that it would be more rational for the funding of the acquisition of properties from the Council by the HDV to be funded by way of external private finance.
- 16 **HDV role in a commissioning structure**
- 16.1 We note that the Council delivers its services through Access Selby, which from a legal perspective is currently part of the Council but has the potential to become a separate legal entity from which the Council will commission its services. Under such a commissioning structure the HDV could sit as the new build arm. If the recommendations in this report are followed then the HDV's structure would not need amending following any change to the Council's service delivery structure; the HDV could maintain the same links as it would initially have with the Council.
- 16.2 We anticipate in this report that the HDV would be set up to carry out new build (either on Council land which is transferred to it or potentially on third party land which it acquires) but it could also have the ability to acquire existing properties from RPs where they wish to rationalise their stock and sell stock owned in the Selby District.
- 16.3 As an aside, and beyond the scope of this report, it is worth noting that a number of Councils are now establishing housing management subsidiaries in order to give an effective divide between the Council's strategic and operational housing roles; we can advise further on these models if required.

Trowers & Hamlins LLP
13 December 2012

Appendix 1 - Possible objects of the HDV

Set out below are broad charitable objects suitable for a housing charity and which have previously been registered with the Charity Commission. These objects are also suitable for registration with the Homes and Communities Agency (**HCA**) as an RP, should the Council wish to set up the HDV as an RP. If the Council wishes to achieve as quick a registration as possible, the Council may wish to omit the optional objects set out in square brackets and in italics below (otherwise as part of the Charity Commission's registration process you will be required to demonstrate active plans to fulfil those objects):

- to provide housing, including social housing or hostels or other residential accommodation and any associated amenities for persons in necessitous circumstances upon terms appropriate to their means;
- to provide for aged, disabled (whether mentally or physically) or chronically sick persons in need thereof, houses or hostels and any other residential accommodation and any associated amenities especially designed or adapted to meet the disabilities and requirements of such persons;
- to provide services, advice or assistance upon terms appropriate to their means to aged, disabled (whether mentally or physically) or chronically sick persons or other persons in necessitous circumstances in need thereof and to provide any associated amenities specially designed or adapted to meet those disabilities and requirements of such persons;
- *[to provide recreation or other facilities in the interest of social welfare with the object of improving the conditions of life for the residents of the local authority area in which the company owns or manages housing stock;]*
- *[to relieve poverty amongst the residents of the local authority areas in which the company owns or manages housing stock;]*
- *[to advance education, training or retraining, particularly amongst unemployed people and providing unemployed people with work experience;]*
- *[to maintain, improve or provide public amenities for the public benefit in the interests of regeneration in areas of social and economic deprivation in which the company owns or manages housing stock.]*

Appendix 2 – Summary of the ALMO model

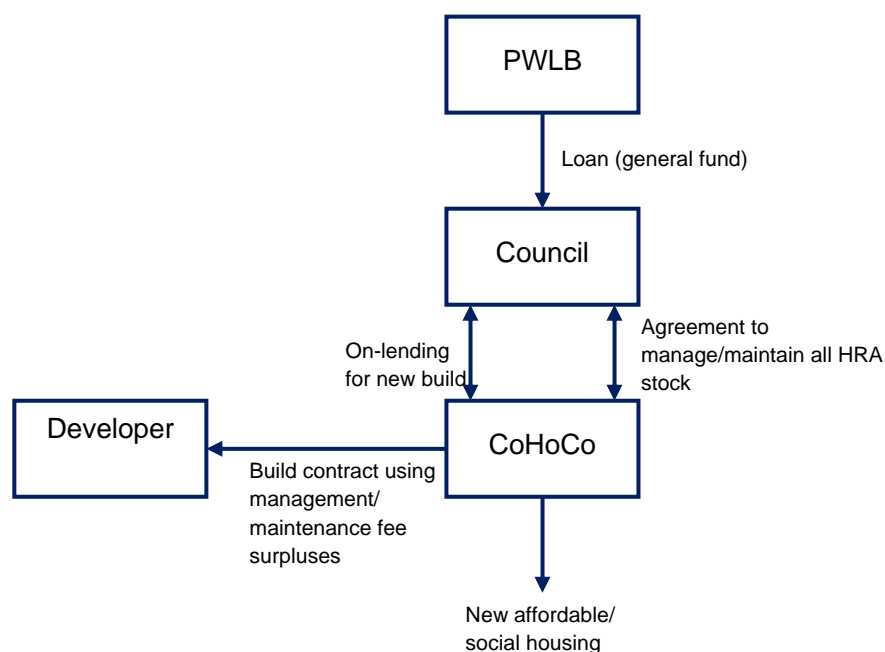
An ALMO means a Arms Length Management Company, which is a wholly-owned subsidiary established by the Council with the purpose of delivering housing management and maintenance services to the existing housing stock. Whilst wholly owned, the ALMO is directed by a non-executive board conventionally comprised of local authority nominees (usually elected members), tenants and local "independent" people.

The ALMO model was initially conceived by the (then) ODPM as a "third" option available for local authorities who wished to access decent homes backlog funding but who did not wish to pursue stock transfer or PFI.

More recently, a number of other local authorities have set up an ALMO (not always "badging" the vehicle as an ALMO) not to access decent homes backlog funding but as a means of separating their strategic housing function from their operational function. Examples include Shropshire, Welwyn Hatfield, Cornwall and a "super" ALMO established by four local authorities in east Kent. Other local authorities are looking to their ALMO to deliver a broader range of housing related functions beyond "pure" housing management.

The CoHoCo model variant

A small number of local authorities are looking at working up the ALMO model to take full advantage of the new self-financing regime to assist councils in maximising the use of their housing rental income to deliver new build supply. This is the so called CoHoCo (Council Housing Company) variant.



Under this model

- The Council sets up a CoHoCo and enters into an Agreement with it for the management/maintenance of all of the HRA stock for an agreed (perhaps fixed) fee (based on the capacity of the Council's HRA). The services could comprise simply housing management

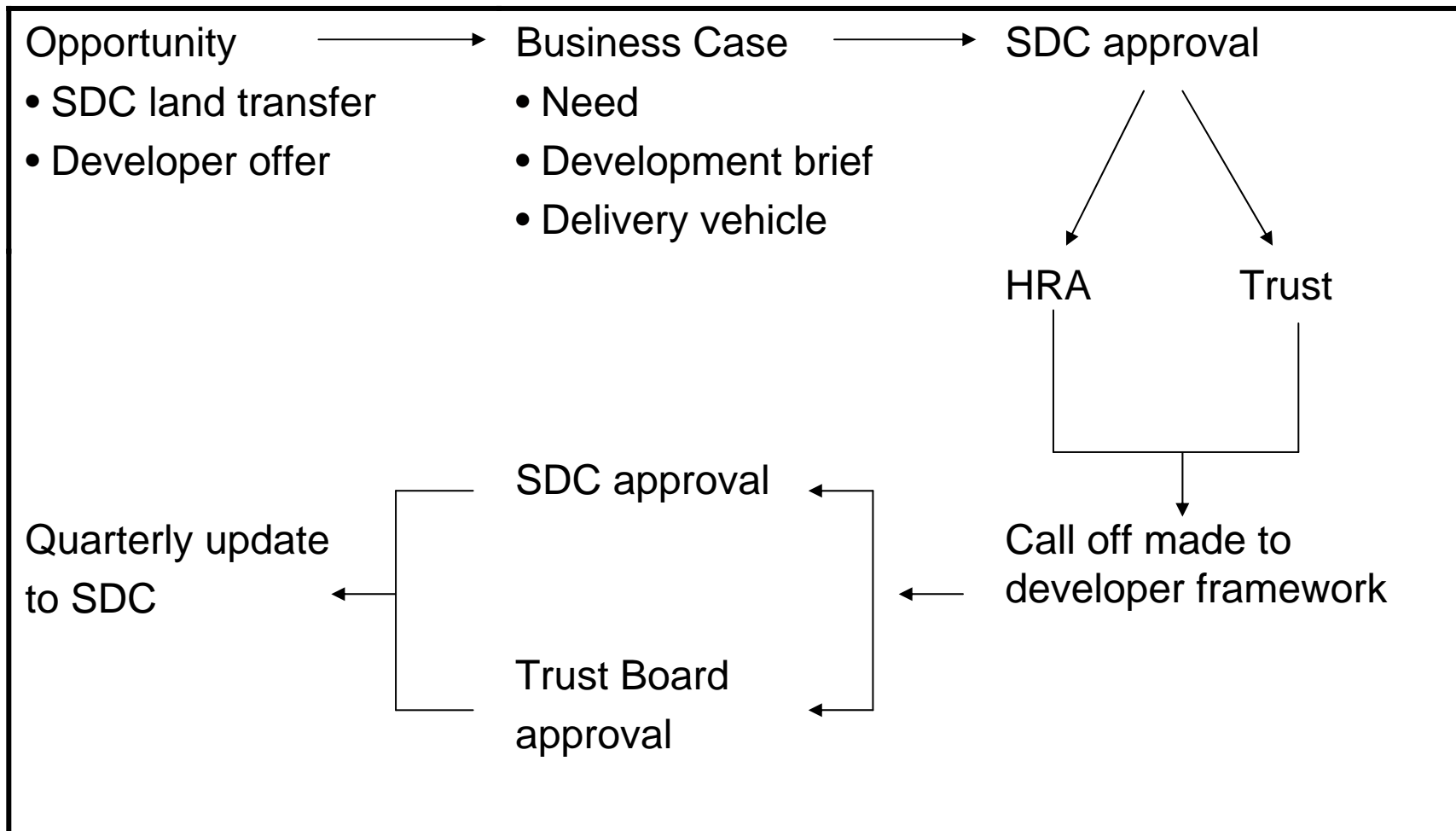
but should ideally extend to repairs and maintenance. This is because the wider the scope of the services the greater the potential benefits of this model (because of the greater scope for efficiency savings).

- The model relies upon the CoHoCo providing the services efficiently in order to generate a surplus (i.e. lower than the agreed fee) which it could then use for new build (which could be additional to development funded through more conventional mechanisms as described in the main body of this report) and which sit outside of the Council's HRA.
- The Council could prudentially borrow and on-lend to the CoHoCo against these (future) surpluses to build new affordable housing owned by the CoHoCo. Since the CoHoCo's fee and its new build housing would be held outside the HRA, any prudential borrowing in respect of the new build development would be general fund borrowing and would therefore not be subject to the debt cap.
- The CoHoCo would manage and maintain the new build housing and use its own rental income from the new units and the surpluses from the Management/Maintenance Agreement to service the prudential borrowing debt.
- If the CoHoCo were to be wholly owned, Tax issues would arise as described in the main body of the report.

Powers and Consents

- The delegation of the Council's housing management functions to an ALMO or CoHoCo would require consent under Section 27 of the 1985 Act from the HCA.
- Prior to the establishment of an ALMO or CoHoCo, the Council would need to consult its secure tenants regarding the proposed changes to housing management under Section 105 of the 1985 Act.
- If the CoHoCo is to develop new housing on land which is currently held by the Council, the Council will need to consider its powers and the Secretary of State consent requirements to transfer land to the CoHoCo as described in the main body of this report.

Development process



ASSET REGISTER

Usage / Other Information**OPERATIONAL LAND & BUILDINGS****Garages**

Garages x 483	Rented by members of the public
---------------	---------------------------------

Corporate Buildings & Depots

Barlby Depot, Barlby Road, Selby	Workshop, Outside & Store
----------------------------------	---------------------------

Leisure Centres

Profile Gym	Gym and Dance Studio
-------------	----------------------

Community Centres

Northfield, Womersley	Community Centre - Vacant
-----------------------	---------------------------

Car Parks

Joseph Street, Tadcaster	Car Park
Portholme Road	Car Park
Church View, Sherburn in Elmet	Car Park

NON-OPERATIONAL LAND & BUILDINGS**Corporate Buildings & Depots**

43 Kirkgate, Tadcaster	3 Floors of accommodation - vacant
------------------------	------------------------------------

Cafés

Park Street, Selby	Café, Kitchen, Preparation Room etc
--------------------	-------------------------------------

Miscellaneous Land

Rear of Council Houses, Chapel Haddlesey	Existing Agricultural Tenancy
St Wilfreds Close, Brayton, Selby	Existing Agricultural Tenancy
Land Craven Garth, Beal	
Industrial Land, The Vivars, Selby	Vacant
Flaxley Road Land, Allotment Gdns, Selby (999 year lease)	Presently Unoccupied
Field Lane, West Haddlesey	
Marsh Lane, Marsh Croft, Brotherton	Allotment Gardens & Works
Land at 27 Flaxley Road, Selby	Unknown

Housing Trust - Communications and engagement

1. Stakeholder mapping

Code

Levels of influence (1 to 5)

1 – No influence on process

5 – Potentially a strong influence on process

Levels of impact (1 to 5)

1 – No impact on process

5 – Potentially a strong impact on process

Role we want them to play (1 to 5 as follows)

1 – No active role

2 – Need to know to inform their dealings with us, but no action necessary

3 – To act as advocates for us in their dealings with others, helping to build wider support

4 – To make decisions/policies that will support the process

5 – To lead this work either within the community or with others

A higher score denotes a more important stakeholder in terms of the delivery of the project.

Stakeholder Scores

		Influence	Impact	Role	TOTAL	Methods of Communication etc
Internal	Executive	5	5	5	15	Weekly Despatch at key decision points Reports to Exec Programme Board
	All other councillors	4	5	4	13	Weekly Despatch at key decision points Reports to Exec Programme Board updates Report to full Council at key decision point(s)
Our people	Residents (all)	1	2	2	5	CEFs Citizenlink Local media Website CCC Social media
	Media (local)	4	4	3	11	Proactive media Reactive responses as requested Social media
	Media (trade)	4	4	4	12	Proactive media Reactive responses as requested Social media
	Existing tenants	1	2	2	5	As per residents, plus Open Door newsletter
Interested parties	Homes and Communities Agency	5	5	5	15	Invite to project meetings
	Housing developers	5	5	5	15	Host information event (Potential meet the buyer event) Written marketing material to key stakeholders
	Housing associations	1	2	2	5	Written marketing material to key stakeholders
	Education (training opportunities within development)	3	3	4	10	Direct engagement through existing contact Written marketing material to key education sector stakeholders

	Third sector partners	2	2	4	8	Direct engagement through existing contact Written marketing material to key education sector stakeholders
Local government with potential interest	NYCC	4	4	4	12	Senior management link already exists
	NY district and borough councils	3	3	3	9	Through existing links: CEX network
	LGYH	2	2	3	8	Through existing links: CEX network
	Parish councils	2	2	2	6	Media releases
	Selby Town Council	2	2	2	6	Media releases
	Tadcaster Town Council	2	2	2	6	Media releases
	IDeA	1	1	3	5	Trade press contacts
	LGA	1	1	3	5	Trade press contacts
Political	MP	2	2	4	8	Leader brief through existing links
	Auditors	5	5	4	14	Existing update meetings

Housing Trust Project Risk Register - January 2013

Ref	Risk	Likelihood	Impact	Risk Score	Mitigating actions	Traffic light
1	Social housing schemes are not viable	5	5	25	Individual schemes will be subject to business case. Engage SDC/HCA early to enable bids for funds where available.	High risk - active management required
2	HDV does not achieve registration with HCA	4	5	20	Engage HCA in the feasibility stage and incorporate learning into the developing business case	High risk - active management required
3	Unable to recruit directors with the necessary skills and experience to work with the Council and support development of the new organisation	4	5	20	Establish roles and responsibilities for board directors/members and undertake robust recruitment campaign	High risk - active management required
4	Project not supported by Council	3	5	15	Develop a robust business case which clearly demonstrates the costs/benefits & advantages/disadvantages	High risk - active management required
5	Key stakeholders not supportive of the project	4	3	12	Develop stakeholder engagement strategy	High risk - active management required
6	Operational structure of the HDV is not sustainable	3	4	12	Seek advice/support for charity partner to benefit from lessons learned. Secure operational budget for 3 years to allow Trust to become established	High risk - active management required
7	HDV objectives do not align/support the Council's objectives	2	5	10	Council will establish the HDV and will therefore influence its objectives - review Corporate plan and HRA Business Plan to ensure strategic fit	Medium risk - active management required but plans in place to mitigate
8	HDV governance does not comply with legal requirements	2	5	10	Specialist legal advice commissioned and received	Medium risk - active management required but plans in place to mitigate
9	HDV corporate structure does not maximise financial benefits	2	5	10	Specialist financial advice commissioned	Medium risk - active management required but plans in place to mitigate

Ref	Risk	Likelihood	Impact	Risk Score	Mitigating actions	Traffic light
10	HDV does not achieve registration with Charity Commissioners	2	5	10	Articles established which comply with CC requirements - specialist legal advice required	Medium risk - active management required but plans in place to mitigate
11	Council will have limited control over new build development	3	3	9	Developments put forward for approval by the Council. Bids assessed against agreed criteria to establish most appropriate development route (e.g. HRA or HDV)	Medium risk - active management required but plans in place to mitigate
12	Insufficient land identified to enable new build development	3	3	9	Commission review of assets by Access Selby	Medium risk - active management required but plans in place to mitigate
13	Housing management via Access Selby not compliant with procurement rules	3	3	9	Specialist legal advice commissioned	Medium risk - active management required but plans in place to mitigate
14	Company becomes insolvent	1	4	4	No action - Developments would be subject to robust business case and properties would be managed by Access Selby to agree performance targets	Low risk - Risk acknowledged and either plans in place to mitigate or no further action required
15	Future of Selby District Council is uncertain due to continuing funding cuts	2	2	4	No action - Assets held by the charity (HDV) would be retained by the charity - Council would cease to be a member but other successor Council(s) could become members	Low risk - Risk acknowledged and either plans in place to mitigate or no further action required

Risk assessment	
Likelihood	Impact
1 Very low	1 Negligable
2 Low	2 Marginal
3 Significant	3 Medium
4 High	4 Critical
5 Very high	5 Catastrophic

Key Stakeholders	Interest H/M/L	Influence H/M/L
Councillors	H	H
HCA	H	H
Auditors	H	M
Tenants	M	M
Developers	M	M
College (training via development projects)	M	M
NYCC	M	M
Staff	M	L
CAB and other voluntary sector organisations	M	L
RSLs	M	L

Potential Comms Strategy

Project updates through programme Board/Exec
Engage early - potential to invite them to project meetings?

Quarterly meetings already available to provide progress updates. Potential to engage on corporate finance issues

Engage tenant scrutiny panel and via tenants' newsletter

Meet the buyer' event(s)

Direct engagement

Direct engagement

Project updates via staff newsletter as part of wider programme for growth

Briefings/newsletter

Briefings/newsletter