

Harlow Investment Fund

Decision Making, Deadlock and Board Decisions

Introduction

Homes England wishes to explore affording Harlow and Essex a role in the determination of strategy and the activities of the joint venture that in strict commercial terms, in the private sector, would not be afforded to investors at the proportionate level of investment. Homes England will need to get an approval for a structure offering significant control to parties with proportionately small holdings. We will also need to agree any proposal with PfP.

Please may we treat this paper as a note to inform our discussions and, as such, very much subject to approvals and contract in due course.

Recap of the Discussion 5 May 2020

This Paper develops the concept that was discussed with the Parties on 5th May, namely that the Fund's decision-making falls into three 'baskets' (by way of recap):

1. **Main Strategic Decisions** – a traditional list of shareholder reserved matters (called “**Shareholder Protection Matters**” in this Paper at **Appendix 1**);
2. **Investment and Activities Decisions** – an agreed list of decisions which are of primary importance to the Parties on which there is one to one voting at the Board (now called “**Board Referred Matters**” going forward and in this paper **Appendix 2**); and
3. **Operational and De-minimis Decisions** – administrative type decisions as well as ordinary responses required for normal company operation:
 - Majority would be within the duties and responsibilities of the Commercial Manager and so be taken by that entity;
 - Company co-operation and approval is to be on a conventional basis – Directors free to act and shareholders consent in the normal way under the Companies Act;
 - Ability to respond to smaller detailed administration and operational decisions to avoid reputational harm, including responding to HMRC or Companies House

Discussion Paper

Contracting out day to day duties

As the purpose of this venture, and the currently proposed Limited Company interim stage vehicle (Invest Co Ltd), is to prepare the parties for the launching of a fund and the introduction of a third party investor. Our aim should be for the board to “contract out” to a Commercial Manager Co (to be procured) the day to day operational duties of running the Invest Co Ltd.

This should reduce the duties placed on the board and the parent organisations. This would also be the manner of operating with a fund, and a General Partner Co and Fund Manager. It is good discipline and preparation to establish this interim venture in this manner.

Board Referred Matters

Any matter that is on the Board Referred Matters list will require the unanimous approval of all of the directors on the board.

Appendix 2 includes those matters that we propose are Board Referred Matters. It goes without saying that monitoring the performance of the Commercial Manager contract is the core function of the board.

In the event of variations to existing investments taking those investments outside of the JV Business Plan (or Investment Policy), or a breakdown in relations with the Commercial Manager, the board would be the first point of responsibility for managing a response to that breakdown.

However, as part of the instructions to the Commercial Manager the board will want to be privy to and consulted on a series of key commercial and strategic matters. These will include approving new Investment Proposals and confirming investments are in line with the Investment Policy and the JV Business Plan.

A careful balance needs to be struck such that the responsibility of the Commercial Manager is not undermined, and likewise the board is not oblivious to the management of Invest Co Ltd.

Once agreed, we propose that this list of Board Referred Matters would need a shareholder approval to amend, and as such be a Shareholder Reserved Matter.

Board Directors

This approach does not mean the board can be, or should be, made up of individuals lacking skills and experience. There will still be a burden of decision making and interrogation placed on the board and the board will be integral in approving selected items (Board Referral Matters) as between the board and the Commercial Manager.

Board Structure and Make-Up

We are keen to ensure proper representation from partners. As such we are proposing a board of six (6) directors with a make-up that is disproportionately weighted in favour of Harlow and Essex.

- Shareholder A - Harlow 1 director (proportion of the board 17%)
- Shareholder B - Essex 1 director (proportion of the board 17%)
- Shareholder C - PfP 2 directors (proportion of the board 33%)
- Shareholder D - Homes England 2 directors (proportion of the board 33%)

Selecting Board Directors

We are not proposing that the parties can consent to the individual proposed for a board role. We are proposing that the parties should propose a suitable director in their opinion and providing that the individual proposed meets the statutory requirements under the Companies Act there should be an instruction to the board to appoint the director at the next board meeting [It is noted that the Parties discussed and agreed in principle that this process (administratively) should be as easy as possible in the legal drafting around this issue.]

Shareholder Protection Matters

Any matter that is on the Shareholder Protection Matters list will require the unanimous approval of all of the shareholder parent organisations.

We are proposing traditional Shareholder Protection Matters for those important matters that the parties believe require approval of their parent organisations. This is the highest level of protection typically enjoyed by shareholders in an enterprise. Pinsents have drafted a specific template for this venture for our consideration and we attach that template to this note as Appendix 1.

Ordinary Board Duties

Any matters not on the Shareholder Protection Matters list or the Board Referred Matters list will fall to the company to manage according to the normal manner a company would with proportionate votes and board decisions based on a simple majority.

Many, if not all, of these activities should be undertaken following the advice of the Commercial Manager (as would happen in a full fund structure with a General Partner and Fund Manager). It is proposed that the scope of the Commercial Manager contract (see the Service Provider Agreement Paper) is carefully considered to ensure this broad passing of duties to the Commercial Manager works effectively.

Inevitably there will be formalities and activities that the board will need to respond to in the ordinary course of business. These will not be capable of capturing on the lists of Shareholder Protection Matters and Board Referred Matters and indeed it would not be sensible to do so. These are *de minimis* matters where the Invest Co Ltd will need to respond quickly.

As such we would propose a signing and response regime whereby such matters can be signed and responded to by all the shareholder directors (A,B,C, & D) providing:

- i) two directors from different Shareholders sign at all times; and
- ii) one of Shareholder C or D's directors always signs as one of the two signatures required (subject to Conflict Matters etc see below).

Deadlocked Board

Clearly a board with 6 members could create a deadlock at board level. We consider that this is preferable to a structure that allows an independent board director the casting vote. We do not consider it appropriate for any of the parties to carry such a vote either. Consensus should be our aim.

We are proposing that a deadlocked board be given time to reconsider, debate, and demand further information from the Commercial Manager. After that time period has elapsed, we consider that the matter should be referred to the sponsor organisations and we would encourage the formulation of a suitably empowered (informal) senior sponsor panel for this purpose.

Deadlock

Where a deadlock cannot be resolved, after escalation, we are proposing a conventional deadlock options process. This would include the ability to buy out parties who wish to leave, but more properly will relate to the winding down of the fund following continuation of the fund existing obligations. This will need to be the focus of a later paper, following the structure notes currently being considered.

Conflict Matters

Inevitably there will be matters where there are conflicts of interest and the parties will have to manage that conflict. Procurement is one such issue and will be the subject of a separate workstream. There will need to be typical conflicts language as is customary in such a joint venture. We propose that rather than over complicating this paper this will need to be the focus of a later paper, following the structure notes currently being considered.

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Appendix 1

SHAREHOLDER PROTECTION MATTERS

The following are Shareholder Protection Matters, save to the extent that any such decision relates to a matter which is already approved in the Investment Policy.

The "**Fund**" means the limited liability company used as the "Interim Vehicle" and any subsidiary¹ vehicle of the Fund shall be referred to as a "**Fund Subsidiary**".

SHAREHOLDER PROTECTION MATTER	
1.	SPECIAL RESOLUTION MATTERS
1.1	Passing any resolution for the Fund or any Fund Subsidiary which the Companies Act 2006 prescribes to be passed by way of special resolution (as the same is defined by section 283 of the Act).
2.	FUND CAPITAL
2.1	Issuing or allotting any shares in the Fund or a Fund Subsidiary.
2.2	Issuing, granting or consenting to the assignment of options over any shares or Shareholder Interest ² in the Fund or a Fund Subsidiary.
2.3	Creating any rights to convert other securities into shares in the Fund or any Fund Subsidiary.
2.4	Consolidating, sub-dividing, converting, cancelling or otherwise altering any of the rights attached to any of the issued shares (or any class of shares) in the Fund or any Fund Subsidiary.
2.5	Reorganising the share capital of the Fund or a Fund Subsidiary.
2.6	The Fund or a Fund Subsidiary purchasing or redeeming any of its shares.
2.7	The Fund or any Fund Subsidiary repaying any amounts standing to the credit of any share premium account or capital redemption reserve or other surplus or reducing any uncalled liability in respect of partly paid shares.
2.8	The Fund or a Fund Subsidiary creating any borrowings or other indebtedness or obligation in the nature of borrowings (including obligations pursuant to any debenture, bond, note, loan, stock or other security and obligations pursuant to finance leases).
2.9	The creation of any Encumbrance ³ (or allowing one to subsist) over all or any part of the business, undertaking, property or assets of the Fund or a Fund Subsidiary, and/or the Fund or a Fund Subsidiary issuing, granting or consenting to the assignment of options over any debentures or other securities.

¹ Subsidiary has the meaning given in 1162 of the Companies Act 2006. It is currently envisaged that the parties will seek to structure any JVs in which the Fund invests (as far as is possible) so that they are not Subsidiaries of the Fund.

² Means the entire legal and beneficial interest a shareholder has in the Fund from time to time

³ Means a mortgage, charge (whether fixed or floating in nature), lien, pledge, deposit by security or other agreement having the effect of providing security to a creditor

SHAREHOLDER PROTECTION MATTER	
2.10	The Fund or any Fund Subsidiary giving any guarantee, indemnity, security or letter of comfort in respect of the obligations of any other person.
2.11	The Fund or a Fund Subsidiary re-purchasing, repaying, redeeming or cancelling [any loan notes] ⁴ otherwise than in accordance with their respective terms including changing the interest rate, fees and/or repayment profile applicable to such loan notes.
2.12	Declaring or paying any distribution in respect of profits, assets or reserves or in any other way reducing the reserves of the Fund or a Fund Subsidiary.
2.13	Approving the retention of profits of the Fund or a Fund Subsidiary for working capital purposes.
2.14	Entry into any hedging or derivative instrument, any forward contracts or any other financial products by the Fund or a Fund Subsidiary.
3.	FUND BUSINESS
3.1	The Fund or any Fund Subsidiary acquiring, or investing in, another business or company.
3.2	The Fund incorporating any Fund Subsidiary other than in accordance with the parameters set out in the Investment Policy.
3.3	Entering into or participating in any joint venture, partnership or other profit-sharing arrangement with any person [(or making any amendment or variation to any such arrangement after it has been approved)].
3.4	The Fund or a Fund Subsidiary in any way disposing of (whether through amalgamation, merger, consolidation, sale, transfer, entry into a lease or licence, or otherwise) all or a substantial part of the Business, undertaking, property or assets of the Fund or any Fund Subsidiary in excess of £[][%], whether by a single transaction or series of transactions, related or not, and whether by way of sale of assets or some other arrangement.
3.5	The Fund or a Fund Subsidiary acquiring a business (as a share sale or as a business acquisition) or interests in any undertakings.
3.6	The Fund or a Fund Subsidiary acquiring property or assets other than in accordance with the Investment Policy.
3.7	The Fund or a Fund Subsidiary entering into any transaction or arrangement outside of the ordinary course of the Business [or making any amendment or variation to any such transaction or arrangement after it has been approved].
3.8	The Fund or a Fund Subsidiary entering into any contract, or any series of connected contracts, liabilities or commitments (including capital expenditure) which commits the Fund or a Fund Subsidiary to an annual payment in any period exceeding £500,000.

⁴ To be replaced with specific categories of loan notes issued on this transaction (for example A, B loan notes).

SHAREHOLDER PROTECTION MATTER	
3.9	The commencement of any winding up or dissolution of the Fund or any Fund Subsidiary, or of the appointment of any liquidator or administrator in respect of the Fund or a Fund Subsidiary, save as expressly contemplated by this Agreement ⁵ or as required by Law.
3.10	Approval of the Investment Policy and making any variation to the Investment Policy.
3.11	Approval of investment proposals where not in accordance with the Investment Policy.
3.12	The appointment of the Principal Commercial Manager ⁶ .
4.	RELATED PARTY TRANSACTIONS
4.1	The Fund entering into, terminating or varying any contract, terms, material transaction or other arrangement (whether legally binding or not) with:
4.1.1	any Shareholder;
4.1.2	any member of a Shareholder's Group; or
4.1.3	any person connected with a Shareholder or a member of a Shareholder's Group.
5.	OTHER ISSUES OF IMPORTANCE TO SHAREHOLDERS
5.1	Moving the central management and control of the Fund or a Fund Subsidiary outside the UK.
5.2	Moving the tax residence of the Fund or a Fund Subsidiary outside the UK.
5.3	The Fund or a Fund Subsidiary making any political donation.
5.4	The initiation, conduct, settlement or abandoning of any legal, arbitration or other dispute resolution proceedings by the Fund or a Fund Subsidiary for which the claim or liability (including related costs) is or may be in excess of £20,000.
5.5	Ceasing to carry on the Business or the carrying on of the Business ⁷ on any materially reduced scale
5.6	The commencement of any new business not being ancillary or incidental to the Business.
5.7	Creating or amending any bonus, profit sharing or other financial incentive scheme.
5.8	Making any change to its auditors or its accounting reference date.
5.9	[Note: the appointment and removal of a director will be by the relevant appointing member (i.e. each member appoints its own directors) by notice to DevCo- this will be covered in the main body of the shareholders' agreement once developed]

⁵ means the shareholders' agreement.

⁶ Note: the Principal Commercial Manager is the equivalent to the Fund Manager under the Interim Structure.

⁷ The definition of the Business of the Fund to be developed against the proposed activities of the Fund.

SHAREHOLDER PROTECTION MATTER	
5.10	The establishment of and delegation of powers to any committee of the Board or, in the case of any Fund Subsidiary, any committee of its board of directors.
6.	ADDITIONAL MATTERS
6.1	The Fund or a Fund Subsidiary engaging employees
6.2	Establishing or amending any pension scheme
6.3	Factoring or discounting any debts of the Fund or a Fund Subsidiary
6.4	Making any agreements with revenue authorities or any other taxing authority with a value in excess of £[] []% in respect of the Fund or a Fund Subsidiary
6.5	Changing bankers to a bank outside the UK
6.6	Changing the name of the Fund or a Fund Subsidiary
6.7	Entry in to any agency, distribution or similar agreement by the Fund or a Fund Subsidiary
6.8	Giving notice of termination of any contracts/ arrangements of [a material nature] ⁸ to the Fund or any Fund Subsidiary

⁸ To be further developed against contractual arrangements.

Appendix 2

Board Referred Matters (Investment and Activities Decisions) – Unanimous Voting

The following draft set of decisions have been identified as ones requiring the Board to approve on a unanimous basis:

- An Investment Proposal (in accordance with the JV Business Plan Guidance (as sent to you previously) that meets the Investment Policy (including the Investment Objectives and Project Eligibility Criteria);
- Acquisition or disposal of land or property (submitted with an updated Investment Proposal i.e. following the first stage Skeleton Investment Proposal);
- Submission of a planning application (submitted with an updated Investment Proposal);
- Borrowing by a Project SPV (an off-balance sheet investment vehicle with a third party partner in accordance with the Investment Policy and JV Business Plan (which includes Gearing Parameters – see Harlow Funding and Project Delivery Paper);
 - [NB: the creation of the Project SPV Subsidiary, or Project SPV, is a Shareholder Protection Matter]
- Borrowing by a Project SPV Subsidiary (where it is from the original Shareholder(s));
- Variation to the JV Business Plan (the plan setting out how the Investment Policy will be achieved - NB the Investment Policy is a Shareholder Protection Matter);
- Approval of a revision to a previously approved JV Business Plan following a Trigger Event (relating to the overall operation of the fund);
- Approval of a revision to a previously approved Project Investment Plan following a Trigger Event;
 - NB Board will have approved the Investment Proposal, the Investment Proposal is implemented under a Project Investment Plan, and a trigger is breached (see Project Investment Plan Triggers Paper);
- [Appointment of a Development Manager in accordance with the template Services Agreement and the Investment Proposal and JV Business Plan approved by the Shareholders to be discussed, see Service provider Agreement Paper];
- [Any recommendation to shareholders to terminate Development Manager Services Agreement];
- Any recommendation to shareholders to terminate the Commercial Manager Services Agreement; and

- Entering into any contract for services (including Model Auditors) or other liability with an annual payment below £500,000 not identified in the budget agreed with the Commercial Manager (NB above this amount is a Shareholder Protection Matter).

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