

The logo for Ashfords, consisting of the word "ashfords" in a white, lowercase, sans-serif font, positioned in the upper right corner of the page. The background of the entire page is a complex geometric pattern of overlapping triangles and polygons in various shades of green, teal, and blue, creating a modern, abstract design.

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## LEP Reorganisation – Rights and Responsibilities

Somerset Council

23 August 2023

Ashfords LLP  
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## 1. Introduction and Background

- 1.1. Ashfords LLP has been asked by Somerset Council (the “**Council**”) to advise in relation to certain assets and liability of the Heart of the South West Local Enterprise Partnership (“**HSWLEP**”). In addition to the Council, this advice is provided to be relied upon by HSWLEP, Devon County Council (“**DCC**”) and Plymouth City Council (“**PCC**”) as other partners in the projects run by the HSWLEP (together the “**Partners**”).
- 1.2. The Government has announced, by a letter dated 4<sup>th</sup> August 2023, that from April 2024, its sponsorship and funding of Local Enterprise Partnerships will cease (the “**Transition**”). The Government has set out that it will support upper tier local authorities (or combined authorities under a devolution deal) to take on the functions currently delivered by HSWLEP and has published some technical guidance on this point<sup>1</sup> (the “**Guidance**”).
- 1.3. The Partners have provided Ashfords LLP with various example documents relating to the main sources of funding to the HSWLEP: the Growing Places Fund, the Getting Building Fund and the Local Growth Fund (the “**Funds**”). We have been asked to advise in relation to the Funds and the outputs from the Funds (assets, revenue, future rights) and specifically the initial questions asked were:
  - 1.3.1. Are each of these funds public money?
  - 1.3.2. Where do the funds legally sit, are they on the LEP CIC balance sheet or the accountable body’s balance sheet?
  - 1.3.3. Is there any specific issue/s that need to be considered given the Accountable Body’s accounting treatment of the Growing Places Fund including the principal and the interest accrued?
  - 1.3.4. Is there any specific or relevant obligation in how each source of funds is used / spent in the future?
  - 1.3.5. Is there any specific issue/s that needs to be considered under the Freedom and Flexibility Agreement between the LEP and the Accountable Body that impact on the above considerations?
  - 1.3.6. If any of the funds were transferred to another body (Local Authority, CIC, Government, Combined County Authority) are there any obligations, conditions or restrictions including governance and decision making which would apply?
  - 1.3.7. What are the implications of this advice for Board Directors of the CIC or the Accountable Body? E.g. future treatment/ recording of assets
- 1.4. Ashfords LLP is not qualified to advise on the accounting treatment of assets and liabilities and financial advice will be needed in relation to those elements of the questions, however we have sought to provide advice in this note to assist that financial advisor.
- 1.5. As the questions set out above were asked before the Guidance was issued by Government, we consider it is helpful in this note to first summarise the positions in the Guidance that relate to these questions and in particular the three Funds. We have also picked up in this section how these positions are relevant to HSWLEP, based on the documentation provided by the Partners.

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<sup>1</sup> <https://www.gov.uk/government/publications/local-enterprise-partnerships-integration-of-lep-functions-into-local-democratic-institutions>

Next we have set out the existing obligations from Government over the Funds currently in place. Finally we seek to answer the questions asked, where possible.

## 2. The Guidance

- 2.1. The Guidance sets out that the Government will withdraw core funding from LEPs from April 2024 and transfer the funding of the LEPs to local authorities. The LEPs can choose to continue to operate as a private entity, but the functions of: business representation, strategic economic planning and responsibility for delivering Government programmes will be transferred to a top tier local authority (or top tier authorities, depending on the LEP geographies, or combined authorities as part of a devolution deal). Government will work with those entities where the LEP geography includes several top tier local authorities to determine the position on transfer of functions.
- 2.2. Decisions on transfer of assets should be made by March 2024 having been agreed between the LEP and its Accountable Body. This should be in line with any pre-existing arrangements. Where none are in place, the Government expects any reserves and assets built up using public funds will remain within the public domain through transfer to the relevant local authority. Where the LEP and Accountable Body cannot agree, the Government will intervene to assist. In the case of HSWLEP we are not aware from the documents provided of any pre-existing arrangements which determine the transfer of assets (but please correct us if there are some) and therefore the assumption is that the assets will transfer to a top tier local authority, or authorities. The HSWLEP will need to agree with the Council, as its Accountable Body, how these assets should be transferred.
- 2.3. Growing Places Fund – The management of the ongoing delivery or closure of the programme, alongside existing assets, financial reserves and loan books, should be agreed locally, in line with any pre-existing arrangements between the LEP and its Accountable Body. Use of financial reserves established through the fund should be determined in line with the decision of the relevant Section 151 officer. For HSWLEP we have not seen anything in the documents provided that appears to be a pre-existing arrangement between the LEP and the Council for this fund, aside from the general governance arrangements for the LEP. Accordingly the ongoing management and closure of the programme and the transfer of assets, financial reserves and loan books will need to be agreed. We note, for example, in one of the template Growing Places funding agreements provided, Plymouth City Council is the Accountable Body for that project. Our review of the Growing Places documentation has identified that the following will apply to projects under this programme and will need to be considered in relation to the transfer of functions and assets:
  - 2.3.1. Loans arrangements created by the grant funding agreement for the repayment of loan and interest in favour of the HSWLEP, which will need to be legally novated/assigned to the relevant top tier local authority;
  - 2.3.2. Reserves held by the Accountable Body following capital repayment of loans, interest payments received, programme funding not yet defrayed and works retentions unpaid on current projects;
  - 2.3.3. Future repayments and interest to be received under the loan arrangements which will flow from the legal novation of the grant funding agreement;
  - 2.3.4. The benefit of collateral warranties from contractors and consultants for the projects, where these are still valid, which will need to be legally assigned to the relevant top tier local authority to ensure action can be taken if needed;
  - 2.3.5. Any deeds of covenant in place for a project if project land has been transferred during the term are for the benefit of HSWLEP and will need to be legally assigned to the relevant top tier local authority to be effective;

- 2.3.6. All mortgages (the examples given showed first, second and third charges over the property) which are not discharged are for the benefit of HSWLEP and will need to be legally assigned to the relevant top tier local authority and the change registered at the Land Registry;
  - 2.3.7. Any mortgage protection clauses in leases of the project property, which are still valid, will be for the benefit of HSWLEP and will need to be legally assigned to the relevant top tier local authority and the change registered at the Land Registry;
  - 2.3.8. All Restrictions on Title at the Land Registry, that are still valid, relating to the project are for the benefit of HSWLEP and this will need to be amended at the Land Registry to be for the benefit of the relevant top tier local authority;
  - 2.3.9. Any project specific agreement (e.g. a Mercure Branding Agreement in one of the examples provided) will be for the benefit of HSWLEP and will need to be legally assigned to the relevant top tier local authority;
  - 2.3.10. The ongoing obligations under the grant funding agreements for the HSWLEP (via its Accountable Body) to monitor, record and report performance under the agreement, to consent to project changes, step in to works if needed, receive repayment of any grant overpayment and to take action in the event of breaches, to include clawback for the rest of the term of the agreement, will need to be novated to the relevant top tier local authority; and
  - 2.3.11. The ongoing protections in relation to liability and indemnities under the grant funding agreements for the HSWLEP need to be novated/assigned to the relevant top tier local authority.
- 2.4. Growth Deal/Local Growth Fund – The LEP’s Accountable Body will subsume any loan books and be responsible for ongoing monitoring requirements. For HSWLEP, therefore, we assume that the Council will have the assets and liabilities transferred to it. We cannot see, from the documents provided, that there are any loan arrangements for projects under this programme, however, please do let us know if this is not the case. Accordingly the grant funding agreements for this programme will need to be transferred to the Council. It is assumed that the Council will need to continue to comply with the monitoring and evaluation requirements in the local and national assurance framework to ensure the Growth Deal Objectives are met. It does not appear that the Government has any rights to clawback the programme funding once expended. The grant funding agreements have been entered into by the Council but on behalf of the HSWLEP and therefore these agreements (if still in force) will need to be legally novated to the Council to ensure the following can be addressed:
- 2.4.1. Sign off of any outstanding milestones for project completion;
  - 2.4.2. Consent for any changes to the project;
  - 2.4.3. Ensuring that the property is used for the project purpose for 6 years and the Restriction on Title at the Land Registry in favour of the Council on behalf of HSWLEP is amended to the Council and this is registered at the Land Registry, if the 6 year term has not ended;
  - 2.4.4. Monitoring reporting and taking action if there is an event of default, including stepping into the project and receiving any clawback prior to Project Completion Date;
  - 2.4.5. Receiving any grant overpayment identified; and
  - 2.4.6. The Council is the beneficiary of any liabilities and indemnities under the grant agreement that are still valid, rather than the HSWLEP.

In addition, the benefit of any collateral warranties entered into for the project, if still valid, need to be legally assigned to the Council.

- 2.5. Getting Building Fund - The LEP's Accountable Body will subsume any loan books and be responsible for ongoing monitoring requirements. For HSWLEP, therefore, we assume that the Council will have the assets and liabilities transferred to it. We cannot see, from the documents provided, that there are any loan arrangements for projects under this programme, however, please do let us know if this is not the case. Accordingly the grant funding agreements for this programme will need to be transferred to the Council. It is assumed that the Council will need to continue to comply with the monitoring and evaluation requirements in the local and national assurance framework. It does not appear that the Government has any rights to clawback the programme funding once expended. The grant funding agreements have been entered into by the Council but on behalf of the HSWLEP and therefore these agreements (if still in force) will need to be legally novated to the Council to ensure the following can be addressed:
- 2.5.1. Sign off of any outstanding milestones for project completion;
  - 2.5.2. Consent for any changes to the project;
  - 2.5.3. Ensuring that the property is used for the project purpose for 6 years and the Restriction on Title at the Land Registry in favour of the Council on behalf of HSWLEP is amended to the Council and this is registered at the Land Registry, if the 6 year term has not ended;
  - 2.5.4. Monitoring reporting and taking action if there is an event of default, including stepping into the project and receiving any clawback prior to Project Completion Date;
  - 2.5.5. Receiving any grant overpayment identified; and
  - 2.5.6. The Council is the beneficiary of any liabilities and indemnities under the grant agreement that are still valid, rather than the HSWLEP.

### **3. What are the Government restrictions under each programme which apply to HSWLEP and the Accountable Body?**

- 3.1. For clarity, we set out for each Fund the key restrictions set out by Government in relation to the programme, taken from the documents provided by the Partners. If there are any other documents, relating to the Government requirements, please let us know.
- 3.2. Growing Places – The Government has set out the following conditions and restrictions in relation to this Fund:
  - 3.2.1. The funds must be used in accordance with Section 11 of the Local Government Act 2003 (use of capital receipts); and
  - 3.2.2. Auditor and Chief Executive to sign and return a declaration by a set date.clawback can be made by the Government if these conditions are not met.
- 3.3. Growth Deal/Local Growth Fund – The Government has set out the following conditions and restrictions in relation to this Fund:
  - 3.3.1. The funding must be used to secure the outcomes set out in the Growth Deal, but with the ability to use the freedom and flexibilities to manage the capital budgets between programmes;
  - 3.3.2. To comply with the National and Local Assurance Framework;
  - 3.3.3. Track progress against metrics and outcomes in line with national monitoring and evaluation framework;
  - 3.3.4. Communicate outcomes and outputs and following branding guidance; and
  - 3.3.5. The funds must be used in accordance with Section 11 of the Local Government Act 2003 (use of capital receipts).

- 3.4. Getting Building Fund – The Government has set out the following conditions and restrictions in relation to this Fund:
- 3.4.1. The funding must be used to support the Getting Building Fund projects agreed with the Government, with the ability to use the freedoms and flexibilities to manage the capital budgets between programmes;
  - 3.4.2. Funding must be expended by a certain date;
  - 3.4.3. To comply with the National and Local Assurance Framework;
  - 3.4.4. Track progress against metrics and outcomes in line with the Getting Building Fund data submission guidance; and
  - 3.4.5. Communicate outcomes and outputs and following branding guidance;

#### **4. Are each of these funds public money?**

- 4.1. Yes, we consider that all of these funds are public money. In our view, the funding for the programmes is provided by Government to deliver certain outputs (e.g. Growth Deal agreed with Government). Where funding has not yet been defrayed, these are clearly public funds. Where funding has been defrayed but then returned via loan arrangement or clawback we assume the Government's intention would be for those funds to be used to further the programme/other public sector initiatives.
- 4.2. Although this position is not set out in the agreements between the Accountable Body and Government, it is supported by the wording at section 33 of the Guidance which states: "where there are no existing arrangements, Government expects that any reserves and assets built up using public funds will remain within the public domain". In the absence of any arrangements to the contrary (which we have seen no evidence of) they should be assumed to be public funds.

#### **5. Where do the funds legally sit, are they on the LEP CIC balance sheet or the accountable body's balance sheet?**

- 5.1. This is an accounting question. However we have considered the legal position in relation to the funds under the arrangements with Government and the grant funding agreements with project recipients to seek to assist in this assessment.
- 5.2. All of the documents provided by the Partners setting out the relationship between Government and HSWLEP and the Accountable Body for all three Funds set out that the funding is being provided to the HSWLEP with the Accountable Body taking the role of legal and fiscal management of the funds. Accordingly, it seems that HSWLEP is in control of the funds (project funding decisions), with the Accountable Body ensuring the public sector probity of the funds. The Service Level Agreement between the Council and HSWLEP flows down a large amount of the HSWLEP's obligations in relation to the Fund to the Council to provide these on HSWLEP's behalf.
- 5.3. The grant funding agreements provided by the Partners for all three funding programmes clearly set out that the Accountable Body is contracting on behalf of HSWLEP. This confirms the position set out above that the funding is being provided by the HSWLEP, but the Council is administering the Fund and ensuring legal and fiscal probity on behalf of HSWLEP.
- 5.4. On this basis it is not possible to say absolutely who controls the funds, whether it is the HSWLEP or the Accountable Body. In practice it seems both entities have an element of control over the funds with the HSWLEP having control over the funding decisions and as the main funder under the grant funding agreement, and the Accountable Body having control over the financial side of the fund and taking actions under the grant funding agreements on HSWLEP's behalf.
- 5.5. All of the property rights created under the grant funding agreement (mortgages, restrictions on title, deeds of covenant, lease obligations) are clearly cited as for the benefit of the Accountable Body on behalf of HSWLEP and therefore belong to HSWLEP. See section 2 above for reference

to our advice that the rights and obligations under the grant funding agreements will need to be legally transferred to the Accountable Body via either novation or assignment as they are not legal rights belonging to the Accountable Body, but merely on HSWLEP's behalf, currently.

**6. Is there any specific issue/s that need to be considered given the Accountable Body's accounting treatment of the Growing Places Fund including the principal and the interest accrued?**

6.1. This is an accounting point, however, see our response to 5 above for the legal control position. The Growing Places funding agreement with Government provides that this is an unringfenced grant. The Government can order repayment of the grant if it is not used in accordance with Section 11 of the Local Government Act 2003 (use of capital receipts). There is no other right for the Government to clawback. Please also see 3 above for further details of restrictions/conditions.

**7. Is there any specific or relevant obligation in how each source of funds is used / spent in the future?**

7.1. There are no express obligations in the documents provided for all three programmes setting out how funds should be used/spent in the future. There are requirements to spend some funding by a certain date.

7.2. More relevant is the need for the continuing monitoring/reporting/contract management obligations for ongoing projects to continue to be carried out to meet the Government's requirements (see 3 above). In particular, we are assuming that the Government will require the body who receives the rights and obligations under the Funds (see 2 above for more detail on these) to comply with the local and national assurance frameworks until notified otherwise.

7.3. Given the limited details provided in the Guidance we assume that the Government will provide further detail/enter into further discussion with the body receiving the LEP's functions and assets to set out further guidance on use of the funds in the future.

**8. Is there any specific issue/s that needs to be considered under the Freedom and Flexibility Agreement between the LEP and the Accountable Body that impact on the above considerations?**

8.1. We are not aware that there is a Freedom and Flexibility Agreement in place. We have reviewed the Service Level Agreement between the parties, and this provides for the Council to deliver programme management services for HSWLEP. This agreement does not create any specific issues that need to be considered.

8.2. We are aware that the Government has provided the LEPs with Freedom and Flexibility to run the programmes in a such a way to meet their objectives and deal with capital receipts accordingly, we have not seen any other specific issues. If there is further documentation we should review on this point please let us know.

**9. If any of the funds were transferred to another body (Local Authority, CIC, Government, Combined County Authority) are there any obligations, conditions or restrictions including governance and decision making which would apply?**

9.1. The Guidance provides no detail on how the Government sees the transfer of functions being controlled and restricted going forwards. Further guidance will be needed to make this clear for those receiving the functions and assets. See section 2 above for details of the ongoing obligations/rights which will need to be legally transferred to the body receiving the functions and assets.

9.2. The existing legal position between the Government and the HSWLEP and Accountable Body does not set out what happens in the event of transfer of the grant to another body. Whilst the position can be inferred from the existing requirements to meet the projects identified in the applications, monitoring and reporting controls and compliance with the local and national



assurance framework (see 3 above), it has not been set out by Government on a legally clear basis.

**10. What are the implications of this advice for Board Directors of the CIC or the Accountable Body? E.g. future treatment/ recording of assets?**

- 10.1. This is also an accounting point; however our view is that the Government has not made it clear how the transferred assets should be treated by the body receiving them. Based on the current obligations in relation to the programmes it is likely that that body will need to meet these existing obligations in relation to the Funds (see 3 above). What will be clearer at the point of transfer, however, is that the body receiving the assets will be in complete control of them and therefore it is clear that these should be reflected in their accounts.
- 10.2. Ongoing liabilities and rights (see 2 above) should be reflected in the accounts based on whether they are contingent assets and returns. Given the current legal relationships with Government in relation to these Funds (the very limited possibility of clawback – see section 3 above) and that the bodies will have extremely limited liabilities to grant recipients under grant funding agreements (once transferred) there will not be any significant financial liabilities transferred under these programmes.
- 10.3. As HSWLEP is a Community Interest Company with an asset lock and corporate obligations consideration also needs to be given as to how the assets owned by the HSWLEP can be transferred to the relevant top tier local authority for no consideration without breaching those obligations. The directors will require advice on how they can carry out such a transfer in accordance with the restrictions in the articles and without breaching their directors' duties to act in the best interests of the company.
- 10.4. Further consideration also needs to be given as to what will happen to the HSWLEP once the assets and functions are transferred and the core funding removed. If the intention is that the company will be wound up, there are additional obligations on the directors of the company not to take any actions that would cause the company to be technically insolvent before a voluntary winding up. Further advice on this element can be provided if required. In reality, further guidance from Government on this point is also likely to be needed as it will affect LEP's up and down the country.