

### Legal Powers to Establish the HIC

This appendix considers the legal basis on which the Council could establish the HIC to delivery private and affordable housing.

#### **Affordable Units**

This section considers the legal basis on which the Council could deliver affordable housing outside the HRA.

As stated, one of the Council's key objectives is to provide new affordable housing and to this end, the Council is developing the Queensway Estate which is anticipated for a significant number of mixed tenure properties, including affordable tenure, over the next ten years.

The accounting treatment of Council assets is determined by the power the Council uses to 'create' them. Sections 9 and 17 of the Housing Act 1985 give Councils power to provide/acquire housing for the purposes of Part 2 of that Act and housing so provided or acquired must be held in the HRA. There are however other powers on which the Council could potentially rely and the question is whether it is reasonable for the Council to do so.

The obvious alternative power is the so-called the General Power of Competence introduced in the Localism Act 2011. This essentially provides local authorities with the legal capacity to do anything that an individual can do that is not specifically prohibited.

This is essentially a free-standing power but the need to satisfy the 'reasonableness' the case for using section 1 of the Localism Act 2011 and not sections 9 and 17 of the Housing Act 1985 needs to be carefully constructed, i.e. why the objectives cannot be achieved by the Council itself, within the HRA.

The case for the use of the General Power of Competence is strengthened if the Council does more than mimic the provision of accommodation through the Council's HRA. This may involve shorter term (assured short-hold) tenancies and the willingness to respond to a variety of changing housing needs and market conditions.

A comparison with the Council's current tenancy policy will be important, bearing in mind the revised regime introduced by the recent Housing and Planning Act. In short, any company will need to be making a different 'offer' to future tenants.

#### **Private Rental Units**

As stated, the Council can rely upon Section 95 of the Local Government Act 2003 and Section 1 of the Localism Act 2011 to undertake for a commercial purpose the activity of forming and operating a wholly owned subsidiary company limited by shares for the purposes of providing market tenure units.

In order to justify the use of this power the Council will have to be able to demonstrate that it would ordinarily have the powers to undertake the activity other than for commercial gain.

This can easily be demonstrated as the Council as a Local Housing Authority has:-

- (a) a duty to consider housing conditions in their district and the needs of the district with respect to the provision of housing accommodation (Section 8 of the Housing Act 1985), and
- (b) a power to provide housing accommodation (Section 9 of the Housing Act 1985 and other miscellaneous powers including the homeless persons legislation). The Council does not have a duty to provide the housing accommodation. The Council will undertake the commercial activity through a company.

The Council should also comply with the limitations contained in Section 95 of the 2003 Act and the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 particularly with regard to considering and approving a business plan.

However, the Council should also comply with the propriety requirements in Part V of the Local Government and Housing Act 2009. The 1989 Act regulates companies which a local authority controls (or dominantly influences). These include certain propriety controls most of which are relatively "archaic" and resource intensive:

- company documentation (including letter needs) must indicate that the company is Council controlled
- the company must not publish party political publicity
- a disqualified councillor cannot be a director
- information about the affairs of the company must be supplied to the Council's auditor
- the company's auditor must be approved by the PSAA
- pay and expenses of Councillor directors must not exceed the amount payable to a Councillor for a comparable duty on behalf of the local authority and Councillors cannot be paid twice for the same duty. (\*)
- the company must provide financial information to Councillors where they require it for the performance of their duties (there are provisos for confidential information) (\*) and
- the company must keep minutes of its general meetings available for public inspection for 4 years.

(\*) These two propriety controls would not exist in this instance as the assumed Governance structure for the HIC does not include Councillors for either the direct management or board representation of the company being established.