



REPORT OF: **HOUSING, HEALTH AND ECONOMIC DEVELOPMENT SERVICES MANAGER**

TO: **SPECIAL BUDGET EXECUTIVE**

DATE: **7th February 2018**

Report Author: **Julie Whittaker**
Tel. No: **(01282) 661038**
E-mail: **julie.whittaker@pendle.gov.uk**

ESTABLISHMENT OF A HOUSING JOINT VENTURE COMPANY

PURPOSE OF REPORT

To seek agreement to the establishment of a new Joint Venture Company between Pendle Council, Barnfield Investment Properties and Harewood Housing Society Ltd (part of the Together Housing Group). The purpose of the Company is to increase housing supply for return on investment through the development of a mix of open market and affordable housing in Pendle.

RECOMMENDATIONS

1. To agree the setting up of a new Joint Venture company between Pendle Council, Barnfield Investment Properties and Harewood Housing Society Ltd.
2. To agree the draft Heads of Terms at Appendix 1 setting out how the Joint Venture company will operate.
3. To give delegated authority to the Chief Executive in consultation with the Leader to agree the final details of the Joint Venture and establish the company.

REASON FOR RECOMMENDATIONS

1. To support the development of new open market and affordable housing in Pendle.
2. To provide a return on investment.

ISSUE

1. In September 2017 the Executive agreed to the principle of establishing a Joint Venture (JV) between PEARL2 and Together Housing to develop open market and affordable housing. The intention of the JV would be to increase housing development in Pendle through bringing in another partner with additional resources. It would also secure funding for affordable housing that may otherwise have gone to other boroughs.
2. Following agreement to the principle of a JV further legal advice has been sought on how to structure a JV to ensure that it would comply with public sector Procurement Regulations, if required.

PROCUREMENT REGULATIONS

3. Our existing PEARL2 JV with Barnfield Investment Properties was established in 2009 following an OJEU compliant procurement process. In the original OJEU advert it was stated that the joint development working was for a fixed period of 120 months (ie 10 years). This period will expire in 2019.
4. When PEARL2 was established it was agreed as part of the procurement that PEARL2 could offer contracts to Barnfield Construction without the need for further procurement. This was on the understanding that an independent Employer's Agent, employed by PEARL2, would assess price proposals from Barnfield Construction to ensure that they represented value for money. Sub-contracted packages of work would still be subject to a tendering process.
5. As the PEARL2 partnership will only run until 2019 Members will need to decide in the coming months whether they wish to extend the timescale of this partnership. This will be the subject of a separate report to a future meeting.
6. If it is agreed to extend the timescale then it would need to be done in compliance with the Public Contracts Regulations 2015. Regulation 72 of these Regulations relates to changes to existing contracts and has a number of permissions which allow revisions to contracts without the need to carry out a further procurement exercise. Regulation 72 would apply as long as, amongst other matters, the value which Barnfield benefits from as a result of the extension does not exceed 50% of the value of the original contract and there is no material modification to the nature of the contract.
7. The original OJEU Contract Notice did not actually contain an anticipated contract value (it was not possible to do so at the outset of the arrangement given the scope to introduce new development opportunities during the life of the procurement), so it would become a question of fact as to whether or not the extension added more than 50% to the value over the preceding (original) period. However, introducing a further partner as a new equity investor into PEARL2 would alter the capital structure of PEARL2 significantly. This would be classed a substantial modification and would not be acceptable under the regulations without carrying out a further procurement. To allow for the option of extending the timescale of the existing PEARL2 JV it will be necessary to establish a new company rather than introduce a further partner into the existing partnership.

STRUCTURE OF A NEW JV

8. When establishing a new JV it is intended that construction work will still be carried out by Barnfield Construction, as this arrangement has worked well in our existing PEARL2

JV. The use of Barnfield would be subject to requirements to ensure value for money for the JV. In order for this arrangement to take place the new JV will need to be structured in a way that it is not classed as a 'Contracting Authority'. Contracting Authorities are State bodies, regional or local authorities or "*bodies governed by public law*". The JV company is not a State body or a regional or local authority and therefore would need to fall within the last category to be classed as a Contracting Authority.

9. A body governed by public law needs to meet a number of tests: it needs to be established to meet needs of general interest, not have an industrial or commercial character and satisfy finance and control conditions.
10. Where a body operates in normal market conditions, aims to make a profit and bears the losses associated with its activities then it is likely to have an industrial and commercial character and thereby not eligible for Contracting Authority status. The purpose of this is that the "bodies governed by public law" category is not intended to capture commercially independent organisations in the marketplace. It will be important to establish the JV company so that it operates competitively in the market, aims to make a profit and bears its own losses (in that it is not protected by any expectation of State finances against losses incurred). The arrangement between Pendle Council and the joint venture company will need to be commercially at an arm's length. This is how our established PEARL companies work at present.
11. The original proposal was for Together Housing to be the JV partner. Together are now proposing that the partner will be Harewood Housing Society Ltd, who are part of the Together Housing Group and act as their development company. This is because they are currently changing their status from a Registered Provider to a Charity (which is classed as a private organisation). This will mean that overall the new JV will only have public sector control from the Pendle Council shareholding. This will be a further safeguard to ensure that the JV is not classed a Contracting Authority.

HEADS OF TERMS

12. The draft Heads of Terms are attached at Appendix 1. The key points are:

Structure

13. The proposed JV will be structured as a private company limited by shares. The shareholding of the JV will be as set out below. This is based on the principle of Together Housing being a 50:50 partner with the PEARL partners:

Harewood Housing Society Ltd	50%
Pendle Council	15%
Barnfield Investment Properties Ltd	35%

14. The current arrangement with PEARL involves a 30% shareholding from Pendle but in the new JV Pendle will have a 15% shareholding. This new arrangement will bring in funding from another partner, so increasing the amount of leverage the Council's funding can achieve and increase the overall housing delivered in the borough (for every £1 that Pendle contributes, partners will contribute £5.67).

Business

15. The first projects to be delivered by the JV will be those that are currently under development by PEARL/PEARL2 i.e. Clitheroe Road (Foxhills), Carry Lane and Oak Mill (Langroyd Place). A pipeline of future sites will also be developed. Harewood Housing will be given the first option to purchase any properties that are developed for an

affordable tenure, including shared ownership, at a price to be agreed by the JV. If they do not wish to purchase them the JV would have the option of selling them to another Registered Provider or selling them as open market housing (subject to any planning requirements for affordable housing).

Funding

16. As now, and in compliance with State Aid requirements (see below) funding would be on the basis of loans (in proportion with the shareholding percentage) with further development funding from banks or other lenders. The JV partners are currently applying to the Lancashire LEP for a loan under the Growing Places Fund.

Governance

17. The governance of the JV will be through a Board with representation from each of the three partner organisations. The Board will have overall control of JVCo including:
- dealing with accounts (including management accounts, end of year accounts and reports to the parties);
 - preparing the annual Business Plan; and
 - providing the parties with information as to progress of the business
18. Pendle Council will have four seats on the Board who will be elected members, two from the ruling Group and one each from the other Groups. The voting rights will be in proportion to the shareholding rather than the number of members i.e Pendle will have 15% of the votes. However, there will be a number of reserved matters which will require the agreement of all members. These include the adoption of annual Business Plan, entering into major construction contracts and changing each party's contributions. **Importantly, this will mean that Pendle Council will be able to veto developments that they do not want to progress.**

Disputes

19. If there is a dispute at the Board there will be an escalation procedure. If disputes cannot be agreed by the Board directors they will be escalated to the Managing Director/Chief Executive level of the respective organisations. If a resolution cannot be found at that level this will be classed as 'deadlock' and there will be a further formal escalation procedure. Failure to agree to progressing a particular project as part of a Business Plan for the JV is not counted as 'deadlock', it simply means that that site will not be purchased by the JV. If one or two of the three parties still wished to progress the development of that site then they could do that as part of a separate arrangement outside of the JV.
20. Experience of our PEARL JVs has shown that early informal discussion between the parties about a particular matter in advance of it going to the Board means that projects or financial arrangements that are unlikely to be accepted by both organisations do not get progressed to a stage of requiring Board approval. It is hoped that the new JV can operate in a similar way but the relevant safeguards will be in place if needed.

Profit

21. Each site would need to be viable in its own right (as with projects considered by PEARL2 at present). Profit from earlier schemes would be reinvested back into the company to reduce the need for borrowing on future schemes, unless all parties agreed to take funding out of the JV.

22. Services/Works

In line with existing PEARL arrangements, where Barnfield and Pendle Council put in staff time to develop projects at no charge to the company, Harewood Housing will do the

same. Again, this will be undertaken in compliance with State Aid obligations. Arrangements will need to be agreed for other support such as accountancy and administration of Board meetings.

23. Harewood are happy that Liberata are given first option for architectural services as they have carried out initial feasibility work on the provisional programme. Pendle's Engineers would also be given the opportunity to tender for the provision of engineering services. An Employers Agent would be jointly procured for projects which are not yet underway.
24. Construction management and lead contractor works will be undertaken by Barnfield Construction and they will be responsible for procuring sub-contractors. Barnfield will also lead on sales and marketing through their existing Barnfield Homes brand.

STATE AID

25. It will be important to ensure that any land or funding that public sector agencies, including Pendle Council, put into the new JV is not classed as State Aid. This is ensured under the existing PEARL2 JV through land being disposed of at market value and funding being provided in the form of loans provided at market rates. This will be considered on a similar basis with the new JV with each scheme/funding source considered on an individual basis.

TRANSFER OF PEARL HOUSING PROJECTS

26. As set out above, the current housing projects that are being delivered by PEARL/PEARL2 i.e. Clitheroe Road (Foxhills), Carry Lane and Oak Mill (Langroyd Place) will transfer into the new JV. A due diligence exercise is currently being carried out on behalf of the new JV to assess the value of the sites, the works carried out to date and the value of the completed developments. Existing contracts will also need to be novated (i.e. transferred) across from PEARL/PEARL2 to the new JV. PEARL/PEARL2 will agree the relevant values of the sites with the new JV to ensure that PEARL receives market value for the sites. This is important both to ensure that the PEARL companies are not disadvantaged in any way but also to ensure that the transactions do not involve State Aid.
27. The value of the sites and work to date will be PEARL/PEARL2's initial contribution into the JV and Harewood Housing will match that financial value to provide some further initial cashflow.

NEXT STEPS

28. Subject to receiving the necessary approvals from Pendle and Harewood Housing it is the intention for the Articles of Association and the Shareholders Agreement to be produced to enable the new JV to be set up for the beginning of the financial year.

IMPLICATIONS

Policy: None directly arising from this report

Financial: Additional funding will be brought in by Harewood Housing to fund more schemes than PEARL2 would be able to do at present. Existing funding that is in the Council's budgets to provide as loans to the PEARL companies may be redirected into the new JV, subject to agreement by Councillors.

Legal: A new legal structure will need to be put in place between Pendle, Barnfield and Harewood Housing. The power that is most appropriate for the Council to use in this scenario, given its desire to pursue a commercial outcome / purpose, is the power of general competence set out in s1 of the Localism Act 2011 which provides as follows: “s1(1) *A local authority has power to do anything that individuals generally may do*”

Consistently with the proposed outcome, s4(2) of the Localism Act 2011 goes on to provide as follows: “s4(2) *Where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.*” This gives a broad power sufficient for the Council’s engagement in this joint venture with Harewood and Barnfield.

The new JV will be structured in a way that means it is not classed as a Contracting Authority and is therefore not covered by the provision of the Public Contract Regulations 2015.

Risk Management: The new JV will be established as private company limited by shares and will be at arms-length from Pendle. Under the new JV Pendle’s shareholding will be 15% so the level of risk is reduced when compared to the PEARL companies where the shareholding is 30%. Loan funding into the new JV will be protected by ensuring that each new development scheme is appraised and is considered financially viable before a contract is let.

Health and Safety: None directly arising from this report

Sustainability: None directly arising from this report

Community Safety: None directly arising from this report

Equality and Diversity: None directly arising from this report

APPENDICES

Appendix 1 – Heads of Terms of the Joint Venture

LIST OF BACKGROUND PAPERS

None