

GVA

GVA Real Estate Finance

An **APLEONA** company

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Report

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Wirral Growth Company

Full Business Case

6th June 2017

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

1. Executive Summary

The Strategic Options Report in relation to establishing a property delivery company was presented to Cabinet on 27th February 2017. Cabinet confirmed the recommended option in the Strategic Options Report of establishing a property company and authorised the preparation of a full business case (FBC) to be developed around the preferred option.

The option endorsed by Cabinet at its February meeting supports the development of a Joint venture vehicle (either a company or more likely a limited liability partnership). The expression "company" will be used throughout this business case to cover reference to the property joint venture, whether it is formed as a company or LLP. This report will consider the implications for the Council of either a Limited liability Partnership (LLP) or a Limited Company (Ltd.) structure. In order to protect the proposed name "Wirral growth company" (WGC) a limited company has been formed with this name, which would be dissolved if an LLP was the preferred vehicle (or the company's name could be changed and potentially used in the group structure).

The purpose of this report is to provide an update of the positive progress made and for Cabinet to provide authority to the project team to start the formal procurement process, as detailed in this report.

The joint venture company once established will give the Council a conduit for its agreed assets to be passed to in pursuit of its strategic objectives. The strategic objectives of the Council that the Joint Venture will seek to address are as follows:

- Secure local economic 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 leasing of its land and property assets, with a preference to generate secure revenue income streams.
- To ensure and encourage additional private sector investment, capacity and capability is enabled to support the broad regeneration objectives of the Council.
- 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.
- 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 from the use of its land.

Following Cabinet's approval of the Strategic Options Report the project team have been undertaking a period of soft market testing with potential bidders. The purpose of soft market testing is to help inform the Council's route to the market. The feedback so far has been positive and the form of the JV as a company/LLP has been seen as attractive to the market, however the exact detail of the transactions and legal framework continue to be developed.

Some headline responses from the soft market testing are as follows:

- Effective Governance and decision making processes are essential;
- There is an expectation that, as part of the procurement process, bidders will be given a 'sample' of sites in order to demonstrate skills and approach;
- This is clearly a Developer lead proposition – not Investor led;
- Clarity on WBC vision is required.

So far as the last point is concerned the Council is in the process of finalising a Strategic Regeneration Framework for Wirral that should provide more clarity over the Council's vision for regeneration.

Structure and Documentation

The expectation is that the JV will be a corporate vehicle owned 50:50 by the Council and a Private Sector Partner (PSP). Both parties will share risks and rewards and will be able to invest in the JV. It may also have subsidiary structures, depending upon the nature and type of development and where the asset will ultimately be held.

Now that procurement rules require the publication of all proposed joint venture documentation at the time the OJEU notice is issued to commence the procurement, members are asked to approve the approach taken following the soft market testing and consideration by officers as this will be the basis of the procurement pack.

A summary of the proposed documentation is as follows:

Procurement documentation

- Draft OJEU Notice
- Guidance for the procurement process – Memorandum of Information
- Supplier Questionnaire (SQ)
- Selection criteria
- Invitation to Participate in Dialogue (ITPD)
- Evaluation criteria for outline solutions and award criteria
- The stage 2 invitation to continue dialogue (ITCD) and the Invitation to submit final tender (ISFT) may be provided later
- Procurement Resourcing Schedule including Wirral Council officer input to the process alongside advisors

Corporate documentation

Constitution of Wirral Growth Company Limited (WGC) – company limited by shares established to protect the name (but considered most likely that the joint venture entity will be an LLP).

Joint Venture Partnership Agreement – between the Council, the Private Sector Partner (PSP) and the LLP (WGC), setting out the constitution of the LLP and regulating the conduct and affairs of each party in relation to WGC (and any subsidiaries of WGC) (Development Subsidiaries). This includes the Procurement Strategy for WGC, the Delegation Policy and the Projects Policy (including in relation to the draw-down of sites and Site Development Plans (SDPs)) and how decisions will be made.

Parent Company Guarantee – between the PSP Guarantor, WGC and the Council, under which the PSP guarantor will guarantee the obligations of the PSP.

Loan Note Instruments – including the Initial & Interim Council Loan Note Instruments; the Council Loan Note Instrument; the Initial & Interim PSP Loan Note Instruments; and the PSP Loan Note Instrument–with WGC as issuer to the Council and/or PSP (as appropriate). There will also be the Development Subsidiary Loan Note Instrument with any Development Subsidiary as issuer to WGC.

Security Agreements - relating to the Council, PSP and Development Subsidiary(ies). So long as the various Loan Notes (relating to the Loan Note Instruments detailed above) remain outstanding, they shall be secured by WGC in favour of the Council / PSP by charging the property, rights and assets of WGC (/any Development Subsidiary which will charge in favour of WGC). Any security granted to the Council and the PSP may, in time, be subject to any security granted with priority in favour of a third party (senior) funder. Inter-creditor Deed (between the lenders)/ Deed of Subordination (in the event that there is senior lending by a third party).

Property Documentation

- Option Agreement (in relation to each Site transferring into WGC) – the Council (as the current holder of the relevant Site(s)) and WGC. WGC would be required to satisfy some pre-conditions before being able to exercise an Option e.g. best consideration and financial returns, planning etc.
- Transfer / Lease – if an Option is exercised the Option Agreement should allow for transfer of the Site by way of lease to the WGC. In relation to the sites which are residential sites it is proposed that the freehold will transfer either to the developer or the residential occupier. For civic accommodation there may be a lease and lease back.
- Development Management Agreement – WGC and Development Manager.
- Pre-Construction Agreement, Development Agreement and/or Building Lease/Licence – this could be an alternative to a lease being granted, whereby WGC is granted a licence to build on the Council's land and negotiate all sales, with the Council then transferring the

completed building/residential units to the end buyer by long lease or freehold transfer with appropriate collateral warranties and assignment of IP rights.

- Building/Construction Contract with appropriate collateral warranties and assignment of IP rights.

Financial case

For the phase 1 sites which are intended to form the basis of the initial period of development activity undertaken by WGC, we have developed a market facing financial model that illustrates the potential value to the Council of its participation in the company. From the initial financial modelling undertaken of the phase 1 assets it is anticipated that the Council will yield a positive financial return following the development of the assets.

Overall this can be accounted for by three main characteristics:

- Return of land injected into the JV of £26,324,373
- Interest paid to the Council on its loan notes of £2,692,987
- Potential profit share from the Joint Venture of £25,537,369

This position excludes any other wider financial benefits such as business rates and Council tax growth, potential increases in land values (over time and as areas are developed in due course) and community benefits that may not otherwise be available.

It is important to note a number of key assumptions have been made in relation to the modelling work as follows:

- In offering some of the phase 1 assets to WGC the Council will forego annual revenue income in the region of £200,000; this revenue loss will need to be mitigated by forecast profit share income generated by the company. Additionally the Council will benefit from no longer paying for the maintenance costs of assets that have transferred.
- The Council is likely to support the development of Birkenhead town centre through its new civic presence, if this was not the case it will reduce the overall financial benefits associated with the scheme.
- From the land receipts the Council will be required to pay the HCA £2m in relation to the Bromborough former MOD site.
- The individual site proposals which have been developed are based on known capacity constraints and assumed end uses, and valued using current market data. The partner selected may elect to bring forward the sites in a different way, which will potentially change the overall financial proposition; however the approach adopted so far is reasonable.

- During the procurement process the financial model will be updated to reflect the revised proposals and the outcome. This updated model will be used to make the decision to finalise the contractual relationship with the partner selected and establish the joint venture LLP.

Through the procurement process the bidders will be asked to provide a baseline analysis of 14 sites (representative sample) for them to demonstrate their approach to the sites. The Council will assess each of the bidder's submissions and compare the financial outputs to the baseline model which supports this report.

It is envisaged that the initial identified phase 1 sites to support the procurement excise will cover the five areas of Birkenhead, New Brighton, Bebington, Wallasey and Bromborough.

Subject to approval of this report it is anticipated that the next steps will be as follows and identified in the table below:-

DRAFT TIMETABLE – PROPERTY JV PROCUREMENT	
Indicative Timeframe /Date	Stage
March 2017	PIN Notice and soft market testing. MIPIM. Bidder days with opportunities and visits to development opportunity sites
March/April/May 2017	Development of procurement documents including Selection Questionnaire (SQ) evaluation methodology (financial and quality), SQ evaluation questions, draft contracts, Competitive Dialogue (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))
19 June 2017	Cabinet approval of procurement, with 5 clear days for call in or special urgency consideration
19 June 2017	Dispatch of the Works Concession CD OJEU Notice by the Council. Procurement Documents made available to Candidates.
19 July 2017	Deadline for SQ to be returned by Candidates to the Council and review and evaluation by the Council of the SQ. Cabinet approval to selection for the next stage early to mid-July.
Early August 2017	Invitation to Participate to Dialogue ("ITPD") issued by Council to up to 5

	<p>shortlisted Bidders (6 in the event that the next bidder is close – within 1%).</p> <p>Allow at least four weeks for the first dialogue stage before ITPD submissions are due back.</p>
Early September 2017	<p>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 2 bidders (3 in the event that the next bidder is close – within 1%)</p> <p>Given this is over the summer period we have allowed a month for this.</p> <p>This assumes that the Council will evaluate the outline solutions in September.</p>
Mid - End September 2017	<p>Tenderers will be issued with an Invitation to Continue Dialogue (“ITCD”)</p> <p>Allowing eight weeks for the second stage of dialogue ideally, we would seek to have 8 weeks for this stage given the complexity of the project but a compressed timetable with high frequency of bidder dialogue attendance could be used during these two months.</p>
Late November 2017	Close of Dialogue and issue of Invitation to Submit Final Tenders (“ISFT”)
Mid-End November 2017	Deadline for submission of Final Tenders to be returned from shortlisted Candidates.
End November 2017	<p>Evaluation of Final Tenders and recommendation to the Cabinet of the Tenderer to be appointed as Preferred Bidder.</p> <p>This allows a relatively short intensive period of two weeks to assess the final tenders.</p>
Early December 2017	<p>Confirming Commitments with Preferred Bidder to finalise contractual documentation.</p> <p>[Proactive scrutiny prior to Cabinet?]</p>
December 2017	<p>Cabinet approval of Final Award Decision</p> <p>[Council to confirm actual scheduled meeting date]</p>
December 2017	Notification by Council of the final award decision and commencement of the 10-calendar day standstill period.
January 2018	Expiry of standstill period.
January/February 2018	<p>Appointment and entering into contract with the successful Tenderer.</p> <p>Formal launch of JVC</p>

February/March 2018	On site with first development
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Following conclusion of the procurement process a report will be presented back to Cabinet that will seek to progress the following points:

- Approval of the appointment of a partner to progress the establishment of the joint venture vehicle and the terms of that appointment.
- Agree who the appointed Directors will be on the Board
- Agree the terms for the transfer of the first tranche of sites
- Finalise the exact financial arrangements, including value of assets injected, cash injected and financial returns anticipated.
- Agree the outline joint-venture business plan
- Enable the Council to enter into the legal agreements set out.

In order to achieve such a fast procurement the Council will need to devote meaningful officer resources to assist with the selection and evaluation of bidders and during the dialogue stage. The timetable will slip if this does not happen.

Should members agree to proceed then in due course the Cabinet (and/or Council as appropriate) will need to decide who will make decisions on behalf of the Council in relation to the JV as funder and owner, how the land will be transferred to the JV, who will represent the Council's interests on the WGC Board, and as well as agreeing the business plan and financial arrangements for WGC, amongst other things.

2. Strategic Case

Against a 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 that encompasses an asset 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, for which a Mayor has just been elected.

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, an unprecedented level of investment interest in the region.

As one of its key objectives the programme is considering 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 Plan.

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

- Protecting the most vulnerable.
- Driving economic growth; and
- 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; and
- Some functions 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 constitutes 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 those held for 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 the full business case appraisal for establishing a property development company.

The basis of this selection was set against a review of the Council's strategic objectives, and the option that demonstrated the best fit was identified as the preferred option, which in this case was option 4. The strategic objectives used were as follows:-

- 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 the Council's 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?
- What are the key financial and funding implications?

The approach and answers to these questions helped develop the preferred option, and its structuring addresses key issues raised.

Options considered

As background the table below sets out the options that were considered at the Strategic Options stage.

<p>Option 1 - Do Nothing (Business as Usual)</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>Option 2 - Arm's length wholly owned company</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>Option 3 - Public Public corporate body</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>Option 4 - Joint venture company</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 considered 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; and
- On-going governance arrangements /how decisions are made/accountability to the Council.

Each of the options was considered in relation to how they best fulfil the strategic objectives of the Council as set out above. In assessing the above range of options available to the Authority in taking forward a property development company the Council agreed through the Outline Business Case (OBC) stage and Strategic Options Report the parameters by which company will be measured.

The option which provided the best strategic fit was option 4, a joint venture company.

3. Preferred Option

Following Cabinet approval of the Strategic Options Report in February 2017 a significant amount of work has been undertaken to refine the preferred option to enable this report to be presented. The Cabinet report identified Option 4 (Joint Venture Company) as the preferred option to take forward to a full business case stage. The work completed over the last two months includes the following key areas of activity:-

1. Establish the financial model to support the option, which provides an illustration of the level of financial return that the Council could reasonably expect, through its involvement in the Joint venture entity. Covered within the financial section of this report.
2. A period of soft market testing to inform the full business case, including high level feedback from the market to help inform the final approach adopted.
3. A high level selection process to determine the phase 1 asset list, which will be the initial focus of the joint venture vehicle. This list is detailed in Appendix 1.
4. Refinement of the procurement approach to be adopted through to conclusion. Covered within the delivery section of this report.
5. Drafting the full range of joint-venture documentation needed to progress the procurement and listed later and in the Executive Summary.

In establishing the joint venture the Council is looking 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 company that is intended to be a body not governed by public law, a commercial body.

The detailed legal structure and its key characteristics can be found within the Delivery Case section of this report, and this information builds on the content that was contained within the Strategic Options Report previously approved.

The Council is asked to approve the structure and principles of the joint-venture documentation as set out in this FBC, including the principles as to the size of board and the way in which sites will be brought forward for development, following the preparation of site development plans (SDPs). The governance structure and approach to site development and transfer of land are set out below. These principles will be negotiated through the procurement process as prospective partners may propose alternatives through the competitive dialogue that takes place with the shortlisted bidders.

Governance arrangements

The WGC will be structured on the basis of a 50:50 joint venture special purpose vehicle, jointly owned by the Council and a private sector partner, specifically formed to deliver the strategic objectives set out in section 2 above. The form of vehicle proposed by this Business Case is for a Limited Liability Partnership (LLP) rather than a company limited by shares, due to the more favourable tax position for a local authority from LLP status.

Other features of the structure will include:

- Commitment to a long term arrangement for 10 years with the ability to extend the period up to 15 years should that be desired;
- Equal sharing of risks and rewards;
- Equal control with the same number of Board Members appointed (probably two Board Members from each of the Council and a private sector partner) and decision-making by consensus;
- Procurement through an EU process of a partner, creation of the vehicle and also the full range of services required to promote and deliver development including;
 - o Development management;
 - o Contractor services;
 - o Asset management services; and
 - o Potentially facilities management.
- The procurement will establish the fees that will be chargeable for the above services with proposals around incentivisation;
- The structure is likely to include subsidiary companies/corporate vehicles;
- Decisions will be based upon an agreed rolling [3] year business planning process with matters outside the Agreed Business Plan being treated as reserved to the Council and Private Sector Partner;
- Council willingness to use compulsory purchase if required (providing the Council is indemnified for costs in the usual way);
- The private sector partner will be required to input capital to match the value of the Council's land holdings and both partners may provide loans to the joint venture at commercial rates;
- Security will be taken over assets, but where third party funding (for example from a bank or other third party) then security over other partner's capital may be deferred;
- Completed developments may be held or sold to investors, such as the Merseyside Pension Fund;
- Exit routes and dispute resolution procedures will be agreed in advance;
- Transparency and openness between the partners over the costs of the company and any subsidiaries.

Land disposals process

The Council needs to ensure that it obtains best consideration for any land and property that it agrees to transfer to the joint venture company (and this will be tested through independent valuation). Sites will generally be transferred on a long leasehold basis, although residential accommodation may be transferred on a freehold basis. The drawdown of sites from the indicative list will be as agreed between the partners, through the preparation of site development plans (SDPs) and the business planning process. The drawdown of sites will be subject to the decision of the Council, being satisfied that it will receive best consideration (and the discretion of the Council may not be fettered in this regard), but option agreements may be entered into over sites as they come forward. Once the

site development plan process has been completed (including satisfaction that best consideration will be received) the draft option agreement allows the JV to serve an option notice and once served the JV may drawdown the sites in that notice.

Through the procurement the partners' approach to the development of sites which may not in themselves be viable will be tested and the programme should include sites that will deliver growth as well as social and community benefit as part of the overall programme.

Title may or may not pass immediately, dependant on the final destination of the asset. Subsidiary companies may also be used as part of the structure so that a completed development may be transferred, for example to a pension fund (such as Merseyside Pension Fund) or another investor, following completion or to facilitate a development on a ring-fenced basis. Similarly, the Council may not transfer title to assets where the development is undertaken on Council land and the Council will ultimately own the asset, -the details of how such developments will be structured will be considered before disposal as part of the site development process. The usual market approach to development and structuring will be considered as part of the business planning and disposal process and this will be taken into account in structuring the arrangements.

In some areas there may be a need to use compulsory purchase powers, particularly to encourage negotiation with less willing land owners. In utilising Compulsory Purchase Order (CPO) powers the Council would expect the joint venture company to underwrite the costs. CPO may be instrumental in complex developments around for example Woodside and Birkenhead town centre.

The Council will need to be mindful about the potential for conflicts of interest to arise and to ensure that the roles of Board members and Council decision-making are segregated so far as possible to minimise the likelihood of challenge from conflicts of interest, breaches of the Members' Code of Conduct or perceived bias.

Will the company be the only developer within Wirral in future?

No - The Council has around 1,900 sites across the Borough. Only a small proportion of these will be developed by WGC and existing individual land sales and Council development projects will carry on being developed in the usual way. The Council needs to focus on the growth of business across the Wirral, improving the environment and delivering jobs and improving the asset portfolio so that the Council receives better financial and non-financial returns. There are many strands to this in the Asset Transformation Programme as well as delivering through the WGC.

4. Financial Case

Background

In February 2017 Cabinet approved the further development of the preferred option for the establishment of the WGC. Following Cabinet approval a considerable amount of time has been spent developing the option, including the detailed arrangements around how the joint venture may operate. Alongside analysis of the potential governance arrangements associated with the company, detailed development of the financial model has been undertaken.

The financial model will provide a key baseline to support the negotiations with potential commercial partners and provide an important financial baseline for the Council to better understand the likely levels of financial return it could reasonably expect to achieve through its involvement in the joint venture company.

In developing the financial model the project team has worked closely with various parts of the organisation from across the Council to ensure the preferred option is capable of being implemented and is consistent with other work streams being delivered. The benefit of adopting this approach is to minimise the level of duplication of efforts and importantly to avoid any double counting of benefits.

In developing the financial model it has been necessary to identify the initial sites that would form part of the phase 1 disposals to the joint venture. A meeting was held on 27th February 2017 at Wirral MBC including officers cutting across the Asset, Planning, and Housing teams of the Council, and representatives of GVA. The site selection process that the team has undertaken is detailed in Appendix 1 of this report. For the purposes of financial modelling the model focuses on the phase 1 assets agreed to be included. Appraisal assumptions are detailed in Appendix 2.

In developing the joint venture model it has been necessary to explore two different structures, a Limited Liability Partnership (LLP) and a traditional Limited company corporate structure. To support this analysis we have developed a baseline financial model and then applied the two alternative structures to enable the Council to understand the impact of each. Ultimately the structure chosen can be driven by the Council but the preferences of the prospective joint venture partners have been considered through the soft market testing process; however it is important that the Council understands the impact of each.

Through the procurement process the Council will seek to find the best private sector partner, establish the joint venture vehicle group structure which will secure consents and assemble the land across the sites and manage all works necessary to bring forward development. It is intended that the Council will formally enter into the JV following completion of the OJEU process, probably in early 2018.

Practically speaking issues surrounding how land would transfer, whether subsidiary companies should be established in order to undertake particular developments (to take account of how sites may be disposed of in due course e.g. share transfer or title transfer) and other considerations relevant to the particular development will be determined as part of the site development plan (SDP) and disposal process, more details of which are set out in section 5 below - the Commercial Case.

Overall Financial Summary

In developing the full business case it is necessary to undertake a full financial assessment of the delivery options.

The financial assessment has been undertaken to include the following:-

- An appraisal of the Council's sites that potentially form the phase 1 disposals to WGC including a baseline assessment which will provide a minimum return position for the Council.
- Specific financial modelling to consider the financial cashflow of the Strategic Sites in a JV delivery structure.
- Overall cashflow requirement for the JV which will illustrate the financial returns to the Council through its participation in the JV, through profit share.

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

Based on the financial analysis undertaken as part of the development of the FBC overall it is forecast that the Council could achieve a positive Net Present Value (NPV) of £25,186,837 through its involvement in the JV associated with Phase 1 assets injected only. Future phase assets are yet to be formally identified and considered and will be subject to subsequent decision making.

Overall the positive NPV can be accounted for by three main characteristics:

- Return of land injected into the JV of £26,324,373
- Interest paid to the Council on its loan notes of £2,692,987
- Potential profit share (dividend) from the JV of £25,537,369

This position excludes any other wider financial benefits such as business rates and Council tax growth. This analysis will be developed during the procurement exercise.

The financial benefits are likely to be achieved through the following mechanisms:-

- Residual land Value of Council assets once developed
- Interest on Deferred Land Payments (through a loan note structure)

- Share of surplus/profit achieved through the JV

Although we have not provided a detailed analysis of the likely level of returns that could be achieved by the Council through further capital / cash investment in the JV, we intend to safeguard this opportunity through the procurement route. Prior to the appointment of the partner following the formal procurement approach we will provide an update on the level of return that could be reasonably anticipated through this type of financial structure.

The table below provides more detailed analysis of the level which could be achieved through the JV. The table below analyses the level of return that the Council could achieve and also the level of return that could be achieved by the Partner.

<u>Council Returns</u>	
IRR	57%
NPV	25,186,837
Land Value	26,324,373
Land Loan Note Interest	2,692,987
Profit	25,537,369

<u>Partner Returns</u>	
IRR	82%
NPV	21,850,132
Match Funding Interest	1,827,980
Additional Funding Interest	0
Residual Cash Payment Interest	135,008
Profit	25,537,369

<u>Funding/Investment Breakdown</u>	
Council Land Equity	25,067,657
PSP Match Funding	25,067,657
PSP Residual Cash Payment to Council	1,256,717
PSP Additional Funding	0
Senior Debt	75,202,970

In addition it is important that the Council understands the anticipated cash flow of benefits associated with its participation in the JV, although at a pre-procurement stage this will only be indicative.

The table below provides an analysis of the annualised payments to the Council from the JV, based on the current financial model. For modelling simplicity it is assumed that land is drawn down in March 2019. The profile of returns to the Council in practice will be dependent on the actual phasing plan that will be informed by the JV partner and agreed by the Council and as such this should only be viewed as an indicative set of returns based on the assumptions within the model. The analysis is

designed to show that there is a viable proposition to take to the market and should not be seen as the actual returns that the Council will receive.

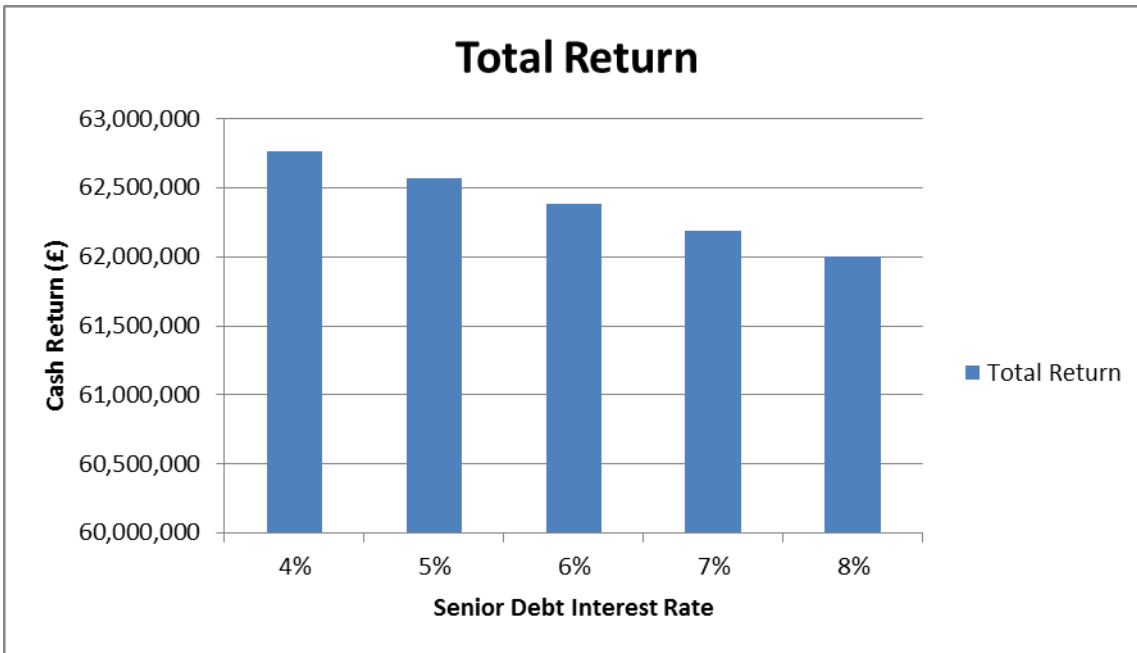
It is important to note a number of key assumptions have been made in relation to the modelling work as follows:

- In disposing of phase 1 assets to the JV the Council will forego annual revenue income in the region of £200,000, this revenue loss will need to be mitigated by forecast profit share income generated by the company.
- The Council is likely to support the development of Birkenhead town centre through its new civic presence, if this was not the case it will reduce the overall financial benefits associated with the scheme.
- From the land receipts the Council will be required to pay the HCA £2m in relation to the Bromborough former MOD site.
- The individual site proposals have been developed based on known capacity constraints and assumed end use, and based on current market trends. There has been a preliminary assessment of title issues and there may be further issues that arise from the due diligence process that is ongoing. The partner selected may elect to bring forward the sites in a different way, which will potentially change the overall financial proposition.
- During the procurement process the financial model will be updated to reflect the revised proposals and the outcome. This updated model will be used to make the decision to finalise the contractual relationship with the partner selected and establish the joint venture LLP.
- To support the overall cash viability of the JV the Council will allow the phase 1 payments for the use of sites to be paid once sites have been developed. However the Council will charge an interest rate premium on the deferred capital. The interest rate charged is proposed as 7%.

Through the procurement process the bidders will be asked to provide a baseline analysis of 14 sites (representative sample) for them to demonstrate their approach to the sites. The Council will assess each of the bidder's submissions and compare the financial outputs to the baseline model which supports this report.

The initial sites to support the procurement excise are highlighted in Appendix 1.

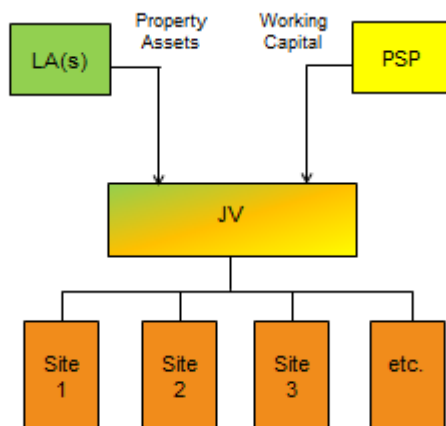
We have undertaken some additional sensitivity analysis to further understand the impact on the financial position of potential changes. The sensitivities relate to the financing cost, specifically the senior debt interest rate. The graph below shows the overall impact on the total return when changing the interest rate between 4-8%.



Summary of tax implications from structures associated with a Ltd Company /LLP

As mentioned in the Options Report (February 2017) the typical joint-venture structure is as follows:

Typical Property Joint Venture - LABV



Bevan Brittan has provided an analysis of the differences in tax structure of the two types of delivery structure considered, as follows.

Background

Both a company and an LLP are separate legal entities distinct from the Council and any other owners/partners. This means that the joint-venture vehicle may buy and hold property in its own name and borrow independently and may also charge its assets to the partners and third parties as

appropriate. It may sue and be sued in its own name and may have liabilities to others independently of its parents.

Most vehicles operate on two levels, the ownership level, often providing broad strategic control; and representation on the decision-making board or governing body which takes most of the decisions and manages the entity. In an LLP the arrangements between the partners are set out in a "members agreement" rather than the constitution of a company which is set out in the publicly available Articles. The relationships between an LLP or a company and the Council are broadly the same and regulatory and filing requirements are similar. However, the clear advantage of an LLP over a company limited by shares is the tax position. In summary, a company distributes profits after-tax whereas an LLP is "tax transparent" which means that distributions attract the tax structure of its parents.

Councils do not pay corporation tax and generally recover all of the VAT they pay. In general, a company will be subject to corporation tax on its profits before distribution and a commercial property development company would be subject to the usual rules and reliefs. In comparison an LLP is corporation tax 'transparent' which means that profits are taxed in the hands of the partner. As local authorities do not pay corporation tax there should be a benefit to the Council as a recipient of its share of untaxed profit if structured as an LLP. The likely benefit will be assessed once the full business case has been fleshed out.

There may be some VAT leakage in the establishment of separate legal entities and some Stamp Duty Land Tax to pay on transfers of land, but opportunities in structuring each development will be taken to seek to minimise the incidence of taxation.

A summary of the tax position comparing a company and an LLP is set out below.

Limited Company Structure

A limited company is treated as being opaque for tax purposes (i.e. as a separate taxable entity from that of the owners and directors).

Trading profits - a company will pay corporation tax on its trading profit. Corporation tax is charged at 19% regardless of the level of profits distributed by the company.

- Trading losses - a company can set losses of its trade generated in any given accounting period off against: other income and gains of that company generated in the same or previous accounting period (e.g. income from other trades or capital gains) (current year and carry back relief); and profits generated in the same trade in that company in future accounting periods (carry forward relief).

A company can also set off trading losses generated in the last 12 months of a trade that permanently ceases, against other income and gains of the company in the same accounting period and the three previous accounting periods (terminal loss relief).

Capital gains - a company pays corporation tax on its chargeable gains (other than gains on properties that have been subject to the annual tax on enveloped dwellings, which will be instead be subject to capital gains tax at 28%).

A company is entitled to indexation allowance when calculating its capital gains, which effectively allows for inflation over the period of ownership of the asset.

A company may also be able to take advantage of roll-over relief on disposal of an asset.

Capital allowances - a company may claim capital allowances on eligible assets which it uses in its business. The allowances are the tax equivalent to the depreciation of capital assets and, if claimed, reduce the trading profits generated by the company and therefore the amount of corporation tax payable.

VAT - VAT registration is mandatory once the value of VATable supplies made by the company in the year exceeds the registration threshold. A company may only have one VAT registration regardless of how many trades it carries on.

NICs - NICs are only payable by a company when it pays remuneration to an employee.

When a company pays an employee:

the employee is required to pay (usually by deduction from salary by the employer) primary class 1 NICs of 12% of earnings between the primary threshold and the upper earnings limit (£157 and £866 earnings per week, for the 2017/18 tax year) and 2% of earnings above that upper earnings limit; and the company, as employer, is required to pay secondary class 1 NICs of 13.8% of earnings above the secondary threshold (£157 earnings per week for the 2017/18 tax year).

From 6 April 2016, a company that pays secondary class 1 contributions is entitled to an "employment allowance" of £3,000 broadly to be set off against class 1 secondary NICs (albeit, from 6 April 2016, a company where the only employee is also a director of the company cannot qualify for this allowance).

Dividends - a company may distribute taxed profits to its shareholders by means of a dividend. Dividend income, in the hands of the recipient, will be taxed in accordance with the tax status of the recipient.

Limited Liability Partnership (LLP)

Although in general commercial terms an LLP is regarded as a body corporate and as separate and distinct from the members and officers, an LLP is treated for tax purposes as a general partnership (i.e. as being tax transparent). In some circumstances, tax transparency may not apply or be lost.

Trading profits - each member is treated as though it is carrying on a separate "notional" trade representing its share of the LLP's activity according to the LLP's profit sharing arrangements (as set out in the members' agreement and proposed as 50:50).

Trading losses - a member can broadly use trading losses generated in its notional trade in the same way as a sole trader.

Capital gains - when an LLP disposes of an asset each member is allocated the gain or loss arising in accordance with the asset surplus sharing arrangements (usually set out in the members' agreement) in force between the members at the time of the disposal (or by reference to the allocation of the gain in the accounts if there is no such agreement). Each member is assessed to capital gains tax on an individual basis.

A chargeable gain may also arise on the sale of a member's share in the LLP's assets to a third party or a change in a member's sharing ratios, depending on whether cash is received and whether the asset has previously been revalued in the LLP's accounts.

Capital allowances - where an eligible asset is owned by the LLP or is owned by one of the members and used in the LLP's business (without the member being separately paid for the use of that asset), a claim for capital allowances is the tax equivalent to the depreciation of capital assets and has the effect of reducing the profits generated by the LLP before the profits are allocated to the members, and will therefore reduce the income tax payable by the members in accordance with their profit shares.

VAT - registration is mandatory once the value of VATable supplies made by the LLP in the year exceeds the registration threshold and may be made in the name of the LLP. As part of the VAT registration the LLP is required to notify HMRC of the details of each of the members within the LLP.

A member will remain liable for the VAT obligations of an LLP arising after ceasing to be a member unless and until the change has been notified to HMRC.

NICs - NICs are only payable by an LLP when it pays remuneration to an employee, broadly in the same manner as a limited company.

Stamp Duty Land Tax (SDLT)

- There are some **SDLT** reliefs that apply to group companies and potentially some SDLT reliefs available in relation to transfers between a local authority and an LLP. Further consideration of the likely impact will need to be made in due course once the business case figures are known and dependent on how sites are brought forward through site development plans. SDLT is something that may influence how a particular development is structured from a tax perspective.

Conclusion

- In view of the significant amount of capital (and/or revenue) that may be generated by way of development profit the tax transparent nature of an LLP would be more beneficial from the Council's perspective.

Financial Modelling Assumptions

The financial model that has been developed looks at the viability of a joint venture structure. The viability is not only assessed on the basis of residual land value but from a fully funded cashflow over the development period. The modelling structure and the funding and financing structure should not be seen as a definitive way forward that a private sector partner (PSP) will need to prescribe to. The modelling and viability assessment is designed to assess whether, given a traditional funding package, the developments through a joint venture structure are viable. In reality potential partners will utilise different financing structures and will be expected to propose the most efficient financing structure to deliver the sites in phase 1 and add the greatest value for the joint venture.

The residual land value calculations that have been carried out show that a number of sites are not viable in their own right however the joint venture structure leveraging the value of other more viable sites allows for the negative value sites to be delivered as part of a wider development programme.

The model that has been developed looks to finance the sites using a traditional mix of equity and debt instruments. The Council's land value is used as the Council's equity with the private sector partner (PSP) matching the land value with a cash injection. This matching of land value will ensure that the joint venture maintains a 50/50 equity split throughout the development phases and this reflects the ultimate profit share from viable developments.

When assessing the level of equity that is necessary in the vehicle at any given point in time an assumption has been made that senior debt at 60% of funding the requirement is achievable. Where the Council's land value is higher than the 40% of equity required, an upfront cash payment is made to the Council representing the difference in the required equity and the total land value.

Should the land value been lower than the 40% equity requirement, then it is assumed in the model that the PSP will provide additional funds in the form of a mezzanine debt finance. The Council will reserve the right to provide this additional finance should it wish to do so on a case by case basis but for the purposes of the modelling we have assumed that the Council will only invest land into the joint venture.

Where the land value has been assessed as negative, this is subsidised by positive land values from other sites with no further cash injection required by the Council to plug viability gap on a site by site basis. For modelling simplicity we have assumed that the drawdown of land occurs at a single point in time, however in practice, there will be a phased drawdown of land and this will be set out in the agreed business plan that both partners will subscribe to.

It is currently assumed that the land will transfer to the JV post planning consent being granted and as such the Council benefit from 100% of the uplift in land value. This will likely be a point of negotiation through the procurement process with each bidder considering potentially bidding a percentage of land value uplift that should be shared between the JV and the Council based on the amount of value the JV has added to the planning process.

Key Model Assumptions table

Equity Split: Council/PSP	50/50
Debt/Equity Split	60/40
Senior Debt Interest Rate	4%
Council Land Value Loan Note Coupon	7%
PSP Match Funding Coupon Rate	7%
PSP Additional Funding (Mezzanine) Interest	10%
NPV Council Discount Rate	3.5%
NPV PSP Discount Rate	8%

5. Commercial Case

To progress the preferred option it has been necessary to focus on the commercial arrangements, and specifically define the initial property transactions in pursuit of the Council's strategic objectives. The principle focus of this section of the report is the process by which the Phase 1 assets have been identified. Importantly the phase 1 assets form the basis of the financial modelling exercise that has been undertaken.

In developing and to support the output of the financial model it has been necessary to identify the initial sites that would form part of the phase 1 disposals to the property joint venture. The full report produced by GVA can be found in Appendix 1; however this section provides a summary of the main points discussed.

A meeting was held on 27th February 2017 at Wirral MBC including officers cutting across the Asset, Planning, and Housing teams of the Council, and representatives of GVA. The purpose of the meeting was to review the 'long list' of the Council assets and identify prospective Phase 1 JV sites.

The long list included assets covering:

- Land and buildings – freehold and leasehold
- Operational assets
- Non-Operational assets

A total of 1,888 sites were identified on the long list site. Criteria were established to identify potential Phase 1 sites from the long list of assets including:

- Sites must generally be developable within the next 12-18 months
- Sites must not already be in the process of disposal or subject to agreement with a private sector partner / developer, principally to avoid any duplication of benefits.

It was noted in discussion that a number of the assets are subject to other initiatives and exercises underway within the Council. The main initiatives and exercises are noted below, with implications for the refinement of the shortlist:

- **Registered Housing Providers (RPs)** – a number of assets had previously been identified by the Council as being appropriate for the purposes of soft market testing with RPs. The criteria for these assets mirrored those of the proposed WGC, with the addition of being residential sites exclusively. These assets were not blanket removed for the purposes of WGC, with discussion around the potential for both processes to not be mutually exclusive (i.e. the potential for RP's to deliver as part of WGC which is as yet untested), and that the RP soft market testing was not binding in relation to any specific sites (albeit it was noted that the Council were keen to ensure there was no reputational impacts of any decisions around WGC sites with the RPs). On review however a number of sites were identified to have specific housing outputs which may not be commercially developable / deliverable

under WGC without putting specific restrictions on the ultimate partner / sites to be included. Sites identified that fit with this criteria were removed.

- **Capital Disposal Programme** – a number of assets had previously been identified by the Council for direct disposal to generate capital income to meet immediate budget deficit pressures. Initially these assets were not removed for the purposes of WGC, with discussion around the potential to identify alternative site disposals, or investment sales, should the need arise in due course depending on the testing of the viability of WGC based on the potential Phase 1 asset list. Following further discussion and re-affirmation of the need to identify sites for direct disposal to address the deficit budget, these sites were removed from consideration under WGC.
- **Reimagining Leisure** – a review is underway across the Council to consider the future provision of leisure services across Wirral. This captures assets including open space, playing fields, sports clubs (Council owned), museums (Council owned). These assets were removed from the long list, with potential to bring assets into future phases of WGC depending on the outcome of the review.
- **Library Review** – a review is underway across the Council to consider the future provision of libraries across Wirral. These assets were removed from the long list, with potential to bring assets into future phases of WGC depending on the outcome of the review.
- **Employment Land Review** – an updated Employment Land Review evidence base is currently being prepared on behalf of the Council, including consideration of a number of Council assets. It was agreed that conclusions around the potential availability of industrial estates owned by the Council would not be possible until this ELR process is completed. These assets were removed from the long list, with potential to bring assets into future phases of WGC depending on the outcome of the review.
- **Green Belt sites** – we discounted all Green Belt sites as not being able to be delivered within 12-18 months on a policy compliant basis, with the exception of sites where there is existing building footprints which could be redeveloped.
- **Operational assets** – we discounted the majority of operational assets as not being able to definitively be delivered within 12-18 months. Operational assets which are known to be underutilised, and/or are known to be in the process of being vacated were considered.
- **Car Parking Strategy** – it was noted that a number of assets on the long list are existing car parks where income (revenue) is currently received by the Council. A number of car parks were therefore discounted on this basis.

This refinement process resulted in the identification of 49 assets for consideration to potentially form Phase 1 for the WGC. These assets are listed at Appendix 1 to this report and may be supplemented by some strategic acquisitions following completion of the reviews mentioned above.

How Phase 1 assets will be transacted with the joint venture

Background

The Council is considering how it should invest land and property into WGC and wishes to have a clear process for considering the disposals to WGC on a site by site basis. We considered a range of preliminary issues that should be reviewed as part of the strategy for disposal of land and property to WGC in due course under a number of sub-headings and then considered the proposed disposal process.

PRELIMINARY ISSUES

Powers

Probably the most important element is finding the most appropriate power under which to dispose of land for development. Local authorities have very wide powers to acquire, sell, appropriate and develop land. Further details of those powers have been provided to the Council. In summary, they include the following:

- S.120-123 Local Government Act 1972 (LGA 72);
- Ss.227 and 233 Town and Country Planning Act 1990 (TCPA 90);
- Housing Act 1985;
- Local Government Act 1988; and
- Local Authorities (Land) Act 1963.

A combination of these specific powers would usually be sufficient for the Council to undertake any property related project, both within its area and potentially outside its area where the motivation is connected with the benefit or improvement of the area. For example this could include building industrial units in a neighbouring area which would benefit residents by providing jobs for them.

Additionally, where a local authority wishes to acquire property once developed by WGC pursuant to its investment powers then it may be appropriate to invest in land and property pursuant to s.12 Local Government Act 2003. This is a power for local authorities to invest both for any purpose relevant to their functions and for the prudential management of the Council's financial affairs. This could include long term and short term investment in land and property. The Council will need to have regard to the prudential code, published by CIPFA in determining how much money should be invested and the type of investments that should be pursued. Any investment would need to fit with the Council's overall adopted investment strategy under the prudential regime. This could be for capital appreciation, interest or revenue returns. Investment does not usually involve "trading" although the Council may also choose to invest in a company or body that is set up to trade.

Because there are a number of options, the Council needs to be clear as to its primary purposes for undertaking any land and property investment and development. We would normally advise that "powers follow purposes". Powers must also be exercised properly, taking into account all relevant considerations.

Best consideration

The Council has a fiduciary duty to tax payers to manage its non-operational estate effectively and to generate a commercial return. On the sale of any land and property under s.123 LGA 72, s.32 Housing Act 1985 and s.233 TCPA 90, local authorities are required to get "the best consideration that can reasonably be obtained" (otherwise the Secretary of State's consent is required for disposals longer than seven years at an undervalue). Sales at an undervalue may also constitute state aid, even where there is a well-being benefit pursuant to the Wellbeing general disposal consent in circular 06/2003.

The Council's development plan documents are public documents and the Council may speculate (in the same way as a developer or an individual) on the future potential and development opportunities that may arise in relation to land that may not currently be apparent. This means that the WGC may take a longer term view about land use and in particular where it may wish to promote different types of development in the longer term - there may be changes to facilitate different development in due course.

The Council needs to obtain best consideration, even where it transfers land to a company in which it has an involvement, for example a joint venture asset vehicle or a wholly owned separate legal entity. Failure to dispose at best consideration could result in claims of unlawful state aid and/or there may be a breach of section 123 LGA 72 (or similar powers in the TCPA 90 or Housing Acts).

The Council should obtain professional valuation advice on whether best consideration is being achieved. Whilst such advice may be provided by in-house valuers, it may be more appropriate to obtain independent advice since the Council will be making a disposal to a connected body and this could raise questions over how the valuation was made. Where the Council considers it may be challenged as to any valuation it may therefore wish to seek external valuation advice; also in circumstances where there is any question of being unable to agree upon best consideration, then a second professional opinion may be sought (consistent with the state aid guidelines issued by the EU). The rules are now set out in the "Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU" published in May 2016 and 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".

Land held for different purposes under different powers may be disposed of for different values of best consideration, depending upon the purposes for which it is held and then disposed of – appropriation may assist in this. For example, should the Council wish to develop for public realm or a transport interchange or other purposes that would not be the most profitable purpose, then where the land is held or appropriated for planning purposes (and that disposal would facilitate the proper planning of the area) the consideration may be the best consideration for that particular type of development that the Council wishes to see on the land for the proper planning of the area rather than its most profitable purpose.

Best consideration should be assessed close to disposal as part of the Site Development Plan (SDP) process – it would not be possible now to give a binding valuation of all of the indicative sites that could form part of the WGC development programme for the next five years – values will fluctuate, sometimes up and down. The drawdown process will require appropriate valuation at the time (or just before) the sites are transferred to WGC. Best consideration may include overage or whatever may be usual for the nature of the site and type of development. There may be reasons why title is

not transferred on day one (for example if there is likely to be an end sale to a third party buyer of a finished unit or a pension fund and this would save stamp duty) – in which case WGC may not take title to the site immediately, but may operate on the basis of a building agreement and lease/licence. Where consideration is deferred it will be important for the Council to consider what security may be available in relation to the land (eg. a restriction on title). Whilst local authorities are unable to mortgage or charge land and property, WGC will be able to do so.

As above, the reasons for the particular approach to be adopted and how the Council will demonstrate that it will obtain best consideration should be set out in an audit trail and the decision should be reasonable in a Wednesbury sense.

Probity in planning

Any land that is being considered for disposal by the Council should be properly assessed against local and national planning policy to establish whether planning permission is likely to be granted in respect of any development that is intended for the land. If a development brief or development plan document is needed to support the planning application, the Council should consider whether it would be appropriate to prepare one (or whether this should be done by or in conjunction with WGC – although this has the potential to create conflicts of interest).

If the Council intends to seek planning permission for the development of any land, it should ensure that it prepares the relevant planning application in the same way as any other applicant, similarly for WGC. The planning applications should also be determined in the same way as any other applicant. The Council should not do anything in its land holding capacity that appears to fetter its discretion in relation to planning.

We would advise that different members, so far as possible are represented on the development control committee that considers any planning applications involving Council land, from those who are represented on the Cabinet that would make decisions about disposing and developing the land. The Council may already have a planning code that ensures probity in planning and minimises conflicts of interest arising. This should be made available to WGC.

Bias and pre-determination

There have been numerous cases that have involved Councillors taking decisions in one capacity and then taking them in another capacity which results in allegations of bias and/or pre-determination. In some cases decisions have been quashed (e.g. Georgiou v Camden) and in others the decision has been upheld.

It is advisable to remind members to declare any interests prior to consideration of matters (including at any parish/town council meeting) and to allow them to state their position clearly (usually that they may have been at the Parish Council meeting or said x, y or z but will listen to any material planning considerations and debate and discussion before taking a decision) when at development control committee.

Although s.25 Localism Act 2011 sought to minimise the circumstances in which there would be a finding of pre-determination, in practice the section largely restates the common law. Although a prior indication of a view on a matter does not necessarily amount to pre-determination, all the facts and circumstances of each case must be reviewed to see whether or not the conduct actually amounts to pre-determination (for example leading a campaign against a development or making

comments about a development frequently and being part of an "action group" or body that demonstrates support for or against particular types of development). S.25 can therefore be negated in the circumstances of any particular case.

In order to minimise the risks around bias and pre-determination it would be helpful to remind members in advance of any development control or cabinet meeting considering applications from the Council/WGC and/or issues around development and also asking members with any prior involvement to consult the Council's Head of Legal Services or senior democratic services officers regarding interests and/or bias/pre-determination/prior consideration of matters, in good time before the meeting so that matters may be properly assessed.

Training may also assist and some local authorities make it compulsory for members to receive training on probity in planning and other matters before considering matters through development control.

Development risks

The development of land and property gives rise to a number of risks that the Council will need to manage. Property values fluctuate frequently (some commentators expect property values to go down as a result of Brexit, especially as North West prices have risen most over the last 12 months – the General election also brings uncertainty). There is a risk that any land and property will not be worth as much as WGC has spent on the land and all the costs associated with developing the land. This may not matter where the property has been developed in order to generate a rental return that delivers a surplus in the longer term. Equally capital appreciation may occur over a longer term basis. This means that the Council should carefully consider how it gets the money for the land out and what security may be available as well as the valuation of the land put in at best consideration.

Usual construction practices should apply, including obtaining collateral warranties from any design and construction companies and the intellectual property rights and assignment of any designs developed by architects on behalf of WGC and for the benefit of any end purchaser or pre-lets.

Procurement and Standing Orders

As well as going through a procurement process to find a partner and establish WGC in accordance with the Public Contracts Regulations 2015, the Council needs to follow its contract procedure rules/standing orders.

Other/Miscellaneous Considerations

These include:

- Title issues including covenants, easements and rights of light etc.
- Appropriation of land and property;
- Crichel Down Rules
- Open space
- Reverter Acts for former schools and school playing field disposal consents
- Challenge

Leaving a reasonable amount of time between any planning or land decision and a start on site to allow for challenge – the judicial review period in relation to the issue of planning permission or for a procurement challenge is 6 weeks. Judicial review of public law decisions must be initiated

'promptly', though in exceptional cases the court will allow longer than the 3 months permitted to bring a claim.

The due diligence process on sites is ongoing.

DISPOSALS PROCESS

Prior to disposal

As part of the procurement process, as well as on a periodic basis to be set out and agreed in the joint venture arrangements with the private sector partner (or PSP), WGC will have both a Partnership Business Plan and individual Site Development Plans (SDPs)). The following paragraphs set out a common approach but this should be confirmed as the preferred approach by the Council.

Partnership Business Plan

This would be a multi-year plan (probably for three years on a rolling basis) updated annually for approval and adoption by the Council and the PSP. It would include a list of sites which WGC expects to draw down for development and the expected order of drawdown and development.

The inclusion of a site in the Partnership Business Plan would need to be justified on the basis of it furthering WGC's stated aims and objectives as more particularly set out in the JV Agreement as being the "Business" of the JV, including how WGC (and through it the PSP) would tackle more challenging sites (in terms of initial site conditions, funding availability, etc.) alongside more readily profitable sites – the Council will not wish to see WGC/the PSP "cherry-picking" the best sites whilst leaving behind those with lower (or no) potential margins. Approval and adoption of the Partnership Business Plan would be a reserved matter and therefore would need the unanimous consent of both the Council and the PSP. Where a revised version of the Partnership Business Plan has not been approved, the previous version would apply.

Where either the Council or the PSP wishes to bring forward a new site that is not listed in the then approved Partnership Business Plan, this activity would itself be a reserved matter and therefore require the unanimous consent of the Council and the PSP.

Site Development Plan (SDP)

WGC would prepare (or more likely have prepared for it by the Development Manager for WGC Board's approval) an SDP for each site identified in the Partnership Business Plan. Each SDP would be prepared by WGC (as before, most likely by the Development Manager) for approval by the Board on an iterative basis with ever-increasing levels of detail in each successive submission of a draft SDP.

It would be usual to have two or three levels of detail in the SDP process – each of which must be consistent with the use allocation for a site in the Partnership Business Plan: indicative, interim (if required) and final. There is usually a stated expectation in the JV Agreement that updated versions of SDPs will be approved by the JV Board/the JV's partners provided these updated plans are consistent with previously approved versions (as, in simple terms, they should just be more detailed versions of earlier approved plans).

The approval process provides continued control for the Council (in its capacity as the original site owner) as a change of strategy for a site could be rejected without being a deadlock/termination event as a change of strategy would usually be expressly stated to be a reserved matter.

Site drawdown

Where a member of the JV is also a landowner of sites that may be drawn down into the JV for development, it is necessary to ensure there is a separation of decision-making between the two roles to ensure that the landowner has control over when a site is released to the JV. This separation is usually achieved by the landowner controlling its release of land into the JV through a contractual agreement (often, but not exclusively, referred to as a Landowner's Agreement).

The Landowner's Agreement/Option will have a set of conditions which the JV will need to satisfy in order to be permitted to drawdown a site. Usual conditions would be: land assembly; vacant possession; third party consents; site conditions; supply chain approval; satisfactory planning permission; funding availability; and viability. Only when all of these conditions have been satisfied would the JV be able to trigger land draw down. This approach is commonplace as a landowner often wants to establish the disposal value for its land (often to form part of its equity stake in the JV) and the satisfaction of all of these conditions will be important in achieving a maximum "RICS Red Book" or other appropriate valuation.

Disposal process

Much of the following commentary on the disposal process cross-refers into the funding structure, so will need to align at the outset with the Council's preferred funding model. The structure below represents a "straw man" for discussion purposes. It will also need to be modified to account for the "disposal" of a site where title does not transfer into the joint venture structure.

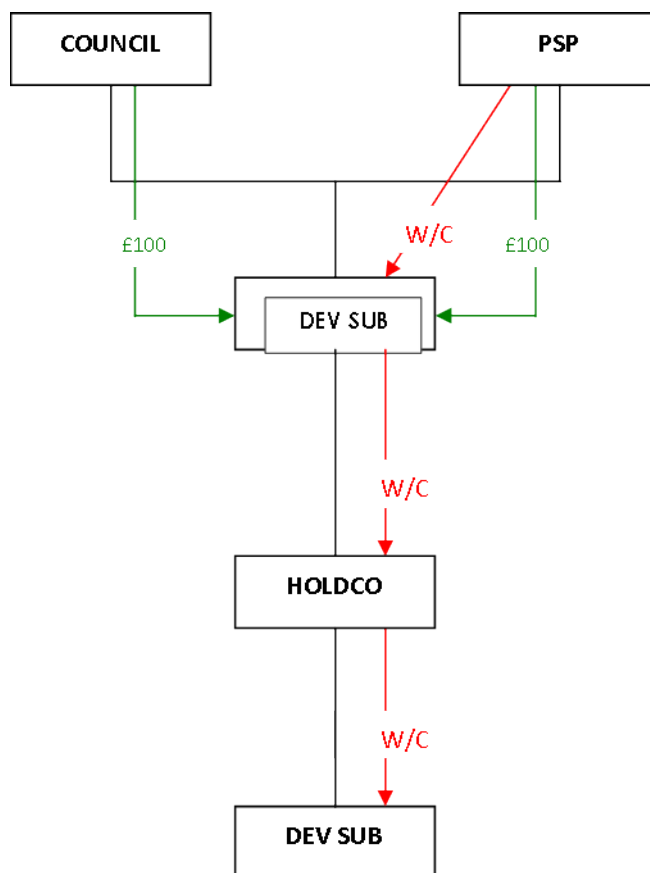
The fundamental questions for the Council to consider at this stage in relation to site disposal and valuation are:

- How well-developed the "sample" schemes will be at completion of the joint venture?
- Which party/ies provide cash-flow for WGC in advance of disposal? Are there any limits to that obligation (e.g. if planning appeals are required)?
- Whether site transfers will be undertaken by way of freehold transfer or long leasehold (probably the latter)?
- Whether the land value takes account of the cost of any units being transferred back to the Council upon completion of the development (e.g. affordable – or to an RP)?
- Whether a third party independent valuation will be required?(Generally speaking this will be the case)
- Whether there will be a minimum acceptable residual land value (e.g. between the sum of £1 and the minimum residual land value bid by the JV/successful PSP)?

- How the PSP's required rate of return will be tested in the procurement and captured in the SDP (and whether the rate is "blended" to take account of tenures and any affordable elements being built for the Council)?
- Whether the Council wishes to occupy any accommodation developed (e.g. civic offices and potentially joint accommodation with the Police) and if so on what terms and how will the property interests be structured?
- Whether the Council requires a "day one" payment for 100% of its land value or is comfortable with a "deferred" payment (either as a future obligation to pay or as a loan note) and what security is required in respect of any deferred obligations?

Whether the Council will also require WGC to pay overage at a percentage bid by the PSP based on a final development appraisal after units have been sold or in circumstances where an alternative planning permission has been obtained, or there is a disposal at an uplifted value prior to development?

Structure Prior to Disposal

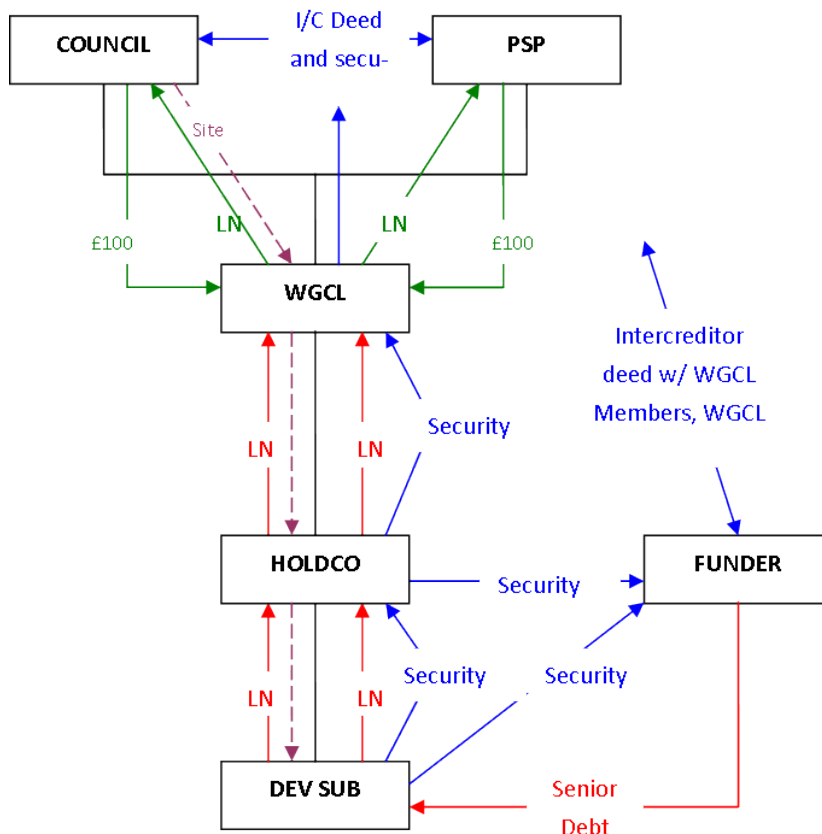


- Note – the direction of the arrows denotes the direction in which something has been given, granted or transferred.

- The Council and PSP each contribute £100 to WGC on execution of the JV Agreement as a "show of good faith" capital contribution (in the diagram above these are coloured green). These nominal capital contributions do not bear interest and are not secured.
- The subsidiary structure beneath WGC is set up with nominal equity subscriptions.
- In advance of the first site development, the working capital requirements of WGC alone for the "start-up" phase will be minimal, given that most costs will be incurred in relation to the development of a site, even if incurred in advance of the first site development.
- In relation to WGC's working capital requirements during the "start-up" phase and for every site development, the PSP puts in agreed working capital (often referred to as "Initial PSP Loan[s]" and coloured red in the diagram above).
- In some schemes, the Council may agree to put in working capital alongside the PSP and/or premises and staff, if the JV's costs can be reduced more effectively in this manner. If this approach was agreed, the premises and staff would be valued (by agreement between the JV partners or by expert determination, if necessary), so as to give a notional principal amount of the "Initial Council Loan[s]". The Council Initial Loan would then appear on the diagram above as "W/C" in an identical manner to the Initial PSP Loan. The Initial Loans bear interest until the date on which the PSP Loan Notes and Council Loan Notes are issued (see section 2 below).
- The Initial PSP Loan shall be applied to the "start-up"/development costs in relation to the development of a particular site development. To the extent Initial Loans are to be applied to costs for more than one site, then the JV partners shall agree how these costs will be apportioned between each of the site developments for the purposes of calculating the PSP Loan Notes in relation to each Site (see section 2 below). If apportionment is required, the amounts of Council Initial Loans and PSP Initial Loans provided to WGC drawn down in relation to a particular site would be limited to the amount referable to that site development (i.e. not all of the costs for subsequent sites will be provided to WGC at the outset).
- The Initial PSP Loan to WGC could be on-loaned to an intermediate holding company (HoldCo) incorporated for the purpose of ensuring a third party funder is able to take security at that level over the share capital/members' capital interests in the development subsidiary when third party funding is provided (it isn't essential from a legal perspective and funder views differ; some private sector bidders do not favour the use of a HoldCo. This would need to be discussed with bidders as part of the procurement). HoldCo will on-loan the amount of the Initial PSP Loan received from WGC to the relevant development subsidiary for use in relation to the relevant site development. These on-loans are coloured red in the diagram above (though this does not automatically denote they would be used for the same working capital purposes as the loans into WGC).

- The Initial Loans are not "equity" and are not secured (i.e. they remain at risk if a development does not proceed) - to the extent PSP Loan Notes are not issued in relation to a site development, the JV partners shall agree how to apportion working capital expenditure in relation to that site development against other site developments, if appropriate and possible from an accounting/tax perspective.

Structure on Transfer of Site



- Note – the direction of the arrows denotes the direction in which something has been given, granted or transferred.

Upon a site being transferred into WGC (shown as a purple dashed line in the diagram above):

- the Council is issued with a Council Loan Note to the value of the site;
- the Initial PSP Loan and accrued interest is crystallised into a PSP Loan Note and issued to PSP; and
- as a "default" position, PSP is obliged to match the aggregate amount of the Council Loan Note by way of Additional PSP Loan Notes, so that the amounts of Loan Notes held by each JV partner is equalised. Given the funding structures for individual site developments will be tailored to those sites, this obligation to "value match" will be subject to anything agreed by the JV partners to the contrary and set out in the relevant SDP.

The form of the Council Loan Notes and PSP Loan Notes will be the "agreed form" loan note instruments adopted at completion. The Loan Notes issued by WGC (coloured green) and are secured. The form of security will most likely be an all monies debenture secured against the assets of WGC. This debenture would be granted by WGC in favour of either a security trustee (jointly appointed by the JV partners) under a security trust deed which also regulates the respective JV partners' claims in relation to the security or to the JV partners themselves with deed of priorities to regulate their respective claims. On the diagram above, this is shown as "I/C Deed and Security". The security arrangements for the whole structure are coloured blue.

The Loan Notes issued by WGC will bear interest. Given that a particular site development may not require the PSP to contribute its entire loan note commitment at the same time as the site is transferred by the Council, WGC will be paying to the Council interest on a greater principal value (i.e. the difference between the aggregate principal value of the Council Loan Notes and the aggregate principal value of the PSP Loan Notes from time to time).

The site is transferred by WGC to HoldCo and subsequently from HoldCo to the relevant development subsidiary in consideration for Loan Notes from HoldCo and the Development Subsidiary respectively (coloured red); these Loan Notes are secured in favour of the loan note holder in each case (although that security will rank behind any third party (senior) debt security).

If additional finance is required from the JV partners on top of the Loan Notes referred to above, then they will agree this at the relevant time. The ability to contribute additional amounts or assets may well be subject to the terms of any third party (senior) debt.

The third party funder provides third party (senior) funding to the relevant development subsidiary (or HoldCo, if required by the third party funder) for the development of the site and takes as security an all monies debenture over HoldCo/the development subsidiary and its/their assets (as required). The third party funder also enters into an intercreditor deed with the JV partners, WGC and HoldCo subordinating the JV partners', WGC's and HoldCo's security to the Third Party Funder's security.

There may be other reasons for creating corporate structures, which may include the creation of a subsidiary as an investment vehicle for onward sale of the completed development in due course, for example to a pension fund (such as the Merseyside Pension Fund) or other investor, enabling a share sale (i.e. change in ownership of the corporate entity) rather than disposal of the asset per se.

Decision-making

Decisions on the acquisition, appropriation or disposal of land and property are executive functions and may therefore potentially be made by the Leader, the cabinet, a committee of cabinet, a portfolio holder or an officer.

A specific delegation to an officer (for example the Deputy Chief Executive) may be appropriate in consultation with the Leader who has the regeneration and economic development portfolio along with responsibility for financial management (unless the Leader is one of the Council's Directors of WGC) and/or the Deputy Leader who has responsibility for asset strategy and delivery as part of the Environment portfolio.

Any delegated decision will need to take into account a number of matters and will need to be based upon a written report. The report will need to encompass the usual legal, financial, technical and other relevant considerations that would normally be expected in a cabinet report (and take account of the Council's fiduciary duty, equalities and other relevant duties).

Under the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012/2089 (the 2012 Regulations), the decision record needs to encompass the following:

- a record of the decision including the date it was made;
- a record of the reasons for the decision;
- details of any alternative options considered and rejected by the member or officer when making the decision;
- a record of any conflict of interest declared by any executive member who is consulted by the member or officer and which relates to the decision; and
- in respect of any declared conflict of interest, a note of dispensation granted by the relevant local authority's head of paid service.

Decisions must be published within two days under the Council's constitution and must be sent to all members of the Council. The decision may be called-in within five days of being published (Council Procedure Rule 35) unless the decision also specifies that the decision is urgent and the special urgency provisions set out below are followed.

It is anticipated that most of the disposals by the Council to WGC will amount to a 'key decision' under the Council's constitution. The Council's threshold for key decisions is £500,000 or 10% of the relevant budget head (whichever is the smaller), unless the specific expenditure or saving has previously been agreed in full Council or it is a decision taken in accordance with the Council's Treasury Management Policy, or any decision which in the view of the Leader will have a significant effect on a significant number of people. (Constitution Article 13.3).

At present the only significant powers delegated in the constitution relate to the Leader of the Council who is authorised to agree disposals of up to £2,500,000. (The amount for acquisitions i.e. to purchase or take a lease of land, buildings and other assets is only half of that - up to a value of £1,250,000 provided the funding has already been approved by Council.) Clearly if the Leader of the Council is a Board member of WGC he would be unable to take a decision to sell land to the

Company by the Council (that would breach the Members' Code of Conduct and would most likely amount to common law bias). Cabinet or another portfolio holder should exercise these powers under the Council's Executive arrangements.

Call-in

Disposals of land and property, as executive decisions, are subject to the Call-In procedure, with the exception of any decision taken under the special urgency provisions. Under Council Standing Order 35(10) a decision will be urgent if any delay likely to be caused by the Call-In process would seriously prejudice the Council's or the public's interest. The Council's Chief Executive must agree both that the decision proposed is reasonable in all of the circumstances and to it being treated as a matter of urgency. Such decisions must be reported to Council at least annually.

Notice should usually also be given of a forthcoming executive key decision (including whether the decision will be delegated to officers) 28 days before a decision is to be made (even where it is envisaged that decision will be taken in private, under the 2012 Regulations). Under the 2012 Regulations consultation is required with the relevant Scrutiny Committee chair and in their absence the Mayor or Deputy to be able to dispense with the usual notice and take the decision more quickly under the special urgency procedures.

6. Delivery Case

Delivery approach

This section of the report focuses mainly on the procurement route intended to be used to identify a private sector partner to establish the joint venture vehicle with.

This overview is not an exhaustive list of all points raised in the principal legal documentation nor is it a substitute for considering the principal legal documents themselves in full. Terms defined in the principal legal documentation have the same meanings in this overview.

Overarching Principles

WGC provides an opportunity for the JV Partners to harness private sector funding and expertise with Sites currently owned by the Council (and others) to help deliver the holistic long term physical development and regeneration of Wirral with associated benefits that contribute to the social and environmental improvement of the area and provide community benefits.

The first principles for the WGC are:

- in relation to the Sites, to contribute to the delivery of Wirral's Pledges, the Council's Asset Transformation Programme and Strategic Objectives;
- to bring forward, in a timely manner and responding to market demand, the development of the indicative Sites and potentially to undertake other site development;
- to bring forward, responding to market demand, the development of Sites which are considered more difficult to develop at a comparable rate with Sites which are considered easier to develop;
- to make strategic and opportunistic acquisitions, in particular interventions that support the implementation of the Wirral Plan or the development of an improved retail, commercial and public sector offer in Birkenhead and other Wirral town centres;
- to secure an adequate return to the JV Partners commensurate to their investment and the level of risk in respect of such investment to maximise the profits made by the WGC (this is the "Mandatory WGC Objective"); and
- to support the Council in pursuit of its wider objectives by identifying and helping deliver favourable solutions that balance financial, economic and social returns.
- WGC may develop Sites directly or enable the delivery of major development schemes in partnership with others (such as Woodside). The most appropriate approach may vary on a site by site basis, or may vary over time. The Procurement Strategy provides the framework to enable WGC to provide and/or procure works and services for each project.
- All projects to be delivered by the WGC will be assessed by reference to the Council's Strategic Objectives and WGC's Objectives, as set out in the WGC Business Plan and

Partnership Agreement. The WGC Business Plan will be approved by the Council and the Private Sector Partner on a [3] year rolling basis. Indicative Sites for development may change, depending upon title, collaboration or market conditions from time to time and as sites are drawn down for development. Both the Council and the PSP will need to approve changes to the Sites to be developed in the Approved Partnership Business Plan from time to time.

Principal Parties

The principal parties to this joint venture are:

- the Council
- the PSP – []
- WGC – structured as a Limited Liability Partnership with wholly-owned development subsidiaries underneath the main JV vehicle
- The PSP Guarantor – [Group plc]
- the Development Manager – []
- Providers of works and services during the initial 10-year exclusivity period – []

Legal Structure

The Council and the PSP will be members in a [company/limited liability partnership], for a minimum term of [fifteen] years with an option to renew for a further [five] years. The WGC will take the form of a 50/50 deadlock company/limited liability partnership in which the JV Partners will each hold an equal interest.

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
BASIC INFORMATION	
Principal legal documents and parties	<p>Partnership Agreement – between the Council, the PSP and WGC, setting out the constitution of WGC and regulating the conduct and affairs of each party. This includes the Procurement Strategy, the Delegation Policy and the Projects Policy (including draw down of sites and Site Development Plans) and how decisions will be made.</p> <p>Parent Company Guarantee – the PSP Guarantor, WGC and the Council, with the PSP guarantor guaranteeing the obligations of the PSP.</p> <p>Loan Note Instruments – including the Initial/Interim Council Loan Note Instrument; the Council Loan Note Instrument; the Initial/Interim PSP Loan Note Instrument; the PSP Loan Note Instrument – with WGC as issuer to the Council and/or PSP (as appropriate). There will also be the Development Subsidiary Loan Note Instrument with any Development Subsidiary as issuer to the WGC.</p>

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
	<p>Security Agreements - relating to the Council, PSP and Development Subsidiary. So long as the various Loan Notes (relating to the Loan Note Instruments detailed above) remain outstanding, they shall be secured by WGC in favour of the Council / PSP by charging the property, rights and assets of the WGC. This will equally apply to any Development Subsidiary which will charge in favour of WGC the property, rights and assets of the Development Subsidiary. Any security granted to the Council and the PSP will, in time, be subject to any security granted with priority in favour of a third party (senior) funder.</p> <p>Option Agreement (in relation to each Site transferring into the WGC) – the Council (as the current holder of the relevant Site(s)) and WGC. WGC would be required to satisfy some pre-conditions before being able to exercise an Option (e.g. best consideration and likely financial returns).</p> <p>Transfer / Lease – if an Option is exercised the Option Agreement allows for transfer of the Site by way of long lease to WGC [99 years plus]. In relation to the sites that are residential sites it is possible that the freehold will transfer.</p> <p>Development Management Agreement – WGC and the Development Manager</p> <p>Pre-Construction Agreement, Development Agreement and Building/Construction Contract – the Council and WGC or WGC and [] Plc, with appropriate collateral warranties and assignment of IP rights.</p>
Name of the LLP	Wirral Growth [Company] Limited Liability Partnership (WGC)
BUSINESS	
"Business" of the WGC	<p>The "Business" of WGC will be defined in the Partnership Agreement as:</p> <ul style="list-style-type: none"> • during any period for which a Partnership Business Plan has been adopted and is in force, to undertake such business(es) as is or are set out in that Partnership Business Plan; • during any period for which an Adopted Site Development Plan has been adopted and is in force, to undertake such business(es) as is or are set out in that Adopted Site Development Plan; • during any period for which an Adopted Project Plan has been adopted and is in force, to undertake such business(es) as is or are set out in that Adopted Project Plan; and <p>to undertake such other business(es) as the JV Partners may from time to time unanimously agree,</p> <p>provided in all circumstances that such business(es) promote the achievement of the Council's Strategic Objectives and Wirral Pledges and WGC's Objectives for Wirral – these objectives will be set out in the</p>

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
	<p>Partnership Business Plan and Partnership Agreement.</p> <p>Development activities may be carried out through separately incorporated SPVs which are wholly-owned by the WGC (for risk and debt security ring-fencing reasons).</p> <p>The WGC's business will be framed by a Partnership Business Plan and individual Site Development Plans.</p>
FUNDING THE WGC	
<p>How will the Site development funding needs of the WGC be met?</p>	<p>Funding requirements will be agreed and set out in the Site Development Plan and the overall annual Business Plan.</p> <p>In advance of Site transfer (where a Site is to transfer to the WGC):</p> <ul style="list-style-type: none"> • Council undertakes title and other initial site investigations/preliminary checks and may take action such as advertising open space and appropriating the land between different purposes for the creation of site development plans. • PSP provides initial working capital to develop proposals and Site Development Plan. If agreed in the Partnership Business Plan the Council may also provide initial cash or assets to the WGC if WGC's costs can be reduced more effectively. Interest will accrue on the initial funding but the initial working capital funding may/may not be secured. • Planning application/permission costs to be borne by the PSP. <p>Upon Site transfer (where a Site is to transfer to the WGC):</p> <ul style="list-style-type: none"> • Initial cash or value of assets (if any) provided by the Council and the market value of the Site crystallised into the Council Loan Note. • PSP to match the value of the Council's Loan Note through the PSP Loan Note (the initial funding provided by the PSP, including in relation to planning costs in advance of site transfer counts towards the value matching obligation). • Third party funding obtained for Site development, if required. • Additional finance may be provided by the JV Partners if unanimously agreed. • Interest will accrue on JV Partner Loans at a rate to be agreed between the partners and state aid compliant. Third Party Funding and JV Partner Loans to be secured and subject to any deeds of priority entered into between the JV Partners and/or the JV Partners and the Third Party Funder.
SITES	
<p>Approval process for a Site Development Plan</p>	<p>A template Site Development Plan governing all future Sites (including those within the sample group) will be scheduled to the Partnership</p>

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
in relation to a Site	<p>Agreement. Going forward, Site Development Plans are agreed via a four stage process:</p> <ul style="list-style-type: none"> • Draft Indicative SDP – the WGC prepares, and its Board considers whether Indicative SDP meets [the Mandatory WGC Objectives for the phase 1 sites] and at least two other objectives each of which will be drawn from the Council's Strategic Objectives or the WGC Objectives. • Draft Formal SDP – Upon the JV Board approving the Draft Indicative SDP, it becomes a Draft Formal SDP and the JV Board shall as soon as reasonably practicable but in any event within three Business Days, circulate the same to JV Partners for approval. Within [20] Business Days of the JV Partners receiving the Draft Formal SDP from the JV Board, a meeting of the JV Partners shall be convened for them to consider and, if thought fit, approve the Draft Formal SDP. Upon the JV Partners approving the Draft Formal SDP, the Draft Formal SDP shall be immediately deemed to have been adopted by the LLP as a Site Development Plan. <p>Any non-material variation to a Site Development Plan requires the approval of the JV Board. The JV Board shall refer any proposed variation to the JV Partners if all Representatives appointed by at least one JV Partner request that the variation be referred to the JV Partners. Any material variation to a Site Development Plan (including any variation referred to the JV Partners by the JV Board) requires the approval of both JV Partners as a reserved matter.</p>
Can other Council and non-Council sites be considered for redevelopment by the WGC?	Yes – the approval process is broadly the same set out above (i.e. preparation and approval of a Site Development Plan).
Conditions to transfer of Site to the WGC	<p>Common conditions – e.g. approval of Partnership Business Plan and Site Development Plan, best consideration and financial objectives.</p> <p>Specific conditions – as may be set out in the relevant Site Development Plan.</p>
Timing of land transfers in to the WGC	<p>At any time subject to the terms of the approved Site Development Plan and satisfaction of conditions in relation to a particular Site.</p> <p>Transfers may be made in different ways depending upon the nature of the development. For example a building agreement and lease then sale to an investor (such as the Merseyside Pension Fund) or direct transfer to a subsidiary of WGC for onward transfer of the company or sale.</p>

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
Valuation principles for Council's land transferring in to the WGC	Market valuation (under RICS Red Book Principles or otherwise as appropriate to market conditions for the development and state aid compliant) and carried out by an independent valuer at or immediately prior to the Adopted SDP being submitted to JV Partners for approval.
Procurement of works and services by the WGC	With effect from the Effective Date until the date [10/15] years after the Effective Date, subject to the value for money protections and tender processes set out in the Procurement Policy, the PSP shall have the exclusive right to provide those works/services to the WGC and its Development Subsidiaries (and to enter into those contracts with the WGC and its Development Subsidiaries) that are set out in the Procurement Strategy respectively.
Use of proceeds of Site sales / profits	<p>Save to the extent otherwise expressly agreed in writing by the JV Partners, Net Profits remaining after repayment of Third Party Funding and any retention shall first be used by the WGC to make certain repayments in accordance with the following descending priority of repayments (unless otherwise agreed by the JV Partners in writing):</p> <ul style="list-style-type: none"> • repayment to the Council and the PSP of any outstanding Initial Council Loan Notes and Initial PSP Loan Notes (plus, in each case, any interest accrued thereon); • repayment to the Council and the PSP of any outstanding Interim Council Loan Notes and Interim PSP Loan Notes (plus, in each case, any interest accrued thereon); • repayment to the Council and the PSP of any outstanding Council Loan Notes and PSP Loan Notes (plus, in each case, any interest accrued thereon). <p>Any remaining Distributable Profits after the WGC has made all repayments pursuant to the above shall be apportioned between the JV Partners in proportion to their Capital Contributions and credited to their respective Current Accounts accordingly.</p>
Community Projects	Community Projects are those projects where the Council or other public sector bodies are the ultimate client. Separate provisions within the Partnership Agreement will regulate the bringing forward and funding of and returns made in relation to Community Projects.
GOVERNANCE	
Composition of the Board	Two representatives appointed by each JV Partner. The Board should not be too big nor too small to manage to the business of the WGC. The Council's proposed representatives at this stage would be the Portfolio Holder for Economic Development and Energy, and Strategic Commissioner for Growth. Substitutes will be permitted. The right commercial people need to be appointed to the Board so that the Board

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
	<p>is a viable commercial decision-making entity.</p> <p>The Chair of the Board has no second or casting vote.</p>
Decision-making	<p>Matters reserved to the JV Partners in the Delegation Policy will be passed if approved by both JV Partners.</p> <p>At JV Board level, each representative will have one vote and a decision of the JV Board will be passed if approved by a majority of representatives. The Partnership Agreement will contain provisions relating to conflicts of interest to ensure, as far as possible, that the WGC is at an arms length to the JV Partners.</p>
Deadlock	<p>Escalation to senior persons within the PSP and Council organisations, followed by either expert determination and/or winding up (depending on nature of deadlocked matter and whether the deadlocked matter can ultimately be resolved).</p>
MISCELLANEOUS	
Restrictions on the WGC JV Partners	<ul style="list-style-type: none"> • not to bring standing of WGC / its JV Partners into disrepute nor to attract continuous material adverse publicity; • not to establish any undertaking nor otherwise compete directly with WGC's business within Wirral; • not to acquire any "competing property" unless WGC is offered opportunity to acquire the property first.
Transfers by JV Partners of interests in the WGC	<p>No transfers at any time are permitted to unsuitable persons. Subject to this, no transfer of a JV Partner's interests without consent of the other JV Partner except for certain "intra-group" permitted transfers.</p> <p>A transfer of interests in the WGC will include a transfer of the benefit and burden of any loans made to the WGC.</p>
Default	<p>Default events will include a change of control, insolvency, material or persistent breach.</p> <p>Whilst a breach remains unremedied (if it is remediable), the defaulting JV Partner and any Board Members appointed by it are excluded from decision-making and may not receive any distributions of profits referable to the period of the default subsisting.</p> <p>On a default under the Partnership Agreement, the "non-defaulting Member" has the option (but not the obligation) to buy out the other (defaulting) JV Partner's interests in the WGC at a discount to market value.</p>
Duration of joint venture	<p>Unless terminated early, the joint venture will last for 10 years with option to renew for further 5 years.</p>

ISSUE	SUMMARY OF PRINCIPAL LEGAL DOCUMENTS
Winding up	<p>Standard winding up events (i.e. both JV Partners agreeing, insolvency of the WGC, unresolved deadlock, change in law, duration of the WGC expiring).</p> <p>Winding up event will also terminate any outstanding options and regularly entitle the Council to repurchase Site(s) out of the WGC at their then market value.</p> <p>After payment of all expenses and third party creditor costs, any surplus distributed between the JV Partners will on a 50:50 basis.</p>

Risks

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 EU procurement/compliance issues and how the risks of a potential procurement challenge can be mitigated. It is not possible to guarantee that there will not be any challenge to the process, appointment of a partner or related decisions.
Setting up WGC 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. This may need to be supplemented externally
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 the 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.	Listening to and acting upon the market soundings
Identifying sites for development at the commencement of the property JV process through Council reports and the procurement process can raise community 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 Council will adopt a transparent approach to the inclusion of sites and projects in the property JV. A robust information strategy will be used to provide full information on 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 WGC, 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>Segregation of roles and responsibilities of Board members, planning decisions and Cabinet decisions as owner and funder between</p>

	<p>members will reduce risks.</p> <p>Maintaining political priority will be assisted by a transparent process and following the establishment of WGC ensuring the delivery of key commercial and community projects.</p>
<p>Short term increase in the cost of the Capital Programme due to the delay associated with creating WGC.</p>	<p>Planning significant regeneration projects for short, medium and long term delivery. Robust management of the Capital Programme by Members and Officers to ensure major capital investment is delivered within WGC.</p>
<p>Potential market saturation with demand outstripping supply of suitable joint venture partners.</p>	<p>Soft market testing to be undertaken in preparation for the procurement process. Listening to and acting upon the market soundings will be important. Interest has been high at MIPIM and through the soft market testing</p>
<p>Not being able to secure the right joint venture partner following procurement.</p>	<p>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.</p>
<p>Joint venture partner "cherry picking" commercial sites for development rather than less viable or community sites.</p>	<p>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 the programme.</p>
<p>Duplication of work / counter-productive work between Council staff and WGC staff.</p>	<p>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.</p>
<p>Council capacity to match the capacity of the joint venture partner to serve on the property JV</p>	<p>The Council will need to carefully consider the skills and availability of Members and/or Officers</p>

<p>Board and make day to day operational decisions.</p>	<p>to represent the Council on the WGC Board.</p> <p>Bevan Brittan will provide training for representatives on the WGC 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 WGC Board), as a 50% partner in the WGC (e.g. approval of all business plans and material contracts that either govern or affect the WGC, expenditure over certain thresholds and appointment of key personnel to the WGC).</p>
<p>Requires defined development pipeline to maximise success and investment opportunities.</p>	<p>At the outset of the procurement the Council will identify the development opportunities for the WGC in the short, medium and long term. The partnership business plan (approved by the WGC 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 WGC.</p>
<p>May not achieve best value due to the property market and funding market.</p>	<p>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.</p>
<p>Higher rewards need to be balanced against sharing in re-development costs.</p>	<p>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.</p>
<p>Significant deadlock and breakdown of the WGC.</p>	<p>It is expected that the parties will act reasonably in their decision making and in 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 WGC 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 WGC cannot resolve the deadlocked matter, then a project would not proceed.</p> <p>Where there is deadlock that would prevent the WGC continuing, the legal arrangements will contain the power for one WGC partner to either buy out the other WGC partner at a valuation to</p>

	be agreed or to call for the winding up of the WGC.
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Procurement Strategy

PROCUREMENT PROCEDURE SELECTION

Background

The Council asked Bevan Brittan for advice on the most suitable procurement procedure in order to be able deliver the WGC and be in a position to recommend the appointment of a partner to Cabinet for approval early in 2018. 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 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).

The Concession Contracts Regulations 2016 ("CCR") applies to works concession contracts which have an estimated value of £4,104,394 or above. The estimated value is calculated not only in terms of the payments from the Council but also but also all the revenue received from third parties. A works concession contract is one where the Council entrusts a provider with the execution of works for which the remuneration consists either solely in the right to exploit the works that are subject to the contract or in that right together with payment. A key characteristic of a works concession contract is that involves the transfer of operating risk in exploiting the works to the concessionaire where under normal operating conditions, it is not guaranteed to recoup the investment made or the costs

incurred in operating the works. The risk transfer to the concessionaire would involve real exposure to market risk such as any potential estimated loss which could be incurred is not nominal or negligible

The joint venture is likely to fall within this classification given the level of investment which is anticipated from the provider in financing the JV arrangements and the demand risk that it incurs in its participation in the JV in being able to secure purchasers and tenants for the developed assets in order to realise a return for its investment.

Works concession contracts exceeding this threshold need to be advertised by the issue of a Concession Notice in the OJEU. The Council has greater flexibility in structuring the procurement competition procedure under the CCR so long as it remains compatible with the "procedural guarantees" set out in Regulation 26 to 41 of the CCR. However, it is common for contracting authorities to replicate the competitive dialogue procedure described in the Regulations given the market is familiar with this form of competition and it also provides a suitable multi-stage competition with allows negotiation on the contractual terms as well as on the technical solution proposals.

The commentary below compares the merits of the competitive dialogue approach with other traditional procurement procedures described in the Regulations. Under the CCR, there remains the 30 days minimum time-limit for OJEU advertisement and SQ return.

Competition Approaches

A common form of competition is to use the restricted procedure which involves a 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 day 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 procedure with negotiation 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, although the time required will be significantly longer due to the need to engage in dialogue meetings with the bidders and evaluate bidder's solutions in order to achieve a reduction of bidders during the process.

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: ¹

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 applications	30 days deadline for request to participate in dialogue	30 day deadline for request to 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 objective award criteria which are disclosed in advance and 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:

¹ 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.

Competitive Dialogue

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 must 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 option	Yes	Yes
Ability to make an award on the basis of initial tender submission	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	Yes, it is possible to make an award on the basis of the initial tenders without invoking the second negotiation stage of the competition.
Gradual development of tenders through phases to reduce bid cost risk	Yes, first stage tenders can be a basic version of the requirements of the final tender.	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. ²
Negotiation permitted in first phase	Yes, the Council can decide to negotiate at any of the tender stages during the dialogue procedure prior to the call for final tenders.	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

² 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.

		Council's preferences because of this.
Minimum Timetable requirements for first stage	No prescribed timetable so long as reasonable time provide given the complexity of submission requirements	30 days ³ from invitation to submit initial tenders (25 days where tenders submitted electronically) However, local authorities have the ability set time by mutual agreement with the bidders (or a minimum of 10 days if not agreed).
Minimum Timetable requirements for second stage (prior to request for final tender)	No prescribed timetable so long as reasonable time provide given the complexity of submission requirements	No prescribed timetable so long as reasonable time provide given the complexity of submission requirements
Preferred Bidder Stage Negotiations	Yes, ability to confirm financial commitments or other terms to finalise the agreement	No, final tenders cannot be refined through further negotiation with the preferred bidder.

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?

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

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.

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 – WGC PROCUREMENT	
Indicative Timeframe /Date	Stage
March 2017	PIN Notice and soft market testing. MIPIM. Bidder days with opportunities and visits to development opportunity sites
March/April/ May 2017	Development of procurement documents including Selection Questionnaire (SQ) evaluation methodology (financial and quality), SQ evaluation questions, draft contracts, Competitive Dialogue (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))
19 June 2017	Cabinet approval of procurement, with 5 clear days for call in or special urgency consideration
19 June 2017	Dispatch of the Works Concession CD OJEU Notice by the Council. Procurement Documents made available to Candidates.
19 July 2017	Deadline for SQ to be returned by Candidates to the Council and review and evaluation by the Council of the SQ. Cabinet approval to selection for the next stage early to mid-July.
Early August 2017	Invitation to Participate to Dialogue ("ITPD") issued by Council to up to 5 shortlisted Bidders (6 in the event that the next bidder is close – within 1%). Allow at least four weeks for the first dialogue stage before ITPD submissions are due back.
Early September 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 2bidders (3 in the event that the next bidder is close – within 1%) Given this is over the summer period we have allowed a month for this. This assumes that the Council will evaluate the outline solutions in September.
Mid - End September 2017	Tenderers will be issued with an Invitation to Continue Dialogue ("ITCD") Allowing eight weeks for the second stage of dialogue ideally, we would seek to have 8 weeks for this stage given the complexity of the project but a compressed timetable with high frequency of bidder dialogue attendance

	could be used during these two months.
Late November 2017	Close of Dialogue and issue of Invitation to Submit Final Tenders ("ISFT")
Mid-End November	Deadline for submission of Final Tenders to be returned from shortlisted Candidates.
End November 2017	Evaluation of Final Tenders and recommendation to the Cabinet of the Tenderer to be appointed as Preferred Bidder. This allows a relatively short intensive period of two weeks to assess the final tenders.
Early December 2017	Confirming Commitments with Preferred Bidder to finalise contractual documentation. [Proactive scrutiny prior to Cabinet?]
December 2017	Cabinet approval of Final Award Decision [Council to confirm actual scheduled meeting date]
December 2017	Notification by Council of the final award decision and commencement of the 10-calendar day standstill period.
January 2018	Expiry of standstill period.
January/February 2018	Appointment and entering into contract with the successful Tenderer. Formal launch of JVC
February/March 2018	On site with first development

James Dair, Judith Barnes 6 June 2017

