

CABINET

22 March 2022

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| Title: Be First Business Plan 2022-27 | |
| Report of the Cabinet Member for Finance, Performance and Core Services | |
| Open Report with Exempt Appendix 1 (relevant legislation: paragraph 3 of Part I of Schedule 12A of the Local Government Act 1972) | For Decision |
| Wards Affected: All | Key Decision: Yes |
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| Accountable Strategic Director: Claire Symonds, Chief Executive | |
| Summary <p>This report seeks Cabinet approval of the 2022-27 Business Plan for Be First (Regeneration) LTD (co no: 10635656) (Be First) in line with the requirements of its Shareholder Agreement. The Business Plan has been scrutinised by the Shareholder Panel, the advisory body created to monitor and report to Cabinet on the performance of companies that the Council has a shareholding interest in.</p> <p>It must be noted that the Business Plan has been developed whilst in pandemic environment and its impact and that of other factors such as Brexit and increased fire regulations requirements are still impacting trading conditions and the Company's ability to deliver the outcomes outlined in the business plan. Performance against this plan will be monitored through the Shareholder Panel.</p> <p>The substantive Business Plan is contained within Appendix 1, which is in the exempt section of the agenda as it contains commercially confidential information (relevant legislation: paragraph 3 of Part I of Schedule 12A of the Local Government Act 1972) and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.</p> | |
| Recommendation(s) <p>The Cabinet is recommended to:</p> <ul style="list-style-type: none">(i) Approve the Be First Business Plan 2022-27, as set out at Appendix 1 to the report;(ii) Authorise the Finance Director, in consultation with and on the advice of the Investment Panel, to take all necessary action to enable Be First to carry out its proposals under the Business Plan and to agree any minor variations to the Business Plan subject to the conditions in these recommendations; | |

- (iii) Authorise Be First and/or the Finance Director to enter into any procurement related agreement or commitment, including procuring the new Development Framework, required to enable the delivery of the Business Plan, subject to compliance with Subsidy rules, the Public Contracts Regulations 2015 (or any replacement thereof) and the Council's Constitution; and
- (iv) Authorise the Finance Director, in consultation with and on the advice of the Investment Panel, to grant loans and complete all necessary documents and negotiations to complete the projects set out in the Business Plans subject to all necessary due diligence and compliance with Subsidy rules, the Public Contracts Regulations 2015 (or any replacement thereof) and the Council's Constitution.

Reason(s)

To assist the Council with delivering the Inclusive Growth Strategy and delivering a well-run organisation. This proposal is in line with Recommendation 8 of the independent Growth Commission's report published in February 2016 and is therefore aligned to the Council's 'Inclusive Growth' priorities.

1. Introduction and Background

- 1.1 Approval of the Be First business plan is reserved to the Council as shareholder under the Shareholder Agreement (entered into with Be First in September 2017). This is an executive function exercised by the Cabinet on behalf of the Council as shareholder. In line with the Shareholder Agreement, this Business Plan has been produced for Cabinet approval.
- 1.2 The Business Plan was approved by Be First's Board in February 2022; Corporate Strategy Group on 17th February 2022 and has been scrutinised by the Shareholder Panel and recommended for approval to Cabinet on Monday 28th February 2022.
- 1.3 This report highlights Be First's key objectives to be delivered and the period by which the returns, either financial or social, are expected with the detail behind the assumptions outlined in the 2022-27 Business Plan (Appendix 1).
- 1.4 The proposed Be First Business Plan identifies that Be First have progressed a number of activities in 2021/22 and that overall, since it was created Be First has played a key role in enhancing socio economic outcomes for the borough, as well as delivering on regeneration and place making objectives – all in synergy with the Council's "no one left behind" vision.
- 1.5 The 2021-26 GLA Affordable homes programme allocations show Barking and Dagenham as the top London borough to deliver new homes – expected to deliver 1,757 new homes (in second place is LB Enfield - expected to deliver 1,119 homes).
- 1.6 However, 2022 was another difficult year, with continuing challenges associated with trading in a pandemic environment and persistent pressures as a result of increased labour and materials costs, which have all had an impact on schemes delivery timeline and costs. The Grenfell Fire tragedy in June 2017 still plays a contributing factor to increased development costs.
- 1.7 The challenges have impacted existing and pipeline schemes' viability and have

made it more difficult for Be First to maintain its planned development programme through which it draws fee income. These trading conditions have therefore impacted the Company's ability to deliver the financial return and all core service functions are expected to deliver final year income which is less than business plan targets.

- 1.8 The 2022-27 Business Plan and the 2022/23 income forecasts in particular highlight the difficulties associated with delivering the core service functions of the Company in this trading environment. Furthermore, the procurement of a new development framework is anticipated to reduce the income associated with levy fees in future.
- 1.9 The 2022-27 plan assumes zero NHB payments post 2022/23. Central Government however, recently launched a consultation regarding a new round of New Homes Bonus (NHB) payments, although this will not attract new legacy payments. Should the consultation outcome result in some elements of NHB payments being issued, this may improve the financial return to the Council.

2. Be First Company performance highlights in 2021/22

- 2.1 Considering the challenges discussed above, Be First has been proactive in adapting its strategy during 21/22 and at the time of the production of this report is still forecasting to deliver its financial return and other commitments set out in its 2021-26 business plan by the end of the Financial Year. Although achievement of those still relies on certain schemes reaching contract award or practical completion by the end of March 2022 and therefore is not certain.
- 2.2 Be First's performance is measured against the following four key strategic objectives and progress and achievements against each of these is set out below.

Strategic objective 1 – New homes delivery
 Strategic objective 2 - Place making
 Strategic objective 3 - Socio-economic outcomes
 Strategic objective 4 - Financial return

2.3 New homes delivery

- 2.4 On a like-for-like comparison, schemes included in the 2021-26 business plan target are expected to achieve 207 out of the 241 new homes delivery target. However, Be First have accelerated the delivery of Gascoigne West Phase 1 which is now expected to complete by the end of 2021/22. If successful, this will add 201 additional units completed this year; totalling 408 new homes delivered.

Table 1: 2021/22 new homes completion forecast

| Project | Homes | |
|---------------------------------|------------|---------|
| Sacred Heart | 29 | |
| Melish & Sugden Way | 19 | Delayed |
| A House for Artists | 12 | |
| Becontree Avenue 200 | 19 | |
| Sebastian Court | 95 | |
| Margaret Bondfield | 15 | Delayed |
| Gascoigne East Phase 2 –Block C | 52 | |
| Total as per BP | 241 | |
| Gascoigne West Phase 1 | 201 | |

- 2.5 The 2022-2027 plan assumes zero NHB payments post 2022/23. Central Government however, recently launched a consultation regarding a new round of New Homes Bonus (NHB) payments, although this will not attract new legacy payments. Further details will be made available when this process concludes
- 2.6 **Place shaping**
- 2.7 The work to enhance outcomes from the Barking and Dagenham Local Plan as well as delivery of strategic projects, such as the Film Office and the relocation of The City's food markets, is expected to attract new employers to the borough, stimulate the local economy and create a sense of civic pride for residents.
- 2.8 The Thames Road Masterplan has been progressed, and officers are now working on the delivery plan which will set out the way the vision will be delivered. Work has commenced at Mark's Gate to co-design a vision for the area through engagement with communities, to ensure place shaping is driven by residents' experiences and needs.
- 2.9 The local plan has now been submitted for to the Planning Inspectorate for independent examination – in conjunction with the vision of “no one left behind” and sets out ambitious plans to deliver over 44,000 new homes; 20,000 new jobs and several other initiatives.
- 2.10 **Socio economic outcomes**
- 2.11 A number of the targets set out in the original Be First Business Plan were intentionally long term in nature and reflected the aspiration of the 30-year timeline for some borough Manifesto targets. These indicators are heavily influenced by factors in the external environment outside of Be First's control however Be First are an important lever in securing those outcomes.
- 2.12 For instance, since the pandemic broke out unemployment in the Borough increased from 5.5% in 2020 to 7.2% in 2021. This translated into 5,900 more residents claiming unemployment related benefits in September 2021 compared to February 2020. Be First is working with the Council's commissioning team to create additional local jobs through the Film Office, the forthcoming relocation of The City's food markets and other initiatives to assist in driving down unemployment levels.
- 2.13 Notably, the % of residents who are economically active (aged 16-64) with NVQ3 qualifications has increased from 46.8% in 2019 to 59.8% in 2020 – resulting in Barking & Dagenham moving from 32nd place on the league table (where it's been since 2017) to place 29. The business plan target is to contribute towards a positive movement of 5 places by 2027.
- 2.14 In addition, Be First's own initiatives and work with its supply chain to enhance socio-economic outcomes are expected to assist in altering the trajectory of socio-economic outcomes for the borough and as an example the following have been achieved during the 21/22 year
- 140 New Barking and Dagenham Jobs
 - 56 Apprenticeships supported across the Framework
 - 244 Work Experience weeks delivered across Be First Projects

- 1365 Volunteering days
- £67,929,140 invested locally in the supply chain

2.15 Financial Return

- 2.16 Be First's financial return is made up of several income sources such as the operational surplus from Be First's core functions (planning, capital programme delivery, construction), New Homes Bonus and Commercial income generated from investments proposed and delivered by Be First. To-date £2,605k has been secured in NHB and £6,862k in commercial income.
- 2.17 In the 2020/21 financial year Be First declared a £6m cash dividend to the Council, with £2m expected to be released by the end of this financial year, with the rest following in 2022/23. In the 2021/22 financial year Be First anticipate over-achieving with £13.9m (current unaudited position) against a £11.8m return but any dividend will depend on a number of elements which are yet to be finalised;
- 2021/22 Final audited accounts position (will be known in the Summer)
 - Tax liability on Be First's Profit and Loss Account which cannot be confirmed until the audited accounts are finalised
 - Confirmed retained earnings position (sufficient cash in the business to pay the dividend)
- 2.18 Importantly, overperformance in 2021/22 is expected to be made possible due to higher than planned commercial income, generated from Be First's marketing and handling of the sale of the Muller site. Core service functions of the business as noted in the introduction have all delivered less income than forecasted.
- 2.19 In total, Be First had to have delivered a cumulative return of £10.3m by 31 March 2021 and then annually recurring thereafter. Therefore, by the end of this financial year across the different income sources mentioned above, Be First should have delivered a £20.6m cumulative return to the Council. Be First has achieved cumulative surpluses in excess of its target within its accounts as set out within the Business Plan, but the actual return delivered to the Council will be £15,467k once the £6m dividend is paid in full. It has been recognised that the return will not be exactly £10.3m every year however, Be First are still expected to deliver the required return over the plan period.

3 Be First Business Plan Commitments 2022-27

- 3.1 The plan outlines a 390 new homes completion target in 2022/23. For further context, when Be First produced its first business plan five years ago, it anticipated delivering 595 new home completions in 2022/23.
- 3.2 In its 2021-26 plan, Be First noted that in order to achieve its finance return targets, it needed to deliver an average of 615 units per year. Across the proposed 2022-27 plan period the average new homes to be delivered per year is 468. Only two years out of the plan period deliver above the 615 averages required, however over the plan period Be First are forecasting to deliver at or above their agreed £10.3m revenue target per year due to additional income being expected from commercial acquisitions and sales income.
- 3.3 The plan includes further commitments to work with the Inclusive Growth

Commissioner to confirm the demands on the Housing Capital programme, enable a holistic approach to new homes delivery, as well as identify and pursue further opportunities to enhance delivery of this strategic objective - to accelerate regeneration activities in the borough.

- 3.4 The 2022-27 business plan outlines various commitments to work towards decarbonisation, from company level to collaboration with other council owned companies, as well as monitoring of Be First's supply chain efforts in this space.

4 Consultation

- 4.1 The Be First Business Plan has undergone the following consultations -

- Approved by the Be First Board in February 2022;
- Endorsed by Corporate Strategy Group on 17 February 2022;
- Endorsed by the Shareholder Panel on 28 February 2022.

5 Risks

- 5.1 There are a number of risks that have the potential to impact on Be First financial performance including risks attached to capital programme delivery; supply chain costs; general economic performance and activity including the ongoing impact of Brexit and Covid-19. These are assessed as part of the business plan and mitigations and monitoring arrangements in place, with the risk register being routinely updated. Corporate risks are monitored through the Shareholder Panel.
- 5.2 Given the increased scale of the borrowing, the interest rate risk (i.e. the risk that interest rates will be higher than currently forecast) will be significant. An interest rate margin has been included to produce the interest budget but there is still the risk that borrowing rates could increase, which would make a number of the more marginal schemes unviable. To mitigate this, where schemes have progressed through Gateway 4 and are in the process of being built, the Council will seek to lock in the borrowing requirement, but it will only do so when rates are relatively low.
- 5.3 It is key that the Council ensures the activity of Be First is strategically aligned with the Council and Reside priorities, to deliver long term outcomes for the borough. The Council has long established governance arrangements to achieve this through the Investment Panel and associated gateway processes.

6 Financial Implications

Implications completed by: David Dickinson, Investment Fund Manager and Tomas Mulloy, Chief Accountant

- 6.1 The Be First Business Plan (BFBP) is based on data as at 30 November 2021 and this predates any subsequent Investment Panel and Cabinet agreements. The costs in the report include significant increases in build costs for most schemes but predates additional pressures that have resulted from the high inflation levels, especially around operational costs.
- 6.2 The BFBP is dependent on development fees paid by the Council, although there is an increased income stream from commercial schemes. The developments outlined in the report have been significantly impacted by the increases in build cost and

increase to operational costs to manage schemes. This has resulted in most of schemes that are being built or are scheduled to be built to be unviable when assessed against their original assumptions.

- 6.3 The build cost increases are due to additional requirements to meet updated fire regulations, increased materials costs and, to a degree, costs associated with Covid-19. The build costs increase, although costly to the Council, have positively contributed to the Be First return target as fees are based on a percentage of build costs. However, the increase in build costs have meant some schemes have been delayed. To improve scheme viability, additional grant has been requested from the GLA and the use of Right to Buy (RtB) receipts has increased from 30% to 40% (i.e. if £3m was originally required, £4m of RtB is being used). The use of RtB receipts will have an impact on future schemes as it is effectively a finite resource for the Council and is reliant on the sale of properties within the HRA. It is essential that future developments take this impact into consideration.
- 6.4 Even with the additional grant and use of RtB receipts, the viability of most schemes remains extremely challenging with schemes that were previously viable now being unviable or marginally viable. This is especially the case at individual tenure level and it has been necessary to significantly reduce the loan interest rate to Reside and the Registered Provider for these schemes, which has resulted in a much-reduced margin to the Council. The interest margin provides some protection to the Council should the viability of a scheme deteriorate. The reduction in lending rate has resulted in most schemes being viable but has greatly reduced the return to the Council and even then, many schemes are only marginally viable. It has also reduced the amount of surplus available to cover losses that are forecast in some years for other schemes, such as Trocoll.
- 6.5 The reduction in lending rate was possible due to the Council locking in low rates from the Public Loan Works Board. However Gilt rates have increased significantly over the past two months, and this limits the ability to reduce lending rates for pipeline schemes and potentially may require the lending rate to increase if the increase in rates is long term. This will put further pressure on the viability of pipeline schemes if build and operational costs do not decrease.
- 6.6 One consequence of the increased build costs is that there is an increase in the number of turnkey schemes being looked at as part of the BFBP. Turnkey schemes are built by a developer and can be built for significantly lower unit costs than Be First can achieve. For these schemes the Council agrees to purchase all or part of the scheme to accelerate the build, to ensure a stalled scheme progresses or to influence the amount of social housing being provided. These schemes can be significant in size, with Beam Park, a recently agreed scheme, requiring the Council to borrow in excess of £250m to accelerate delivery of 936 units in Dagenham. The Be First pipeline of schemes includes a number of turnkey schemes and it is essential that decisions to fund these schemes take into account the level of additional borrowing that the Council will need to undertake.
- 6.7 A number of turnkey schemes have been entered into with inflation linked financing of up to 50-year periods (effectively a leasing arrangement linked to the Consumer Price Index). Inflation linked financing provides the Council with an additional risk as the initial interest rate is higher than if the Council was funding these schemes directly and the interest rate is variable throughout the contractual period (subject to a cap). Consequently, the unit cost benefit of a turnkey scheme can be eroded

through higher financing costs. In addition to interest rate risks there are also cashflow pressures where schemes have financial years with negative cashflow forecasts. These shortfalls will need to be funded by surpluses generated by other schemes to ensure that the overall investment programme remains viable. The Council will have nearly £350m of exposure to inflation linked returns through Reside 1, the Aparthotel, Travelodge and Trocoll, which is a significant risk. The BFBP does not mention any further externally funded schemes and it is recommended to avoid these schemes in order to limit the Council's exposure to this risk and further cashflow pressure on the overall investment programme.

6.8 As a summary, the UK residential property market has come under pressure from a number of areas, with Covid-19 and increases in build costs providing the biggest challenges. Be First have managed to continue to progress a number of schemes and the regeneration within the borough is improving a number of areas, although the Council's borrowing requirement has increased significantly, with its return reducing substantially. Although there are considerable pressures on the residential schemes there have been a number of very positive outcomes to some of the industrial units the Council has purchased to progress regeneration. Although these generally provide a one-off contribution, it will be necessary to use returns from these sites to support pressures in the residential properties.

6.9 **Be First Return to the Council and Increased Borrowing Requirements**

6.9.1 The BFBP outlines a continuous programme of development and regeneration of the Council, with a significant increase in borrowing required. The BFBP shows that Be First are forecasting to provide a return of £13.9m for 2021/22, which is higher than the original forecast of £11.8m. The excess return is mainly due to Be First receiving fees for the sale of the Muller site. The BFBP includes pressures on labour and material costs for running the business and the reasons for these should be monitored closely. The BFBP does not include debt repayment.

6.9.2 The BFBP forecasts Be First's ability to deliver at or near its target of £10.3m to the Council for the next three years. As the target return has not changed from the £10.3m, the forecast of additional return provides a margin, should there be pressures on the return.

6.9.3 To enable Be First to achieve these returns and to fund the schemes that have been agreed to date, the Council will need to spend £712.7m to 2025/26. This is in addition to the total spend of £503.8m already incurred. This will push the total amount borrowed by the Council to £1.5 billion. If pipeline schemes are taken into account, the forecast is for total borrowing increasing to over £3 billion over the next ten years. Adding income strip schemes agreed will increase the total capital financing requirement to potentially £3.5 billion.

6.9.4 The new build schemes and turnkey schemes agreed and under construction or at design and planning stages are summarised below:

| Total New Build | Spend to 31 March 2022 | Spend 2022/23 to 2025/26 | Total Spend |
|------------------------------------|------------------------|--------------------------|-----------------|
| | £Ms | £Ms | £Ms |
| 12 Thames Road | 7.72 | 42.10 | 49.81 |
| Becontree Avenue 200 | 5.10 | - | 5.10 |
| Becontree Heath GW5 | 14.92 | - | 14.92 |
| Brocklebank | 0.23 | 12.69 | 12.93 |
| Crown House | 56.55 | -15.90 | 40.65 |
| Gascoigne East 3B | 3.05 | 122.84 | 125.89 |
| Gascoigne East Phase 2 Block C | 23.28 | -0.77 | 22.51 |
| Gascoigne East Phase 2 Block E1 | 7.54 | 54.13 | 61.67 |
| Gascoigne East Phase 2 Block E2 | 40.02 | 19.87 | 59.89 |
| Gascoigne East Phase 2 Block F | 37.80 | 36.16 | 73.97 |
| Gascoigne East Phase 3A Plot I | 3.11 | 39.96 | 43.06 |
| Gascoigne East Phase 3A Plot J | 10.39 | 24.40 | 34.79 |
| Gascoigne West Phase 1 | 80.26 | -14.74 | 65.52 |
| Gascoigne West Phase 2 | 41.63 | 88.37 | 130.00 |
| Grays Court | 6.98 | - | 6.98 |
| House for Artists | 3.32 | - | 3.32 |
| Industria | 10.77 | 26.32 | 37.09 |
| Jervis Court | 0.88 | 13.06 | 13.94 |
| Leisure Centre | 0.05 | 16.69 | 16.75 |
| Margaret Bondfield | 0.44 | - | 0.44 |
| Mellish Close | 2.02 | 0.22 | 2.24 |
| Oxlow Lane | 3.45 | 9.67 | 13.12 |
| Padnall Lake Phase 1 | 2.39 | 11.31 | 13.70 |
| Padnall Lake Phase 2 | 3.29 | 9.47 | 12.76 |
| Padnall Lake Phase 3 | 1.51 | 29.81 | 31.32 |
| Roxwell Road | -0.05 | 16.70 | 16.65 |
| Sacred Heart | 8.45 | - | 8.45 |
| Sebastian Court | 13.71 | - | 13.71 |
| Sugden Way | 2.60 | - | 2.60 |
| Weighbridge | 10.42 | - | 10.42 |
| Wivenhoe | 3.86 | - | 3.86 |
| Woodward Road | 12.91 | 3.45 | 16.36 |
| Total New Build | 418.60 | 545.82 | 964.43 |
| Turnkey Schemes | | | |
| Trocoll House * | 0.80 | 1.67 | 2.47 |
| Transport House | 0.93 | 35.17 | 36.10 |
| Town Quay Wharf | -1.94 | 9.87 | 7.93 |
| Chequers Lane | 23.38 | -7.68 | 15.69 |
| Beam Park | 61.99 | 127.86 | 69.22 |
| Total Turnkey | 85.16 | 166.88 | 252.03 |
| Total Borrowing Requirement | 503.76 | 712.70 | 1,216.46 |

* Trocoll costs relate to management costs, the actual build costs are £94m and this will be added to the Council's Capital Finance Requirement.

6.9.5 Development and Construction income, which delivers the majority of Be First's financial return is driven predominantly by fees from the Councils Investment and Acquisitions Strategy (IAS). The Council is responsible for funding the IAS and therefore this income is reliant on the Council providing funding. This funding

requirement must be factored into Be First's future strategy as there will be a limit to the level of funding the Council can provide, especially given the viability pressures the strategy is currently experiencing.

6.9.6 The Business Plan does not cover, in any great detail, other income streams outside of Development and Construction Fees and it is essential that Be First identifies additional income streams to reduce the pressure on the Council, being mindful of the requirement to remain within the Teckal framework. If this does not happen then there will be a continuous requirement for the Council to continue to increase its borrowing levels.

6.10 **New Homes Bonus**

6.10.1 As outlined in the BFBP, the future of New Homes Bonus (NHB) is unclear and potentially may end. Currently it has not been included from 2023/24 and therefore this risk has been mitigated to a degree in the BFBP.

6.11 **Be First Dividend**

6.11.1 To date, the return to the Council from Be First has been in form of NHB and Commercial Income. There have been no dividends received from Be First to date due to liquidity issues.

6.11.2 In Be First's FY20/21 accounts, they have declared a dividend of £6m but they can only pay £2m in 2021/22. This is the first dividend payment from Be First to the Council. The dividend for 2022/23 is yet to be confirmed but will include surpluses from the forthcoming disposal of the Muller site.

6.12 **Be First Loan**

6.12.1 The Council has provided Be First with a working capital loan of approximately £4.6m. Currently, interest is capitalised against the loan and the loan is unsecured. The BFBP does not include any plan to repay the loan or repay interest (rather than capitalise it) and it will be important that future Business Plans include a repayment plan as well as the implication of the repayment.

7 **Legal Implications**

Implications completed by: Dr Paul Feild Senior Governance Lawyer

7.1 Cabinet is requested to approve the Business Plan for Be First, for the five-year period 2022-2027. The Council is a 100% shareholder of Be First, which was set up by the Council to accelerate delivery of regeneration in the area. The relationship between the Council and Be First is regulated through a shareholder agreement dated 29 September 2017, albeit this is not a legal requirement. Shareholder agreements make provision to ensure accountability to the Shareholder and form part of both the governance of the companies and the contractual documents setting out the course of business, accounting for dividends, and reserved activities over which only the shareholder has control. Via its shareholder controls (exercised through Cabinet and Shareholder Panel) the Council can set the strategic direction for Be First and monitor its performance. It is a condition of the agreement that an update on the business plan is presented to the Council on an annual basis, albeit the Business Plan for Be First is prepared for a rolling given year period.

Relevant Statutory Powers

- 7.2 The Council has a number of relevant powers regarding its establishment of trading companies, borrowing and investment activities. Section 1 of the Localism Act 2011, the general power of competence (“GPC”) empowers local authorities to do anything that an individual can lawfully do provided that the activity is not expressly prohibited by other legislation. Activities authorised by the GPC can include investment, trading or charging decisions which may be undertaken through commercial (corporate) vehicles with the primary aim of benefiting the authority, its financial management, its area or its local communities. The power is wide and provided that the specific activity is not expressly restricted or proscribed by other legislative provisions, it will be within the parameters of the GPC power. However, Section 4 of the Localism Act 2011 adds a proviso that if the GPC power is exercised for an activity which may be deemed ‘for a commercial purpose’ that is more than incidental to other functions or purposes of the Council, such activity must do so through a company. Therefore, there may be circumstances where commercial activity carried out by the Council’s companies may necessitate that a company limited by shares is utilised and may require further approvals by Cabinet whether the projects have been identified in the proposed Business Plan(s) or not.
- 7.3 Section 12 of the Local Government Act 2003 (“Power to Invest”) enables a local authority to invest for any purpose relevant to its functions under any enactment, or for the purposes of the prudent management of its financial affairs. Consequently, borrowing to invest primarily or only for profit would not be deemed directly relevant to fulfilling the authority’s functions and will not, therefore, be authorised under this power, furthermore revision to the accounting body CIPFA’s Prudential Code for Capital Finance issued in December 2021 forbids borrowing for the sole purpose of generating an income. However, investment in development, land or property with a view to promoting regeneration will fall within the power to invest.
- 7.4 Section 1 of the Local Government Act 2003 (“Power to Borrow”) provides local authorities with the power to borrow for any purpose relevant to their functions under any enactment or for the purpose of the prudent management of its financial affairs. The Power to Borrow has similar constraints to the investment power under the 2003 Act. To reiterate borrowing primarily to achieve a return is unlikely to be deemed connected to the functions of the Council or to be prudent financial management. Caution should be exercised in making decisions to ensure that any investments or loans financed with borrowing further the functions of the Council and are consistent with the prudent management of the Council’s financial affairs and associated prudential guidance. In instances, where there may be commercial reasons for borrowing or investment further scrutiny and approval by Cabinet will be necessary as to whether the proposed activity is within the powers to invest and borrow, reference to the revised CIPFA Prudential Code for Capital Finance is essential and relevant statutory guidance will be necessary (among other matters).

Other Legal and Commercial Considerations

- 7.5 The Council’s fiduciary duties can be summarised as the Council acting as a trustee in respect of taxes collected and public sector income on behalf of its rate and taxpayers. The Council in effect holds money but does not own it; it spends money on behalf of its business rates and council taxpayers.

- 7.6 In making approving the business plan, Cabinet should consider the risks and benefits of approving the recommendations, i.e. whether a prudent investor, shareholder or borrower would undertake the activity or risks proposed; whether the Council will achieve appropriate outcomes and return for the risk it is taking, and that the risks and potential costs involved in approving the planned business activity have been appropriately mitigated in the event of the company (or any subsidiaries) becoming insolvent and/or defaulting on outstanding loan(s). It should be borne in mind that in instances where loan book activity references in the report and business plans is funded by PWLB borrowing, a default by the borrower/s (whether the Council's entities or other third parties) could leave the Council exposed to repaying loans and interest notwithstanding default by its borrowers. The responsible officer (the Finance Director) under the Councils Constitution's Scheme of Delegation for Investment should also consider these risks in approving the terms of any relevant legal agreements.

Funding and Borrowing

- 7.7 Section 15 of the Local Government Act 2003 requires that the Council have regard to statutory guidance in relation to exercising its borrowing and investment powers. The relevant Statutory Guidance on Local Government Investments (3rd Edition, issued on 1 April 2018). In accordance with the Guidance (paragraphs 33 and 34), A local authority may choose to make loans to local enterprises, local charities, wholly owned companies and joint ventures as part of a wider strategy for local economic growth even though those loans may not all be seen as prudent if adopting a narrow definition of prioritising security and liquidity provided that the overall Investment Strategy demonstrates that:

- The total financial exposure to such loans is proportionate;
- An expected 'credit loss model' has been adopted to measure the credit risk of the overall loan portfolio;
- Appropriate credit controls are in place to recover overdue re-payments; and
- The Council has formally agreed the total level of loans by type and the total loan book is within self-assessed limits.

- 7.8 It is noted that matters associated with credit / risk management and borrowing / lending activity are expected to be addressed in the next iteration of the Council's Investment Strategy.

- 7.9 Individual schemes and projects will have potential implications under the Public Contracts Regulations 2015 and state aid rules, which will need to be complied with by the Council or the company undertaking such activity for the Council. The Council should put in place appropriate assurance protocols for checks and balances to ensure that its companies are compliant.

Procurement Implications

- 7.10 Be First's business arrangements were structured to ensure that it can provide services to the Council without being subject to the compliance with the European procurement rules. That position has changed in that since February 2020 the UK has left the EU and the transitory measures ended on 31 December 2020. However some of the principles are also within in the UK's Public Contract Regulations 2015 (PCR. Thus the so-called 'Teckal' exemption is also set out in Regulation 12 of the

PCR. CIPFA advise that compliance requires a local authority (the Council) must control all the shares in a company (Be First), and also exercise effective control over the company's affairs in a manner similar to its own directorates, and finally that there is no direct private capital participation. Regulation 12 (3) of the PCR sets out the meaning of "control" as exercising a "decisive influence over both strategic objectives and significant decisions of the controlled legal person."

- 7.11 To benefit from the Teckal exemption, the PCR require that at least 80% of Be First's business turnover must be for its public sector owners. Be First is able to Undertake 20% trading with third parties in a manner which is still compliant with its 'Teckal' arrangements with the Council. The turnover is calculated based on three years of turnover – therefore allows for some smoothing over these years. It must be borne in mind that as a Teckal company Be First is an emanation of a public body, therefore, a contracting authority. As the financial position to date demonstrates, Be First primarily act as development / construction manager for contracts in respect of which the Council is employer. Therefore, in procuring works, services or other supplies from third parties, the company must tender in a manner compliant with procurement legislation. Whilst the Council has and is delegating to Be First procurement of contracts which facilitate the delivery of the Business Plan, it should be noted that as the parent body and often contracting party, the Council would also bear the risk of any non-compliance. Therefore, it is recommended that the Council in its shareholder capacity should undertake appropriate assurance measures from time to time to ensure overall compliance with procurement law and good practice by Be First.

Subsidies

- 7.12 While the UK has left the EU, local government is an emanation of the state, the Council must still comply with UK Law regarding subsidies. In a nutshell local authorities cannot subsidise commercial undertakings or confer upon them an unfair economic advantage. For example the UK membership of the World Trade Organisations agreement on trade also has requirements regarding subsidies albeit somewhat less prescriptive than the EU. However, the general principle applies in that support on a selective basis to any organisations or undertaking in a manner that could potentially distort competition and trade is challengeable and unlawful. This principle is binding in law on the Council. A distinction should be made for grant funding to deliver affordable housing. These payments are from the state to make viable such tenures which would not otherwise be viable, they are not subsidising Be First as an entity itself. Returning to the operation of Be First, Business Plans must be compliant in design and execution to avoid subsidising. The Council is aware of its duty not to breach Subsidy law and in this regard, will continue to monitor and seek reassurance from its companies that their activities and support from the Council (including its terms, finance rate and security offered) satisfies the Market Economy Investor Principle and any loans and facilities from the Council are at a commercial rate. Due diligence will be carried out to confirm this to the Finance Director for Investment before entering into any agreements or permitting drawdowns.
- 7.13 Even if there are any residue aftermath of the EU rules that appear no-effective now, the Council has duty to seek best value and improvement under the Local Government Act 1999 and public law fiduciary duty to look after its assets owned to the Government, Non-Domestic ratepayers and Council taxpayers of the borough. This means there is a duty of trust to look after all funds and assets of the Council as though the Council was a trustee and be management in a prudent and sound

business-like way and minimising risk to the assets and resources owned by the Council and its companies.

Governance Implications

- 7.14 The approval of the Be First business plan is reserved to the Council as shareholder under the Shareholder Agreement. This is an executive function exercised by the Cabinet on behalf of the Council as shareholder. Under Part 3, Chapter 1, paragraph 1.2 of the Council's Constitution, the Cabinet can in turn delegate its functions to an officer or authorise the officer to take decisions in respect of specific schemes forming part of the Business Plan, subject to established parameters, such as the need to consult other officers or Cabinet Members prior to making a final decision. It is noted that an Identified Officer being the Finance Director has such delegations (e.g. in respect of investment decisions) under the Constitution or expressly given by Cabinet on specific plans or schemes.

8 Other Implications

- 8.1 **Contractual Issues** - Development of Business Plans is a contractual commitment for all of the Companies and is designed to set the framework by which the strategic direction of each Company is considered and approved or endorsed by the Council as either a major or minor Shareholder.
- 8.2 **Corporate Policy and Customer Impact** – The outcomes noted within the Business Plan are expected to have a positive impact on residents, either by supporting the Council's aim to become self-sustainable as well as improving service outcomes and employment and business opportunities for residents and local businesses.
- 8.3 **Health Issues** - The proposed Business Plan will have a positive impact on the local community in terms of improvements to the environment, place making and housing.
- 8.4 **Property / Asset Issues** – Any changes to the delivery of regeneration schemes will impact the financial assumptions set out within the Reside Business Plan

Public Background Papers Used in the Preparation of the Report: None

List of appendices:

Appendix 1: Be First Business Plan 2022-2027 (exempt document)