

Committee: Cabinet

Date of meeting: 4 July 2018

Subject:	Establishment of wholly owned Housing Companies and Business Plan
Lead Officer:	Sarah Selvanathan, Strategic Director & Deputy Chief Executive
Portfolio Holders:	Housing: Councillor A Kelly Resources: Councillor R Mitchell
Link to Council Priorities:	Community Wellbeing - Help meet the need for affordable housing through a housing company owned by the Council (Ref:H2)
Exempt information:	Appendices A-D as named under heading Enclosures/Appendices
Delegated status:	For recommendation to Council on 18 July 2018
Key decision:	N/A

Executive Summary:

This report builds upon the decisions made by the Council on 21 February 2018 to establish local authority owned housing companies. In this report, Cabinet is asked to consider and recommend for full Council approval a range of decisions that will establish two companies and adopt a business plan and budget. An operational structure is proposed that will provide the Council with a set of controls ensuring transparency and accountability over the activities of the companies.

This report also sets out the framework for the creation and establishment of the new companies that will enable the Council to meet its objective to deliver more affordable homes. The Business Plan sets an ambitious target of over 250 new homes to be delivered over the life of the 5-year plan.

Recommendations: that

- (a) the formation of EBC Investments Ltd and EBC Homes Ltd, with governing Articles of Association and a Delegations Matrix as attached to the report, be approved;**
- (b) the Business Plan, budgets and initial operational plans for each of the companies be approved;**
- (c) the professional advice of the Council's appointed legal advisors, Browne Jacobson LLP, be considered and noted;**
- (d) the tax advice of the Council's appointed financial and tax advisors, PricewaterhouseCoopers [PWC] be considered and noted;**
- (e) Council officers appointed to the Boards of EBC Investments Ltd and EBC Homes Ltd be granted indemnities pursuant to the Local Authorities (Indemnities for Members and Officers) Order 2004 and non-Council appointees as Directors of the said companies be indemnified on no less favourable terms;**

- (f) an Independent Chairperson to serve on the Board of EBC Homes Ltd be recruited;**
- (g) the trading and development activities for both companies be initiated as soon as the 4 conditions below are met:**
 - i. the Council approves this report and its recommendations.**
 - ii. appointments to the Boards of each company are made, noting that EBC Homes Ltd may need to make interim arrangements until the recruitment of an independent Chairperson is concluded.**
 - iii. Board member training is concluded for Board Members of each company.**
 - iv. the requisite governance and administrative arrangements are in place to ensure that both companies operate efficiently and lawfully.**
- (h) the Strategic Director and Deputy Chief Executive in consultation with the Portfolio Holders be given delegated authority to settle the final forms of company documentation, including necessary filings with Companies House, to give effect to these recommendations and the decisions of the Council;**
- (i) the Council grants a loan of up to £250,000 to the Housing Companies at a pre-agreed interest rate and repayment period;**
- (j) the suite of documents requiring noting and/or approval and that are appended to this report be identified as follows:**
 - i. the Business Plan [2018-2023].**
 - ii. the Budget [2018 to 2019] for EBC Investments Ltd.**
 - iii. Articles of Association for EBC Investments Ltd.**
 - iv. delegations to EBC Investments Ltd.**
 - v. the Budget [2018 to 2019] for EBC Homes Ltd.**
 - vi. Articles of Association for EBC Homes Ltd.**
 - vii. delegations to EBC Homes Ltd.**
 - viii. operational Plans for EBC Investments Ltd and EBC Homes Ltd for 2018 to 2019.**
 - ix. legal advice report from Browne Jacobson LLP.**
 - x. tax advice from PricewaterhouseCoopers (PWC).**

Report

1. Purpose of the Report

- 1.1 The first objective is to seek Cabinet approval to approve all of the recommendations in this report.
- 1.2 The key points that the cabinet are asked to consider are:
 - i. The structures and relationships between the Council, EBC Investments Ltd and EBC homes are fully described in the report by Browne Jacobsen and reflect the best possible legal structure to enable delivery of the Business Plan, given the scale and context of the anticipated development programme of the companies.
 - ii. The tax advice provided by PWC.
 - iii. The Delegated Authorities set out the decision-making capabilities of each company and it is confirmed that the Council via the Shareholder Board retains ultimate overall control of the activities of EBC Investments Ltd and EBC Homes Ltd.
 - iv. By approval of the Business Plan, Budget and related matters, the Council is delegating the operational responsibility to deliver the targets contained within the Business Plan to EBC Investments Ltd and by extension to EBC Homes Ltd.
 - v. The Council via the Shareholder Board will hold the Boards of EBC Investments Ltd and EBC Homes Ltd accountable for the operational performance of each company.

The planned scale of development activity will be ultimately governed by:

- i. the capacity of the companies to acquire land/sites/projects that will deliver the targeted number of homes;
- ii. securing planning consents; and
- iii. the viability and deliverability of identified projects.

2. The implementation phase since 21 February 2018

This section of the reports sets out actions taken to implement the Council's decisions made on 21 February 2018.

2.1 Legal and Tax Advice

This section summarises the advice provided by Browne Jacobsen LLP and PWC in relation to the most appropriate and efficient structures that should be established by the Council as it develops housing through throughout the life of the business plan. Their advice is appended to this report.

In reaching the correct decision, the Council needs to strike a balance across the range of available options. The factors that officers have considered in this regard were:

- Legal considerations
- Tax implications
- State Aid considerations

2.2 Work Completed to Date

The actions taken are summarised as follows:

- i. Appointment of a consultant – Ozay Ali.
- ii. Appointment of Legal Advisors – Browne Jacobsen.
- iii. Appointment of tax and financial advisors – PWC.
- iv. Preparation of Business Plan.
- v. Commissioning of capacity studies for potential new developments.
- vi. Registration of EBC Investments Ltd and EBC Homes Ltd.
- vii. Progression of pre-construction phase of Cobham High Street.

2.3 Work in Progress

The implementation phase is progressing very well, but there is work still to do, which is summarised below:

i. 5-year Treasury strategy

This will be prepared once the development pipeline is planned and costed.

ii. 5-year Financial plan

This will be completed when EBC Homes Ltd has schemes that are fully consented. The plan will need to be approved by the Board of EBC Investments Ltd.

iii. Operational plan for 2018/19

This work will be prepared and tabled to the Boards of EBC Investments Ltd and EBC Homes.

iv. Evaluation of capacity studies

These will be considered by EBC Homes Ltd and fed into the operational plan as required.

The above work will be planned, delivered and monitored by EBC Homes Ltd and EBC Investments Ltd under the scrutiny of the Council and the Shareholder Board through formal reporting and monitoring requirements that are set out in the Council's forward plan

The Business Plan includes some potential sites which will need to be reviewed and progressed as part of the Council's decision-making process.

Approval of the Business Plan does not mean the potential sites are being approved for development.

3. Legal and Tax Advice

This section summarises the advice provided by the Council's external advisers in relation to the most appropriate structure that should be established by the Council to develop housing under the recommended business plan. Their advice is appended to this report.

In reaching its decisions, the Council needs to strike a balance across the range of available options. The factors that officers have considered in this regard are:

- Legal considerations of preferred option
- Tax implications of preferred option
- State Aid considerations
- Flexibility of preferred option
- Potential future exit routes of preferred option
- Transparency of preferred option

During meetings with external advisers, the Officers have been very clear to ensure the preferred option would be the best fit for the factors set out above and that has led to the final recommendations in this report.

A "Do nothing" option has been rejected by way of earlier Council decision. The two options for establishing an arms' length vehicle are:

- a company limited by shares; or
- a Limited Liability Partnership (LLP) structure.

The company option featured in the previous reports to the Council, but the LLP option was highlighted by PWC as part of their advice. This issue formed a major part of the overall options appraisal, and the final conclusions being:

The LLP Option – More information about this option is set out in both the legal and tax advice reports that are appended to this report. Although the use of an LLP might bring some tax advantages to the Council, the legal advice outweighed any potential tax advantages. This is because LLPs cannot be used to pursue "commercial purposes" and also due to concern over possible HMRC challenge. The LLP approach is also more complex as it would require the setting up of a wholly owned company to act as a member of the LLP (alongside the Council).

The Company Option is the best fit for the Council given the context of the business plan and the advice received.

As Cabinet will note, the external advisers then provided further advice and the proposed structure mirrors, to a large extent, the diagram set out in the 21 February 2018 report considered by the Council, but involves a different approach to how the Council might deal with its existing land when developed by EBC Homes Ltd.

The diagram below sets out the proposed structure and Cabinet will note that any sales of private market homes will be made directly from the Council, thus providing some corporation tax advantages.



The Council (generally via the Shareholder Committee):

- is shareholder of EBCI Ltd;
- approves business plans and exercises control;
- provides State aid compliant support;
- as necessary holds or transfers land for development into the companies;
- receives dividends distributed by EBCI Ltd

EBCI Ltd is holding company and may establish (with EBC consent) further subsidiaries. Funding from EBC may go via this company. It will oversee EBCH Ltd (in accordance with delegations).

EBCH Ltd will act as a developer of homes for sale or for rent, and including affordable housing of different tenure types. It will act as landlord for properties retained. It will engage a professional team and contractors as necessary, and will have ability, with shareholder approval, to enter into contracts and borrow money.

Further details on how the above structure will work are set out in the advice from external advisers.

The proposed structure enables the Council to add, or remove, subsidiaries under EBC Investments Ltd to suit the prevailing corporate requirements of the Council in the future.

4. Risk & Challenges

The key challenges to the successful delivery of the Business Plan are identified as follows:

4.1 Lack of development sites

This is a key challenge, which needs to be overcome across every part of the Borough.

Actions Required:

- i. Support the use of Council owned land within the programme, subject to the usual Council approval and statutory requirements.
- ii. EBC Homes Ltd needs to develop relationships with local land owners and agents.

4.2 Affordability Risks

This is a key challenge that will require an innovative and commercial approach across the development pipeline. Some form of subsidy will be required within the permitted laws and State aid regulations.

Actions Required:

- I. The development pipeline will require some private sales to create a *programme cross subsidy* into affordable homes. The Business Plan will assume a 50:50 sales/affordable homes split.
- II. Use of the Housing Enabling Fund [subject to the prevailing allocation rules] will reduce debt finance on some developments that will improve affordability.
- III. Use of modern methods of construction to reduce construction periods will reduce development costs. It must be stressed that the use of such innovation will not reduce the quality of design or construction.
- IV. Innovative development and lease finance is available in the market and EBC Investments should explore such opportunities as may be available in the market.

4.3 Planning Consent Risks

The deliverability of the business plan will depend upon EBC Homes Ltd securing land with planning consents that can then be developed.

Actions Required:

- I. EBC Homes Ltd will need to ensure that pre-applications and planning applications meet the requirements of local planning policies to ensure that planning consents are secured.
- II. Sites with planning consents can be sourced, but at a premium that would impact on affordability.

4.4 Sales Risks

Delivering affordable homes will depend upon cross subsidies that are created through sales and market rents, which may be susceptible to market forces.

Actions Required:

- I. The programme should focus on building affordable homes across the whole Borough area subject to financial viability.
- II. Strategic sales approach with forward marketing and a dedicated sales team.

4.5 A Lack of Development Expertise

EBC Homes Ltd will require adequate development skills to oversee programme delivery and on-going governance support.

Actions required:

- I. To appoint an independent Chair with development and affordable housing development experience and a commitment to serve the community of Elmbridge.
- II. To appoint a Housing Development Manager to co-ordinate and oversee the work of EBC Homes Ltd.

The Housing Company Delivery Consultant has agreed to support the Council as it establishes the skills it needs to manage and deliver the programme.

4.6 Governance Risks and Management Risks

The governance arrangements must ensure that the Council retains overall control whilst it enables EBC Investments and EBC Homes Ltd to operate at a reasonable arms-length. Further, the appointed directors of each Company need to be aware of, and work within, their duties as such.

Actions Required:

- I. A clear delegations framework that sets out the roles and responsibilities of the Council, EBC Investments Ltd and EBC Homes Ltd

- II. Training is delivered to all Board Members and key personnel
- III. The Council puts in place an annual review process to evaluate the effectiveness of governance and deliver further training and support as may be required.

The establishment of the housing company will enable the Council to develop a clearer and more accountable structure in terms of:

Shareholder Board

This is a Council committee which has been established to exercise the Council's rights and responsibilities as a shareholder in local authority companies. Its role, membership and functions are set out in Part 3 of the Council's Constitution. The Board will provide the key control for overseeing the work of the companies. It will fulfil the Council's role as sole shareholder and assert the shareholder's rights in relation to business. The detailed relationship between the Council and the companies are set out in the proposed scheme of delegation but the Board's role in ensuring good governance is key. The role of Shareholder should be administered separately from Cabinet business to evidence the Council acting as sole shareholder for the company (a private function) is completely distinct from the Council acting as a Local Authority (public function).

Being a Council committee, the Shareholder Board will have decision-making powers and be subject to the same rules as other Committees on publishing agendas and allowing public access. If the business to be transacted is particularly sensitive (e.g. regarding site acquisition) then a category of exempt information will be engaged and a public interest test applied that would allow the Board to move into Part 2.

The Shareholder Board should work in a complementary manner with the Affordable & Social Housing Working Group so as to avoid some duplication. The Shareholder Board has been appointed on a politically proportionate basis and it will also ensure that elected members retain overall control of the work of the companies. The Affordable & Social Housing Working Group will remain a wider consultative and working group on matters of affordable housing across the Borough.

The Members of the Shareholder Board during 2018/19 are as follows:

Leader – Councillor T Oliver
Resources Portfolio Holder – Councillor R Mitchell
Housing Portfolio Holder – Councillor A Kelly
Chairman of Overview and Scrutiny Committee – Councillor N Haig-Brown
Councillor R Green
Councillor A Davis

EBC Investments Ltd and **EBC Homes Ltd** will each have Articles of Association, appointed Boards and operational plans, budgets and performance targets which will be monitored by the Shareholder Board and subject to clear delegations.

The **management of developed/built homes** will be outsourced to a local housing association company and the process of identifying a suitable management service supplier is currently underway. This process will reduce management risks.

5. **Directors' Indemnities**

Officers of the Council appointed to serve on company boards will be non-remunerated and it is right to extend lawful protections from personal liability when they are acting in their company roles. The legal report by Browne Jacobson recommends that the Council grant appropriate indemnities to Directors when carrying out official company duties. The Local Authorities (Indemnities for Members and Officers) Order 2004 gives a specific power to authorities to grant indemnities and/or take out insurance to cover the potential liability of councillors and officers in a wide range of circumstances. These indemnities do not cover any findings of criminal liability or liability arising from fraud, deliberate wrongdoing, or the cost of pursuing a defamation claim. It is recommended that the indemnity be extended to the role of non-executive or independent members of the company boards. These persons would normally be entitled to be covered by liability insurance on no less favourable terms than those in place for other members of the Board. Letters of engagement will make appropriate provision for these terms.

6. **Summary and Conclusion**

The creation of EBC Investments Ltd and EBC Homes Ltd are the culmination of an extensive period of work by a wide range of elected members and officers across the Council.

The shared vision of a wholly owned housing company that will provide local people with affordable housing is now a reality.

As this report highlights, there are a range of risks and challenges that need to be addressed as this new business takes shape and officers very much hope that the Cabinet will seek full Council approval for the recommendations set out on this report.

Financial Implications:

The report by PWC explains the tax implications of these proposals. There are revenue costs incurred to date for the initial set up costs of the company including financial, tax, legal and project related costs. To date, £95,000 has been spent against a budget of £200,000 approved by Council in February.

EBC Investments Ltd and EBC Homes Ltd will need/incur operational costs for the initial set up but also on an ongoing basis. In the early years and until the Housing Companies start to receive rental income, the Council will need to provide a start-up loan which can be repaid to the Council on a pre-agreed interest rate and repayment period.

It is recommended a loan of £250,000 is made available by the Council for this purpose.

Environmental/Sustainability Implications:

There are none identified in this report.

Legal Implications:

Report by Browne Jacobson LLP explains legal implications.

Equality Implications:

There are none identified in this report.

Risk Implications:

Key risks are set out in section 4 of this report.

Community Safety Implications:

There are none identified in this report.

Principal Consultees:

Portfolio Holders for Housing and Resources.
Council Management Board.
Affordable and Social Housing Working Group.

Background Papers:

None.

Enclosures/Appendices:

- Appendix A: The Business Plan [2018-2023].
- Appendix B: The Budgets for EBC Investments and EBC Homes Ltd 2018/2019.
- Appendix C: Legal advice report from Browne Jacobson LLP (Pages 1-93)
 - Legal Opinion – (pages 1-26)
 - Company Structure Diagram (page 27)
 - EBC Investments Limited (pages 28-53)
 - EBC Homes Limited Articles of Association (page 54-83)
 - Delegations Matrix for EBC Investments Limited and EBC Homes Limited (pages 83-93).
- Appendix D: Tax and general financial advice from PWC.

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