

PART 2 – CONFIDENTIAL FACTS AND ADVICE

DD2175

Title: Real Lettings Property Fund

Information may have to be disclosed in the event of a request under the Freedom of Information Act 2000. In the event of a request for confidential facts and advice, please consult the Information Governance team for advice.

This information is not for publication until the stated date, because:

This section includes legal comments which are not for publication due to professional privilege.

Date at which Part 2 will cease to be confidential or when confidentiality should be reviewed: **at the end of the lifetime of the fund i.e. 7 years from entering into the Partnership Agreement (Jan 2024)**

Legal recommendation on the grounds of keeping the information confidential:

The legal advice in this part 2 is subject to legal professional privilege. Accordingly, it may be withheld from publication pursuant to the corresponding exemption in section 42 of the Freedom of Information Act 2000.

Legal Adviser - I make the above recommendations that this information should be considered confidential at this time

Name: John Benson

Date: 20 September 2017

Confidential decision and/or advice:

1. Legal comments

Vires issues

- 1.1 Based on the information in Part 1, it appears that the proposed Limited Partnership would be carrying on “specified activities” as defined in the Greater London Authority (Specified Activities Order) 2013, in that it would be engaged in “the management and exploitation of land on a commercial basis with a view to the realisation of a profit in connection with the Greater London Authority’s housing, regeneration and economic development functions under the Greater London Authority Act 1999”. The GLA has been advised that to be a partner in a partnership which will derive its profits from letting and selling real property is to carry on the activity of managing and exploiting land.

- 1.2 Under section 34A of the Greater London Authority Act 1999, “specified activities” may only be undertaken by a company that is a subsidiary of the GLA.
- 1.3 Accordingly, if the Limited Partnership which the GLA is proposing to participate in is carrying on specified activities, the GLA will need to participate through a subsidiary company. It is proposed that the investment in the Limited Partnership be made by GLA Land and Property Limited, which is a subsidiary of the GLA, and therefore this requirement would be satisfied.

Public Procurement and Funding Issues

- 1.4 As set out in paragraph 1.1 of part 1, Resonance submitted a bid for funding to the Innovation Fund within the Homes for Londoners: Affordable Homes Programmes 2016-21 (the “Fund”). Ordinarily, a successful applicant for funding would enter into a funding agreement with the GLA. Pursuant to such an agreement, the GLA would fund the applicant’s project and any benefits from the project would accrue to the funded partner and to third parties rather than to the GLA. Furthermore, as the GLA would receive no direct benefit, the funding agreement would not be subject to VAT.
- 1.5 The GLA’s participation in the RLPF2 is somewhat different. Pursuant to the limited partnership agreement, the GLA is the direct recipient of services provided by Resonance RLPF2 GP Limited (the “General Partner”) and, as such, the agreement is subject to VAT (see clause 12.3 of the limited partnership agreement). Furthermore, as set out in paragraph 1.14 of part 1 of this decision form, the GLA anticipates that it will receive up to a 6% return on its investment of £15 million and that the General Partner will receive fees equivalent to 1% of the invested funds during the investment period and 0.75% of the invested funds following the investment period.
- 1.6 The GLA sought advice from Nigel Giffin QC as to whether or not the GLA’s entry into such an arrangement as the RLPF2 would fall within the ambit of the Public Contracts Regulations 2015 (the “Regulations”) and as such, whether it should be procured by an EU-advertised, procurement process.
- 1.7 In his advice, leading counsel advised that, in general, by reason of the financial services exemption within the Regulations, the GLA should be able to participate in collective investment schemes without conducting a procurement under Regulations. However, in the case of the RLPF2, the exemption might not apply because the investments, which are being managed in the scheme, are not in the nature of financial instruments. Accordingly, if a third party were to claim that the GLA had breached the Regulations by appointing Resonance without having first undertaken an EU-advertised procurement, a sympathetic court could declare the limited partnership agreement between the GLA and the General Partner to be ineffective; i.e. void. It would also be open to the court to award damages to the said third party.
- 1.8 In light of this, the GLA is advised not to enter into the limited partnership agreement unless Resonance agrees to the insertion of an “ineffectiveness clause”. Such a clause would ensure that the GLA would neither lose its invested funds nor have to pay extra fees nor damages in the case where a challenge was made, it were successful and a declaration of ineffectiveness were made. As regards the issue of a possible award of damages, there is no way for the GLA to mitigate the risk of this possible outcome, save as noted in paragraph 1.9 below.
- 1.9 The fact remains that the GLA did select Resonance following a competitive process; albeit one designed for the awarding of a grant and one that was not advertised in accordance with the Regulations. This competition of the opportunity does mitigate the procurement risk, but it cannot be said to remove it entirely.

GLAP's Entry into the Limited Partnership Agreement

- 1.10 Finally, part 1 of this decision form states that the GLA's subsidiary company, GLAP, will enter into the limited partnership agreement on behalf of the GLA. Whilst the GLA has not received any direct advice on whether GLAP is a contracting authority for the purposes of the Regulations, it has received indications from other leading counsel that it might be.
- 1.11 If GLAP is a contracting authority, then the same procurement risks arise for GLAP vis-à-vis entering the limited partnership agreement as would arise for the GLA.