

**Report to:** Children, Young People and Families Scrutiny Committee

**Date:** 12<sup>th</sup> November 2009

**Subject:** Building Schools for the Future - Future Governance and Contractual Agreements

**Report of:** Executive Director of Children and Young People's Services

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**Purpose / summary:**

This report outlines the future governance arrangements of Cabinet, the Strategic Partnering Board, the joint working arrangements with Salford and the Local Education Partnership. The report also considers the Strategic Partnering Agreement which the Council will enter into with the Local Education Partnership to deliver the first wave of the Building Schools for the Future initiative in Wigan.

**Alternative options considered and reason for selecting the one recommended:**

The alternative to proceeding to financial close of the contract is in effect not to pursue the BSF programme.

**Recommendation / decision:**

Unfortunately the report had to go to Cabinet before Children, Young People and Families Scrutiny Committee because of the financial close timescales.

Cabinet has already made the decisions detailed below:

- ◆ To approve the entry of the Strategic Partnering Agreement, the Shareholders Agreement, the Co-operation Agreement and all other documents which are ancillary to these documents and necessary to give effect to the project and delegate authority to the Executive Director of Children and Young People's Services in consultation

with the Service Director Borough Solicitor and Service Director Corporate Services to approve the final detailed terms.

- ◆ To approve the establishment of the governance arrangements described in the report.
- ◆ To approve the Council's investment into the Local Education Partnership.
- ◆ To authorise the Service Director Corporate Services to complete all necessary certificates under the Local Government Contracts Act 1997 and to give the indemnity in this regard as described in this report.
- ◆ To appoint a director of the Local Education Partnership.

### Risks / Implications:

Financial:	The Council has been notified of £78.7 million indicative capital funding. Investment in the Local Education Partnership is outlined in this report.
Staffing:	There will be implications in relation to individual school projects.
Policy: Equal Opportunities - Has a Diversity Impact Assessment been conducted?	Building Schools for the Future N/A as these issues will be considered on a project by project basis.
Wards affected:	All

### Property Implications – Does the proposal involve a reduction, addition or change to the Council's asset base or its occupation?

Yes

**If yes, have the property implications been agreed with the Corporate Property Officer?**

Yes

**Does this proposal have significant implications for the Council and the local population?**

Yes

**Does this proposal involve a new policy or procedure or significant changes to an existing policy or procedure?**

No

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Has the Service Director - Borough Solicitor confirmed that the recommendations within this report are lawful and comply with the Council's Constitution? **Yes**

Has the Service Director - Corporate Services confirmed that any expenditure referred to within this report is consistent with the Council's budget? **Yes**

Are any of the recommendations within this report contrary to the Policy Framework of the Council? **No**

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**For Cabinet reports only :**

Categorisation of the report:	<b>x</b>		<b>x</b>
Discussion leading to a decision		Discussion	
Monitoring		Decision	
Sharing for corporate understanding		Information	

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**Tracking/Process:**

	Consultation	Ward Members	Partners
Committee	Overview & Scrutiny	Cabinet	Council
12 <sup>th</sup> November 2009		22 <sup>nd</sup> October 2009	

The Background Papers to this report contain exempt information under Schedule 12A of the Local Government Act 1972

Proper Officer



Date

November 2009

## Background

1. At its meeting on 20<sup>th</sup> May 2009 Cabinet agreed to the appointment of the Transformational Learning Partnership consortium (TLP) as the selected bidder to deliver the Salford and Wigan Building Schools for the Future programmes. Members also agreed the requirements of the Council in relation to the continuing negotiations to achieve a financial close to the project, authorised negotiations on the final form of the commercial and associated documentation and approved the development of the Local Education Partnership in consultation with colleagues from Salford City Council.
2. Those negotiations have been progressed. Clearly the Wigan and Salford Councils are at different stages of their respective programmes. Salford are seeking to reach financial close not only on the over-arching strategic partnership arrangements but also on two specific school projects. While Wigan has an interest in ensuring that TLP are able to close satisfactorily the individual school schemes with Salford, we have an interest in being assured that TLP can take forward the Wigan Programme and that the contractual arrangements adequately facilitate and protect the development of the Wigan Programme.
3. Since the appointment of the selected bidder Wigan has received confirmation of indicative capital funding of £78.7 million and additional funding for ICT development for its Phase 1 programme. The Council is endeavouring to work with TLP to progress the necessary initial development work in relation to the Phase 1 schools. How these are procured will be subject to the contractual provisions and governance arrangements that will form part of the agreements to be entered on financial close. This will include the requirement for the submission of an Outline Business Case and the application of the New Project Approval Procedure in relation to each school project. The key document in this respect will be the Strategic Partnering Agreement.
4. This report now requests Cabinet to authorise officers to take all necessary steps to complete the necessary contractual documentation and establish the ongoing governance arrangements to take the projects forward and outlines the procedures under which Wigan's programme is to be progressed.

## Governance

5. There are effectively three different levels of governance arrangements to be put into place to ensure that the two Wigan and Salford Programmes are successfully implemented.
  - ◆ The first is the formal contractual arrangements to be entered with the TLP consortium and the Local Education Partnership which will be established to deliver the Programmes. These are governed by the provisions of a Strategic Partnership Agreement and a Shareholders Agreement
  - ◆ The second concerns the arrangements to be entered between the two local authorities and in this respect a Co-operation Agreement between Wigan and Salford is proposed

- ◆ The third governance arrangements are the internal arrangements within this Council to drive our position in relation to the above two arrangements

## **Shareholders Agreement and Strategic Partnering Agreement**

6. The Wigan and Salford Programmes will be procured through a Local Education Partnership (**LEP**). This will be a joint venture company limited by share, with four shareholders: Wigan Council, Salford City Council, TLP and BSF Investments LLP. BSF Investments LLP is a limited partnership established by DCSF and Partnerships UK to manage their interests in BSF schemes being managed by Partnerships for Schools. The shareholding will be split 5% : 5% : 80% : 10% between the four shareholders respectively. Wigan and Salford will accordingly be minority shareholders. The parties will complete a Shareholders Agreement (the **SHA**). The two Councils will each have a right to appoint a director to the LEP Board of Directors, one director being appointed by BSF Investments and four directors being appointed by the TLP consortium. It is suggested that the Project Sponsor, the Deputy Chief Executive be nominated as the Council's LEP director as early business decisions will be required in advance of financial close.
7. The LEP which must have been incorporated by financial close enter into a long term Strategic Partnering Agreement (the **SPA**) with the two Councils. The SPA sets out the exclusivity granted to the LEP to develop in Wigan and Salford and the terms under which such exclusivity will be granted including the provision of partnering services, new project approval processes and significantly a demonstration of continuous improvement and value for money.

A summary of the main provisions of the SHA and the SPA is set out in Appendix A.

### **8. The Strategic Partnering Board**

Under the Strategic Partnering Agreement a Strategic Partnership Board will be established with the following role

- a) Review financial and operating (including performance) issues in relation to the LEP.
- b) Give guidance on and approve which new projects should be progressed, by whom and on what basis.
- c) Act as the primary mechanism for managing the LEP's performance in Wigan.
- d) Serve as a forum for the open exchange of ideas so as to enable the Local Authority, the stakeholder representatives and the LEP to discuss the Local Authority's forthcoming accommodation and service delivery requirements for the area to ensure an integrated co-ordinated approach to fulfilling such requirements and to develop and update the SBC.
- e) Such other rights and obligations as are consistent with achieving the successful delivery of the Building Schools for the Future initiative in Wigan.

9. The SPB will consist of
- ◆ a named representative from each of the two Councils and other nominated Council representatives
  - ◆ a representative from the LEP (as approved by the LEP Board of Directors)
  - ◆ such other stakeholder representatives (relevant diocesan authority representatives or others from the local secondary education community) as the Councils may nominate
  - ◆ a non-executive independent Chair

The stakeholder representative and the Chair will be non-voting posts and clearly there will be some decisions in which the LEP representative will not be able to vote on the grounds of potential commercial conflict.

10. **Co-operation Agreement**

In addition to the above formal contractual provisions governing the relationship of the two Councils with the LEP and the procedures to be followed in relation to individual projects, the joint nature of the arrangements involving Wigan and Salford means that an understanding between the two Councils is required as how we will operate the processes and how we will engage with each other.

11. The Co-operation Agreement will deal with a range of issues relating to the shareholdings of the two authorities in the LEP and the directors appointments including restrictions on the transfer of shares without the consent of the other Council and what happens if one Council ceases to be a party to the SPA. In addition arrangements for the recovery by the LEP of its initial set up costs are included. The responsibility for which depends upon the financial close of Wigan's Phase 1 schemes and Salford's Phase 2 schemes. The estimated costs are approximately £1.1 million. Wigan's share is ultimately 50% and becomes payable on financial close of the Phase 1 schemes.

**Joint Local Authority Client Team**

12. Significantly the Co-operation Agreement outlines how the two authorities will work with the LEP and the Strategic Partnering Board and their roles in relation to their respective Programmes. It is intended that the two authorities will establish a Joint Local Authority Client Team for the duration of the overall project. This will be attended by the Council's respective Directors of Children and Young Peoples Services (and/or other nominees), the Council's respective LEP directors and the Council's respective representatives on the Strategic Partnering Board.

13. The role of the joint team will be
- ◆ To provide a forum for joint strategic discussion and consideration of all aspects of the each Strategy for Change including any potential for joint projects/ways of working
  - ◆ To provide a means for the joint review where appropriate of all aspects of the performance of the LEP
  - ◆ Consideration of issues relation to proposed New Projects and any potential impact on:
    - (a) Existing LEP projects;
    - (b) Authority or LEP resources; and
  - ◆ To consider other issues which Team deem to be of mutual interest and agree to consider from time to time

A diagrammatic illustration of how the joint team will effect the delivery of new projects is set out in Appendix B to this report

### **Wigan Schools for the Future Programme Board**

14. Clearly Cabinet will anticipate taking the key decisions in relation to moving forward this Council's programme including:
- ◆ Approval of Outline and Final Business Cases
  - ◆ Approval of the award of contracts
  - ◆ Approval of new projects brought forward under the BSF initiative
  - ◆ An overall review of performance of the LEP, educational impact, new project development, financial matters

It will be necessary to manage and direct the programme on both an on-going strategic and operational level and in this regard a Programme Board consisting of key senior officers, stakeholders and relevant Members will be appropriate and existing arrangements may well need to be enhanced and developed

### **Certificate under Local Government Contracts Act 1997**

15. The Service Director The Service Director – Corporate Services in his capacity as the Section 151 Officer will be issuing a certificate under the Local Government (Contracts) Act 1997. This certificate will confirm that the Council has the powers to enter into the Strategic Partnering Agreement. In PFI transactions generally, the issue has arisen as to whether in law a duty of care arises, where the Chief Finance Officer certifies that a public authority has a power to enter into a contract, in the knowledge that this certification will be relied upon by both the counter party e.g. the other party(s) to the relevant contract. It cannot be ruled out completely that personal liability could attach to the officer, although in the absence of dishonesty, bad faith, recklessness or even negligence, the risk is considered to be small. Nevertheless, given

the fact that at law personal liability may arise as a result of the giving of a certificate and bearing in mind that a certificate must be provided to enable the project to proceed, it has become common practice for public authorities to provide a specific indemnity for the officer concerned even though the Council's policy in relation to such indemnities will apply.

## **LEP Financial Implications**

16. In addition to the LEP initial set up costs referred to above there are requirements on the Council to invest in the LEP. Each investment will be shown in the Council's accounts. These are as follows:-

a) **5% Shareholding in the LEP**

As outlined previously, Wigan Council will be a 5% shareholder in the LEP. The total equity investment will be a nominal £1,000, the Council's share of this being £50.

b) **Working Capital Investment in the LEP**

In order to finance the LEP company in the short-term, the LEP will require a working capital loan. This is provided by the shareholders and Wigan's element of this is approximately £80,000. This provides a fixed return with the full loan repayable within three to five years.

c) **Shareholding in each Special Purpose Vehicle (SPV) Created to Design, Build, Finance and Operate the PFI New Build Schools**

As each Wigan phase is completed, a SPV company will be created to manage the new build schools on behalf of the private sector. The LEP will be an equity investor in the SPV and as such, Wigan Council will also be an investor. The total equity investment will be a nominal £1,000, the Council's share of this being £100 as Wigan will take Salford's share of investment in a Wigan PFI and vice versa. In addition to the equity made via the LEP, Wigan Council will also be expected to invest directly in the remaining equity available. Typically, this will cost £900, Wigan's total equity investment therefore being £1,000 per new build PFI school.

d) **Investment in the Sub Debt Provided by the Shareholders of the SPV**

The bulk of the private finance required for each PFI deal comes from the banks (typically 90%) but a proportion also comes from the equity investors as outlined above and also as subordinate debt. As a shareholder in the SPV, both directly and indirectly via the LEP, Wigan Council will be required to provide an amount of sub debt in order to fund the deal. Typically this will cost £300,000 per new build PFI school. This sub debt provides a fixed return repayable over 25 years over the course of the PFI deal.

Prior to financial close the LEP will be required to produce a business plan for the consideration and approval of the two Councils

## Financial Close/Contractual Completion

17. The current programme for financial and contractual close of the SPA, the SHA, the Co-operation Agreement and the LEP arrangements indicates an estimated completion in November 2009. Authority is therefore required to take all appropriate steps to secure that completion.

Members are requested therefore

- ◆ To approve the entry of the Strategic Partnering Agreement, the Stakeholders Agreement, the Co-operation Agreement and all other documents which are ancillary to these documents and necessary to give effect to the project and delegate authority to the Director of Children and Young Peoples Services in consultation with the Service Director Borough Solicitor and Service Director Corporate Services to approve the final detailed terms
- ◆ To approve the establishment of the governance arrangements described in the report
- ◆ To approve the Council's investment into the Local Education Partnership
- ◆ To authorise the Service Director Corporate Services to complete all necessary certificates under the Local Government Contracts Act 1997 and to give the indemnity in this regard as described in this report
- ◆ To appoint a director of the Local Education Partnership

## **SUMMARY OF THE STRATEGIC PARTNERING AGREEMENT (SPA) AND SHAREHOLDERS AGREEMENT (SHA)**

### **1 Duration and Exclusivity**

1.1 The term of the Strategic Partnering Agreement is for 10 years. The 10 year period is the period of time over which it is anticipated that the LEP should be in a position to complete the relevant programme of works/services in relation to Building Schools for the Future in Wigan and Salford.

1.2 There is flexibility to extend the term of the SPA for up to a further five years by agreement between the parties.

1.3 The exclusivity to be granted to the LEP per wave in Wigan, can be summarised as follows:

a) it relates to:

- (i) the provision of “Relevant Facilities” (essentially secondary schools maintained by the Council which come within the definition of “Major Capital Projects”);
- (ii) the provision of the specified Partnering Services; and
- (iii) the provision of Project Services to Approved Projects.

**BUT** is all subject to the approval process for New Projects (see below).

b) “Major Capital Projects” can be summarised as projects:

- (i) having a capital value of £250,000, where the project involves the construction of, or refurbishment, repair or extension to, a Relevant Facility (or of any part thereof) pursuant to a PFI Project Agreement; and/or
- (ii) having a capital value of over £250,000, where the project involves the construction of, or refurbishment, repair or extension to, a Relevant Facility (or of any part thereof) pursuant to a D&B Contract; and/or
- (iii) the ICT requirements for the Phase 2 schools and the Phase 3 schools; and/or

- (iv) having a capital value of over £250,000, which have been the subject of a D&B Contract where the project involves Hard FM Services;

and in any such case where the Council has the legal power to effect and control procurement of such premises or facilities.

The Council cannot take forward Major Capital Projects without invoking the New Project Approval Procedure (which is the procedure pursuant to which the LEP submits its proposals for any such new project).

- c) In addition, the LEP may be requested to provide additional or wider services or works.

## **2 Who are the Parties to the SPA and SHA?**

- 2.1 a) SPA – the parties to the SPA are Wigan Council, Salford City Council and the LEP.
- b) SHA – the shareholders (entering into the SHA) are:
  - (i) Wigan Council;
  - (ii) Salford City Council;
  - (iii) BSFI (being BSF Investments LLP, a limited partnership established by DCSF and Partnerships UK to manage their investments in BSF schemes being managed by Partnerships for Schools (PfS); and
  - (iv) the Private Sector Partner (PSP).

## **3 Purpose of the LEP, the Partnering Services and Delivery of the Partnering Services**

### **3.1 Partnering Services to be provided by the LEP**

The role of the LEP is to support the Council in relation to the long-term capital investment programme for the secondary schools estate in Wigan by providing Partnering Services. The nature and extent of the Partnering Services is determined by the Council's Partnering Services Specification.

- 3.2 Collective Partnership targets are set out in the SPA.

### **3.3 How are the Partnering Services to be delivered?**

The LEP is responsible for the Partnering Services, but can sub-contract all or part to Partnering Service Providers.

3.4 The Strategy for Change (SfC) is prepared by the Council and sets out its anticipated accommodation requirements in respect of its secondary schools estate. This will be reviewed annually by the Council. The SfC will be the reference document against which the LEP will develop proposals for New Projects to meet the need for Relevant Facilities set out in the SfC approved by the Council.

#### 4 **Funding, Financing and Value for Money**

4.1 **Initial Subscriptions** – the mechanism for the initial subscriptions for shares in the LEP is set out in the SHA. The share designations will be:

- a) A shares to Wigan Council and Salford City Council;
- b) B shares to BSFI; and
- c) C shares to the PSP.

4.2 **Further Capital** – if the Board of Directors decides that the LEP needs to issue further shares, then associated provisions are set out in SHA. There is a detailed offer round mechanism giving pre-emption rights to the existing shareholders to be able to take up their proportion of the new shares to be issued. If they do not want to/cannot do this then their shareholdings will be diluted. However, the minority protection rights attaching to the A shares and the B shares held by the Councils and BSFI will be unaffected by any resultant dilution i.e. so long as the Councils or BSFI holds the initial shares issued to them they will have such rights.

4.3 **Payment for Partnering Services** – these provisions are dealt with in the SPA:

- a) The LEP's costs in providing the Partnering Services will be reimbursed against an agreed schedule of rates.
- b) A Project Management Fee will be paid to the LEP (in relation to the costs incurred in taking a New Project through the New Project Approval Procedure). Subject to certain limited exceptions, this Project Management Fee will only be payable if the relevant New Project becomes an Approved Project. The Project Management Fee will also be reimbursed for schemes which are developed but which do not reach fruition because the Council, in effect, reneges on or changes any of the Approval Criteria parameters within which the LEP was asked to work up the New Project Proposal, withdraws the project or there is a Local Authority Event of Default.
- c) The LEP will also be entitled to recover the LEP Initial Set-up Costs as part of the Project Management Fee in the first five year period. The Project Management Fee will be payable on the signature of the relevant Project Agreement(s) for the relevant New Project(s) being entered into during the first five years of the SPA.

- d) To the extent the LEP has not entered into New Projects during the first five years of the SPA and has not recovered the LEP Initial Set-up Costs together with the associated costs of interim funding, then the Council would then pay to the LEP the balance of any such unrecovered costs, unless there has been a SPA Material Default.

4.4 **Benchmarking and Market Testing Procedure** – the provisions can be summarised as follows:

- a) As part of the New Project Approval Procedure the LEP will be required to demonstrate value for money to the satisfaction of the Council by reference to the cost of the New Project compared to:
  - (i) Phase 1 projects in Salford and Wigan;
  - (ii) the anticipated cost of future projects as set out in the Continuous Improvement Plan; and
  - (iii) the costs for equivalent projects based on the benchmarking data and indices provided in relation to the BSF Programme by PfS.
- b) Benchmarking is to be carried out by the LEP and reported on by the LEP to the Council as part of Stage 2 of the procedure set out in the SPA.
- c) The Council and the LEP have agreed a Continuous Improvement Plan.
- d) For New Projects which receive Stage 1 Approval on or before the fifth anniversary of the date of the SPA, the LEP will need to satisfy the requirements in SPA, outlined above. These requirements may themselves require some degree of market testing.
- e) After the fifth anniversary of the date of the SPA, the LEP will need to satisfy the requirements in SPA, in relation to:
  - (i) the first Representative New Project of each type;
  - (ii) any other New Project for which Stage 1 Approval is sought prior to the Representative New Project of the relevant type having been approved; and
  - (iii) any other New Project for which Stage 1 Approval is sought and where the LEP decides to market test that project.
- f) The LEP and the Council have to use reasonable endeavours to agree the nature and scope of projects within the SfC which are representative of the type of projects to be carried out by the LEP

pursuant to each of the PFI Project Agreements and D&B Project Agreements (with each such project being a Representative New Project).

4.5 Records and open book accounting provisions and support to the Council in terms of audit requirements affecting the Council are set out in SPA.

## 5 **Management of the LEP**

### 5.1 **Composition of the LEP Board**

- a) Council (A shares) – one Director Wigan, one Director Salford;
- b) BSFI (B shares) – one Director;
- c) PSP (C shares) – four Directors;
- d) an independent non-executive Chairman appointed by the shareholders.

The Council is also entitled to nominate an observer to attend Board meetings.

5.2 Board composition gives the PSP day to day operational control of the LEP but this is, in practice, subject to the:

- a) terms of reference set for the LEP in the SfC;
- b) New Project Approval Procedure;
- c) Business Plan for the LEP; and
- d) Shareholder Consent matters.

5.3 **Quorum** – one Director from each class (but lesser requirements in relation to any adjourned meeting if quorum then not present). If a Director considers that there is a conflict of interest between his duty to the Council and his duty as a Director, then such Director is entitled to abstain from the voting on the relevant matters.

5.4 **Matters Requiring Shareholder Consent** – the SHA lists reserved matters where the Council and BSFI approval is required as shareholders in relation to the relevant matter. The list covers, for example, changes to the Business Plan, changing the LEP's constitution and approvals in relation to the establishment and operation of project companies.

5.5 The first **Business Plan** covering the period from the date of completion through to the end of the first financial year of the LEP will be set out in the SHA. The Business Plan is to be reviewed by the Board at least every six months and updated for each financial year.

## 5.6 **The Strategic Partnering Board (SPB)**

The role and make-up of the SPB is contained in the Cabinet report.

## 6 **New Project Approval and Project Delivery**

6.1 Once approved, New Projects are to be delivered by the LEP itself and/or by a Project Company which must be a subsidiary of the LEP at the outset for the initial lock in period.

6.2 In outline the approval process comprises:

- a) General obligations on the LEP to work up New Projects in accordance with the SfC.
- b) Stage 1 Approval worked up – the requirements which the LEP must comply with are set out in the SPA. This then goes to the SPB and the Council for consideration. If approved, the process then moves to Stage 2.
- c) Stage 2 requires more detailed work to be done to work up the Stage 1 Approval into more detailed proposals. The detailed list of requirements for a New Project Final Approval Submission is set out in SPA. The Stage 2 proposal is to be considered against the Approval Criteria set out in the SPA. These criteria include consideration of the LEP's performance in terms of continuous improvement and track record on previous projects, affordability and whether the proposals meet the Council's requirements identified at the time of the Stage 1 Approval. The Council would be free to procure the relevant facilities outside of the LEP if the Stage 2 proposal is not approved because it does not satisfy the Approval Criteria. If the proposal does receive Stage 2 Approval then the LEP will implement the New Project. If a New Project Final Approval Submission is improperly rejected by the Council, the Incurred Project Management Fee will be paid by the Council to the LEP and the Council will not be entitled to procure the Relevant Facility outside the terms of the SPA.

6.3 **Disapplicaton of Exclusivity** – in the event that:

- a) a New Project Proposal is not submitted by the LEP in accordance with the agreed provisions; or
- b) a New Project Proposal does not receive Stage 1 Approval; or
- c) a New Project Final Approval Submission is properly rejected and does not receive Stage 2 Approval;

then the Council is entitled to procure the New Project outside the terms of the SPA and would not be or be deemed to be in breach of the exclusivity provisions set out in the SPA. See also paragraph 7.1 below.

## **7 Termination/If Things Go Wrong**

### **7.1 LEP Events of Default**

- a) The LEP has an opportunity to remedy certain defaults or, in certain circumstances where the LEP Event of Default is not capable of remedy, to propose an “Improvement Plan” for consideration by the Council.
- b) The Council may require replacement of a defaulting Supply Chain Member. Alternatively, the Council may:
  - (i) either suspend the LEP’s exclusivity (which may be subject to future reinstatement, at the Council’s discretion); or
  - (ii) call a SPA Material Default.

If the Council chooses the latter, the PSP may be required to sell its investment in the LEP either to the other shareholders or in the open market.

- 7.2 Council Events of Default** – the list of Local Authority Events of Default is much shorter than that for LEP Events of Default (e.g. non payment of amounts due by the Council or deliberate frustration of New Project implementation). Compensation is potentially payable under SPA, following a Local Authority Event of Default. Where the LEP has served a Local Authority Default Notice more than once in any twelve month period, the LEP would not be required to provide the Partnering Services unless all Partnering Services Costs are paid monthly in arrears (interest will accrue on any outstanding payments).

**Dated**

**2009**

**THE COUNCIL OF THE CITY OF SALFORD  
WIGAN BOROUGH COUNCIL**

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**BSF CO-OPERATION AGREEMENT**

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**ADDLESHAW GODDARD**

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## Parties

- (1) **THE COUNCIL OF THE CITY OF SALFORD** of Civic Centre, Chorley Road, Swinton, Salford M27 5DA (**Salford**); and
- (2) **WIGAN BOROUGH COUNCIL** of Town Hall, Library Street, Wigan WN1 1YN (**Wigan**).

## Background

- (A) Salford and Wigan have been working together since 2007 on a joint "Building Schools for the Future" procurement and have now selected a selected bidder.
- (B) BSF will involve the establishment of a joint venture limited liability company in which Salford and Wigan will both be shareholders (the **Local Education Partnership**) alongside BSF Investments LLP (**BSFI**) and the private sector partner.
- (C) The purpose of this agreement is to set out how Salford and Wigan will work together in the context of the LEP Shareholders' Agreement and the Strategic Partnering Agreement between the two authorities and the LEP.

## It is agreed

### 1 Definitions and interpretation

- 1.1 In this agreement the following definitions shall apply:

**Business Days** means a day other than a Saturday, Sunday or a bank holiday in England

**BSFI** has the meaning in recital (B)

**LEP** has the meaning in recital (B)

**Reserved Matters** has the meaning set out in the Shareholders' Agreement

**Shareholders' Agreement** means the Shareholders' Agreement in relation to the LEP entered into (or to be entered into) between the authorities, BSFI and the private sector partner in the LEP

**Strategic Partnering Agreement** or **SPA** means the Strategic Partnership Agreement dated even date herewith made between the LEP and the two authorities

### 2 Overall governance arrangements in relation to the LEP

- 2.1 Attached as an Appendix is a diagram and protocol for how the authorities will work together day to day and with the LEP to deliver their BSF programmes (the **Governance Protocol**). The Governance Protocol may be amended from time to time by agreement in writing between the respective BSF Project Directors for the two authorities shall procure that their officers work in accordance with the Governance Protocol in effect at the relevant time.

### 3 Shareholdings in the LEP

- 3.1 Wigan and Salford will each hold 5% of the share capital of the LEP.

- 3.2 Each authority will also invest (via the LEP or directly) in special purpose companies set up by the LEP to deliver PFI schools for that authority. Any economic risk/return will be for the account of the authority making the relevant investment and the authorities shall give effect to this by making any required balancing payments in terms of any dividends or other payments made to them by the LEP.

#### **4 Directors**

- 4.1 Each authority shall appoint, and maintain in that role, a director to the board of the LEP as permitted under the Shareholders' Agreement.

#### **5 Reserved Matters relating to the LEP**

- 5.1 There are a number of Reserved Matters in the Shareholders' Agreement. If approval is sought from the authorities in relation to a Reserved Matter an authority shall procure that approval is promptly given in respect of a Reserved Matter:

- (a) if requested by the other authority to give such approval; and
- (b) if the Reserved Matter principally relates to the other authority and does not have (and is not reasonably likely to have) any material impact on the requesting authority.

- 5.2 If approval is sought in relation to a Reserved Matter and agreement cannot be reached on giving the approval then the relevant matter shall be referred to the dispute resolution procedure in clause 9.

#### **6 "Threshold Return Certification" under the Shareholders' Agreement**

- 6.1 Schedule 8 to the Shareholders' Agreement includes a mechanism dealing with profits/returns in the LEP being made at above prescribed levels. The authorities agree that if one of them wants a certification under clause 6.2 of Schedule 8 to the Shareholders' Agreement, then both authorities will procure that the certification is promptly requested from the LEP by them as shareholders.

#### **7 Restriction on the transfer of shares in the LEP**

- 7.1 Each authority recognises the personal nature of its shareholding in the LEP in relation to the its BSF programme. In the unlikely event that an authority wishes to transfer any interest in any shares it has in the LEP then it will only do so having obtained the prior written consent of the other authority (such consent not to be unreasonably withheld or delayed). If such consent is sought then, as a condition to giving that consent, the relevant authority may require that the transferee of the shares enters into a deed of adherence agreeing to be bound by the terms of this agreement as if it had been a party in place of the outgoing authority.

- 7.2 In the event that either:

- (a) under clause 13 (*Termination following a LEP Event of Default*) of the SPA either authority determines that they wish to terminate the SPA and therefore bring to an end the delivery of the partnering services from the LEP; or
- (b) under clause 14 (*Local Authority Event of Default*) of the SPA one authority defaults under the SPA so that the LEP seeks to terminate the provision of the partnering services to that authority,

then the shareholding of the relevant authority in the LEP shall be taken up by the remaining authority at nominal value in accordance with clause 9.2A of the Shareholders' Agreement.

## **8 LEP Initial Set up Costs**

8.1 The LEP Initial Set Up Costs of one million one hundred thousand pounds (£1.1 million) shall be paid by Salford and Wigan in the proportions set out in Appendix 2 (Recovery of LEP Initial Set Up Costs).

## **9 Costs in relation to the development of New Projects by the LEP**

9.1 The LEP shall be required to keep separate accounts of work done for each authority in relation to the development of New Projects under the provisions of schedule 3 to the SPA. Those LEP costs shall be for the account of the relevant authority to which the proposed New Project relates.

## **10 Strategic Partnering Board**

10.1 Salford and Wigan confirm that, in accordance with Schedule 3 of the SPA, each authority shall be responsible for approving its own projects in consultation with the SPB.

## **11 Disputes**

11.1 If there is any disagreement or dispute in relation to any matters under this agreement or in respect of how the authorities (or their director appointees) conduct themselves as shareholders/ directors in the LEP and/or under the SPA, then an authority may invoke this dispute resolution procedure in which case the matter in dispute shall be referred to the Chief Executives of the authorities (or another senior officer nominated by the Chief Executive) who shall use all reasonable endeavours to resolve the matter in dispute.

11.2 No recourse to arbitration or litigation by either authority shall take place unless and until the procedure in clause 9.1 has been followed and twenty (20) Business Days have elapsed from the matter being referred under clause 9.1.

## **12 General provisions**

12.1 **Entire Agreement.** Except where expressly provided otherwise in this agreement, this agreement constitutes the entire agreement between the parties in connection with subject matter and supersedes all prior representations, communications, negotiations and understandings concerned in the subject of this agreement.

12.2 **Notices.** Any notice to be given pursuant to this agreement shall be in writing and sent as registered or certified mail return receipt requested. Any notice to a party under this agreement shall be mailed to the address of the party as shown above.

12.3 **Duration.** This agreement shall continue in full force and effect for so long as both authorities hold shares in the LEP or until termination or expiry of the SPA.

12.4 **Contracts (Rights of Third Parties) Act 1999.** No third party shall have the right to enforce any term of this agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

12.5 **Counterparts.** This agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed in either case by all the parties shall contribute a full original of this agreement for all purposes.

## **Appendix 1**

### **Governance Protocol**

[Stephen to agree with Janet using the diagram and any extra required text]<sup>1</sup>

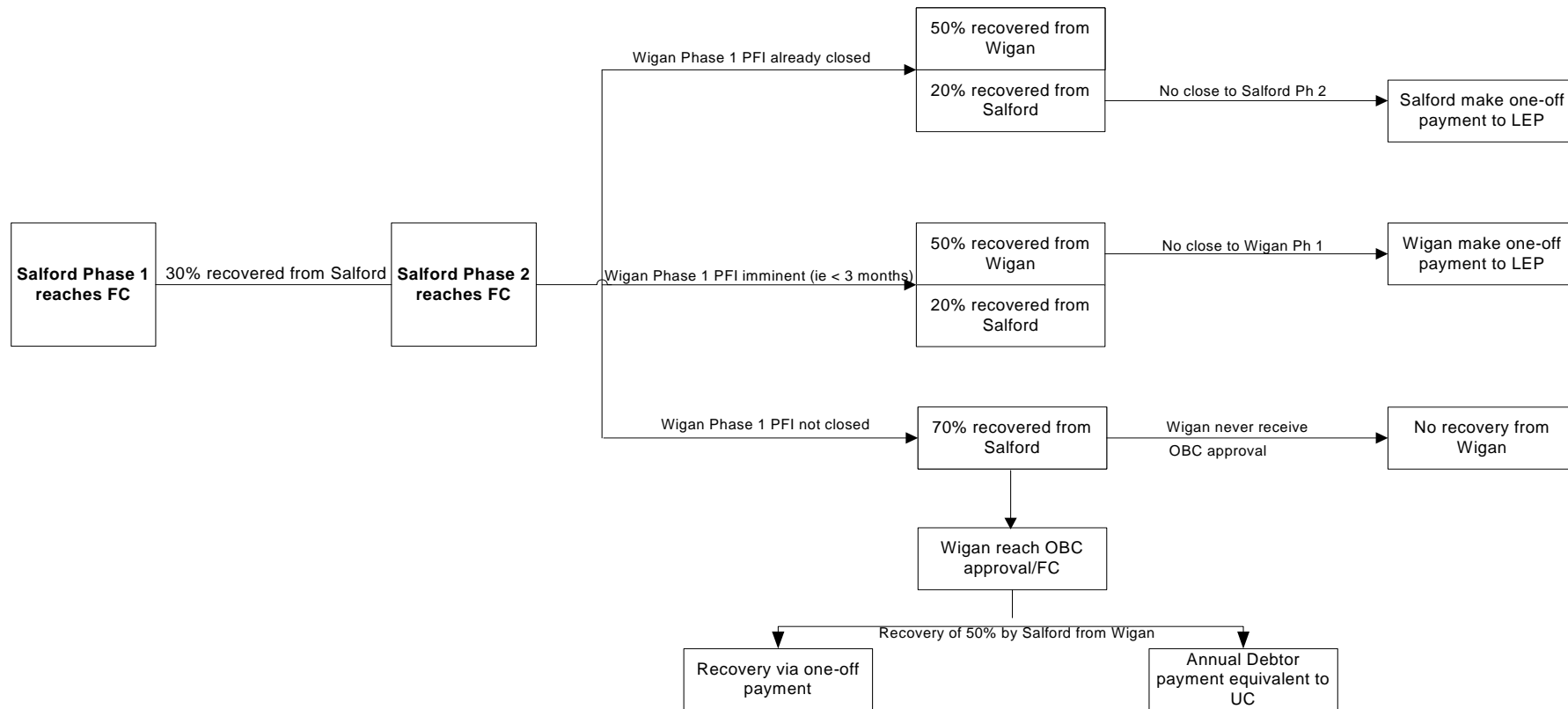
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<sup>1</sup> To be inserted – Stephen to provide please

## Appendix 2

### Recovery of LEP Set Up Costs – Flow Chart

#### RECOVERY OF INITIAL SET UP COSTS – FLOW CHART



Executed and delivered as a deed:

The common seal of )  
**THE COUNCIL OF THE CITY OF SALFORD** )  
was hereunto affixed in the presence of: )

.....

Authorised Signatory

.....

Full name (BLOCK CAPITALS)

.....

Position/Title

The common seal of )  
**WIGAN BOROUGH COUNCIL** )  
was hereunto affixed in the presence of: )

Authorised Signatory

.....

Full name (BLOCK CAPITALS)

.....

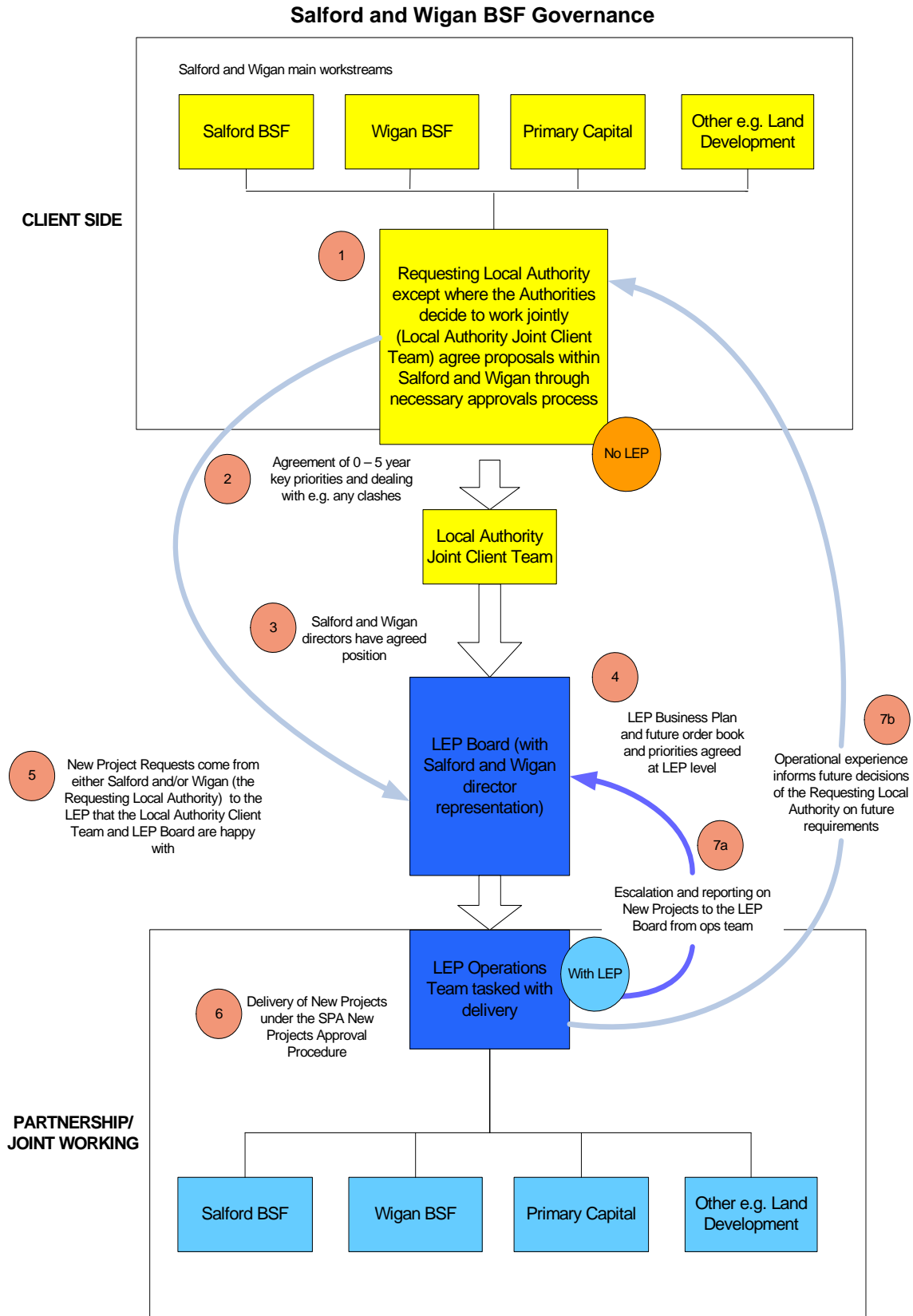
Position/Title

Appendix 1

Governance Protocol

Part 1 – General principles of engagement

The diagram below shows at a high level the stages, processes and parties involved in the development and delivery by the LEP of New Projects.



The general principles governing the way in which the Authorities will interact with each other and the other interested parties in relation to the LEP are that:

- Each Authority will separately maintain responsibility for approving and financing its own proposed or agreed New Projects in line with relevant legislation and statutory powers, its own constitution, standing orders and agreed approval processes and Schedule 3 to the Strategic Partnering Agreement.
- That Salford and Wigan representatives will form a Joint Local Authority Client Team (the terms of reference for which are set out in below) to discuss any projects that are of interest to both Authorities as well as being a forum for sharing information about current and future projects and agreeing how to manage any potential conflicts in demands on resource.
- That Salford and Wigan representatives will together with a LEP representative, any agreed Stakeholder Representatives and an independent chairman form the Strategic Partnering Board and as such to manage the performance of the LEP and assist and advise in the development and updating of each Strategy for Change and any New Projects, in accordance with Clause 6 of the Strategic Partnering Agreement.
- That the Salford and Wigan LEP Directors together with the BSFI and [PSP] LEP Directors will constitute the LEP Board and as such direct and control the business of the LEP in accordance with the Shareholder's Agreement.

## **Part 2 - Joint Local Authority Client Team Terms of Reference**

### **1 Joint Local Authority Client Team**

Salford and Wigan shall establish and maintain for the duration of this agreement a liaison group (Joint Local Authority Client Team), consisting of (as a minimum) the Authorities' respective Directors of Children's Services, or their nominated representatives, the LEP Directors and, as appropriate and invited from time to time, such other attendees as may be agreed by the parties.

### **2 Functions**

The functions of the Joint Local Authority Client Team shall be:

- 2.1 to provide a forum for joint strategic discussion and consideration of all aspects of the each Strategy for Change including any potential for joint projects/ways of working;
- 2.2 to provide a means for the joint review where appropriate of all aspects of the performance of the LEP;
- 2.3 consideration of issues relating to proposed New Projects and any potential impact on:
  - (a) Existing LEP projects;
  - (b) Authority or LEP resources; and
- 2.4 to consider other issues which Team deem to be of mutual interest and agree to consider from time to time.

### **3 Role**

The role of the Joint Local Authority Client Team is to agree any joint Salford and Wigan Projects and make recommendations to the LEP as to relative timing and priorities of Projects.

### **4 Practices and procedures**

Subject to the provisions of this Terms of Reference, the members of the Joint Local Authority Client Team may adopt such procedures and practices for the conduct of the activities of the Joint Local

Authority Client Team as they consider appropriate, from time to time, provided that the quorum for a meeting of the TEN Centre Liaison Committee shall be four (4) (with at least two representatives from each Local Authority).

## **5 Decision-making**

Any decisions made by the Joint Local Authority Client Team will be by consensus.

## **6 Frequency of meetings**

The Joint Local Authority Client Team shall meet at least once every quarter (or at such intervals as the Joint Local Authority Client Team shall determine).

## **7 Convening of meetings**

A meeting may be convened at the request of any member of the Joint Local Authority Client Team.

## **8 Notices of meetings**

Not less than ten (10) Business Days notice (identifying the agenda items to be discussed at the meeting) shall be given to convene a meeting of the Joint Local Authority Client Team, except that in emergencies, a meeting may be called at any time on such notice as may be reasonable in the circumstances.

## **9 Attendance at meetings**

Meetings of the Joint Local Authority Client Team should normally involve the attendance (in person or by alternative) of representatives at the meeting. Where the representatives of the Joint Local Authority Client Team consider it appropriate meetings may also be held by telephone or another form of telecommunication by which each participant can hear and speak to all other participants at the same time.

## **10 Minutes**

Minutes of all meetings and decisions of the Joint Local Authority Client Team shall be kept by Salford and Wigan alternately every meeting, and circulated promptly to all representatives, normally within ten (10) Business Days of the making of the decision or the holding of the meeting.