Neutral Citation Number: [2018] EWHC 192 (Admin)

Case No: CO/3713/2017

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2018

**Before** :

**MR JUSTICE OUSELEY**

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**Between :**

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|---|---|
| **GORDON PETERS** | **Claimant** |
| **- and -** | |
| **LONDON BOROUGH OF HARINGEY** | **Defendant** |
| **- and –** | |
| **LENDLEASE EUROPE HOLDINGS LTD** | **Interested Party** |

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**MR DAVID WOLFE QC, MISS SARAH SACKMAN AND MISS KATHERINE BARNES**
(instructed by **LEIGH DAY**) for the **Claimant**
**MR NIGEL GIFFIN QC, MR RANJIT BHOSE QC AND MISS RUCHI PAREKH**
(instructed by **PINSENT MASONS LLP**) for the **Defendant**
**MR JAMES GOUDIE QC**
(instructed by **ASHURST LLP**) for the **Interested Party**

Hearing dates: 25 & 26 October 2017

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# Approved Judgment

## MR JUSTICE OUSELEY:

1. The Claimant is a resident of Haringey, Chair of the Older People's Reference Group for Haringey, a member of "Stop HDV" which is a coalition of groups of Haringey residents opposed to the Haringey Development Vehicle ("HDV") and a former senior local government official. Put very simply, the purpose of the HDV is to create a partnership between the Defendant, Haringey London Borough Council ("the Council") and the private sector, to bring private sector finance, experience and expertise to the task of developing the Council's land for its better use, and so achieving the Council's strategic aims in housing, affordable housing and employment.

2. The Claimant challenges by way of judicial review a decision made by the Council, through its Cabinet or Executive, on 20 July 2017; the Grounds refer to an earlier decision on 3 July 2017, which the later decision reconsidered and confirmed; nothing turns on which of these two decisions is challenged. The decision of 20 July was to confirm Lendlease Europe Holdings Ltd ("Lendlease") the Interested Party, as the successful bidder to become the Council's partner in the HDV. The decision also approved the structure of the HDV, the 50/50 split between Lendlease and the Council, as well as the related legal documents.

3. The merits of that decision, and of those which led up to it, are controversial among many in the Borough, including council tenants. There was considerable public interest at the hearing. But I am not concerned with the wisdom or merits of the decision. I am concerned with the issues of law about the powers of the Council and the lawfulness of the procedures it adopted.

4. The grounds of challenge are that the Council (1) could not use a Limited Liability Partnership ("LLP") for these purposes since the Council was acting for a commercial purpose under s1 Localism Act 2011, and so had to use a limited company; (2) had failed in its statutory duty of consultation under s3 Local Government Act 1999; (3) had failed in its public sector equality duty under s149 Equality Act 2010; and (4) could only take this decision in full Council and not by Cabinet alone, by virtue of rule 4(1)(b) Local Authorities (Functions and Responsibilities) (England) Regulations 2000 SI No.2853, ("the Functions Regulations").

5. These grounds are all contested by the Council and Lendlease, who both also say that all grounds, save the question of whether the decision should have been taken in full Council, are affected by undue delay: grounds for the challenges first arose on 10 November 2015 or at the latest on 14 February 2017, when earlier decisions in the long process of decision-making were taken. Proceedings were not lodged until 14 August 2017. Time should not be extended. Permission and relief should also be refused under s31(6) of the Senior Courts Act 1981 because it would cause hardship, prejudice and detriment to good administration. They also say that permission and relief should be refused under s31(3D) of the 1981 Act because it is highly likely that the outcome for the Claimant would not have been substantially different, if the alleged unlawful acts had not taken place. The Claimant contests each of these points in his turn, in particular as to when grounds for the challenges first arose.

6. The proceedings took the form of a rolled up hearing, not least because of the significant delay issues. I heard the permission and substantive issues together.

7. The grounds require consideration of many reports, minutes and resolutions over a period of more than two years, as well as of other documents. I am going to set out the relevant parts for all grounds in one stage, rather than going to the documents separately for each stage. However, so that the significance of what I set out is more readily apparent, I start with the statutory provisions the interpretation or application of which is at issue.

**The statutory provisions**
**(1) The Localism Act 2011**

8. S1 creates a general power of competence, rather awkwardly sometimes called "GEPOC". It provides:

> "(1)A local authority has power to do anything that individuals generally may do."
>
> (2) Subsection (1) applies to things that an individual may do even though they are in nature, extent or otherwise -
>
> (a) unlike anything the authority may do apart from subsection (1), or
>
> (c) unlike anything that other public bodies may do.
>
> (4) Where subsection (1) confers power on the authority to do something, it confers power (subject to sections 2 to 4) to do it in any way whatever, including –
> (a) power to do it anywhere in the United Kingdom or elsewhere,
> (b) power to do it for a commercial purpose or otherwise for a charge, or without charge, and
> (c) power to do it for, or otherwise than for, the benefit of the authority, its area or persons resident or present in its area.
>
> (5) The generality of power conferred by subsection (1) ("the general power") is not limited by the existence of any other power of the authority which (to any extent) overlaps the general power.
> (6) Any such power is not limited by the existence of the general power (but see section 5(2))."

9. S4(1) and (2) create a qualification:

> "(1) The general power confers power on a local authority to do things for a commercial purpose only if they are things which the authority may, in the exercise of the general power, do otherwise than for a commercial purpose.

(2) Where, in the exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.

(2) A local authority may not, in exercise of the general power, do things for a commercial purpose in relation to a person if a statutory provision requires the authority to do those things in relation to a person"

10. "A company" for these purposes is defined in s4(4) in a way which excludes an LLP; it includes a company within the meaning of s1 Companies Act 2006.

11. For an LLP to be incorporated, s2(1) Limited Liability Partnerships Act 2000 requires two or more persons to be associated for carrying on a lawful business "with a view to profit".

12. The Council relied on s1 of the 2011 Act as the source of its power to enter into the HDV, with the associated arrangements. The Council contended that s4(2) did not apply because it was not "doing things for a commercial purpose".

13. The issues included whether the Council was doing anything in relation to the HDV for a commercial purpose, whether the purpose of the HDV itself was relevant, and whether as Lendlease and the Council contended, to come within s4(2) any commercial purpose had to be the true and dominant purpose, rather than, as the Claimant submitted, "a" commercial purpose, which however significant or otherwise that might be, meant that a company and not an LLP had to be used.

14. The Council also contended that it did not matter if the GEPOC was not available, because other powers could have been used to achieve the same corporate structure and end.

15. It was not suggested that there was any aspect of what the HDV LLP was intended to do which could not have been done by a limited company as defined by s1 Companies Act 2006. An LLP was used because it would bring VAT and corporation tax advantages, and flexibility in its governance to cope with the two partners' differing interests.

**(2) Local Government Act 1999**

16. S3 provides a general duty to consult in these terms:

"(1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.

(2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult-

a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority,

b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions,

c) representatives of persons who use or are likely to use services provided by the authority, and

d) representatives of persons appearing to the authority to have an interest in any area within which the authority carries out functions.

(3) For the purposes of subsection (2) "representatives" in relation to a group of persons means persons who appear to the authority to be representative of that group.

(4) In deciding –

e) how to fulfil the duty arising under subsection (1),

f) who to consult under subsection (2), or

g) the form, content and timing of consultations that under subsection

an authority must have regard to any guidance issued by the Secretary of State."

There was no dispute but that, like all local authorities, the Council is a "best value authority". It did not carry out a statutory consultation exercise under s3. It says that the decisions of 3 and 20 July were not decisions in fulfilment of the duty in s3(1), so as to require the statutory consultation in s3(2). In any event, there had been significant opportunities for the Claimant, his group and others, to make their views known directly and through the Council's Overview and Scrutiny Committee, OSC.

**(3) Equality Act 2010**

17. S149 provides:

"(1) A public authority must, in the exercise of its functions, have due regard to the need to -

(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act:

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;

(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it;

[…]

(3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and person who do not share it involves having due regard, in particular, to the need to –

a) remove or minimise disadvantages suffered by persons who share a relevant characteristic;

b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;

c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

18. The relevant protected characteristics include age, disability, pregnancy and race. Mr Wolfe QC for the Claimant focused on the importance of "due regard" being had to this duty before decisions were taken, having regard to it rigorously, and with recorded evidence that due regard had been had.

**(4) Local Authorities (Functions and Responsibilities) Regulations 2000**

19. The structure of local government broadly requires decisions to be taken by the local authority's executive, usually as here called its Cabinet, except where specific contrary provision is made. Mr Wolfe submitted that it was.

20. R4 provides:

"4. – Functions not to be the sole responsibility of an authority's executive

(1) In connection with the discharge of the function –

[…]

b) of formulating a plan or strategy for the control of the authority's borrowing, investments or capital expenditure or for determining the authority's minimum revenue provision;

[…]

the actions designated by paragraph (3) ("the paragraph (3) actions") shall not be the responsibility of an executive of the authority.

(2) Except to the extent of the paragraph (3) actions, any such function as is mentioned in paragraph (1) shall be responsibility of such an executive.

(3) The actions designated by this paragraph are…

a) the giving of instructions requiring the executive to reconsider any draft plan or strategy submitted by the executive for the authority's consideration;

b) the amendment of any draft plan or strategy submitted by the executive for the authority's consideration;

[…]

(d) the adoption (with or without modification) of the plan or strategy."

21. The Council's Constitution in Article 4 reflects that; full Council must approve the budget and determine the Council's borrowing limits.

22. Mr Wolfe submitted that the decisions of 20 July formulated a plan or strategy for the control of the Council's investments because of the way in which it would place assets with the HDV and obtain returns upon them.

23. All material decisions were made by the Cabinet, including those of 3 and 20 July 2017.

**The Council's decision-making process**
**(1) 10 February 2015**

24. On 10 February 2015, the Council's Cabinet considered a report entitled "Development vehicle feasibility study and business case" from its Director for Regeneration, Planning and Development, and its Assistant Director of Regeneration. The issue was described as follows:

> "1.1 This report seeks Cabinet approval for the proposal to tender for a feasibility study and business case including engagement with Members, staff and stakeholders for a Haringey development vehicle, and - if such an approach is recommended – support for the procurement of partners for that vehicle.
>
> 1.2 Subject to the more detailed work proposed here, it is considered that a development vehicle, established as a joint venture between the council and one or more private sector partners, is a leading option for removing what would be otherwise insuperable barriers to realising the council's ambitions for building new homes and securing its wider regeneration objectives, including in relation to the Tottenham regeneration programme; the emerging Wood Green Investment Framework; housing estate renewal and the council's own commercial portfolio. This is principally because, while the council has access to the land required, it cannot access sufficient capital funding and does not on its own have the commercial and development expertise required to achieve the best possible outcomes. The creation of a vehicle would marry the council's land assets with investment and expertise from one or more private partners while retaining a stake and a degree of influence over the pace and nature of development that would not be possible with more traditional land deals or development agreements. This proposal builds upon the initial scoping work already done for the council by Turnberry Real Estate, which is summarised later in this report."

25. The Cabinet Member introduction emphasised the role which Council owned land had to play in realising the Council's ambitions for regeneration, new homes and mixed communities and objectives at the heart of its new Corporate Plan. A strategic long-

term partnership was required. But the decision recommended would only take the Council to the next stage in its investigation of the options for finding that partnership.

26. The Officer's report explained the work done so far: Turnberry Real Estate, external consultants, had submitted a scoping report for a development vehicle, to secure the investment and expertise necessary to secure regeneration across the Council's portfolio of sites. It described the basic principles underpinning any "vehicle proposition" as being that:

> " • The council would hold a 50 % stake in the vehicle, with the remaining 50% stake held by its strategic investment partner or partners.
>
> • The vehicle would be established for the long term, most likely for a period of up to 20 years with an option to further extend.
>
> • The council's contribution – and equity stake – would comprise some or all of its investment portfolio and development sites. The strategic investment partner(s) would provide funding, as well as services including (but not limited to) asset management, development management and fund management.
>
> • Receipts would be distributed pro rata between the councils and partner(s) based on their stake, or recycled to support the delivery of further projects."

Equality effects were mentioned: although the recommended decisions had no direct equality implications themselves, the services proposed were "in support of wider objectives which are aimed at improving the supply of housing – and particularly affordable housing- with the aim of improving access to all sorts of housing for everyone, and in particular vulnerable and protected groups." This was to be a common theme of the decision-making process.

27. The Cabinet resolved to accept the recommendations to seek tenders for a feasibility study to develop the case for the preferred option, the joint development vehicle. The reasons for the decision were that the option of a joint development vehicle as a way of pursuing housing development and regeneration on the Council's land had "potentially significant implications in governance and financial terms for the Council itself, and could have major material impact on places and people across a number of wards, hence this is considered a key decision for approval by Cabinet."

**(2) 10 November 2015**

28. On 10 November 2015, the Cabinet considered a further report from the same two officers. Its stated purpose was to present to Cabinet "the proposal to establish a Development vehicle for Haringey to deliver regeneration and achieve new housing,

jobs and social and economic benefits: to present the business case supporting this; and to seek approval to commence a procurement process….". The Cabinet Member introduction commented that the "path towards an up-and-running development vehicle is a long one. This decision - to agree the approach and to start the search for a joint venture partner - is a vital milestone." Much hard work lay ahead.

29. The Cabinet decided, in line with the recommendations, to approve the business case for the establishment of the HDV, in the form of an "overarching vehicle" in line with what was called option 6, and to agree to the commencement of a Competitive Dialogue Procedure to procure its HDV partner. It also agreed on three categories of Council land, with different future roles in relation to the HDV. I elaborate on these later.

The Minutes record the reasons for the decision as follows:

> "REASONS FOR DECISION
>
> The Council has set out in its Corporate Plan and associated strategies, a set of challenging social, economic and regeneration objectives. It also has challenging economic and housing growth targets from the London plan, as well as a need to maintain its existing housing stock and carry out major estate renewal. It has neither the resources not the capacity to achieve these alone.
>
> In the autumn of 2014, Turnberry examined the market on the Council's behalf to see if there was an appetite for partnership with the Council to deliver these social and economic objectives; deliver new housing and economic growth. On confirming that there was interest, the Council commissioned detailed work into the options for delivering the objectives, which is included in the Business Case at Appendix A1 and considered in detail below.
>
> In summary, the site by site disposal of land will not deliver the required social and economic benefits or the renewal of estates as the level of upfront funding required by the private sector, particularly for estate renewal, will prevent them being developed, and where it is possible to move development forward will reduce returns and inhibit the delivery of social and economic benefits.
>
> For the Council to establish a wholly owned company and carry out the work itself, would mean a commitment to a level of borrowing that is impossible for the Council to sustain, and a level of risk that would not be prudent.
>
> Accordingly the option recommended is that the Council should seek through open procurement a private sector partnership with whom to deliver the objectives in partnership.

> The Council accepts a degree of risk in that it will commit its commercial portfolio to the vehicle, and will, subject to the satisfaction of relevant pre-existing conditions, also commit land. It has also to bear the costs of the procurement and establishment of the vehicle, and some limited development risk. However, in return, the contribution to its Corporate Plan objectives, including high quality new jobs, new homes including affordable homes and economic and social benefits, will be at a scale and pace that would otherwise be unachievable. The Council also receives a financial return that it can reinvest in the fulfilment of its statutory functions, and particularly in measures to achieve such social-economic objectives (as more particularly described in paragraph 7 below and Appendix 7) or, as appropriate, such other strategic outcomes under the Corporate Plan.
>
> The development partner, who continues to bear funding risk and the consequent development risk, enters a long term partnership with a non-commercial partner in a political environment, making it essential for them to maintain relationships. However, they obtain a long term pipeline of development work, in an area of London with rising land values, and with a stable partner.
>
> It is not feasible for the Council to continue to operate as it has done previously and the approach outlined will help deliver wider social and economic benefits, as well as the housing and jobs outlined in the Council's plans. It should be noted, however, that this report does not recommend a decision to establish a vehicle, but simply to open a procurement process with a view to establishing one; the decision to establish will come back to Cabinet in due course."

30. The background to the recommendations as set out in the report was that the Council had made a major commitment to growth in housing and employment in its Corporate Plan and through its contribution to the London Plan. These ambitions were elaborated in the Council's Economic Development and Growth Strategy and in the Draft Housing Strategy. Housing and employment growth were seen as the key to the Council's long-term strategy for the future of the Borough. Over time, better housing and employment would improve the quality of life for residents and help reduce demand for council and other public services.

> "The increased council tax and business rate income will also help to put the Council's finances on a more sustainable long-term footing" as other revenues decreased, and it would allow "further cross-subsidy and investment into the stated socio-economic objectives in Corporate Plan outcomes".

31. At 7.3, the report emphasised that the Council's own landholdings had a:

> "key role in driving this economic growth and providing new housing. Without use of surplus Council land such as unneeded offices in Wood Green, disused depots and under-used commercial property, the Council cannot achieve its targets. Similarly, estate renewal on the Council's large and medium sized estates provides a major opportunity not only to increase the number of homes, but also to improve the mix of tenures and sizes and address the condition of the housing stock".

32. A number of estates were identified for improvement. The report then commented that development on Council land gave the Council "a particularly good opportunity to define the type of housing and jobs the Council" wanted to see and to start regeneration in priority areas like Wood Green town centre. Success in attracting infrastructure investment from other sources would not deliver regeneration across all those areas of the Council's landholdings in need.

33. At 7.5, the report stated that:

> "the Council did not have the financial resources to achieve its stated socio-economic aspirations and its Corporate Plan outcomes".

Recent studies had confirmed that its finances were "considerably short of being able to meet all the aspirations." Recent changes in Government finance had made that worse. There was not enough money to maintain the existing housing stock fully, still less to build new homes.

34. As with many other local authorities the Council had a:

> "demonstrable shortage of capacity and expertise to deliver the schemes required. On its own it cannot achieve its aims and it needs to bring in people and skills to make the developments happen. These skills would be difficult and expensive to acquire in competition with other boroughs and the private sector."

The report therefore said at 7.7:

> "The value of seeking a private investment partner is that they will bring both capital resources, and skills and expertise to help achieve the Council's objectives. Financial returns will accrue on a phased basis giving the Council the option to spend these on further development – including affordable housing – on social and economic benefits or on other corporate plan objectives. During the Future of Housing Review, the member review group felt that in principle, some kind of development vehicle was needed as the Council had little choice of option to achieve its objectives".

The joint venture development vehicle model appeared to be the best solution to deliver the Council's ambitions. The report then turned to the concept of a development vehicle: the 50% Council owned/50% private sector owned joint venture development vehicle was already in use by local authorities in the UK to bring forward major development on their land where they lacked the investment capacity and skills to achieve the best possible regeneration outcomes in some other form. Such a joint venture development vehicle could combine Council land with private investment and expertise:

> "while maintaining an appropriate degree of Council control over the pace and quality of development. It can also potentially give the Council a long-term income stream as well as capital returns, which may be re-invested in accordance with the Council's statutory functions on new housing, on social and economic benefits or on other Corporate Plan objectives."

Now was the appropriate time to consider such a vehicle. Planning, regeneration, housing and housing investment strategies were being developed. The review of the Future of Housing had "demonstrated forcibly that there is insufficient capital funding available to deliver all the Council's aspirations"; that meant that potential options for maintaining homes or delivering new ones and economic growth were extremely limited but a joint venture development vehicle might however be a potential solution.

35. Consultation with the market confirmed that certain parts of Haringey were seen as areas of high potential, the market believed in the Council's "affordable London message" and shared its interest and belief in mixed tenures. It was said to have growing confidence with the "Council's leadership".

36. Objectives had been developed to underpin the assessment of any potential approach to development of the Council's assets:

> "i. To deliver growth through new and improved housing; town centre development; and enhanced use of the Council's property portfolio.
>
> ii. To achieve and retain a long term stake and control in development of the Council's land, maintaining a long term financial return which can be reinvested in accordance with the Council's statutory functions, on new housing, on social and economic benefits or on other Corporate Plan objectives.
>
> iii. In partnership with the private sector, to catalyse delivery of financially unviable schemes.
>
> iv. Achieve estate renewal by intensification of land use and establishment of a range of mixed tenures, together with tenure change across the Borough where appropriate.
>
> v. To secure wider social and economic benefits in areas affected, including community facilities, skills and training,

> health improvement or crime reduction for the benefit of existing residents.
>
> vi. Incorporate land belonging to other stakeholders, both public and private sector, into development."

37. Paragraph 7.16 described how the proposed development vehicle could be a catalyst to help achieve "the outcomes set out right across the Council's Corporate Plan." It would contribute directly to housing and estate renewal ambitions and support the creation of new space for business and jobs, but it would also create and support new training and apprenticeship opportunities and "give the Council an opportunity to invest in a still wider range of outcomes." The vehicle would deliver new homes in a wide range of tenures, commercial retail, office and manufacturing space and employment through the activities of the vehicle itself, such as construction and as a result of new commercial and retail developments.

38. An appendix included an outline of key additional social and economic benefits to be specified as part of the procurement because it was important that the Council maximise the social and economic value from the project. The Council would receive financial returns from successful developments.

39. At 7.19, the report commented:

> "that Council will of course have competing priorities for the reinvestment of these resources in accordance with its statutory functions and Corporate Plan objectives, but the intention is to invest such resources in employment and training programmes; to subsidise more affordable housing and/lower rents; or to support other Corporate Plan objectives such as crime reduction measures, health improvement or community facilities."

The report then turned to the options for "potential delivery structures". The preferred option was the "overarching vehicle" which meant that assets could be taken forward by way of:

> "different delivery mechanisms beneath the overarching level, through, for example, development agreements, joint ventures etc. Assets could be taken forward individually, as portfolios or through sub-portfolios of assets. The structure would also allow for the cross-funding of income from the commercial portfolio and quick-win projects (i.e. value release properties) to be used to fund projects such as the key estate renewal sites."

It could also provide an asset management role to enhance returns from the assets and could also act as a development manager, asset manager, fund manager and provide a strategic funding role in taking schemes forward. The model would also allow Council involvement in schemes where it had "limited land ownership". It referred to this as being the approach taken by London Borough of Hammersmith and Fulham.

(That authority later changed its decision on the LLP structure of its development vehicle).

40. The "overarching vehicle" was the model best providing the means for achieving Council objectives, specifically because it gave the "greatest chance of achieving regeneration and development on a scale consistent with the Council's ambitions, in turn encouraging further growth and enabling the wider social and economic benefits to which the Council aspires"; and it would allow the Council "to retain influence and control over the pace and quality of development through its 50% stake in the vehicle" including through nominations to the board of the vehicle. The third reason is important:

> "(c) As can be seen from the financial appraisal, this approach is projected to achieve a considerable financial return which can be invested in accordance with the Council's statutory functions, in the further development of the stated socio-economic objectives or spent on the delivery of wider Corporate Plan objectives. This is significantly as a result of the bringing in of private sector resources to enable and make viable development. The other options project a significantly lower return in the event that they can be made to work at all."

41. The fourth reason was that the vehicle could allow asset and development management, fund management and services provision within the same structure. Fifth and sixth:

> "(e) Value can be extracted from the commercial portfolio and the town centre market led opportunities (at Wood Green) to be used to cross fund other projects, such as more financially challenging estate renewal sites. Money can also be retained within the vehicle and used to cross subsidise or fund other projects.
>
> (f) While the Council will undertake a measure of development risk, it has in return the opportunity for reduced costs, and a share in very likely increased profits which may be reinvested in accordance with the Council's statutory functions, in the promotion of the stated socio-economic objectives. This level of risk, which is limited to the extent of land committed to the vehicle, and the commercial portfolio which is proposed to go in at day one, is significantly less than if the Council bears the whole burden of borrowing and cost to finance development. It is however, not a risk free situation and is the price paid for ongoing influence and control, together with financial returns."

The overarching vehicle would be able to adapt and respond to market changes in Council requirements.

42. At 7.45, the report said that the HDV would be established either as a limited company, or as a Limited Liability Partnership. The report discussed various aspects of the potential corporate structure including deadlock provisions. It was envisaged

that the HDV would be set up for a period likely to be 15 to 20 years. The Council would put land and development sites and its commercial portfolio into the vehicle. These would provide income to support the running of the partnership as well as providing opportunities for enhanced management and improved asset management. The Council would retain a role in decision-making because certain key decisions would be reserved for the Council and its partner to take as shareholders, unanimously. These could include the approval of business plans, third party funding and material acquisitions or disposals.

43. The report then turned to the categories of land which the Council was to decide whether to put into the vehicle. At this stage, it was recommended that there be three categories of sites: category 1 was land owned by the Council "that it is intended will be transferred into the vehicle subject to satisfaction of the appropriate conditions precedent and obtaining necessary consents, where applicable." These included the Northumberland Park Regeneration Area, Wood Green Civic Centre and Library, specified buildings in Wood Green owned by the Council, as well as certain identified commercial portfolio assets. The approval of Cabinet to this was sought so as "to indicate to the market that it is proposed to transfer these assets to" the HDV. Those were to be included in category 1 "because the Council considers them Priority Areas for Regeneration, because they are potentially attractive to the market, and because they should significantly enable the delivery of the Council's aspirations for homes and jobs, and for socio-economic benefits". The commercial portfolio was included to obtain enhanced use of the assets and better returns to support the operation of the HDV.

44. Category 2 comprised "sites and assets that may be transferred to the vehicle and should be considered within the scope of the procurement process". These included a number of Housing Revenue Account sites. The commentary stated that in all instances "the inclusion of a site on this list as a potential site does not indicate any present change in the situation for residents and tenants." Full consultation with residents and detailed planning would be undertaken before any site in any category were transferred to the development vehicle for improvement or renewal. A number of General Fund sites were also listed. The category 2 sites were within the scope of the procurement process "and may be transferred into the vehicle if the Council wishes to do so in due course or if the potential partner identifies these as suitable sites". They could be included as Priority Areas for Regeneration or because they were attractive potentially to the market or could significantly enable the delivery of the Council's aspirations for socio-economic benefits. But they were not category 1 because either the Council's present view of the future of the site was insufficiently clear or discussions with residents were not sufficiently advanced or because there was uncertainty as to the market view of them.

45. Category 3 sites were sites and assets within the Borough "that as yet have not been identified that may be suitable for development and inclusion" within HDV's work. These might be identified at a later date or as part of the procurement process. They could be Housing Revenue Account or General Fund sites suitable for regeneration or to meet the socio-economic aspirations of the Council. A further report would be necessary should it be sought to transfer them to the vehicle.

46. The final list of sites proposed for transfer would be subject to negotiation through the procurement process until the final approval of Cabinet at the end of that process.

The decision being taken on this particular occasion did not in itself authorise any transfer of land. Sites would not transfer into the vehicle on the day the vehicle was created, but a suitable date would be agreed for each site, once a suitable scheme had been developed, planning permission achieved and, in an estate renewal scheme, when residents were re-housed. For those currently occupying such sites, this was seen as a further development of work in progress, and "does not actually change what is proposed for the residents [sic] home or business but only provides the way to achieve what is proposed."

47. The Northumberland Park Regeneration Area was the subject of specific discussion; its regeneration had long been a priority for the Council and over the years considerable money and effort had been put into the area. Its inclusion in possible sites for a development vehicle "will come as no surprise to residents". The potential inclusion did not change the approach to the area which would still be through detailed consultation and engagement with residents and local ward members and there would still be careful master-planning. The individual residents' situations in relation to their homes had not changed. They would still be fully consulted on future developments. Various aspects of the regeneration of Wood Green were discussed; the report commented at 7.68 that a public consultation on the draft Wood Green Area Action Plan and the Council's regeneration plans for the area were scheduled for early 2016. The plans and any subsequent development proposals would be subject to the same degree of engagement, whether they were taken forward by the HDV or through some other method.

48. The next steps were then set out, but at 7.74 members were told to note that the Cabinet's authority was not being sought to set up the HDV "but rather to move on to the next stage and embark on a formal procurement process".

49. Included within the report was a section headed "Comments of the Assistant Director of Corporate Governance and legal implications".

> "9.1 To undertake the transactions and participate in the proposed Development vehicle and proposed associated structure referred to in this report, the Council will be relying upon the General Power of Competence ("general power" contained in Section 1 of the Localism Act 2011 in conjunction with the powers set out below….
>
> 9.3 Section 4 Localism Act 2011 provides that if an authority is exercising the general power for a commercial purpose then the local authority must do it via a company. In this instance the local authority are proposing this project for the purposes set out in paragraphs 7.16 to 7.19 of the report and in Appendix 7 and the primary purposes of the project are non-commercial, although the Council would be acting on a commercial basis as a partner in a joint venture. In addition the objectives of the project are to comply with the objectives of Corporate Plan referred to in paragraph 6 of the report. These objectives are non-commercial socio-economic objectives. It is currently proposed to structure this project through a Limited Liability Partnership albeit this will be decided as part of the procurement process when further advice will be taken. Pinsent Masons LLP have advised on a number of similar

> projects and are satisfied in these circumstances that the Council may rely on the general power as legal authority for this project and for the proposed LLP structure. Leading Counsel has also been instructed to advise on this point and has confirmed that in his opinion the Council has the power to become a member of an LLP for the purposes of this project. This issue has never been challenged or litigated on in respect of previous LLP schemes involving local authorities and therefore there is no established case law on the point."

50. A number of other relevant powers and obligations, including the obligation to obtain best consideration under s123 Local Government Act 1972, were also referred to.

Equality issues were discussed as follows:

> "10. Equalities and Community Cohesion Comments
>
> 10.1. An Equalities Impact Assessment for the procurement and creation of the vehicle is attached as Appendix 10. The company documentation will require the vehicle to comply in all respects with legislation and good practice in this area.
>
> 10.2. Asset business plans and proposals on a project by project basis will contain appropriate EqIA documentation, and it is open to the Council if it wishes to include this as a condition that must be fulfilled before land can transfer."

51. The Appendices, including the Business Case, were in much the same vein: the Council had the land but not the cash, capacity and expertise to deliver the regeneration and development sought. The Overarching Vehicle, in an asset management role, could " 'sweat' " the assets. In option 6, the Council would be able to participate in its profits, cross fund other projects such as estate renewal, and adopt a long-term investment approach, three among eighteen advantages identified.

52. Appendix 10 was an Equality Impact Assessment carried out in September 2015. It said:

> "An EqIA is being undertaken due to the potential for the vehicle's activities to impact on tenants, leaseholders, other residents, and those in housing need, as well as business owners, including (in all categories) those from the protected groups. A detailed site by site EqIA will be carried out as the vehicle carries out its work, if members agree to the setting up of the vehicle."

53. What then followed was a framework which referred to the available data sources without itself containing the data of, for example, "the Equalities Profile of Haringey", and of various subgroups such as tenants and the homeless. There were brief comments dealing with whether the impacts of the proposal on those with various protected characteristics would be positive or negative and with a short comment as to why. The positive and negative impacts were the same for each characteristic: the positive impacts of the vehicle proposal would arise from meeting future housing needs; its economic and growth aspects were intended to provide jobs, training facilities and support into employment; under "negative" it said that the detail of specific schemes which would fall under the development vehicle still had to be worked out. The positive and negative impact of individual schemes "will need to be assessed on a site by site basis." The short commentary against each protected characteristic, and for some there was no data upon which comment could be made, put shortly, was that those whose protected characteristics put them at a disadvantage whether by gender, ethnicity or disability would benefit from better housing provision and job opportunities.

54. The initial impact analysis stated:

> "The development vehicle proposal seeks to enable development to meet future housing need within the borough and should therefore have a positive impact across the protected characteristics, particularly where high levels of housing need have been identified as with younger age groups, lone female parents and black and minority ethnic households. Similarly, the provision of other benefits through jobs and training, community facilities, and new commercial and retail facilities should have a positive impact across the protected characteristics. The detail of specific schemes which would fall under the development vehicle is still to be worked out. The impact – positive or negative – of individual schemes will need to be assessed on a site by site basis. At present, the decision, if agreed by members, will be to procure the vehicle. It does not at this time establish the vehicle, nor does it allocate particular sites for development at present."

55. EqIAs would be completed in relation to individual sites as they were brought forward. Consultation would be undertaken on a scheme by scheme basis and used to inform those EqIAs. It concluded:

> "overall, the development vehicle proposal is considered to have a positive impact for disadvantaged and excluded groups, including those with the protected characteristics. However, individual schemes will need to be assessed as they are brought forward for their specific impact on equalities."

**(3) Tender Documents**

56. The Tender Documents sent out in February 2016 required bidders to supply information, among other matters, on the total returns to the Council, its partner and

the HDV, the split of profits between the Council and its partner, and on the proposed profit distribution arrangements.

**(4) The Council Newsletter**

57. The Council's local newsletter then told local residents, for example, in Cranwood and Northumberland Park about its regeneration plans which included working in a 50/50 partnership with the private sector. There was local consultation on its draft Estate Renewal and Re-housing Policy. Commercial tenants whose property had been identified for inclusion in the HDV were informed in January 2016 of the decision to select a partner for the HDV, and the likely 12 – 18 month timescale of the selection process.

**(5) Related Strategies and Plans**

58. The Council's draft Housing Strategy of 2015, as with its Corporate Plan, referred to the role which Council land, potentially through a development vehicle, would play in housing growth and wider regeneration. This was subject to public consultation in 2015, but before the November 2015 Cabinet decision. It was adopted in November 2016; it referred to the Council's intended establishment of a development vehicle to maximise the potential of public land. The Review Group reporting to the Council in September 2015, had agreed that a corporate development vehicle was "likely to be the most appropriate option" for delivering improvements to homes on major estates.

**(6) The Overview and Scrutiny Committee**

59. The Overview and Scrutiny Committee, OSC, through a Panel, reported on 17 January 2017 to the Cabinet on the governance arrangements for the HDV. This was an interim report. It considered that governance arrangements would be critical to ensure that the operation of the HDV was "transparent and accountable and operates in the interests of the Council and the residents it serves." It considered the HDV on the basis that it would be an LLP.

**(7) 14 February 2017**

60. On 14 February 2017 Cabinet considered the OSC report. The Cabinet member Introduction from the Leader of the Council welcomed it but she said that she was "absolutely clear that there is no justification for delaying the Council's decision-making in respect of the vehicle…." Nine of the OSC recommendations were wholly or partly accepted. But were the HDV stopped, the costs would increase, there was a risk of legal challenge from bidders; market confidence, and ongoing and future procurement exercises, would be undermined. Other ways would then have to be identified to generate the income expected from the HDV both in terms of share and profits, and expected growth in the Council's revenue base. "If such income could not be identified then there would need to be significant levels of additional savings found in order to balance the Council's budget in future years." The Council, however, did have the right to amend the procurement timetable or halt the process if it chose. It stated that the HDV "will be a Limited Liability Partnership…." The recommendations of the OSC were set out in an appendix and then answered. Many went to the merits of the HDV and its structure.

61. The OSC had recommended that the risks could not adequately be mitigated by any governance arrangements and that therefore the HDV plans should be halted. The Cabinet considered that stopping the process would also "prevent answers to the issues raised coming forward…." The five month period before the HDV was established would provide the opportunity to address concerns highlighted in the Panel's presentation. The responses to the OSC report as recommended were approved. The OSC recommended that final authorisation should be reserved to full Council. This was rejected because the question of whether Cabinet or full Council took the decision was determined by statute and the Council Constitution, not by a discretionary Cabinet decision. It was an executive decision for Cabinet to make. The OSC recommended that a full consultation be undertaken among the tenants and leaseholders on estates identified for renewal through the HDV, and with commercial tenants whose property would transfer to the HDV. This too was rejected on the grounds that agreement in principle to transfer a site to the HDV for redevelopment "does not constitute any agreement to a particular proposal for re-development, or to a change to any resident's landlord".

62. Residents would be "heavily involved in shaping and responding to the redevelopment proposals for each site".

63. Consultation would be carried out as appropriate under the Housing Act 1985 with secure tenants; existing residents and commercial tenants had been kept informed about the emerging HDV proposals. It was not necessary or appropriate to carry out further consultation with commercial or residential tenants on the appropriateness of an "HDV – style approach". The discussion of the OSC recommendations gave rise to no further equalities implications.

64. The same Cabinet meeting also considered the outcome of the Competitive Dialogue procurement process authorised on 10 November 2015 to procure the HDV development partner. Cabinet was asked to approve the selection of the preferred and reserved bidders and to approve the next stage of work to clarify the preferred bidder's proposal "with a view to establishing the HDV, and to note the emerging arrangements for governance of and management of the relationship with the HDV."

65. The Cabinet member introducing it saw this decision as "a critical and exciting step towards delivering our growth ambitions". Cabinet were recommended to proceed to the next stage and "in particular to formalise the structure of the vehicle, finalise legal documents and further develop site and portfolio business plans….". The reasons for the recommended decision included the case for growth, which I have largely set out already. The case emphasised the problems the Council faced in funding services unless the Council Tax and Business Rate base grew. The problems in terms of housing, quality of housing and jobs would then increase. The Council could not achieve its growth targets "without realising the potential of unused and under-used Council-owned land."

66. Part of the reasons for the adoption of the joint venture development vehicle model were then repeated and the different options were rehearsed. The report of the Future of Housing Review Group was considered. It had felt that "some kind of

development vehicle was needed as the Council has little choice of option to achieve its objectives."

67. The review had "demonstrated forcibly that there is insufficient capital funding available to deliver all the Council's aspirations….it also concluded that a joint venture development vehicle may be a potential solution". It was supported by the Independent Advisors' report which noted that a range of development vehicles had been established country-wide, usually to develop new housing of a range of tenures and with governance and financial structures varying from case to case. The six options were rehearsed and the advantages of the preferred option repeated. The report then said at [6.19]

> "In particular respect of the Council's aspirations to deliver the greatest possible amount of high quality affordable housing; this approach has two key strengths. First, it enables the Council – via its stake in the vehicle – to ensure that the vehicle's development proposals secure not only the greatest amount of affordable housing from this land, but that this housing meets the particular housing demand in Haringey as set out in the Council's Housing Strategy. This can always start with the presumption that sites delivered through the vehicle would meet council policy – for example to yield 40% affordable housing overall – with a strong governance position from which to secure those outcomes. Second, the Council will always have the option, on a case by case basis, to reinvest its financial returns from the vehicle in affordable housing, allowing future developments promoted by the vehicle to achieve better outcomes – whether larger overall amounts of affordable homes, a different tenure mix, or lower rents – than would be possible based on those developments' basic viability."

68. The bidders and the process were then described. The key elements of the preferred bidder's proposals were set out along with the scoring for the bids where financial return was one of five scoring criteria, each equally weighted at 20%. The governance of the HDV, including the board's constitution, decisions reserved to members of the company, and the arrangements for resolving deadlocks and so on, was to be set out in the Members' Agreement and other legal documents which had been negotiated and would be finalised before being presented to Cabinet for approval. The Chief Finance Officer and the Assistant Director of Corporate Governance then commented on the financial and legal implications respectively. The projections represented best estimates rather than fixed figures; the actual returns would be dependent on a range of variables which could change over time. They were also based on indicative scheme designs and masterplans which would inevitably undergo significant changes. Variables included the profit level that could be expected from any particular development, the share of uplift of land value, interest rates and level of fees. The report said at [8.6]

> "As well as direct returns in the form of profit share and interest payments, the Council will also receive an indirect financial benefit from the Development Vehicle in the form of increased Council Tax and Business Rates received."

69. As the Council would expect to receive returns in the form of interest on equity investment, the funding structure of the vehicle was important. It would "require significant amounts of funding across its lifetime, far in excess of the level of funding that the Council on its own could secure." The funding was discussed. The Council's initial equity investment would be the value of the commercial portfolio transferred to the HDV at the outset. Vacant possession of the category 1 sites would be required for them to be placed in the HDV. Those costs would be particularly significant in the case of Northumberland Park Estate. But the HDV was expected "to provide significant levels of additional funding to the Council in future years, through profit share and increased Council Tax as explained above." Various other risks and costs were then set out. The comment on finances noted that the Council was also likely to benefit financially "due to the socio-economic activities of the Development Vehicle."

70. The report then referred again to the use of the general power of competence in section 1 of the Localism Act 2011, in conjunction with the other powers referred to in the report of 10 November 2015. It repeated the passage set out in paragraph 9.3 of the earlier report but omitting the words "…although the Council would be acting on a commercial basis as a partner in a joint venture."

71. The February 2017 report said now that "it has been accepted by all the bidders following dialogue that the HDV would be a Limited Liability Partnership ("LLP"). The position remains therefore (based on the initial advice provided by Pinsent Masons LLP) that the Council may rely on the general power as legal authority for the setting up of the HDV as an LLP."

72. The Equalities Impact Assessment (EqIA) from November 2015 was attached as an appendix. The report continued: "there are no further Equalities Implications as a result of this report, although the company documentation will require the Haringey Development Vehicle to comply in all respects with legislation and good practice in this area".

73. The Cabinet resolved unanimously to agree to the selection of Lendlease as preferred bidder with whom the Council would establish the HDV.

**(8) The OSC's Subsequent Intervention**

74. The OSC Panel, on 2 March 2017, provided a number of reasons why it contended that the decision should be reconsidered by Cabinet. It foresaw significant unresolved issues regarding financial and legal risks, inadequate consultation and EqIAs, which it said could potentially render the Council in breach of its public sector equality duty, and risked "the possibility of action in the High Court….". So far as material the issues were considered by Cabinet and rejected for the same reasons as those already given on 14 February 2017. There were clearly considerable political differences between the Cabinet and the OSC.

75. A further report of 13 June 2017 was prepared for the OSC about the HDV. It held what it called "six evidence gathering sessions, meeting stakeholders with a wide range of knowledge and experience". On EqIAs, it noted from a Project Team Report that the Cabinet reports, expected in July 2017 to establish the HDV and to agree the first set of business plans, would be accompanied by four full EqIAs.

**(9) 3 July 2017**

76. This OSC report was considered by Cabinet on 3 July 2017. The briefing from the Council Project Team of 24 March 2017 to which the OSC had referred said:

> "The potential impact of the individual business plans is likely to be greater than that of the decision to establish the HDV. Those business plans, and the final terms of the HDV's establishment, are still in development, so at this stage it will only be possible to talk about the Equalities Impact at a high level and on a provisional basis."

The 3 July 2017 report accepted a number of the OSC's recommendations but the Cabinet Member said there was no justification for delaying the Council's decision-making in respect of the HDV. It said this about EqIAs:

> "All business plans – the mechanisms for committing sites to the HDV – are (and will continue to be) accompanied by equality impact assessments (EqIAs) which inform the content of the plans and which Cabinet will consider alongside the business plans themselves as part of the decision on whether to approve them. This is to ensure that Cabinet members discharge their Public Sector Equality Duty (PSED). The business plans' EqIAs contain actions to commit to undertaking further EqIAs for specific elements of the business plans.
>
> However, it is not accepted that this should be undertaken by an external advisor. It is good practice for the individual or team to develop the EqIA alongside the development of a proposal as this allows equality issues to be embedded in proposals. It also allows the Council to document how it has shown due regard to the PSED throughout the development of the proposal as the duty does not just apply to decision makers but also people developing and implementing decisions. An external advisor would be detached from the process."

77. On 3 July 2017, Cabinet also considered a further substantial report for the purpose of deciding the outcome of the Preferred Bidder stage of the Competitive Dialogue procurement process for the HDV development partner.

78. As recommended in the report, it decided to confirm Lendlease as its development partner, and to approve the setting up of the HDV with Lendlease on a 50:50 basis on the structure set out in the report. Legal documents and six Business Plans were approved, including a Strategic Business Plan, a Social and Economic Business Plan, a Commercial Portfolio Business Plan and three specific area Business Plans: Northumberland Park, Wood Green and Cranwood. The Commercial Portfolio was to be disposed of to the HDV for £45m as the Council's initial investment, and the HDV was to have an option for a 250 year lease of Category A land at Wood Green. Various powers were delegated to officers.

79. The reasons for the decision were set out at length. The case for growth referred to the aims of the Corporate Plan, of the Housing Strategy and of the Economic Development and Growth Strategy. The needs were stark: high unemployment levels, a growing incidence of "in-work poverty", youth unemployment, low life expectancy, unaffordable increases in market rents and house prices, population growth, increasing demand for social housing, homelessness and high levels of deprivation. Growth in the Council Tax and business rate base was essential to the future sustainability of council services and to improve the living conditions, incomes, opportunities and well-being of residents in accordance with the Corporate Plan. The growth targets could not be achieved without realising the potential of unused and under-used Council-owned land.

80. The reasons also summarised the history of the decision-making and alternative options.

81. The Cabinet's attention was specifically drawn to the following points as "some of the most significant elements of the proposed arrangements":

- An estimated 6,400 new homes, of high quality and meeting Council policy in terms of affordable housing, and potential for more than 20,000 jobs overall
- Estimated development returns to the Council of £275m, plus a share of enhanced rental returns from the commercial portfolio, plus estimated section 106 and Community Infrastructure Levy investment of £37.7m, plus council tax and business rate uplift rising to an estimated £13m per year.
- £8m HDV investment into its social and economic programme, plus £20m investment from Lendlease in a Social Impact Vehicle to drive long-term social outcomes.
- Firm guarantees for existing tenants in estates proposed for development by the HDV that they will have a right to return to the estate, and to be rehoused on similar terms and rent, plus a dedicated support package for resident leaseholders.
- Overall, an agreement that drives – through a co-ordinated programme across the whole borough – long –term improvements in the prosperity and wellbeing of the borough and its residents, at a scale and pace that the Council could never achieve alone.

82. The critical elements of the proposed HDV – in terms of governance, the commercial deal and the proposed work programme – are all set out in this report, providing the information felt necessary for Cabinet members to make the necessary decisions. The

detailed legal and business plan documentation is published alongside this report in the interests of transparency."

83. These were elaborated in the Cabinet Member's Introduction. The development of the proposals for an HDV was set out at some length. It then described the work undertaken after the February 2017 decision to confirm the terms of the bid, and to reach the legal agreements for the establishment of the HDV and the business plans for its first phase of work. Cabinet approvals for this would be "a major step in unlocking the considerable growth potential of the Council's own land and meeting a number of core Council ambitions".

84. Examples were given of how the arrangements could respond to changing circumstances, and how the Council could control these responses:

> "All material changes would be subject to the Council and Lendlease agreeing any necessary element of – or amendments to – the scheme business plans. Further, any additional Council property proposed for development by the HDV would be subject to a new business plan which would have to be approved by the Council (and Lendlease) before work could commence.
>
> In addition to these controls over the work programme of the HDV through its status as 50% partner, the Council will retain its statutory functions in respect of the HDV work programme, including as local planning authority giving it further influence and assurance over the implementation of the HDV's programme of work."

85. The legal documentation was discussed next; nine agreements were proposed for approval.

> "The Objectives of the HDV are enshrined in the Members' Agreement, and are the objectives to which the HDV Board must give consideration in setting and implementing the strategy and programme of the HDV. They are:
>
> 1. to deliver growth through new and improved housing; town centre development; and enhanced use of the Council's property portfolio;
>
> 2. to achieve and retain for the Council a long-term stake and control in development of the Council's land, maintaining a long-term financial return for the Council which can be reinvested, in accordance with the Council's statutory functions, on new housing, on social and economic benefits or on other Council Corporate Plan objectives;
>
> 3. in partnership with the private sector to catalyse delivery of financially challenging schemes;

> 4. to achieve estate renewal by intensification of land use and establishment of a range of mixed tenures, together with tenure exchange across the Borough where appropriate;
>
> 5. to secure wider social and economic benefits in areas affected, including community facilities, skills and training, health improvement and crime reduction for the benefit of existing residents;
>
> 6. to incorporate land belonging to other stakeholders, both public and private sector, into development; and
>
> 7. to achieve a commercially acceptable return."

86. The reasons why the HDV was proposed as an LLP were then set out:

> "The main HDV and its development subsidiaries are proposed as limited liability partnerships (LLPs). This is proposed because LLPs are 'tax transparent' which means that their members are taxed on the proceeds of the LLP's business on the basis of their own tax status. As the Council is not liable for corporation tax, it will not be taxed on its share of profits from the LLPs."

87. The investment subsidiary was also to be an LLP. The deadlock provisions and financial structure were described, and then the development project process: the only Category 1A Property in the Development Framework Agreement ("DFA") was Wood Green; its development process was described. Neither of the two named Category 1B properties – Northumberland Park and Cranwood – were included in the DFA, or recommended yet for inclusion. Cabinet decisions to move any property from Category 1B to 1A would be required, after both community consultation and statutory consultation under s105 Housing Act 1985, which would also mean full Council's consent to authorise the making of an application for the Secretary of State's consent. There was no obligation on the Council to reach any decision to move property from 1B to 1A, either.

88. The "overall commercial deal" was described, and the benefits to each partner in the HDV. It referred to the equity input, the price paid for the Council's Commercial Property Portfolio, Lendlease's fees for strategic asset management and development management services, and the Council's role in forward-funding land assembly, already covered. The detail of its infrastructure risks and guarantees were in an exempt report. The quantum and timing of returns to the Council were described; there was an equal share in the proceeds and development and management and rental returns on the Commercial Property Portfolio. The partners were equally exposed to development risk. But only the Council would receive certain other benefits: share in certain increases in land value, increase in council tax and business rate and community infrastructure levies, £8m investment in the HDV's social and economic programme plus £20m Lendlease investment in the social investment vehicle and benefits in housing, jobs and economy.

89. The Chief Financial Officer summarised the financial returns and related benefits in this way:

> "The financial model for the HDV states a number of high level financial benefits which can be described as:
>
> - LBH's share of development profits is forecast at an estimated £275m.
>
> - LBH will receive a Land Value transfer return of an estimated £18m.
>
> - LBH will also expect to receive returns from the Investment Management portfolio (the transfer to the HDV of the Commercial Portfolio) and guaranteed income from the portfolio. This figure cannot easily be estimated, especially given the uncertainty over costs associated with the management of the commercial portfolio.
>
> Decisions on how these profits will be spent is a matter for the Council to decide through its normal budget setting processes when the profits become attributable.
>
> Further benefits will accrue to the Council as a result of the direct impact of the activities of the HDV.
>
> - Increase in Council Tax estimated at circa £8m per annum by 2032
>
> - Increase in Business Rates estimated at circa £5m per annum by 2032
>
> - Increase in CIL (Community Infrastructure Levy) payments estimated at circa £18.8m in total over the programme of delivery
>
> - Increase in S106 receipts estimated at circa £18.9m in total over the programme of delivery
>
> In summary, whilst the financial mechanisms contained in the commercial arrangements for the HDV are complex, there are no items that fall outside of the budgetary framework for 2017/18. The financial implications arising from future business plans for each phase of the HDV will form part of the Medium Term Financial Strategy (MTFS) planning in future years, and will be approved as part of the Council's normal budget setting process."

90. The legal power relied on was described in [8.34 – 8.36] in much the same terms as before but I set out [8.36] as the version in the decision challenged.

> "Section 4 of the Localism Act 2011 provides that where, in the exercise of the general power, if an authority does things for a commercial purpose then it must do them via a company. In this instance the Council is proposing creating the HDV for the purposes set out in the Cabinet report of 10 November 2015 and now contained in the Members Agreement to be entered into. The primary purposes of these are non-commercial. In addition the objectives of the HDV are non-commercial socio-economic objectives. The HDV would be a Limited Liability Partnership ("LLP"). Pinsent Masons LLP have advised that the Council may rely on the general power as legal authority for the Council in participating in the HDV as an LLP (such advice contemplating an HDV group structure). The HDV will be the main holding vehicle and various subsidiaries will be set up. The commercial portfolio will be held in a Limited Partnership vehicle."

91. The report then turned to the public sector equality duty in s149 Equality Act 2010. Cabinet members had "to consider carefully and evaluate the points made in this section" and in the EqIAs annexed. It continued:

> "As set out in the Strategic Business Plan, the establishment of the HDV will allow the Council to tackle a range of inequalities which impact on the protected groups, including:
>
> Better prospects in education, employment and training
>
> Healthy lives
>
> Community pride and housing
>
> Clean environments
>
> It would not be possible to address these inequalities to the same extent if Council adopted an alternative option, as outlined in sections 4, 5 and 6 of this report.
>
> Each project business plan that is submitted to Cabinet for the HDV will be accompanied by an EqIA. With this decision there are EqIAs for the following Business Plans:
>
> Commercial portfolio
>
> Cranwood
>
> Northumberland Park
>
> Social and Economic

Wood Green

Within these, the Council has identified positive and negative impacts of individual Business Plans, and how negative impacts may be mitigated. To the extent, that it is not possible for negative impacts on the protected groups to be mitigated, members must weigh the negative impacts against the positive ones, and must weigh in the overall balance those impacts which are negative against the positive, countervailing factors, sought to be obtained from proceeding with the HDV. Subject to the decision being rational and lawful overall, it is for Cabinet members to decide what weight should be given to the countervailing factors.

Cabinet should note that every time the Council submits a Business Plan for the HDV, an EqIA will be undertaken, which will be used as a working document for any subsequent decision resulting from the Business Plan, or, when relevant, a further EqIA will be undertaken by the Council. The governance of the HDV will ensure that actions identified will be monitored and that due regard is paid to the Public Sector Equality Duty."

92. EqIAs for both Northumberland Park and Cranwood had been prepared. Further detailed EqIAs would be prepared if Cabinet considered any decision to dispose of Northumberland Park or Cranwood. It continued:

"Engagement processes for each business plan will make sure that all sections of the local community impacted by the business plan will be proactively engaged with through the consultation process. In addition, engagement processes will ensure that barriers to consultation for different protected groups are removed, including offering reasonable adjustments for disabled people and translation and interpretation services when appropriate.

In the operation of the HDV, consideration will be needed to take steps to prevent discrimination, harassment or victimisation based upon relative protected characteristics occurring through adopting appropriate equalities policies. In addition, any organisation commissioned by the HDV to deliver a service will be required to prevent discrimination, harassment and victimisation based upon the protected characteristics towards employees, service users or residents through appropriate mechanisms."

93. The Leader specifically asked the Cabinet to note that part of the report and the appended EqIAs for the Strategic Business Plans for Northumberland Park, Wood

Green, Cranwood, the Commercial Portfolio and the Social and Economic Business Plan. The Minutes noted:

> "The equalities comments were set out at section 8.49 to 8.57 of the report and outlined the equalities work completed thus far. The Cabinet Member emphasised that there will not be disposal of category 1B properties until there has been a full consultation. As and when further decisions on these sites come forward equalities impact assessments will be refined and improved in future as more information is available and as and when further decisions are made.
>
> The current equalities impact assessments, contained in the agenda packs, as referred to by the Leader, were prepared by regeneration officers, in the areas in question, with Council in-house equalities policy expertise provided to support their completion. There had also been external legal advice sought to ensure the equalities impact assessments were consistent with the Council's public sector equality duties."

The five EqIAs appended are considerable documents, running in total to well over a hundred pages.

94. The Cabinet also received deputations, including one from Stop HDV and Haringey Defend Council Housing, taking issue with the use of the HDV, fearing it signalled a move away from affordable housing, discouragement for tenants taking up the promise of a right to return, and "social cleansing". Others were concerned that the Council was "disrespecting" Council tenants and developing homes for richer tenants, reinforcing inequality. Cabinet members responded to these points.

95. The papers considered by the Cabinet included a report from Pinsent Masons on the structure of the HDV and its documentation. The Investment Special Purpose Vehicle, as a Limited Partnership, would give the HDV greater flexibility to attract future investors should the HDV think that appropriate; it also had tax advantages for certain types of investor. Mr Wolfe saw that as supporting his contention as to the commercial purposes of the HDV. The Council would not be a member of this LLP.

96. The HDV Strategic Business Plan Delivery Strategy stated that it might "be necessary to acquire significant areas of existing non-council owned properties such as private residences…business premises…" The properties were identified in Business Plans and acquisition costs estimates were available. Acquisition would be negotiated, but potentially backed by compulsory purchase powers. The HDV might also "enter joint ventures on formalised profit sharing positions with third-party owners who wish to maintain an interest within any redevelopment…" Mr Wolfe said that the extent of the Council's engagement in property development would be further seen in the potential for proposals for Category 3 properties to bring other land assembly opportunities that could:

> "potentially improve options for rehousing, social and economic enhancements and therefore provide opportunities to build on the longer-term vision and ambitions of HDV.

> As part of the business planning process, opportunities will be identified and put forward to the Council where Category 3 Properties could benefit the Commercial Portfolio through enhancing the ability to cluster investments to amplify impact.
>
> HDV may have opportunity and reasons to acquire additional assets over the life of the project to achieve longer-term strategic goals, such as creating HDV-branded clustering in the commercial portfolio, or wider town centre impact at Wood Green.
>
> Further acquisitions may also be part of the process to speed up the current Category 1 phasing or future Category 2 Properties, by providing wider rehousing opportunities. All opportunities will be business case led and appropriate funding agreed between the HDV partners in accordance with the Members Agreement and the Finance and Commercial Business Plan."

97. This strategy dealt with the delivery of affordable housing, for which there was a 40% total target level across the Category 1 sites. That level was a balance to achieve policy outcomes. "But it does have some significant commercial impacts that HDV will need to actively manage". It continued:

> "Delivery of affordable housing is recognised as being a key strategic aim of HDV to support the Council's wider ambitions for housing delivery and to create a balanced and varied community outcome. Affordable housing at this level is challenging to deliver commercially, particularly at the early stages of a large-scale regeneration project, when mobilisation and infrastructure costs are high and revenues have not yet benefitted from the place making and regeneration uplift. The HDV will work with the Council to continually balance the ambitions between delivering a level of affordable housing that exceeds many schemes in London and the Mayor's ambitions, whilst ensuring that development continues commercially viable, and maintains momentum."

98. Later it said:

> "A strategy that will require jointly Lendlease and Council development is the potential for the HDV to form an entity that would be eligible to act as an RP [Registered Provider]. This would enable the HDV to take a long-term investment position in affordable housing across the borough, and potentially lead to a revenue-generating portfolio that could even expand farther than the borough to other Lendlease developments and beyond.
>
> Any decision to pursue this Strategy would be taken by the HDV Board."

99. The Investment Business Plan Commercial Portfolio contained this "Vision" in its Executive Summary:

> "The commercial portfolio will be a catalyst for regeneration; creating safe, vibrant places for people to shop, work and thrive.
>
> HDV will increase the capital value and revenue streams of the portfolio to reinvest in new properties in the borough. New business and employment opportunities will deliver social and economic benefits to the people of Haringey."

100. It explained:

> "The commercial portfolio provides a critical platform for HDV to deliver immediate, short-term regeneration benefits and build a visible presence in the community. Given that many of the activities the HDV will undertake are long term and take time to establish, the commercial portfolio offers the HDV a presence on Day 1, giving reach and impact across the borough. This will be vital in enabling HDV to gain wider business momentum and public recognition."

It explained the purpose of taking the opportunity "to significantly increase the annual income and overall value of the portfolio, while also delivering social and economic improvements". Its short, medium and long-term strategies were:

> "**Short term:** bring the properties up to statutory compliance, reposition the portfolio through the acquisition and disposal of assets, creating clusters around hubs in key target areas, such as near the HDV's other development sites to maximise impact.
>
> **Medium term:** attract inward investment through the commercial portfolio to enable further regeneration.
>
> **Long term:** redevelop the estates within the portfolio to implement change in other parts of the borough."

This plan then explained that general development opportunities for housing development had been identified in the commercial portfolio. The commercial portfolio would be critical to delivering inward business investment to Haringey, business support and growth in sectors and jobs, for existing business and to attract others to Haringey. It would support housing and employment opportunities, and healthier and safer communities.

101. The strategic focus for the commercial portfolio would be "to drive growth in the annual net income, asset value and ensure strategic focus".

102. I was taken to parts of the Members' Agreement. Clause 4 expressed the HDV objectives thus:

"4.1.1 to deliver growth through new and improved housing; town centre development; and enhanced use of the Council's portfolio;

4.1.2 to achieve and retain for the Council long term stake and control in development of the Council's land, maintaining a long term financial return for the Council which can be reinvested, in accordance with the Council's statutory functions on new housing, on social and economic benefits or on after Council Corporate Plan objectives;

4.1.3 in partnership with the private sector to catalyse delivery of financially challenging schemes;

4.1.4 to achieve estate renewal by intensification of land use and establishment of a range of mixed tenures, together with tenure change across the Borough where appropriate;

4.1.5 to secure wider social and economic benefits in areas affected, including community facilities, skills and training, health improvement and crime reduction for the benefit of existing residents;

4.1.6 to incorporate land belonging to other stakeholders, both public and private sector, into development; and

4.1.7 to achieve a commercially acceptable return."

103. The objectives of the Investment LLP were:

"4.2.1 to optimise financial returns for the benefit of HDV;

4.2.2 to increase the capital value of the Investment Portfolio held by InvLP;

4.2.3 to maintain long term revenue streams;

4.2.4 to use the Investment Portfolio to contribute to the wider socio-economic objectives of the HDV and the Council, and to the statutory functions of the Council where appropriate;

4.2.5 to deliver a high quality asset management service in relation to the Investment Portfolio including acquisition and disposal as appropriate; and

4.2.6 to contribute to the financial operation and viability of the HDV and HDV development schemes."

Additionally, the HDV and HDV Partners could seek additional "investment and development opportunities" proposed by the Private Sector Partner in accordance with the provisions of the agreement.

**(10) 20 July 2017**

104. On 20 July 2017, there was a further Cabinet meeting. This was a special meeting held to reconsider the decisions of 3 July, following a "call in" to the Overview and Scrutiny Committee which required this reconsideration. At the Cabinet meeting, the OSC explained its concerns about the risks in the establishment of the HDV, "a long running theme in the debate". It had considered aspects and public policy, the need for an increase in housing and social housing in particular. This led to its consideration of specific aspects of the proposed agreements, to which Cabinet members responded at the meeting. The decision of 3 July 2017 was affirmed.

**(11) Origin of this litigation**

105. On 13 February 2017, Mr Peters's solicitors, Leigh Day, wrote a pre-action protocol letter to the Council threatening judicial review proceedings in respect of a decision to proceed with the HDV, or to do so without adopting the recommendations of the OSC, if taken by the Cabinet on 14 February. It noted that there was to be a further decision on the establishment of the HDV with the Council's preferred partner and its governance structure. The Council was under a legal obligation to consult on this "critical" decision.

106. The intended grounds of challenge to the February decision included that the Council had not consulted as required by s3 Local Government Act 1999, that the issue should have been decided in full Council under the 2000 Regulations, and that the s149 Equality Act public sector equality duty had been breached, because insufficient information had been obtained, including through consultation, for it to be fulfilled.

107. There was a substantial reply on 27 February, the deadline set by Leigh Day, from Pinsent Masons, for the Council. Amongst other points, it contended that if the s3 LGA 1999 duty did apply, it applied to the 10 November 2015 decision, and so was now being raised significantly out of time. Leigh Day replied on 17 March requiring a further rapid reply. But no proceedings were taken. Then, on 11 July it sent its "Urgent: 3rd Pre-Action Protocol Letter" requesting a reply within 7 days. It now raised "commercial purpose" issues under the Localism Act, to which the Council responded, again raising the delay point. Proceedings were stamped as lodged on 14 August.

**Ground 1: The Localism Act and "Commercial Purpose"**

108. Mr Wolfe contended that the Council was doing "things" in entering into a partnership with Lendlease through the HDV "for a commercial purpose". He accepts that that is not to be judged simply by how the Council may describe it; it is an issue for the Court. I accept that doing precisely the same "things" through a company would avoid this issue, and that it is not obvious that the use of an LLP gives rise to any issues in terms of the underlying political disagreements which would not also arise with a company. The choice was seemingly related to tax advantages and

flexibility in governance for both parties. But he is right that if a company must be used, the use of an LLP is ultra vires and unlawful.

109. Mr Wolfe submitted that s4(2) Localism Act requires a focus not so much on the setting up of the HDV but rather on what the Council would actually be doing through the HDV. This involved no piercing of the corporate veil. If the focus was limited to the setting up of the HDV, s4(3) of the Act could readily be circumvented. Those "things" included managing its commercial property portfolio, selling and acquiring property, property development, renting property. The HDV Members' Agreement required the HDV to generate a "commercially acceptable return" from its activities, which could be reinvested: [9.3] of the 10 November report said that, although the primary purposes of the project were non-commercial, "the Council would be acting on a commercial basis as a partner in a joint venture". Mr Hawthorn, the Council Director of Housing and Growth said, in his first witness statement, that a further objective of the HDV, additional to its original objectives, was "securing a financial return". The establishment of the LLP was by statute for the carrying on of a business "with a view to profit". Mr Wolfe particularly drew attention to [7.16 – 7.19] of the 10 November 2015 report. The report made references throughout to the indicia of commercial purposes: investment, return of profit, sharing risk and reward with its private sector partner – which was acting commercially; the Council would judge those matters as would a commercial enterprise. Profit maximisation was the key to its purpose. The Council was to participate in development and land acquisition, ambitious beyond what a Council could do.

110. There was no requirement that a commercial purpose be the sole or primary purpose of the Council's actions. The Act referred to doing things for "a" commercial purpose; a component commercial purpose sufficed.

111. Mr Wolfe did not concede that, if the relevant question was whether the Council's primary or dominant purpose in "doing things" was commercial, the answer was that it was not primarily commercial. He said there was no or insufficient evidence one way or the other; it was difficult to weigh, and not impossible to contend that the Council fell on the wrong side of the line. The agreements had scope for variation and were drafted in an "open-textured" style.

112. None of the alternative powers had been considered by the Council.

113. Mr Giffin QC, who led for the Council on this ground, submitted that it was plain that all this fell within s1 of the Localism Act. The only question was the effect of s4. The real purpose of s4, with s1 enabling a local authority to set up trading enterprises to sell, for example, services to the world at large simply in order to generate revenue for the Council, was to require that to be done through a company. It appears that that was to avoid VAT or other tax advantages accruing to the local authority, and to achieve a level playing field with its commercial competitors.

114. The principal elements of what the Council was doing were (i) becoming a member of the LLP (ii) disposing of a significant part, but not all, of its commercial property portfolio to the HDV as its initial investment under a conditional option agreement (Category 1 land), (iii) granting to the HDV a conditional option to acquire commercial properties at Wood Green (Category 1A land), (iv) providing for the possible transfer to the HDV of other categories of land, which included housing land

held for its statutory functions in the future if the Council, subject to appropriate consultation, so decided, (v) entering ancillary agreements, and (vi) enabling sites to be managed and developed in accordance with Business Plans approved by the Council.

115. The Council's purpose in setting up the HDV and its participation in its activities was to ensure that its assets, when disposed of to the HDV or developed or managed by it, would contribute to the Council's strategic aims as a result of the HDV's activities: economic development and regeneration of the areas concerned, job creation and growth, and improved and additional housing, including affordable housing. The primary objective was not making a profit from the management or redevelopment of the sites, although it was also intended that the commercial performance of its commercial properties should be improved. Developing and managing its assets for a commercially acceptable return so that the development, management and return could contribute to the strategic aims of the Council did not mean those activities were undertaken for a commercial purpose within s4(2). The Council's purposes were not commercial at all in that sense.

116. The concept of a "commercial purpose" in s4 was considered by Warren J in *R(The Durham Co. Ltd) v HMRC and HM Treasury* [2017] STC 264, an Upper Tribunal decision. He said obiter at [63]:

> "For the purposes of the provisions of the Local Government Act 2003 and the Localism Act 2011 just discussed, the concept of a commercial purpose is of some importance. It is not a defined term. But what is clear is that there must be a 'purpose' and it must be 'commercial'. The fact that a service is provided for a charge, even if that charge is set so as to make a surplus or profit, does not demonstrate that the purpose of providing the service is commercial. Indeed the fact, if it be a fact, that an LA is carrying out certain activities – including advertising and negotiating contracts with customers – in the same way as a private sector operator does not necessarily mean that the relevant service is being provided for a commercial purpose. An LA has wide social responsibilities which a private sector operator does not, responsibilities which include statutory duties. Its purposes in providing a particular service may be to fulfil those responsibilities. The service is not, in those circumstances a commercial purpose. It is not immediately obvious to me that, if the LA is empowered and chooses to provide those services in a way which is designed to make a profit, the purpose of the provision then becomes a commercial purpose. It is well-arguable that the LA's purpose in providing the service (i.e. to do something or 'do things', as envisaged in ss1 and 4 Localism Act 2011) is not a commercial purpose even though its objective in adopting the method which it does for effecting its purpose is to make a profit. In cases where there is no intention to make a profit but only to cover costs (as in the case of North Lincolnshire and Westminster in the present case), that will be a factor – and an

> important factor – in determining whether there is a commercial purpose. It is a question of fact, in any particular case, whether the LA is carrying out the relevant activities for a commercial purpose or otherwise than for a commercial purpose."

117. S4(2) should not be interpreted so as to bring in a requirement for a company to be used where no such requirement had previously existed in respect of the same activity. S1 was a culmination of a long process of liberalising powers; s4(2) applied to those areas where the power to undertake an activity had not previously existed: it applied to general powers where there was otherwise no power to act for a commercial purpose.

118. He traced some aspects of the development of the powers of local authorities in this respect. In *Risk Management Partners Ltd v Brent LBC* [2009] EWCA Civ 490 [also reported at [2010] PTSR 349], Risk Management Partners challenged the lawfulness of Brent's participation in a guaranteed indemnity mutual insurance company which was expected to produce substantial savings in premiums for its London authority members, and to improve risk management. It was said that s2 Local Government Act 2000, broadly expressed through the power to "do anything" likely to promote the well-being of the area, economically, socially or environmentally, did not empower a Council to take any steps simply to save money, let alone to act as guarantor of the liabilities of other authorities. Moore-Bick LJ said this at [169]:

> "In my judgment the authorities to which I have referred show that when a local authority enters into arrangements to obtain property, goods or services necessary for or incidental to the performance of its primary functions, the farther those arrangements depart from the simple acquisition of the benefits in question, the greater the likelihood that they will fall outside its powers. The reason is, perhaps obvious: if what is required (in this case insurance) can be obtained by a straightforward contract with a recognised kind of supplier, more elaborate arrangements are likely to involve elements which, although they may form an integral part of what may be regarded as a beneficial scheme, are not necessary for the achievement of the objective and can less easily be regarded as incidental to the performance of the authority's function."

119. S95(3) Local Government Act 2003 was a revenue raising provision; it had permitted local authorities (subject to an order) to do for a commercial purpose anything they were permitted to do for their ordinary functions, but using a company.

120. Mr Giffin submitted that the Council's purposes were wholly non-commercial, but that if a local authority's actions had a separate commercial purpose as but one of its purposes, that commercial purpose had to be the dominant or primary purpose in order to require the use of a company. It would be odd if a local authority, prudently preferring an approach financially advantageous to it, over one less financially advantageous, had to proceed via a company because of the incidental financial returns. An incidental or ancillary purpose was also to be seen as no more than an

aspect of the purpose to which it was an incident or ancillary, not as a separate albeit lesser purpose.

121. Mr Goudie QC for Lendlease supported that approach by reference to *R v Southwark Crown Court ex parte Bowles* [1998] AC 641. The issue there was whether an application made by the police under s93H Criminal Justice Act 1988 for the production by business owners of documents was made for "the purposes" of an investigation into whether any person had benefitted from criminal conduct, or was instead for the purpose of an investigation into whether there had been criminal misappropriation of clients' money. Section 93H solely permitted such applications for the purposes of assisting in the recovery of proceeds of criminal conduct. Under the heading "Determining the purpose for which an application is made", Lord Hutton, whose speech their Lordships agreed with, said this:

> "A further point was considered by the Divisional Court which was stated by Simon Brown LJ [1998] QB 243, 250 – 251 in this way:
>
> "What then is the touchstone by which to decide whether a section 93H application should be made by the prosecuting authority and, other conditions being satisfied, granted by court? I can find no better way of expressing it than to say that the question to be asked is this: what is the dominant purpose of the application? Is it for criminal investigation purposes – to determine whether an offence has been committed and, if so, to provide evidence of that offence – or is it to determine, in respect of criminal offending – although not necessarily a specific offence which the prosecution already has reasonable grounds for believing (rather than merely suspecting) has been committed – whether, and, if so, to what extent, someone has benefited from it, or the whereabouts of the proceeds."
>
> …
>
> Secondly, in my opinion the nature of the dominant purpose test is well stated in *Wade & Forsyth on Administrative Law*, 7th ed. (1994), p.436:
>
> "Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is ultra vires."
>
> In those cases where consideration may have to be given to the distinction between the two purposes, or where it may appear

> that the two purposes may coexist (an example being where the police wish to investigate a case of living on the earnings of a prostitute), I think that there will be little practical difference between applying the test adopted by Simon Brown LJ and applying the test propounded by Mr Temple, but if a difference were to result, I consider it to be clear that the dominant purpose test is the appropriate one to apply.
>
> Accordingly, I consider that if the true and dominant purpose of an application under section 93H is to enable an investigation to be made into the proceeds of criminal conduct, the application should be granted even if an incidental consequence may be that the police will obtain evidence relating to the commission of an offence. But if the true and dominant purpose of the application is to carry out an investigation whether a criminal offence has been committed and to obtain evidence to bring a prosecution, the application should be refused."

122. An LLP, by s2(1)(a) of the Limited Liability Partnership Act 2000, had to be formed for carrying on a business "with a view to profit". Merely making a profit from activities or maximising return did not make those activities commercial. Nor did it deal with the purpose of seeking to make a profit, which is relevant to s4(2) Localism Act. Mr Goudie also pointed to the obligations of financial prudence and obtaining best consideration for land disposals which underlie local authority activities; *Charles Terence Estates v Cornwall Council* [2012] EWCA Civ 1439, [2013] 1 WLR 466. This meant that profit and return could not of themselves indicate a commercial purpose to an activity for s4(2) purposes. The question was not whether a Council was acting commercially, but whether it was acting for a commercial purpose.

123. S4 did not examine the purpose of some other body participating in activities with the Council. So the purposes of Lendlease, which were commercial, were not to the point. And what was done by a separate corporate entity as an LLP was not done by the Council, and its purposes were not the same as the Council's purposes in becoming a partner in it. That was not to suggest that HDV's purposes and activities were irrelevant to judging the Council's purposes in establishing and acting through the HDV. But under s4, what mattered was the Council's purpose; the purposes of the LLP and of its individual members could be different without affecting the application of s4(2).

124. *Saloman v Saloman Co Ltd* [1897] AC 22 meant that the Council ceased to do "things" when the HDV did them. The HDV would have its powers fixed by its private law constitution.

125. Mr Giffin submitted, alternatively, that, even if there was a commercial purpose to the Council's activities so that its reliance on s4 Localism Act was precluded, there were other statutory powers which, in combination, entitled it to proceed in the way it proposed. It did not matter, as I accept, that those powers had not been specifically in the Council's mind in reaching its decisions, so long as the nature of the alternative powers did not affect the substance of the decisions. There had been no suggestion

that the Council was acting for an unlawful purpose, or was seeking to circumvent statutory controls which would otherwise have applied.

126. S2 Local Authority (Land) Act 1963 permitted local authorities to develop land. S123 Local Government Act 1972 permitted the disposal of land.

127. S12 Local Government Act 2003 permitted a Council to invest "(a) for any purposes relevant to its functions under any enactment". Those functions included housing functions under the Housing Act 1985, and economic development under the Localism Act and there was the general obligation to manage its affairs prudently. "Invest" in my judgment, has its normal meaning, and does not cover spending money for perceived public benefit long or short term. Further powers to enter contracts existed in s1(1) Local Government (Contracts) Act 1997 for the provision to it of assets or services. This would cover the services in the agreements. The general ancillary provisions of s111 Local Government Act 1972 were relevant to all these powers. Public-private partnership existed long before GEPOC. Clawback provisions and tenant nomination rights were common. Appointing Board members of special purpose joint venture vehicles was commonplace under either s12 of the 2003 Act or s111 of the 1972 Act.

128. The Council could undertake these activities through individual contracts (though less effectively). It would clearly not then be acting for a commercial purpose.

129. There are however some cautionary words to be said about the restrictions on the seemingly broad language of other statutes. S111 Local Government Act 1972 could not permit the ancillary to the ancillary, or the borrowing or levying of money not specifically permitted; see *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 and *R v Richmond upon Thames LBC ex parte McCarthy and Stone Ltd* [1992] 2 AC 48. In *Credit Suisse v Allendale BC* [1997] QB 306, the Court of Appeal rejected Credit Suisse's contention that s19(1) Local Government (Miscellaneous Provisions) Act 1976, which permitted the provision of "assistance of any kind", extended to assisting, by a guarantee of its borrowing, those providing facilities which the Council could itself provide. It was not simply that the Council could not use a corporate vehicle to evade statutory restrictions on the Council's borrowing and spending powers; a local authority could only use its powers in the way Parliament intended.

130. Mr Wolfe submitted that the Council's alternative powers argument, if correct, did no more than seek to provide powers for the establishment of the HDV, not what it would be doing through the HDV. It needed to show alternative powers for what the Council would be doing through the HDV. Entering the HDV was not an "investment" under the 2003 Act.

**Conclusions on Ground 1**

131. I accept, at the outset of my analysis, Mr Wolfe's contention that if the power being exercised is one that can be undertaken only through a company, it is ultra vires for it to be done through an LLP, whatever the reason for the distinction in the Act between the two, intentional or otherwise.

132. In my judgment, the purpose of s1 of the Localism Act is to give authorities a considerably broader range of powers than they had enjoyed hitherto. S1 is not

confined to enlarging authorities' powers simply so that they can "do things" with a commercial purpose, although it clearly does enable them to "do things" for a commercial purpose. The commercial purpose will include trading and money-making activities which previously they could not undertake, and these activities may put them in competition with the private sector, large or small. The requirement for those activities, done "for a commercial purpose", only to be carried out by a company prevents the local authority being in a more favourable position in relation to taxes than those with whom it is newly enabled to compete. I do not consider that Parliament, which had already accepted that certain Council activities should be undertaken through a company, intended that those other "things" that could be done already without a company, now had to be done through a company, if they were to be done at all. It was not intended that the existing powers of authorities, in the guise of a very considerable enlargement of their scope, including their non-commercial scope, should become restricted in that way. Still less do I think that it was it intended that doing "things" which might generate a profit or return for the council, a commonplace of many council activities related to its land assets, and which the council could then put to use for its functions, should now be done and only lawfully done through a company, and indeed not through an LLP.

133. It is in that light that I consider whether the Council, in entering into the HDV LLP, is doing so for a commercial purpose. In formulating that point, I am aware that greater precision may be required, when I come to consider delay, over the point when the "thing" is done, and whether that is for a commercial purpose.

134. It is the Council's purpose in doing the "thing" challenged which must be examined. Its purpose in entering into the HDV arrangements and activities may be very different from Lendlease's, which is a commercial purpose. Nor is the question simply: what is the purpose of the HDV? It is perfectly sensible for the partners to have different lawful purposes which are brought together. Their different purposes may each be achieved through its activities. The question to my mind is: what is the purpose of the Council in entering into those arrangements for an HDV to do what it intends the HDV to do? I did not find that reference to *Saloman v Saloman* advanced the issue under ss1 and 4.

135. In so far as Mr Wolfe's argument depended on placing emphasis on "a purpose" in ss1 and 4 of the Localism Act, I reject it. The question is: is the purpose for which these things are being done a commercial purpose? The phrase is to be read as a whole without intoning the article "a" with an emphasis which distorts the thrust and purpose of the section. In my judgment, s4(2) requires an overall view to be taken of "the thing" being done, and of the overall purpose for which it is done.

136. That is perhaps only another way of expressing, by reference to the specific statutory language, the dominant purpose test put forward by Mr Giffin. The analysis of such words in *Southwark Crown Court*, above, is persuasive; nothing in it turned on the precise language or context being considered. The House of Lords used "the purposes" and "the purpose" indifferently. Besides, if the purpose which is said to be commercial is simply an incidental or ancillary purpose to the non-commercial purpose, it is correctly seen as part of the non-commercial purpose, and not as a commercial purpose at all.

137. It would require clear statutory language, rather than reading "a" with emphasis, for a separate but minor, or lesser and incidental, purpose or the inevitable accompaniments to the dominant purpose, to require the use of a company when the dominant overall purpose did not.

138. The contrary analysis would introduce very difficult problems for local authorities in judging whether a company was necessary: it would require disaggregation of what may be a single overall purpose, with components not sensibly separable from others, or using a company because of a minor or incidental component. This would be particularly problematic in view of the various obligations on local authorities to carry out functions in a financially prudent manner. This is likely to require them to act, at least at times, in a manner which could be characterised as "commercial". This would be a curious consequence of an Act the avowed purpose of which was to give local authorities greater powers and flexibility.

139. To my mind, there is no doubt but that the Council's purpose in entering into the arrangements setting up the HDV and governing its operation, including the relationship between the two partners, cannot be characterised as "a commercial purpose" within the scope of the Localism Act. Even more clearly is its dominant purpose not commercial. Any commercial component is merely incidental or ancillary, and not a separate purpose.

140. I have set out the development of the Council's thinking and decision-making very fully. There is simply nothing which would support the contrary view, from the initial description of the issue on 10 February 2015 with the principles underpinning a development vehicle, to the elaborate reasons for the decision of 10 November 2015 to establish the HDV and to commence the Competitive Dialogue Procedure to procure its partner, and on to the 14 February 2017 decision approving the preferred and reserve bidders with a view to establishing the HDV, through its consideration of the OSC's views, to the decisions of 3 and 20 July 2017 approving the setting up of the HDV and its documentation. The purpose is to develop and manage the Council's land so as to achieve its aims for housing, especially affordable housing, and employment growth, which it considered it could not achieve without bringing in private sector funds, expertise and experience.

141. Mr Wolfe pointed to aspects of the HDV and the related agreements which he submitted showed that there was "a" commercial purpose to it all, even if not the dominant one, but sufficient for the Act to require that it all be done by a company. Mr Wolfe had obvious difficulties avoiding the concession that the dominant purpose on any view was non-commercial.

142. Mr Wolfe referred to the returns or profits which the HDV, and the Council thereby, intended to achieve, whether by way of development gain or improved rents. The Council would have to accept a degree of risk in putting its commercial portfolio into the HDV. An "overall commercial deal" was described. The legal advice in successive reports, that the "primary purposes" of the arrangements were non-commercial, clearly implied that at least a secondary purpose was indeed commercial. One purpose behind the use of a LLP was to enable other investors to be attracted. A balance between affordable housing policy outcomes and the cost of achieving them had "some significant commercial impacts that HDV will need to actively manage." It could not be the case, submitted Mr Wolfe, that the mere fact that the Council might

make a profit which it could use either for its proper policy objectives or to reduce Council tax meant that the activities had no commercial purpose. After all, activities undertaken for commercial purposes could all have that effect.

143. First, I accept that last point in principle, but it does not assist Mr Wolfe here. By the same token, the mere fact that a profit might be made which could be used in either of those ways does not of itself show that the activities had any commercial purpose at all, because of the obligations of financial prudence.

144. I largely agree with the approach, albeit obiter, of Warren J in The *Durham Co Ltd* case.

145. Second, the phrases to which Mr Wolfe took me do not show a separate commercial purpose, whether minor or not. It is important to examine why this is all being done. The purpose behind the Council's entering into the HDV and associated arrangements is not that of a property investor, simply seeking to make a profit or to achieve a return on development or improved rentals. The purpose of the Council is to use and develop its own land to its best advantage so that it can achieve the housing, employment and growth or regeneration objectives that it has laid down. In order to achieve as much as it can, it has to achieve the best consideration on any disposal of its land; and it must be in other respects financially prudent, to produce returns in various ways which can be used to further its policy objectives. Achieving the return is neither the activity nor its purpose of itself. It may be quite different for Lendlease. The various phrases simply reflect that making a return is one intended but lesser consequence of the primary purpose of the property management or development which the Council is using the HDV to undertake: the purpose of doing all of that is to achieve the developments and refurbishments themselves for the variety of local public benefits which that of itself would bring, plus an improved local tax base, and a return to enable further regenerative development. Some return on the investment and use of the Council's land should be a consequence of obtaining the best consideration and of acting prudently financially.

146. The acquisition of other land in the context of regenerating a large estate is a commonplace, and, backed by compulsory purchase powers, it demonstrates not one whit that a separate activity of property development is being undertaken. Such powers have to be used for statutory purposes. There is a possibility of the HDV acquiring sites, including from outside the Borough, for "branding" purposes or to create a "revenue generating" portfolio. These opportunities are said to arise in connection with Category 3 land proposals. The HDV arrangements contemplate possible opportunities which the HDV could take in that way. I accept that those HDV powers imply that there could be a commercial purpose to those HDV actions. But they do not necessarily do so at all. In any event, their use may, if and when this occurs, achieve as a matter of purpose, the Council's non-commercial aims as well as the commercial aims of Lendlease. The aims of the HDV partners are different. The real question is what is the Council's purpose in entering into the arrangements approved in the July decisions: the purpose is non-commercial. I am not persuaded that that language shows a commercial purpose, even as a minor component, attributable to the Council. However, should the Council make a decision which meant that the Council was acting for a commercial purpose in that or some other way, that specific decision could be challenged as beyond what the Council could do

through the HDV. For the purposes of his delay argument that is exactly what Mr Wolfe was suggesting the Claimant or others could do.

147. The language of the "purposes" in [9.3] of the November 2015 report on powers, and continuing, does not affect the position: the question is for the Court, and the report does not address the question of "a purpose" with the full analysis which those simple words have attracted here. The "investment" of land or obtaining a return on it through the HDV, may not be the "investment" in the sense of s12 of the 2003 Act, but it is the use of Council's resources for Council functions. The purpose of making a return is to enable the process of further development, for the public benefit that that in turn would bring, to continue.

148. I do not consider it right to characterise the Council as having a commercial purpose at all; the fact that a return is hoped for, to be reinvested for the same policy objectives does not turn them into commercial purposes at all. It may be acting in a commercial manner, as Mr Goudie suggested, but it is not acting for a commercial purpose.

149. In the light of that conclusion, I do not consider it necessary to consider in detail Mr Giffin's arguments that the Council did not need to rely on GEPOC and could instead have relied on the other powers which he identified. I accept that if the powers exist, the Council is entitled to rely on them even if it did not turn its mind to them. I can readily understand why the Council decided simply to rely on the very broad GEPOC, rather than drawing various legislative strands together, and pigeonholing each of the separate activities to the appropriate power with their various restrictions and qualifications. However there is nothing particularly unusual in a local authority developing its land for the purposes of policy objectives, such as providing or improving its housing stock and its affordable housing, or for providing modern and attractive accommodation for businesses and town centre activities; nor in acquiring land to create sites which achieve such objectives; nor in its having a partnership with a private sector development company, to bring in the finance and development expertise which the Council may lack, which has to yield a return for the private sector partner. What may be unusual is the use of a corporate body, whether company or LLP, and the relationship with a single developer, extensive in duration and range of property type and activities. I find it very difficult, however, to conclude that that could not all have been done before s1 Localism Act was enacted, if the overall relationship were financially prudent and best consideration were obtained for the land. If so, it would not have attracted s4(2). But that is because it would not have been acting for "a commercial purpose" in the s4(2) sense; for example acting in a commercial manner in relation to the disposal of land.

150. The problem I see in the Council's analysis of alternative powers is that the only purpose in considering them is to overcome an argument about "a commercial purpose", whether a dominant or subsidiary purpose. Mr Giffin has not really set out to justify the use of the alternative powers on the basis that there is a commercial purpose to these activities in a sense which falls foul of s4(2). If Mr Wolfe is right, and the Council is to become in substance a commercial or housing property developer, I find it difficult to see that those other provisions permit it, and through an LLP, whereas s1 with s4(2) does not. If his references to activities also undertaken by a commercial developer are no more than references to what broadly I have called financial prudence in expenditure and disposals for Council functions, they are not in

my view adequate to show "a commercial purpose". But if I am wrong, and have misjudged their significance, I do not see how the alternatives save the Council because in reality they start from the same assumption, that this is not for a s4(2) commercial purpose.

151. In the light of these conclusions, I do not consider it necessary to consider the delay issue in detail. The general principles are set out in *R(Sustainable Development Capital LLP v Secretary of State for Business, Energy and Industrial Strategy* [2017] EWHC 771 (Admin), Lewis J.

152. The Claimant may complain about the principle of an HDV, and that is the reason why the litigation has been brought, and the LLP issue has been raised. I see nothing to suggest that the Claimant would be content with the HDV if only it were to proceed through a company rather than an LLP. But the Claimant is entitled to use the argument that a company should have been used and not an LLP to throw a spanner in its works, even though the precise corporate form of the HDV may not itself be of the remotest concern to him; see (*R) Kides v South Cambridgeshire DC* [2002] PLR 66, [2002] EWCA Civ 1370. The long-standing objection to the principle of the HDV does not mean that the ground at issue must be treated as arising when the principle of an HDV was approved.

153. No challenge to the decision to enter into the HDV *as an LLP* could sensibly been brought in respect of the decision of 10 November 2015, since no such decision was reached: the choice of corporate vehicle, which is what this ground is all about, lay ahead. At the meeting of 14 February 2017, it was clear that the Council decided that the HDV should be an LLP. I regard that as the decision which should have been challenged; the Claimant indeed threatened judicial review proceedings on 13 February 2017 in respect of decisions anticipated to be taken the next day at Cabinet, although the LLP issue was not then one being raised. However, the selection of Lendlease as the preferred bidder with whom the Council would establish the HDV, necessarily preceded the final decision to enter the HDV on the terms which were yet to be established.

154. The decisions of 3 and 20 July 2017 are plainly consequential decisions, as the decision-making process advanced further down the road; they provide for its formal establishment and for the disposal and option for Category 1 and Wood Green sites respectively.

155. It is not wholly clear, applying the House of Lords decision in *R(Burkett) v Hammersmith and Fulham BC* [2002] 1 WLR 1593 as discussed in *R(Nash) v Barnet LBC* [2013] EWCA Civ 1004, [2013] PTSR 1457, and set out below in relation to Ground 2, whether the July decisions represent a separate stage which permits grounds related to the use of an LLP that first arose on 14 February, to be raised again. It is right that the February 2017 decision could not be formally implemented until the conclusion of the negotiations leading to the July agreements, and I can see possible parallels with both the resolution and grant of planning permission in *Burkett* and the decision-making stages in *Nash*. But I have concluded that, applying the principles in *Nash* in the light of its facts, the February decision was the decision to use an LLP. The decision in July dealt with the details of the agreement with Lendlease over the HDV, the distinct next stage after the February decision that an LLP was to be used. The target of the Claimant on this ground is the establishment of

the HDV as an LLP, and not the particular subsequent form the implementing agreements took. I refuse to extend time to challenge the February decision, and the challenge to the July decisions is in substance out of time. If the challenge had succeeded on the merits, I would still have refused to extend time in respect those decisions. The parties would have had to take their chances on future challenges to future actions, and alternative powers. But if the proper application of *Burkett* and *Nash* meant that the July decisions were in substance separate decisions, I would not have refused relief.

156. I am satisfied, that this ground is reasonably arguable; but I refuse permission, on grounds of delay. I would have dismissed it on its merits.

**Ground 2. Consultation under s3 Local Government Act 1999**

157. The rather broad language of s3 was considered in *R(Nash) v Barnet LBC* above. The lawfulness of the Council's decision (because referring to the Defendant in *Nash,* not in this case) to outsource a high proportion of its functions and services was at issue; one ground was that the consultation obligation in s3 of the 1999 Act had not been complied with.

158. Underhill LJ dealt with the background to the 1999 Act at first instance; [2013] EWHC 1067 (Admin) at [67]. The relevant 1998 White Paper was concerned to replace compulsory competitive tendering with a more flexible approach through outsourcing, but so as to achieve the same benefits by way of value. There was to be neither a compulsion to outsource functions, nor a presumption against it if that were more efficient and effective. He then analysed the statutory language at [69] as follows:

> "(1) The core subject matter is 'the way in which' the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. I do not say that the choice of whether, or to what extent, to outsource is the only such choice; but in the light of the legislative background outlined above the 'ways' in which functions can be performed must include whether they are performed directly by the authority itself or in partnership with others: indeed that would seem to be a paradigm of the kinds of choices with which s3(1) is concerned.
>
> (2) The duty is aimed at securing 'improvements' in the way in which the authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria…
>
> But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely

> securing improvements in the *way* in which authorities perform their functions."

159. At [73], he rejected a possible distinction between consultation for the purpose "of deciding how to fulfil the duty" and consultation about "how to fulfil the duty" as theoretical: a consultation for the purpose of deciding whether to undertake a major outsourcing programme inevitably invited views on the proposal to undertake it. At [75(1)], he made this point about the very broad discretion which the statutory language gave to local authorities as to how to satisfy the duty in s3:

> "(1) I fully accept that it cannot have been the statutory intention that every time that an authority makes a particular operational decision, by way of outsourcing or otherwise, it is required by s3 to consult about that decision simply because that could be said to be part of 'the way in which' it performs its functions. As I have said above, in this context that phrase connotes high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required."

Underhill LJ's approach was approved by the Court of Appeal.

160. Barnet LBC also contended that the challenge was out of time: the decisions challenged, dated 6 December 2012 and 31 January 2013, to award the relevant contracts to particular contractors were not the decisions to which, if any, s3 applied. The Court of Appeal, refusing the Claimant's application for permission to appeal, held that the s3 duty applied only to earlier decisions of 2010 and 2011, and so the challenge was out of time. Those decisions instituted the policy of outsourcing.

161. Davis LJ, with whom Lord Dyson MR and Gloster LJ agreed, said this at [50 – 51]:

> "50. This has to be assessed by reference to the terms of section 3 of the 1999 Act. In my view that section is framed in notably broad terms. The duty is to "make arrangements" to secure continuous improvement in "the way" in which a relevant authority's functions are exercised: section 3(1). The obligation to consult, under section 3(2) then arises for the purposes of deciding "how" to fulfil that duty.
>
> 51. That being so it seems to me an impossibly narrow application of the section to link it to the decision of 6 December 2012. The section is not designed to require consultation about the terms of particular contracts which an authority may be minded to make: indeed considerations of commercial confidentiality would in any event often make that an impossibility. Moreover it seems at first sight most surprising to align the duty to consult with the date of resolving to enter into a particular contract. Rather one might expect –

> given the width of section 3 – that the duty should be geared to consultation at a much earlier stage, well before the stage at which consideration is given as to whether the relevant officer is to be authorised to sign a particular contract. Those considerations justify the judge's finding (at paragraph 34 of his judgment) that the duty to consult is concerned with "questions of policy and approach", not specific operational matters. That indeed accords with the wide language, and underlying purpose, of section of the 1999 Act."

Thus, the decision to award contracts as the outcome of the process was not a decision to which the consultation duty applied.

162. Indeed Davis LJ went on to point out that the true gravamen of the complaint was not about who was the outsourcing contractor but the whole principle of outsourcing services at all. There could have been no possible argument that a challenge to the decisions of 2010 and 2011 was premature. In effect, it was conceded that consultation at that stage would have been lawful. It would also have been at the formative stage of the decision-making process, which is when consultation is supposed to take place. It was not to the point that the Council could withdraw from the procurement process. The 2010 and 2011 decisions were intended to have legal effect and significant consequences in terms of incurring costs and expenditure of time on the procurement process. Argument that there was a continuing duty of consultation was irrelevant because time for the challenge ran from when grounds *first* arose.

163. It was argued in *Nash* that, even though the 2010 and 2011 decisions were challengeable on the grounds that s3 of the 1999 Act had not been complied with, the later decisions were nonetheless challengeable on the grounds that they were the outworking of the earlier decisions. The claimant relied upon the House of Lords decision in *R(Burkett)* above. This was rejected by Underhill L J at first instance at [41], for reasons adopted by the Court of Appeal; these are set out in its judgment at [42] as follows:

> "Mr Giffin developed those points clearly and cogently, but I do not accept them. I do not believe that *Burkett* is authority for the proposition that in every situation in which a public-law decision is made at the end of a process which involves one or more previous decisions – what I will refer to as "staged decision-making" – time will run from the date of the latest decision, notwithstanding that a challenge on identical grounds could have been made to an earlier decision in the series. In my judgment it is necessary in such a case to analyse carefully the nature of the latest decision and its relationship to the earlier decision(s). I believe the true position to be as follows. If the earlier decision is no more than a preliminary, or provisional, foreshadowing of the later decision, Burkett does indeed apply so that the later, "final", decision falls to be treated as a new decision, the grounds for challenging which "first arise" only when it is made. But if the earlier and later decisions are distinct, each addressing what are substantially different stages

> in a process, then it is necessary to decide which decision is in truth being challenged; if it is the earlier, then the making of the second decision does not set time running afresh. I accept that the distinction may in particular cases be subtle, but it is in my view nonetheless real and important."

164. Underhill LJ held the 2010 and 2011 decisions to be "distinct substantive decisions" to outsource functions and services, and to commence the statutory formal procurement procedure, involving actions, and the expenditure of time and resources. They had "immediate legal effect" unlike the "conditional resolution" in *Burkett*, which was "preliminary, provisional or contingent".

165. Just as I am bound by *Burkett*, so too am I bound by the basis upon which it was distinguished in *Nash.*

166. Mr Bhose did not take issue with the Claimant's standing to bring this ground of challenge but he did contend that the Claimant did not fall within the scope of s3(2), which would be relevant to how the court should approach the exercise of its discretion if the Council had breached its consultation duty. The Claimant is Chair of the Older People's Reference Group for Haringey, a committee member of Haringey Over 50s Forum and Vice Chair of Public Voice which is responsible for the statutory Healthwatch contract in Haringey. The Stop HDV group has many affiliated bodies including local trades union groups political parties, other campaign groups and Residents Associations. There is no evidence which persuades me that he is a representative of taxpayers, non-domestic ratepayers, or of persons "appearing to the authority to have an interest in any area within which the authority carries out its functions." Such persons may be affiliated to Stop HDV, but that does not make him a representative of them. I take the view however that as Chair of the Older People's Reference Group he could be a representative, in a broad sense, of persons who use or are likely to use local authority services. But he would only be a "representative" for the purposes of s3(2) if he appeared to the Council to be its representative. Its stance suggests that he does not so appear to the Council.

167. However, be that as it may, the Claimant is entitled to challenge the lawfulness of the absence of consultation by the Council under s3, whether he is a representative or not. That is the effect of *Kides*, above, and he is also entitled to argue that his ability to stop the HDV process would have been hampered by a failure on the Council's part to carry out consultation with others which it was obliged to do. I do not find persuasive the Council's suggestion that if it had breached its duty and the challenge were brought in time, relief should be refused on that particular account.

168. The Council did not accept that the duty to consult had arisen in respect of any of its proposed decisions in relation to the use of a HDV. But if such a duty had arisen, it contended that it had arisen in November 2015, or no later than February 2017; it did not apply in relation to the July 2017 decisions, which were "operational" or about entry into particular arrangements. The "high-level" decisions, to which the duty might apply, had been made at the earlier stages. The focus of Mr Wolfe's arguments was on the July 2017 decisions.

**Conclusion on Ground 2**

169. The first question, therefore, is whether the Council was making "arrangements to secure continuous improvement in the way its functions are exercised", having regard to economy, efficiency and effectiveness, when it proposed or decided on its strategy for developing its land or for doing so with a private sector company, or doing so through the HDV. S3 is not limited to outsourcing in any specific sense; it covers arrangements which have the very generally expressed statutory purpose, though "arrangements" which are matters of improved internal efficiency are not included. The "arrangements" are arrangements with other parties, aimed at improving the way "its functions are exercised." This is borne out by the "Revised Best Value Statutory Guidance" of March 2015, which refers to the use to be made of voluntary and community groups, and local small businesses.

170. I can see the argument that the intended purpose of the HDV may not be what s3 had in mind, but its language covers "functions" which in local government is a very broad concept. Mr Bhose did not argue that the Council was not carrying out its "functions" when the process began, or at later stages. Of course, there is no obligation to enter into any particular form of arrangement, but it is difficult to see why the proposed overarching vehicle was not, in the Council's judgment, an "arrangement" or one "to secure continuous improvement" in the way it exercised various property management and housing functions, having regard to economy, efficiency and effectiveness. The Council's acceptance that it is entering a HDV type of arrangement for the purposes of its functions is implicit in much of its alternative powers argument in ground 1. Before deciding whether to make an arrangement for a HDV type vehicle as a means of fulfilling its duty, it is my judgment that the duty to consult arose. And it is not at issue but that it was not fulfilled.

171. The next question is the stage at which that duty had to be fulfilled. S3 is correctly seen as requiring consultation about a "high level" decision, policy or approach, and not one about awarding, let alone entry into, a particular contract. The language of *Nash* was directed to the issue in that case; but it did decide that the duty to consult had arisen before Barnet LBC decided to award its first outsourcing contract, which itself preceded, of course, the actual entry into the contract. It decided that s3 applied to decisions taken in 2010 and 2011 to proceed with the procurement process for the outsourcing of functions. In 2010, Barnet LBC's Cabinet approved a framework for its "One Barnet" programme, and authorised the commencement of a procurement process to identify a strategic partner to provide development and regulatory services. In March 2011, a Cabinet Committee appraised the options, which included proceeding in-house, or with a public or private sector partnership of various sorts, and authorised the production of a business case for the procurement of a private-sector partner, by a process which could only proceed to a Dialogue procedure once the business case had been approved. Subsequently the OJEU notices were given. Time for the purposes of judicial review began to run from either of those 2010 or 2011 decisions.

172. In my judgment, the equivalent decisions on the HDV were taken in February 2015, or at the latest November 2015, and the consultation duty should have been undertaken before those decisions were actually arrived at, so as to fulfil it at a formative stage. The 10 February 2015 decision was to seek tenders for a feasibility study to develop the preferred option for a joint development vehicle on a 50 /50 basis

with a strategic investment partner from the private sector. The 10 November 2015 decision approved the business case for the establishment of the HDV, as an overarching vehicle in line with option 6, and agreed to the commencement of a Competitive Dialogue Procedure to procure the HDV partner.

173. Mr Wolfe contended that the July 2017 decisions were the relevant ones for the purposes of s3, but this was founded less on statutory construction in the light of *Nash,* than on what he said was information not available before July, but which was essential in order for consultees to have adequate information to enable them to understand the proposal and to respond usefully. Were he right about that, I would not refuse relief: no time issue would arise; the problems which the Council and Lendlease would face would simply be the inconvenience inherent in complying with this particular statutory obligation, which cannot be a sound discretionary reason for not doing so; the anticipated consultation on future disposals would not satisfy s3.

174. Mr Wolfe said that it was not until the report to Cabinet of 3 July 2017 that the legal and financial arrangements for the HDV were set out publicly: the arrangements for the Council's control over its assets, its ability to pursue social rather than commercial objectives, the level of financial risk to the Council and the democratic accountability of the HDV. He provided a detailed list which ranged from the details of the structure of the HDV as an LLP, to the deadlock and winding up provisions, the price to be paid for the Council's commercial property portfolio, day-to-day management of HDV properties, and obligations to existing Council tenants. He submitted that these were not mere operational matters but fundamental to how the HDV would operate. Only with that information could consultation take place on issues such as the degree of Council control over its assets, financial risk and obligations to existing tenants. This was the stage at which the role of the Human Rights Act 1998, the public sector equality duty, the scope for councillors to represent tenants' concerns to the Council and their right to return were known. It was in July that the procurement process was at the stage where the report stated that "the Council can make a decision whether or not to proceed with Lendlease."

175. The question, however, in my judgment is whether the s3 duty only arose with the benefit of the information in the July reports but before the decisions in July were taken. It did not. The duty arose by November 2015, or even February 2017 at the latest. The question is not what information was first available in July 2017, unless without that level of detailed information, the duty in s3 could not be fulfilled and so could not have arisen. But to require that level of detailed information before s3 consultation could take place, would run counter to the whole tenor of s3. It is clearly directed to issues of principle and approach: should the regeneration objectives of the Council, in relation to its own land and housing, be achieved with a private sector partner through a single or overarching 50/50 development vehicle, or should one of the other options be followed? To my mind, it is inevitable that consultation at the level contemplated by s3 will be undertaken when many issues of significance remain to be resolved. It cannot have been the intention of Parliament that consultation should only take place about the approach when all the details of any significance, which could affect a consultee's views, were known to the Council. It is not the intention that consultation about policy and approach should take place after time and effort has been expended by authority and third party pursuing its practical implementation.

176. I recognise that where issues remain to be resolved, and their resolution may affect consultees' views about the merits of a particular approach, consultees' views may be conditional or qualified. However the language of s3 makes it clear that the level of decision-making, about which consultation is required, is the point where an authority is selecting the option in principle and establishing its approach, before significant expenditure on implementing the established approach is to be incurred, and before the third parties are approached, who will in their turn have to incur significant expenditure before any particular arrangement is agreed and entered into. It does not matter that the Council thereafter remains able to change its approach, whether through a change of heart or because the preferred approach proves unsatisfactory as principles meet negotiations for implementation.

177. Mr Wolfe's argument implies that no proper statutory consultation could have been undertaken on the information and decisions in February or November 2015, or even February 2017. That is untenable: had the duty been fulfilled, with the information then available made public, and addressing the issues of policy and approach, I find it impossible to believe that those opposed to or uncertain about the principle of the HDV would have said that they could not comment usefully on an overarching single development vehicle for the regeneration and management of commercial and housing property and land, in 50/50 partnership with the private sector, until they had all the information available in July 2017. Consultees could also have stipulated what requirements had to be met for them to be satisfied with such an approach, failing which it should not proceed. The Council could decide whether or not to take that on board as the proposal moved towards practical implementation. Mr Wolfe's quote above, from the July report rather misses the limited point it was making: it was about how very advanced the procurement process was, that the decision about proceeding on these agreements with this specific partner could now be made. That is well beyond the stage for consultation about the policy of regeneration through the option 6 sort of 50/50 council/private sector overarching vehicle.

178. I am strongly reinforced in my judgment by the decision in *Nash*. Although I accept that the decisions actually challenged in *Nash*, were not the same as the decisions actually challenged here but related to particular contracts, the decisions in relation to which the s3 duty arose in *Nash* are closely parallel to the November 2015 decision here. Moreover, the decisions of July 2017, when given effect to, are much closer to what might be seen as the point of no return which was the case with the decisions of 2012 and 2013 actually challenged in *Nash*. As with *Nash*, the 2015 and 2017 decisions are quite distinct and substantially different stages. Consistently with *Nash*, I am satisfied that it is too late to bring this challenge.

179. I reject Mr Wolfe's contention that time could not run from the November 2015 decision because it was not "communicated". The decision was not kept private and hidden from the person affected so as to amount to no decision at all, applying *R(Anufrijeva) v SSHD* [2003] UKHC 36, [2004] 1 AC 604. Indeed, the Claimant, at [20] of his second witness statement makes clear not only that he knew of the November 2015 decision, but was also aware of the absence of consultation. The November 2015 reports and decisions were publicly available; there was even a Council press release. Commercial tenants whose properties were identified in the November 2015 report were written to in January 2016, informing them of the decision to set up a new joint venture vehicle for improved management of the

Council's commercial portfolio and regeneration of its area. It has been an issue of local controversy for some years, and, at the high level or policy or approach level, it did not burst newly on to the local political scene in July 2017. In any event, the question is when grounds first arose, not when any particular claimant knew of the decision. Its point of knowledge may or may not be a basis for extending time. There is no basis for an extension of time here from 2015.

180. Worse still for the Claimant, it was manifest by February 2017 that he could proceed with such a challenge: the pre-action protocol of 13 February 2017 put that beyond doubt, as did the Council's response. But still no challenge was brought.

181. I refuse to extend time in relation to either the November 2015 or February 2017 decisions, because of delay alone. But there are further significant reasons telling against any extension of time.

182. Any s3 consultation on the July 2017 decisions would have to permit the whole process from before November 2015 to be consulted upon, and not just the particular decisions of July 2017. The prejudice to the Council's proposals and to Lendlease is obvious, as would be the damage to the Council's reputation as a body with which a private sector body could enter into a fruitful negotiating relationship, for any further regeneration process.

183. The 2015 decisions began a process of significant commitment of time and cost in the process. Between February 2017 and the July 2017 decisions, further significant costs were incurred again both by the Council and by Lendlease, in understandable reliance on the lawfulness of the earlier decisions. Mr Hawthorn's evidence on behalf of the Council was that some £1.45m had been incurred between November 2015 and August 2017, with some £420,000 of that being incurred after February 2017. There had obviously also been very significant staff time costs at a senior level. Ms Seeley's evidence on behalf of Lendlease was that £3.5m had been incurred by way of direct costs between February 2016 and August 2017, with further significant internal capital and human resource investment.

184. Mr Wolfe contended that the Council and Lendlease were not entitled to rely on the costs incurred between November 2015 and July 2017 because those were always at risk were the Council to decide not to proceed, as it could have done, or were negotiations to break down. That is true, but that degree of risk is factored into the parties' judgment as to whether to enter the bidding process and then to proceed to work it up to agreement. Delayed legal challenges are a possible risk, but it is rather the party who has delayed who must face the risk to his litigation caused by what others have done meanwhile. Those others are entitled to proceed, knowing that the Courts will consider very carefully the prejudice to them through delayed litigation where promptness is required. I see no basis for his contentions that the asserted expenditure at risk is speculative; true it is that that is not broken down and vouched, but it is quite unjustified to suppose that the Council and Lendlease do not have a reasonable handle on their costs, direct and indirect; they are bound to be significant on a project, the scale and complexity of which Mr Wolfe has emphasised.

185. There are significant other discretionary reasons why time should not be extended.

186. Although other consultation mechanisms do not satisfy the function of consultation under s3, there were consultation mechanisms, notably on the draft Strategic Plan, which enabled the public to express views on the approach behind the proposals. Mr Hawthorn's first witness statement refers to the occasions on which other consultation processes had referred to the potential role of an HDV for regeneration projects, including: the draft Housing Strategy published for public consultation in the summer of 2015; meetings about the Council's Draft Estate Renewal, Rehousing and Payments Policy in 2015 and 2016, after the November 2015 decision, with residents groups and others from Northumberland Park Estate and more widely, where questions were asked by residents about the HDV, though that was not the purpose of the meetings; a newsletter was distributed to the Northumberland Park Estate residents in November 2015 and Residents Associations were asked to respond to "key questions", about regeneration and the HDV. Although the thrust of these and other consultation exercises, for example under planning legislation, was about what should be done to regenerate an area rather than about the mechanism by which it was to be done, those are not two water tight compartments. There will be "community consultation", as Mr Hawthorn put it, before any further individual transfers of Council property into the HDV take place, including under s105 Housing Act 1985, where applicable.

187. I cannot however conclude, for the purposes of s31(3C) and (3D) Senior Courts Act 1981, that it is highly likely that, had there been s3 consultation in November 2015, the decision would still have been the same. That is quite a difficult contention in the context of a duty to consult with an open mind.

188. I refuse permission to argue this ground because it is out of time.

**Ground 3: the public sector equality duty**

189. The relevant principles are set out in *R(Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [26] and approved in *Hotak v Southwark LBC* [2015] UKSC 30, [2016] AC 811.

190. Mr Wolfe contended that the very limited EqIAs undertaken in September 2015 could not fulfil the obligations in s149 Equality Act 2010 because too little was known about the proposed HDV arrangements for a properly considered analysis of its possible effects. The very much more substantial EqIAs of July 2017 assumed the existence of the HDV, and so they also could not examine the equality implications of deciding whether or not to proceed with the approach established in November 2015, and more precisely defined in July 2017. Issues which could give rise to equality implications, which fell between the two stools, included (1) public accountability: those with certain protected characteristics, affected by HDV projects, could lose political influence over the way in which their homes were developed; (2) the HDV appeared not to be subject to the Equality Act obligations to which a public authority developer would be subject; (3) were the HDV to fail financially, this would be likely to have a disproportionate effect on those whose protected characteristics made them particularly dependent on Council services and funding; (4) the need for the HDV to achieve a commercially acceptable return would affect its approach to existing residents, a disproportionate number of whom had protected characteristics, such as a disability which could be affected by the differences in the way a housing estate would be developed by a wholly public body and the HDV. There had been no public

consultation with individuals with those protected characteristics which could be affected by the arrangements for the HDV itself, rather than by the arrangements for an individual development proposal, which were yet to come. I note the emphasis his argument places on the November 2015 decision.

191. Mr Bhose submitted that it was not possible to undertake a more detailed analysis in September 2015, so there was no breach of the duty as at that stage; and the full EqIAs undertaken for the July decisions, as envisaged by the November 2015 decisions, amply satisfied the duty as at that stage, and further EqIAs would be undertaken if and when other individual sites were transferred to the HDV. Those undertaken in September 2015 did assess, on the basis of the information available, what the impact would be. The "democratic deficit" referred to by Mr Wolfe, was considered at the 14 February 2017 meeting in response to the OSC report, but it was not accepted for the reasons given at that meeting.

192. Mr Bhose described Mr Wolfe's examples as fanciful and theoretical, and over - detailed for forensic purposes of just the type of which courts had spoken critically in *R (Bailey) v LB Brent* [2011] EWCA Civ 1586 at [102], and in *R (Branwood) v Rochdale MBC* [2014] EWHC 1024 (Admin): (1) reduced public accountability: such an issue could not arise merely from the setting up of the HDV, but only from future decisions to redevelop particular housing estates through the HDV, for which there would be consultation and an EqIA; (2) the Council's equality obligations: these were addressed in the July 2017 report; the HDV is not at present undertaking "public functions" and so does not, at least yet, have to comply with PSED obligations, but that cannot and has not affected compliance by the Council with its own duties; (3) financial risk: the equality effects of this can only sensibly be assessed in the context of a specific redevelopment of a housing estate; (4) the HDV's commercial purpose would not drive the approach to existing residents, and again could only be considered in relation to a particular site and project, when an EqIA would be undertaken. Mr Wolfe's focus on the setting up of the HDV itself missed the target he purported to be aiming at, which was the effect of redevelopment through the HDV on those who lived on the estates to be redeveloped. The latter would be dealt with through site specific EqIAs.

193. The Council did not need to consult for the purposes of obtaining sufficient information for the EqIAs for July 2017 decisions to be lawful.

194. It was far too late for the November 2015 decision to be challenged on this ground; the challenge to the July decisions was misplaced. If there had been a breach of the PSED, it would still be possible for it to be complied with in the future, and so no relief should be granted; (also reported at [2012] PTSR 56).

**Conclusion on Ground 3**

195. I reject this ground of challenge. What is actually most striking about the sequence of decision-making is the regularity with which the PSED has been considered. It was considered in the February 2015 meeting, and again in the September 2015 EqIA, for the November 2015 meeting, and at a level of generality fitting the stage reached; "due regard" was had to those statutory issues, and a conclusion reached. The decisions anticipated the stage at which further EqIAs would be needed; no challenge was brought to those decisions. Those further EqIAs were provided at the July 2017

meetings. They are considerable documents, as I have said, replete with data on protected characteristics and the need for regeneration which would advance that position. They refer to the forms of consultation undertaken. They remain at a high level, and refer to the policies developed to deal with negative points. The July 2017 decisions anticipate further EqIAs as and when sites may be transferred for development to the HDV. I emphasise that the s149 duty is not a duty to produce EqIAs. It is to have "due regard" to the issues.

196. Mr Wolfe appeared to contend that there is a stage in the decision-making process, which dealt with choice of the HDV in principle, which required compliance with s149, where it was not complied with. But if so, this was the stage at which the Council decided to proceed with an overarching single development vehicle in a 50/50 partnership with the private sector, as opposed to pursuing some other option. This decision was reached in 2015, whether in February or November. The September EqIA addresses the principle of the development vehicle. It does so in terms of the advantages and the disadvantages, by reference to protected characteristics, of the development which the HDV is to be set up to achieve, rather than on a comparative basis, with other possible options. Of course, given that option 6 was seen as the most effective way of achieving those advantages, the HDV on a comparative basis would have been the most favourable in terms of the PSED. The four issues which Mr Wolfe raised, to exemplify his points, could have been raised in 2015, as, if material issues, they seem to be issues inherent in the notion of a 50/50 partnership with the private sector, through a separate corporate vehicle.

197. In my judgment, the Council was entitled to structure its decision-making in the way it did: what is the option to pursue to achieve the strategic regeneration aims? Having pursued it to the stage of detailed agreements, does the Council want to enter those agreements? The first significant stage was marked by the two 2015 decisions. In February 2015, the option to be taken forward for more detailed examination through a feasibility study was the HDV; and in November 2015, the HDV partner was to be sought through the Competitive Dialogue Procedure. If a detailed comparative equality exercise with other options were required, it was before February or during that stage. But it is not necessary in law for other options to be evaluated for compliance with the duty in s149. The Council must have due regard to the duty in taking its decision. It considered the equalities impact of the means whereby it chose to pursue its strategic objective. Its whole objective was to improve the lot of those with greater needs and difficulties, and it chose what it considered the most effective means of achieving the greatest benefit for them. The second stage in July 2017 had taken the preferred option to the point of entry into the negotiated arrangements. The equalities impacts of entering into those arrangements were fully considered. The equalities impact of specific site transfers would be considered as and when they occurred. This was not the stage at which issues which went to the principle of the HDV were to be considered. So no challenge sensibly lies to the July 2017 decisions.

198. Mr Wolfe's four points by way of example illustrate how remote from reality equalities arguments can become forensically. The residents of estates which may potentially go into the HDV are not affected by the entry into the arrangements for the HDV. If at the time their estate is being considered for transfer, and the EqIA is being undertaken, such drawbacks as they may face from those four points, can be taken into account for s149 purposes. Of course, it may not be possible to change the HDV

arrangements to eliminate such adverse effects as may be attributable to those points; but that is not what s149 requires. If those points are material in PSED terms, they are not be ignored simply because the HDV has become the Council's regeneration vehicle.

199. Moreover, to speculate that, in any particular such specific transfer, the protected characteristics of some might be indirectly affected, through possible want of political influence over councillors, or through the HDV not being obliged to comply with s149, or risk of financial failure, or of disabilities for example being treated less favourably because of "commercial" purposes, either involves issues which can be considered on future transfers, or they raise issues of principle which were for consideration in 2015. Besides, the very points themselves, rather indirect and speculative as they are, are not ones which the Council could have been criticised sensibly for not considering for the purposes of s149. Differential impacts because of protected characteristics, as opposed to status as tenants, are not readily discerned in those four points. It is not enough to find a point which an EqIA might have considered. The s149 duty is much broader. Its fulfilment does not require this level of analysis.

200. I refuse permission to argue this ground because it lacks arguable merit in relation to whichever decision it is addressed. It is also a long way out of time in relation to the only decisions to which Mr Wolfe's contention is arguably capable of being addressed – February or November 2015. There was no suggestion in November 2015 that a subsequent EqIA would be undertaken for the principles decided on at those meetings. This ground has nothing to do with the choice of form of corporate venture vehicle. It is only because the only decisions for which a challenge is in time, July 2017, deal with the mechanisms of this LLP, that Mr Wolfe has had to find aspects related to them in relation to which he could possibly say that the s149 arose but was not fulfilled.

201. If the duty were breached at any stage, I am also wholly satisfied that compliance would not have made the slightest difference to the decisions, and I also therefore refuse permission under s31(3C) and (3D) of the Senior Courts Act 1981. I would also have refused relief in the exercise of my discretion in view of the future decisions where the PSED will again be considered, the absence of any public advantage in returning to some much earlier stage, and the prejudicial impact on the Council and Lendlease.

**Ground 4: should the decision have been taken by full Council?**

202. Mr Bhose submitted that the effect of s9D Local Government Act 2000 was to place decision-making in the hands of the executive or Cabinet, unless a specific provision made them decisions for the full Council. That submission is undoubtedly correct, and so the decision was properly taken by the Cabinet, unless they fell within the exceptional provisions relied on by Mr Wolfe.

203. The Council's Constitution, Article 4.01, reserves to full Council approval of specific plans, including the Treasury Management Strategy. Article 4.02, sets out the functions which only full Council will exercise: these include "Approving the budget and levying Council tax;" and "Determining the borrowing limits for the authority for each financial year…"; and "All matters that must be reserved to Council under the

Financial Regulations including the adoption and amendment of the Treasury Management Strategy Statement…". The budget "includes the allocation of financial resources to different services and projects, proposed contingency funds, setting the Council tax and decisions relating to the control of the Council's borrowing requirements, the control of its capital expenditure and the setting of virement limits…."

204. Mr Wolfe submitted that the decision to set up the HDV was the formulation of a strategy or plan for the control of the Council's borrowing, investments or capital expenditure. The HDV effectively determined the basis upon which the Council would borrow money, including the degree of risk and against which assets, and would make decisions to invest and expend capital in relation to its property portfolio, affecting budgetary decisions for 15 to 20 years. He emphasised the significance of the decision, acknowledged by the Council to be a major decision about the way in which the Council managed and developed public land.

205. Mr Hawthorn described the Council's budget setting process, wherein full Council agrees a medium-term financial plan, a budget, a capital programme and any amendments to the Treasury Management Strategy. This Strategy was its investment strategy, fulfilling, according to the Council's Chief Financial Officer, CIPFA and central government guidance in a way with which all local authorities are familiar. The July decisions were simply not of that sort.

206. Mr Bhose submitted that the decision to enter the HDV was not a plan or strategy nor did it determine, control or even significantly affect borrowing, investment, capital expenditure, as examination of the financial consequences of the setting up of the HDV explained in the July 2017 report showed. This has been set out above: there were no implications for the 2017-18 budget; financial implications of future HDV business plans would be part of the Medium-Term Financial Strategy planning in the future, to be approved as part of the normal budget-setting process. The fact that it was a major decision did not make it a decision for full Council.

**Conclusion on Ground 4**

207. I agree that it is irrelevant that the July 2017 decisions were very important and politically controversial, and that they were for the Cabinet, unless one of the exceptions applied. The fact that the arrangements have financial consequences does not bring them within the exceptions to Cabinet decisions. I also accept Mr Wolfe's point that the fact that the decisions are not part of the conventional budget setting-process does not of itself exclude them from the language of either the Constitution or of Regulation 4. However, what Mr Hawthorn describes as the conventional budget-setting material for local authorities is not irrelevant to understanding the confines of the legislation. Once the HDV arrangements are entered into, there will be disposals of land with financial consequences, the profits from which may be spent on housing provision, and property may be better managed to increase the financial return. The decision to enter into such arrangements may properly be described as a plan or strategy, but that plainly does not make it a plan or strategy "for the control of the authority's borrowing, investments or capital expenditure". Mr Bhose rightly emphasised the word "control". Even if the decision affects borrowing, investments or expenditure, it does not control any of them. Nor does it come within the Council's Constitution's definition of "budget". The word "investment" as used in the

Constitution and Regulations is not simply a word for beneficial expenditure on public functions. The fact that within the HDV arrangements there may be scope for borrowing and expenditure may mean that future decisions on such matters are for full Council, as the Council itself appears to accept; but that does not make the July decisions, which permit future decisions to be made through entry into the arrangements, decisions for full Council.

208. Mr Bhose also submitted that, as the Claimants' first pre-action protocol letter of February 2017 said that the decision could only lawfully be made by full Council, and the Claimant had taken no steps to prevent Cabinet taking the decision, as he knew would happen, he had delayed unduly. Had Mr Wolfe persuaded me that the decisions ought to have been taken by full Council, I would not have been persuaded by that point that the Claimant had unduly delayed the commencement of these proceedings. The July decision was a separate decision which, if he is right, ought to have been taken by full Council. The fact that earlier decisions ought also to have been taken by full Council, were he right, does not mean that he is out of time to challenge all later decisions on the same broad topic, which ought also to have been taken by full Council.

209. I refuse permission in relation to this ground as upon analysis it is not realistically arguable.

**Overall conclusion**

210. For the reasons give above, I refuse permission on all grounds.