

Living Wage Joint Venture

Heads of Terms v. ~~7-24-10-16~~ 09.01.17

1 BACKGROUND

- 1.1 Hyde Housing Group (**Hyde**) and Brighton & Hove Council (**Council**) wish to work together in partnership. They intend to establish a limited liability partnership (**LLP**) to act as a joint venture vehicle for the construction of 1000 homes to meet the needs of the residents of Brighton and Hove¹. These will include a new Living Wage rent housing model for low income working households and shared ownership homes. The activity will generate an annual surplus to be distributed to Hyde and the Council as the members of the LLP.
- 1.2 Various Council-owned properties have been identified as potentially being suitable for the joint venture. Any decision by the Council to dispose of any property to the LLP would be a decision for the Council undertaken in accordance with the Council's normal governance and procedural arrangements for disposal of land. Various additional properties owned by the Council, or properties owned by Hyde or any third party, may be identified from time to time and the parties will decide whether to pursue the acquisition and development of those properties on a case by case basis in accordance with the documents referred to in paragraph 2.
- 1.3 These heads of terms represent the commercial agreement of the parties at the current stage of negotiations. Whilst this document therefore reflects a reasonably advanced agreed position on the fundamental features of the joint venture, these heads of terms are not exhaustive or intended to be legally binding². The parties only intend to be legally bound to one another when they enter into formal contracts for that purpose.

2 DOCUMENTATION

- 2.1 The joint venture will be based around the following principal documentation:
 - 2.1.1 overarching strategic land agreement (**OSLA**)
 - 2.1.2 limited liability partnership members' agreement (**Members' Agreement**)
 - 2.1.3 [funding agreements]
 - 2.1.4 development management agreement (**DMA**)
 - 2.1.5 asset management agreement (**AMA**)
 - 2.1.6 residential management agreement (**RMA**)
 - 2.1.7 corporate and financial services agreement (**CFSA**)
- 2.2 In addition, the members will approve a Business Plan and financial model. Any material amendments to the Business Plan and/or financial model will require the approval of the LLP's members.

¹ Advice is being taken on how the structure could work to ensure minimal irrecoverable VAT. This may require an additional company (a "VAT Shelter") to enable separation between asset ownership and development or the use of one of the Hyde companies to develop.

² Confidentiality and exclusivity are normally elements that are sometimes made legally binding. It is assumed that there are no legally binding elements given the NDA that has been signed and no proposal for exclusivity.

3 OSLA

3.1 Parties:

- 3.1.1 Council;
- 3.1.2 [Hyde]; and
- 3.1.3 LLP.

3.2 The OSLA will govern the arrangements between the Council [and Hyde] as landowners and the LLP. This will allow the Council [and Hyde] to establish a clear separation of duties and responsibilities when dealing with the LLP in their capacity as a landowner.

3.3 The OSLA will provide appropriate controls, protections and mechanisms for the timing of the drawdown of land from the Council and/or Hyde into the LLP. The following controls, protections and mechanisms are envisaged:

- 3.3.1 the circumstances under which properties will be transferred into the LLP;
- 3.3.2 an option for the LLP to call down identified properties once the relevant property is vacant;
- 3.3.3 the obligations to be performed by each of the Council or Hyde and the LLP in order to prepare and enable properties to be drawn down:
 - (a) when a property is ready to be drawn down, the LLP will have a period of [] months within which to exercise a drawdown option and if the option is not exercised within this period it will lapse and the property will cease to be included in the OSLA;
 - (b) all properties will be drawn down on the basis of either a lease or a freehold transfer which will be granted by the landowner to the LLP. Properties may not be drawn down for land banking but must be developed in accordance with the agreed Business Plan. The option preconditions will be framed so that at the time of draw down, a property must be ready for development in accordance with the Business Plan for that property;
- 3.3.4 the price to be paid for a property will be established (or verified) upon draw down on the basis of a pre-agreed appraisal and approval methodology including circumstances where less than market value consideration is to be provided;
- 3.3.5 preconditions for exercise of draw down option – any option to draw down a property will become exercisable by the LLP when the following have been achieved:
 - (a) the LLP has adopted a Business Plan for the relevant property (which is consistent with the overarching LLP Business Plan) and includes an indicative development programme for the property;
 - (b) the proposed development scheme satisfies a viability test in accordance with the overarching LLP Business Plan and there is a development appraisal adequately costed and verified in sufficient detail to support the viability test;
 - (c) the project monitor or development manager has signed off a value for money certificate in respect of construction costs;
 - (d) the project monitor or development manager has provided a report to the LLP on likely values and costs within specified parameters to support the development appraisal;

- (e) vacant possession can be obtained when needed (and/or arrangements for further decant are in place);
- (f) planning consent has where relevant been obtained by the LLP for the development (or first phase if a multi phased scheme). The assumption in respect of any Council property is that the costs of obtaining planning permission will be met by the LLP (funded 50:50 by the LLP's members) and the property will be valued and transferred with the benefit of planning permission;
- (g) funding has been agreed for the development (or first phase);
- (h) any required amendments to the pro forma lease or transfer documentation for the relevant property have been approved by the landowner (acting reasonably); and
- (i) any consents for disposal which have not already been obtained have been given; and

3.3.6 viability test – prior to exercising any draw down option, the LLP must be satisfied that development is viable in accordance with the Business Plan and financial model. Viability testing (and market analysis) will be on the basis of pre-agreed required levels for IRR for development so that the viability test (and the resulting residual land value), is determined by external or objective market criteria. Elements such as construction costs and anticipated values must have been costed and verified in sufficient detail to ensure that the viability test is robust. This will in part be satisfied by the project monitor/development manager signing off or reporting on certain aspects of the proposed development, as set out above.

[3.4 In the event that development of any land drawn down from the Council is not commenced within three years of transfer the Council will have a right to buy back the land at the same price it was purchased by the LLP.](#)

[3.5](#) ~~3.4~~ Separately, the Council may wish to obtain its own independent report to ensure it is satisfied that the resulting land value and "value for money" analysis meets the Council (as landowner)'s regulatory and constitutional requirements for land disposals.

[3.6 The OSLA will clarify that no HRA asset will be transferred to the LLP.](#)

4 MEMBERS' AGREEMENT

4.1 Parties:

- 4.1.1 Council;
- 4.1.2 [Hyde] [Hyde New Build]³; and LLP.

4.2 The parties will make the following funding available by way of non-interest bearing debt to the LLP:

- 4.2.1 Council: £[] on the timetable provided at Schedule [];
- 4.2.2 [Hyde] [HNB]: £[] on the timetable provided at Schedule [];

4.3 on terms to be agreed between the members and the LLP and recorded in member loan agreements. The parties will hold the following interests and voting rights in the LLP:

- 4.3.1 Council: [50]%

³ To further mitigate any risk associated with the question of whether the Council can directly participate in LLP Hyde's 50% interest may be shared between two entities

4.3.2 [Hyde] [HNB]: [50]%

4.4 Profits will be shared on a 50 / 50 basis.

4.5 ~~4.4~~ The Members' Agreement will govern the commercial terms of the joint venture and how the two parties will jointly run and fund the LLP.

4.6 ~~4.5~~ The stated business of the LLP will be: [].

4.7 ~~4.6~~ Strategic control over the operation of the LLP will be retained by the members through the right to:

4.7.1 ~~4.6.1~~ approve the LLP business plan; and

4.7.2 ~~4.6.2~~ make decisions on a unanimous basis in respect of those matters listed at schedule 1 (**reserved matters**), in the case of the Council such decision to be a matter for the relevant committee.

4.8 ~~4.7~~ If a matter which would otherwise be a reserved matter is included in the Business Plan, then there is no requirement to obtain an additional approval in respect of that matter and the LLP has the authority to proceed and implement it. As a result, reserved matter approval should only be sought in respect of matters outside the Business Plan.

4.9 ~~4.8~~ The parties will establish an LLP management board comprising of [six] individuals:

4.9.1 ~~4.8.1~~ Hyde appointees: [];

4.9.2 ~~4.8.2~~ Council appointees: [].

4.10 ~~4.9~~ One member of the board shall be appointed as chair for an annual term. The right to appoint the chair shall rotate between the parties and the Council shall make the first appointment. The chair will not have a casting vote.

4.11 ~~4.10~~ The parties do not intend that a management board member will provide any goods or services to the LLP in a personal capacity. Accordingly, the LLP shall not remunerate any member of the management board and expenses shall only be paid in accordance with a policy approved from time to time.

4.12 ~~4.11~~ The management board will have the task of delivering the business plan.

4.13 ~~4.12~~ Each management board member shall have one vote on any matter unless he/she has a conflict of interests. A conflict of interests in this context means a personal conflict, a conflict between his/her appointing member (or member of its group) and the LLP (including under any contracts between them) or actual or alleged default of that member under the Members' Agreement. If at any point a conflict of interest arises, the conflicted member and its appointees to the management board member shall be excluded from the LLP's decision-making processes in respect of the matter giving rise to the conflict of interest.

4.14 ~~4.13~~ Any deadlocked decision at management board level (arising by reason of the same number of votes cast for and against a resolution, or by reason of a lack of quorum) may be referred by any management board member to the members for resolution.

4.15 ~~4.14~~ If at any point the members are unable to agree as to how the LLP should proceed in relation to a reserved matter or a matter referred to them by the management board, a deadlock shall have arisen and the following deadlock resolution procedure shall apply:

4.15.1 ~~4.14.1~~ the matter shall be escalated within each member's organisation to [] for the Council and [] for Hyde;

[4.15.2](#) ~~4.14.2~~ failing resolution it may be referred by either member to non-binding mediation; and

[4.15.3](#) ~~4.14.3~~ failing resolution through mediation, either member may give notice that the LLP should be independently valued and sealed bids made by each member for the other member's equity and debt interests in the LLP. In the event neither member makes a bid, the parties shall do all things necessary to approve a winding up of the LLP.

[4.16](#) ~~4.15~~ If a member suffers or commits a default event under the Members' Agreement (broadly, a change of control, unremedied material or persistent breach or insolvency), the other member shall have the right, but not the obligation, to acquire the defaulting member's equity and debt interests in the LLP at 90% of the fair value of those interests as determined by ~~an~~ [\[the average\] of three independent valuations including one being undertaken by the district valuer.](#)

[4.17](#) ~~4.16~~ A member may transfer its equity and debt interests in the LLP:

[4.17.1](#) ~~4.16.1~~ at any time, to another member of its group, provided the transferee has a sufficient financial covenant to meet its obligations under the Members' Agreement, and provided that there is a transfer back in the event the transferee leaves the group of the original member transferor;

[4.17.2](#) ~~4.16.2~~ at any time, with the prior written consent of the other member;

[4.17.3](#) ~~4.16.3~~ after an initial lock in period ~~(equivalent to practical completion [in respect of which development?]) plus one year,~~ [of ten years](#) to a third party but only after offering those interests to the other member on the same terms.

[4.18](#) ~~4.17~~ Any incoming third party shall be required to adhere to the terms of the Members' Agreement and the Business Plan then in force. In no circumstances shall a transfer of interests in the LLP be permitted where the transferee is an "unsuitable person" (broadly, a person with a material interest in the production, distribution or sale of tobacco, alcohol or pornography, any person whose activities are incompatible with the provision of housing services or services to the public sector in general, or any person who poses or could pose a threat to national security).

[4.19](#) ~~4.18~~ On the ~~[seventh]~~ [ten](#) anniversary of the Members' Agreement and on the expiry of each subsequent ~~seventen~~ [ten](#) year period, the members will consider their continued relationship and each of them will have the following rights:

[4.19.1](#) ~~4.18.1~~ to call for the sale of the LLP's assets and its liquidation; and

[4.19.2](#) ~~4.18.2~~ [alternative exit events].

[4.20](#) [In the event that gross rents for tenants of the LLP](#)

[4.20.1](#) [exceed the Local Housing Allowance; and / or](#)

[4.20.2](#) [rise at a rate that exceeds the rate that the National Living Wage is increased;](#)

[the parties shall discuss the scope to address this issue when reviewing the business plan, having regard to the required commercial performance of the project in line with the SFVM and business plan.](#)

5 DEVELOPMENT MANAGEMENT AGREEMENT

5.1 Development Management Agreement between the LLP and HNB for the management of all development services (**DMA**).

Schedule – Reserved Matters

Officers and members of the LLP

- 1 Agreeing the appointment and the appointment terms (including any remuneration terms), or the removal, of any management board member other than one appointed by Hyde or the Council.
- 2 Approving the admission of further members to the LLP or agreeing any rights or restrictions attaching to any shares/equity allocated to such new members.
- 3 Agreeing or approving any increase in the maximum size of the management board.

Future direction and development of the LLP

- 4 Agreeing to enter into or entering into any debt facility or loan agreement other than the member loan agreements
- 5 Forming any subsidiary or acquiring an interest in any other LLP or participating in any partnership or joint venture (incorporated or not).
- 6 Amalgamating or merging with any other LLP or business undertaking.
- 7 Selling or disposing of any part of the LLP.
- 8 Passing any resolution for its winding up or presenting any petition for its administration (unless it has become insolvent).
- 9 Apply for the listing or trading on any stock exchange or market.

Management of the business of the LLP

- 10 Changing the name of the LLP.
- 11 Adopting and/ or agreeing any material amendments or variations to a Business Plan.
- 12 Creating or agreeing to create a charge, security or encumbrance over the LLP's assets, interest or income.
- 13 Changing the nature of the business of the LLP or commencing any new business which is not ancillary or incidental to the business.
- 14 Agreeing to enter into or entering into any acquisition or disposal of any material assets by the LLP.
- 15 Giving notice of termination of any arrangements, contracts or transactions which are material in the nature of the business or materially varying any such arrangements, contracts or transactions.
- 16 [Appointing and changing the LLP's auditors].
- 17 Agree to make or making any loan (otherwise than by way of a deposit with a bank or other institution, the normal business of which includes the acceptance of deposits or in the ordinary course of business) or granting any credit (other than in the normal course of trading or giving any guarantee (other than in the normal course of trading) or indemnity outside the normal course of business.
- 18 Changing the accounting reference date of the LLP.
- 19 Accepting any capital contributions in the LLP.

- 20 Authorising the return of any capital contributed to the LLP to a member.
- 21 Allocating and distributing any profit of the LLP.

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