

## APPENDIX 1 – STRUCTURE OVERVIEW

This appendix deals with the following considerations under the [Preferred Option]:

1. Structure and operation (**Section 1**)
2. Regulatory (**Section 2**)

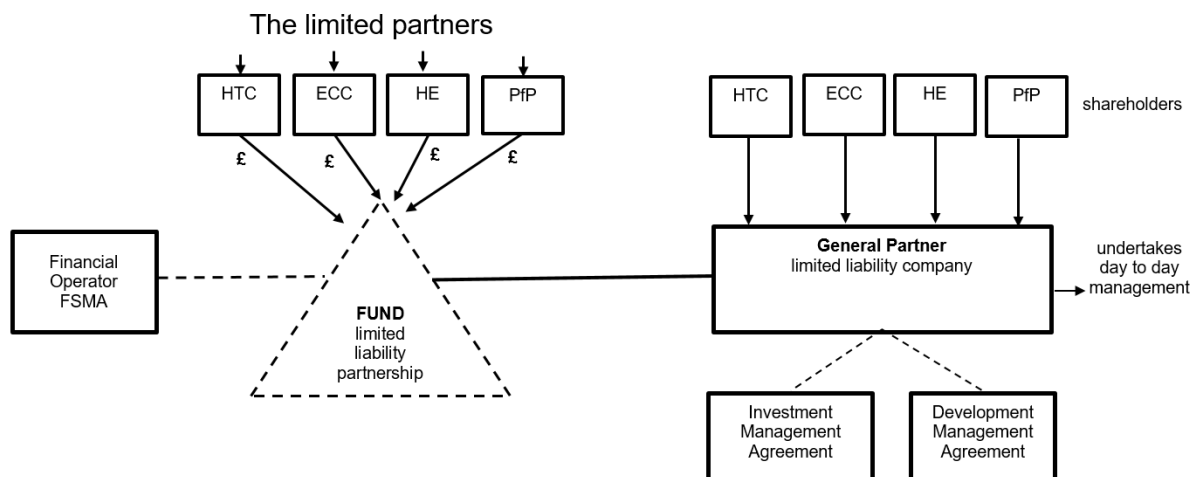
## Section 1 Structure and Operation

### Overview of Strategic Investment Fund Structure

1. At a high level, it is currently envisaged that the structure would operate as follows:
  - 1.1 HC, ECC, HE and PfP (the "**Parties**") would create a strategic investment fund ("**Fund**") using pooled funds received from the Parties; [definitions to be considered against main body of BC]
  - 1.2 the Fund would invest in schemes delivered by SPVs in conjunction with the Parties, invest in [land acquisition, infrastructure or other schemes run by the Parties and/or third parties in Harlow. The Fund may also procure a contractor and/or developer to undertake early activities] [Fund Activities] [in accordance with its Objectives];
  - 1.3 An investment plan would be agreed by the Parties and adopted by the Fund setting out the investment strategy. The Fund would have the ability to invest in schemes with a variety of risk profiles as per the investment plan;
  - 1.4 The Parties would invest cash in the Fund [in the agreed proportions]/[in proportion to their shareholdings<sup>1</sup>] however it is also possible to contribute land/assets in lieu of cash investment;
  - 1.5 Funding contributed by the Parties would be pooled and leveraged to access additional funding for investment in the schemes;
  - 1.6 Fund management and Development management services would be procured in order to progress the Fund Activities (see paragraphs 3.9 and 3.11 below).
  - 1.7 If required pursuant to the financial regulatory rules, an FCA Operator would be appointed to ensure compliance with financial rules/regulations (see Part 7 of Section 2 below).

### Legal structure for strategic investment fund

#### Proposed structure - Limited Partnership ("LP")



<sup>1</sup> The Parties would be shareholders in the "General Partner"- see paragraph 3 of Section 1 below.

## Legal Entity

- 1.8 The most appropriate investment vehicle for the Fund is likely to be a limited partnership ("LP") (subject to the vires considerations set out in Part 3 of Section 2 below).
- 1.9 A limited partnership is not a legal entity but a relationship that exists between the partners<sup>2</sup>. A partnership agreement would regulate the relationship between each of the Parties and the Fund.
2. LPs are one of the most common fund structures used which is generally due to the fact that:
  - 2.1.1 they are tax transparent (avoiding an extra layer of tax on the fund vehicle itself- see Part 8 of Section 2 below);
  - 2.1.2 investors who are limited partners are only exposed to third party liabilities to the extent of their capital contribution when certain conditions are complied with ("**Limited Partners**").
  - 2.1.3 they are attractive to the market allowing for future investment by third parties.

## Limited Partners/General Partner in the Fund

3. At a high level the legal structure is envisaged to operate as follows:
  - 3.1 LP's consist of one or more "limited partners" and a "general partner". Limited Partners are essentially silent investors in relation to the Fund's day to day management as in order to enjoy continued limited liability status, they cannot take part in the management of the partnership or bind the partnership. They will simply contribute monies/assets to the Fund in consideration for an appropriate return. In this structure, HC, ECC, HE and PfP would act as the "limited partners";
  - 3.2 The LP would also need to appoint a "general partner" who takes responsibility for all liabilities of the LP and has the ability to contract on behalf of the LP ("**General Partner**").

## Governance

- 3.3 In the context of this wholly owned structure and in order to allow the Parties strategic control over the activities of the LP, each of the Parties would be a shareholder of the General Partner.
- 3.4 Certain matters would be reserved back for unanimous approval of the shareholders under a shareholders' agreement (ie. the Parties would take these decisions, it is assumed under delegated authority through some form of shareholder executive). These matters will be subject to development but would be likely to include:
  - 3.4.1 Investment strategy and variations to the same;
  - 3.4.2 Variation of the partnership agreement;
  - 3.4.3 Changes to the nature of the partnership business; and
  - 3.4.4 Partners joining and leaving the partnership.
- 3.5 Unless otherwise delegated, day to day decisions of the General Partner would be taken the Board of the General Partner (through directors appointed by the Parties). These decisions would be made by General Partner by the directors in accordance with their statutory duties.
- 3.6 The following key matters will need to be agreed prior to agreement of the fund;
  - 3.6.1 the number of directors appointed by each of the Parties. [It is currently envisaged that this will accord broadly with the respective shareholdings in the General Partner];

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<sup>2</sup> The Limited Partnership Act 1907 and the Partnerships Act 1890 set out the legal framework that applies to limited partnerships.

- 3.6.2 whether board decisions are made by collective or majority voting;
  - 3.6.3 the appropriate quorum requirements for board meetings;
  - 3.6.4 the frequency of board meetings; and
  - 3.6.5 the list of matters reserved to the board.
- 3.7 The matters reserved to the board are likely to include (amongst others):
- 3.7.1 appointments of consultants under a financial threshold;
  - 3.7.2 activities in accordance with the investment plan which have not been delegated to the Fund manager/development manager.
- 3.8 It is envisaged that the Board of the General Partner would have supervisory role over the activities of the investment manager and development manager to whom most of the day to day Fund Activities would be delegated.

### **Resourcing**

#### **Investment manager**

- 3.9 The investment manager would be responsible for implementing the Fund's investment plan. The Investment plan referred to above would be developed and agreed by Parties to include the following key matters:
- 3.9.1 the objectives of the Fund;
  - 3.9.2 IRR requirements;
  - 3.9.3 funding structure;
  - 3.9.4 risk profile; and
  - 3.9.5 ethical considerations.

#### **FCA Operator**

- 3.10 In the event that the Fund is deemed to be a collective investment scheme [or a collective investment undertaking] an authorised FCA Operator would need to be appointed by the Fund in order to deal with compliance requirements with the relevant financial rules and regulations (as further explored in Part 7 of Section 2 below).

#### **Development Manager**

- 3.11 The Development Manager appointed by the Fund would manage and coordinate development management activity required by the Fund including
- 3.11.1 land assembly activities;
  - 3.11.2 development of the masterplan;
  - 3.11.3 procuring professional consultants/contractors on behalf of the Fund; and
  - 3.11.4 coordinating development management activity to implement the relevant business plans.

## **Finance**

- 3.12 It is envisaged that the parties will invest cash into the Fund in accordance with the Investment Plan unanimously agreed by the Parties and then updated at various intervals/as required by the Parties.
- 3.13 The Parties would contractually agree in the partnership agreement to act in accordance with the Investment Plan which will set out the financial contributions required from the Parties and proposed return on investment (amongst others).
- 3.14 Monies invested would be in the form of capital/loan capital. Tax and security considerations will drive the optimum approach.

## **Short Term Projects- Downstream arrangements**

- 3.15 This report assumes that the Fund would be a contracting authority for the purposes of the Public Contracts Regulations 2015 and therefore required to comply with the requirements of the EU procurement regime.
- 3.16 The Fund will have the flexibility to engage in the various delivery mechanisms available in terms downstream delivery. For example, the Fund may:
- 3.16.1 fund schemes through debt/equity arrangements (pure investment mechanism);
  - 3.16.2 appoint a contractor to deliver early infrastructure requirements;
  - 3.16.3 enter into development agreements with developers;
  - 3.16.4 enter into joint ventures with JV partners to undertake direct development; or
  - 3.16.5 acquire sites at market value in order to undertake site assembly activities.
- 3.17 The appointment of a developer, a JV partner or a contractor would most likely require an OJEU procurement although there is potential to consider the use of public sector frameworks such as DPP3 subject to eligibility requirements being met.

## **Conflicts**

- 3.18 Where a conflict exists between the Fund's best interests and the interests of one of the Parties, the rules governing how decisions are made by the Board of the General Partner/shareholders of the General Partner will need to be considered and appropriate provisions built into the constitutional documents.
- 3.19 However, there is also the potential for conflicts of interest to arise in the context of subsequent procurements which may be undertaken by the Fund. For example, there is a clear potential for a conflict of interest where PfP has a requirement to bid to deliver works/services in respect of the ultimate solution. Further discussion is required with PfP to establish the position here against their objectives.
- 3.20 However, it is permissible for one of the authorities within the Fund to deliver certain services for the benefits of all the Parties where:
- 3.20.1 these represent and are part of true co-operation/collaboration between the Parties and subject to the conditions of the "Collaboration Exemption" (described below) being met; or
  - 3.20.2 where the services are below the relevant threshold (currently £118,133).

- 3.21 Where certain conditions are met, the services may more correctly be classified as a form of collaboration and therefore benefit from the exemption under regulation 12 of the Regulations (Public contracts between entities within the public sector) (the **Collaboration Exemption**).
- 3.22 The Collaboration Exemption requires that each of the following are satisfied:
- 3.22.1 The contract "establishes or implements a cooperation" between the Parties (Regulation 12(7)(a));
  - 3.22.2 The contract has "the aim of ensuring that public services [which the Parties] have to perform are provided with a view to achieving objectives they have in common" (Regulation 12(7)(a));
  - 3.22.3 The "implementation of the cooperation is governed solely by considerations relating to the public interest" (Regulation 12(7)(b)); and
  - 3.22.4 The Parties perform less than 20% of the activities concerned by the collaboration on the open market (Regulation 12(7)(c))<sup>3</sup>.
- 3.23 It may however be possible for the Parties to acquire assets from the Fund or to negotiate directly with any JV venture procured.

#### **Exit Strategies**

- 3.24 Unless specified conditions are met, limited partners may not draw out or receive back any part of their contribution to the LP during its lifetime. If they do, they become liable for all the debts and obligations of the LP incurred while taking part in management or up to the amount drawn out.
- 3.25 There is however no bar on the Parties transferring their interest in the LP and shareholding in the General Partner to a third party subject to obtaining the consent of the other Partners/Shareholders or in accordance with agreed pre-emption provisions set out in the partnership agreement/shareholders' agreement.
- 3.26 There may be tax/financial regulatory considerations in relation to the transfer of a Party's interest which will need to be considered at the time.
- 3.27 Additionally, any private sector partner will require the Fund to be sector classified to the private sector which will require a restructure.

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<sup>3</sup> For the determination of the percentage of activities referred to in paragraphs (d), the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the relevant legal person or contracting authority with respect to services, supplies and works for the 3 years preceding the contract award shall be taken into consideration

## Section 2- Regulatory

### PART 1

#### PROCUREMENT

#### 1. APPLICABILITY OF PROCUREMENT LAW TO THE PREFERRED MODEL

- 1.1 The public procurement rules set down in the Public Contracts Regulations 2015 ("**PCR**") and supporting case law, make it clear that when works, services or supply contracts awarded by a contracting authority with a value above the specified financial thresholds must be competitively procured using a PCR compliant tender process.
- 1.2 Regulation 2 of the PCR sets out the definition for a "Contracting Authority" as follows "*the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law, and includes central government authorities, but does not include Her Majesty in her private capacity;*"
- 1.3 At this stage, it would be prudent to assume that the Fund would be most likely to be a contracting authority (subject to any procurement exemptions available) and accordingly this note proceeds on this assumption.
- 1.4 The question of contracting authority status will need to be kept under review as the structure and the objectives of the Fund are finalised however based on the above assumption:
- 1.4.1 the creation of the Fund/or investing in the Fund would not itself engage the Regulations on the basis that no public works, services or supplies will be delivered to the Parties.
- 1.4.2 the Fund itself could be set up between the Parties in a short space of time but any works/services required would need to be procured through OJEU/appropriate frameworks (subject to the Fund being deemed to be a contracting authority).
- 1.4.3 as referred to in section 1, the Fund would be able to invest in schemes delivered by SPVs in conjunction with or one more of the Parties, invest in land acquisition, infrastructure or even other schemes run by the Parties/third parties in Harlow. The involvement of the Parties downstream does not give rise to procurement law concerns as long as the Fund's involvement was limited to investment (and therefore did not engage the Regulations).
- 1.4.4 in the event that the Fund seeks to:
- (a) enter into development agreements with a developers;
  - (b) enter into a joint venture with a JV partner to undertake direct development;
  - (c) appoint a contractor to directly develop a site (as is likely to be the case in the context of delivering early elements),

this would most likely require an OJEU procurement although there is potential to consider the use public sector frameworks such as DPP3 to procure a developer/development partner/contractor subject to the relevant eligibility requirements being met.

## STATE AID ANALYSIS

### 1. STATE AID

#### 1.1 Identifying if State Aid is Present

1.2 When assessing whether State aid is present in respect of a project, it is necessary to consider whether Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") is satisfied. Article 107(1) provides as follows:

1.3 *Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.*

1.4 This Article gives rise to the "Four Part Test" for State aid. The Four Part Test is cumulative and State aid will only exist if all four parts of this test are met. For State aid to exist, the following must be satisfied:

1.4.1 Aid is granted by a Member State or through State resources;

1.4.2 To a certain undertaking (carrying out economic activities);

1.4.3 Thereby creating a selective advantage; and

1.4.4 The transfer of resources distorts or has the potential to distort competition and trade between Member States.

1.5 It has been considered below whether various elements of this project will satisfy each element of the Four Part Test. If State aid is to be avoided, it will be important to demonstrate that the investments by the Fund or provision of public sector funding does not confer a selective advantage to the party in which such investment is made.

1.6 If any state funding was found to constitute unlawful State aid, and if discovered by the European Commission or challenged in court, it would be liable to repayment by the recipient of the aid. Unlawful State aid therefore represents a significant commercial risk and is something which should be avoided.

### 2. MARKET ECONOMY INVESTOR PRINCIPLE

2.1 In order to assess whether such an advantage has been conferred, the Market Economy Investor Principle Test ("**MEIP Test**") should be applied to the assessment. The MEIP Test involves an analysis of the commercial rationale of an investment made by a public body. If it can be said that the terms of the investment constitute normal market terms, then the investment will not be deemed to confer an advantage and will not therefore constitute State aid. The MEIP Test therefore requires a hypothetical assessment of the support provided by the public body in question. Would a hypothetical private investor in comparable circumstances have provided such sums or support to the recipient if it were operating under normal market economy conditions?

2.2 The application of the MEIP Test to any given circumstances entails a complex economic assessment and will turn on its own facts. In this case, the MEIP Test will consider what action a reasonable investor would take in the context of investment in a Fund such as this. It is important to note, however, that the MEIP Test should be applied to the overall investment decision by the Parties, rather than individual facets of the investment. Whilst one individual component of the investment, when analysed in isolation, may not seem on the face of it to satisfy the MEIP Test, it may be that there are sufficient commercial incentives elsewhere in the structure which ensure that the overall investment decision is still one which a reasonable private sector investor in comparable circumstances would take.



- 2.3 *Pari passu* investment (namely investment on equal terms and with equal return and risk) with a private sector investor is deemed to automatically satisfy the MEIP Test and a more detailed hypothetical private sector investor assessment is not necessary.<sup>4</sup> Wherever the Parties' investment is made on a *pari passu* basis with private sector investors, the MEIP Test will automatically be satisfied. Where the investment basis is not entirely *pari passu*, the Parties must compare their actions to a hypothetical reasonable private sector investor to assess whether the MEIP test can be satisfied.
- 2.4 Set out in the sections below are the key alternative State aid solutions that might be relevant to this structure.
- 2.5 **Public Realm**
- 2.6 Public sector funding for public realm works does not constitute unlawful State aid because these types of works are considered to fall within the public sector's public tasks. As a general rule, infrastructure which is owned and managed by the State and which is made available to all on open and non-discriminatory terms is likely to be considered "*open access*" public infrastructure and exempt from the application of the State aid rules.
- 2.7 Infrastructure which will be managed or operated by an undertaking, and where that undertaking is able to commercially exploit the infrastructure, is likely to confer a selective advantage on that undertaking and therefore will be considered to be State aid. A possible exception to this would be where the infrastructure being exploited related to a works concession which had been publicly tendered.
- 2.8 [A recent case, the *German Land Scheme*, provided some much-needed clarity regarding what works constituted public realm works and what did not. The decision listed various activities which could be funded without breaching State aid law. These include:
- 2.8.1 Groundwork for making land ready to build;
  - 2.8.2 Construction costs for streets, street lighting, anti-noise barriers, landscaping;
  - 2.8.3 Connection costs to the mainframe for water, electricity, gas and sewage;
  - 2.8.4 Environmental protection measures and decontamination; and
  - 2.8.5 Removal of constructions that exist on industrial and commercial sites.]

### 3. **ALTERNATIVE AID SOLUTIONS**

- 3.1 If the MEIP Test cannot be satisfied, because the investment is not made on commercial terms or does not generate a fully commercial return, or if the works are not public realm, the Parties may be able to rely upon an alternative State aid 'solution' in the form of a Services in the General Economic Interest ("**SGEI**") argument or by relying upon the General Block Exemption Regulation ("**GBER**"). Rather than arguing that no aid exists at all (as the MEIP Test and public realm arguments do), the SGEI and GBER solutions work on the basis that it is accepted the measure constitutes State aid, but that it is an acceptable form of aid.

### 4. **STATE AID CONCLUSION**

- 4.1 Whether the State aid rules apply to the Parties' investment will depend on whether these investments are made on market terms. If the investment cannot be made on market terms, or if additional grant funding is required, there are a variety of alternate State aid 'solutions' available, in the form of public realm, SGEI or the GBER.

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<sup>4</sup> Case T-296/97 *Alitalia v Commission* [2000] ECR II-3871, paragraph 81

## PART 2

### VIRES

1. This section considers the legal powers available to Homes England, Harlow County Council and Essex County Council in relation to their participation in the Fund (via the LP and the limited liability company acting as General Partner).
- 1.1 **Participation by Homes England- Relevant provisions**
- 1.2 Homes England will need to obtain Secretary of State approval in relation to forming or acquiring an interest in a limited liability company (i.e. the General Partner) pursuant to Section 29 of the Housing and Regeneration Act 2008.
- 1.3 Pursuant to the Homes England Framework (November 2018), Homes England is required to obtain the Ministry of Housing Communities and Local Government Department's prior written approval before incurring expenditure for any purpose that is or might be considered novel or contentious, or which has or could have significant future cost implications.
- 1.4 The proposed LP structure is likely to be considered to be novel or contentious and accordingly require the Department's consent.
- 1.5 **Participation by local authorities**
- 1.6 **Relevant legal provisions**
  - 1.6.1 Section 1 of the Localism Act 2011 introduced a "**general power of competence**" for local authorities (the "**GPC**"). The GPC replaced the Well Being Power in England. The GPC is a power for a local authority to do "anything that individuals generally may do". In using the power, the local authority may act "in any way whatever", whether or not for a commercial purpose, with or without charge and whether or not that action would benefit the local authority, its area or persons resident or present in the area.
  - 1.6.2 The GPC is subject to statutory parameters (including actions prohibited by other legislation). However, the GPC is intended to authorise activities carried out by local authorities for commercial purposes provided they do not relate to charging for services they have a statutory obligation to provide. Significantly the Localism Act additionally provides "**Where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.**" It is the interpretation of the scope of this limitation (particularly "commercial purpose") that will be critical as to whether the general power of competence can be relied upon if an LP structure is to be used.
  - 1.6.3 The recent case of *Haringey*<sup>5</sup> has clarified the interpretation of the commercial purpose limitation under the GPC. In that case, the London Borough of Haringey's objectives were socio-economic and regeneration objectives save for a requirement to achieve an acceptable financial return.
  - 1.6.4 It was found, by the High Court of Justice, that its purpose for participating in an LLP was not commercial but rather to achieve several socio-economic objectives including housing, employment, growth and regeneration objectives. The inclusion of an objective relating to achieving an acceptable financial return was considered a financially prudent way of furthering the Council's policy objectives rather than showing a separate commercial purpose and accordingly it was entitled to rely upon the GPC to participate in the LLP in question.
  - 1.6.5 In this case, we note that the Vision Statement and Vision Outcomes set out in the business case support the position that the authorities' participation in the proposed Fund

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<sup>5</sup> 2018 EWHC 192 (Admin)

is not for a commercial purpose but rather to further socio-economic and regeneration objectives as follows:

*"Through regeneration and redevelopment, Harlow Town Centre will once again become a vibrant and diverse community with the following outcomes created:*

1. A **unified centre** which re-balances the northern and southern area and repurposes the areas of the town centre no longer fit for purpose;
2. A town centre which supports **wider economic growth** in the Harlow and Gilston Garden Town providing shops, services and homes, and a diverse mix of commercial activity in the Town Centre;
3. A **strong retail, leisure and cultural offer** which appeals to Harlow's catchment and enables a 24/7 destination;
4. New communities through **residential-led mixed use developments** that are both balanced and mixed with a variety of tenures available;
5. A **high-quality public realm** and environment with active and meanwhile public spaces;
6. An **inclusive and accessible destination** with excellent multimodal, sustainable transport links;
7. **Seamless integration** into the sustainable transport corridors connecting Harlow and the Garden Town;
8. **Community facilities** which support the town's population; and
9. A **cohesive place**, supported by uses and design proposals which complement one another and work towards the overarching vision."

1.6.1 *[The Vision document suggests that "Investment and commitment in key projects will support in achieving our Town Centre Vision, invest in economic and housing growth and wider job creation but also provide long-term direct financial benefits, creating new business rates and council tax revenue opportunities". Having regard to the Haringey judgment we do not consider that seeking associated financial benefits and returns, which are secondary to the predominant regeneration/socio-economic objectives would preclude reliance upon the GPC.*

1.6.2 *Based on review of the Vision Statement and Outcomes, we consider that the local authority participants in the Fund may, subject to the assumption set out in paragraph 1.6.2 rely upon the GPC in relation to their participation in the Fund.*

1.6.3 *We assume that the Vision Statement and Outcomes is and will continue to be entirely supported by all other evidence including the authorities' cabinet papers/ local authority papers/background documents and other documentation produced by and for the local authority. Accordingly, care will need to be taken in relation to the audit trail relating to the authorities' purpose of participation in the LP structure which should be kept under close review on an ongoing basis until completion of the project.*

1.6.4 *We also consider that the local authority participants may also rely upon the GPC in relation to their participation in the limited liability company established to act as the General Partner.*

## **Investment powers**

- 1.7 In addition to the GPC, the local authorities may also consider Section 12 of the Local Government Act 2003 ("**2003 Act**") which gives local authorities a separate power to invest however this power is not capable of extending beyond investment activities and activities ancillary thereto.
- 1.8 In order to rely upon the 2003 Act in relation to the participation by local authorities in the Fund, it would be necessary to demonstrate that:
  - 1.8.1 the investment is for any purpose relevant to their functions under any enactment or for the purposes of the prudent management of its financial affairs.
  - 1.8.2 the activities the local authorities are undertaking constitute investment;
  - 1.8.3 the authorities have had "regard" to the guidance under section 15 of the 2003 Act.

**PART 3**  
**LAND CONTRIBUTION**

**1. LAND CONTRIBUTION**

1.1 It is not currently envisaged that Homes England will contribute land interests to the Fund and accordingly the regulatory considerations in relation to such land contribution fall outside the scope of this report.

1.2 In the event that land interests are contributed to the Fund by local authorities' members of the Fund they will need to comply with the following elements:

**1.2.1 Disposal of non-housing land**

- (a) Under Section 123 Local Government Act 1972, Local Authorities have the power to dispose of land held by them in any manner they wish<sup>6</sup>. However, save for with the consent of the Secretary of State, Local Authorities cannot dispose of land for a "consideration less than the best that can reasonably be obtained".<sup>7</sup>
- (b) There is no prescribed process to achieve the best consideration reasonably obtainable under section 123, and what is reasonable depends on the facts of the transaction, however the local authority parties can demonstrate that they have complied with the section 123 obligation by marketing the land, or alternatively or additionally, seeking an independent valuation should be obtained.
- (c) There is a general consent for section 123 in Circular 06/03 The General Disposal Consent<sup>8</sup> which may assist where a Local Authority wishes to dispose of land for less than best consideration, if it considers that this will achieve the promotion or improvement of economic, social or environmental well-being of its area:-
  - (i) subject to a maximum undervalue of £2million; and
  - (ii) provided the disposal is State aid compliant; and
  - (iii) it is satisfied that the land is not held as housing land or under the planning acts<sup>9</sup>.

**1.2.2 State aid Guidelines on the Sale of Land and buildings**

- (a) The State Aid Guidelines on the Sale of Land (the "Guidelines") provide a procedure for handling sales of land and buildings in a way that automatically precludes the existence of state aid in relation to the sale of publicly held land.

<sup>6</sup> Section 123(1), Local Government Act 1972 (LGA 1972)

<sup>7</sup> Section 123(2), LGA 1972, and note section 123(7) that consent is not required for short tenancies (ie the grant of a lease for a term not exceeding seven years).

<sup>8</sup> Circular 06/03: Local Government Act 1972 general disposal consent (England) 2003 disposal of land for less than the best consideration that can reasonably be obtained.

<sup>9</sup> That is, held under powers which permit it to be disposed of under the terms of the 1972 Act. The consent does not apply to disposals of land held under section 233 of the Town and Country Planning Act 1990 (land held for planning purposes) nor does it apply to land held for housing purposes under the Housing Act 1995.

- (b) The guidelines are similar but not identical to the "best consideration" rules. Under the Guidelines, the market value of the land can be assessed in the following way:
- (i) **Sale through an unconditional bidding procedure** - As part of an open and unconditional bidding procedure, a sale of land and buildings must be sufficiently well publicised so that the selling price is determined by the market value. An offer is sufficiently well publicised when it is repeatedly advertised over a reasonably long period (two months or more) in the national or international press and when the intended sale of land and buildings may attract investors operating on a Europe-wide or international scale.
  - (ii) An offer is unconditional when the buyer of the land and buildings can decide how to use them. If the unconditionality and sufficient publicity criteria are met, the sale does not involve any element of state aid. If, however, the sale is made without an unconditional bidding procedure being held, an asset valuer must be appointed to establish the selling price.
  - (iii) **Sale without an unconditional bidding procedure** - In such cases an evaluation should be carried out by one or more independent asset valuers based on generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting state aid. The asset valuer must be a person of good repute and must be independent.
  - (iv) If it is clear that the value set by the valuer cannot be obtained, a divergence of up to 5% from that value can be deemed to be in line with market conditions. If the land and buildings cannot be sold even at this juncture, a new valuation must be carried out.

## PART 4

### PUBLIC SECTOR CLASSIFICATION

1. It is necessary to consider the likely sector classification of the LP and General Partner ("LP Structure") – that is, whether they should be classified to the public or private sectors within the National Accounts. The decision on which sector the LP Structure should be in is ultimately one for the independent Office for National Statistics (ONS). However, in simpler cases it may be that HMT will provide a provisional sector classification without reference to ONS<sup>10</sup>.
2. The LP and General Partner will be owned by a mix of central and local government organisations, including Homes England. HMT guidance confirms that all public sector interests in an entity should be aggregated when considering the appropriate sector classification, so it is clearly the case that from the outset the LP Structure will be classified to the public sector.
3. That analysis may change in future in the event that the public sector interests are reduced, and new private sector investors become involved. If that were to happen, then the sector classification would need to be reviewed in light of the then current circumstances, with a particular emphasis on not just the level of public sector ownership but also the level of public sector control over the activities of the entity. "Control" in this context would include (a) the voting power of the public sector owners at both ownership and managerial level; and (b) the ability to force (or veto) certain decisions or the imposition of overly restrictive provisions to public funding of the entity. Care should therefore be taken when designing the governance structure of the new entity to minimise the risk of public sector classification. We would recommend that this be discussed with the HMT Sector Classification team to obtain a steer as to their likely views on classification.
4. Commercially, it is unlikely that any incoming private sector investor would accept a public sector classification. Therefore, the Fund would need to be restructured at this point which will most likely necessitate the incoming investor taking a controlling interest. We understand from Homes England that it is intended to exit at this point.

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<sup>10</sup> Any discussions on classification should take place with the HMT Sector Classification team rather than with ONS

## **PART 5**

### **TAX**

1. Commonly, investment funds are structured as limited partnerships (LPs), as the tax transparent nature of these vehicles has certain benefits for tax exempt Parties and certain types of institutional investors. Broadly, profits of an LP which are received by local authority participants in the Fund are not subject to corporation tax which creates a tax efficient approach. The tax treatment of the proposed structure should be reviewed in detail once the key commercial issues in relation to the structure have been established.
2. The transfers of land from the Parties to the LP may have an SDLT advantage over a company structure although the partnership reliefs are not always available in such structures. The VAT treatment of the contribution of assets and development of those assets will need to be analysed to ensure that VAT recovery incurred on construction and other costs is maximised.