

**GVA** Financial Consulting &  
**Bevan Brittan LLP**

Bevan Brittan  Lawyers for the public,  
private and third sectors



Joint Report

# Strategic Options Report

February 2017

GVA Offices  
65 Gresham Street  
London  
EC2V 7NQ

T: +44 (0)20 7911 2468  
F: +44 (0)20 7911 2560

Bevan Brittan Offices  
Toronto Square  
Toronto Street  
Leeds  
LS1 2HJ

t: 0370 194 5477  
m: 0776 966 8173

## Wirral Metropolitan Borough Council

[gva.co.uk](http://gva.co.uk)

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Prepared By: James Dair/Judith Barnes

**For and on behalf of GVA Financial Consulting Limited and Bevan Brittan LLP**

# 1. Executive Summary

Bilfinger GVA (BGVA) and Bevan Brittan LLP have been commissioned by the Council to provide advice on a range of delivery structures to assist the Council in achieving some of its key ambitions in delivering broad regeneration that will also secure an income stream for the Council.

The Council has identified below a range of strategic objectives that need to be supported in bringing forward a range of alternative delivery options. This report considers each of the options against a number of factors and risks and makes a recommendation to the Council to move towards the preparation of a detailed Business Plan.

The strategic options are:

- Secure local economic growth.
- Make a positive contribution towards delivery of the Asset Transformation Programme.
- Contribute to ensuring that businesses encouraged to invest in the Wirral have access to property that meets their needs and delivers business rate growth.
- Better utilise the Council's assets to drive socio economic change to secure a sustainable future for the benefit of the community.
- Maximise the Council's financial return from the disposal of its land and property assets, with a preference to generate secure revenue income streams.
- Positively contribute towards the Councils Medium/Long Term Financial Strategy (LTFS).
- Improve the environment.
- Ensure the Council is not exposed to undue financial risk.
- Comply with its obligation to obtain best consideration reasonably obtainable on a disposal of its land.
- To ensure and encourage additional private sector investment, capacity and capability is enabled to support the broad regeneration objectives of the Council

In the context of the strategic objectives outlined above the appointed advisors have reviewed the following options with a view to the delivery of the objectives.

<b>Option 1 - Do Nothing (Business as Usual)</b>	The Council takes no action and current delivery arrangements continue. Individual development projects will be brought forward and contractual arrangements entered into with developers on an ad-hoc basis.
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<p><b>Option 2 - Arm's length wholly owned company</b></p>	<p>The Council establishes wholly owned company with clear governance and structure. The company would report directly to the Council's Cabinet.</p>
<p><b>Option 3 - Public Public corporate body</b></p>	<p>The Council and other public sector partners seek to establish a Mayoral Development Corporation or a company with clear governance and structure, for example through the Combined Authority or with the Pension Fund. The MDC/company would report directly to the Council's Cabinet.</p>
<p><b>Option 4 - Joint venture company</b></p>	<p>The Council will seek to create a company not governed by public law through the procurement of an investment/development partner following an OJEU procurement route.</p>

Based on the agreed evaluation criteria as set out in section 3 of this report the option above that provides the best strategic fit for the Council is Option 4, a joint venture company.

Although a joint venture company can take many forms, as described in section 4, it is intended that the exact form and structure of the company be worked up in full detail as part of the development and production of the Full Business Case due to be presented to Cabinet in April / May 2017.

The process of developing the detail around the preferred option will be undertaken through a series of workshops with both Officers and Members to ensure the methodology described by the preferred options is understood and consistent with key stakeholder's expectations.

Initially and subject to the approval of this report the Council will start the procurement process through the publication of a Prior Indicative Notice (PIN), followed by a period of soft market testing with potential partners. The soft market testing process will allow the Council to ensure that when the full business case proposition is presented to Cabinet in April/May 2017 it provides a market facing proposition that is credible and likely to support interest in the Investment/Development market.

Subject to approval of the Full Business Case the Council will then embark on a procurement process to select a partner to join with the Council in establishing a joint venture company or limited liability partnership to secure the Council's ambitions (unless another option is subsequently determined as a better way forward).

This aspect of the procurement process will be detailed in the Full Business Case however more detail of this process is included in Sections 4 and 5 of this report.

## 2. Strategic Case

With the backdrop of continued public funding austerity linked to a clear objective by 2020 to become a self-funding Authority the Council has embarked on a business transformation programme.

The Council is entering a period of unprecedented change and potential opportunity and the Wirral Growth Plan seeks to capitalise on this opportunity by supporting Wirral wide growth for generations to come.

The Growth Plan will feed into the work of the Liverpool City Region Combined Authority, the delivery of the Northern Powerhouse agenda, including supporting the re-balancing of the economy, and the implementation of the Devolution Deal agreed with Government in November 2015.

The Devolution Deal provides a significant opportunity for the Council to bring together alternative funding opportunities as well as additional powers to support growth, and with the Northern Powerhouse area, an unprecedented level of investment interest in the region.

As one of its key objectives the programme will consider and review the potential for a new operating model for the Council to ensure it is capable of delivering its key pledges to the public as identified in the 2020 Wirral Strategic Plan.

The shared Vision for Wirral in the 2020 plan focuses on three key themes:

- Protecting the most vulnerable
- Driving economic growth
- Improving the local environment.

The 2020 Plan is supported by a clear vision for the future of the organisation. This vision is articulated in the future operating model presentation and other key documents. Together they describe:

- A strong strategic hub for Wirral
- A business management function
- A mixed economy of delivery units:
  - Some delivered with and by partners at the appropriate level (Wirral, regional, sub regional), some in-house
  - Some contracted out.

Following a peer review process during 2016 the Local Government Association (LGA) assessed the Council and made a number of recommendations in relation to how the organisation may need to change and refocus if it were to achieve the scale of change it requires to succeed. The LGA made the following observation:-

***“The review identified the need for the Council to be much more commercially focussed, harnessing the spirit and practices of commerce to secure outcomes for residents. This will mean leveraging greater value from assets and resources as well as maximising commercial opportunities and income generation through a range of service models delivered within a public sector ethos”.***

In support of the delivery of the strategic plan the council has embarked on a challenging Asset Transformation Programme. The Strategic Outline Case (SOC) for the transformation programme was endorsed by the Council in March 2016.

One of the conclusions of the SOC was that the Councils Asset portfolio appeared to be too large, too geographically diverse and underperforming financially and suggested a two tier approach to addressing these issues, as follows.

- A council wide adoption of a **Corporate Asset Strategy** to declare its priorities for its property. By way of example, this could be to minimise running costs, maximise receipts and to support the delivery of new housing where possible.
- A redefinition of what it means to be an **operational property**. The operational classification should be reserved for only those properties essential to the provision of a statutory service.
- All other properties should be for **investment only (i.e. generating a financial surplus after costs)**. With a clear understanding of what constitute an operational and an investment property the officers can focus their attention on continually seeking to minimise the cost of the Core properties and **maximising the net income from the Cash properties**.

The broad sense of direction from the SOC was that the Council, following reclassification of the operational assets should be looking to maximise the net income from the assets held for the investment purposes.

The SOC then went on to recommend three key reports required to enable the Council to move the Transformation agenda forward. The three key areas of focus were:-

- Strategic review of the operational property (in conjunction with the wider transitional programme) to challenge the footprint of the Council and to review its options for meeting its statutory obligations including an **options appraisal for establishing a property development joint venture vehicle**
- Asset Management review of the Investment portfolio. This will first benchmark the performance of the Council's portfolio and then to identify asset enhancement opportunities
- A business case for the consolidation of office occupancy into a single site in Birkenhead. This report will consider the operational, financial and regenerative outcomes of such a move.

This report is primarily focused on an **options appraisal for establishing a property development company.**

Following the introduction of the Localism Act in 2011 and the potential freedoms that the Act provides, many local authorities are considering alternative delivery options now available to them to support both regeneration and housing delivery objectives.

### Strategic Objectives

In assessing a range of options available to the Authority in taking forward a property development company the Council must first of all agree the parameters by which options will be measured.

The option which provides the best strategic fit should be the option that is pursued through to full business case stage and presented to Cabinet during April/May 2017.

To enable the options to be measured it has been necessary to establish a range of Strategic Objectives. The Strategic Objectives have been developed from a number of different Council documents and provide a comprehensive list of items that the Council is seeking to promote through a property delivery company.

The list below provides an analysis of the Strategic Objectives that will be used to measure each of the options considered. This list has been agreed by the Senior Executive Member.

### Wirral MBC's involvement in the Property Company is to:-

- Secure local economic growth.
- Make a positive contribution towards delivery of the Asset Transformation Programme.
- Contribute to ensuring that businesses encouraged to invest in the Wirral have access to property that meets their needs and delivers business rate growth.
- Better utilise the Council's assets to drive socio economic change to secure a sustainable future for the benefit of the community.
- Maximise the Council's financial return from the disposal of its land and property assets, with a preference to generate secure revenue income streams.
- Positively contribute towards the Council's Medium/Long Term Financial Strategy (LTFS).
- Improve the environment.
- Ensure the Council is not exposed to undue financial risk.
- Comply with its obligation to obtain best consideration reasonably obtainable on a disposal of its land.

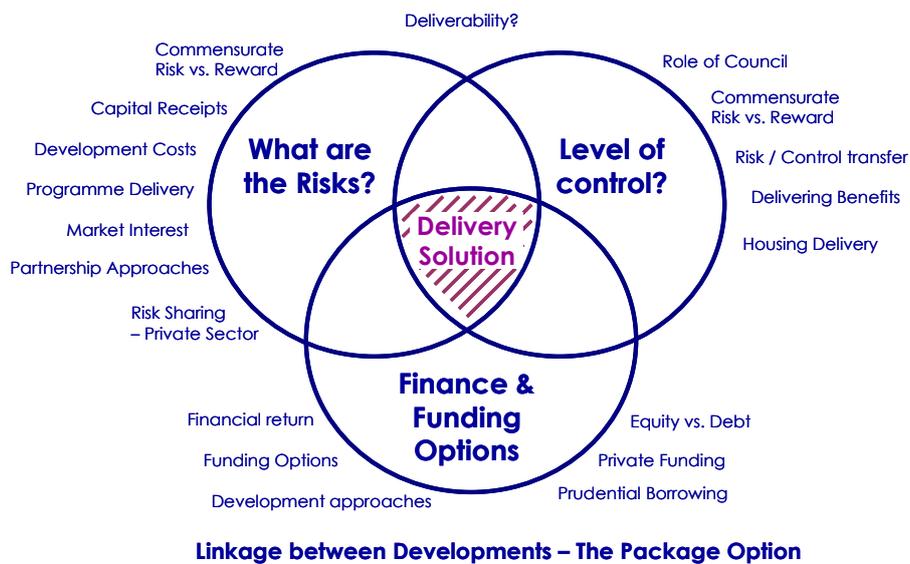
- To ensure and encourage additional private sector investment, capacity and capability is enabled to support the broad regeneration objectives of the Council

**Delivery options**

To understand the most appropriate method of delivering the required investment for regeneration and the most suitable direction of travel that best meets the Councils key strategies, priorities and objectives, a number of interrelated questions need to be considered. They focus on three major factors:

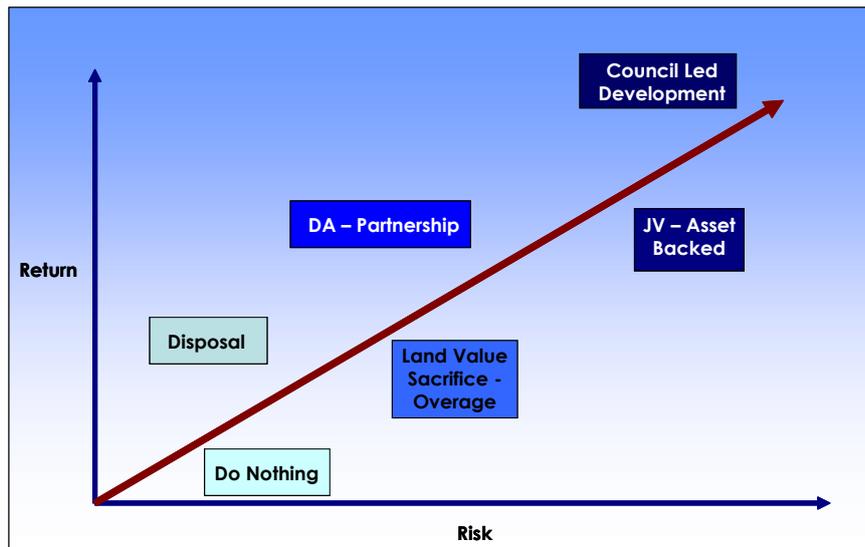
- What are the risks to the programme?
- What role should the Council take in its delivery? And
- What are the key financial and funding implications?

The approach and answers to these questions will help develop the potential delivery solution(s) for the programme at large. These issues are summarised in the diagram below:



Through our commission, we will review these points in arriving at an agreed way forward, and in doing so provide the Council with a range of solutions that are optimum in attracting investment to the Birkenhead area and other key sites to support the delivery of the regeneration required to boost the economy further.

The illustration below provides a high level view of risk and reward in relation to a range of differing delivery options available to the Council.



In the current market there is significant evidence that developers are interested in the potential to share risk and reward with the public sector over a longer period, and in many cases this is preferable to a traditional purchase/disposal/development agreement approach where all risk is taken by the private sector.

Following some initial work with the Council we have identified an appropriate range of options to be considered in this report.

**Options to be considered**

The table below sets out the options that are intended to be tested through the outline appraisal report due to be presented to Cabinet during February 2017. These options are based around our experience and knowledge as professional advisors and are the common routes that many Local Authorities are considering when seeking to establish property development companies.

<p><b>Option 1 - Do Nothing (Business as Usual)</b></p>	<p>The Council takes no action and current delivery arrangements continue. Individual development projects will be brought forward and contractual arrangements entered into with developers on an ad-hoc basis.</p>
<p><b>Option 2 - Arm's length wholly owned company</b></p>	<p>The Council establishes wholly owned company with clear governance and structure. The company would report directly to the Council's Cabinet.</p>
<p><b>Option 3 - Public Public corporate body</b></p>	<p>The Council and other public sector partners seek to establish a Mayoral Development Corporation or a company with clear governance and structure, for example through the Combined Authority or with the Pension Fund. The MDC/company would report directly to the Council's Cabinet.</p>
<p><b>Option 4 - Joint venture company</b></p>	<p>The Council will seek to create a company not governed by public law through the procurement of an investment/development partner following an OJEU procurement route.</p>

[Note that reference to a company in this paper includes other forms of vehicle including community benefit societies and Limited Liability Partnerships.]

In assessing the above options we will need to consider the impact on the Council of the following areas:-

- The extent to which the option meets the Council's strategic objectives and long term growth and regeneration objectives
- Delivery of holistic solutions
- The extent of Council control or influence
- Risks and the extent to which these are borne by the private sector
- How will the option maximise returns and value to the Council
- How well structured is the delivery mechanism
- Flexibility - The procurement and financial implications of implementation
- How will expertise be provided to ensure the success of the option
- Resources required to support the company from the Council
- On-going governance arrangements /how decisions are made/accountability to the Council

Each of the options will also be considered in relation to how they best fulfil the strategic objectives of the Council as set out above.

### 3. Delivery Options Appraisal

In support of a robust and credible Council decision it is necessary to review a range of delivery options that support the fundamental objectives of the Council. In assessing the options, we will identify which option provides the best strategic fit to support the Council objectives. This option will then be taken forward through to full business case stage and represented to Cabinet in April/May 2017 for formal agreement.

In advising the Council we have identified a range of options available to consider in taking forward the objectives. The list below describes the options to be reviewed as part of this section of the report.

The list below highlights the options chosen for review.

- 1) Do nothing (Business as Usual)
- 2) Arm's length wholly owned company
- 3) Public Public corporate body
- 4) Joint venture company

The following section of this report outlines each option in more detail and provides a view of the options covering the following key areas.

- legal powers,
- governance,
- structure,
- risk,
- control,
- funding & finance implication for the Council,

#### Option 1- Do nothing (Business as Usual)

##### Summary of the characteristics of the option

This approach represents the most commonly used structure to develop land and usually sees a land sale or the Council entering into a "Development Agreement" setting out in advance the detail of how a scheme (or batch of schemes) will be developed. The developer is normally in control and the land transfers either on draw down or completion of the development. The Development Agreement could also incorporate on-going management provisions. Various financial permutations are possible, including a combination of fixed land payments and overage. For

example, overage related to the scale and/or performance of the scheme can be paid to the Council, as landowner on an open book phased basis or upon completion.

This option assumes that the Council continues to operate within its existing arrangements with no or very little scope to adopt a multi-site consistent view. Historically the Council has supported some regeneration activity. The principle way in which this has occurred is through two main routes, being:-

- Site Disposal
- Development Agreements

**Site Disposal**

The simplest method of bringing land to the market is through the use of traditional avenues such as site disposal or through development agreements. A straight disposal or asset sale provides the Council with a capital receipt that could be used to support the delivery of the Councils wider regeneration objectives. Disposals of this nature are dependent on market conditions in achieving the best price, and in some instances the Council may wish to consider how this price is reflected in their responsibility to achieve “best consideration”.

Straight disposals are most suitable to individual low value sites, with space or development constraints that lead to a low development value, or where the Council have no interest in the asset for future regeneration purposes.

**Table 1 – Advantages & Disadvantages of Asset Disposals**

Advantages	Disadvantages
The Council can release additional value in the site but not expose themselves to the risks associated with development and delivery of the private sector development.	The Council loses control, other than through planning requirements of the delivery of the sites. This includes quality, design and provision of public space.  In addition, the Council cannot guarantee that development will take place, as the viability and control of the site now rests with the new land owner.
The capital receipt is realised at the point of sale, before any development is undertaken, thereby mitigating the risks associated with development and delivery.	The Council would lose any uplift in value of the site as a result of the development activities.
If the site has a high value or worth to developers then this is the lowest risk option in securing a capital receipt.	Securing Best Consideration i.e. identifying a true land value is difficult to assess in today’s market as prices fluctuate and are considered to be at the low end of a larger cycle.
The Council can look at opportunities to de-risk elements of a site e.g. remediate a site. This in turn will increase the value of any capital receipt that could be taken from a	Retention of a capital receipt from Housing Revenue Account (HRA) land or HRA assets is currently bound by HRA legislation and may be subject to restrictions of use, including pay

Advantages	Disadvantages
disposal.	back to central government.

As identified in the table above, this approach is less risky for the Council as it is taking no development or sales risk, instead choosing to cash in on the value of the site and leaving all of this risk to the private sector. However, it should be noted that all development reward would also pass to the private sector resulting in a potentially significantly lower receipt to the Council. For some sites this may be wholly appropriate as the Council may not wish to undertake significant commercial or private housing development, however, in other circumstances the benefits of Council delivery of affordable housing or community assets may be significant.

**Development Agreement**

The Council can dispose of an asset or site by a more traditional Development Agreement structure. In this option the Council sells or transfers the land for a consideration, thereby entering into a developer agreement. The agreement will be to develop the site, subject to the planning conditions attached.

It is at the developers' discretion as to how best to meet the planning requirements through delivery of the development, a decision that will be based on viability and profitability of the site. Each agreement is usually linked to a timescale to encourage delivery. The Council obtains "best consideration" but some or all of the consideration may be deferred, in return for which the Council will require 'step in' rights through a building lease.

The variant option, which has been used throughout the last the economic downturn, is if the developer struggles to finance the development, financial assistance is given by the Council in terms of a development loan on commercial terms.

The loan is provided under the current prudential powers and is subject to a commercial rate that satisfies OJEU and state aid regulations. Loan repayments are made on contractual terms agreed at the commencement of any financial assistance.

**Table 2 – Advantages & Disadvantages of Development Agreements**

Advantages	Disadvantages
The Council will secure a capital receipt, potentially with some overage payments, for the site. This receipt will be low risk and is generally due once development is undertaken. In addition, the Council may wish to secure a deposit for the site in lieu of payment when the development agreement is placed.	If structured in the traditional manner the capital receipt will be based on current value of the site. It will not recognise any uplift in value as a result of work completed on site or uplift in the land, housing and commercial markets. Land payments in developers' agreements are often paid on completion of the development. This places the Council receipt at risk. The deferred payment will also have an opportunity cost to the Council.
If the scheme agreed by the Council is an attractive project to the private sector then a	The Council has little control over the actual design and delivery of the project. The

Advantages	Disadvantages
variety of different solutions may be put forward for the site. In doing this the Council can draw together the best from a number of different approaches.	development agreement will be granted against an indicative scheme and the final development will be based on viability and profitability. In addition, once the agreement has been granted the Council will find it difficult to amend or adjust the scheme.
The Council is able to impose some conditions and requirements on the development through both the planning process and the developers' agreement, thereby ensuring that the development will go some way to meeting its overall aspirations.	Currently, there is a high political risk with a development agreement option as it provides no guarantee of actual development taking place. Development agreements are often time limited and these options can expire.
The Council can ensure that development occurs and is funded by the developer through the disposal of an asset	In the current economic conditions and the decline in the housing market the true land value is difficult to determine. Too high a value will make the development seem unviable to developers, too low a value will not provide best consideration for the Council and its assets.
The majority of the risk with delivering the site is passed to the developer; as such this represents a low risk option for the Council in securing development.	Any unknown site conditions or additional requirements may impact on viability of the scheme and may lead to changes in the proposal originally put forward.

### Do Nothing (Business as Usual) - Summary analysis

The extent to which the option meets the Council's strategic objectives and long term growth and regeneration objectives	<ul style="list-style-type: none"> <li>• Lacks a "master planning" overview – sites brought forward on an ad-hoc basis and subject to market view on whether individual sites can make an appropriate return.</li> <li>• Unprofitable sites would not be developed.</li> <li>• Unlikely to fulfil all of the Council's long term regeneration objectives.</li> <li>• Financial returns are limited, and unlikely to provide long term revenue income streams.</li> </ul>
Delivery of holistic solutions	<ul style="list-style-type: none"> <li>• No long term partnership, so no incentive for private sector to look for longer term return.</li> <li>• Solutions will be dictated on a per site basis, by interests of the developer of that site.</li> <li>• Inconsistent developments.</li> <li>• Solutions less likely to take into account social factors as financial return will be the primary driver for individual developers.</li> </ul>

The extent of Council control or influence	<ul style="list-style-type: none"> <li>• Council has a degree of control and influence over a sale or the terms of the Development Agreement, but is otherwise placed in a passive role, relying upon planning controls or monitoring the scheme.</li> <li>• Controls set out in development documentation agreed on a per site basis.</li> <li>• Council will be "arm's length" from decision-making by the developer. Whilst the Development Agreement can incorporate a "governance protocol", developers will need an incentive to allow the Council to "interfere" (as they see it) in their development process; but such involvement may bring risks of procurement challenge.</li> </ul>
Risks and the extent to which these are borne by the private sector	<ul style="list-style-type: none"> <li>• Market forces risk is borne by the Council – the development will only proceed when the market supports the development.</li> <li>• Planning and site assembly risk often remains with the Council.</li> <li>• Main development cost risks transferred to the private sector.</li> </ul>
How will the option maximise returns and value to the Council	<ul style="list-style-type: none"> <li>• No ability to lock in private sector returns from one site to "pump prime" or forward fund further sites, unless the Development Agreement covers a batch of sites (even then, a developer is likely to want to realise returns from one site without restriction).</li> <li>• Limited to capital receipts, with some flexibility to deliver ground rents depending upon structure of disposals.</li> <li>• Some sharing of improved returns through overage may be possible, but these agreements in practice do not often deliver.</li> </ul>
How well structured is the delivery mechanism	<ul style="list-style-type: none"> <li>• Development Agreement route is "tried and tested" and represents a structured means of delivery.</li> <li>• EU procurement implications where the Council receives an asset or places control over the development (other than through the planning process).</li> </ul>
Flexibility	<ul style="list-style-type: none"> <li>• Little flexibility as the design/ specification of the schemes are generally fixed at the point of contractual/ financial close.</li> </ul>
The procurement and financial implications of implementation	<ul style="list-style-type: none"> <li>• No procurement implications of a pure land sale.</li> <li>• Relatively simple to set up a development arrangement for a single scheme – a development partner for a single or number of schemes can be procured in six months.</li> <li>• There may be a number of procurements/ Development Agreements entered into in the long</li> </ul>

	<p>term. This means the Council does not benefit from any economy of scale and will incur repeated medium/ high start-up costs to procure a development partner.</p> <ul style="list-style-type: none"> <li>• May not achieve best value due to current property market and funding market.</li> <li>• Private sector partner carries funding risk. Council should seek a parent company guarantee where appropriate.</li> </ul>
How will expertise be provided to ensure the success of the option	<ul style="list-style-type: none"> <li>• To a limited degree, the Council benefits directly from private sector experience.</li> <li>• Council not expected to provide any expertise, but private sector cost likely to be higher as a result.</li> </ul>
Resources required to support the company from the Council	<ul style="list-style-type: none"> <li>• Minimal resource implications for operation.</li> <li>• Council is not required to provide capital or debt finance, other than equivalent land value if consideration is deferred pending successful development.</li> </ul>
On-going governance arrangements /how decisions are made/accountability to the Council	<ul style="list-style-type: none"> <li>• Council control over decision-making through usual processes and procedures (executive functions).</li> <li>• Council has a degree of control and influence over the terms of the sale or the Development Agreement, but is otherwise placed in a passive role, monitoring the schemes/disposals. The Council may have 'step-in' rights if the developer fails or buy-back rights if land sold for development is not carried out after a number of years, depending upon the terms.</li> </ul>

## Option 2 - Arm's Length Wholly Owned Company (WOC)

### Summary of the option

The Council establishes a wholly owned and controlled company with clear governance and structure. The company would report directly to the Council's Cabinet. There is a need to question how much independence this company would have in practice, depending upon how it is structured and the freedoms to operate commercially in the market. It may be able to leverage more finance but this in practice would be 'on balance sheet' finance. Also this depends upon precisely what it is doing – is it development, land promotion, development management – acting like a commercial developer within Wirral or outside as well? The company may need to recruit and employ staff to take forward development.

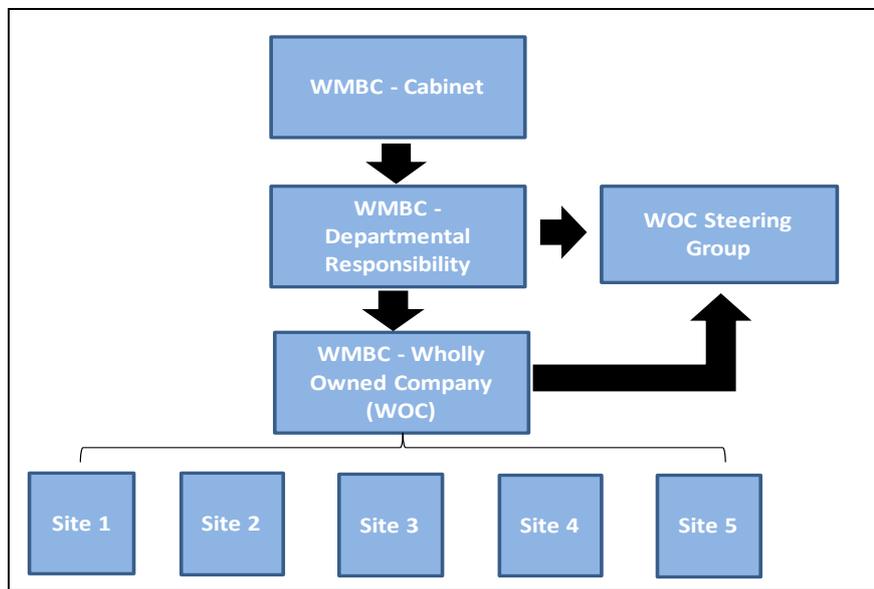
There are a number of powers that may be used to form or participate in a company and these include incidental powers in section 111 Local Government Act 1972; commercial purposes powers in section 95 Local Government Act 2003 or sections 1 & 4 Localism Act 2011; or for regeneration purposes under section 1 Localism Act 2011.

**Key Characteristics**

- Arm's length vehicle that is 100% owned and controlled by the Council.
- Day to day management is undertaken through a clearly defined governance arrangement which reports directly into the Councils Cabinet structure.
- Establish a Board structure with potential to appoint high profile credible Chief Executive.
- The company can be separately branded and marketed and appear distinct from the Council.
- Can second staff to the company from the Council and establish a small but focused delivery team that will not be distracted from the core business of the company.
- Company may be a "Contracting Authority" in procurement terms.
- Funding and other risks in practice are likely to need to be underwritten by the Council.

**High level Relationship Structure**

The below chart provides an overview of the corporate structure that would be taken forward should a Wholly Owned Company (WOC) be established.



The below table provides an analysis of the key characteristic of the option and what the potential impact will be on the Council.

<p>The extent to which the option meets the Council's strategic objectives and long term growth and regeneration objectives</p>	<ul style="list-style-type: none"> <li>• Council signs off company's business plan, thereby controlling the delivery of objectives to a much higher degree than under option 1.</li> <li>• The Council is able to control what the company does</li> </ul>
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	and may therefore require the company to deliver both profitable and un-commercial development.
Delivery of holistic solutions	<ul style="list-style-type: none"> <li>As above, the Council can dictate the delivery of solutions – however, unless the company generates new solutions (usually through recruitment and employment of a new team), to what extent will the company do more than Option 1 above.</li> <li>Opportunity to develop new brand with separate vehicle – more potential to be a development arm of another public sector body than if asset development undertaken "in-house" per Option 1, for example to assist in delivery of the One Public Estate arrangements.</li> <li>Also, a clearer, more focussed remit for the development function, away from the other operational distractions of working within the Council.</li> <li>Could be a commercial company, not limited in the amount of income which can be received from acting on behalf of other organisations.</li> <li>A separate company may be better able to promote the Council's assets for development through the local plan and planning process.</li> </ul>
The extent of Council control or influence	<ul style="list-style-type: none"> <li>Higher than under option 1, although level of day to day influence may be lessened if the Board includes non-Council representation or if most decisions delegated down to senior (non-Board level) management team employed by company.</li> <li>Significant decisions outside of the approved business plan are likely to require Cabinet approval (unless delegated).</li> </ul>
Risks and the extent to which these are borne by the private sector	<ul style="list-style-type: none"> <li>Unless and until the company is self-funding, the Council will retain a measure of working capital risk.</li> <li>Delivery risk transferred to company, although the Council may need to stand behind the company.</li> </ul>
How will the option maximise returns and value to the Council	<ul style="list-style-type: none"> <li>The Council is likely to receive best consideration from land and developer profit (unlike option 1), however for the developer profit to be maximised, the company will need to ensure that it employs market leading commercial and development skills (itself or on a contractual basis).</li> <li>There may be limits on what a new wholly owned company may borrow thereby limiting the developments that take place.</li> </ul>
How well structured is the delivery mechanism	<ul style="list-style-type: none"> <li>Establishing a local authority company is a well-established delivery mechanism.</li> </ul>
Flexibility	<ul style="list-style-type: none"> <li>Some flexibility but company will be subject to full requirements of Local Authorities (Companies) Order 1995. A summary of those requirements can be</li> </ul>

	provided.
The procurement and financial implications of implementation	<ul style="list-style-type: none"> <li>• The company is still likely to be a "contracting authority", requiring EU procurement compliance (unless established for purely commercial purposes). In this case the Council may contract with the company as it wishes (subject to limits) and vice versa.</li> <li>• Assuming the company is purely commercial and not a "contracting authority", the Council cannot award contracts directly to the company free from procurement requirements – the company will be in competition with other potential suppliers. Reduced partnership with the Council.</li> </ul>
How will expertise be provided to ensure the success of the option	<ul style="list-style-type: none"> <li>• No ability to leverage off private sector expertise, unless provided to the company or bought in. Company may need to recruit and employ directly a new team to deliver objectives.</li> <li>• Possible TUPE transfer of some of the Council's existing function?</li> </ul>
Resources required to support the company from the Council	<ul style="list-style-type: none"> <li>• Resources required to effect transfer of assets and working capital to deliver development programme until receipts are received.</li> <li>• Significant resources will be incurred by the Council in establishing the WOC most of which will need to be externally procured.</li> <li>• Will an entity with no trading history have a better reception from the market than the Council?</li> <li>• The Council may be called upon to bolster company activity through guarantees (consider State aid risks) or loans. State aid issues may arise on a transfer of assets to the company unless transferred at best consideration. Security required from the company if consideration for land is deferred.</li> </ul>
On-going governance arrangements /how decisions are made/accountability to the Council	<ul style="list-style-type: none"> <li>• More freedom and flexibility from Council decision making, though Cabinet is responsible for establishing the company and reserved decision-making through usual processes and procedures (executive functions).</li> <li>• Delivery should be quicker than under Option 1 and commitment of assets (depending on how committed) may offer greater freedom from Council control.</li> <li>• Council has less day to day control – greater potential for disputes to arise between Council and company over direction and control of business.</li> <li>• Conflicts of interest can arise between the Council and the company – these can be managed through Council and company policies, so policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected members and officers should be wary of sitting on both shareholder Council and Board of company, or of exercising more than one role in relation to a given development (e.g.</li> </ul>

	on behalf of the Council as landowner and planning authority)).
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### Funding & Finance options,

The initial setup costs of the WOC will need to be met by the Council. This could be arranged through a working capital facility agreement between the two parties. Ultimately the facility will be repaid using the proceeds of developments.

This option would also require the Council to adopt the same role as a commercial developer.

It is likely that the Company would need to secure development expertise to support the company's activity. The cost of this would need to be met by the company. In addition, but fundamental is that the WOC will need to secure construction expertise and capacity to support development activity.

In the short term this cost is likely to require direct financial support from the Council in the form of a working capital facility.

Many types of Councils have used wholly owned companies as a means meeting the challenges associated with housing delivery and some for wider regeneration.

## Option 3 – Public Public Corporate Body

### Summary of the option

The Council and other public sector partners seek to establish a corporate body which could be a Mayoral Development Corporation (MDC)/Urban Development Corporation (UDC) or a company with clear governance and structure, for example with the Pension Fund or other One Public Estate Partners, building upon the Wirral Asset Strategy and Wirral Partnership. The Council's involvement in such a company would be governed directly by the Council's Cabinet. The Council may or may not have control of the company, depending upon what is negotiated with the partners.

A corporate structure with other public partners creates a number of advantages, as set out below, but in comparison to a contractual joint venture, the key advantages include:-

- A true alignment of the public sector interests as partners in the vehicle. This could be articulated in an agreed business plan;
- A separate Board that is at arm's length from the Council which means decision making, provided it is in line with the Partnership Business Plan, can be expedited;
- As a long term vehicle, partners can take a longer view on returns and it is easier to create "cross-subsidy" between development of the better and poorer assets;
- There is a clearer sharing of returns rather than relying on potentially difficult overage structures.

The Council and other public sector partners seek to establish a Mayoral Development Corporation or a company with clear governance and structure, for example through the Combined Authority or with the Pension Fund.

The only powers to form an MDC at present are through the Combined Authority (CA) with government approval and this means that the Mayor of the Liverpool CA (once elected) would have significant control over the delivery of the plans for an MDC. Also because of the need for legislation (a statutory Instrument to create the MDC) and the speed of being able to agree the modus operandi of the MDC with the Mayor (likely to be a year or two) an MDC structure is therefore discounted as a realistic option. Likewise a formal UDC would need legislation and a significant lead in time for creation and is therefore discounted. Alternatively partnering with other public bodies such as the Merseyside Pension Fund (to provide investment funding for regeneration within the Wirral (up to an agreed limit)) and/or One Wirral Public Estate Partners could deliver a public public joint venture regeneration vehicle that would be of benefit to the area.

**Key Characteristics**

<p>The extent to which the option meets the Council's strategic objectives and long term growth and regeneration objectives</p>	<ul style="list-style-type: none"> <li>• The Council would not have sole control in this option and therefore this would limit the extent to which it is able to deliver the Council's aspirations.</li> <li>• Council signs off company's business plan, but in partnership with other stakeholders.</li> <li>• Progress may be slower than in Option 2 due to the involvement of other public body stakeholders.</li> </ul>
<p>Delivery of holistic solutions</p>	<ul style="list-style-type: none"> <li>• Council may have stronger influence than other partners on the delivery of solutions depending upon how the company is structured - and potentially in relation to its own land in the Wirral – however, unless the company generates new solutions (usually through recruitment and employment of a new team), to what extent will the company do more than Options 1 &amp; 2 above?</li> <li>• Opportunity to develop new brand with separate vehicle – more potential to be a development arm for several public sector bodies than if asset development undertaken "in-house" per Option 1, or through a wholly owned company in Option 2, for example to assist in delivery of the One Wirral Public Estate arrangements.</li> <li>• A clear strategy has already been developed with Partners in the Wirral Public Estate Group which has a joint asset management system.</li> <li>• More focussed remit for the development function, away from the other operational distractions of working within the Council.</li> <li>• A separate company may be better able to promote the Council's assets for development through the local plan and planning process.</li> <li>• Could be a commercial company, not limited in the amount of income which can be received from acting on behalf of other organisations or could be regeneration focussed.</li> </ul>
<p>The extent of Council control or</p>	<ul style="list-style-type: none"> <li>• Level of day to day influence will be lessened as the</li> </ul>

influence	<p>Board will include non-Council representation and where decisions are delegated down to senior (non-Board level) management team employed by the company.</p> <ul style="list-style-type: none"> <li>• Significant decisions outside of the approved business plan are still likely to require Cabinet approval (unless delegated).</li> <li>• Council has control/influence through participating directly in decision making and through the adoption of business plans and documentation agreed with the Council at the outset.</li> <li>• A corporate structure creates a legal entity that can enter into agreements itself.</li> </ul>
Risks and the extent to which these are borne by the private sector	<ul style="list-style-type: none"> <li>• Unless and until the company is self-funding, the Council will retain a measure of working capital risk.</li> <li>• Delivery risk transferred to company, although Council may need to stand behind the company, as may other partners.</li> </ul>
How will the option maximise returns and value to the Council	<ul style="list-style-type: none"> <li>• The Council is likely to receive best consideration from land and developer profit (unlike option 1), however for the developer profit to be maximised, the company will need to ensure that it employs market leading commercial and development skills (itself or on a contractual basis).</li> <li>• Development profit will be shared with other partners.</li> <li>• There may be limits on what the company may borrow thereby limiting the developments that take place.</li> <li>• Potential for additional CA funding if an MDC (but there will be many calls for support on CA growth funding).</li> </ul>
How well structured is the delivery mechanism	<ul style="list-style-type: none"> <li>• Establishing a local authority company is a well-established delivery mechanism.</li> </ul>
Flexibility	<ul style="list-style-type: none"> <li>• Some flexibility but company will be subject to Local Authorities (Companies) Order 1995 (depending upon how the company is structured this could be minority interest requirements rather than full requirements). A summary of those requirements can be provided.</li> </ul>
The procurement and financial implications of implementation	<ul style="list-style-type: none"> <li>• The company is still likely to be a contracting authority, requiring EU compliance, unless established for purely commercial purposes.</li> <li>• Assuming the company is purely commercial and not a contracting authority, the Council cannot award contracts directly to the company free from procurement requirements – the company will be in competition with other potential suppliers.</li> <li>• Reduced partnership with the Council.</li> </ul>
How will expertise be provided to	<ul style="list-style-type: none"> <li>• No ability to leverage off private sector expertise,</li> </ul>

<p>ensure the success of the option</p>	<p>unless provided to the company or bought in. Company may need to recruit and employ directly a new team to deliver objectives.</p> <ul style="list-style-type: none"> <li>• Possible TUPE transfer of some of the Council's existing function?</li> </ul>
<p>Resources required to support the company from the Council</p>	<ul style="list-style-type: none"> <li>• Resources required to effect transfer of assets and working capital to deliver development programme until receipts are received.</li> <li>• Will an entity with no trading history have a better reception from the market than the Council or any of the other partners on a contractual basis?</li> <li>• The Council and partners may be called upon to bolster company activity through guarantees (consider State aid risks). State aid issues may arise on a transfer of assets to the company unless transferred at best consideration.</li> <li>• Funding may be more straightforward with a pension fund partner but skills may still need to be acquired/procured.</li> </ul>
<p>On-going governance arrangements /how decisions are made/accountability to the Council</p>	<ul style="list-style-type: none"> <li>• More freedom and flexibility from Council decision making, though Cabinet is responsible for establishing the company and decision-making through usual processes and procedures (executive functions).</li> <li>• Delivery may be quicker than under Option 1 but potentially slower than Option 2 and commitment of assets (depending on how committed) may offer greater freedom from Council control.</li> <li>• Council has less day to day control – greater potential for disputes to arise between Council, stakeholders and company over direction and control of business.</li> <li>• Conflicts of interest can arise between the Council and the company – these can be managed through Council and company policies, so policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected members and officers should be wary of sitting on both shareholder Council and Board of company, or of exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)).</li> <li>• Risk of dispute or deadlock between the Council and other partners resulting in breakdown of the property company, through pre-agreed dispute resolution mechanism.</li> </ul>

**Funding & finance options**

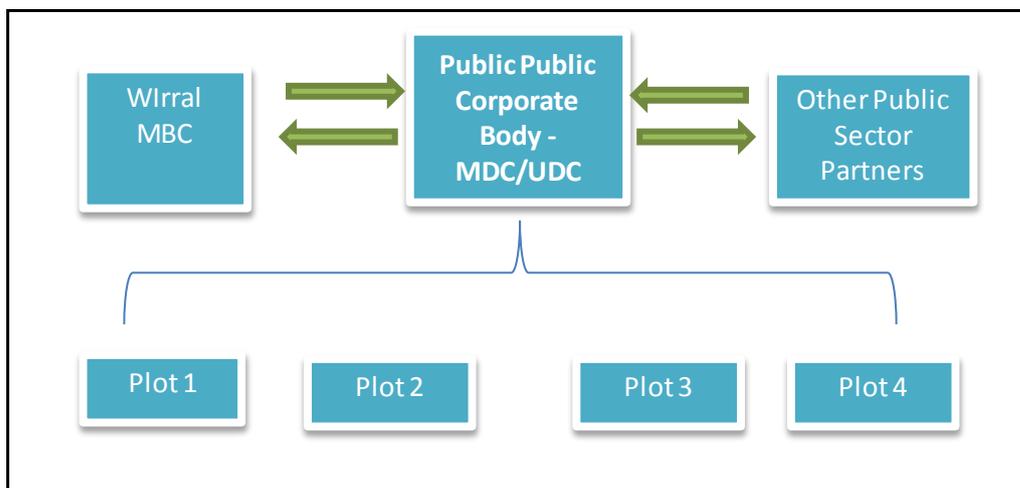
Although some of the joint venture structures differ, generally the following funding and finance assumptions will apply:-

- The Council invests its land as equity;
- Public partners will invest their land and/or cash on commercial terms;
- The balancing cash requirement of the company is likely to be provided by some form of debt facility. The debt facility is likely to be provided by a bank or the partners and could include the Council, as long as this is input in a state aid compliant manner.

The company would most probably acquire the land from the partners but could acquire other land as well. The Council will need to ensure it has satisfied the legal tests in relation to best consideration to enable the land to transfer.

**High level Relationship Structure**

The below chart provides an overview of the corporate structure that would be taken forward should a Public Public Corporate Body were to be established



**Option 4 – Joint Venture Company**

**Summary of the option**

Joint ventures are becoming the main way that the public sector can leverage private **investment** and **expertise** to support regeneration objectives. There are many different types of joint venture to consider, the selection of the type of structure is important as it will set the tone of the arrangement between the parties going forward.

Joint venture structures are becoming the preferred way that Investors and developers participate in regeneration activity with the Public Sector. Both the public and the private see joint ventures as a way of driving value out of public assets.

The Council will seek to create a company through the procurement of an investment/development partner following an OJEU procurement route. It is likely that this would be a 50:50 Joint Venture (JV) company that would be a commercial body, not governed by public law.

A 50:50 JV company would require the partners to be treated equally, especially in terms of the manner and amount of investment and the returns on those investments. A typical structure is shown below. It is also important that the partners are treated equally in the context of avoiding unlawful state aid. This means that equity investment should be at the same level and loans to the company

should attract a commercial rate of interest that meets state aid rules. From the Council's perspective this provides the potential to establish a revenue income stream for the Council in addition to other income it may receive from the JV.

In this section we will review the main components of a corporate joint venture from the Council's perspective; we will not be focusing on a contractual joint venture. The main difference between the two types of JV is that in a contractual joint venture scenario the Council would not transfer its assets up front.

A corporate joint venture creates a number of advantages, as set out below, but in comparison to a contractual joint venture, the key advantages include:-

- A true alignment of the public and private sector interests as partners in the vehicle. This could be articulated in an agreed Partnership Business Plan;
- A separate Board that is at arm's length from the Council (with up to 50% representation by the Council) which means decision making, provided it is in line with the Partnership Business Plan, can be expedited;
- As a long term vehicle (10, 15 or 20 years), partners can take a longer view on returns and it is easier to create "cross-subsidy" between development of the better and poorer assets;
- The private sector partner can be financially incentivised to add value to pipeline assets;
- There is a clearer sharing of returns rather than relying on potentially difficult overage structures

The Council will seek to create a company not governed by public law through the procurement of an investment/development partner following an OJEU procurement route. Our advice is to establish a non – contracting authority as this would provide a greater level of flexibility going forward and would be the preference of a development/investment partner.

**Key Characteristics**

<p>The extent to which the option meets the Council's strategic objectives and long term growth and regeneration objectives</p>	<ul style="list-style-type: none"> <li>• More likely to fulfil all of the Council's objectives, especially a more holistic asset transformation programme and financial returns.</li> <li>• Business opportunities for the property JV (as a separate entity) to competitively tender for regeneration and property development projects/opportunities in Wirral and beyond its boundaries not involving Council land.</li> </ul>
<p>Delivery of holistic solutions</p>	<ul style="list-style-type: none"> <li>• Delivery of holistic and comprehensive regeneration across a number of sites, including cross-subsidisation.</li> <li>• Opportunity to develop new brand with separate vehicle – more potential to be a development arm than if asset development undertaken "in-house" per Option 1.</li> <li>• Joint JV investment should incentivise the private sector partner to deliver over the long term.</li> <li>• Opportunities to work with Partners in the Wirral Public Estate Group where there are joint asset management projects.</li> <li>• More focussed remit for the development function, away from the other operational distractions of</li> </ul>

	<p>working within the Council.</p> <ul style="list-style-type: none"> <li>As a separate company better able to promote the Council's assets for development through the local plan and planning process.</li> </ul>
The extent of Council control or influence	<ul style="list-style-type: none"> <li>Council has control through participating directly in decision making and through the adoption of business plans agreed with the Council at the outset.</li> <li>Council has control and influence over the terms of the contractual documentation with the partner and the JV company.</li> <li>A corporate structure creates a legal entity that can enter into agreements itself.</li> <li>A 50/50 JV that allows the Council to "deadlock" unacceptable private sector proposals (thereby preventing development the Council does not want to see through a negative veto).</li> <li>Level of day to day influence will be lessened as the Board will include non-Council representation and where decisions are delegated down to senior (non-Board level) management team employed by the company.</li> <li>Significant decisions outside of the approved business plan are still likely to require Cabinet approval (unless delegated).</li> </ul>
Risks and the extent to which these are borne by the private sector	<ul style="list-style-type: none"> <li>Transfer of development costs and risks to the JV and private sector partner.</li> <li>Risks around the Council's investment in the JV company especially in first few years, probably largely through deferred consideration for land, requiring security and on the same basis as the private sector partner.</li> <li>Identifying sites for development through Cabinet reports and the procurement process can raise community expectations for delivery.</li> </ul>
How will the option maximise returns and value to the Council	<ul style="list-style-type: none"> <li>Council will take a share of the development profits and income generated.</li> <li>Requires defined development pipeline to maximise success and investment opportunities.</li> <li>Development is likely to proceed more quickly to ensure the private sector partner delivers returns on their investment.</li> </ul>
How well structured is the delivery mechanism	<ul style="list-style-type: none"> <li>Well structured. A corporate structure creates a legal entity that can enter into agreements itself to resource and deliver development.</li> <li>Risk of JV partner "cherry picking" commercial sites for development rather than community sites lower than Option 1 due to negative veto.</li> </ul>

Flexibility	<ul style="list-style-type: none"> <li>• Flexibility to include additional development sites, without the need for a separate procurement, provided within original scope.</li> <li>• Flexibility of operation but company will be subject to minority interest requirements of Local Authorities (Companies) Order 1995. A summary of those requirements can be provided.</li> </ul>
The procurement and financial implications of implementation	<ul style="list-style-type: none"> <li>• For the Council to run an OJEU process is likely to be resource intensive and expensive. .</li> <li>• Risk of not securing the agreement of the Council to proceed and high start-up costs to establish the JV that will be abortive if the Council decides not to proceed.</li> <li>• Potential market saturation with demand outstripping supply of suitable JV partners.</li> <li>• Risk of not being able to secure the right JV partner following procurement.</li> <li>• Short term increase in the cost of the Capital Programme due to the delay associated with creating a property JV.</li> <li>• Establishment of a partnership where profit can be reinvested in future, more challenging projects.</li> <li>• Leverage of significant private sector investment.</li> </ul>
How will expertise be provided to ensure the success of the option	<ul style="list-style-type: none"> <li>• Council benefits directly from private sector experience and expertise to enhance and realise asset value.</li> <li>• Brings the skills required to deliver the programme and/or experience of acquiring them.</li> </ul>
Resources required to support the company from the Council	<ul style="list-style-type: none"> <li>• Resource intensive to establish the JV, less so during operation.</li> <li>• Monitoring and evaluation important.</li> <li>• Resources required to effect transfer of assets and working capital to deliver development programme until receipts are received.</li> <li>• Even though it will be an entity with no trading history it will have a better reception from the market than any of the other options, due to the private sector partner's reputation and track record.</li> </ul>
On-going governance arrangements /how decisions are made/accountability to the Council	<ul style="list-style-type: none"> <li>• More freedom and flexibility from Council decision making.</li> <li>• Cabinet remains responsible for establishing the company and reserved matter decision-making through usual processes and procedures (as involvement in a company is an executive function)</li> <li>• Council capacity to match the capacity of JV partner to serve on the property JV Board and make decisions.</li> <li>• Conflicts of interest between elected Members /</li> </ul>

	<p>Officers and their Council roles if on the property JV Board need to be managed.</p> <ul style="list-style-type: none"> <li>• Potential conflict between the Council as a 50% property JV partner, the statutory objectives of the local planning authority and any future changes in political priority.</li> <li>• Risk of deadlock and breakdown of the property JV, through pre-agreed dispute resolution mechanism.</li> </ul>
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**Funding & finance options**

Although some of the joint venture structures differ, generally the following funding and finance assumptions will apply:-

- The Council invests its land as equity;
- A Partner will invest equivalent cash;

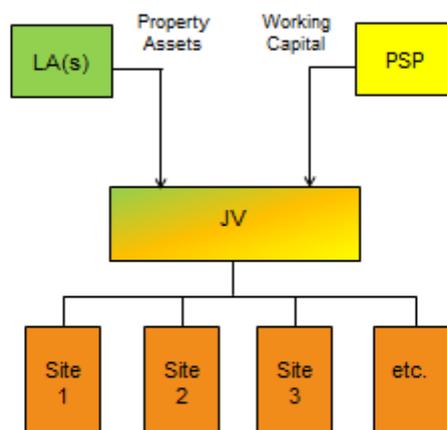
The balancing cash requirement of the company is likely to be provided by some form of debt facility. The debt facility is likely to be provided / arranged by the partner rather than the Council however the Council can in some circumstances provide working capital, as long as this is input in a state aid compliant manner. This provides the opportunity for the Council to establish a revenue income stream.

The JV would most probably acquire the land from the Council. The Council will need to ensure it has satisfied the legal tests in relation to best consideration to enable the land to transfer.

**High level Relationship Structure**

The below chart provides an overview of the **one** of the potential structures that could be taken forward should a joint venture corporate body be established. The diagram below provides some analysis of a company or Limited Liability Partnership (LLP) structure. Separate corporate bodies may be formed in relation to the development of individual sites to ring-fence development for onward sale or to ensure transparency on costs etc.

**Typical Property Joint Venture - LABV**



A usual joint venture structure is shown in the diagram above. In this scenario the Council would:

- Through procurement, select a private sector joint venture partner that would both resource the preparation of a 'masterplan' for each of the sites, secure planning permission, and where necessary fund infrastructure and any off-site highway or other works;
- Agree to commit its land assets to the 50/50 joint venture upon agreed pre-conditions being met. These would be articulated in an agreed business plan and would include issues such as: viability, preferred phasing, a delivery strategy (this could include partial development but also plot sales), and funding;
- Once committed the Council would receive a loan note at an agreed coupon (interest) rate and at the same time the private sector partner would need to match the equity value of the Council's land with equity (cash and loan note);
- The JV would then raise development debt against the combined value of the land and matched equity and then deliver the scheme in accordance with the business plan and associated site specific development strategy;
- Upon the completion of agreed milestones (or financial hurdles), surpluses would be distributed to the Council and its private sector JV partner in accordance with the respective shares;
- Governance and dispute resolutions provisions would be in place and are expanded upon later in this report.

## Assessment of the options

Based on a range of key assumptions and experience of similar arrangements an assessment of the options has been made to seek to identify which option provides the best strategic fit with the Council objectives as set out in section 2 of this report.

The table below provides an assessment of the options against the objectives set. Each option has been scored in relation to its positive contribution towards the objectives. The team has assessed each option using their professional judgement based on knowledge and experience of other similar scenarios. The scores methodology is based around "0" being a poor strategic fit and "10" being a good strategic fit.

Strategic Objectives		Option 1	Option 2	Option 3	Option 4
1	Secure local economic growth.	3	5	7	8
2	Make a positive contribution towards delivery of the Asset Transformation Programme.	3	6	5	6
3	Contribute to ensuring that businesses encouraged to invest in the Wirral have access to property that meets their needs and delivers business rate growth.	2	4	7	7
4	Better utilise the Council's assets to drive socio economic change to secure a sustainable future for the benefit of the community.	2	6	7	8
5	Improve the environment.	4	4	8	7
6	Maximise the Council's financial return from the disposal of its land and property assets, with a preference to generate secure revenue income streams.	4	8	6	8
7	Positively contribute towards the Councils Medium/Long Term Financial Strategy (LTFS).	2	6	6	9
8	Ensure the Council is not exposed to undue financial risk.	7	4	5	8
9	Comply with its obligation to obtain best consideration reasonably obtainable on a disposal of its land.	7	7	5	7
10	To ensure and encourage additional private sector investment, capacity and capability is enabled to support the broad regeneration objectives of the Council	4	5	8	9
<b>Total Score</b>		<b>38</b>	<b>55</b>	<b>64</b>	<b>77</b>

Note: Scoring of each option is based around the options ability to positively contribute towards delivery of the objective. 0=option does not positively contribute, 10=option make a full and positive contribution towards the objective.

As the table shows option 4 scores highest and therefore we would recommend taking this option forward through to full business case stage as the preferred option.

The preferred option section of this report provides greater detail in relation to the option.

## 4. Preferred option

Following on from the selection of Option 4 as the preferred option this section of the report provides more detail in relation to the joint venture option. This section of the report provides an overview of the key points to consider when establishing a joint venture.

In principle the Council will seek to create a company not governed by public law through the procurement of an investment/development partner following an OJEU procurement route.

It is anticipated that the Council will require a partner whom has sufficient “equity/cash” to invest alongside the Council's existing asset base in forming a joint venture. In addition the partner will need to demonstrate development expertise and a credible track record of comparable developments. The Council envisages that for the joint venture to be successful it will require the development skills to be provided by the partner.

The full detail of this option will be further developed in consultation with the Council Officers and Members prior to the full business case being presented to Cabinet in April/May 2017 for consideration. However this chapter provides an overview of the follow key areas of consideration:-

- Legal Powers used to establish the preferred option
- Governance Arrangements
- Board Composition – Directors
- Potential conflicts of interest
- State Aid
- Structure available
- Risk
- Soft Market Testing
- Potential “Value Capture” Methodology

### Legal Powers

Local authorities can do what they are statutorily empowered to do and what may be inferred by the language of an Act of Parliament. The Council's vires to participate in the development vehicle need to be rooted in a specific power, otherwise the Council's actions will be open to challenge. This is particularly important if the proposed course of action is potentially contentious or novel, or

moving into commercial territory where competitors may be ready to question the Council's basis for the enterprise. The position in relation to local authority vires has changed significantly in recent years with the introduction of the general power of competence in the Localism Act 2011 (LA 2011), which provides a wide power to do anything that an individual may do.

In exercising any power or duty local authorities must act for proper purposes, in good faith and must exercise their powers properly, following proper procedures in a "Wednesbury reasonable" manner. In other words Councils must act for proper motives, taking into account all relevant considerations, ignoring irrelevant matters, not acting irrationally and balancing the risks against the potential rewards. Additionally, local authorities must consider the usual fiduciary, best value, crime and disorder reduction, equalities, health and wellbeing and any other relevant overarching duties to take into account when making decisions, as well as any explicit requirements placed on a power.

An authority's motivation is important in determining whether or not it can use any particular power, because matters pursued for certain objectives will be lawful, but if pursued for other objectives may be unlawful. If a statutory power is exceeded or used for an improper purpose, then its use can be challenged in the courts. A decision to enter into arrangements will be tainted if there is an improper purpose which is the sole, dominant or primary purpose. A decision may also be tainted if the improper purpose had a material influence. However, an incidental or collateral benefit from the use of a statutory power within its limits and for a proper purpose can nevertheless be lawful.

However, before considering the effect of the LA 2011 provisions on local authority vires, it is important to note that local authorities already have wide ranging powers in relation to property, to facilitate their responsibilities to provide and develop assets for the benefit of their areas. These powers include the following:

- sections 120 to 123 of the Local Government Act 1972 (powers to acquire, sell and appropriate land);
- sections 2, 3 and 5 of the Local Authorities (Land) Act 1963 (powers to develop land);
- Part 2 of the Housing Act 1985 (powers to acquire, develop, sell land for housing purposes);
- sections 24 to 26 of the Local Government Act 1988 (powers to provide 'financial assistance' including to subscribe for shares in companies for privately let housing);
- sections 227 and 233 of the Town and Country Planning Act 1990 (acquisition and disposal of land for planning purposes);
- powers to invest for the purposes of their functions or treasury management purposes; and
- miscellaneous other powers.

A combination of these specific powers would usually be sufficient for a local authority to undertake any property acquisition, development, sale, rental or related project in its area where at least part

of the motivation was connected with the broad benefit or improvement of its area. There may be additional powers related to specific activities which the Council can rely upon and these should be confirmed once the proposals are refined. Further details of the specific powers can be provided on request.

In addition:

- section 95 of the Local Government Act 2003 enables Best Value authorities to trade for a commercial purpose anything that is related to a function of the authority or is ancillary, conducive or facilitative to the exercise of that power, provided that trading is delivered through a company under Part V Local Government and Housing Act 1985 or community benefit society, not an LLP;
- the LA 2011 creates a general power of competence, as a much broader "power of first resort" (though like section 95 projects pursued for the primary purpose of commercial trading must be through a Part V company or community benefit society, pursuant to section 4 of the LA 2011); and
- the Council has various additional ancillary powers (for example, section 1 of the Local Government (Contracts) Act 1997 and section 111 of the Local Government Act 1972).

Where the primary motives are regeneration and asset transformation/development, the Council does not need to establish a 'commercial purpose trading company' under section 95 or the LA 2011, even though it is desirable to secure financial returns. Where the primary driver is commercial profit like any other private developer then a section 95 or LA 2011 company or community benefit society may be appropriate.

The Council should therefore be able to root specific development proposals in specific powers and to form appropriate corporate vehicles (for example, a company or an LLP, as a wholly-owned vehicle or joint venture), whether for the better discharge of its functions, regeneration, asset transformation or for some other purpose.

## Governance

A company is a separate legal entity distinct from the Council and any other owners/partners. The Council will need to consider a range of governance related issues, including:

- the division of responsibilities between shareholders/members (as owners) and directors, and matters reserved to the shareholders/members;
- directors and company secretaries, their duties and potential liabilities (where the vehicle is structured as a company);
- board composition;
- managing conflicts of interest, for both Council officers and elected members; and
- the requirements of Part V of the Local Government and Housing Act 1989 and the Local Authority Companies Order, where relevant to the particular company.

In a company limited by shares, the owners are its shareholders. Shareholders ultimately control the company through the ability to appoint and remove directors on the company's board and certain statutory rights to make decisions in the form of special and ordinary resolutions. In addition,

shareholders may exercise control in accordance with the rights given to them either in the articles of association or a shareholders' agreement.

For local authority wholly or jointly owned companies, it would be normal for a shareholders' agreement to be put in place to provide the Council with strategic control over the operation of the company through the right to approve a business plan and certain "reserved matters". A sample list of reserved matters can be supplied, but they reflect the decisions which are often important enough to the owners of a separate vehicle to warrant the owners' specific approval. The type of decisions usually included in lists of reserved matters include:

- entering transactions of a significant scale;
- changing the type of business undertaken;
- buying or selling a significant part of the JV undertaking unless envisaged by the agreed business plan;
- admitting new shareholders to the company;
- changing the constitution of the company; and
- winding up the company.

The reserved matters would need to be modified to suit the particular governance requirements of individual vehicles and may require negotiation where third parties are involved in the vehicle as this is a key control mechanism which the council can exercise over the vehicle. A balance needs to be struck between maintaining appropriate control but also to recognise that the vehicle is operating with public money and giving the vehicle sufficient freedom and flexibility to operate commercially.

The Council will need to decide who it wishes to exercise its shareholder function. Given the function is about the strategic control over the company's activities, it would be usual for this function to be exercised by the Council's members. Depending on the level of control retained under the shareholders' agreement, this could be:

- through all shareholder decisions going to Cabinet;
- a committee of the Cabinet being established to undertake some or all decisions;
- certain decisions being delegated to certain member(s) (e.g. a portfolio holder) and/or senior officers.
- If a matter is not by law or through the vehicles governing documents reserved to its owners, then it is effectively delegated to those persons charged with management responsibility within the vehicle. In a company, this group is the board of directors.

### **Directors and board composition**

Directors owe a number of duties under the Companies Act 2006 and the common law generally and a summary of the principal duties and liabilities of directors is set out below. Additionally, it is commonplace, though not essential, for a private company to appoint a secretary. Directors will be in control of the operation and management of the company, subject to the control which the owner(s) have under the articles of association and any shareholders' agreement.

There is no set template for the size or composition of the board of a company. There are however a number of issues to be considered when deciding on the make-up of the board:

- the appropriate size for a board;
- the appropriate mix of skills and experience needed to lead a successful enterprise;
- the need to demonstrate sufficient control; and
- the potential for conflicts which could hinder the effective operation of the board (or indeed the Councils).

Although the company will be a body which is owned in whole or in part by the Council, it must be allowed to operate as a separate enterprise. The company's board therefore needs to be of a sufficient size to ensure an appropriate spread of skills and experience but not so large so as to inhibit fast and flexible decision making, sometimes to tight commercial timescales. We would usually consider that a board of between 4 to 7 individuals (with the ability of directors who cannot attend any meeting to send agreed alternates/substitutes) to be a workable size.

The Council will need to consider ideally what skills and experience are needed from individual directors to drive the company forward and make it successful. This will depend on the type of business the company will be undertaking and also on the commercial nature of the enterprise. Council members and officers, who may not have a commercial background, will need to be supported by a commercially astute company board. In this context the private sector partner may offer such skills or a non-executive director may be appropriate.

In terms of the different "types" of people who may be considered for board membership, these can be identified as follows:

- elected members of the Council (non-executive directors);
- officers of the Council (also called non-executive directors), i.e. officers who are not transferring to the company but are staying in their Council roles;
- senior managers/employees of the company itself (executive directors), i.e. officers who have either transferred/been seconded from the Council to the company or have been directly recruited by the company. It would usually only be the Chief Executive who would be considered for a director role as well as their employee roles; or
- independent people selected (ideally through open recruitment to adhere to good governance principles) because they bring specific skills and experience (often referred to as independent non-executive directors).

The question of whether elected members should be on the company board is considered further below from a conflicts perspective. If a view is taken that elected members should be on the company board, it is still relevant to consider what personal skills and experience they are required to bring.

### Summary of Directors Duties

- **to act within powers** – a director must act in accordance with the company's constitution and only exercise powers for the purposes for which they are conferred;

- **to promote the success of the company** – a director must act in a way s/he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so, s/he must have regard to (amongst other things) the following factors:
  - (a) the likely consequences of any decision in the long-term;
  - (b) the interests of the company's employees;
  - (c) the need to foster the company's business relationships with suppliers, customers and others;
  - (d) the impact of the company's operations on the community and the environment;
  - (e) the desirability of the company maintaining a reputation for high standards of business conduct; and
  - (f) the need to act fairly as between members of the company
- **to exercise independent judgement** – this duty is not infringed by acting (i) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by the directors or (ii) in a way authorised by the company's constitution.
- **to exercise reasonable care, skill and diligence** – this means the care, skill and diligence that would be exercised by a reasonably diligent person with (i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company and (ii) the general knowledge, skill and experience that the director has.
- **to avoid conflicts of interest** - a director must avoid a situation in which s/he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).
- **not to accept benefits from third parties** - a director must not accept a benefit from a third party conferred by reason of (i) being a director, or (ii) doing (or not doing) anything as director.
- **to declare interests** - if a director is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, s/he must declare the nature and extent of that interest to the other directors.

Where more than one duty applies in a given case, the directors must comply with each applicable duty. The general duties also do not require or authorise a director to breach any other law.

The general duties apply to all the directors of a company. "Director" is defined in the Act to include any person occupying the position of director, by whatever name called (and can include so called shadow directors being a person in accordance with whose instructions a Director is accustomed to act). The Act makes no distinction between executive and non-executive directors.

The general duties are owed to the company. Two broad implications follow from this:

- Directors must act in the interests of the company, even where they are appointed to the board by a third party, such as the Council. The nominated directors will need not only to avoid conflicts of interest but to avoid the perception of any conflict.
- Only the company will be able to enforce the general duties, although in certain circumstances individual members may be able to bring an action on the company's behalf (often referred to as a derivative action) and creditors may be able to do so where the company is (or may become) insolvent.

It is important to note that the Companies Act 2006 did not codify all common duties and law rules or equitable principles which directors need to consider when exercising their functions as directors. Directors will continue to owe certain equitable and common law duties to the company, such as:

- the duty of confidentiality (this can be particularly problematic where directors are appointed by a third party with potentially overlapping interests); and
- the duty to consider or act in the interests of creditors when the company is insolvent, with a view to minimising losses to them.

Liability for breach or threatened breach of the general duties is personal to the directors concerned and unlimited in scale. Accordingly, it is not possible to quantify the potential exposure of a director. There may be a need to consider insurance and/or indemnity for directors.

### **Conflicts of interest**

In relation to conflicts, there are a number of issues to consider which can impact on the composition of the board and in particular, what role should elected councillors and/or council officers play in relation to the board.

### **Council officers as directors**

Our advice to councils contemplating appointing officers and/or members to a board of a corporate entity which it owns, is generally to avoid councillor directorships. This is because it is easier to manage the conflicts for an "officer director" than for an elected member - the Council can agree to the officer continuing to act as an officer despite potential conflicts; agree not to take action against him/her where s/he is required to act contrary to the interests of the Council due to his/her role as a director; and agree to his/her remuneration as a director (or that the person will not receive any additional remuneration from the Council).

There are three caveats to the recommendation of appointing officer directors which may affect who is identified to undertake this role:

- We would advise against statutory officers (the Monitoring Officer and s.151 Chief Finance Officer in particular) being appointed as company directors as they may be

required to undertake their statutory roles in relation to the company at some point which would raise difficult conflicts;

- There needs to be consideration of the "retained client" role i.e. if all officers who know anything about the services being delivered are either transferred to the company to run them and/or on the company board as a director, who is left to provide the expert, impartial advice to the Council to make decisions about service performance by the company and about decisions in relation to the company in their capacity as owners;
- If officers, who are also company directors, are making decisions (at Council level) about the company, those decisions will potentially be open to challenge because the decision is influenced by bias or the perception of bias (because of their role at the company) and/or by pre-determination (that they have made their minds up because of the company role and are not making the decision objectively and fairly).

It is a criminal offence for officers, under the cover of their office, to accept anything other than their proper remuneration. Accordingly, where officers are appointed as directors by reason of their post within the Council, they may not accept any payment from the company for their services as a director, unless the Council agrees that the additional payment shall form part of the proper remuneration for that role. It is therefore recommended that any officer director should be formally appointed and should formally notify the Council of their interest, and their declaration should be kept on the officer declaration file.

### **Elected members**

It is completely lawful for elected members to be directors of Council companies, however there are some intrinsic conflicts which need carefully to be addressed. These relate both to the Code of Conduct for Members but also to the risk of decisions made by a councillor where s/he is also a director of the company being challenged on the basis of bias or predetermination. It is not possible for the Council to avoid accusations of bias or predetermination, especially if the member is senior. Directorships can therefore constrain elected members' "Council side" activities and inhibit members carrying out their elected strategic policy direction and scrutinising roles.

In the light of this, local authorities often decide only to involve officers in director roles, ensuring that elected members are free to decide key issues about the organisation (i.e. the reserved matters) on behalf of the Council in its strategic role as sole or part owner.

Directors' remuneration (if any) with the company will be governed by the provisions of the Local Authorities (Companies) Order 1995, which restricts the amount of remuneration that a member can receive. This means that they cannot receive any additional remuneration from the company for acting as a director which is beyond the special responsibility allowance they would have received had the activities of the company been discharged by the Council. Any remuneration they receive will be deducted from the special responsibility allowance that they receive within the Council and they may only claim mileage and subsistence at the rates that apply to members. Remuneration would also potentially amount to a Disclosable Pecuniary Interest.

## Practical points

If members or officers are appointed as directors of the company, there will be a number of arrangements/processes to be put in place to ensure that conflicts are properly addressed and managed as follows:

- the constitution of the company should address "inherent situational conflicts" of the Council-appointed directors on the board given that these conflicts can be foreseen because of the links between the councils and the company – this helps to ensure openness of decisions making and probity at the company end of activities;
- appropriate conflicts and interests should be declared and recorded at all relevant company meetings;
- at the Council end, any officer serving as a director on a company must declare interests (and be given the necessary consents to act);
- under s.117 of the Local Government Act 1972;
- under his/her contract of employment; and
- under any relevant code of conduct for officers;
- any elected member serving as a director of a company must declare an interest under the Councillors' Code of Conduct) and comply with other rules about members on companies (including a restriction on any remuneration); and
- there must be arrangements at the Council end to ensure that decisions can be made in relation to the company which are robust. Although all the necessary conflicts and interests can be declared, if decisions are made by the Council by members or officers who have an interest in that decision from a company perspective, there will always be a risk of an allegation of bias or pre-determination being made to challenge that decision.

## State Aid

State aid is a concept which derives from European law. Under the Treaty of the Functioning of the European Union (the **Treaty**), state aid is prohibited unless the aid is expressly permitted under the Treaty or by the European Commission (the **Commission**).

Both the Commission and the European Court of Justice have interpreted the term "state aid" very widely to include many different forms of state financial assistance or economic advantage. As a result, any benefit to an organisation (including a body owned and controlled by a contracting authority) is potentially caught as an aid. Examples of state aid include:

- (a) working capital or other loans;
- (b) provision of premises or use of equipment on a free or discounted basis;
- (c) sales of goods or services to the organisation at an undervalue;
- (d) purchase of goods or services from the organisation at an overvalue;
- (e) provision of grant funding e.g. for the acquisition of assets; and/or
- (f) equity investment.

(Please note that this is not an exhaustive list)

The concept also extends to more complex situations, such as the construction of infrastructure by a local authority which may benefit specific third parties in addition to the local authority itself.

The following four elements need to be present in order for aid to constitute state aid:

- (a) the aid is granted by the member state or through state resources;
- (b) the aid favours a certain undertaking/group of undertakings (i.e. an entity/entities engaged in economic activity) or the production of certain goods;
- (c) the aid distorts or threatens to distort competition; and
- (d) the aid affects trade between member states or is capable of having an effect on cross-border trade.

In assessing whether aid from the state to a recipient is permissible, it should first be considered whether the aid can be brought outside of the scope of the four conditions above (i.e. it can be argued that the aid does not amount to state aid). If each of the above conditions is satisfied, it should then be considered whether the aid is "permitted" aid (i.e. the aid has been approved by the Treaty or Commission).

A number of arguments can be deployed to contend that a proposal is not in fact a state aid. The key arguments which can be made in this respect are as follows:

- (g) **The market economy investor principle applies** - this means that there is no state aid because the benefit flows from a transaction on market-facing terms (for example, a loan is being offered to an organisation by a local authority on the same commercial terms as a private sector investor would offer to that same organisation, whether in terms of anticipated return on capital, charges for use of land or property or otherwise). This is often the easiest way of side-stepping the state aid rules. However, while this may be relatively easy to demonstrate - for example, by market testing or benchmarking the aid with aid available from a private provider - the provision of aid on this basis may mean that the recipient struggles in the early stages of its life. We have summarised some further considerations in relation to the market economy investor principle in Section
- (h) **The aid constitutes infrastructure and development of that infrastructure is within the remit of the local authority** - this would only apply if the infrastructure being developed is genuinely not selective in its benefit to the public such as public realm.
- (i) **There is no impact on competition as the benefit has itself been competed for** - in order to run this argument, an aid giver would need to ensure that a robust procurement programme had been adhered to in respect of the aid.
- (j) **There is no impact on trade between member states** - this argument can be difficult to run and is only likely to be applicable to a very local enterprise providing a service which is not provided elsewhere in the EU. These circumstances are rare and generally confined to cultural activities. In general the EU has taken quite a wide view of the scope for potential impact on trade between member states and has not required evidence of actual impact.
- (k) **The recipient is not operating as an undertaking** (i.e. not engaged in economic activity) for the purpose of the proposed scheme. It is possible for the same entity

to be classified as an undertaking in one scenario but to fall outside of the definition of an undertaking in different circumstances.

### What forms of permitted state aid are there?

Although the Treaty prohibits in principle the grant of state aid, the aid will be deemed acceptable if it falls within any of the following categories:

- (a) any of the exemption provisions, such as the general block exemption regulation (**GBER**) or the de minimis regulations;
- (b) Services of General Economic Interest (**SGEI**) in accordance with the SGEI package of measures;
- (c) the aid has been notified to, and approved by, the Commission under Article 107(3) of the Treaty; or
- (d) the Treaty has declared the proposed aid to be compatible with it under Article 107(2) of the Treaty or elsewhere.

It is important to note that exemptions are analysed separately, but the amounts may be aggregated to avoid member states evading the limits on the proportion of eligible costs they can fund (known as the "intensity of aid").

Categorisation of aid will also extend to the disposal of land and property to any JV company at less than best consideration. There are rules set out in the "Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU" published in May 2016 that require in the case of sales of land, "*an independent expert evaluation prior to the sale negotiations to establish the market value on the basis of generally accepted market indicators and valuation standards*".

The Council will need to ensure that it is not in any way subsidising the business, in a way that a private sector partner would not be subsidising a company or JV company, since that could be a breach of state aid law.

## Structure

The most common forms of corporate vehicle considered or established by local authorities are:

- a private company limited by shares;
- a private company limited by guarantee;
- a community interest company limited by shares;
- a community interest company limited by guarantee;
- a limited liability partnership (LLP); and
- a community benefit society.

We have not included less common corporate vehicles (such as charitable companies as they are unlikely to be appropriate for the type of regeneration/development proposal envisaged) nor unincorporated arrangements (such as a contractual joint venture, limited partnership or traditional partnership), but can include these if requested.

Although this will need to be tested more fully through the full business case stage, we would anticipate that most potential partners would welcome an LLP structure. One clear advantage of an LLP in preference to a company for a local authority venture is that any Council profit would be treated as if made by the Council itself and therefore would not be subject to corporation tax so far as the Council's share is concerned. This may have significant financial benefits so far as a multi-million pound development vehicle is concerned. In another case this amounted to around £40m projected profit over the long term life of a JV vehicle (c 15- 20 years).

A summary of the key features of the common corporate vehicles can be supplied along with a synopsis of the advantages and disadvantages of those vehicles. However, they all share one feature in common – each vehicle has a separate legal personality independent of its "owner". Subject to the rules governing the form of vehicle, it may hold assets in its own name and invest funds. It may sue and be sued in its own name and owe liabilities to others on the same basis. The "owner" will benefit from limited liability in its capacity as owner, although it may of course owe additional obligations to the vehicle or to third parties in respect of the vehicle in other capacities (such as guarantor or funder). It is open to the Council to contractually restrict the vehicle in its business (to what is often called its "objects" or "mission statement") or what it can do (its "powers").

Most vehicles have two layers, the ownership level, often providing broad strategic control; and representation on the decision-making Board or Governing Body or committee of management or similar.

**Risk**

The specific risks for a property company or JV are highlighted below, together with proposals for how these risks can be mitigated.

Risk	Mitigation
EU procurement implications	Bevan Brittan LLP will advise on all EU procurement/compliance issues and how the risks of a potential procurement challenge can be mitigated.
Setting up a property JV will require dedicated resource throughout the procurement and over the life of the JV.	Throughout the procurement process the Council will have the opportunity to consider the level of resources required.
Not securing the agreement of Council to proceed and high start-up costs that will be abortive if the Council decides not to proceed at any stage.	The Council will have the opportunity to consider at each stage of the procurement whether to proceed with a property JV or not.  If progress is made but the Council subsequently decides not to proceed there will be abortive costs to the Council incurred up to that point. There may also be some reputational risk.
Identifying sites for development at the commencement of the property JV process through Council reports and the procurement process can raise community	The Council will adopt a transparent approach to the inclusion of projects in the property JV. A robust information strategy will be used to provide full information on

Risk	Mitigation
expectations for delivery; but also potential objections to the developments before the business case, timing and details of the development project have been created.	the time taken to establish the property JV; the need for projects to be time phased to reflect the commercial relevance and also the Council's priority for regeneration projects; and that the normal planning processes and consultation will be used as projects develop.
Potential for conflict between the Council as a partner in a property company/JV, the statutory objectives of the local planning authority, and any future changes in political priority.	<p>Sites selected for initial development by the property JV will need to be informed by planning policies and guidelines. Site development briefs should be prepared to ensure clarity for any company/JV/partner. Whilst this situation does not presume planning permission, neither should the projects suggest development that would be unrealistic.</p> <p>Maintaining political priority will be assisted by a transparent process and following the establishment of the property JV ensuring the delivery of key commercial and community projects.</p>
Short term increase in the cost of the Capital Programme due to the delay associated with creating a property JV.	Planning significant regeneration projects for Medium term delivery. Robust management of the Capital Programme by Members and Officers to ensure major capital investment is delivered within the property company/JV.
Potential market saturation with demand outstripping supply of suitable joint venture partners.	Soft market testing to be undertaken in preparation for the procurement process.
Not being able to secure the right joint venture partner following procurement.	For a JV it is envisaged that a competitive dialogue procurement procedure will be used. This process will allow the Council to set the selection and award criteria in order to secure the right joint venture partner. It will also provide the opportunity for the Council to define the proposed working relationship for the property JV.
Joint venture partner "cherry picking" commercial sites for development rather than less viable or community sites.	This will be tested fully during the procurement process. The JV company business plan will define the objectives of the Council/ property JV and the priorities for development. The business plan (that will be updated over the life of the property JV) will require approval by the property JV Board, of which Council will be a 50% partner and the Council. Whilst a commercial approach would need to be taken the Council will be able to influence

Risk	Mitigation
	the programme.
Duplication of work / counter-productive work between Council staff and property JV staff.	The appropriateness of transferring some or all of the Asset Management Team will require further consideration. The Council will need to retain access to high level skills for supporting it in its decision making process as a 50% partner in the property JV, including the approval of Site Development briefs. Proposals will be developed and informed by the procurement process.
Council capacity to match the capacity of the joint venture partner to serve on the property JV Board and make day to day operational decisions.	<p>The Council will need to carefully consider the skills and availability of Members and/or Officers to represent the Council on the property JV Board.</p> <p>Bevan Brittan will provide training for representatives on the property JV Board in corporate governance matters including how to deal with potential conflicts of interest.</p> <p>Certain strategic decisions will be reserved to the Council (not the property JV Board), as a 50% partner in the property JV (e.g. approval of all business plans and material contracts that either govern or affect the property JV, expenditure over certain thresholds and appointment of key personnel to the property JV).</p>
Requires defined development pipeline to maximise success and investment opportunities.	At the outset of the procurement the Council will identify the development opportunities for the property JV in the short, medium and long term. The partnership business plan (approved by the property JV Board) will set out priorities for development on a rolling 3 or 5 year basis to maximize success and investment opportunities, balanced against the objectives of the Council and property JV.
May not achieve best value due to the property market and funding market.	The long term nature of the arrangement and opportunity for the private sector to phase developments including "batching" will seek to mitigate against this risk.
Higher rewards need to be balanced against sharing in re-development costs.	It is expected that the Council will take a share in development risk in order to maximise the opportunities for development profit/reward. This will be further tested during the procurement.
Significant deadlock and breakdown of the property JV.	It is expected that the parties will act reasonably in their decision making and in

Risk	Mitigation
	<p>doing so, approve the relevant business plans and development proposals, provided the parties are satisfied and objectives are met, to avoid unnecessary deadlock.</p> <p>If deadlock arises at the property JV Board level, the Board members themselves will try to resolve the deadlock within a reasonable time frame. If they cannot do so, the deadlocked matter will then be referred to senior representatives of the property JV partners. If the property JV partners cannot resolve the deadlocked matter, then a project would not proceed.</p> <p>Where there is deadlock that would prevent the property JV continuing, the legal arrangements will contain the power for one property JV partner to either buy out the other property JV partner at a valuation to be agreed or to call for the winding up of the property JV.</p>

### Soft Market Testing

To enable further refinement of the preferred option as it is developed through to full business case we would recommend undertaking a soft market testing exercise. The principle reason for undertaking such an exercise is to obtain market evidence to the robustness and credibility of the commercial proposition that the Council wishes to pursue and to informally test the way the Council intends to bring the proposition to the market. One of the other key benefits of market testing is that it will enable the Council to better understand the list of potential developers and investors who are interested in supporting delivery in the region.

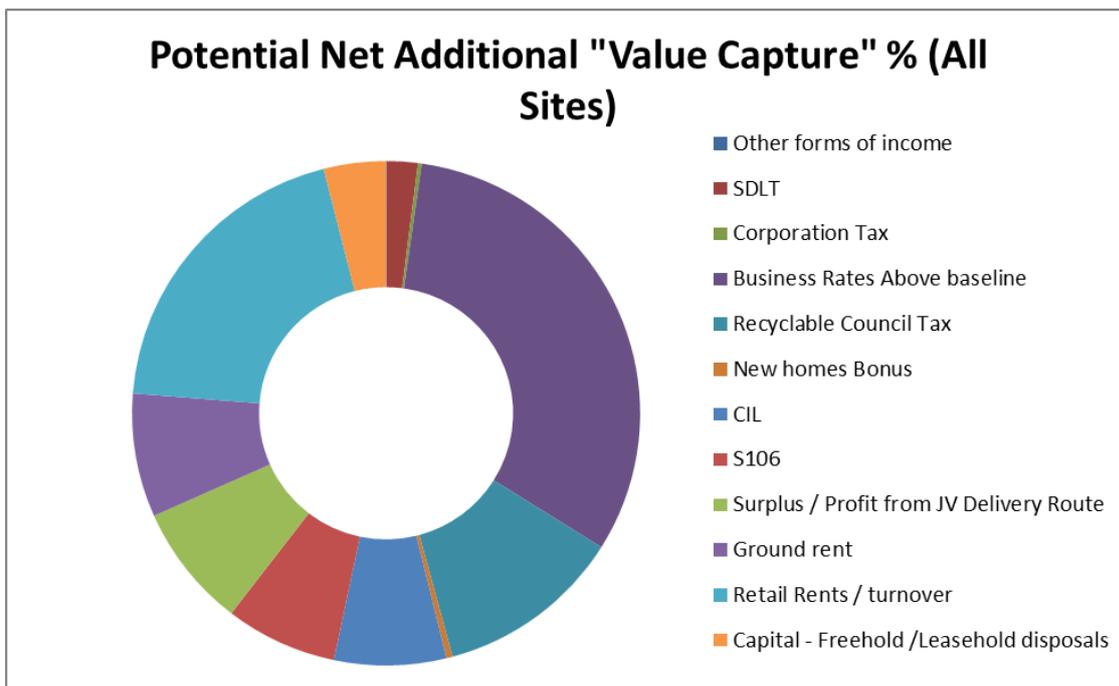
The feedback from the exercise will be used to help inform the preferred structure of the proposition within the full business case presented to Cabinet during April / May 2017.

### Value Capture Methodology.

In addition to the direct benefits that will arise from the joint venture arrangement the Council will also expect to benefit from other financial output of commercial development. These benefits are likely to take the following form:-

- Additional business rates growth(above the baseline)
- Additional Council tax growth (above the baseline)
- Community Infrastructure Levy (CIL)
- Section 106 contributions
- New Homes bonus
- Potential for betterment levies

The diagram below provides an illustrative example of the level of "value" that would be typically be generated from multi-site development.



As part of the full business case we will make an assessment of the likely value that will be created through the company that will positively impact on the Councils Financial position.

## 5. Next Steps in securing a partner

This section of the report provides an overview of the key stages that the Council must consider in taking forward the preferred option, through to full business case stage.

Although this section of the report covers a number of areas for consideration the main focus is around the procurement procedure that is envisaged will be followed, following approval of the Full Business Case in April/May 2017.

### Procurement Procedure Selection

#### Background

The Council has asked us for advice on the most suitable procurement procedure in order to be able deliver the Property Joint Venture and be in a position to recommend the appointment of a partner to Cabinet for approval late in 2017. It is taken as read that the Council will need to procure a development partner with which to form a Joint Venture (JV) corporate body, because it will be looking for skills and investment to join (on a *pari passu* basis) to exploit the opportunities that the Council's land holdings and the rest of the Wirral has to offer.

Pure land transactions fall outside of the EU procurement regime, but where the Council has control over development or join with others to exploit opportunities, that will not be the case.

The Public Contracts Regulations 2015 (as amended) (the **Regulations**) apply to "contracting authorities". Companies which are held to be contracting authorities are subject to the application of EU procurement rules when they award contracts for goods, services and works where the estimated value of the relevant contract is above certain EU thresholds or if the opportunity has a realistic prospect of cross border interest.

- The current EU procurement thresholds impacting on local authorities are as follows:
- Supplies and services - local authorities - £164,176
- Works and concessions - all contracting authorities including local authorities - £4,104,394
- Light touch regime for services - all bodies including local authorities - £589,148

The Council (and also a company if it is also a contracting authority) will need to consider procurement law when it needs to engage with external organisations for works, supplies or services to further the delivery of the scheme. It may be that the Council is able to progress certain strategic and site assessment work from its internal resources and will need further external expertise at some point (be it advisory consultancy services, design services or the implementation of construction works to develop the sites).

#### Advertised competition

Where the EU procurement rules are engaged for above threshold contracts then an advertised competition needs to be conducted under the relevant procurement rules.

Where the full scope of the Regulations applies then there are various procedures which would need to be followed in order to award a contract. A common form of competition is to use the **restricted procedure** which involves 30 day OJEU advertising period, followed by a shortlisting of bidders to

participate in a tender stage. The shortlisted bidders would then normally have at least 30 days to prepare a tender. Once an award decision has been reached then the unsuccessful bidders are debriefed and a 10 standstill period needs to be observed before the contract is entered into. So typically, it would in theory be possible to conduct a procurement exercise from OJEU to award in a 3 – 4 month period using this procedure. However, the Council would also have to budget time in preparation of the procurement documents (including the contract and evaluation methodologies) which normally would have to be available when the OJEU notice is published.

However, the restricted procedure prohibits negotiations on the fundamental aspects of the contract and therefore is a rather inflexible procedure when a complex contract needs to be awarded. In those circumstances a **competitive dialogue or competitive negotiated procedure** is often used which allows for the gradual reduction of the number of bidders/solutions during the process and negotiations to be conducted on the contract and technical solution during those stages prior to the submission of a final tender. This is a practical approach so that usually only the final two bidders incur bid costs to produce comprehensive tenders. Similarly, this involves a 30 day OJEU advertising period, but the duration of the other competitive dialogue stages are not regulated so the process can be adapted as to the complexity of the requirement and available time.

Where the Council wishes to involve private sector participation to invest in and deliver the scheme through forming a JV company then that is likely to need to be procured as some form of works contract opportunity or works concession contract.

On the basis that negotiation will be required during the procurement procedure (given the complexity of the commercial issues) the two procedures to consider are:<sup>1</sup>

- The competitive dialogue procedure ("**CD**") (Regulation 30 of the Public Contracts Regulations 2015 (as amended) ("**PCR 2015**")); or
- The competitive procedure with negotiation ("**CPN**") (Regulation 29 of the PCR 2015).

It would be possible to conduct either procedure in the available time although they would have different dynamics for the bidders and the Council.

This paper compares and contrasts the features of the two procedures to assist the Council in deciding which procedure to commit to.

**Stage One OJEU & SQ Selection Shortlisting**

There is no difference in the statutory timetable at this stage. Both procedures require 30 days to elapse between the dispatch of the OJEU Notice and the deadline for the request to participate.

Both procedures require a minimum number of **three** candidates to commence the tender stage, however more may be invited – and no more than 5 as this may become unmanageable.

OJEU AND SHORTLISTING		
	CD	CPN
Minimum time-limit for SQ	<b>30 days</b> deadline for request to	<b>30 day</b> deadline for request to

<sup>1</sup> For the purposes of this advice, we assume that the conditions in Regulation 26 (Choice of Procedure) of the PCR 2015 are satisfied to be able to use CD or CPN.

applications	participate in dialogue	participate
Minimum number of candidates to be invited to participate in tender stage	3	3

**Reduction of Number of Tenderers and Solutions**

Both procedures permit the reduction of the number of tenders to be negotiated (in the case of CPN) or the number of solutions to be discussed (in the case of CD) by having elimination stages. The reduction must be by way of applying award criteria set out in the procurement documents.

In both procedures the recourse to having an elimination stage is optional so that it would be possible to: in the case of CD, to start with 3 bidders and invite all 3 bidders to submit final tenders; or in the case of CPN, to invite 3 bidders to submit initial tenders, and if an award is not reached on the basis of the initial tender, to invite all 3 bidders to engage in the negotiation phase and submit final tenders.

The main advantages of incorporating mid-tender elimination stages are:

**CD**

It is attractive in terms of keeping bid cost risks manageable for bidders in that *outline bid solutions* are assessed in order to reduce the number of bidders and only the two bidder finalists go on to negotiate and submit complete final tenders. At that point they are submitting final tenders as one of two bidders which is a more attractive bid cost investment than all bidders being invited to submit complete final tenders.

Also, if the detailed negotiations (particularly on contractual terms) occur in the second stage of competitive dialogue, this can be resource intensive for remaining bidders and the Council alike and so it is preferable to keep the number of bidders engaged at this stage to a minimum.

**CPN**

In CPN, a similar efficiency can be achieved in that only the two most competitive initial tenders are invited to the negotiation phase in order to keep bid cost risk down for the bidders and negotiation costs down for the Council as to the number of parties engaged.

However, if the Council wishes to make an award on the basis of initial tenders, whilst providing an early award outcome, it does imply that all tenderers commencing the initial tender stage would have to submit complete and fully developed tender offers. This may not be an attractive basis of competition from a bid cost risk point of view when the bidder is one of at least three bidders and initial tenders are lengthy and resource intensive to complete and price.

The main disadvantage of a phased elimination is the additional time in the procurement cycle in order to review and evaluate tenders and then debrief unsuccessful bidders at that stage. However, in a complex procurement, phased elimination through the CD procedure in reducing numbers provides a means of managing bid costs for bidders and the authority alike.

**Ability To Make An Award At First Stage**

This is the unique advantage of CPN in being able to make an award on the basis of the initial tender without having to invoke the second negotiation stage.

In contrast, CD requires the award to be made on the basis of the final tenders and therefore, if a two stage procedure is set out, then the stages ought to run their course.

**Ability To Negotiate At The First Stage**

CD permits negotiations in all dialogue stages and is superior in that regard in allowing that engagement flexibility to improve the suitability of the offers.

Whilst the drafting is not entirely clear, CPN seems to only permit negotiation after the assessment of initial tenders and so is reserved only for the second stage.

**Timetable Constraints At Various Stages**

Whilst the dialogue phases are not regulated in duration, CPN requires that the initial tender phase allow 30 days for the preparation of initial tenders, although in practice this will have little bearing on the procurement planning.

First, the Council in CPN is able to have a shorter period by mutual agreement with bidders (and in the absence of agreement this can be as short as 10 days). So both procedures permit for a very short first stage if the procurement were to be structured that way.

However, if the Council was conducting a CPN utilising the ability to make an award on the basis of the initial tender, the bidders would be required to deliver complete proposals and pricing for (or applicable to) all selected sites in their submissions and this is likely to require a substantial tender return time.

**Preferred Bidder Stage**

An advantage of the CD procedure over CPN is that the CD has a preferred bidder stage where a limited amount of negotiation is permitted to finalise contractual details and confirm financial commitments with the bidder with the most economically advantageous tender.

This flexibility is useful for complex commercial projects where it would otherwise extend the negotiation phase with remaining bidders in requiring all issues to be resolved prior to final tenders being submitted.

OTHER COMPARISONS		
	CD	CPN
Multi-stage procurement reducing bids / solutions	<b>Yes</b>	<b>Yes</b>

option		
Ability to make an award on the basis of initial tender submission	<b>No, if there is a multi-stage competition then the award evaluation is made on the basis of the final tenders requested at the end of the final stage</b>	<b>Yes, it is possible to make an award on the basis of the initial tenders without invoking the second negotiation stage of the competition.</b>
Gradual development of tenders through phases to reduce bid cost risk	<b>Yes, first stage tenders can be a basic version of the requirements of the final tender.</b>	<b>No, if the Council wishes to be able to make award on the basis of initial tenders, those tenders will not be complete and capable of acceptance at that point.<sup>2</sup></b>
Negotiation permitted in first phase	<b>Yes, the Council can decide to negotiate at any of the tender stages during the dialogue procedure prior to the call for final tenders.</b>	<b>No, negotiation reserved for period after initial tenders and prior to the call for final tenders. The initial tenders may not be as attuned to the Council's preferences because of this.</b>
Minimum Timetable requirements for first stage	<b>No prescribed timetable so long as reasonable time provide given the complexity of submission requirements</b>	<b>30 days<sup>3</sup> from invitation to submit initial tenders (25 days where tenders submitted electronically)</b>  <b>However, local authorities have the ability set time by mutual agreement with the bidders (or a minimum of 10 days if not agreed).</b>
Minimum Timetable requirements for second stage (prior to request for final tender)	<b>No prescribed timetable so long as reasonable time provide given the complexity of submission requirements</b>	<b>No prescribed timetable so long as reasonable time provide given the complexity of submission requirements</b>
Preferred Bidder Stage Negotiations	<b>Yes, ability to confirm financial commitments or other terms to finalise the agreement</b>	<b>No, final tenders cannot be refined through further negotiation with the preferred bidder.</b>

### Works Concession Contract Procurement

A works concession contract is a works contract, the consideration for which consists either solely in the right to exploit the works that are the subject of the contract or in that right together with payment. They are characterised by a transfer of operating risk of an economic nature involving the

<sup>2</sup> If the Council does not intend to make award at initial tender, then this stage could operate in the same way as CD as an elimination phase based on a basic version of the final tender requirements. However, this would be dispensing with the main feature and advantage of CPN.

<sup>3</sup> This can be reduced to 10 days when a PIN notice procedure is followed under Regulation 29 and 47 of PCR 2015.

possibility that the provider will not recoup the investments made and the costs incurred in operating the works.

Concession Contracts are regulated by the Concession Contracts Regulations 2016 (CCR 2016). These can be works or services. The essential feature of a concession contract involves real exposure to the vagaries of the market such that any potential estimated loss incurred by the concessionaire is not merely nominal or negligible. This classification may be relevant where the works contractor for a development takes on investment and demand risk for onward sale of developed assets. The CCR 2016 provides a great deal of procedural flexibility over the conduct of procurement exercises subject to some general rules to ensure transparency and equal treatment.

Whether the project is considered a work arrangement under the PCR 2015 or a works concession contract arrangement under the CCR 2016 may be a very fine point and will depend on the commercial make-up of the arrangements. It may have some concession characteristics and features in requiring finance to be raised and shared risk in development through the JV. Whether the Council's intended consideration and investment towards the scheme would sufficiently dilute the private sector partner's risk for it to fall under the PCR 2015 is difficult to gauge at this stage. Also the viability of commercial approaches will need to be explored through the soft market testing.

It should be noted that if the scheme is classified as a works concession contract then the CCR 2016 allows a great deal of procedural flexibility in designing a competition so long as they remain compatible to some general procedural safeguards. Even so, the CD and CPN procedures are often adopted as familiar format of competition to providers in the market. Under the CCR 2016, there remains the 30 days minimum time-limit for OJEU advertisement and SQ return. So whilst a CCR 2016 classification may affect the advertising formalities, the procedure selection approach choices below remain relevant irrespective of the regime it falls under.

## Conclusions and Decision Making

Taking all these factors in the round, our view is that either CD or CPN procedure would be viable to deliver the project but the dynamics and benefits are different.

### *Why should the Council choose Competitive Dialogue?*

Overall the procedure may be more attractive to bidders given the phased development of the solutions with unsuccessful bidders having only expended costs on delivering outline solutions.

The ability to negotiate during both stages of dialogue in a multi-stage procurement is more likely to result in the development of suitable and focused tenders.

Having a preferred bidder stage provides flexibility to resolve final contractual details with the preferred bidder alone.

The trade-off is that there is no early award to the procedure to achieve timetable gains. However, it should be noted that the duration of the dialogue stages are not regulated and the Council has flexibility to set the duration of each stage to suit its requirements. A compact procurement could be achieved with CD using all the benefits described above by prescribing many specification and contractual arrangements to reduce the scope of negotiations and tender requirements.

### *Why should the Council choose Competitive Procedure with Negotiation?*

The main advantage is the ability to make an award on the basis of the initial tenders, which provides an opportunity to make an award without completing the full procurement cycle on a multi-phase procurement. It has the benefit of the flexibility of engaging a negotiation phase if the Council wishes to engage with some of all of the bidders to improve their tender offerings.

However, to achieve an award on the basis of initial tenders, this would entail some compromises as to:

- A lack of opportunity to engage and negotiate with bidders on their initial tenders before they are submitted;
- The requirement for all shortlisted bidders to submit completed tenders to make to make an award on the basis of initial tenders possible; and
- Factoring a longer initial tender stage of sufficient duration for fully scoped and complete tenders to be prepared.

However, this "front-loading" of tender submission would facilitate a shorter second negotiation stage as the Council would be negotiating from fully formed initial tenders positions.

### **Which procedure will complete quicker?**

In theory CPN has the opportunity to reach an early award in the basis of the initial tenders. In practice the gains may be marginal if the negotiation phase is engaged in CPN (and it is likely to be desirable to engage the negotiation phase for an opportunity to refine and optimise the offerings).

CPN would have a longer initial tender phase, but would facilitate a shorter negotiation phase before the submission of final tenders. There is a high bid cost investment for all participants so it will be important to have manageable tender submission requirements to make the project attractive and for bidders to place the initial tender. This suits a procurement process where the Council's specification and contract terms are largely prescribed so that it requires modest investment to complete the tender requirements.

CD has a different dynamic. It facilitates a shorter initial tender phase anticipating a longer negotiation phase with the bidder finalists (before calling for final tenders). Bid cost investment is borne by the bidder finalists and suits a more ongoing engagement and development approach to shaping the tenders. Furthermore, there is a confirming commitment stage where only the preferred bidder is being required to negotiate to complete final details.

### **Which procedure would we recommend?**

In this case we would recommend the CD procedure. The main advantage with CPN is the ability to award on the basis of initial tenders. If this is not utilised, in our view CPN is inferior to CD given the inability to negotiate on the initial tenders and a lack of a preferred bidder stage.

We consider that given the complexity of the requirement, it would not be practical to expect bidders to produce tenders capable of acceptance at initial tenders in CPN without negotiations.

### **Timetable**

For a draft Timetable on the basis of using the CD procedure – see below.

## Status of The JVC as a Contracting Authority

A key question is whether the JV company will itself be a contracting authority and subject to public procurement law. For the company to be a contracting authority, it will need to be a body which is governed by public law.

Under Regulation 2 of the Public Contracts Regulations 2015 a body governed by public law is a body that has all of the following characteristics:--

*(a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;*

*(b) they have legal personality; and*

*(c) they have any of the following characteristics:--*

*(i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;*

*(ii) they are subject to management supervision by those authorities or bodies;  
or*

*(iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;*

All three limbs (a)-(c) must be present for the company to be a body governed by public law, although limb (c) can be satisfied if only one of the subsidiary limbs (i)-(iii) is present. We will look at each limb in turn.

**"(a) [it is] established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.** In broad terms, the words "needs in the general interest" cover needs associated with the public interest which the state itself provides or over which the state has a decisive influence. Where an activity is regulated, then the presence of such regulation indicates that the underlying activity relates to needs in the general interest. There is a low threshold to meeting this test.

If the JV company has "an industrial or commercial character", then it would not be a body governed by public law (and therefore not a contracting authority). If it were to operate in normal market conditions, aimed to make a profit and was exposed to risk of financial loss in its activities, then it would arguably have an industrial or commercial character. The test (of whether an entity has an industrial or commercial character) excludes entities which are corporate bodies which are subject to commercial preferences to purchase efficiently and therefore operate in a fully commercial manner. It is difficult (in general terms) to provide a definitive view on how a court would view the character of an entity as the court would take into account all the legal and factual circumstances of the sector and the commercial orientation of that entity. However, if the company receives funding from, or is insulated against financial risk by the Council if it is to make a loss, it is arguably not exposed to the same commercial pressures as an entity which is competing in the market and has an industrial or commercial character. In this case we would expect all risks and

rewards to be shared equally and the Council should not therefore have greater exposure than its partner. This part of the test overlaps with the later question of whether or not the trading company is financed by the state for the most part (see below).

**"(b) [it has] legal personality";** A JV company or LLP would satisfy this test.

**"(c) [it has] any of the following characteristics:--"** The fulfilment of **any one** of the three criteria contained in Regulation 2(c) (i)-(iii) (see section 2 above) would enable the company to satisfy limb (c) of the definition of "bodies governed by public law". .

**"(i) [it is] financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;"** This depends on the source of any funding. The phrase "for the most part" in was held by the court to mean "more than half". The court also observed that the question should be decided by reference to the finance of the body in question during that budgetary year, considering whether or not the finance during that budgetary year is for the most part (i.e. more than half) from the state. All sources of income must be included in the calculation, including income resulting from purely commercial activity. We would expect not to meet this test as a 50:50 JV with the private sector.

**"(ii) they are subject to management supervision by those authorities or bodies;"** Again any control will be 50:50 JV with the private sector partner.

**"(iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;"** Again this is likely to be a 50:50 JV with the private sector and so the Council would appoint half or less of the Directors.

Overall, it seems likely that the company will have an "industrial or commercial character" because it will be operating as a commercial entity and will be subject to market risk. As a result it is unlikely to be defined as a contracting authority. This means that once the original procurement has been undertaken to find a partner and establish the JV company the JV company will be able to procure outside of EU procurement rules.

However, the JV itself can only provide works and services back to the Council within the scope of the contract and JV opportunity awarded to it so it will still be necessary to properly scope and test the opportunities the private sector partner (through the JV) will be entitled to provide through the procurement. The initial procurement can establish not only the private sector partner in the equity of the JV, but also the supporting supply-chain to serve the Council through the JV.

An investor JVC will not deliver the same "once and for all" procurement benefits if the partner along with a development manager/constructor is not procured through an EU compliant process under the PCR 2015. If only a value for money procurement is undertaken to secure an investor then individual sites that were subsequently developed as Council assets and infrastructure or public realm or where the Council wished to exert more control over a site than planning and usual sale terms may require further procurement and the risk of individual developments being caught would negate the benefits of a swifter initial process.

NB: the Council must be able to resource the preparation, evaluation and decision-making required to meet the timetable below which is ambitious.

DRAFT TIMETABLE – PROPERTY JV PROCUREMENT	
Indicative Timeframe /Date	Stage
March 2017	PIN Notice and soft market testing. MIPIM. Potential bidder day with opportunities and visits to development opportunity sites?
March/early April 2017	Development of procurement documents including SQ evaluation methodology (financial and quality), SQ evaluation questions, draft contracts, CD evaluation methodology (financial and quality), CD evaluation questions. This is because Regulation 53 requires that all procurement documents should be available at the time of the OJEU contract notice publication (though with a works concession contract it is possible to defer tender stage documents release to the commencement of the invitation to tender stage (i.e. after SQ shortlisting))
April/May 2017	Dispatch of the OJEU Notice by the Council in April/May 2017. Procurement Documents made available to Candidates.
Early June 2017	Deadline for SQ to be returned by Candidates to the Council and review and evaluation by the Councils of the SQ. Cabinet approval to selection for the next stage mid-June to late June.
Early July 2017	Invitation to Participate to Dialogue ("ITPD") issued by Council to up to <b>[5 Council to confirm number]</b> shortlisted Bidders. <i>Allow at least four weeks for the first dialogue stage before ITPD submissions are due back.</i>
Beginning August 2017	Deadline for submission of ITPD responses/outline solution tenders to be returned from shortlisted Tenderers to Council. Evaluation by the Council of the ITPD response/outline solution tenders and further shortlisting to <b>[2-3 Council to confirm number]</b> <i>This assumes that the Council will evaluate the outline solutions over August. Given this is over the summer period we have allowed a month for this.</i>
Early September 2017	Tenderers will be issued with an Invitation to Continue Dialogue ("ITCD") <i>Allowing eight weeks for the second stage of dialogue Ideally, we would seek to have 12 weeks for this stage given the complexity of the scheme but a compressed timetable with high frequency of bidder dialogue attendance could be used during these two months.</i>
Late October 2017	Close of Dialogue and issue of Invitation to Submit Final Tenders ("ISFT")
Mid-November	Deadline for submission of Final Tenders to be returned from shortlisted Candidates.
Mid-November to late November 2017	Evaluation of Final Tenders and recommendation to the Cabinet of the Tenderer to be appointed as Preferred Bidder. <i>This allows a relatively short intensive period of two weeks to assess the final tenders.</i>
Early December 2017	Confirming Commitments with Preferred Bidder to finalise contractual documentation. <i>[Proactive scrutiny prior to Cabinet?]</i>
Mid/late December 2017	Cabinet approval of Final Award Decision <b>[Council to confirm actual scheduled meeting date]</b>
Late December 2017	Notification by Council of the final award decision and commencement of the 10-calendar day standstill period.
Early January 2018	Expiry of standstill period.
January 2018	Appointment and entering into contract with the successful Tenderer.
February 2018	Formal launch of JVC
March 2018	On site with first development

## Site Assembly strategy

At the point when the Council formally embarks on the OJEU procurement process it will be necessary to identify the initial assets that are planned to be disposed of to the property company. Although the disposal may take the form of a long lease in many cases, it is important that the Council is in a position to define which assets are going to be subject to potential transfer.

Although an initial review of key assets is underway this process must be concluded prior to full business case approval and the commencement of the formal procurement process to enable the commercial market to have clarity on what they are competitively bidding for.

To enable in contiguous and comprehensive development to occur in certain area of the Borough the Council may elect to acquire assets in advance of transfer to the Joint Venture. Any acquisition is subject to separate approval.

## Governance arrangements to support the project development

The Council has set a challenging timeframe to bring forward the preferred option through to procurement completion, and therefore to ensure adherence to the timetable the project team will have to establish a strong governance arrangements going forward.

The project governance will be managed through the Project Board which will involve officers across the Council together with the supporting consultants.

Bevan Brittan LLP has been appointed to provide legal support to the project as well as leading on the public procurement process outlined in this report. GVA Financial Consulting has been appointed to provide commercial property, finance and delivery advice to the Council. Potentially the Council may need to secure professional Tax advice to support the development of the preferred option.

It is envisaged that the project team will meet weekly following the approval of this report to enable the delivery of a full business case capable of seeking Cabinet approval in April/May 2017. It is anticipated that the project team will continue to meet weekly during the procurement process.

## Finance Assessment of the Joint Venture Options

In developing the full business case it will be necessary to undertake a full financial assessment of the delivery option.

The financial assessment will need to include the following:-

- An appraisal of the Council's sites that potentially form the initial phase 1 disposals to the JV company including a baseline assessment which will provide a minimum return position for the Council.
- Specific financial modelling to consider the financial cash flow of the Strategic Sites in a JV delivery structure.
- Overall cash flow requirement for the JV which will illustrate the financial returns to the Council through its participation in the JV.
- Develop a value capture model which identified the secondary benefits that will flow to the Council, such as additional business rates etc. should development occur.
- In addition we may need to develop a specific private rental sector (PRS) housing financial model.

The financial assessment undertaken by the Council will form part of the assessment criteria of the partner procurement process.

## Conclusions

In conclusion this report has identified option 4 as the preferred option to take forward through to full business case stage.

Subject to Cabinet endorsement of this report the project team will start a soft market testing process to inform the form of the full business case due to be presented to Cabinet in April / May 2017. In addition, a PIN notice will be lodged to inform the market of the Councils intention to undertake an OJEU procurement process to appoint a joint venture partner by the end of this year.