LONDON BOROUGH OF WALTHAM FOREST

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Report Title | Housing Investment and Delivery | 
Cabinet Portfolio | Councillor Khevyn Limbajee, Portfolio Lead Member for Housing | 
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Wards affected | All wards | 
Public Access | Open Except for Appendices 4 and 5 which are exempt in accordance with Section 100(A-H) of the Local Government Act 1972 and Schedule 12A as amended, on the grounds that it involves the likely disclosure of exempt information as defined in Part 1, paragraph 3, as they contain information relating to the financial or business affairs of any particular person (including the authority holding the information) and Part 1, paragraph 5 as it contains legally privileged information and disclosure would not be in the public interest | 

1. SUMMARY

1.1 On 24 May 2016, Cabinet approved in principle the establishment of a wholly owned company as a means to provide housing investment and delivery in the borough and to deliver a commercial return to the Council.

1.2 The Council now wishes to establish Waltham Forest Developments Ltd (the “Company”) and to provide the finance to enable the Company
to undertake an initial programme of development and investment activities.

1.3 This report confirms the proposed structure of the Company and its governance and its initial development and investment programme for years 2016/17 to 2020/21.

2. RECOMMENDATIONS

2.1 For the reasons set out in this report Cabinet is recommended to:

2.1.1 Approve the establishment of the wholly owned company, to be called Waltham Forest Developments Ltd, for the objects and purposes set out in this report and the Appendices, and on the basis of the associated documentation.

2.1.2 Agree that the Directors of Waltham Forest Developments Limited will be ex officio the officers holding the posts set out in paragraph 3.10 (or any successor post performing the same function) and that the initial appointments will be referred to full Council for ratification.

2.1.3 Agree to establish a Shareholder Committee as a sub-committee of Cabinet with the Terms of Reference provided at Appendix 3 and that the Lead Members identified under paragraph 3.15 be appointed to the Sub-Committee.

2.1.4 Approve the provision of finance by the Council to Waltham Forest Developments Ltd of up to £100 million over the period 2016/17 to 2020/21 for development and investment activities. Such finance to be provided subject to a satisfactory business case being provided for each development or investment opportunity or activity, and on terms consistent with the options and recommendations set out in Appendix 5 – Funding options report.

2.1.5 Approve the provision of an initial loan of £150,000 to meet the working capital requirements of the company and delegate authority to the Director of Finance to agree the terms.

2.1.6 Delegate authority to the Director of Finance to:

(a) Appoint professional consultants to provide financial, commercial and legal advice as required.

(b) Take all necessary actions and agree all appropriate documents to establish and incorporate the Company.

3. PROPOSALS

Background and Purpose

3.1 In May 2016, Cabinet approved in principle the establishment of a wholly owned company with the purpose and objectives being to provide housing investment and delivery in the borough and to deliver a commercial return to the Council.

3.2 The business of the Company will be:
To operate as a commercial company (for trading or other purposes) and deliver a financial return for the benefit of the Council and/or to fund the Company's future business activities;

- to purchase land and property either from the Council or on the open market; and

- to acquire, develop, construct and/or refurbish residential homes and retail or commercial premises in accordance with the Business Plan.

- any other activity reasonably incidental to the above.

3.3 Whilst in the first instance the development and investment activities of the Company are proposed to relate almost entirely to housing development within the Borough, it is recommended that the Objects of the Company are unrestricted and that, subject to Shareholder (i.e. the Council) approval, the Company can operate outside of the Borough. This openness and flexibility is recommended to allow the Company to undertake other non-residential commercial development and investment, and also to undertake development or investment activities on sites either owned by the Council already or acquired by the Company outside of the Borough.

Company Form

3.4 The recommended form for the Company is as a wholly owned Company Limited by Shares. This allows for future flexibility for the Council and the Company to determine the most appropriate structure and approach to future development or investment activities beyond those initially envisaged. In this form the Company would be able to claim Stamp Duty Land Tax relief on land transfer from the Council (as sole shareholder in the first instance).

3.5 Operating through such a Company potentially offers an easier route to implement structures for projects going forward. For instance, the Council may decide to deliver project through a series of individual vehicles i.e. with the Company acting as a holding company for the vehicles, or to split distinct elements of a complex project into separate vehicles.

3.6 Alternatively, the Council may decide to form a strategic partnership with a co-investor (possibly a financial investor or a housing developer). By selling part of its stake in the Company to the co-investor the Council could change the Company from a wholly owned subsidiary into a Joint Venture company. This would be a relatively straightforward option if the Company was already established and trading.

3.7 A co-investor could be a private sector business, or potentially another public sector body (e.g. a neighbouring Borough) to allow for the sharing of risks and costs, and to facilitate developments where there is a common interest (e.g. sites close to or straddling a boundary).
3.8 Such actions are not the current intentions of the Council, however if a Company structure already exists, implementing such options would be relatively easy at a future time should circumstances demand.

3.9 A report setting out the key features of the proposed Articles of Association, prepared by Trowers & Hamlin, the Council’s legal advisers for this project, is included at Appendix 1.

**Governance**

3.10 A Board of Directors who will, in the first instance, be made up of Council officers ex officio will lead the Company. It is recommended that the Board of Directors comprises those occupying the following posts, and any successor job titles that perform the same function:

- Assistant Director of Housing Strategy and Investment
- Director of Financial Management & Accountancy
- Head of Commercial Law
- Assistant Director of Property

3.11 The appointment of Council officers to external companies is subject to ratification by full Council.

3.12 These activities of the Company and the interests of the Shareholder, the Council, are governed by a Shareholder Agreement which sets out the terms under which the Company will operate and how the Council, as shareholder, will participate in the Company. A report on the key features of the proposed Shareholder Agreement, also produced by Trowers and Hamlin, is included at Appendix 2.

3.13 It is recommended that the Council as Shareholder be represented by a Shareholder Committee. The Shareholder Committee will enable the Council to draw expertise and leadership from across the Cabinet in representing its interests and to be supported by Officers through the preparation and consideration of proposals.

3.14 It is recommended that the Shareholder Committee is formally constituted as a sub-committee of Cabinet in order to allow it to carry out its duties on behalf of the Council. A proposed Terms of Reference for the Shareholder Committee is included at Appendix 3.

3.15 It is recommended that those occupying the following Cabinet posts make up the Shareholder Committee:

- Leader (acting as Chair)
- Portfolio Lead Member for Housing
- Portfolio Lead Member for Economic Growth

3.16 It is understood that the Council is considering a number of areas of commercial operation and as such may decide to hold shares in other companies. To this end, it is recommended that the Shareholder Committee is not limited to representing the Council’s interests in respect of this specific Company.
3.17 Changes to the Council’s Constitution to reflect the creation of the Shareholder Committee and its Terms of Reference are subject to approval by full Council.

**Annual Business Plan**

3.18 The key role of the Shareholder Committee will be to agree the annual Business Plan prepared by the Company. The Business Plan will include:

- An updated programme of activity for the forthcoming year
- An updated financial plan for the forthcoming year including cash flow identifying income and expenditure and forecast for drawdown of finance provided by the Council
- Details of proposed future development and investment pipeline

3.19 The Business Plan will be prepared and submitted for approval in February to enable approval prior to the forthcoming financial year.

**Resourcing**

3.20 The Company is envisaged to procure services from the Council and/or others as appropriate, such that it operates efficiently and with the minimal viable operational overheads. In particular, it is proposed that in the first instance the Company will procure the following services from the Council:

- Company secretariat services
- Development management including Project Management, property, legal and planning advisory services
- Construction services (to make use of Council housebuilding framework where appropriate)
- Housing operation including management, maintenance and lettings

3.21 The Company will not be restricted to these arrangements in the future and the decision to procure these services from the Council will be taken on a project-by-project basis and consider the nature of the project and the ability and capacity of the Council to provide these services. For example, it could be envisaged that the marketing and letting of homes for market and sub-market rent or commercial properties may be best supported by others.

3.22 It is not proposed that in the initial operation of the Company a Managing Director or equivalent will be required. However, in progressing from Cabinet and Council approval to incorporation and full operation of the Company, the Company requires a dedicated resource for an initial period. This is in addition to the project specific staff resources provided by the Council and is required to undertake the following:

- Preparation of detailed loan and finance agreements
• Preparation of detailed business plan
• Preparation of scheme appraisal templates and proforma
• Preparation of contract and scope of services for procurement of Council services
• Development of proposals for operating private and intermediate rented housing
• Determination of requirements for subsidiary structures for different activities

3.23 It is proposed that the Company directly employs this dedicated set up resource in order that appropriate focus can be given. The initial resource is required on a full time basis for a period of say six months, presumed to run from November 2016 and would later drop to say, 0.4 of a Full Time Equivalent, once the set up is complete, and the resource is required to client the operations of the Company and the services provided by the Council.

3.24 The initial six month period of set up is estimated to require up to £150,000 of working capital (with approximately £130,000 falling within 2016/17) to provide for both the staff member employed by the Company (most likely on an interim basis) and for external legal and financial advice as the agreements and service contracts are prepared.

3.25 Following this period the costs arising from the Company’s client function and operation will form part of the Company’s activities and be recovered as project overheads applied to the development and investment activities.

Provisional development and investment programme and associated resources

3.26 A preliminary programme of development and investment activities for the Company has been identified. This programme runs for 5 years up to and including 2020/21 and includes the development of some 189 mixed tenure homes on Council owned land, both that currently accounted for within the Housing Revenue Account and the General Fund. This phase incorporates the housing developments on areas of Aldriche Way and Hylands Road estates and other potential sites. The programme also makes provision for the acquisition of a further 260 affordable homes from Council led developments at Central Parade, Juniper House and Coronation Square (Score Centre).

3.27 A summary of the provisional programme including anticipated timescales for completion is included at Appendix 4. This programme will form part of the Business Plan to be prepared and approved on an annual basis.

3.28 The schemes comprising this preliminary programme have an estimated capital funding requirement of £100 million, comprising both development led activities i.e. design, planning, construction and subsequent operation of new homes, and investment led activities i.e.
acquisition of properties developed by others and their subsequent operation.

3.29 The decision to provide finance for any one development or investment opportunity will be subject to:

- A satisfactory financial appraisal being provided demonstrating that the opportunity is financially viable
- There being sufficient headroom within the agreed finance to be provided to the Company by the Council
- Any project specific approvals being in place, i.e. where Cabinet approval, or other as appropriate, is required for the disposal of land to the Company

3.30 In the case of development led activities on Council owned land, the decision to provide finance and to proceed with a project will be made following the completion of a feasibility study. The preparation of the feasibility study, and the associated costs, will be the responsibility of the Council.

3.31 In the case of development led activities on private land, the preparation of the feasibility study, and the associated costs, will be the responsibility of the Company.

3.32 In the case of investment led activities i.e. property acquisitions, it is envisaged that the decision to provide finance and to proceed is made following the completion of the financial appraisal by the Company which will require the provision of any and all terms limiting or determining the use and operation, and affecting the value of the properties.

3.33 As noted under para 3.24 in addition to project specific finance, the Company will require working capital to undertake the activities noted under para 3.22 for set up.

4. OPTIONS & ALTERNATIVES CONSIDERED

4.1 The main alternatives to a Company Limited by Shares are Companies limited by Guarantee, Community Benefit Societies and Limited Liability Partnerships.

4.2 If the Company is not going to be used to trade for profit, and no dividends are anticipated to be paid to the Council as shareholder, the most suitable options are to set it up either as a company limited by guarantee or a community benefit society. However, the intended commercial objectives of the Company and the desire that the Council as shareholder receives dividend payments these forms would be inappropriate.

4.3 A Limited Liability Partnership requires at least two members so therefore a wholly owned local authority vehicle is not immediately suitable to this structure. Additionally, there are other vires concerns for a local authority participating in an LLP, particularly if using the power under section 1 of the Localism Act 2011, which provides that
the corporate form of the vehicle must be either a company or a community benefit society – not a limited liability partnership.

5. **SUSTAINABLE COMMUNITY STRATEGY PRIORITIES (AND OTHER NATIONAL OR LOCAL POLICIES OR STRATEGIES)**

5.1 The Council has ambitious targets for regeneration set out in a suite of documents under the *Creating a better place: Waltham Forest 2014-18* umbrella including Better Housing. As part of this regeneration programme, the Council is looking to facilitate and enable the delivery of 12,000 new homes of all tenures.

5.2 The housing development programme will contribute to meeting this new homes target. There will also be opportunities for providing construction training, apprenticeships and jobs through the building of these new homes.

6. **CONSULTATION**

6.1 No specific consultation is required for the decisions set out in this report. However, consultation will take place on an individual site basis as proposals are developed and submitted for planning and will include statutory consultation of neighbours and any other identified special interest groups.

6.2 In addition to this statutory consultation, neighbours of each of the sites, ward councillors and special interest groups including tenants and residents associations will be consulted on the development proposals prior to designs being finalised for planning applications.

7. **IMPLICATIONS**

7.1 **Finance, Value for Money and Risk**

7.2 It is proposed to establish a company wholly owned by the Council limited by shares. The company will be established in accordance with the Companies Act 2006.

7.3 It is recommended, subject to individual business cases, that the Council make a loan facility available to the company of up to £100 million covering the period up to 2020/21.

7.4 One option is that this loan facility could be funded through the Council borrowing from the Public Works Loan Board (“PWLB”). The Prudential Indicators contained in the Treasury Management Strategy 2016/17 report have been adjusted to provide the necessary headroom to allow for this potential borrowing requirement.

7.5 Funding will be provided on terms consistent with the options and recommendations set out in Appendix 5 – Funding options report, and will be subject to approval by Cabinet of a separate business case for each development. Funding provided by the Council to the company must be on commercial terms to comply with legislation on State Aid.
7.6 Funding for affordable housing may be exempt from this requirement but currently it is not planned to use this exemption. It is estimated that based on a loan portfolio of up to a £100 million that a surplus to the General Fund over the cost of borrowing from PWLB could be up to £750k per annum by 2020/21 (but estimates of interest rates in the future are uncertain).

7.7 The funding will include the provision of a working capital loan of £150,000, (£130,000 during 2016/17), on terms to be agreed by the Director of Finance. This loan will cover the revenue expenditure requirements of the company and /or the employment of temporary staff for a limited period and it will be funded initially from the BSR Investment Pot. If the company decides to directly employ staff it will need to consider arrangements for payroll, pensions and insurance.

7.8 The business case for each scheme developed by the company will include whether land is to be purchased from the Council or from others, and if Council land will be provided at less than full market value. If developments are to take place on HRA land then the company must pay market value for the land or the land must be appropriated to the General Fund. The company will aim to provide affordable housing within its developments to comply with Council objectives subject to the requirement to trade prudently and remain solvent.

7.9 Monitoring of the company’s progress, including financial monitoring, will be primarily the responsibility of the Board of Directors, subject to the supervision of the Shareholders Committee. The company will be liable to corporation tax. It will also incur VAT which is not recoverable (unlike the Council). These taxation costs will need to be taken into account in preparing financial plans.

7.10 The Company will need to take appropriate insurance in the light of its plans including appropriate Directors insurance and any related to being an employer to cover any staff that later may be directly employed.

7.11 The cost of establishing and incorporating the company (2.1.5 (b)) is estimated to be minimal and can be funded from within existing budgets.

7.11.1 There are risks of setting up a company, the primary one being that due to unforeseen market changes it may become insolvent. This risk should be mitigated by suitable monitoring arrangements as set out above. It is important that the company maintain the flexibility to set rents and if necessary dispose of properties to meet any shortfalls. The company should not be authorised to borrow or incur long-term liabilities without prior Council approval.

7.12 Legal

7.12.1 The Council has the power to establish and operate the company to develop homes to be let for rent and sold on the market or for low cost home ownership using the general power of competence under section 1 of the Localism Act 2011. In exercising this power the Council is still
subject to its general duties, such as its fiduciary duty, and must exercise the power for a proper purpose. The power is also limited where it overlaps with a power which pre-dates it (section 2 Localism Act 2011). Accordingly in setting up a trading company the Council must comply with section 95 of the Local Government Act 2003 and the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009.

7.12.2 Under section 4 of the Localism Act 2011 where, as is proposed here, that the general power is used for a commercial purpose, that commercial purpose must be carried out through a company.

7.12.3 Under sections 1 and 12 of the Local Government Act 2003 the Council may borrow money or invest for any purpose relevant to its functions or for the prudent management of its financial affairs. The borrowing must be prudent and comply with the Prudential Code.

7.12.4 The Council has the power to provide financial assistance (loan) for housing purposes under section 24 of the Local Government Act 1988 where the immediate landlord of the occupier is not a local authority. In this instance the landlord will be the Company. This power is subject to consent of the Secretary of State. The Secretary of State has set out pre-approved consents in the "General Consents 2010" (July 2011) and the "General Consents 2014" (April 2014). The Council can provide financial assistance to the Company under Consent C of the General Consents 2010.

7.12.5 Any housing made available for sale by the Company would not be covered by the 1988 Act. However the Council may rely upon the general power of competence under section 1 of the Localism Act 2011 to fund the Company for the purpose of the company operating a business to provide homes for market sale. The Council may also use this same power to provide loans to the Company for working capital.

7.12.6 It is proposed that Council lending to the Company will be structured and provided at market terms and rates and so would not constitute State Aid. The issue of State Aid will be kept under review and considered on a scheme-by-scheme basis.

7.12.7 The Council may also secure its lending to the Company with legal charges on the property acquired or developed by the Company.

7.12.8 The Council has the power to dispose of land by lease to the company under section 123 of the Local Government Act 1972 and obtain best consideration for the land. Sale at an undervalue may require consent from the Secretary of State and/or may constitute unlawful State Aid.

7.12.9 The Council is entitled to dispose of land held in its Housing Revenue Account providing it complies with section 32/43 of the Housing Act 1985. Although these consents for HRA land normally require the consent of the Secretary of State, there are general consents that have been issued. These powers are complex and as such, site-specific advice will be obtained for any disposal.
7.12.10 If the Council were to transfer land to the company and impose specific requirements as to what will be developed on that land then this is likely to be a public works contract. However, providing the company remains wholly in the ownership of the Council (or is otherwise wholly publicly owned) then, subject to the relevant tests being met, such a contract would still be compliant with the Public Contracts Regulations 2015.

7.13 Equality and Diversity

7.13.1 An initial screening exercise of the equality impact of this decision was undertaken and determined there was no negative impact on the Council’s equality duty. The developments that the Company undertakes will contribute positively to age and disability equalities through providing housing to Lifetime Homes and Wheelchair housing standards.

7.13.2 The Screening Assessment is provided at Appendix 6.

7.14 Sustainability (including climate change, health, crime and disorder)

7.14.1 Proposals for developments will be developed in accordance with national, regional and local standards for sustainable development and opportunities to exceed these will be explored. All homes and commercial property will be designed to meet the Council’s requirement to reduce carbon emissions.

7.14.2 Although the Code for Sustainable Homes has been officially scrapped by the government, where the new “national technical standards” (set at the equivalent of a code level 4) have not been incorporated into the Building Regulations, all new homes will be designed to meet the energy aspects of Code for Sustainable Homes level 4 as a minimum requirement, the contract will specify the climate change impact mitigation measures required in the construction of the new homes, according to local, regional, and national standards.

7.14.3 Commercial space will be designed to achieve a BREEAM rating of ‘Very Good’ for remodelled/refurbished areas, new build areas will be designed to achieve a BREEAM rating of ‘Excellent’.

7.14.4 Proposals will meet 35% reduction against 2013 Building Regulations for CO2 reduction to mitigate climate change and carbon emissions through promoting resource efficiency and high environmental standards.

7.15 Council Infrastructure

7.16 The approach to resourcing the Company’s activities is described under paras 3.20 to 3.23. The budget for these activities is included within the business plan and finance requirements noted in this report.
7.17 Ahead of Cabinet and Council approval, the Council is currently resourcing the project using staff from the Families and Homes and Finance directorates.

BACKGROUND INFORMATION (as defined by Local Government (Access to