Attachment

GLA Steering Group Paper of 18 November 2021
Crystal Palace National Sports Centre

GLAP Steering Group

Date of meeting: **18 November 2021**

Title of paper: **GLA/GLAP Investment**

To be presented by: **Luke Webster**

Introduction

GLAP directors are meeting regularly to discuss the future of GLAP and give thoughts on how the company can be better structured to meet Mayoral objectives. As part of these discussions, it was agreed that Counsel advice should be sought in relation to the circumstances that recoverable investment, by way of equity (acquisition of share capital) or loan, must, as opposed to may, be made through GLAP (or another GLA subsidiary company) and the consequences of a successful challenge where a GLA subsidiary company is not used in circumstances where section 34A of the Greater London Authority Act 1999 is found to apply.

To date nearly all recoverable investments in the Housing and Land directorate are transacted by GLAP but it is considered by officers to be more beneficial going forward if certain recoverable investments could instead be transacted by the GLA using other statutory powers.

The GLA, through TfL Legal, appointed Clive Sheldon QC to provide the advice and a conference to discuss the instructions and talk through the advice was held on 1st November. Set out below are a summary of key points from Counsel's opinion. The full advice is set out in Appendix A.

Summary of Key Points

<u>GLA powers</u>

1. Section 12(1)(a) of the Local Government Act 2003 ("the 2003 Act") empowers the GLA to make an investment where that is "relevant" to the GLA's functions. Those functions include "housing and regeneration" functions. There is some uncertainty as to what is meant by "invest" in the context of section 12(1)(a) though it is suggested that it would cover investment for financial gain, and probably for public benefit purposes as well.

2. Irrespective of whether the GLA makes an investment under section 12 of the 2003 Act or provides funding under section 30 of the Greater London Authority Act ("the1999 Act"), where the investment/funding is for financial gain (see paragraphs 13 and 14 below with regard to the commerciality tests) and falls within the ambit of a "specified activity" under the Greater London Authority (Specified Activities) Order

2013/973 ("the 2013 Order") carried on by the GLA, the GLA is expected - pursuant to section 34A of the 1999 Act - to make this investment/funding using a company (or by delegating to a taxable body under section 38 of the 1999 Act). The language of section 34A of the 1999 Act is that the GLA "may carry on specified activities for a commercial purpose *only if it does so*" in that way.

3. "Specified activities" for the purposes of the 2013 Order are "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". In essence, the specified activities are property development.

Whether GLA investment falls within section 34A of the 1999 Act

4. A key point to bear in mind when considering future investments is that, given the GLA has been using GLA Land and Property Limited (GLAP) until now to carry out the majority of its housing and regeneration related investments, it should be cautious about any change of approach, and should avoid doing anything "cute". A different approach will be subject to scrutiny.

5. Where the GLA makes use of section 12 of the 2003 Act (or any other power, including section 30 of the 1999 Act) to invest in another entity engaged in property development, section 34A of the 1999 Act does not apply unless as a matter of substance the way in which the investment by the GLA is constructed is properly understood as the GLA itself engaging in the specified activity (property development).

6. In other words, if the GLA invests in a property development company by, say, acquiring a small shareholding in the company or by providing a small amount of loan finance, that would not itself amount to the GLA carrying out the specified activity. The GLA is not, itself, managing or exploiting land. The GLA will not have control over the activity that is taking place, and the entity in which the GLA is investing will be paying tax, and so will be carrying out its property development activities on a level playing field – from a tax perspective – with other property development businesses, which is the "statutory mischief" that section 34A of the 1999 Act is seeking to address. The reference to "small" is in the context of the overall finance that the property development company requires for the particular activity (or activities) in question.

7. Where, however, the GLA is making a more considerable contribution, then this might be regarded as the GLA itself carrying out the property development, and therefore caught by section 34A of the 2003 Act. Whether it does so depends on the extent of the contribution and/or the degree of control that the GLA has over the activity in question.

8. In assessing the extent of the contribution and/or the degree of control that the GLA has over the activity in question, this needs to be looked at in the aggregate of what

the GLA is doing with respect to the activity, even where it is relying on different statutory powers with respect to that activity.

9. It is difficult to draw precise boundaries for when the GLA will be regarded as carrying on property development. If the GLA is providing 50-100% loan (or equity) finance for a particular project, then this would be most likely to be regarded by the reasonable observer as the GLA carrying out the project itself as the bulk of the funding for the project was coming from the GLA. This would most likely be the case even if it is only when there is a default that the GLA might get involved in the day-to-day development.

10. Where the funding (loan or equity) for the particular project by the GLA is significantly *less than* 50% of the overall funding for that project, then this will probably not be regarded as the GLA carrying out the project itself, unless the terms indicated that the GLA had control over the project. Where the instrument of such an investment may lead to the GLA obtaining land (for instance through a counterparty defaulting on a secured loan, or as a result of an embedded option) and if the subsequent property development is for financial gain, then it would be appropriate for the GLA to transfer the land or property to GLAP (whether directly or through election by the GLA) at the point of any enforcement or exercise of any option.

11. There will be a "grey area" near to the 50% line. It is advised that the GLA takes a cautious approach, especially as until now it has used GLAP for these kinds of investments, and there could be close scrutiny of why it has changed its approach. Accordingly, the closer one gets to the 50% line, the more cautious the GLA should be.

12. Having a charge over land for the purposes of security does not necessarily bring the arrangement within the terms of the 2013 Order. The charge over the land would not necessarily amount to the GLA holding the land "on a commercial basis with a view to the realisation of a profit"; it may properly be regarded as the GLA holding the land for the purposes of security.

13. With regard to whether a specified activity satisfies the commerciality tests and therefore falls within section 34A of the 1999 Act, section 34A refers to "specified activities *for a commercial purpose*" and the 2013 Order describes the "specified activity" as being "the management and exploitation of land *on a commercial basis with a view to the realisation of a profit*". There are several possible ways of reconciling the duplicated use of the term "commercial" and the similar, albeit not the same, words "a view" and "a purpose". The *cautious* approach for the GLA to adopt here would be to read the 2013 Order, in the context of section 34A(1) of the 1999 Act – in particular "for a commercial purpose" and "with a view to the realisation of a profit" - as meaning that if *any* part of the motivation is profit-making, then the GLA is expected to use a company (where the GLA is carrying out a specified activity).

14. The cautious approach is that the primary or dominant motivation does not need to be profit-making. Therefore investment in mixed tenure property development (including affordable housing which is not delivered with a view to making a profit) could potentially (depending as described above on the nature of the loan/equity arrangements) fall within the scope of section 34A of the 1999 Act as making a profit on some of the properties would be an aspect of the GLA's motivation. The test is likely to apply to each investment, even if there are expected to be losses across a portfolio of investment.

15. The meaning of "on a commercial basis" would most probably be interpreted on an objective basis. This will involve looking at whether the conduct of the GLA is something which a commercial actor would do. There is clearly a range of conduct which commercial actors would carry out. Given that the GLA will need to act *rationally* and with some care as to the risk that it takes with public funds, the closer that the GLA gets to the centre of the spectrum on the range of commercial actor behaviour the more likely that it will be acting lawfully. The GLA will need to set out its rationale for the risk profile that it applies to different projects, and explain by reference to its knowledge and/or experience of the commercial marketplace how that risk profile corresponds to what it understands to be the risk profile for similar types of project within the commercial sector.

<u>Consequences of a successful challenge where a subsidiary company is not used</u>

16. Where section 34A of the 1999 Act is found to apply, but a subsidiary company is not used, this will have the effect that the activity will be taxable. Although there is a risk that the relevant activity could be found to be void or voidable, the risk is probably low.

17. The above paragraph reflects the statutory position. Of course if, for example, there are contractual obligations to comply with the law, a further consequence is that those obligations would be breached.

Conclusions and next steps

Following discussions at this meeting to discuss risk appetite and preferred approach, a working party will create a brief policy document including a decision flow chart to classify opportunities into those which *may* as opposed to *must* be transacted through GLAP (or another appropriate subsidiary); this will be brought back to the Steering Group for approval.

Following approval of this framework, it is proposed that the Executive Directors of Resources and Housing and Land will take decisions on the appropriate transacting body on the advice of their teams, with regard to appropriate legal advice for any projects falling within the 'grey' areas discussed above.

Appendix A:

Advice in the matter of Greater London Authority recoverable investments, Clive Sheldon QC