

ROTHER DISTRICT COUNCIL

ACQUISITION OF PROPERTY

INITIAL ADVICE

1 INTRODUCTION

- 1.1 Rother District Council (the Council) is considering adopting a property investment strategy. The Council's focus will be on the acquisition of property both within and outside the District with a view to generating income to support the revenue budget. Investments may be considered in commercial industrial and residential property and it is proposed that a geographical limitation of within a maximum 90 minutes driving distance is considered to increase the size of the pool of available properties and create a more diverse portfolio of localities and commercial sectors.
- 1.2 The Council already has a diverse portfolio of assets with a book value in March 2017 of £36.85m. Out of a total of 290 separate assets valued in 2017, 48 are classed as investment assets. Investment assets are those which are held solely to earn rentals and/or for capital appreciation. The definition is not met if the property is used in any way to facilitate the delivery of services or production of goods, or is held for sale.
- 1.3 The total value of the investment portfolio as at 31 March 2017 was assessed at £10,447,000; generating rental income in the region of £800,000 per annum, representing an overall gross return on capital of 7.6% and net return of 6.2% (excluding central support costs).
- 1.4 Initially the Council is looking to invest £7m, funded from capital and revenue reserves in order to support income producing assets. Further investment may follow and borrowing may be considered to fund future acquisitions.
- 1.5 In addition the Council has plans to acquire property for economic development and regeneration purposes although they are not the main subject of this report.
- 1.6 We have been provided with the Council's report to Overview and Scrutiny Committee of 11 September 2017 on the proposals, together with a report prepared by Capita Asset Services on their interpretation of the available powers.
- 1.7 We have been asked to advise on the appropriate powers for investment.
- 1.8 This Paper is structured as an Executive Summary Report together with an Appendix containing further detail of land and property and investment powers.
 - 1.8.1 Whilst we have made some high level comments in relation to tax, we are not advising the Council on tax matters. Accordingly, the Council should seek confirmation of the tax position as part of the planning/structuring of acquiring each asset.

2 EXECUTIVE SUMMARY

What are the Council's purposes?

- 2.1 The key to identification of the correct powers to use is the need for clarity over the Council's purposes. As can be seen from the Appendix, there are wide powers, principally within the Local Government Act 1972 and the Housing Act 1985 to deal with land both inside and outside the area, provided the Cabinet can demonstrate the benefit or improvement to the area that is likely to result at the time of the acquisition – or in the longer term. There will be other explicit powers and also incidental powers (for example Section 19 Local Government (Miscellaneous Provisions) Act 1976 for leisure purposes) that enable a local authority to invest in land and property for various purposes.

- 2.2 In most cases the use of the general power of competence is not required to deal in land and property however; ultimately an assessment of the most appropriate power goes back to the purposes that the local authority hopes to achieve. The general power of competence can be used to "top up" these powers, create companies and other vehicles, but not to override any specific restriction, e.g. the need to obtain consent. We usually say that "powers follow purposes".
- 2.3 An individual may invest in land and property and therefore so may a local authority under the general power of competence. If an individual wished to invest in land and property primarily for a financial return i.e. for commercial purposes then under section 4 Localism Act 2011 this would need to be done through a commercial trading company.
- 2.4 There are also investment powers in section 12 Local Government Act 2003 that allow local authorities to invest both for treasury management purposes (including investment of Council funds); and for any purpose relevant to their functions. Investment powers are used on the strength of financial return irrespective of location and appear to be most relevant to the Councils purposes as set out in the Scrutiny report for investing current funds.
- 2.5 From what we have seen the initial investment would be made from Council reserves and would be proportionate to the other Council investments etc. We assume that a further £7m of investment in property would fit within the Council's investment strategy as already approved (or as amended once members have agreed the revised approach) and that such a strategy would reflect the CIPFA Prudential Code and the DCLG Guidance on investments referred to in the Appendix.
- 2.6 Should the Council's purpose purely be commercial trading in land and property or commercial investment through borrowing then a commercial trading company pursuant to s95 Local Government Act 2003 or sections 1 and 4 Localism Act 2011 may be appropriate.
- 2.7 Where a company is formed there will be additional considerations of how the company is funded and how investments are realised for the benefit of the Council. Costs will undoubtedly be higher and there may be additional tax and VAT issues to take into account, which potentially makes investing through a corporate vehicle more costly and less rewarding. To avoid state aid the Council may need to treat the vehicle at arms length by ensuring that loans the Council makes to the company are at commercial rates commensurate with those that an institutional lender would make to the company.
- 2.8 The Council may borrow for the purposes of any of its functions under section 1 Local Government Act 2003 and that would cover investment in property for the benefit or improvement or development of the area (under the wide powers set out in the Appendix) or investment in a company. Whenever the Council considers the acquisition of a specific piece of land we would recommend that an appraisal of the Council's powers is undertaken at the relevant time - particularly to focus on all of the land and property powers when the acquisition would be based on borrowing. Significant speculative borrowing to invest outside of the area is both risky and potentially unlawful (see DCLG Guidance), therefore each acquisition should be looked at on its merits and the linkages to the area and other powers should be explored.
- 2.9 Pure investment of Council funds outside of the area in land and property may be progressed as part of the Council's adopted investment strategy in accordance with the CIPFA Prudential Code and the DCLG Guidance on investments, as updated from time to time, and as referred to in the Appendix. The approach of investment in a balanced portfolio appears to offer a prudent approach. However, we would caution against significant additional borrowing to invest since this could expose the Council to significant additional risk with uncertain times ahead. Significant in this context would need to be established by the Chief Finance Officer through a range of factors including the extent of the Council's investment, the borrowing by the Council and appropriate sensitivity analysis.

3 EXERCISE OF POWERS

- 3.1 Local authorities are often referred to as "creatures of statute". This is because they have been created by statute or by Royal Charter and what they can do is constrained by the powers that Parliament has chosen to give them. In addition, local authorities can do what is necessarily implied

by a statutory power and also what is "calculated to facilitate or conducive or incidental" to the exercise of any of their powers and duties pursuant to Section 111 Local Government Act 1972.

- 3.2 Whilst Section 1 Localism Act 2011 gives local authorities a general power of competence, this is a power which builds upon and supplements the other powers of local authorities and it cannot be used to 'get around' any explicit limitations or restrictions on other powers, therefore other existing relevant powers must be explored where they exist. Explicit relevant powers may better meet the Council's purposes and should be considered first in preference to the general powers such as the Local Government Act 1972 or the power to invest in the Local Government Act 2003.
- 3.3 Some Acts of Parliament impose a duty i.e. they require local authorities to act, in which case the authority must perform that function, although there may be a discretion in how to perform that function. Other provisions give discretionary powers that allow local authorities choice over whether they perform the function at all, e.g. to provide grants and other financial assistance or to provide recreational facilities. The word 'function' has been defined by the courts to include all of the powers and duties of an authority, so this is a generic term to describe all of an authority's powers and duties, covering all of its activities.
- 3.4 In exercising any power or duty local authorities must act for proper purposes, in good faith and must exercise their powers properly, following proper procedures in a "Wednesbury reasonable" manner. In other words Councils must act for proper motives, taking into account all relevant considerations, ignoring irrelevant matters, not acting irrationally and balance the risks against the potential rewards. Additionally, local authorities must consider the usual fiduciary, best value, crime and disorder reduction, equalities, health and wellbeing and other relevant overarching duties to take into account when making decisions, as well as any explicit requirements placed on a power.
- 3.5 An authority's motivation is important in determining whether or not it can use any particular power, because matters pursued for certain objectives will be lawful, but if pursued for other objectives may be unlawful. (For example if the Council wished to assist in alleviating the housing crisis by setting up or participating in a company to develop housing for private letting under Section 24/26 Local Government Act 1988 it would be lawful; or to develop housing of a particular type for rent to meet market demand; or through a regeneration company set up to create jobs, improve the area and invest in training; whereas if it set up such a company with the sole objective to develop housing by avoiding the right to buy then it would be unlawful, because it would be seeking to use a company to avoid an explicit restriction placed upon the Council).
- 3.6 Where a scheme is novel or involves charging or trading then it may attract greater scrutiny in terms of implementation. Challenge could arise from interested competitors, service users, disgruntled members of the public, auditors or anyone else with a 'sufficient interest'. Any challenge could involve a lack of consultation or failure to consult those with a legitimate expectation; failure to have regard to other relevant issues e.g. equalities/other overriding duties or specific issues such as consultation.

4 POWERS FOR THE ACQUISITION, SALE AND DEVELOPMENT OF LAND

- 4.1 Local authorities have very wide powers to acquire, sell, appropriate and develop land. These powers are set out in more detail in the Appendix to this note. In summary they include the following:-

- **Sections 120 to 123 of the Local Government Act 1972**
- **Section 227, Town and Country Planning Act 1990**
- **Section 233, Town and Country Planning Act 1990**
- **Local Authorities (Land) Act 1963**

- **Housing Act 1985**

- 4.2 A combination of these specific powers would usually be sufficient for the Council to undertake any property related project both in its area and outside where at least part of the motivation was connected with the broad benefit or improvement or development of its area. (For example this could include building industrial units in a neighbouring area which would benefit residents by providing jobs, likewise housing to meet demand.)
- 4.3 Where a local authority wishes to **invest** in property then it may be appropriate to consider section 12 Local Government Act 2003. This is a power for local authorities to invest, not only for any purpose relevant to their functions but also for the purpose of the prudential management of their financial affairs. The Council will need to have regard to the Prudential Code published by CIPFA and government guidance in determining how much should be invested and the type of investments that will be pursued.
- 4.4 Any investment in land and property would need to fit with the Council's overall investment strategy under the Prudential regime. Investment is usually considered for the purposes of ensuring a capital appreciation, interest or revenue return. Investment does not usually involve trading, although the Council may choose to invest in a company or body that it sets up to trade. Clearly the investment power would be used only where the primary purpose was investment, rather than regeneration or development per se or the benefit or improvement of the area as this could be achieved under other powers.
- 4.5 The commercial trading powers under section 95 of the LGA 2003/Localism Act 2011 sections 1 and 4 are not generally relevant when seeking to improve the Council's own property portfolio or meet housing need or develop properties to improve the area for residents or shared service delivery etc. However a commercial trading entity, set up as a commercial property developer purely for commercial profit may need to be a section 95/4 company.

What are the Council's purposes?

- 4.6 There are wide powers principally within to acquire, invest and deal with land. In most land and development cases, the use of the general power of competence is not required, however, ultimately an assessment of the most appropriate power goes back to the purposes that the local authority hopes to achieve. The general power of competence can be used to "top up" these powers (e.g. to form a company or enter into a joint venture), but not to override any specific restriction, e.g. the need to obtain Secretary of State's consent. We usually say that "**powers follow purposes**".
- 4.7 If a local authority wished to act as a developer to improve the quality of industrial units or housing in the area, to help attract new business and to prudently invest to manage its finances for the longer term, this could be pursued under the Local Authorities (Land) Act 1963 and/or potentially as an investment under s12 Local Government Act 2003.
- 4.8 If an authority wishes to act as a developer for profit whether inside or outside the area with the primary motivation being purely the generation of capital receipts and/or dividends through the development of land for profit - speculative risk based trading in the manner of a private developer - not job creation, regeneration nor improvement of the area, in these circumstances, the Council may need to set up a trading company under Section 95 Local Government Act 1972/section 4 Localism Act because the whole purpose is commercial trading in the private sector with a view to making a profit i.e. it is 'all about the money'.
- 4.9 Where an authority wishes to stimulate the local economy and provide jobs for the local population by developing surplus land and property (and buying land and property if appropriate) and wishes to engage the local college to provide apprenticeships on real building projects, encourage the creation of new building firms through business support, also seeking to achieve the Council's estates strategy, improvement of public realm in the town centre then (no matter whether the land is within or outside of the area), land may be acquired for development to help achieve these regeneration

purposes pursuant to the powers in the Local Government Act 1972 and the Local Authorities (Land) Act 1963.

- 4.10 Sections 24/25 Local Government Act 1988 may also be relevant to the development of housing for rent by a company owned by the Council or alternatively for the purposes of regeneration and job creation to stimulate the local economy and to help meet housing need or just to acquire shares in such a company as an investment.

Commercial Trading

- 4.11 It should be remembered that councils may act commercially without having as their primary purpose commercial trading for profit in competition with the private sector. Management and operation of the commercial property portfolio should be undertaken on a commercial basis to meet the Council's fiduciary duties to taxpayers.
- 4.12 Ultimately a whole host of factors will need to be considered that will determine whether the Council's actions amount to commercial trading and whether such trading needs to be carried out through a company, but it does not follow that having a commercial purpose, particularly if that is not the primary purpose, will always require a local authority to set up a commercial trading company.
- 4.13 In addition to explicit powers, the Local Government Act 2003 introduced powers to charge and trade in function-related activities. These powers enable authorities to charge whenever they have a power to provide a service and are not under a duty; likewise to trade for a commercial purpose in that function. The downside of using the charging powers is the requirement to cover costs and not generate a surplus *"taking one year with another"*. If there are other explicit powers to operate commercially, then the 2003 Act would direct the Council to use those other powers to charge and trade respectively, before relying on the 2003 Act powers.
- 4.14 When it comes to trading under the 2003 Act the authority must have as the central purpose risk-based commercial trading in the private sector for profit. This power states:

95 Power to trade in function-related activities through a company

"(1) The appropriate person may by order—

(a) authorise [relevant authorities] to do for a commercial purpose anything which they are authorised to do for the purpose of carrying on any of their ordinary functions, and

(b) make provision about the persons in relation to whom authority under paragraph (a) is exercisable.

(2) No order under this section may authorise a [relevant authority] —

(a) to do in relation to a person anything which it is required to do in relation to him under its ordinary functions, or

(b) to do in relation to a person anything which it is authorised, apart from this section, to do in relation to him for a commercial purpose.

(3) An order under this section may be made in relation to—

(a) all [relevant authorities], particular [relevant authorities] or particular descriptions of [relevant authority] ;

(b) all things authorised to be done for the purpose of carrying on a particular function, particular things authorised to be done for that purpose or particular descriptions of thing authorised to be so done.

(4) Power conferred by an order under this section shall only be exercisable through a company within the meaning of Part 5 of the Local Government and Housing Act 1989 (c. 42) (companies in which local authorities have interests)."

- 4.15 There is no definition of "*commercial purpose*" in this Act or in the Localism Act. Acting commercially may mean lots of things to different people. Councils are being encouraged to act more commercially and this can cover a whole host of issues, for example it can mean councils operating in a more commercial way through internal trading or incentivised performance or reducing costs and increasing income whether through charging or trading, or just acting in a more business-like manner. Alternatively it could mean acting purely for profit in a commercial business in the same way as the private sector. We would interpret the latter as primary purpose commercial trading under the Local Government Act 2003, not necessarily the former, particularly where pursued for other purposes. The primary driver must therefore be commercial profit, rather than other primary purposes.
- 4.16 We would suggest that this means operating a commercial trading entity, without subsidy, through a Part V Local Government and Housing Act 1989 company or community benefit society purely for commercial purposes/profit. In other words it is "*all about the money*".

The Trading Order

- 4.17 Where a company is set up under Section 95, a local authority needs to comply with the Local Authorities (Best Value Authorities) (Power to Trade) (England) Order 2009. This requires local authorities to consider and approve a suitable business case for establishing a trading company. That business case must include details about:
- "*the objectives of the business;*
 - *the investment and other resources required to achieve those objectives;*
 - *any risks the business might face and how significant these risks are; and*
 - *the expected financial results of the business, together with any relevant outcomes that the business is expected to achieve*".
- 4.18 In addition, the Order makes it clear that any accommodation, services, staff or other support provided by the Authority – including the interest rate on loans - must be charged for by the Authority, at least covering costs, but potentially at a market rate, to demonstrate that the company is not being subsidised by the Authority. This is important in the context of competition law and state aid.
- 4.19 Further guidance on the 2003 Act Trading Powers can be found on the DCLG website, as follows:

Trading company Guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/8311/133628.pdf

General power of competence

- 4.20 The introduction of the general power of competence to replace the wellbeing power in England in 2012 allowed local authorities even wider scope to do anything that an individual may do, much wider than in relation to their functions, even "*things... unlike anything that public bodies do*". There are of course some limitations, including the need to follow any pre-existing requirements and respect any restrictions, limitations or prohibitions on taking action in other powers. For charging and trading the requirements are similar to the Local Government Act 2003 (although no requirements have been placed in a Trading Order, as yet). An individual could invest anywhere therefore the Council could use the general power to top up the existing explicit powers if needed.

- 4.21 The general power of competence does not permit any wider delegation of functions and so it must be remembered that a company is not a body that the Council may delegate functions to in the absence of explicit legislation or an order under the De-Regulation and Contracting Out Act 1994.
- 4.22 The Secretary of State retains the ability to constrain the use of the general power through regulations but equally is able to amend, repeal or revoke legislation which restricts its exercise. Any post commencement legislation will not limit the exercise of the power unless there is an express restriction. Whilst there is no similar requirement for approval of a business case where a trading company is set up under the general power of competence, we would advise that a similar approach be adopted, as the matters required to be included in a Business Case under the Trading Order all appear to be very relevant considerations to decision-making in the establishment of a company.

Setting Up a Company/Corporate Vehicle

- 4.23 There are few explicit powers to set up companies and reliance is most often placed on s111 Local Government Act 1972 allied to a function (based on the Greater Manchester Trusts case) as well as the general power of competence.
- 4.24 Trading Companies may be established as wholly owned and controlled companies or may be joint ventures in collaboration with others. Where reliant upon Section 95 or Section 4 Localism Act the vehicle must be "a company within the meaning given by Section 1(1) of the Companies Act 2006, or a society registered or deemed to be registered under the Co-operative and Community Benefits Societies Act 2014 or the Industrial and Provident Societies Act (Northern Act) 1969". This would encompass companies limited by shares, guarantee, community interest companies (CICs) and what were Industrial and Provident Societies – community benefit societies.
- 4.25 A trading company (formed for commercial purposes) is not generally compatible with using the Teckal exemption, where a company is more likely to be formed for service delivery or "social purposes". The exemption is now reflected in the Public Contracts Regulations 2015 (as amended) and the principal tests for a Teckal company are:
- No private capital;
 - The control test, requiring the parent authority(ies) to exercise control similar to that exercised over its own departments; and
 - Carrying out the essential part of its activities for the parent(s), which means more than 80% of what the company does.
- 4.26 Where an authority sets up a trading company, its objective is usually to trade widely with the private sector, rather than trade only with its parent, or potentially other public bodies under the Goods and Services Act, since this may be achieved without forming a company. A trading company, by its very independent and commercial nature is unlikely to be a contracting authority for procurement purposes (whereas a Teckal company almost certainly would be). This means that a trading company need not procure services supplies or works through an OJEU process. Authorities should also be aware of the potential impact of state aid and competition law and should therefore avoid subsidy of any trading company established.

Tax

- 4.27 Usually where a separate legal entity is established, there will be corporation/income tax and VAT considerations. Corporation tax is usually paid on trading profits, even where these are reinvested in the activities of the company. There are a number of reliefs but these would need to be looked at in the context of the business plan for each specific acquisition.
- 4.28 Unlike companies, Local Authorities are able to recover all of their VAT on non-business and certain exempt activities and do not pay corporation tax. If VAT is charged by the company on a proportion

of its income, it would usually be able to reclaim from HMRC the same proportion of VAT on supplies made to it (which would otherwise be a hard cost). Opting to tax or not on acquisitions may be a key issue for the revenues of the company.

Governance and Controls on Local Authority involvement in companies

- 4.29 Part V of the Local Government and Housing Act 1989 introduced controls on Local Authority involvement in companies. Companies were categorised into:
- Controlled;
 - Influenced (private sector led or public sector); and
 - Minority interest.
- 4.30 Whilst initially there were financial consequences of a company being public sector influenced or controlled, the financial controls were removed with the introduction of the Prudential finance regime in 2004. Only propriety controls remain, which require Local Authorities to ensure for example that any directors appointed would not be disqualified from being a Local Authority member; remuneration and expenses do not exceed levels that the Local Authority could pay; information must be provided to the Local Authority's auditor (controlled companies must obtain the consent of the NAO to the appointment of an auditor); and letterheads must show the if the company is a subsidiary of the Council. A further more detailed note can be supplied on Part V as required. It was intended that Part V would be replaced by Part 12 Local Government and Public Involvement in Health Act 2007, however, that has not been implemented.
- 4.31 The Local Audit and Accountability Act 2014 enables Council auditors to issue a public interest report on companies in which Councils are involved. For a recent one highlighting governance issues in connection with a trading company see the report on City of York Trading Ltd at: <http://www.psaa.co.uk/2016/02/16247/>
- 4.32 We would usually recommend that statutory officers, such as the Chief Finance Officer and Monitoring Officer are not appointed as Directors of local authority companies, nor cabinet members who would otherwise make Council decisions about the company to avoid conflicts of interest. Directors have duties to promote the success of the company and that may come into conflict with Council interests – also there is a company law duty to seek to avoid such conflicts. There may be a presumption of bias or pre-determination where a Council member or officer takes decisions within the Council about a company in which the Council is involved and is also a Director, and therefore such conflicts are best avoided.
- 4.33 Clear channels of responsibility and accountability should be established for dealing with Council companies and appropriate documentation put in place to manage the arrangements and demonstrate transparently how the organisation operates, eg who will scrutinise actions and how frequently there will be reporting and to whom, as well as the charging arrangements for provision of services.
- 4.34 Further governance information on local authority involvement in companies may be provided on request.

APPENDIX

POWERS FOR THE ACQUISITION, SALE AND DEVELOPMENT OF LAND INCLUDING HOUSING AND INVESTMENT POWERS

- 1 Local authorities have very wide powers to acquire, sell, appropriate and develop land. These powers including the following:
 - Section 120 LGA 1972 allows local authorities to **acquire** land either for the purposes of any of their functions, or "the benefit, improvement or development of their area ... whether situated inside or outside their area". The section goes on to state that the land need not be immediately required for the purpose for which it is acquired (so that a long term view may be taken – strategically important sites may be acquired for the long term) and land may be acquired by agreement or compulsory. Pursuant to Section 120(4) local authorities may act together in purchasing land and may make arrangements for joint use and occupation whether one authority buys the land or they join together and purchase it.
 - Section 121 allows local authorities to **acquire** land compulsorily for the purposes of Section 120, or the Local Authorities (Land) Act 1963 or for any purpose where they could acquire by agreement. This is just one power to acquire land compulsorily and whilst it requires the consent of a Minister, not all of the other powers require such consent.
 - Section 122 LGA 1972 allows local authorities to **appropriate** land between different purposes – to all intents and purposes this is an internal transfer of land. This may be relevant where land is no longer required for one purpose but could be transferred to general purposes for example, with public notice advertising to free the land from constraints of any Trust that might have applied under the Public Health Act 1875 or Open Spaces Act 1906.
 - Section 2 Local Authorities (Land) Act 1963 is a power to develop land that enables local authorities to erect any building and construct or carry out works on and "for the benefit or improvement of their area". A local authority may also repair, maintain and insure any building or works erected, constructed or carried out and generally may "deal with any such building or works in the proper course of management". Under Section 3 local authorities may advance money to others to acquire land or to erect any building or carry out any work on land. Any advance needs to be secured by a mortgage for a period not exceeding 30 years (and there are other detailed provisions), some of which apply to builders under Section 4. Section 5 allows the provision of garage accommodation, hard standing and other off street accommodation for keeping motor vehicles.
 - Section 123 LGA 1972 allows local authorities to **dispose** of land "in any manner they wish" provided that best consideration is obtained, for any interest for a term exceeding 7 years (or an assignment which still has more than 7 years to run). Disposals of land for more than 7 years for less than best consideration require the consent of the Secretary of State and there is a general consent where land is disposed of for wellbeing purposes which (subject to state aid and other relevant considerations) may be useful in disposing of land for community purposes for example, open space must be advertised and any objections considered before disposal.
- 2 There are separate powers in relation to land held for **housing purposes** pursuant to Part 2 Housing Act 1985 (HA85). Whilst most of these powers relate to district councils there are reserve powers for county councils to act where the districts are not acting, with the approval of the Secretary of State.

In particular:

- Section 9 HA85 allows a local authority to erect houses or convert buildings into houses for the purposes of Part 2 of the Act or acquire houses to provide housing accommodation. Section 9 goes on to say that the authority may alter, enlarge, repair or improve a house which is erected, converted or acquired or which is disposed of under the section. Land may be disposed of to others to provide housing accommodation. (However, under this power a local authority may not provide a cottage with a garden of more than one acre.)
- Section 12 gives incidental powers to provide shops, recreation grounds and other buildings considered beneficial with the Minister's consent). Roads and streets and open spaces may be provided in connection with the development housing and similarly the authority may contribute towards the expenses of developing the land where other persons provide housing accommodation on land disposed of by the Council.
- Under Section 14 local authorities may "for supplying the needs of their district" exercise the previous powers mentioned **outside of their area** but in advance of so doing need to notify the County Council in whose area their district is situated (or if outside the immediate county, the Council in whose area the authority propose to exercise the power – but failure to notify does not invalidate exercise of the power).
- Section 17 is a power to acquire land for developing housing or to allow others to develop housing or to alter, enlarge, repair or improve housing accommodation. Land may also be acquired for disposal to provide housing and may be acquired compulsorily (with the consent of the Secretary of State).
- Section 19 is a power to appropriate housing land for other purposes, with the Secretary of State's consent (although there are some general consents).
- Section 28 enables county councils to take such steps as they consider appropriate to identify housing need; to provide housing at the request of a district or otherwise, with the consent of the Secretary of State, in the same manner as a district council. The Secretary of State may impose conditions e.g. as to transfer to the district council upon payment by the district for the homes.
- Section 29 enables a county council to develop homes for employees for the County Council pursuant to the provisions of this Part.
- Section 31 enables local authorities to sell, exchange or lease land for providing housing of any description at such price, or for such consideration, or for such rent as having regard to all the circumstances is the best that can reasonably be obtained, notwithstanding that a higher price, consideration or rent might have been obtained if the land were used for purposes other than housing.
- Section 32 is a power to dispose of land held under Part 2 Housing Act 1985 (without prejudice to the right to buy) and such disposals require the consent of the Secretary of State, although there are a number of general consents that are updated periodically. Further details may be provided on request.
- Sections 24-26 Local Government Act 1988 allow local authorities to set up or participate in companies or to assist persons to develop housing for private letting. This includes making grants or loans; guaranteeing the performance of any obligation owed; indemnifying a person in respect of any liabilities, loss or damage; or if that person is a body corporate, acquiring share or loan capital in that body. There may be state aid implications and disposal must be at best consideration to meet the criteria in the General Consents.

- There are also powers to dispose of land at less than best consideration (there is an annual cap on the amount that a local authority can pay by way of financial assistance of £3 per head of population).
 - There are also powers to set up or participate in housing associations should this be of interest (or example, Section 58 Housing Associations Act 1985 or s22 Housing Act 1996).
- 3 Where land has been acquired or appropriated for planning purpose, then it may be sold under section 233 Town and County Planning Act 1990 for the best consideration that can reasonably be obtained to secure a particular development required for the proper planning of the area (which may not be its most profitable purpose).

POWERS TO INVEST MONEY IN LAND AND PROPERTY

- 4 Under the prudential financial regime a local authority has the power to invest monies under section 12 Local Government Act 2003 either for

"(a) any purpose relevant to its functions under any enactment, or

(b) for the purposes of the prudent management of its financial affairs".

- 5 This investment must have regard to proper accounting practices and relevant CIPFA guidance. The Council has a number of different powers that enable it to acquire, develop and sell land, should it so wish; they form part of the Council's functions for the purposes of section 12 above.
- 6 Section 15(1) of the Local Government Act 2003 requires a local authority "to have regard (a) to such guidance as the Secretary of State may issue, and (b) to such other guidance as the Secretary of State may by regulations specify..." The Guidance from the Secretary of State for CLG dated 10 March 2010 on Investments is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320206/1501971.pdf The guidance from DCLG at paragraph 19 suggests that speculative borrowing over and above need purely to invest at a profit is unlawful.
- 7 Section 21 of the Local Government Act 2003 empowers the Secretary of State to make regulations and to issue guidance about the accounting practices to be followed by a local authority. The principal regulations are the Local Authorities (Capital Finance and Accounting) (England) Regulations 2003/3146, as amended. Regulation 31 specifies the CIPFA Code of Practice on Local Authority Accounting in the United Kingdom and Service Reporting Code of Practice for Local Authorities as the proper practices. The current edition of the former is the 3rd edition; the latter is published annually. Local authorities should also have regard to CIPFA Treasury Management in the Public Services: Code of Practice and Cross-Sectoral Guidance Notes.
- 8 It will be important for the Council's Chief Finance Officer to confirm that the size, duration and scope of the proposed investment fit within the Council's own Medium Term Financial Strategy, its Investment Strategy and the CIPFA Code. The Council's investment strategy should look at security, liquidity and yield in that order. The strategy should be balanced and not result in over investment of funds in more risky ventures (Council officers/members may remember the interest rate swaps case of *Hazell v Hammersmith and Fulham*).
- 9 Local authority investments are split into two types: specified and non-specified. Specified investments are those that are invested in institutions that offer high security and high liquidity. Such investments must be in sterling, must mature within one year and must be made in high credit-rated financial institutions, as measured by the three credit rating agencies: Fitch, Standard & Poor's and Moody's. Non-specified investments are riskier investments that mature after any period longer than 365 days. The reason for splitting the two types of investments is to

manage risk, the first type being deemed to be safer than the second. The informal commentary on the Government guidance does not itself impose limits, but states that local authorities themselves should define the limits to be held in such investments at any time of the year.

- 10 Where the Council uses investment powers the strength of financial return and level of risk is key in determining how to invest, rather than location being a primary consideration (with most of the land and development powers the Council must show what benefit or improvement there will be to the area, even where the acquisition is outside the area.
- 11 Finding the relevant powers to act is only part of the story when it comes to taking lawful decisions. The Council also needs to exercise its powers properly, taking into account all relevant considerations, ignoring irrelevant considerations, following proper procedures, avoiding any unlawful fetter on the Council's discretion and any other relevant public law principles. When considering an investment, the Council also needs to compare the likely returns that would be generated by investing monies in other investments, particularly when weighed against the costs and risks involved.
- 12 No particular form of investment vehicle is required, what is important is that the investment must fit with the Council's Prudential borrowing and investment requirements (including the Council's Medium Term Financial Strategy and investment strategy) adopted from time to time. Should the investment not fit with the current strategies, then it may be appropriate to take a report to the Council to authorise a new investment strategy or to add a form or proportion of investments into the existing strategy. However, the Council's investment strategy must still have regard to the values involved, the need for diversification of the portfolio, the likely cash flow implications (both for revenue and capital) the principles of security, liquidity and yield, in that order, as well as any other relevant considerations.
- 13 The Council will also need to put in place a framework for managing any new property investments. The management of the Council's finances, in accordance with the Prudential Financial regime is a non-executive function. Decisions about a significant Investment would therefore need to be made by the Council, unless decisions have been delegated to a committee or officer. This contrasts with the position of entering into a development partnership, primarily for regeneration or development purposes, which would fall squarely within the remit of the Cabinet.
- 14 The Council's Chief Finance Officer should keep under review the performance of the investment in accordance with the anticipated progress. If for any reason the investments are not proceeding as anticipated, then it may be that the Chief Finance Officer will recommend alternative action to be taken by the Council. As part of the Council's risk management strategy options to exit or re-balance the portfolio should be included within the arrangements.
- 15 Whenever the Council considers an acquisition of a specific piece of land we would recommend that an appraisal of the Council's powers is undertaken at the relevant time, particularly to utilise land and property powers for the benefit, improvement or development of the area when the acquisition would be based on borrowing. Speculative borrowing to invest outside of the area is both risky and potentially unlawful, therefore each acquisition should be looked at on its merits.