

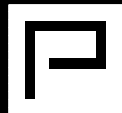
**PENNINGTONS
MANCHES
COOPER**

**EPPING FOREST DC
INITIAL LEGAL ADVICE:**

**VEHICLE STRUCTURE &
GOVERNANCE
(FOR PROJECT DELIVERY)**

Overview

- Drivers
- Delivery models reviewed
- Key factors taken into consideration
- Outcome of analysis
- Compliant decision making
 - Replicating existing executive controls
 - CIPFA
 - Statutory guidance
 - State aid
 - Procurement considerations
- Corporate structure
- Decision making - Shareholder, Board, Gatekeeper and Reserved Matters
- EFDC control - summary
- Anticipated outcome



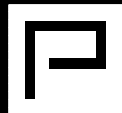
Drivers

- To generate a profit / return to the Council on investment (to assist replace other sources of income), including through the development of council owned sites delivering residential, retail and leisure amenities
- To create a vehicle able to undertake:
 - Development
 - Investment
 - Repairs and maintenance,
- To uphold the core values of the Asset Management strategy: *stronger communities, stronger place, stronger Council*
- To be compliant with legislation and good governance
- To be robust with regard to risk and appropriate controls
- To enable flexibility and dynamism, and to secure commercial confidence



The delivery models reviewed

1. In-house
2. Company Limited by Shares
3. Modified Company Structure (MTS)
4. LLP



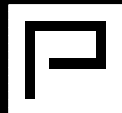
Key Factors taken into consideration

- **Vires** (general)
- **Compliance with legislation** - vehicle set up, activities and operation
- **Procurement** - need to advertise set up and activities
- **Ability to contract** with third parties (and wider flexibility)
- **Tax** efficiency and risk
- **Overall suitability of vehicle to deliver** Council's stated aims and envisaged works and services



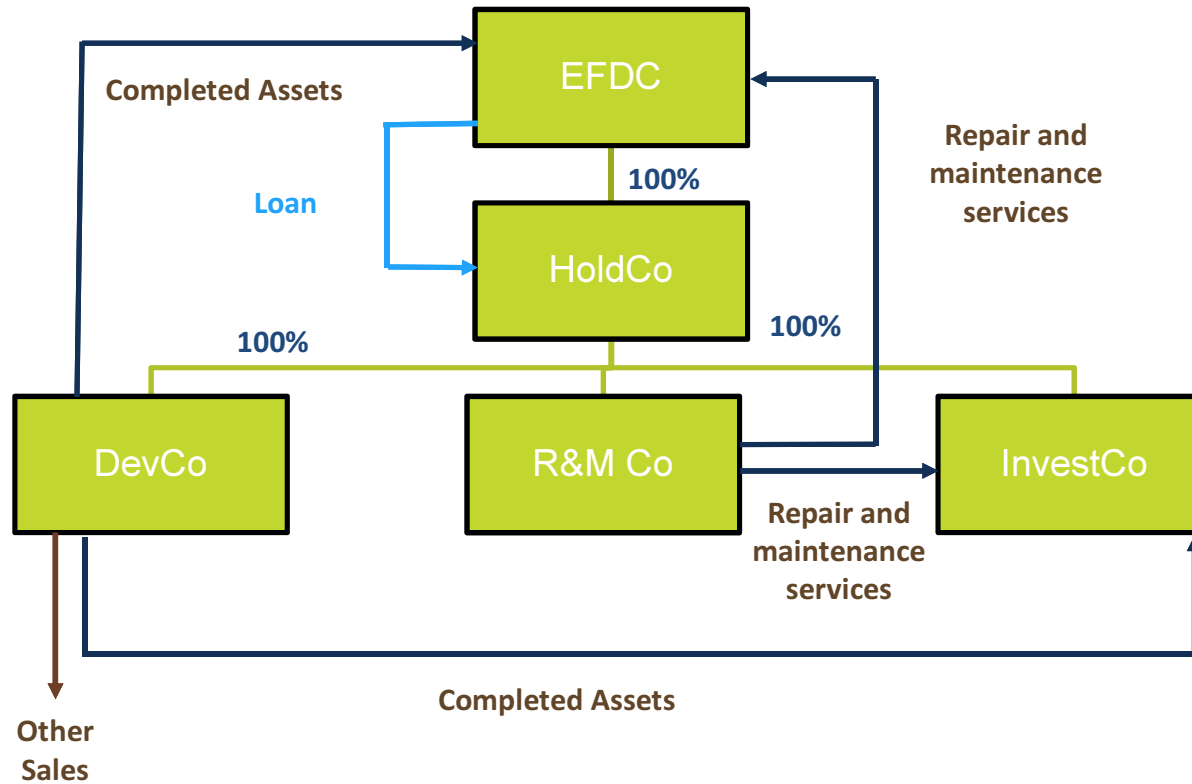
Outcome of analysis

- Company limited by shares preferred
- Key reasons
 - A separate “company” needs to be set up to undertake “profit making” activities as envisaged here
 - A holdco structure channels decision making, cash flows and borrowing and provides tax efficiencies
 - Ring-fences risk (if desired)
 - Facilitates contracting and working effectively with third parties and creates commercial confidence
 - Can be structured to reduce PCR 2015 procurement costs and hurdles
 - Range of activities EDFC are planning to undertake
 - Option least open to challenge
 - Familiar in the sector



Recommended Structure

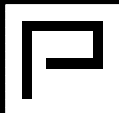
MODEL B (COMPANY LIMITED BY SHARES)



Decision making and vires

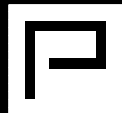
a) Existing Executive Arrangements

- Decision making will remain in line with existing Executive arrangements
 - (including the scheme of delegation)
- As such, the following matters generally remain reserved for full Council:
 - approval of / adoption and revisions to the policy framework and the budget
 - Adoption of plans and strategies, (will catch the 1 and 6 year business plans – as incorporated into the Budget)
- This is supplemented by express control over “Reserved Matters”



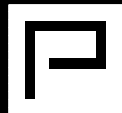
b) CIPFA

- The SoS has given guidance in relation to the way s.12 powers (to invest) are exercised in the form of the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003
- Local Authorities must have regard to this Guidance
- The following apply:
 - *"Treasury Management in the Public Service: Code of Practice and Cross - Sectoral Guidance Notes"* Chartered Institute of Public Finance and Accountancy (CIPFA)
 - Statutory Guidance on Local Government Investments (3rd Edition), MGCLG



c) Statutory Guidance on Local Government Investments (3rd Edition)

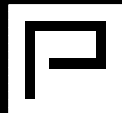
- The regulations require the preparation of at least one Investment Strategy for each financial year
- To contain specified disclosures and reporting requirements
- The Strategy should be approved by full Council
- **This is recognised and information is provided to facilitate this through the contract documents**



d) State Aid

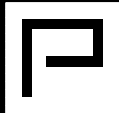
- To comply with State Aid Regulations
- **Land**
 - Asset transfers into the company will be required to be transacted at fair value, which means open market value and
 - any disposal of land must also be for the best consideration reasonably obtainable under s.123 of the Local Government Act 1972

Market value will be subject to independent valuation / verification
- **Loans**
 - Must be provided on no more preferential terms or rates than had a commercial lender provided the lending for similar activities with a similar risk profile



e) Procurement considerations

- If structured correctly the set up and activities of the vehicle need not be advertised
- Set up
 - As the council will have 100% ownership and the requisite control over holdco and delivery vehicles, the Council can take advantage of the *Teckal* exemption



Procurement considerations

- Subsequent activities
 - Any vehicle purely performing commercial functions to "*make a profit*" are unlikely to be seen as "*meeting needs in the general interest*" (the test to engage procurement regulations)
 - As such, the entities may not be caught by the Public Contract Regulations 2015 and have freedom to contract without tendering, etc **provided:**
 - the vehicles remain free to make day to day commercial operational decisions within the control parameters outlined earlier
 - the *Teckal* '80%' test is not breached



Corporate structure

- A holding company (“Qualis”), 100% owned by EFDC;
- Three wholly-owned subsidiaries of Qualis each also being a company limited by shares being:
 - A development company (Devco)
 - An investment company (Investco), and
 - A repair and maintenance company (R&Mco)



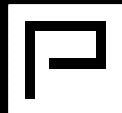
Corporate structure

- Shareholders have no obligations as a matter of law
- Each company will have a board of directors appointed by EFDC responsible for day to day governance
- Constitution of each board is a matter for EFDC throughout the life of project (note: EFDC is a party to each shareholder agreement)
- Each vehicle remains subject to both of the following:
 - general governance controls
 - express shareholder controls



Corporate structure – board control

- **Flat Structure**
- **Boards** broadly **being same** across different entities, but, with possibly with differences / additions to recognise specific business activities
- Manages day-to-day activities
- Each company and its activities governed by a shareholders' agreement (which is structured to operate both within statutory and agreed constraints)
- Subject to i) above controls and ii) compliance with directors duties, each board **can delegate duties**, functions, including to EFDC personnel



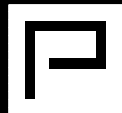
Corporate structure – board composition

- The composition of the Board is proposed to be a combination of:
 - Council Officer Appointees
 - Council Members (pro rata), and
 - Independent Non-Executives
- As regards appointments:
 - It will be recommended to Cabinet that an interim board is appointed on 6 February 2020
 - A recruitment and selection process will be run using a specialist, independent recruitment
 - Candidates will be subject to due diligence, considering the commercial and development interests of potential candidates
 - The final selection process to be undertaken by the Councils' Senior Management Selection Panel. Recommendations to appoint will then be made to Full Council for approval.



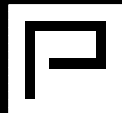
Corporate structure – shareholder control

- Primary purpose of the shareholders' agreement: to set out those matters that the directors of the relevant company can and cannot undertake including those without specific consent (“Reserved Matters”)
- Reserved Matters are referred to a specified person (a ‘gatekeeper’) acting for EFDC to:
 - make decisions to extent has delegated power to do so; and
 - (otherwise) channel questions and decisions to relevant Council entities for approval



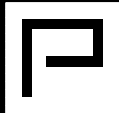
The Gatekeeper

- It is recommended that the section 151 Officer act as gatekeeper on behalf of EFDC as the Shareholder's Representative.
- The section 151 officer acts as a conduit between EFDC and Qualis Group (and subsidiaries)
- The extent to which the gatekeeper can take decisions will be determined by EFDC in advance
 - General (existing) delegated powers
 - Express additional delegation (if felt appropriate) to deal with non key or lower threshold matters



The Gatekeeper

- The Section 151 Officer will:
 - act in accordance with the sanctioned business case, budget, and loans already agreed or approved by EFDC
 - Seek approvals for any Reserved Matter (outwith his delegated authority)
 - IN ADDITION bring to the attention of the Cabinet any significant issue or deviation from these approvals on the precautionary principle
 - In respect of any issue of concern the gatekeeper will:
 - firstly, brief the Leader
 - secondly, and if requested, set out the issue and decision to Cabinet or Full Council for approval in line with the mandates of the existing EFDC Constitution



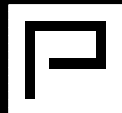
Corporate structure – reserved matters

- Reserved matters are the means by which the corporate entity operators within an agreed framework
- The framework sets the boundaries between activities which are and aren't permitted without specific permission from the gatekeeper E.g.:
 - expenditure up to a limit will be allowed, but over the limit needs to be referred to the gatekeeper
 - where within his delegated power, then make decision
 - otherwise (following the usual EFDC processes for such matters) gatekeeper to obtain relevant Council approvals



EFDC control- summary

- 100% owner (directly over Holdco and indirectly, through Holdco, over subsidiaries)
- Party to each Shareholders agt so can directly enforce same
- Appoints and ultimately controls Board
(although day to day activities and business of the business to be left to and managed by Board)
- Reserved Matters



EDFC- Approvals and reporting

- Approvals:
 - Annual review of the business cases, the 1-year and 6-year Business Plans
 - Inclusion of the impact of the Qualis annual business case into EFDC's Annual Budget for approval by Cabinet and recommendation for approval to Council
 - Reserved Matters
 - Specific requirement for Qualis to give first refusal to EFDC loans
- Reporting
 - A quarterly requirement for Qualis progress reports, including standard financial and business measures
 - In-depth Scheme / Development reporting to Council under DMA
 - The ad hoc ability for the Section 151 Officer to exercise the “open book” requirement and provide a report to the Cabinet as necessary



Anticipated Outcome

- The estimated gross investment by the Council will be around £100m in the next five years, delivering a minimum 3% net return across the portfolio
- The current budget estimates expect Qualis to deliver:
 - A return of £600,000 a year for four years in respect of working capital loan
 - A return of £600,000 a year in perpetuity around new asset purchases (initially these have been purchased via the Council).
 - A return £2,200,000 for 30 years in respect of loans given for developments
 - A return £192,000 a year in leasing space and buying services from the Council
- In addition to the benefits set out within the budget the Council may also achieve:
 - Additional dividends as properties are sold, potentially from 2022/23
 - Possible savings in EFDC if further services and personnel are transferred to Qualis



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