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DATE: 2 May 2013 OUR REF: YOUR REF:

Dear Councillor

CABINET - TUESDAY, 7TH MAY, 2013

I am now able to enclose, for consideration at the meeting of the Cabinet on 7th May 2013, the following report which was unavailable when the agenda was printed.

Agenda Item No 10

Development Company (Pages 1 - 110)

To consider a report recommending that Council set up a Development Company, wholly owned and controlled by the Council, to drive forward the development of the Council's land assets, for housing and economic growth.

Yours sincerely,

Paul Mountford
Democratic Services Officer

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 Agenda Item 10

CHESHIRE EAST COUNCIL

Cabinet

Date of Meeting:	7th May 2013
Report of:	Director of Economic Growth and Prosperity
Subject/Title:	Development Company
Portfolio Holder:	Cllr Jamie Macrae, Prosperity and Economic Regeneration

1.0 Report Summary

1.1 This report sets out the benefits, implications and proposed approach to the creation of a new delivery vehicle, to drive forward the development of the Council's land assets so as to promote housing and jobs growth. It summarises the work of Deloitte LLP (business and financial advisors) and Bevan Brittan LLP (legal advisors), appointed to evaluate options and report back on a preferred model to provide the best opportunity to realise the ambitions of the Council, and to create the infrastructure necessary to ensure greater prosperity for all our residents.

1.2 The report seeks Members' agreement to set up a wholly Council-owned and controlled, arms-length Development Company, limited by shares, where the Council retains the assets.

2.0 Decision Requested

2.1 It is recommended that Cabinet:

2.1.1 Recommend to Council the setting up of a Development Company – East Cheshire, Engine of the North, wholly owned and controlled by the Council, in the form described in this report, to drive forward the development of the Council's land assets, as a key element for the Council's wider plans for housing and economic growth.

2.1.2 Recommend to Council to appoint initially to the Board of the Company the following non-executive Directors: Cllr A Thwaite (Chairman), Cllr D Druce (Vice Chair), Cllr D Newton (Vice Chair), Cllr P Groves, the Director of Economic Growth and Prosperity (Caroline Simpson), the newly-appointed Head of Development (Darran Lawless) and agree that the Borough Solicitor, (Mike Rowan) take on the role as Company Secretary.

2.1.3 Recommend to Council that a Shareholder Committee is established comprising of the Leader, Deputy Leader, Portfolio Holder for Prosperity, Portfolio Holder for Resources and the Chief Executive.

2.1.4 Give delegated authority to the Interim Chief Executive and Interim Monitoring Officer to take forward the actions required to implement the recommendation and set up the Development Company, reporting back to Cabinet in October 2013 on progress. Specific actions to take forward are:

Set up the Company as operational (separate legal entity) and establish its Memorandum and Articles of Association by **end May 2013.**

Finalise initial staffing arrangements and related HR considerations; insurance arrangements; and other operating procedures to ensure that the Council's budget envelopes and capital plans in relation to the activities of the Company are clearly understood by **end May 2013.**

Develop a 3-Year Business Plan for the Company, to establish the portfolio of assets it is required to act upon; any provision of resources to facilitate land acquisitions; and set objectives against which its performance will be measured. Also draw up Company Objects and, if relevant, an Agency Agreement by **end October 2013**

3.0 Reasons for Recommendations

3.1 Following the Council's recent options appraisal on the most effective approach, and having received expert external advice and assistance from both Deloitte and Bevan Brittan LLP, the preferred option is delivery of the Council's objectives through a wholly-owned and controlled arm's length company, where the Council retains ownership of the physical assets.

3.2 It is considered that the principal advantage of this option, over all others, is that it allows the Council to focus its delivery through the separate arm's length company, without distracting the company's management and staff with the Council's other day-to-day operational requirements. The Company can also better promote the Council's land and property assets for development through the Local Plan and planning process.

3.3 In addition, the Company can be used flexibly by the Council as its agent, without tying the Council down to a single delivery model (as would a "local asset backed vehicle" (LABV) or transfer of assets). It is believed that this vehicle, also is likely to be regarded as more attractive by the Cheshire and Warrington LEP and possibly other public sector bodies, as a delivery vehicle for their purposes, than direct contract with an in-house Council team or a non-wholly controlled Council company/ joint venture.

4.0 Wards Affected

4.1 All

5.0 Local Ward Members

5.1 All

6.0 Policy Implications

6.1 The recommendation supports the Council's priority of promoting and investing in local economic growth and the outcomes set out in the Three Year Plan, particularly in relation to ensuring Cheshire East has the infrastructure necessary for a strong, diverse and resilient local economy, and that the area is a good place to live and work.

7.0 Financial Implications

7.1 In February this year Cabinet approved spending of up to £100,000, from an existing Economic Development earmarked reserve, on independent legal and financial advice on the best way to take forward this initiative. Spending to date has been contained well within that envelope; the remainder of the reserve can be used to cover further Company set-up costs (e.g. marketing).

7.2 The Council's Budget for 2013/14 provides for an enhanced Economic Growth function, in terms of both Revenue and Capital budgets, and the operational activities of the proposed new Development Company would be financed from within those approved resources. In future, it is envisaged that the Council's Capital Programme would benefit from the work of the company e.g. through the realisation of capital receipts, from the sale of assets or from attracting additional inward investment.

7.3 Along with evaluation of options and matters of governance, the brief to Deloitte included a requirement for advice on related finance and accounting issues, particularly the relevant tax considerations. This report and its recommendations reflect the advice received.

7.4 As noted in section 14 below, the Company would be a provider of professional services; the Council would pay for the services of the Company as for any other external provider of consultancy services, on an appropriate value-for-money basis.

8.0 Legal Implications

8.1 It is proposed that the new delivery vehicle be a company limited by shares, due to the limited profit available and given the legal considerations highlighted in Bevan Brittan LLP's Advice Note. Section 6 of this Advice Note sets out various mitigation strategies in relation to the risks identified with the preferred option.

8.2 It is important for the Council to:

- Identify the scope of the agency role and its' arrangements with the company;
- Consider who will be Board Directors and how such a role is to be reconciled with any role within the Council, taking into account actual and perceived conflicts of interest and bias, particularly with regard to planning matters, where in effect the Council is both the promoter of a development and the planning authority deciding on it;

- Consider the necessary constitutional and administrative processes which the Council has and make any necessary amendments to these, to ensure that the Company can be used effectively and efficiently to improve delivery timescales
- Consider the effective drafting of the Memorandum and Articles of Association of the Company, to give the Council the necessary degree of control (e.g. the Council would approve any Business Plan (i.e. the overarching "envelope" of the Company's activities), scrutinise the Company's performance and Board activities (directing the Board where necessary to act or not act in a certain way) and exercise a veto at Board level on all or key, strategic decisions affecting the Company), without hampering the day-to-day operations of the Company or discretion of it's Board so it retains agility and flexibility;
- Consider a clearly defined funding model for the Company; and
- Consider the clearly defined staffing arrangements for the Company

9.0 Risk Management

9.1 The potential risks associated with creating and operating a new delivery vehicle of this type, as recommended in this report are summarised in Appendix F, along with related impacts and how those risks may be mitigated or eliminated.

10.0 Background

10.1 In February Cabinet considered a report setting out the strategic case for creating a new delivery vehicle, to drive forward the development of the Council's land and property assets, to promote housing and jobs growth. Cheshire East has ambitious growth plans - with expected targets of at least 20,000 additional jobs and 27,000 new homes by 2030. We are aiming for at least 7,000 new homes in the next five years.

10.2 It is important that the Council is seen to drive forward its economic growth agenda through accelerated development of its assets, both strategic sites identified in the Development Strategy and smaller sites which can deliver investment and growth and contribute to housing supply. A new focused delivery vehicle will galvanise efforts to speed up the development of our own assets to bring about essential investment in new infrastructure and new housing, economic growth and capital receipts.

10.3 The earlier report to Cabinet in February recommended the engagement of legal and business/ financial experts, to evaluate options and report back on a preferred model to provide the best opportunity to realise the ambitions of the Council, in this regard. Following an appropriate procurement exercise, Deloitte LLP were appointed as financial advisors and Bevan Brittan LLP as legal advisors to the Council for this project.

10.4 The comprehensive project brief given to the consultants included the following elements: Consideration of options; Governance and scope; Financing of the vehicle; Financial, accounting and taxation matters; and Risk management.

10.5 Deloitte have prepared a report for the Council and Bevan Brittan LLP have complemented this with an advice note on legal matters; their Executive Summaries are shown as Appendices A and B respectively. This report summarises their work, makes clear recommendations on the preferred approach, and describes the next steps to implementation.

11.0 Consideration of Options

11.1 Following an initial review of the options for creating a delivery vehicle the expert advisors summarised the potential models for consideration as follows:

1. **Status quo** – continuing with the current team, without changes to its capacity and capability;
2. **Self-delivery** – strengthening the current team and making alterations to internal working practices;
3. **Wholly owned and controlled** arms length **company**
   a. *Where the **Council transfers the assets***
   b. *Where the **Council retains the assets;***
4. **Wholly owned, *not* controlled**, but influenced arms length **company**
   a. *Where the **Council transfers the assets***
   b. *Where the **Council retains the assets;***
5. Public/ private **joint venture.**

11.2 Clearly, the preferred delivery vehicle must be fit for purpose and capable of realising most or all of the Council's objectives. The criteria against which options have been evaluated reflect the Council's ambitions for speedy, large-scale housing and business growth, and for the new Company. They are shown in Appendix C; and they include the following objectives:

- to accelerate growth in terms of housing completion and jobs investment, using Council-owned land and property assets;

- to maximise development and minimise risk to the Council, by providing dedicated delivery arrangements and relevant and up to date property and commercial expertise;

- to secure additional private sector, Government and European Funding investment into the Borough, through creating a stronger focus on delivery; and providing a mechanism with the potential to deliver larger scale development schemes locally for the Cheshire & Warrington LEP;

- to create profitable and transparent relationships with developers and investors which deliver financial and regeneration benefits; and

- to capture the financial benefits and tax efficiencies of a dedicated delivery vehicle, which is Council-controlled, but can benefit from agile operating arrangements that can be developed at a later date when it is fully established.

11.3 Following evaluation and moderation of the options, by officers from the Council's Regeneration, Legal and Finance teams, the preferred delivery model is **Option 3b: Wholly owned and controlled arms length company, w*here the Council retains the assets***. Against the objective-based criteria described in Appendix C, this is considered to provide the best opportunity to realise the development ambitions of the Council; (a Summary of Evaluation Scores is shown as Appendix D).

11.4 This approach will allow the Council to focus its delivery through the separate arm's length company, without distracting the Company's management and staff with the Council's other day-to-day operational requirements. In addition, the Company can be used flexibly as an agent, without tying the Council down to a single delivery model (as would be the case,say, with an asset-backed Joint Venture company).

11.5 Furthermore, by creating a new identity and brand in this way– with a high profile and an "open for business" attitude – Cheshire East is likely to be seen as more attractive by developers and other external investment bodies and partners, than through a direct contract with the Council, or a non wholly-controlled Council company/ joint venture.

11.6 In addition, in keeping the structure/ scope of the vehicle simple in this way the Council would avoid the potential for "tax leakage" (i.e. unnecessary exposure to Stamp Duty Land Tax, Corporation Tax, etc.), that would otherwise be the case if the Council's assets were transferred to the Company (or asset acquisitions were made by the Company rather than by the Council).

11.7 In effect, the Development Company would in future provide professional services for the Council, acting on its behalf in the promotion of its assets for disposal and development, proactively creating productive relationships with developers and investors, negotiating agreements for sale, lease, or acquisition of sites for housing and business growth. In terms of the best legal form of such a corporate entity, the experts would recommend a "Company Limited by Shares".

11.8 This is because a company limited by shares is a "tried and tested" corporate vehicle used widely within the public and private sectors, with a separation of risks between the shareholder (in this case the Council) and the company and with a clear decision-making forum for the formulation of business strategy (the Board of the Company). Whilst both a company limited by shares and a company limited by guarantee are able to distribute any profits made (with a share-based company being marginally easier), a company limited by shares is more readily capable of being transferred to another party if required in the future. This means that if the Company had value (i.e. another party was willing to pay to own the Company in place of the Council), the Council's shares could easily be transferred to that other party.

11.9 Whilst there are some tax benefits to the use of a limited liability partnership over a company limited by shares or guarantee, given that profit generation and distribution will be limited, an LLP structure is not critical (see the Deloitte Report for details). In addition to this, there is a legal consideration for discounting the LLP model. Under section 4(2) of the Localism Act 2011, if a local authority does anything for a commercial purpose in the exercise of its general power of competence, it must do so through a company. Exercising the power for a "commercial purpose" is not defined in the 2011 Act, but the definition of "company" does not include LLPs. Where the development vehicle is generating profits from outside the Council's area and/ or those profits are not then recycled towards wider Council aims (for example, regeneration, housing, public realm works), it is more likely that the development vehicle's purpose is seen as commercial in nature. Using a company structure rather than an LLP structure avoids any later issues under section 4(2) of the Localism Act 2011.

12.0 Governance and Scope

12.1 Whilst it is for the Council to determine its preferred approach, the Deloitte report recommends that the Board of the Company should be constituted with a relatively small number of individuals in order to be the most effective.

12.2 Based on their experience, Deloitte have suggested that six directors (comprising a mix of Members and senior officers of the Council) would provide the appropriate balance of focus and resource to lead the strategic direction of the Company. Deloitte and Bevan Brittan LLP have each provided advice regarding the best means of ensuring conflicts of interest are avoided, in relation to membership of the Board:

- It is easier to manage the potential conflicts for an "officer director", as the Council can agree to the officer continuing to act in their substantive role despite potential conflicts; can agree not to take action against him where he is required to act contrary to the interests of the Council due to his role as a director; and can agree to his remuneration as a director if applicable. The selection and involvement of senior officers acting as directors to the company will require careful consideration by the Council for these reasons.

- Where a "councillor director" is concerned the Council, (as owner of the company and ‘ controller’ of the Board of Directors) can agree to him or her acting as a director, but under the provisions of the Localism Act 2011, the councillor would need a dispensation to enable him to act as a councillor where a conflict of interest arises or is particularly likely to do so, for example, where a Company Director is also a Cabinet Member. Dispensations may be able to be granted as the provisions of the Localism Act are fairly wide and, for example, a dispensation can be granted if the authority, "considers that granting the dispensation is in the interests of persons living in the authority's area", or "considers that it is otherwise appropriate to grant a dispensation". The member must apply for the dispensation in writing and it does not avoid the requirement for registration of interest or of disclosure whenever a matter of Council business affecting the company is being discussed.

- It is also important to remember, that despite all of the above being in place it can be very difficult to avoid the perception of bias, which, if proven, can invalidate the decisions of the Council and give rise to a public perception of wrongdoing which can be very difficult to resolve. For this reason, care needs to be taken over the selection of those elected Members who will serve on the Board of the Company.

12.3 With the above advice in mind, it is suggested that the Council agrees to appoint initially the following non-executive Directors: Cllr A Thwaite (Chairman), Cllr D Druce, Cllr D Newton, Cllr P Groves, the Director of Economic Growth and Prosperity (Caroline Simpson), the newly-appointed Head of Development (Darran Lawless) and agree that the Borough Solicitor, (Mike Rowan) take on the role as Company Secretary. It is recommended that the core role of the Chair and the Board of the Company is to ensure the work programme of the Company fits within the Council’s corporate objectives; to develop the strategic work programme; and importantly to monitor and drive forward delivery through robust performance management.

12.4 Bevan Brittan have advised that Directors' remuneration with the wholly-owned company will be governed by the provisions of the Local Authority Order 2005, which restricts the amount of remuneration that an elected Member may receive. In effect, this means that they cannot receive any additional remuneration from the Company for acting as a director, which is beyond the special responsibility allowance they would have received had the activities of the Company been discharged by the Council. Any remuneration they receive will be deducted from the SRA that they receive within the Council and they may only claim mileage and subsistence at the rates that apply to councillors.

12.5 Clearly, in order to implement this initiative, the Council will need to review and revise its decision-making structures. This will include defining the operating parameters of the Company – e.g. which assets are available for disposal or development; and giving the delegated authority required to negotiate agreements for sale or lease to developers, investors or end users or development agreements with developers; etc. – in such a way as to provide assurance to the Council regarding the proper management of its property assets.

12.6 The Council would exercise control of this new vehicle also by agreeing a 3-Year Business Plan for the Company, which establishes the portfolio of assets it is required to act upon as a priority; any provision of resources to facilitate land acquisitions; and set objectives against which its performance will be measured. This Business Plan will be specific to the Development Company but fit within the overall Council's reporting arrangements.

12.7 With regard to the accountability of the Company, the Council needs to determine reporting arrangements for the scrutiny of the Company's performance. As a provider of services helping to deliver the Council's economic growth agenda, the Company's activities would fall within the remit of the Portfolio Holder for Prosperity & Economic Regeneration and would be subject to the normal scrutiny arrangements of the Council. This would involve regular quarterly performance reports to Cabinet and Corporate Scrutiny Committee.

12.8 It is proposed that a Shareholder Committee is established comprising of Members from Cabinet and the Chief Executive to oversee the operations of the Company. It is recommended that the Shareholders Committee is comprised of the Leader, Deputy Leader, Portfolio Holder for Prosperity, Portfolio Holder for Resources and the Chief Executive. The proposed governance model is outlined in Appendix G.

12.9 As noted above, a key objective of this initiative is also to create the potential for the vehicle to operate outside the Council's geographic boundaries and provide advisory services for the Cheshire and Warrington LEP (and possibly other public sector bodies). Deloitte have noted that the Company would need to develop its service offer and commercial arrangements with the other authorities; and also have regard to associated resourcing requirements as well as to consider any impact on its tax position. Similar considerations would apply if the Council wished over time the Company to expand the scope of its functions beyond its original purpose.

13.0 Management Structure and Initial Work Programme

13.1 The management of the Company would complement the new organisational arrangements being developed in the Council, with the most senior role (Managing Director) working under the direction of the Company Board and with a reporting line to the Council's Director of

Economic Growth & Prosperity, relating to the work of a wider Council team and benefitting from other initiatives being taken forward to improve and streamline working practices in this context.

13.2 Regarding the staffing of the Company, it is envisaged that there would be a small “core” team of Managing Director; a Development Programme Manager; up to three Development Surveyors; a Legal Advisor; and a Finance Advisor, with ability to flex resource inputs relative to the needs of the work programme and associated funding as set out in the 3-Year Business Plan.

13.3 It is recommended that initially staff employed by the Council seconded to the Company, as required, with appropriate charges made to the Company’s account for their time, along with associated overhead and support costs. This approach would be simpler than TUPE transfer of staff to the Company, and particularly would avoid additional pension-related costs for both the Company and the Council. The Company may purchase external consultancy services directly though, relating to the requirements of the work programme and within the budget envelope and scope of its 3-Year Business Plan.

13.4 An initial work programme for the Development Company is being prepared for consideration. The Council’s substantial asset portfolio includes a range of land and property holdings, with the potential for significant residential and/ or business-led development. Subject to planning consent and the economic conditions prevailing at the time of marketing of sites, it is understood that capital receipts in excess of £100m may be achievable over the next 10 years. The Development Programme will evolve further as part of implementation, and will form the first 3-Year Business Plan for the Company.

14.0 Financing of the Vehicle

14.1 As the Company would be a provider of professional services, the Council would pay for the services of the Company, as it would for any other external provider of consultancy services. For the Council, such expenditure would be treated under the usual capital/ revenue rules, and with spending on services relating to the disposal of its assets chargeable against its associated capital receipts (subject to the statutory limit of 4% of each receipt).

14.2 As indicated in section 7, the financing of the operational costs of the Company (e.g. staffing, marketing, other services and support expenses) would continue to be provided for in the Council’s medium term financial plans – i.e. reflected in Capital project and disposals programmes, as they develop, with any costs not chargeable to capital being met from existing Revenue budgets for the Development Team and its associated support services.

15.0 Financial, Tax and Accounting Matters

15.1 The Deloitte report contains analysis and commentary on tax considerations, in respect of Corporation Tax, Stamp Duty Land Tax and VAT. It recognises that the position of Councils, in relation to tax, is particularly favourable (e.g. with no liability for Corporation Tax and particular rules in relation to VAT).

15.2 Consequently, in general terms when considering alternative delivery vehicles, there must be a focus on minimising "tax leakage". A high level summary of the tax implications of each of the options for new delivery vehicles is shown in Appendix E.

15.3 As noted in paragraph 11.3, the recommended option is for a wholly Council-owned and controlled company, providing professional services. Under this model - *with the Council retaining ownership of its property assets, until actual disposal to a developer, investor or end user (or indeed the Council acquiring assets, in relation to acquisitions negotiated by the Company on its behalf)* – the Council avoids over-exposure to Stamp Duty and Corporate Capital Gains Tax. Furthermore, simple reimbursement of operating costs of the Company would avoid Corporation Tax leakage, in material terms.

15.4 The external experts have provided information on company accounting, financial reporting and State Aid. As requested in the brief, they have also given advice on the financial aspects in respect of the staffing of the company, which we will need to give consideration to (e.g. as noted above, whether staff employed by the Council should be simply seconded to the Company; or formally transferred under TUPE, with the associated complexities and costs of pension transfers; and insurance/ indemnity matters relating to both officers and Members).

16.0 Risk Management

16.1 The potential risks associated with creating and operating a new delivery vehicle as recommended in this report are summarised in Appendix F, along with related impacts and how those risks may be mitigated or eliminated. A detailed Risk Management Plan will be developed and put in place as part of the actions needed to establish the new company.

17.0 Access to Information

The background papers relating to this report can be inspected by contacting the report writer:

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Deloitte - Executive Summary APPENDIX A (1)

- **Background:** Cheshire East Council ("the Council") has ambitious growth plans with the Local Plan setting out the delivery of major new infrastructure, at least 20,000 jobs and 27,000 new homes by 2030. In response to the growth agenda, the Council is seeking to accelerate the development of Council owned assets and to boost the delivery of developer-led strategic sites and is considering the creation of a new dedicated Development Vehicle for this purpose. In March 2013, the Council commissioned Deloitte to support the financial aspects of a high level appraisal on a range of options for the Development Vehicle and to provide some specific advice and commentary on the proposed preferred option. The purpose of this report is to document the findings of our high level review. The Council has significantly shortened the timetable for this high level review. This report therefore comments on the work to date and further work and clarification is required to address a number of points raised in this report.

- **Option appraisal and preferred option:** The Council in conjunction with its legal advisers (Bevan Brittan) and Deloitte have development a shortlist of potential delivery options. A qualitative options appraisal has been scored by a project team consisting of Council officers, Deloitte and Bevan Brittan has identified the preferred option to be Option 3b*: Delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the assets* ("the Company"). Under Option 3b, the proposed scope of the Company is to:

- To accelerate growth in terms of housing completion and jobs investment on Council owned assets;
- To provide dedicated delivery arrangements and property and commercial expertise;
- To secure additional private and Government investment into the Borough through increased focus on delivery;
- To potentially provide a mechanism to deliver schemes to the Cheshire & Warrington LEP as well as the Council;
- To create profitable and transparent relationships with developers and investors to deliver financial and regeneration benefits;
- To capture any financial benefits and tax efficiencies of a dedicated delivery vehicle which is Council controlled.

- **Council Assets** the proposed preferred option does not envisage the transfer of Council assets to the Company. The ownership and management of the Council assets will be retained by the Council and the financial transactions associated with the financing, maintaining and disposing of capital assets are expected to follow existing arrangements. The Council and Company will need to consider how the current arrangements regarding the management of the Council assets are impacted as a result of the newly formed Company in order to provide the management arrangements for the proper control, management and stewardship of Council assets.

- **Capital financing**: the Council has envisaged some form of "revolving fund" to facilitate asset acquisition. Given capital financing transactions will be retained in the Council, it may be that the benefits of the revolving fund could be achieved through the use of an "earmarked reserve" rather than a separate fund, subject to the impact on the Council's corporate financial management and capital financing plans and clarification of governance arrangements.

Executive Summary (continued) APPENDIX A (2)

- **Governance arrangements**: The Council preferred option is the delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset. We understand the Council has given some early consideration to the governance arrangements for the Company although at this point in time proposed governance arrangements are still being considered by the Council and arrangements are not yet finalised.
- **Board representation and managing conflicts**: the Board should be constituted with a relatively small number of individuals to provide the appropriate balance of focus, skills and resource to lead the strategic direction of the Company. Larger numbers of individuals may result in reduced focus and strategic direction. The Council needs to manage potential conflicts (real and perceived) and consider the appropriateness of Councillors and lead officers acting within the Council on any matter which has a significant impact on the Company.
- **Decision making structures**: The Council will need to agree the parameters of the Company's decision making and how the management of the Company and key decisions will interface with existing Council decision making and approval structures. For example, will certain decisions require Cabinet approval, delegated approval from the relevant portfolio holder, approval from the relevant chief officer?
- **Company accountability and scrutiny**: we are informed by the Council that the activities of the Company would fall within the remit of the Portfolio Holder for Prosperity & Economic Regeneration and would be subject to the normal scrutiny arrangements of the Council. The Council needs to finalise these reporting lines to ensure appropriate arrangements are in place to manage the performance of the Company.
- **Accounting / reporting:** Company directors will be responsible for operation and management of the Company and for accounting records which are sufficient to show and explain the company's transactions and to enable them to ensure that any accounts required be prepared to comply with the requirements of the Companies Act (386 of the Companies Act 2006). Option 3b may qualify as a small company exemption although this will require further analysis and confirmation.
- **Employment model**: We understand from the Council that the estimated staffing and operating costs would be in the region of £0.5 million per annum and that most of the staff are likely to be Council employees. The Council is considering a secondment model (ie seconding of Council staff to the Company) at least in the first instance. In finalising the employment model the Council will need to be mindful of TUPE Regulations and these have been considered in the Bevan Brittan's Advice Note.
- **Financial skills**: the Company will require access to appropriate financial skills. Dependent on the finally agreed scope of the Company, it is likely that certain skills (eg accounts preparation) could be available on a call off arrangement from the Council. It may that expertise in commercial and financial structuring could be provided by the newly appointed Development Executives, through advisory support or through external recruitment.

Executive Summary (continued) APPENDIX A (3)

- **Corporate Tax**: under Option 3b, assuming the vehicle is established for EU procurement reasons as a ‘not-for-profit’ cost-sharing vehicle, the risk of corporation tax leakage should be minimised on the basis either (i) that the vehicle is not carrying on a commercial trading business for tax purposes so does not generate taxable surpluses or (ii) that it is a mutual trader (broadly, a service provider controlled by its members and funded by members’ contributions). Option 3b should also avoid any additional SDLT risk as no property transfers between CEC and the delivery vehicle would be contemplated. If the delivery vehicle were to undertake property transactions directly (as under Option 3a or Option 5), or (under Option 3b) provide commercial services with a view to a profit, the use of a “tax transparent” limited liability partnership (LLP) structure may be beneficial from a corporation tax perspective as it would enable the Council to benefit from corporation tax exemption on its share of profits accruing within the LLP. Use of an LLP would, however, be subject to the Council obtaining legal advice that the particular commercial activities are capable under the Localism Act of being undertaken using a partnership rather than a limited company. An LLP would also not generally be a suitable vehicle for a cost-sharing activity which is not undertaken on a commercial basis, as its presupposes that the LLP is carrying some form of business.

- **VAT**: the Council enjoys a beneficial VAT partial exemption regime allowing it to recover input VAT on its costs in full, provided the VAT incurred on costs relating to exempt supplies (which would include certain sales of land and property) is less than 5% of the total VAT incurred by the Council. We have not reviewed the Council’s partial exemption status as part of this exercise, but the possible impact of future property transactions on the Council’s VAT partial exemption position generally should be kept under review in case there is any risk of the 5% threshold being breached. Under Option 3b, the delivery vehicle is likely to be required to register for VAT and account for VAT on supplies made to the Council. For partial exemption reasons, we would recommend that it is separately VAT registered and is not included within a VAT group registration with the Council. As the vehicle would not itself be entering into property transactions, it should be fully taxable for VAT purposes enabling it to recover input VAT incurred on its costs, so the overall VAT position should be neutral.

- **Future scope expansion**: Going forward, we understand that the Council may wish to consider broadening the scope of the Company to operate outside of the Council’s geographic boundaries and also to potentially widen the scope of the Company to provide additional trading activities to other sectors. In exploring either or both of these scenarios, the Council would need to undertake the appropriate market sounding to provide a level of assurance on the demand for services; consider any potential tax issues; and develop the commercial and pricing mechanisms for such arrangements.

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APPENDIX B (1)

ADVICE NOTE TO CHESHIRE EAST COUNCIL

TO SUPPORT ITS OPTIONS APPRAISAL ON DEVELOPMENT ARRANGEMENTS

1 Introduction and Executive Summary

1.1 Cheshire East Council (the "**Council**") has ambitious growth plans with the Local Plan setting out the delivery of major new infrastructure, at least 20,000 jobs and 27,000 new homes by 2030.

1.2 As a newly created unitary authority, the Council has ambitious plans to create a strong growing economy though job creation and enhancing the region's attractiveness to investors. In addition, the Council's strategic direction reflects a growing appetite for flexibility, agility, freedom from bureaucracy, and for the creation of other forms of operational decision making and delivery vehicles.

1.3 In response to the growth agenda, the Council is to accelerate the development of Council owned assets and to boost the delivery of developer-led strategic sites and is considering the development of a new Delivery Vehicle.

1.4 Bevan Brittan LLP has been commissioned by the Council to support on the legal and governance aspects of a high level appraisal on a range of delivery options available to the Council and to assist on mitigating the risks on the Council's preferred option which best achieves the Council's objectives.

1.5 Deloitte has been commissioned by the Council to support on the financial and tax aspects of this high level appraisal and on the Council's preferred option which best achieves the Council's objectives. Deloitte has also facilitated and recorded the quantitative assessment of options in its report to the Council ("**Deloitte Report**").

1.6 Following the Council's options appraisal and having received advice and assistance from both Deloitte and Bevan Brittan LLP, the Council's preferred option is Option 3b (Delivery through wholly-owned and controlled arm's length company (a "Teckal company") where the Council retains ownership of the assets. The Council considers that the principal advantage of this Option, over all others, is that it allows the Council to focus its delivery through the separate arm's length company, without distracting the company's management and personnel with the Council's other day to day operational requirements. The Company can also better promote the Council's assets for development through the local plan and planning process. In addition, the company can be used flexibly by the Council as an agent without tying the Council down to a single delivery model (as would a LABV or transfer of assets). In addition, the Council believes that this vehicle may be regarded as more attractive by the Cheshire and Warrington LEP and possibly other public sector bodies as a delivery vehicle for their purposes, than direct contract with the Council or a non-wholly controlled Council company/joint venture. The type of vehicle will be a company limited by shares, due to the limited profit available and given the legal considerations highlighted in this Advice Note. Next steps and key risk mitigation is set out at section 6 and the Conclusion.

CONCLUSION AND NEXT STEPS

1.7 Given the Council's Core Aim and objectives set out in section 2 above, the Council's preferred option is **Option 3b**, i.e. delivery through wholly-owned (or jointly-owned with a neighbouring authority) and controlled arm's length company (a "Teckal company") where the Council retains ownership of the assets. The Council considers that the principal advantage of this Option, over all others, is that it allows the Council to focus its delivery through the separate arm's length company, without distracting the company's management and personnel with the Council's other day to day operational requirements. The company can also better promote the Council's assets for development through the local plan and planning process. In addition, the company can be used flexibly by the Council as an agent without tying the Council down to a single delivery model (as would a LABV or transfer of assets). In addition, the Council believes that this vehicle may be regarded as more attractive by the Cheshire and Warrington LEP and possibly other public sector bodies as a delivery vehicle for their purposes, than direct contract with the Council or a non-wholly controlled Council company/joint venture.

1.8 In terms of the type of corporate vehicle to be used, the preferred option is a **company limited by shares**. A company limited by shares is a "tried and tested" corporate vehicle used widely within the public and private sectors, with a separation of risks between shareholder and company and a clear decision-making forum for the formulation of business strategy (the board). The Company would be able to distribute any profits made (albeit the company is not expected to make significant profit), and is more readily capable of being transferred to another party if required in the future.

1.9 Whilst there are some tax benefits to the use of a limited liability partnership over a company limited by shares or guarantee, we understand that profit generation and distribution will be limited; hence an LLP structure is not critical (see the Deloitte Report for details). In addition to this, there is a legal consideration for discounting the LLP model. Using a company structure rather than an LLP structure avoids any later issues under section 4(2) of the Localism Act 2011.

1.10 Section 6 above sets out mitigation strategies in relation to the risks identified with Option 3b. It is important for the Council to:

- Identify the scope of the agency role and arrangements with the company
- Consider who will be a board director and how such a role is to be reconciled with any role within the Council, taking into account actual and perceived conflicts of interest and bias
- Consider the necessary constitutional and administrative processes which the Council has, to ensure that the company can be used effectively and efficiently to improve delivery timescales
- Consider the effective drafting of the memorandum and articles of association of the company to give the Council the necessary degree of control (e.g. the Council would approve any business plan (i.e. the overarching "envelope" of the company's activities), scrutinise the company's performance and Board activities (directing the Board where necessary to act or not act in a certain way) and exercise a veto at Board level on all or key, strategic decisions affecting the company)
- Consider the clearly defined funding model for the company; Consider the clearly defined staffing role for the company.

Evaluation Criteria and weightings

APPENDIX C

The shortlisted options have been scored against the weighted evaluation criteria set out below.

Criteria	Weighting
Is the Option an enabler to housing growth on Cheshire East owned assets?	10
Is the Option an enabler to jobs investment on Cheshire East owned assets?	10
Does the Option enable the Council to maximise development value to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	10
Does the Option enable the Council to minimise risks by providing dedicated delivery arrangements and additional property and commercial expertise?	10
Does the Option have the potential to act as a delivery vehicle to the Cheshire & Warrington LEP as well as Cheshire East Council?	10
Does the Option have the potential to secure private and Government investment into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	10
Does the Option enable the Council to create profitable and transparent relationships with developers and investors which benefits the local communities – potentially utilising the Developer Panel Framework currently being scoped in more detail with a view to procuring during 2013/14?	5
Does the Option enable the Council to maximise any financial benefits through a dedicated delivery vehicle?	10
Does the Option enable the Council to minimise tax exposure of a dedicated delivery vehicle?	10
Does the Option enable the Council to benefit from agile operating arrangements of the delivery vehicle but still retain control?	10
Is the Option flexible to allow the Council to make changes to its structure in the future to meet changing landscapes/priorities?	5

Summary of Evaluation Scores

APPENDIX D

	Option 1		Option 2		Option 3a		Option 3b		Option 4a		Option 4b		Option 5	
	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score
Total	14	125	38	340	37	330	43	390	27	240	34	310	30	280
Ranking	**7**		**2**		**3**		**1**		**6**		**4**		**5**	

Commentary:

- Option 1 lacks the capacity and focus to deliver the Council strategic economic and regeneration objectives.
- Option 2 has the potential to deliver increased capacity and expertise but still lacks focus on key sites i.e. it is likely that the team will retain responsibility for a broader range of Council objectives.
- Option 3a benefits from increased capacity, expertise and focus on key sites but exposes the Council in significant risk both financially and operationally through the transfer of assets which crystallises Stamp Duty Land Tax.
- Option 3b benefits from increased capacity, expertise and focus, minimises the Council's risk exposure and mitigates the impact of Stamp Duty Land Tax.
- Option 4a although similar to Option 3 in terms of capacity, expertise and focus exposes the Council to increase operational risk and complexity through a lack of control and therefore agility in operations and flexibility to change with the Council to meet future objectives. It also exposes the Council to Stamp Duty Land Tax on the transfer of assets
- Option 4b has the same benefits as Option 3a without the exposure to Stamp Duty Land Tax. However, it is unlikely to be accepted as a delivery vehicle for the wider Cheshire and Warrington LEP thereby restricting its use as a commercial entity.
- Option 5 benefits from the increased participation of the private sector potentially providing useful skills, capacity and economies of scale. However, it is likely to require the Council to commit significant capital resources thereby relinquishing control, it is unlikely to be flexible to meet a changing local government landscape and if exclusive may be perceived as the Council favouring one particular private sector entity and compromising transparency. In addition the private sector partner will direct benefits away from local society.

Conclusion:

- Option 3b is considered by the Council to best meet its objectives.

High level tax analysis & commentary on options APPENDIX E

Tax Commentary	Option 1	Option 2	Option 3a	Option 3b	Option 4a	Option 4b	Option 5
Corporation Tax (CT)	Neutral – CEC exempt from CT	As Option 1	CT payable on taxable surpluses within delivery vehicle unless structured as a tax transparent Limited Liability Partnership (LLP).	Risk of CT leakage minimised if vehicle is not trading commercially or is structured as LLP (as in Option 3a).	As Option 3a	As Option 3b	As Option 3a – although use of a Limited Partnership or Limited Liability Partnership should maintain neutrality for the Council's share of the surplus
Stamp Duty Land Tax	Neutral – SDLT generally payable on land/ property acquisitions.	As Option 1	Adverse SDLT position if delivery vehicle is company limited by guarantee, otherwise SDLT neutral on land transfers from CEC to LLP or company limited by shares.	SDLT neutral as in Option 1 (Land interests remain in CEC, so no SDLT issues on formation of delivery vehicle)	As Option 3a, provided CEC holds 75% or more of limited company shares. Complex SDLT partnership rules to be considered (under LLP route).	As Option 3b	As Option 4a
Value Added Tax	Neutral - depending on CEC's de-minimis position	As Option 1	Dependent on specific transactions, should be capable of VAT neutral treatment	As Option 3a	As Option 3a	As Option 3a	As Option 3a

Preferred Option: *Risk Management*

APPENDIX F (1)

Risk	Impact	Mitigation
Inadequate resourcing of the company	The Company delivers a poor service and fails to meet its objectives. Further costs would be required to increase the capacity of the team.	The Council will need to carefully plan the operating functions of the Company to better understand its resource requirements.
Fails to meet business needs / deliver the Council's primary objective i.e. growth in housing and jobs	The Company delivers a poor service and fails to meet its objectives. Further scrutiny/control required on the operational aspects of the Company. Further costs may therefore be incurred e.g. in sourcing the appropriately skilled resource.	The Council will need to clearly define the Company's operating parameters within the Company's constitution and business plan such that it is focuses on targeting the Council's primary objectives. It will also need to ensure the Company is provided with appropriate resources and skills.
Integration with the Council	The Company fails to operate cohesively with the in-house/retained team causing possible duplication of work or inefficient working practices. Further costs may be incurred	The Council will need to ensure there are clear operating boundaries and protocols/procedures such that any interface between the Council and the Company is efficient. It is therefore essential that staff of both the Council and the Company clearly understand their respective roles and responsibilities.
Unclear constitution/role/responsibilities/authority	The Company operates outside its anticipated boundaries further increasing the Council's exposure to operational/reputational risk.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.
Company lacks flexibility to respond to future changes	The Council is unable to utilise the Company to meet potential future objectives. Further costs may be incurred in enabling the flexibility or creating an alternate tool.	The Council will need to give careful consideration to the level of flexibility it allows the Company through its constitution. A careful balance of control and risk will need to be understood.

Preferred Option: *Risk Management*

APPENDIX F (2)

Risk	Impact	Mitigation
Company lacks agility to deliver it primary function	The Council fails to meet its objectives with a potential financial and reputational risk.	The Council will need to give careful consideration to the level of flexibility it allows the Company through its constitution. A careful balance of control and risk will need to be understood.
The Council does not have the required resource to effectively control/manage the Company	The Council lacks the visibility required to maintain scrutiny over the Company with a potential impact on its reputation.	The Council will need to ensure it clearly understands its role as the accountable body and therefore the level of resource required to maintain appropriate scrutiny levels of scrutiny without impacting on the Company's ability to remain agile and flexible.
The Council exerts control inhibiting the Company's ability to be agile and flexible	The Company fails to perform efficiently in meeting its primary objective which will have a financial impact.	The Council will need to ensure it clearly defines its own operating parameters ensuring it gets the right balance of control and risk.
The Company fails to develop beneficial relationships with developers	The Company fails to perform and deliver its primary objective. Further resources and cost may be required to develop beneficial relationships.	The Council will need to ensure the Company is staffed with individuals with the correct skills to enable the Company to operate efficiently.
The Company operates outside of its defined parameters	The Company exposes the Council to additional financial and reputational risk. Further costs may be required to support operations not authorised.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.
The Company acts without delegated authority	The Company exposes the Council to additional financial and reputational risk. Further costs may be required to support operations not authorised.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.

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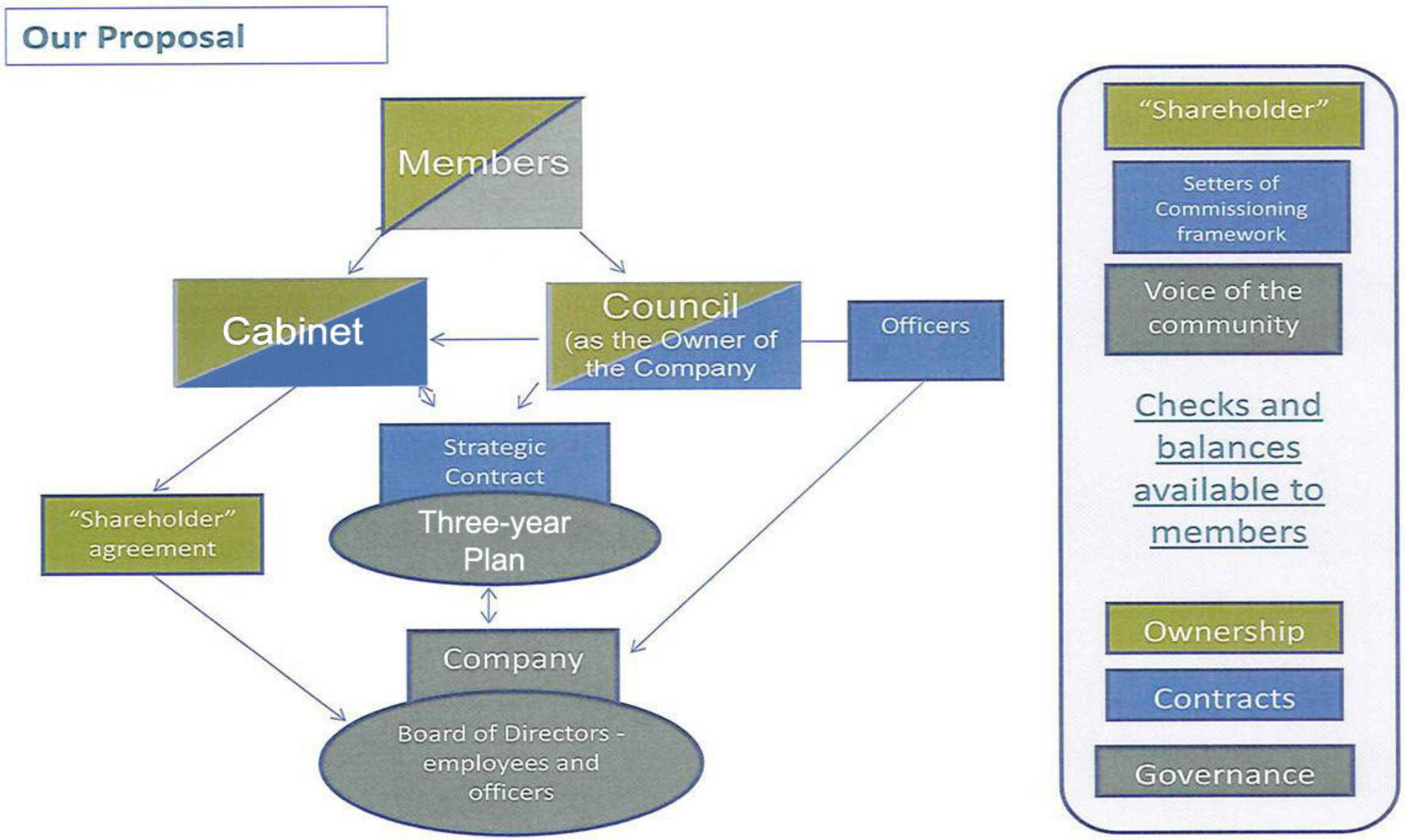
Appendix G – Governance Model East Cheshire Engine of the North



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Cheshire East Council

Financial and business advice in setting up a Development Vehicle

[Draft Report]

26 April 2013

Draft for discussion

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Cheshire
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April 2013

Dear Sirs

High level option appraisal in relation to setting up a Development Vehicle

We have pleasure in enclosing the results of our work in assisting Cheshire East Council ("the Council") to consider a high level option relating to the above. If you have any questions, require any clarifications or would like to discuss this in person please contact me on 0161 455 6484 or Craig Jones on 0121 695 5029.

Yours faithfully

Simon Bedford
for
Deloitte LLP

Important Notice

Deloitte LLP ("Deloitte"), is acting for Cheshire East Council (the "Clients") on the terms set out in the engagement letter dated [ ] [(the "Engagement Letter")] in connection with financial and business advice relating to setting up a delivery vehicle and no one else and will not be responsible to anyone other than the Clients for providing advice in relation to this project. This draft document, which has been prepared by Deloitte LLP ("Deloitte"), has been prepared for the sole purpose of providing the preliminary discussion and presentation to the Client. No party is entitled to rely on this draft document for any purpose and we accept no responsibility or liability or duty of care to any party whatsoever in respect of the contents of this draft document. This is a working draft document issued to Cheshire East Council for discussion purposes only. Our work is incomplete and remains subject to our internal review procedures. Accordingly the draft document's provisional contents, views and conclusions may alter dependent upon our further work and consideration of the issues involved. Such alterations and amendments might be material to the provisional contents, views and conclusions. The information contained in this draft document has been compiled by Deloitte and includes material obtained from information provided by the Client, discussions with management of the Client but has not been verified. This draft document also contains confidential material proprietary to Deloitte. Accordingly, no reliance may be placed for any purposes whatsoever on the contents of this draft document or on its completeness. No representation or warranty, express or implied, is given and no responsibility or liability is or will be accepted by or on behalf of Deloitte or by any of its partners, employees, agents or any other person as to the accuracy, completeness or correctness of the information contained in this draft document or any other oral information made available and any such liability is expressly disclaimed. This draft document and its contents are confidential and may not be reproduced, redistributed or passed on, directly or indirectly, to any other person in whole or in part without the prior written consent of Deloitte.

Contents

Executive Summary

- **Background:** Cheshire East Council ("the Council") has ambitious growth plans with the Local Plan setting out the delivery of major new infrastructure, at least 20,000 jobs and 27,000 new homes by 2030. In response to the growth agenda, the Council is seeking to accelerate the development of Council owned assets and to boost the delivery of developer-led strategic sites and is considering the creation of a new dedicated Development Vehicle for this purpose. In March 2013, the Council commissioned Deloitte to support the financial aspects of a high level appraisal on a range of options for the Development Vehicle and to provide some specific advice and commentary on the proposed preferred option. The purpose of this report is to document the findings of our high level review. The Council has significantly shortened the timetable for this high level review. This report therefore comments on the work to date and further work and clarification is required to address a number of points raised in this report.

- **Option appraisal and preferred option:** The Council in conjunction with its legal advisers (Bevan Brittan) and Deloitte have development a shortlist of potential delivery options. A qualitative options appraisal has been scored by a project team consisting of Council officers, Deloitte and Bevan Brittan has identified the preferred option to be Option 3b*: Delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the assets* ("the Company"). Under Option 3b, the proposed scope of the Company is to:

- To accelerate growth in terms of housing completion and jobs investment on Council owned assets;
- To provide dedicated delivery arrangements and property and commercial expertise;
- To secure additional private and Government investment into the Borough through increased focus on delivery;
- To potentially provide a mechanism to deliver schemes to the Cheshire & Warrington LEP as well as the Council;
- To create profitable and transparent relationships with developers and investors to deliver financial and regeneration benefits;
- To capture any financial benefits and tax efficiencies of a dedicated delivery vehicle which is Council controlled.

- **Council Assets** the proposed preferred option does not envisage the transfer of Council assets to the Company. The ownership and management of the Council assets will be retained by the Council and the financial transactions associated with the financing, maintaining and disposing of capital assets are expected to follow existing arrangements. The Council and Company will need to consider how the current arrangements regarding the management of the Council assets are impacted as a result of the newly formed Company in order to provide the management arrangements for the proper control, management and stewardship of Council assets.

- **Capital financing**: the Council has envisaged some form of "revolving fund" to facilitate asset acquisition. Given capital financing transactions will be retained in the Council, it may be that the benefits of the revolving fund could be achieved through the use of an "earmarked reserve" rather than a separate fund, subject to the impact on the Council's corporate financial management and capital financing plans and clarification of governance arrangements.

Executive Summary (continued)

- **Governance arrangements**: The Council preferred option is the delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset. We understand the Council has given some early consideration to the governance arrangements for the Company although at this point in time proposed governance arrangements are still being considered by the Council and arrangements are not yet finalised.
- **Board representation and managing conflicts**: the Board should be constituted with a relatively small number of individuals to provide the appropriate balance of focus, skills and resource to lead the strategic direction of the Company. Larger numbers of individuals may result in reduced focus and strategic direction. The Council needs to manage potential conflicts (real and perceived) and consider the appropriateness of Councillors and lead officers acting within the Council on any matter which has a significant impact on the Company.
- **Decision making structures**: The Council will need to agree the parameters of the Company's decision making and how the management of the Company and key decisions will interface with existing Council decision making and approval structures. For example, will certain decisions require Cabinet approval, delegated approval from the relevant portfolio holder, approval from the relevant chief officer?
- **Company accountability and scrutiny**: we are informed by the Council that the activities of the Company would fall within the remit of the Portfolio Holder for Prosperity & Economic Regeneration and would be subject to the normal scrutiny arrangements of the Council. The Council needs to finalise these reporting lines to ensure appropriate arrangements are in place to manage the performance of the Company.
- **Accounting / reporting:** Company directors will be responsible for operation and management of the Company and for accounting records which are sufficient to show and explain the company's transactions and to enable them to ensure that any accounts required be prepared to comply with the requirements of the Companies Act (386 of the Companies Act 2006). Option 3b may qualify as a small company exemption although this will require further analysis and confirmation.
- **Employment model**: We understand from the Council that the estimated staffing and operating costs would be in the region of £0.5 million per annum and that most of the staff are likely to be Council employees. The Council is considering a secondment model (ie seconding of Council staff to the Company) at least in the first instance. In finalising the employment model the Council will need to be mindful of TUPE Regulations and these have been considered in the Bevan Brittan's Advice Note.
- **Financial skills**: the Company will require access to appropriate financial skills. Dependent on the finally agreed scope of the Company, it is likely that certain skills (eg accounts preparation) could be available on a call off arrangement from the Council. It may that expertise in commercial and financial structuring could be provided by the newly appointed Development Executives, through advisory support or through external recruitment.

Executive Summary (continued)

- **Corporate Tax**: under Option 3b, assuming the vehicle is established for EU procurement reasons as a 'not-for-profit' cost-sharing vehicle, the risk of corporation tax leakage should be minimised on the basis either (i) that the vehicle is not carrying on a commercial trading business for tax purposes so does not generate taxable surpluses or (ii) that it is a mutual trader (broadly, a service provider controlled by its members and funded by members' contributions). Option 3b should also avoid any additional SDLT risk as no property transfers between CEC and the delivery vehicle would be contemplated. If the delivery vehicle were to undertake property transactions directly (as under Option 3a or Option 5), or (under Option 3b) provide commercial services with a view to a profit, the use of a "tax transparent" limited liability partnership (LLP) structure may be beneficial from a corporation tax perspective as it would enable the Council to benefit from corporation tax exemption on its share of profits accruing within the LLP. Use of an LLP would, however, be subject to the Council obtaining legal advice that the particular commercial activities are capable under the Localism Act of being undertaken using a partnership rather than a limited company. An LLP would also not generally be a suitable vehicle for a cost-sharing activity which is not undertaken on a commercial basis, as its presupposes that the LLP is carrying some form of business.

- **VAT**: the Council enjoys a beneficial VAT partial exemption regime allowing it to recover input VAT on its costs in full, provided the VAT incurred on costs relating to exempt supplies (which would include certain sales of land and property) is less than 5% of the total VAT incurred by the Council. We have not reviewed the Council's partial exemption status as part of this exercise, but the possible impact of future property transactions on the Council's VAT partial exemption position generally should be kept under review in case there is any risk of the 5% threshold being breached. Under Option 3b, the delivery vehicle is likely to be required to register for VAT and account for VAT on supplies made to the Council. For partial exemption reasons, we would recommend that it is separately VAT registered and is not included within a VAT group registration with the Council. As the vehicle would not itself be entering into property transactions, it should be fully taxable for VAT purposes enabling it to recover input VAT incurred on its costs, so the overall VAT position should be neutral.

- **Future scope expansion**: Going forward, we understand that the Council may wish to consider broadening the scope of the Company to operate outside of the Council's geographic boundaries and also to potentially widen the scope of the Company to provide additional trading activities to other sectors. In exploring either or both of these scenarios, the Council would need to undertake the appropriate market sounding to provide a level of assurance on the demand for services; consider any potential tax issues; and develop the commercial and pricing mechanisms for such arrangements.

1. Introduction

Background

- Cheshire East Council ("the Council") has ambitious growth plans with the Local Plan setting out the delivery of major new infrastructure, at least 20,000 jobs and 27,000 new homes by 2030.
- As a newly created unitary authority the Council has ambitious plans to create a strong growing economy though job creation and enhancing the regions attractiveness to investors. In addition, the Council's strategic direction reflects a growing appetite for flexibility, agility, freedom from bureaucracy, and for the creation of other forms of operational decision making and delivery vehicles.
- In response to the growth agenda, the Council is seeking to accelerate the development of Council owned assets and to boost the delivery of developer-led strategic sites and is considering the development of a new Delivery Vehicle.
- Deloitte has been commissioned by the Council to support the financial aspects of a high level appraisal on a range of potential delivery options and to identify a preferred solution which best achieves the Council's objectives and to provide some specific advice and commentary on the proposed preferred option. The scope of our work is set out in our engagement letter.
- Bevan Brittan has been commissioned by the Council to support on the governance and vires aspects of a high level appraisal on a range of delivery options and to identify the governance aspects and risk mitigation aspects of the preferred option which best achieves the Council's objectives. Bevan Brittan has provided an Advice Note to the Council ("Bevan Brittan Advice Note"). Our report contains some cross references to the Bevan Brittan Advice Note.

Council objectives for a Delivery Vehicle and key criteria for the option appraisal

•To accelerate growth in terms of housing completion and jobs investment on Council owned assets;

•To maximise development and minimise risk to the Council by providing dedicated delivery arrangements and property and commercial expertise;

•To secure additional private and Government investment into the Borough through creating the focus on delivery and providing a mechanism to deliver schemes to the Cheshire & Warrington LEP as well as the Council;

•Create profitable and transparent relationships with developers and investors which deliver financial and regeneration benefits;

•To capture any financial benefits and tax efficiencies of a dedicated delivery vehicle which is Council controlled but can benefit from agile operating arrangements and can be reviewed at a later date.

1. Introduction (continued)

Options

•**1**: Status quo - continuing with self-delivery using the current programme with existing team capacity and capability

•**2**: Self delivery - strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Council's constitution

•**3a**: Delivery through wholly-owned and controlled arms' length company where the **Council transfers ownership** of the asset

•**3b**: As 3a but where **Council retains ownership** of the asset

•**4a**: Delivery through wholly-owned but not controlled arms' length company where the **Council transfers ownership** of the assets

•**4b**: As 4a but **Council retains ownership** of the assets

•**5**: A public/private joint venture where the **Council transfers ownership** of the asset to the JV.

Role of the Delivery Vehicle

•The Council has given some early consideration to the proposed role and responsibilities for the Development Vehicle. These include:

•To lead on strategic land acquisitions to enable the delivery of the development programme;

•To promote the Council owned assets for development through the Local Plan and planning process and to undertake masterplanning to bring sites forward for development;

•To identify property related strategic opportunities for the Council;

•To provide commercial property expertise and to potentially act in an advisory capacity for the LEP;

•To undertake development appraisals to inform future investment opportunities; and

•To develop relationships with developers and investors and bring forward partnering and contract opportunities to benefit the Council and the community.

1. Introduction (continued)

Process

•**Property strategy and key sites** – we have discussed with the Council the key sites for development and collated a summary schedule of these sites containing relevant information and the Council's estimated value and timing of bringing these to market.

•**Option appraisal** – building on an initial paper circulated by Bevan Brittan and further discussion with the Council we have developed a short list of options and sought to define and describe the key attributes of each of the shortlisted options.

•**Qualitative evaluation** – we have structured an evaluation criteria and weighting which reflects the Council's stated objectives for the delivery vehicle. The qualitative evaluation scores have been subject to moderation across the project team.

•**Tax implications** – based on the information we have received we have provided high level commentary on the tax implications for VAT, Stamp Duty Land Tax and Corporation Tax for each shortlisted option.

•**Commentary on the recommended option** – we have commented on the specific aspects of the preferred option which the Council included in the brief.

•**Proposed next steps and implementation** – we have set out our view of proposed next steps the Council should consider in the implementation of revised arrangements.

Summary of key development sites

- For the purposes of providing context for the analysis of the proposed Development Vehicle, the Council provided outline details on the proposed key development sites which would be managed through the Development Vehicle. The Council has also provided some illustrative values. These values have been provided by the Council as high level estimates in a short timescale and have not been subject to a formal or detailed valuation exercise. Recognising the confidential nature of such information this information has not been included in this report.

2. Summary of shortlisted options

- Option 1: Status quo continuing with self-delivery using the current programme with existing team capacity and capability
- Option 2: Self delivery strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Council's constitution
- Option 3a: Delivery through wholly-owned and controlled (as defined below) arms' length company where the **Council transfers** ownership of the asset
- Option 3b: Delivery through wholly-owned and controlled (as defined below) arms' length company where the **Council retains** ownership of the asset
- Option 4a: Delivery through wholly-owned but not controlled (as defined below) arms' length company where the **Council transfers** ownership of the assets
- Option 4b: Delivery through wholly-owned but not controlled (as defined below) arms' length company where the **Council retains** ownership of the assets
- Option 5: A public/private joint venture where the **Council transfers** ownership of the asset to the JV

In this Report, references to "control" (as in an arm's length *controlled* company), as set out by Bevan Britton, should be read in the context of the EU case known as "Teckal" (*C-107/98 Teckal Srl v Comune di Viano (Reggio Emilia [1999 ECR I - 8121]*). In that case, the EC court concluded that:

- the contracting authority must exercise over the proposed contractor a control which is similar to that which it exercises over its own departments. the contracting authority (in this case, the Council) must have the power of decisive influence over both the strategic objectives and the significant decisions of the contractor (i.e. the company). The Council would need to have that power of decisive influence at a constitutional as well as an actual operational level (i.e. it actually exercises its powers). From a commercial standpoint the company will need to function as an entity and be able to make decisions about its everyday activity (as internal departments at the Council would be able to do) without having to refer back to the Council for every small decision. The Teckal exemption would not require *all* decisions to be unanimously approved by the Council.; and
- simultaneously, the proposed contractor to which a contract would be awarded must carry out the essential part of its activates with the contracting authority or authorities. For these purposes that the business undertaken by the company for any organisation or entity *other* than the Council would be of marginal significance only.

3. Key Attributes of shortlisted options

Option 1: Status quo continuing with self-delivery using the current programme with existing team capacity and capability

The Council continues with disposing, maintaining or developing assets utilising its existing team (including the newly appointed Development Executive) and governance arrangements.

Asset Ownership: the Council continue to retain control of the assets.

Governance: the Council continues to ratify decisions in accordance with its current working practices and constitution.

Strategy: the Council continues to develop its asset strategy in accordance with current working practices and constitution.

Risk: the Council continues to be exposure to development risks.

Financing: the Council continues to finance its asset strategy in accordance with rules governing local authority finance.

Tax/Accounting: the Council continues to treat its assets in accordance with local authority accounting guidance and account for tax in accordance with local authority finance regulations.

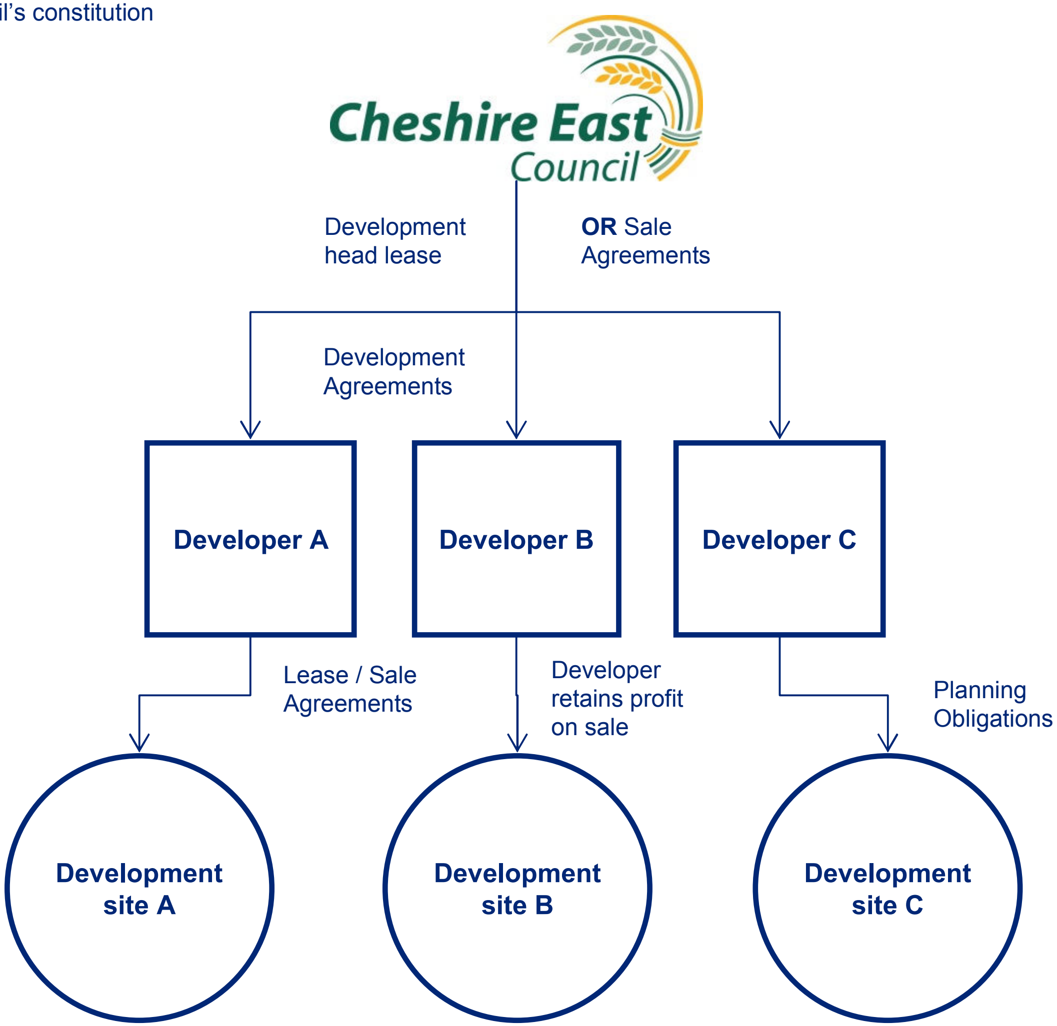
Option 2: Self delivery strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Council's constitution

As per Option 1 the Council continues with disposing, maintaining or developing assets utilising its existing team (including the newly appointed Development Executive) and governance arrangements. This Option would seek to further increase the capacity in terms of resource and skills of the current team. Under this Option, the Council would use the current team as a starting point, strengthening where necessary through external hires and internal movement of Council employees. The Council will also undertake to amend its working practice and/or constitution.

3. Key Attributes of shortlisted options

Option 1: Status quo continuing with self-delivery using the current programme with existing team capacity and capability

Option 2: Self delivery strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Council's constitution



The Council:
•retains direct control of the assets/property portfolio
•competitively appoints a developer for each site
•puts in place all the necessary contractual elements: Development agreement, guarantees, collateral warranties etc.
•funds the development directly
•benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
•provides requires the capacity and expertise
The developer retains the profit on sale of the head lease.

3. Key Attributes of shortlisted options

Option 3a: Delivery through wholly-owned and controlled arms' length company where the Council transfers ownership of the asset

The Council establishes a limited company over which it exercises a level of control which is similar to that which it exercises over its own departments and which carries out the essential part of its activity with the Council.

Principal Activity: to invest in Cheshire East with a view to acting as a catalyst in promoting economic development through property development and job creation. Activities include leading land deals, promoting Cheshire East, masterplanning and pre-development, strategic acquisitions, provision of professional property expertise including development appraisals and relationship development with key investors/private sector parties and other stakeholders.

Asset Ownership: the Council transfers ownership of the assets/property portfolio to the company for a consideration e.g. capital funded by the Council or equity in the company.

Governance: the company is incorporated with members and operates as an autonomous body with a separate management board made up expertise (Councillors and/or Officers) with delegated authority to act and make decisions within the remit of the company's function/objectives in accordance with its articles and memorandum of association. Conflicts of interest must be managed appropriately. See Bevan Brittan Advice Note in this respect. Where the Council is disposing of assets to the company, it will need to secure best consideration or, where it wishes to sell at an undervalue, comply with its general Disposal Order to sell below best consideration only where there are economic, social and environmental considerations for doing so (Section 123 of the Local Government Act 1972). In addition, the Council will need to be mindful to ensure it is not falling foul of State Aid and where there may be any doubt, that it seeks clearance.

Strategy: the company will develop its strategy in line with its own strategic objectives. However, given the Council controls the company, the Council would have a significant influence in this.

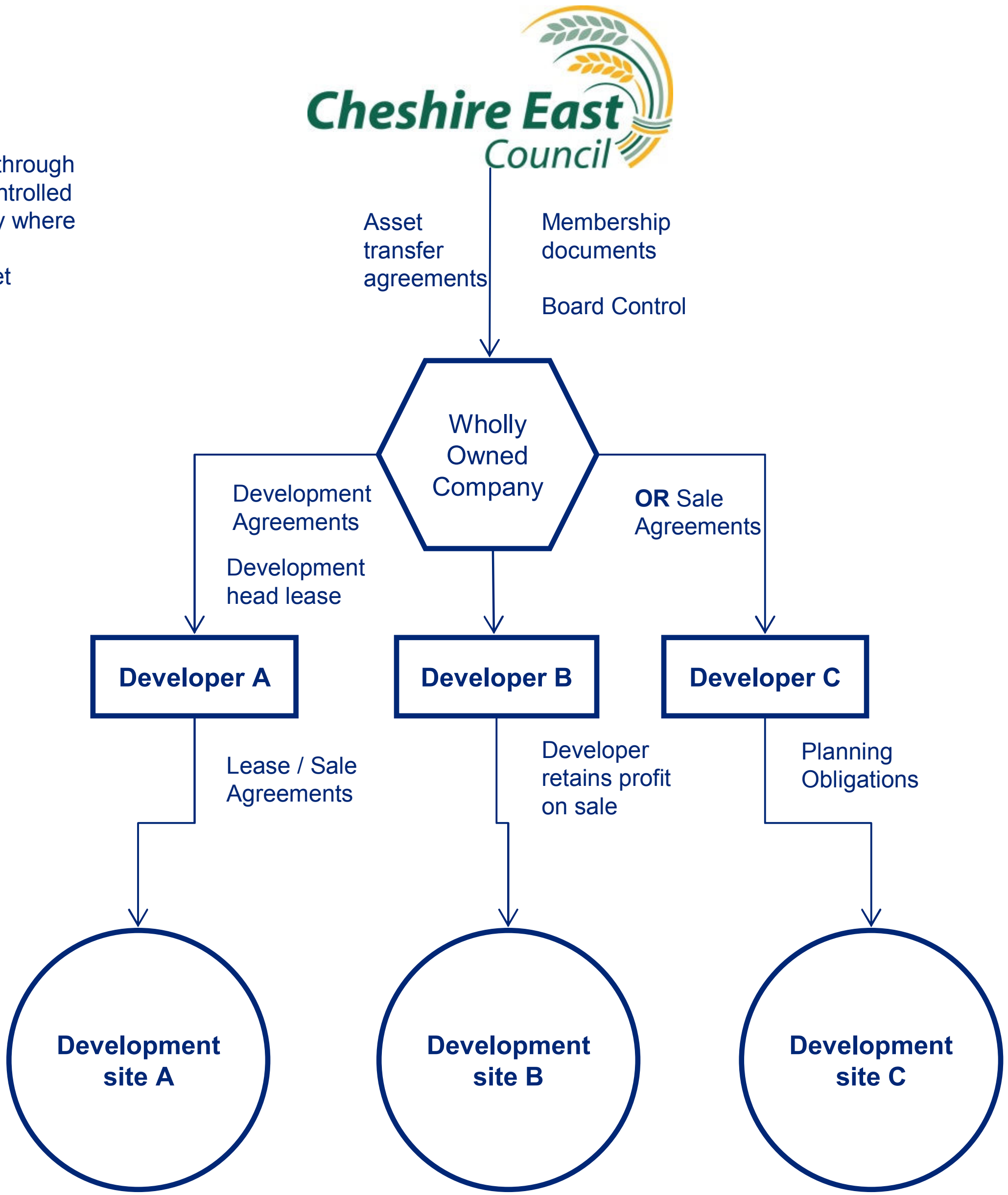
Risk: the Council is exposed to the risks associated with the transfer of assets. The company is exposed to the risks of a commercial body, but in the ordinary course of business the Council's exposure to these risks is limited by the nature of the vehicle (i.e. liability limited to the value of its shares, guarantee or capital interest, depending on the type of corporate vehicle chosen). We understand from Bevan Brittan that where members or officers of the Council are acting for the company, the Statutory Indemnity that they receive from the Council will not apply. Therefore, a fresh indemnity would be required by them. See Bevan Brittan Advice Note on the risks around members/officers acting for the company.

Financing: the Council finances the company to cover the costs of operation. As the company becomes established operating income generated through the provision of professional service may mitigate the Council's exposure. Profits on disposal of the assets are retained by the Company for future investment and/or returned to the Council. The Council will need to consider the cost of service with reference to the Company's Teckal exemption (please refer to the Bevan Brittan Advice Note).

Tax/Accounting: the company prepares accounts and tax returns in accordance with UKGAAP/IFRS and relevant legislation.

3. Key Attributes of shortlisted options

Option 3a – Delivery through wholly-owned and controlled arms' length company where the Council transfers ownership of the asset



The Council:
•Controls the WOC
•transfers ownership of the assets/property portfolio
•funds the operating costs of the WOC
•benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
The WOC:
•competitively appoints a developer for site regeneration
•conducts the sale of sites ear-marked for disposal
•puts in place all the necessary contractual elements: Sales/Development agreement, guarantees, collateral warranties etc.
•retains the proceeds of sales
•provides the capacity and expertise appointed from the market
The developer retains the profit on sale of the head lease or future sales proceeds of redeveloped asset.

3. Key Attributes of shortlisted options

Option 3b: Delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset

As per Option 3a the Council establishes a limited company over which it exercises a level of control which is similar to that which it exercises over its own departments and which carries out the essential part of its activity with the Council. However, in this Option 3b the Council retains the ownership of the assets/property portfolio.

Principal Activity: to invest in Cheshire East with a view to acting as a catalyst in promoting economic development through property development and job creation. Activities include leading land deals, promoting Cheshire East, masterplanning and pre-development, strategic acquisitions, provision of professional property expertise including development appraisals and relationship development with key investors/private sector parties and other stakeholders.

***Asset Ownership**: the Council retains ownership of the assets/property portfolio working with the company on the asset/disposal strategy. This is a significant difference from Option 3a, it is envisage that the company provides a pure professional service thereby excluding [asset handling/transaction activities].*

Governance: the company is incorporated with members and operates as an autonomous body with a separate management board made up expertise (Councillors and/or Officers) with delegated authority to act and make decisions within the remit of the company's function/objectives in accordance with its articles and memorandum of association. Conflicts of interest must be managed appropriately. See Bevan Brittan Advice Note in this respect. Where the Council is disposing of assets to the company, it will need to secure best consideration or, where it wishes to sell at an undervalue, comply with its general Disposal Order to sell below best consideration only where there are economic, social and environmental considerations for doing so (Section 123 of the Local Government Act 1972). In addition, the Council will need to be mindful to ensure it is not falling foul of State Aid and where there may be any doubt, that it seeks clearance.

Strategy: the company will develop its strategy in line with its own strategic objectives. However, given the Council controls the company, the Council would have a significant influence in this.

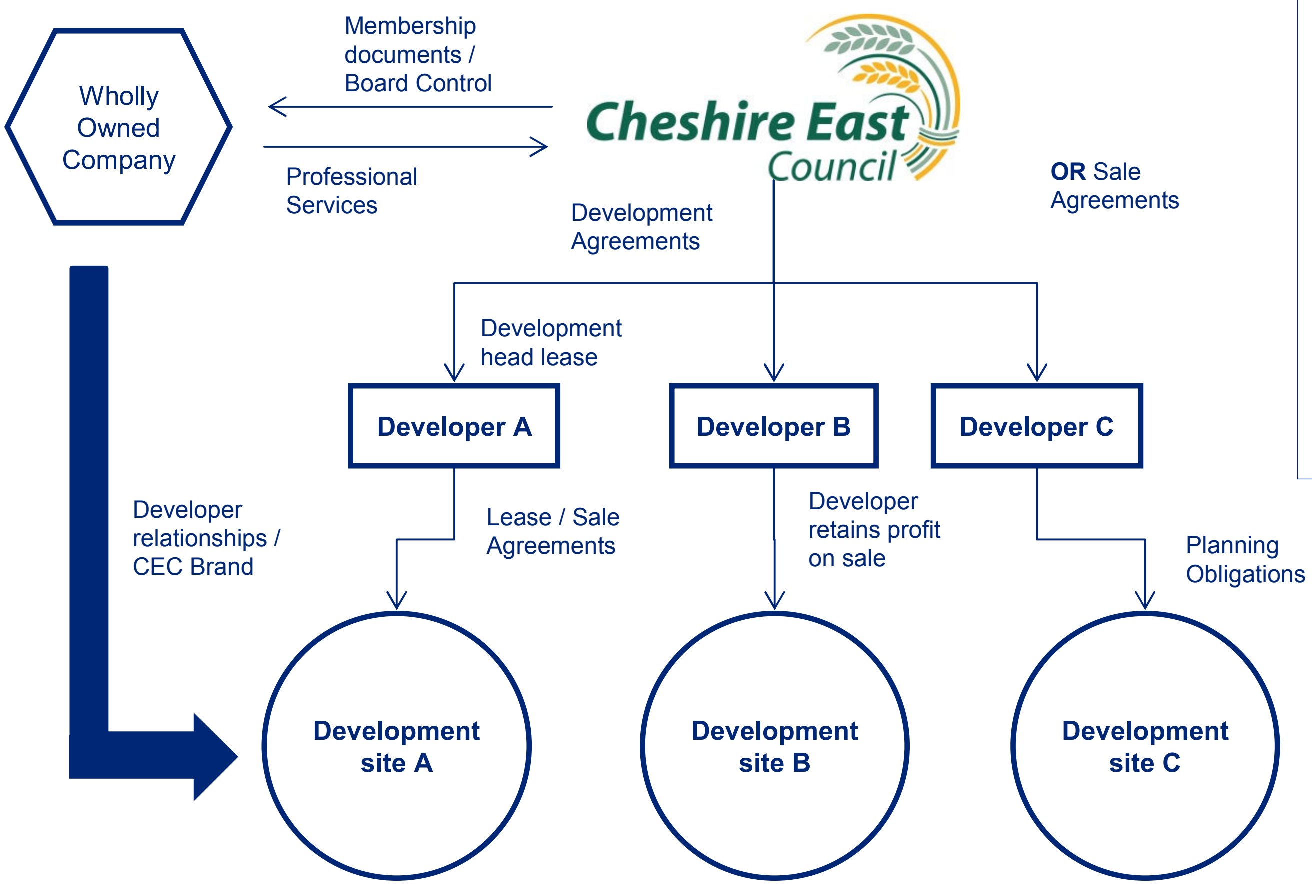
Risk: the company is exposed to the risks of a commercial body, but in the ordinary course of business the Council's exposure to these risks is limited by the nature of the vehicle (i.e. liability limited to the value of its shares, guarantee or capital interest, depending on the type of corporate vehicle chosen). We understand from Bevan Brittan that where members or officers of the Council are acting for the company, the Statutory Indemnity that they receive from the Council will not apply. Therefore, a fresh indemnity would be required by them. Please see the Bevan Brittan Advice Note on the risks around members/officers acting for the company.

***Financing**: costs of operation are recharged to the Council. As the company becomes established operating income generated through the provision of professional service to other Authorities/LEP may mitigate the Council's exposure. Profits on disposal of assets are retained by the Council. The Council may consider implementing a defined/ring-fenced reserve in which to manage disposal proceeds for use in future economic development activities. The Council will need to consider the cost of service with reference to the Company's Teckal exemption (please refer to the Bevan Brittan Advice Note).*

Tax/Accounting: the company prepares accounts and tax returns in accordance with UKGAAP/IFRS and relevant legislation.

3. Key Attributes of shortlisted options

Option 3b – Delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset.



The Council:
- Controls the WOC
- retains ownership of the assets/property portfolio
- funds the operating costs of the WOC
- benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
- Retains the proceeds of sale.

The WOC:
- provides professional services in relation to the sale and/or development of the assets
- conducts the sale of sites ear-marked for disposal
- puts in place all the necessary contractual elements: Sales/Development agreement, guarantees, collateral warranties etc.
- provides the capacity and expertise appointed from the market

The developer retains the profit on sale of the head lease or future sales proceeds of redeveloped asset.

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3. Key Attributes of shortlisted options

Option 4a: Delivery through wholly-owned but not controlled arms' length company where the *Council transfers* ownership of the assets

The Council establishes a limited company over which it exercises a level of influence over the activity of the company.

Principal Activity: to invest in Cheshire East with a view to acting as a catalyst in promoting economic development through property development and job creation. Activities include leading land deals, promoting Cheshire East, masterplanning and pre-development, strategic acquisitions, provision of professional property expertise including development appraisals and relationship development with key investors/private sector parties and other stakeholders.

Asset Ownership: the Council transfers ownership of the assets/property portfolio to the company for a consideration e.g. capital funded by the Council or equity in the company.

Governance: the company is incorporated with the Council having 100% ownership but operates as an autonomous body with a separate management board comprising Councillors, officers and other parties (but without the Council having control at board level) with authority to act and make decisions within the remit of the company's function/objectives in accordance with its articles and memorandum of association.

Where the Council is disposing of assets to the company, it will need to secure best consideration or, where it wishes to sell at an undervalue, comply with its general Disposal Order to sell below best consideration only where there are economic, social and environmental considerations for doing so (Section 123 of the Local Government Act 1972). In addition, the Council will need to be mindful to ensure it is not falling foul of State Aid and where there may be any doubt, that it seeks clearance.

Strategy: the company will be taking its own decisions - not under Council direct control. The company will develop its strategy in line with its own strategic objectives. However, the Council would have some (but not necessarily significant) influence in this.

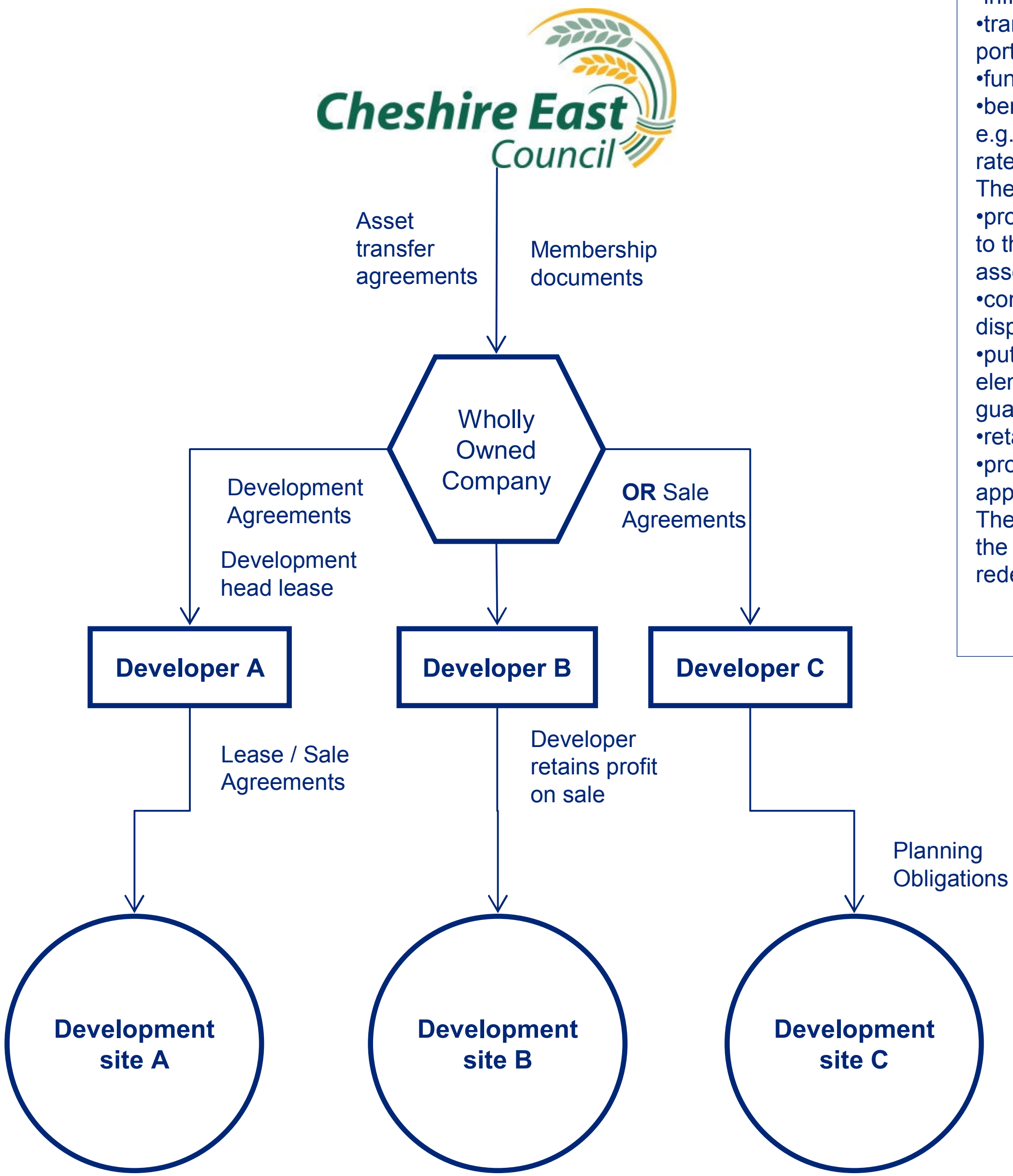
Risk: the Council is exposed to the risks associated with the transfer of assets. The company is exposed to the risks of a commercial body, but in the ordinary course of business the Council's exposure to these risks is limited by the nature of the vehicle (i.e. liability limited to the value of its shares, guarantee or capital interest, depending on the type of corporate vehicle chosen). We understand from Bevan Brittan that where members or officers of the Council are acting for the company, the Statutory Indemnity that they receive from the Council will not apply. Therefore, a fresh indemnity would be required by them. See Bevan Brittan Advice Note on the risks around members/officers acting for the company.

Financing: the Council finances the company to cover the costs of operation. [The Council provides the capital to the company in order for it to purchase the assets for development./ The Council accounts for the debtor upon transfer of the assets / assets are invested in return for equity.]. As the company becomes established operating income generated through the provision of professional service may mitigate the Council’s exposure. Profits on disposal of the assets are retained by the Company for future investment and/or returned to the Council.

Tax/Accounting: the company prepares accounts and tax returns in accordance with UKGAAP/IFRS and relevant legislation.

3. Key Attributes of shortlisted options

Option 4a: Delivery through wholly-owned but not controlled arms' length company where the Council transfers ownership of the assets



The Council:
•influences the WOC
•transfers ownership of the assets/property portfolio
•funds the operating costs of the WOC
•benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
The WOC:
•provides professional services in relation to the sale and/or development of the assets
•conducts the sale of sites ear-marked for disposal
•puts in place all the necessary contractual elements: Sales/Development agreement, guarantees, collateral warranties etc.
•retains the proceeds of sales
•provides the capacity and expertise appointed from the market
The developer retains the profit on sale of the head lease or future sales proceeds of redeveloped asset.

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3. Key Attributes of shortlisted options

Option 4b: Delivery through wholly-owned but not controlled arms' length company where the Council retains ownership of the assets

As per Option 4a the Council establishes a limited company over which it exercises a level of influence over the activity of the company. However, in this Option 4b the Council retains the ownership of the assets/property portfolio.

Principal Activity: to invest in Cheshire East with a view to acting as a catalyst in promoting economic development through property development and job creation. Activities include leading land deals, promoting Cheshire East, masterplanning and pre-development, strategic acquisitions, provision of professional property expertise including development appraisals and relationship development with key investors/private sector parties and other stakeholders.

Asset Ownership*: the Council retains ownership of the assets/property portfolio working with the company on the asset/disposal strategy. This is a significant difference from Option 4a, it is envisage that the company provides a pure professional service thereby excluding [asset handling/transaction activities].*

Governance: the company is incorporated with the Council having 100% ownership but operates as an autonomous body with a separate management board comprising Councillors, officers and other parties (but without the Council having control at board level) with authority to act and make decisions within the remit of the company's function/objectives in accordance with its articles and memorandum of association.

Where the Council is disposing of assets to the company, it will need to secure best consideration or, where it wishes to sell at an undervalue, comply with its general Disposal Order to sell below best consideration only where there are economic, social and environmental considerations for doing so (Section 123 of the Local Government Act 1972). In addition, the Council will need to be mindful to ensure it is not falling foul of State Aid and where there may be any doubt, that it seeks clearance.

Strategy: the company will be taking its own decisions - not under Council direct control. The company will develop its strategy in line with its own strategic objectives. However, the Council would have some (but not necessarily significant) influence in this.

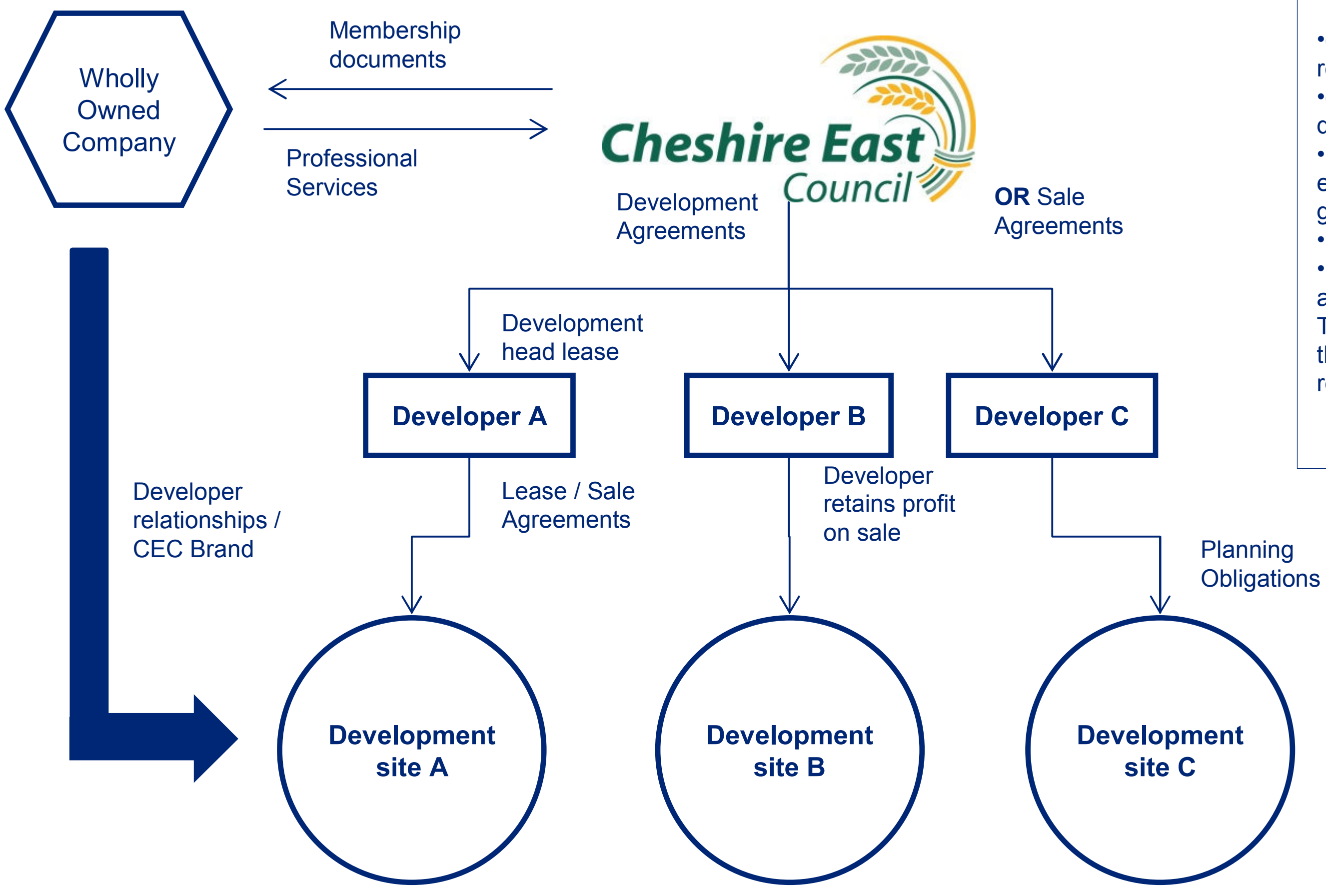
Risk: the company is exposed to the risks of a commercial body, but in the ordinary course of business the Council's exposure to these risks is limited by the nature of the vehicle (i.e. liability limited to the value of its shares, guarantee or capital interest, depending on the type of corporate vehicle chosen). We understand from Bevan Brittan that where members or officers of the Council are acting for the company, the Statutory Indemnity that they receive from the Council will not apply. Therefore, a fresh indemnity would be required by them. Please see the Bevan Brittan Advice Note on the risks around members/officers acting for the company

Financing*: costs of operation are recharged to the Council. As the company becomes established operating income generated through the provision of professional service may mitigate the Council's exposure. Profits on disposal of assets are retained by the Council in a defined/ring-fenced reserve for use in future economic development activities.*

Tax/Accounting: the company prepares accounts and tax returns in accordance with UKGAAP/IFRS and relevant tax legislation.

3. Key Attributes of shortlisted options

Option 4b: Delivery through wholly-owned but not controlled arms' length company where the Council retains ownership of the assets



The Council:
•influences the WOC
•retains ownership of the assets/property portfolio
•funds the operating costs of the WOC
•benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
The WOC:

•competitively appoints a developer for site regeneration
•conducts the sale of sites ear-marked for disposal
•puts in place all the necessary contractual elements: Sales/Development agreement, guarantees, collateral warranties etc.
•retains the proceeds of sales
•provides the capacity and expertise appointed from the market
The developer retains the profit on sale of the head lease or future sales proceeds of redeveloped asset.

3. Key Attributes of shortlisted options

Option 5: Public/Private Corporate JV

The Council undertakes a competitive process to appoint a private sector partner with whom it will create a corporate joint venture. The purpose of the joint venture is to undertake the development of the sites for disposal rather than act as an agent for disposal purposes only. For the purpose of the options appraisal the it is assumed the Council transfers the ownership of the assets/property portfolio to the Joint Venture and the Private sector partner contributes an equivalent equity amount.

Principal Activity: to invest in Cheshire East with a view to acting as a catalyst in promoting economic development through property development and job creation. Activities include leading land deals, promoting Cheshire East, masterplanning and pre-development, strategic acquisitions, provision of professional property expertise including development appraisals and relationship development with key investors/private sector parties and other stakeholders.

Asset Ownership: the Council transfers ownership of the assets/property portfolio which the joint venture undertakes to redevelop.

Governance: the company is incorporated with members and operates as an autonomous body with a separate management board made up expertise (Councillors and/or Officers) with delegated authority to act and make decisions within the remit of the company's function/objectives in accordance with its articles and memorandum of association. Conflicts of interest must be managed appropriately. See Bevan Brittan Advice Note in this respect. Where the Council is disposing of assets to the company, it will need to secure best consideration or, where it wishes to sell at an undervalue, comply with its general Disposal Order to sell below best consideration only where there are economic, social and environmental considerations for doing so (Section 123 of the Local Government Act 1972). In addition, the Council will need to be mindful to ensure it is not falling foul of State Aid and where there may be any doubt, that it seeks clearance.

Strategy: the company will be developing its own strategy. The Council will have an influence on the initial strategic aims, and thereafter will need to agree these with its partner on an on-going basis.

Risk: the Council is exposed to the risks associated with the transfer of assets. The company is exposed to the risks of a commercial body, but in the ordinary course of business the Council's exposure to these risks is limited by the nature of the vehicle (i.e. liability limited to the value of its shares, guarantee or capital interest, depending on the type of corporate vehicle chosen). We understand from Bevan Brittan that where members or officers of the Council are acting for the company, the Statutory Indemnity that they receive from the Council will not apply. Therefore, a fresh indemnity would be required by them. See Bevan Brittan Advice Note on the risks around members/officers acting for the company.

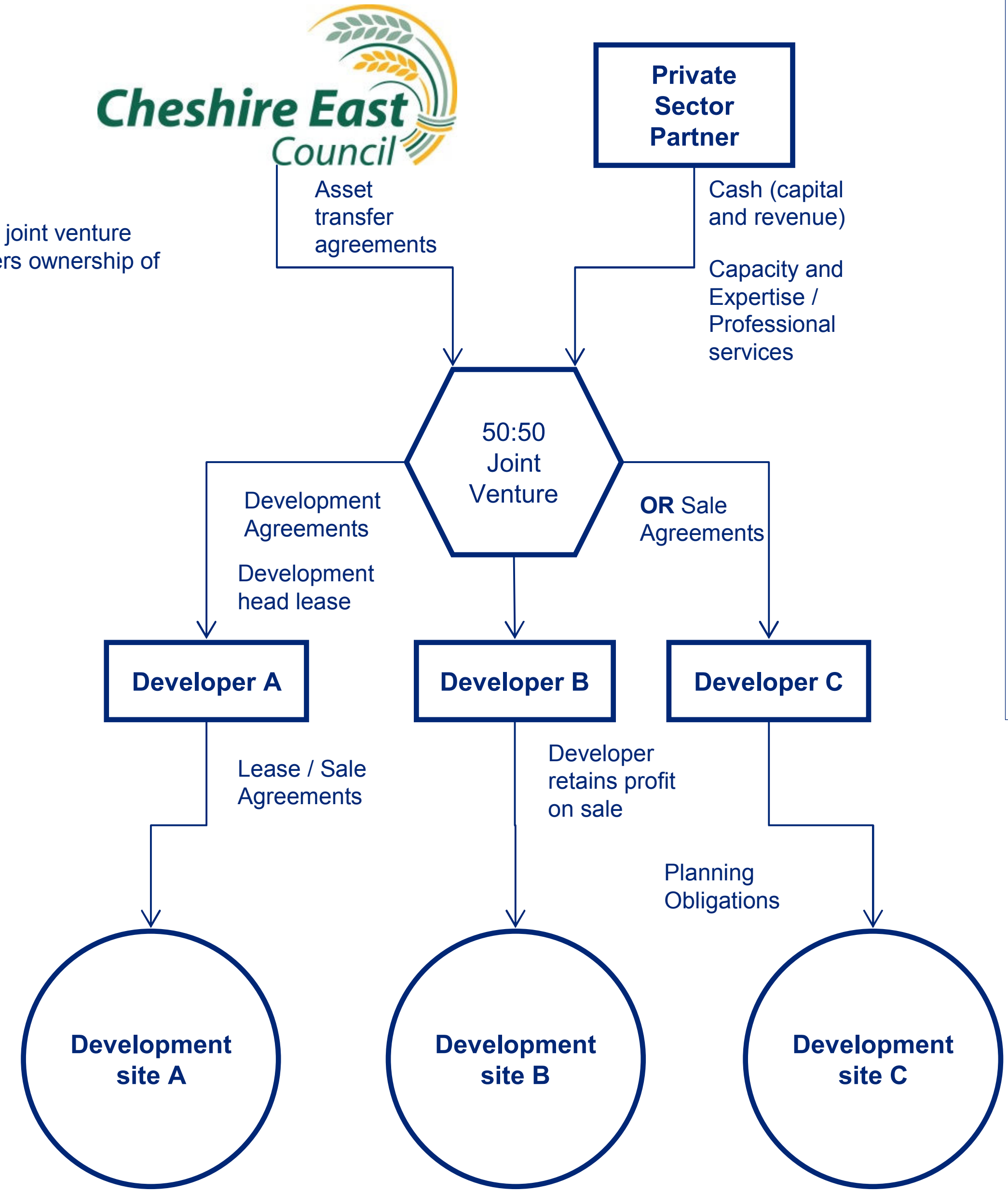
Financing: costs of operation, including revenue (staff/overheads etc) and capital (redevelopment) costs, are met by the joint venture partners in accordance with the JV agreement.

Tax/Accounting: the company prepares accounts and tax returns in accordance with UKGAAP/IFRS and relevant tax legislation.

A **LABV** is a limited liability special purpose vehicle owned 50/50 by the public and private sectors with the specific purpose of carrying out regeneration and/or renewal of development and/or operational assets. The public sector invests property assets into the vehicle which are then "value matched" by cash from the private sector. The JV may then use these assets as security to raise finance to bring forward further development. The public and private sector are equal equity holders and share profits equally.

3. Key Attributes of shortlisted options

Option 5: A public/private joint venture where the Council transfers ownership of the asset to the JV



The Council:
•transfers assets to the JV in return for equity
•benefits from the economic regeneration e.g. new more valuable asset, increase rates / CIL etc or sales proceeds
The private sector partner:
•invests cash to the equivalent value of the Council's assets
•Provides capacity and expertise to undertake property related activity
•Benefits from a share in the profits of the JV
The Joint Venture:
•competitively appoints a developer for site regeneration or acts as the developer
•conducts the sale of sites ear-marked for disposal
•puts in place all the necessary contractual elements: Sales/Development agreement, guarantees, collateral warranties etc.
•retains the proceeds of sales
The developer retains the profit on sale of the head lease or future sales proceeds of redeveloped asset.

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4. Evaluation Scoring Matrix

The shortlisted options has been scored against the evaluation criteria in accordance the following scoring criteria;

SCORE	CATEGORY	DEFINITION
0	Does not meet expected standard	The Option scores a 0 where it fails to meet the objectives of the Council in all cases in delivering its agenda for regeneration and economic development.
1	Unacceptable	The Option scores a 1 where it fails to meet the objectives of the Council in the majority of cases in delivering its agenda for regeneration and economic development.
2	Less than acceptable	The Option scores a 2 where it fails to meet the objectives of the Council in some cases in delivering its agenda for regeneration and economic development.
3	Acceptable	The Option scores a 3 where it meets the objectives of the Council in delivering its agenda for regeneration and economic development.
4	Good	The Option scores a 4 where it meets most, and exceeds in some objectives of the Council in delivering its agenda for regeneration and economic development.
5	Excellent	The Option scores a 5 where it exceeds in all objectives of the Council in delivering its agenda for regeneration and economic development.

5. Evaluation Criteria and weightings

The shortlisted options has been scored against the weighted evaluation criteria set out below. A detailed evaluation scoring and rationale is contained in Appendices A and B.

Criteria	Weighting
Is the Option an enabler to housing growth on Cheshire East owned assets?	10
Is the Option an enabler to jobs investment on Cheshire East owned assets?	10
Does the Option enable the Council to maximise development value to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	10
Does the Option enable the Council to minimise risks by providing dedicated delivery arrangements and additional property and commercial expertise?	10
Does the Option have the potential to act as a delivery vehicle to the Cheshire & Warrington LEP as well as Cheshire East Council?	10
Does the Option have the potential to secure private and Government investment into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	10
Does the Option enable the Council to create profitable and transparent relationships with developers and investors which benefits the local communities – potentially utilising the Developer Panel Framework currently being scoped in more detail with a view to procuring during 2013/14?	5
Does the Option enable the Council to maximise any financial benefits through a dedicated delivery vehicle?	10
Does the Option enable the Council to minimise tax exposure of a dedicated delivery vehicle?	10
Does the Option enable the Council to benefit from agile operating arrangements of the delivery vehicle but still retain control?	10
Is the Option flexible to allow the Council to make changes to its structure in the future to meet changing landscapes/priorities?	5

6. Summary of Evaluation Scores

	Option 1		Option 2		Option 3a		Option 3b		Option 4a		Option 4b		Option 5	
	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score
Total	14	125	38	340	37	330	43	390	27	240	34	310	30	280
Ranking	**7**		**2**		**3**		**1**		**6**		**4**		**5**	

Commentary:

- Option 1 lacks the capacity and focus to deliver the Council strategic economic and regeneration objectives.
- Option 2 has the potential to deliver increased capacity and expertise but still lacks focus on key sites i.e. it is likely that the team will retain responsibility for a broader range of Council objectives.
- Option 3a benefits from increased capacity, expertise and focus on key sites but exposes the Council in significant risk both financially and operationally through the transfer of assets which crystallises Stamp Duty Land Tax.
- Option 3b benefits from increased capacity, expertise and focus, minimises the Council's risk exposure and mitigates the impact of Stamp Duty Land Tax.
- Option 4a although similar to Option 3 in terms of capacity, expertise and focus exposes the Council to increase operational risk and complexity through a lack of control and therefore agility in operations and flexibility to change with the Council to meet future objectives. It also exposes the Council to Stamp Duty Land Tax on the transfer of assets
- Option 4b has the same benefits as Option 3a without the exposure to Stamp Duty Land Tax. However, it is unlikely to be accepted as a delivery vehicle for the wider Cheshire and Warrington LEP thereby restricting its use as a commercial entity.
- Option 5 benefits from the increased participation of the private sector potentially providing useful skills, capacity and economies of scale. However, it is likely to require the Council to commit significant capital resources thereby relinquishing control, it is unlikely to be flexible to meet a changing local government landscape and if exclusive may be perceived as the Council favouring one particular private sector entity and compromising transparency. In addition the private sector partner will direct benefits away from local society.

Conclusion:

- Option 3b is considered by the Council to best meet its objectives.

7. High level tax analysis and commentary on shortlisted options

We have issued to the Council separately a High Level Tax Considerations Paper. The main points applicable to the options under consideration are summarised below. Further commentary on the preferred option is set out later in this report.

Corporation tax

•The Council does not pay corporation tax on its own income or surpluses as it benefits from the blanket tax exemption for local authorities. If a separate corporate entity is established as a delivery vehicle (i.e. a company limited by shares/guarantee or a Community Interest Company) this entity would be within the charge to corporation tax on any profits it makes, resulting (for example under Option 3a) in potential tax leakage. Corporation tax (at a standard rate of 21% from April 2014 falling to 20% from April 2015) could then be payable on the entity's net rental income, trading profits from property development and capital gains on realisation of investment properties.

•The risk of corporation tax at the level of the delivery vehicle could be mitigated, for example under Option 3a, through the use of a limited liability partnership (LLP) structure; with the Council being the principal member and a 100% Council-controlled entity as a nominee. There would also be a corporation tax benefit for the Council in using an LLP structure for a public/private joint venture (Option 5). As an LLP is generally tax transparent, its taxable profits would then be deemed to accrue to the Council enabling it to be benefit from the local authorities' general corporation tax exemption. Use of an LLP structure, though, would be subject to obtaining legal advice to ensure it is within the Council's vires to operate in this way. Under the Localism Act, councils are required to undertake certain commercial activities through limited companies rather than LLPs.

•It should also be noted that an LLP would not generally be a suitable vehicle for a "not-for-profit" non-business activities. An LLP loses its tax transparent status if it does not carry on a business, with the result that it reverts to being treated as a company for tax purposes thus removing any tax benefit for the Council.

•If the delivery vehicle is established as a limited company but solely undertakes support functions for the local authority, its costs being recharged to the Council at cost without a view to profit (e.g. under Option 3b), the company's activities should arguably lack sufficient commerciality to constitute a trade for tax purposes. If it were considered to be trading, another possibility would be for the vehicle to be classified as a mutual trader provided its function is to provide services to its members with, broadly, any surpluses being returned to members through a refund of contributions. Under either of these options, tax leakage at the level of the delivery vehicle should then be minimal (as it would then only be taxed on any investment income or chargeable gains). .

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7. High level tax analysis and commentary on shortlisted options

VAT

•The Council operates under a more beneficial VAT regime, in that is able to recover VAT incurred on costs which relate to exempt supplies (such as certain land/property disposals), so long as that VAT is, in total, less than 5% of the total VAT incurred by the Council. This 5% threshold is known as the 'de-minimis' threshold. So long as the Council does not breach this de-minimis, it can recover all of the VAT which it incurs and which relates to its own business and non-business activities. Whilst this presents some potential additional benefits to maintaining the status quo, we have not reviewed the Council's current partial exemption position, and as such have relied upon a potential benefit arising. In fact, depending on the partial exemption position of the Council, there may be a disincentive to the Council incurring VAT in relation to VAT exempt disposals, such that if the Council did breach its de-minimis threshold, it could lose all of its VAT on costs which relate to VAT exempt business activities.

Stamp Duty Land Tax (SDLT)

•Under any of the options where land interests would be transferred from CEC to the delivery vehicle (i.e. Options 3a, 4a and 5), SDLT charges could potentially be triggered. In particular circumstances, SDLT may be capable of mitigation through use of a tax transparent vehicle (LLP or partnership) or SDLT group relief (which can apply to property transfers between companies in a 75% group relationship as defined under the legislation).

•A transfer of property from CEC to an LLP which is wholly controlled by the Council (e.g. under Option 3a) should not occasion any SDLT charges. However, if the LLP's business was not mainly that of construction but was primarily dealing in land/property investment, it may be treated as a Property Investment Partnership (PIP). If the LLP were classified as a PIP, SDLT may arise in certain circumstances in the future if external investors were to be introduced into the LLP (Option 5) and/or capital ie proceeds from disposals, were returned to the Council within three years of the original transfer).

•A transfer of property from CEC to a company limited by shares (e.g. under Option 3a or 4a) should be eligible for SDLT relief provided the Council's shareholding interest in the vehicle is 75% or more. SDLT group relief could be withdrawn if CEC's shareholding interest in the vehicle were to fall below 75% in the future (broadly, within three years following the original property transfer).

•By contrast, a property transfer from CEC to a company limited by guarantee would be fully chargeable to SDLT as the delivery vehicle (not having issued share capital) would not qualify for group relief.

7. High level tax analysis and commentary on shortlisted options (cont)

Tax Commentary	Option 1	Option 2	Option 3a	Option 3b	Option 4a	Option 4b	Option 5
Corporation Tax (CT)	Neutral – CEC exempt from CT	As Option 1	CT payable on taxable surpluses within delivery vehicle unless structured as a tax transparent Limited Liability Partnership (LLP).	Risk of CT leakage minimised if vehicle is not trading commercially or is structured as LLP (as in Option 3a).	As Option 3a	As Option 3b	As Option 3a – although use of a Limited Partnership or Limited Liability Partnership should maintain neutrality for the Council's share of the surplus
Stamp Duty Land Tax	Neutral – SDLT generally payable on land/ property acquisitions.	As Option 1	Adverse SDLT position if delivery vehicle is company limited by guarantee, otherwise SDLT neutral on land transfers from CEC to LLP or company limited by shares.	SDLT neutral as in Option 1 (Land interests remain in CEC, so no SDLT issues on formation of delivery vehicle)	As Option 3a, provided CEC holds 75% or more of limited company shares. Complex SDLT partnership rules to be considered (under LLP route).	As Option 3b	As Option 4a
Value Added Tax	Neutral - depending on CEC's de-minimis position	As Option 1	Dependent on specific transactions, should be capable of VAT neutral treatment	As Option 3a	As Option 3a	As Option 3a	As Option 3a

8. Analysis and commentary on preferred option (Option 3b)

- Option 3b is considered by the Council to best meet its objectives.
- As set out in the Council's brief, commentary and analysis is required on the preferred option. As set out earlier in this report the preferred option from the qualitative options has been to be Option 3b: *Delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset.*
- Deloitte has commented on the following areas as set out in section 2 of the Council's project brief. The areas the Council required commentary in are set out below;
- Governance and Scope;
- Financing of the Vehicle and Corporate Financial Strategy;
- Financial and Accounting Matters;
- Risk Management.
- As set out earlier in the report the timetable for this work has been significantly reduced. Consequently at this interim point some aspects of the required brief have not yet been completed. Where this is the case, we have stated the additional work which is required.

8. Preferred Option: *Governance and Scope*

Governance

•The Council preferred option (3b) is the delivery through wholly-owned and controlled arms' length company where the Council retains ownership of the asset (hereafter referred to as “the Company”). We understand the Council has given some early consideration to the governance arrangements for the Company although at this point in time proposed governance arrangements were still being considered by the Council and arrangements were not yet finalised.

•**Board representation**: our view is that the Board should be constituted with a relatively small number of individuals. In our experience perhaps a maximum of six (containing a mixture of senior officers and Members) would provide the appropriate balance of focus, skills and resource to lead the strategic direction of the Company. Larger numbers of individuals may result in reduced focus and strategic direction.

•**Potential conflicts of interest:** the Council needs to consider the perception of conflicts even if no actual conflict exists. (ie Council officers or elected Members making decisions at Council and Company Board level). To manage conflicts (real or perceived) the Council would need to consider the appropriateness of Councillors acting within the Council on any matter which has a significant impact on the Company. This issue is considered in detail in Bevan Brittan's Advice Note.

•**Council assets**: the preferred option does not anticipate the transfer of Council assets to the Company. The ownership and management of the Council assets will therefore be retained by the Council. The Council and Company will need to consider how the current arrangements regarding the management of the Council assets are impacted as a result of the newly formed Company in order to provide the management arrangements for the proper controls, management and stewardship of Council assets.

•**Decision making structures**: decision making structures in the new Company would need to be agreed, approved and formalised. The Council will need to agree the parameters of the Company decision making. The Council will need to consider how the decision and recommendations and general business of the running the Company interface with existing Council decision making and approval structures. For example, which decisions require Cabinet approval or delegated approval from the relevant portfolio holder, chief officer etc.

•**Company accountability and scrutiny**: we are informed by the Council that the activities of the Company would fall within the remit of the Portfolio Holder for Prosperity & Economic Regeneration and would be subject to the normal scrutiny arrangements of the Council. The Council needs to finalise these reporting lines to ensure appropriate arrangements are in place to manage the performance of the Company.

8. Preferred Option: *Governance and Scope (2)*

Scope

•Under Option 3b, the scope of the Company would be'

•To accelerate growth in terms of housing completion and jobs investment on Council owned assets;

•To provide dedicated delivery arrangements and property and commercial expertise;

•To secure additional private and Government investment into the Borough through creating the focus on delivery and providing a mechanism to deliver schemes to the Cheshire & Warrington LEP as well as the Council;

•Create profitable and transparent relationships with developers and investors which deliver financial and regeneration benefits;

•To maximise any financial benefits and tax efficiencies of a dedicated delivery vehicle which is Council controlled but can benefit from agile operating arrangements and can be reviewed at a later date.

•**Expansion to Cheshire & Warrington Local Enterprise Partnership (LEP).** We understand that going forward the Council may wish to consider broadening the scope of the Company to operate outside of the Council's geographic boundaries potentially providing advisory and operational delivery services to the local LEP. The basis for this broadening of scope has not been considered at this point. Depending on the scale of business provided for other organisations this could impact the Council's tax position. In addition, the Council would need to develop the arrangements in terms of the services provided; the scale of resources needed and the commercial arrangements between the Council and other Councils in the LEP area.

•**Expansion to other Council services:** The Council may also be interested in the future widening of the Company to provide additional trading activities in other sectors. At this point, the Council does not have specific services in mind and this will need to be considered at a future point. Dependent on the nature and scale of services to be provided, the Council will need to consider the vires and also any VAT implications and potential impacts on any Teckal exemption.

Further work

•**Council constitution:** We understand the Council is in the early stages of considering how the implementation of this Company will impact on the Council's current constitution. We have not reviewed the Council's current constitution but would recommend that the Council establish the impact on the current constitution prior to the implementation of the new Company.

8. Preferred Option: *Financing of the Vehicle and Corporate Financial Strategy (1)*

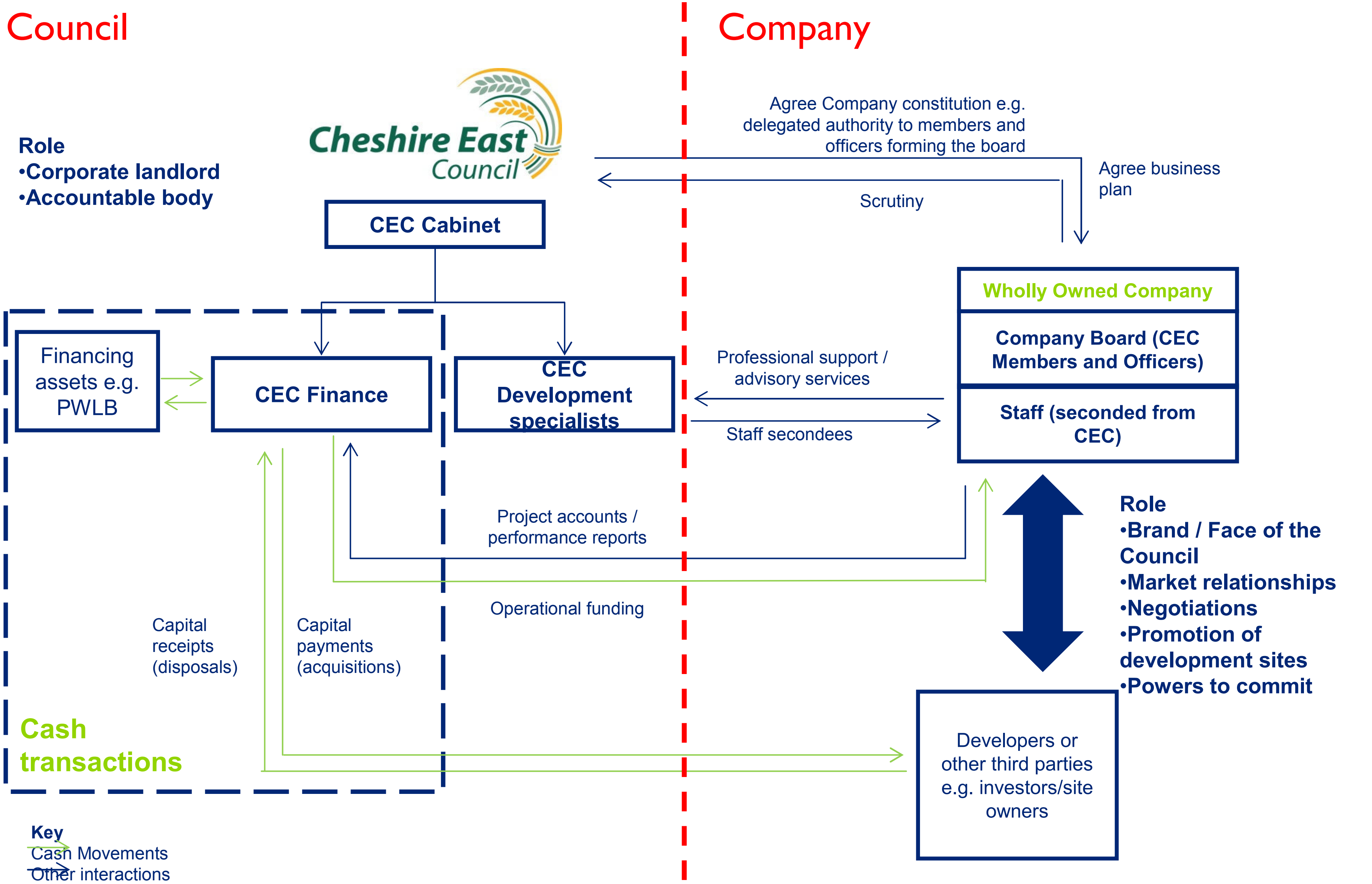
- **Asset Ownership**: as stated earlier in this report, the preferred option does not anticipate the transfer of Council assets to the Company. Therefore the financial transaction associated with the financing, maintaining and disposing of capital assets are expected to follow existing arrangements.
- **Asset recognition**: it is anticipated that Council assets will continue to be recognised on the Council's balance sheet. If specific assets are acquired, the Council will need to continue to consider the appropriate accounting treatment for each asset, recognising the nature of the asset and its intended use.
- **Asset disposal**: it is anticipated that capital receipts arising from the disposal of Council owned assets will continue to be accounted for in line with current arrangements.
- **Financing of asset acquisition:** it is anticipated that the financing of asset acquisition will continue to be in line with current arrangements. Where assets are funded from borrowing, such borrowing is expected to be Council borrowing funded through the normal routes eg Public Works Loan Board.
- **Earmarked Reserve / Revolving Fund**: the Council has envisaged some form of "revolving fund" to facilitate asset acquisition. Given capital financing transactions will be retained in the Council, it may be that the benefits of the revolving fund could be achieved through the use of an earmarked reserve (ie the capital receipts arising from the disposal of certain Council owned assets being ringfenced to finance strategic acquisition of key sites). The Council would need to consider
  - Which assets form part of such an arrangement?
  - The governance for such an arrangement and the decision making regarding use of specific reserve?
  - The potential impact on the financial management of Council where significant capital receipts may be earmarked for specific purposes.
  - The impact on the Council's constitution.
- **Treasury management:** where the Council wish to consider the separation of the financial resources to acquire strategic land assets, the treasury management arrangements will need to be agreed. At this stage it is not envisaged that separate investment and treasury management arrangements are put in place to specifically manage the ringfenced resources. However, depending on scale, there may be some specific sites where the Council may wish to isolate disposal proceeds in a specific investment or account. If such an arrangement is considered necessary then the Council's treasury management policy will be needed to be clarified and amended accordingly.

8. Preferred Option: *Financing of the Vehicle and Corporate Financial Strategy (2)*

- **Set up and operating costs**: the ownership and management of the Council assets will be retained by the Council. The Council and Company will need to consider how the current arrangements regarding the management of the Council assets are impacted as a result of the newly formed Company in order to continue to the proper controls, management and stewardship of Council assets.
- **Company set up costs**: the Company would naturally incur some set up costs and these would need to be recovered from the changes for its services. The precise amount of the set up costs has not been estimated although may include company formation, costs associated with revised branding and literature and one off costs associated with premises etc. The Company would need to agree with the Council the arrangements to recover such costs.
- **Operating costs**: the primary operating costs are expected to be staff costs. At this point, the Council estimates that the that the staffing of the Company would be approximately £500,000 per annum. We have not seen the analysis underpinning this amount. As the intended role and scope of the Company is developed, the Council will need to satisfy that this amount is reasonable and includes any staff overheads and support services costs etc. Consideration would need to be given to how these costs are accounted for and the Company would need to agree with the Council the arrangements to recover such costs.
- **Proposed structure**: for discussion we have set out overleaf a proposed structure for the interface between the Council and Company. Final arrangements will be subject to clarification on a range of matters, for example, governance arrangements.

Draft for discussion

8. Preferred Option: *Financing of the Vehicle and Corporate Financial Strategy (3)*



8. Preferred Option: *Financial and Accounting Matters*

VAT

- Option 3b requires the creation of a separate legal entity from the Council which, it is envisaged, will enter into service level agreements with the Council in order to achieve its aims and objectives. The separate vehicle is likely to be making supplies which will fall within the scope of VAT. As such, it is expected that the chosen vehicle will be required to register separately for VAT, charge and account for VAT on the taxable (likely standard rated) supplies which it makes, and submit periodic VAT returns.
- VAT registration of the chosen vehicle will allow it to recover VAT which it incurs on its costs, and which relate to the taxable supplies which it makes. This will be necessary regardless of type of entity which is chosen for the vehicle. If a Limited Liability Partnership is selected, it will be required to register as a corporate body.
- It may be possible for the chosen vehicle and the Council to set up a VAT Group, which would mean that supplies between it and the Council would be disregarded for VAT purposes, and a single periodic VAT return could be submitted. However, whilst this is possible, HMRC do not allow a Local Authority member of a VAT Group to benefit from the “Section 33” partial exemption de minimis provisions (which apply only to specified bodies), which would mean that the Council would potentially no longer be able to recover VAT which it incurs and which relates to VAT exempt supplies. For this reason we do not recommend that a VAT Group registration is pursued without careful consideration of this potentially detrimental issue.
- As Option 3b does not contemplate the transfer of land and property assets to the chosen vehicle, it appears unlikely at this time that the chosen vehicle will make VAT exempt supplies, which should mean that it shouldn’t suffer any restriction on the recovery of VAT incurred on its costs. This is in contrast to the options which do envisage the transfer of land and property assets to the chosen vehicle (such as Option 3a) where there would be an increased risk of irrecoverable VAT arising in the chosen vehicle. If land and property assets were transferred and those assets were developed for onward sale to residential developers or Housing Associations, for example, there is a significant risk that any onward disposal of those assets would be exempt from VAT – leading to a corresponding restriction in the chosen vehicle’s ability to recover VAT incurred on its costs – this may include VAT which the Council has to charge the chosen vehicle, as a result of any options to tax which the Council may have made in respect of the specific land and property assets.
- Keeping the assets in the hands of the Council removes this risk from the chosen vehicle, although not entirely as the Council may be the entity which makes VAT exempt supplies of the land and property assets. However, as the Council benefits from the “Section 33” partial exemption de minimis provisions, the impact of making VAT exempt supplies may be limited. We have not considered the Council’s partial exemption position, as it is outside of the scope of this report.

8. Preferred Option: *Financial and Accounting Matters*

Corporate Tax

- If under Option 3b, the vehicle is designed from a public procurement perspective to fall within the *Teckal* exemption, we would anticipate that any corporation tax leakage within the delivery vehicle (assuming it is established as a limited company) should be minimal (i.e. corporation tax being limited to any investment income or chargeable gains). This is on the basis that the company's function would be to undertake an essential part of the Council's activities with its costs being recharged to the Council without a commercial profit motive. An LLP structure would generally be incompatible with a non-business cost centre activity of this nature. But, in principle, under this scenario, the vehicle should not be viewed as carrying on a commercial trading activity so would not be expected to generate taxable surpluses for corporation tax purposes. As a fall-back position, if it were deemed to be trading for tax purposes, the company might alternatively qualify for mutual trader status assuming it exists to provide services to its members and its constitution meets certain conditions derived from case law. The tax effect of mutual status should be similar to the company being a non-trader for tax purposes (the company not being taxed on surpluses from trading with its members).
- On balance, it may be easier to support the company's not-for-profit or mutual status for tax purposes if it was established as a company limited by guarantee rather than shares. However, if a company limited by shares is preferred for legal flexibility reasons, it should be feasible to achieve the same status provided suitable wording is included within the constitution. We would recommend that the company's constitution and the contractual documentation should be carefully reviewed from a tax viewpoint prior to implementation to assist this tax filing tax position and a prior ruling is sought from HMRC on the company's "non-trading" tax status
- Alternatively, if the vehicle under Option 3b is established with a view to generating commercial profits on an arm's length basis from third parties as well as the Council, an LLP structure would be beneficial than a limited company from a corporation tax perspective (as in Option 3a) as it should allow the Council to shelter its share of income within the LLP from corporation tax under the local authority tax exemption. This would be subject to the Council having the legal vires to operate through the medium of an LLP in these circumstances.

Stamp Duty Land Tax (SDLT)

- Option 3b should be neutral from an SDLT perspective as there would be no transfers of property between CEC and the delivery vehicle.

8. Preferred Option: *Financial and Accounting Matters*

Accounting, audit and financial reporting

•We have assumed the use of a private limited company.

•Company directors are responsible for operation and management of the company and must keep accounting records which are sufficient to show and explain the company's transactions and to enable them to ensure that any accounts required be prepared to comply with the requirements of the Companies Act (386 of the Companies Act 2006).

•Company directors are responsible for ensuring that the company prepares and delivers annual accounts unless the company is dormant and it is the subsidiary of an EEA parent who agrees to guarantee the company's liabilities (section 448A). These accounts must be audited unless the company meets the small company exemption criteria contained within section 477 of the Companies Act.

•To qualify as small, the company must meet two of the following conditions: turnover equal to or less than £6,500,000, balance sheet total equal to or less than £3,260,000 (asset side only) and employees equal to or less than 50. If the company is part of a group, the group must meet those criteria given above (section 383). A company which is unable to claim audit exemption on the basis of qualifying as small or dormant, might still be exempt from audit if it is a subsidiary of an EEA parent and the parent guarantees its outstanding liabilities (section 479C).

•A company is not entitled to the exemption if it was at any point part of an ineligible group (listed plc, certain financial institutions etc – sections 384 and 478). The deadline for the submission of the accounts for a private limited company is nine months from the accounting reference date (albeit slightly different rules for first periods of more than 12 months where the filing deadline is 21 months from incorporation).

•In addition to the submission of annual accounts, the company must also prepare an annual return which is essentially a snapshot of the company at that given time. It must be filed within 28 days of its made up to date. Any changes to the following must also be filed with Companies House:
•Share capital (allotment, reduction etc.)
•Officers
•Constitution
•Registered office

8. Preferred Option: *Financial and Accounting Matters*

Financial skills:

•The Company will need access to appropriate financial skills. Dependent on the finally agreed scope of the Company, it is likely that the Company would require the following financial skills:

•Appropriate commercial acumen with experience the financial structuring of innovative transactions to achieve the Council's objectives around growth; maximisation of asset value and financial benefits to the Council;

•Expertise in the preparation of required financial statements of the Company;

•An understanding of the local government accounting requirements (depending on the finally agreed governance arrangements).

•Skills relating to accounts preparation and local government finance skills may be available on a call off arrangement from the Council. It may that the commercial acumen and financial structuring skills can be provided by the newly appointed Development Executives, could be available through advisory support or could be provided by a separate experienced hires as the Company moves forward.

Employment model:

•We understand from the Council that the estimated staffing and operating costs would be in the region of £0.5m per annum and that most of the staff are likely to be Council employees, or Council-contracted staff. Under Option 3b there may be a transfer of existing Council staff under TUPE to the separate corporate vehicle. Where this is the case, the Council would need to comply with TUPE Regulations. This issue is considered in detail in Bevan Brittan's Advice Note.

•Looking forward, the Council also needs to be mindful that it will need to provide for any potential transfer of staff should the Company expire or be terminated.

•Given the timescales envisaged for the implementation of this proposed Company, the Council may therefore wish to consider a secondment model of staff to the Company at least in the first instance.

8. Preferred Option: *Risk Management*

Risk	Impact	Mitigation
Inadequate resourcing of the company	The Company delivers a poor service and fails to meet its objectives. Further costs would be required to increase the capacity of the team.	The Council will need to carefully plan the operating functions of the Company to better understand its resource requirements.
Fails to meet business needs / deliver the Council's primary objective i.e. growth in housing and jobs	The Company delivers a poor service and fails to meet its objectives. Further scrutiny/control required on the operational aspects of the Company. Further costs may therefore be incurred e.g. in sourcing the appropriately skilled resource.	The Council will need to clearly define the Company's operating parameters within the Company's constitution and business plan such that it is focuses on targeting the Council's primary objectives. It will also need to ensure the Company is provided with appropriate resources and skills.
Integration with the Council	The Company fails to operate cohesively with the in-house/retained team causing possible duplication of work or inefficient working practices. Further costs may be incurred	The Council will need to ensure there are clear operating boundaries and protocols/procedures such that any interface between the Council and the Company is efficient. It is therefore essential that staff of both the Council and the Company clearly understand their respective roles and responsibilities.
Unclear constitution/role/responsibiliti es/authority	The Company operates outside its anticipated boundaries further increasing the Council's exposure to operational/reputational risk.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.
Company lacks flexibility to respond to future changes	The Council is unable to utilise the Company to meet potential future objectives. Further costs may be incurred in enabling the flexibility or creating an alternate tool.	The Council will need to give careful consideration to the level of flexibility it allows the Company through its constitution. A careful balance of control and risk will need to be understood.

8. Preferred Option: *Risk Management*

Risk	Impact	Mitigation
Company lacks agility to deliver it primary function	The Council fails to meet its objectives with a potential financial and reputational risk.	The Council will need to give careful consideration to the level of flexibility it allows the Company through its constitution. A careful balance of control and risk will need to be understood.
The Council does not have the required resource to effectively control/manage the Company	The Council lacks the visibility required to maintain scrutiny over the Company with a potential impact on its reputation.	The Council will need to ensure it clearly understands its role as the accountable body and therefore the level of resource required to maintain appropriate scrutiny levels of scrutiny without impacting on the Company's ability to remain agile and flexible.
The Council exerts control inhibiting the Company's ability to be agile and flexible	The Company fails to perform efficiently in meeting its primary objective which will have a financial impact.	The Council will need to ensure it clearly defines its own operating parameters ensuring it gets the right balance of control and risk.
The Company fails to develop beneficial relationships with developers	The Company fails to perform and deliver its primary objective. Further resources and cost may be required to develop beneficial relationships.	The Council will need to ensure the Company is staffed with individuals with the correct skills to enable the Company to operate efficiently.
The Company operates outside of its defined parameters	The Company exposes the Council to additional financial and reputational risk. Further costs may be required to support operations not authorised.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.
The Company acts without delegated authority	The Company exposes the Council to additional financial and reputational risk. Further costs may be required to support operations not authorised.	The Council will need to ensure the Company's constitution and business plan is clear and the Company understands its roles and responsibilities and how much delegated authority it has.

Appendices

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Appendix A – Evaluation scoring for shortlisted option

	Criteria	Weighting	Option 1		Option 2		Option 3a		Option 3b		Option 4a		Option 4b		Option 5	
			Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score
1	Is the Option an enabler to housing growth in Cheshire East?	10	1	10	2	20	3	30	3	30	3	30	3	30	3	30
2	Is the Option an enabler to jobs investment on Cheshire East owned assets?	10	1	10	4	20	5	50	5	50	2	20	3	30	2	20
3	Does the Option enable the Council to maximise development value to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	10	0	0	3	30	4	40	4	40	4	40	4	40	4	40
4	Does the Option enable the Council to minimise risks by providing dedicated delivery arrangements and additional property and commercial expertise?	10	0	0	3	30	1	10	3	30	1	10	3	30	4	40
5	Does the Option have the potential to act as a delivery vehicle to the Cheshire & Warrington LEP as well as Cheshire East Council?	10	0	0	2	20	4	40	4	40	2	20	2	20	1	10
6	Does the Option have the potential to secure private and Government investment into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	10	1	10	3	30	5	50	5	50	4	40	4	40	3	30
7	Does the Option enable the Council to create profitable and transparent relationships with developers and investors which benefits the local communities – potentially utilising the Developer Panel Framework currently being scoped in more detail with a view to procuring during 2013/14?	5	1	5	3	15	4	20	4	20	3	15	3	15	2	10

Appendix A – Evaluation scoring for shortlisted option

	Criteria	Weighting	Option 1		Option 2		Option 3a		Option 3b		Option 4a		Option 4b		Option 5	
			Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score	Score	Weighted score
8	Does the Option enable the Council to maximise any financial benefits through a dedicated delivery vehicle?	10	2	20	4	40	3	30	4	40	3	30	4	40	3	30
9	Does the Option enable the Council to minimise tax exposure of a dedicated delivery vehicle?	10	5	50	5	50	0	0	3	30	0	0	3	30	3	30
10	Does the Option enable the Council to benefit from agile operating arrangements of the delivery vehicle but still retain control?	10	1	10	4	40	4	40	4	40	2	20	2	20	3	30
11	Is the Option flexible to allow the Council to make changes to its structure in the future to meet changing landscapes/priorities?	5	2	10	5	25	4	20	4	20	3	15	3	15	2	10
	Total [maximum score 500]		14	125	36	320	37	330	43	390	27	240	34	310	30	280

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Appendix B – Evaluation rationale – Option 1

Criteria	Option 1
Is the Option an enabler to **housing growth** in Cheshire East?	- lack of clarity over roles and responsibilities - potential conflict of interest
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the scale and nature of the current developments sites is not likely to accelerate job creation beyond current levels.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- Development Executive is a short term post. - lack of capacity and focus on key sites
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- the Council retains all risks and does not have the capacity to manage, anticipate and mitigate potential risks.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- the Council does not have the capacity to perform this function in addition to realising its economic and regeneration ambitions.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- potentially lacks capacity, focus and innovation to secure additional competitive funding sources
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- there is a current lack of control over development as a result of the transaction being mainly land deals.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- current arrangements lack the focus and dedicate resource to maximise financial benefits.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- the Council benefits from public sector tax exemptions.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- the current arrangements does not include the capacity or tools to deliver the agility required.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- the current arrangements do not include the capacity or tools to deliver the agility required.

Appendix B – Evaluation rationale – Option 2

Criteria	Option 2
Is the Option an enabler to **housing growth** in Cheshire East?	- lack of clarity over roles and responsibilities - potential conflict of interest
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- depending on the nature of the increased capability and capacity this option has the potential to improve on Option 1 but is not likely to deliver significantly improved focus.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- as an internal option there still may be a lack of focus as a result of operational distraction with other Council priorities.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- the Council retains all the risk however it recruits additional expertise to manage, anticipate and mitigate risks.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- with increased capacity it may offer the flexibility. However, it is unlikely to delivery excess capacity as a result of external recruitment to meet the additional delivery needs of other local authorities
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- provides additionality and may demonstrate an increased desire/focus to deliver economic and thereby meeting central government funding criteria.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- with the increased capacity, skill and focus there is a potential to increase the ability to create profitable, transparent relationships. - profits are retained by the Council.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- increasing capacity and expertise has the potential to allow the Council to focus on delivering financial benefits. - it also does not incur the costs of formation of the company or other associated overheads such as additional statutory Companies Act requirements e.g. statutory filings.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- the Council benefits from public sector tax exemptions.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- increasing the capacity of the team and changing the teams operating procedures has the potential to deliver agility with council retaining a great deal of control.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- increasing the capacity of the team and changing the teams operating procedures has the potential to deliver future change. The most flexible option as companies and JVs can still be selected for sites.

Appendix B – Evaluation rationale – Option 3a

Criteria	Option 3a
Is the Option an enabler to **housing growth** in Cheshire East?	- Company has a clear delineation of responsibility from the Council. - the Company has the ability to lobby on behalf of the Council with the perception of separability.
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the creation of a dedicated delivery vehicle is likely to deliver significant increased focus on the strategic sites and act as an enabler for job creation.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- As a separable entity there is an increased in focus through a dedicated delivery team made up of property and commercial expertise.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- although there is a focus on mitigating risks through the recruitment of expertise transferring the assets introduces significant risk exposure to the Council.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- a wholly owned company controlled by the Council is potentially an acceptable option to other local authorities.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- the wholly owned company offers an increased focus to development. - it also demonstrates an innovative approach to economic growth. - also demonstrates control over how the funds are used.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- an arms length vehicle is perceived to increase the ability of the Council to develop profitable relationships. - with it being a public owned company transparency is inherent in its formation. - profits are also retained by the Council.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- - increasing the capacity to focus on maximising financial benefits - however transferring the assets exposes the Council to increased risks for example in a company failure scenario - costs incurred on set up and associated overheads.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- as well as incurring typical trading entity taxes transferring the assets may crystallise SDLT.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- the company has the potential to deliver an agile solution depending on its terms of reference. Additionally the Council retains control of option 3.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- a wholly owned company has the ability to change. - the Council controls the company and can therefore implement change.

Appendix B – Evaluation rationale – Option 3b

Criteria	Option 3b
Is the Option an enabler to **housing growth** in Cheshire East?	- Company has a clear delineation of responsibility from the Council. - the Company has the ability to lobby on behalf of the Council with the perception of separability.
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the creation of a dedicated delivery vehicle is likely to deliver significant increased focus on the strategic sites and act as an enabler for job creation.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- As a separable entity there is an increased in focus through a dedicated delivery team made up of property and commercial expertise.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- although wholly owned and therefore the Council still retains the risk in this option it transfers the management and mitigation of the risk to a dedicated team not distracted by alternate activity.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- a wholly owned company controlled by the Council is potentially an acceptable option to other local authorities.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- the wholly owned company offers an increased focus to development. - it also demonstrates an innovative approach to economic growth. - also demonstrates control over how the funds are used.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- an arms length vehicle is perceived to increase the ability of the Council to develop profitable relationships. - with it being a public owned company transparency is inherent in its formation. - profits are also retained by the Council.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- increasing the capacity to focus on maximising financial benefits without the risk of transferring significant capital resources - costs incurred on set up and associated overheads.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- the company incurs typical taxes associated with a trading entity which will need to be managed/mitigated.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- the company has the potential to deliver an agile solution depending on its terms of reference. Additionally the Council retains control of option 3.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- a wholly owned company has the ability to change. - the Council controls the company and can therefore implement change.

Appendix B – Evaluation rationale – Option 4a

Criteria	Option 4a
Is the Option an enabler to **housing growth** in Cheshire East?	- Company has a clear delineation of responsibility from the Council. - the Company has the ability to lobby on behalf of the Council with the perception of separability.
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the loss of direct Council control and the transfer of assets may not provide the necessary focus on local job creation.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- As a separable entity there is an increased in focus through a dedicated delivery team made up of property and commercial expertise.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- although there is a focus on mitigating risks through the recruitment of expertise transferring the assets introduces significant risk exposure to the Council.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- a wholly owned company not controlled by the Council is potentially a less acceptable option to other local authorities.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- the wholly owned company offers an increased focus to development. - it also demonstrates an innovative approach to economic growth. - lacks the control over how the funds are used.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- the decrease in control over the company may be perceived as a loss in control over the profits and transparency of the company.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- increasing the capacity to focus on maximising financial benefits - however transferring the assets exposes the Council to increased risks for example in a company failure scenario - costs incurred on set up and associated overheads.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- as well as incurring typical trading entity taxes transferring the assets may crystallise SDLT.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- the company has the potential to deliver an agile solution depending on its terms of reference. However, the Council loses control of option 4.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- a wholly owned company has the ability to change. - the Council lacks control and therefore change the terms of reference could be more complicated.

Appendix B – Evaluation rationale – Option 4b

Criteria	Option 4b
Is the Option an enabler to **housing growth** in Cheshire East?	- Company has a clear delineation of responsibility from the Council. - the Company has the ability to lobby on behalf of the Council with the perception of separability.
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the loss of direct Council control may not provide the necessary focus on local job creation.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- As a separable entity there is an increased in focus through a dedicated delivery team made up of property and commercial expertise.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- although wholly owned and therefore the Council still retains the risk in this option it transfers the management and mitigation of the risk to a dedicated team not distracted by alternate activity.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- a wholly owned company not controlled by the Council is potentially a less acceptable option to other local authorities.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- the wholly owned company offers an increased focus to development. - it also demonstrates an innovative approach to economic growth. - lacks the control over how the funds are used.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- the decrease in control over the company may be perceived as a loss in control over the profits and transparency of the company.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- increasing the capacity to focus on maximising financial benefits without the risk of transferring significant capital resources - costs incurred on set up and associated overheads.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- the company incurs typical taxes associated with a trading entity which will need to be managed/mitigated.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- the company has the potential to deliver an agile solution depending on its terms of reference. However, the Council loses control under option 4.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- a wholly owned company has the ability to change. - the Council lacks control and therefore change the terms of reference could be more complicated.

Appendix B – Evaluation rationale – Option 5

Criteria	Option 5
Is the Option an enabler to **housing growth** in Cheshire East?	- Company has a clear delineation of responsibility from the Council. - the Company has the ability to lobby on behalf of the Council with the perception of separability.
Is the Option an enabler to **jobs** investment on Cheshire East owned assets?	- the creation of a joint venture may reduce the focus on local job creation.
Does the Option enable the Council to **maximise development value** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- As a separable entity there is an increased in focus through a dedicated delivery team made up of property and commercial expertise.
Does the Option enable the Council **minimise risks** to the Council by providing dedicated delivery arrangements and additional property and commercial expertise?	- a JV provides the opportunity to transfer the risk to the private sector who is then contractually incentivised to minimise and manage it.
Does the Option have the potential to act as a delivery vehicle to the **Cheshire & Warrington LEP** as well as Cheshire East Council?	- it is unlikely that a JV will be an acceptable delivery vehicle for other local authorities.
Does the Option have the potential to **secure private and Government investment** into the Borough through creating the focus on delivery and providing the mechanism to deliver capital schemes?	- although the JV is potentially demonstrating innovation and creates a dedicated "brand" to delivering economic growth it may restrict access to further private sector investment beyond that of the private sector partner.
Does the Option enable the Council to create **profitable and transparent relationships** with developers and investors which benefits to local communities – potentially utilising the Developer Panel Framework currently being scoped in a more detail with a view to procuring during 2013/14?	- there is a perceived lack of transparency - with some benefit being shared with the private sector there is potentially a reduction in the benefit being retained by local communities.
Does the Option enable the Council **to maximise any financial benefits** a dedicated delivery vehicle?	- as a JV the financial benefits are split between the public and private sector. - however, with access to private sector expertise, economies of scales and finance financial benefits have the potential to be maximised - costs incurred on set up and associated overheads.
Does the Option enable the Council to **minimise tax exposure** of a dedicated delivery vehicle?	- the company incurs typical taxes associated with a trading entity. - the exposure is shared with the private sector.
Does the Option enable the Council to benefit from **agile operating arrangements** of the delivery vehicle but still retain control?	- a JV has the ability to be agile depending on the company's terms of reference. However, it is likely that the Council loses some control to the private sector partner.
Is the Option **flexible** to allow the Council to make changes to its structure to in the future to meet changing landscapes/priorities?	- the JV is established around a set of terms with the private sector assumed to be competitively procured. Changes to scope and commercial position may result in competition issues and extensive negotiations. - also the private sector has equal control of the shape of the company which may hinder the Council to make changes.

Deloitte.

ADVICE NOTE TO CHESHIRE EAST COUNCIL

TO SUPPORT ITS OPTIONS APPRAISAL ON DEVELOPMENT ARRANGEMENTS

1 Introduction and Executive Summary

1.1 Cheshire East Council (the "**Council**") has ambitious growth plans with the Local Plan setting out the delivery of major new infrastructure, at least 20,000 jobs and 27,000 new homes by 2030.

1.2 As a newly created unitary authority, the Council has ambitious plans to create a strong growing economy though job creation and enhancing the region's attractiveness to investors. In addition, the Council's strategic direction reflects a growing appetite for flexibility, agility, freedom from bureaucracy, and for the creation of other forms of operational decision making and delivery vehicles.

1.3 In response to the growth agenda, the Council is to accelerate the development of Council owned assets and to boost the delivery of developer-led strategic sites and is considering the development of a new Delivery Vehicle.

1.4 Bevan Brittan LLP has been commissioned by the Council to support on the legal and governance aspects of a high level appraisal on a range of delivery options available to the Council and to assist on mitigating the risks on the Council's preferred option which best achieves the Council's objectives.

1.5 Deloitte has been commissioned by the Council to support on the financial and tax aspects of this high level appraisal and on the Council's preferred option which best achieves the Council's objectives. Deloitte has also facilitated and recorded the quantitative assessment of options in its report to the Council ("**Deloitte Report**").

1.6 Following the Council's options appraisal and having received advice and assistance from both Deloitte and Bevan Brittan LLP, the Council's preferred option is Option 3b (Delivery through wholly-owned and controlled arm's length company (a "Teckal company") where the Council retains ownership of the assets. The Council considers that the principal advantage of this Option, over all others, is that it allows the Council to focus its delivery through the separate arm's length company, without distracting the company's management and personnel with the Council's other day to day operational requirements. The Company can also better promote the Council's assets for development through the local plan and planning process. In addition, the company can be used flexibly by the Council as an agent without tying the Council down to a single delivery model (as would a LABV or transfer of assets). In addition, the Council believes that this vehicle may be regarded as more attractive by the Cheshire and Warrington LEP and possibly other public sector bodies as a delivery vehicle for their purposes, than direct contract with the Council or a non-wholly controlled Council company/joint venture. The type of vehicle will be a company limited by shares, due to the limited profit available and given the legal considerations highlighted in this Advice Note. Next steps and key risk mitigation is set out at section 6 and the Conclusion.

2 Council's core objectives and requirements

2.1 The Council's core aim and objective is to select the best option for performance of its development role for carefully selected physical assets (**"Selected Assets"**) which have economic growth and investment potential (the **"Core Aim"**).

2.2 In order to test whether any delivery option is suitable to fulfill the Council's Core Aim, a list of objectives and measures is required. These have been developed by the Council and are set out as follows:

2.2.1 To accelerate growth in terms of housing completion and jobs investment on Council owned assets

2.2.2 To maximise development and minimise risk to the Council by providing dedicated delivery arrangements and property and commercial expertise

2.2.3 To secure additional private and Government investment into the Borough creating the focus on delivery and providing a mechanism to deliver schemes to the Cheshire & Warrington LEP as well as the Council

2.2.4 Create profitable and transparent relationships with developers and investors which deliver financial and regeneration benefits

2.2.5 To capture any financial benefits and tax efficiencies of a dedicated delivery vehicle which is Council controlled but can benefit from agile operating arrangements and can be reviewed at a late date

3 Council's delivery options: qualitative assessment

There are seven principal options available to the Council in relation to achievement of its Core Aim as follows:

- Option 1: Status quo - continuing with self-delivery using the current programme with existing team capacity and capability (some recruitment occurring here)
- Option 2: Self delivery – strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Council's constitution

- Option 3a: Delivery through wholly-owned (or jointly-owned with a neighbouring authority) **and controlled** arm's length company (a "Teckal company") where the **Council transfers** ownership of the assets

- Option 3b: Delivery through wholly-owned (or jointly-owned with a neighbouring authority) **and controlled** arm's length company (a "Teckal company") where the **Council retains** ownership of the assets

- Option 4a: Delivery through wholly-owned **but not controlled** arm's length company where the **Council transfers** ownership of the assets

- Option 4b: Delivery through wholly-owned **but not controlled** arm's length company where the **Council retains** ownership of the assets

- Option 5: Public/Private Corporate JV where the **Council transfers** ownership of the assets to the JV

Each option has varying degrees of risk, potential rewards and levels of independence for or from the Council, which increase from Option 1 to Option 5. A brief explanation of each Option, together with a *qualitative assessment* of the risks and benefits associated with each is set out below.

Some of the Options allow for joint ventures (JVs). The term JV can describe a range of different corporate and contractual arrangements between two or more separate entities. Each party contributes resources to the joint venture and a new business is created in which the parties collaborate together and share the risks and rewards associated with the venture. Different risk and reward permutations are possible. The parties to the JV may provide land, capital, intellectual property, experienced staff or any other form of asset. Each generally has an expertise or requirement which is central to the development and success of the new business which they decide to create together. The parties also have a "shared vision" about the objectives of the joint venture. A joint venture can be structured contractually or through a separate corporate vehicle. It could be with another public entity or a private sector party. A JV can create a contracting authority caught by EU procurement requirements (e.g. Option 3) or not (e.g. Option 5).

Within Options 3, 4 and 5 there are various alternative corporate vehicles which could be established including a company (limited by shares or guarantee) and a limited liability partnership. The headline benefits and risks associated with the most common types of corporate vehicle available are set out in Appendix 1. Deloitte have also run through the tax treatment of such types of corporate vehicle in the Deloitte Report.

A decision to establish any of the Options would require the approval of the Council. Whichever Option is chosen at the outset, there should be **room for growth in and evolution of the business**. However, any **future transition to another vehicle or business** (for example, an evolution of a wholly-owned subsidiary business into a JV business) **would also require further approval**. The proposal is to **limit the "objects" of the initial business so that the Council can be reassured as to the extent of the business being approved at the outset. Any activities not included in the objects would therefore be excluded from the scope of the asset development business.**

What is happening elsewhere in the country and option track record

In our experience, we have not seen many property companies being set up by local authorities in recent years. A number of urban regeneration companies were established in the last decade, but a majority have been dissolved or their businesses taken back "in house". Of those URCs taken "in house", some remained as wholly-owned subsidiaries or had their businesses and assets transferred to a wholly-owned subsidiary – examples include:

- The New Swindon Company's business and assets transferred to Forward Swindon (wholly-owned by Swindon Borough Council)

- Cambourne Pool Redruth Urban Regeneration Company became wholly owned by Cornwall Development Company (itself a wholly-owned subsidiary of the Council)

- Gloucester Heritage became wholly-owned by Gloucester City Council

Other examples of local authorities establishing wholly-owned property companies (although mainly property services not development) include:

- NORSE Group and subsidiaries (formerly Norfolk Property Services) (incorporated 2006) – this is wholly-owned by Norfolk County Council and delivers a range of property services to public and private sector clients across the UK in the education, housing, commercial, government and civic/ community sectors.

- Kingstown Works Limited (incorporated 2006) - KWL is a local authority company delivering building maintenance and repairs works primarily to Hull City Council but they also trade with other local councils and housing associations.

- Solutions SK Limited (incorporated 2006) – the company is controlled by Stockport Council and delivers property services to the public and private sectors (for example, cleaning, landscaping and grounds maintenance, highways, property maintenance and street lighting).

- Acivico Limited (incorporated 2011) – this is a company wholly-owned by Birmingham City Council providing construction and property related services to the public and private sectors.

Examples of local authorities establishing public/private JVs (i.e. Option 4) would include:

- Waterfront Edinburgh Limited (WEL) is a joint venture regeneration company wholly-owned by its two partners, the City of Edinburgh Council and Scottish Enterprise Edinburgh and Lothian, which is a regional economic development organisation established and funded by Scotland's central government (the Scottish Executive). WEL's objective is the regeneration of about one-third of Edinburgh's Granton Waterfront Project which is approximately 140 hectares (346 acres) of brownfield and contaminated land in the North of Edinburgh.

- London Borough of Barking and Dagenham – this Council has utilised its education BSF LEP to take forward housing development at Riverside. It has also loosely joined with a registered provider to regenerate the Gascoigne estate (East).

More recently, the preference for local authorities (where the potential financial gain is sufficient) is to create public-private corporate JVs (i.e. Option 5). Recent examples of this would include:

- Slough Regeneration Partnership LLP – this LABV regeneration joint venture has just been established as a joint venture between Slough Borough Council and Morgan Sindall for the development of Slough's property assets and regeneration of key sites within the Borough. It is structured as a 50:50 JV LLP.

- Croydon Urban Regeneration Vehicle – CURV is a 28-year exclusive partnership between Croydon Council and John Laing to regenerate a range of key sites across Croydon borough.

We have also seen examples of Councils setting up arm's length companies with/without asset transfer, but these tend to be where Councils are joining with other public entities and the combined public entities require a vehicle to share resources, effort, risk and reward. A recent example of this would include:

- Liverpool Vision - Liverpool Vision is an economic development company charged with the city's physical and economic regeneration. The vehicle originally brought together Liverpool City Council with the HCA and North West Development Agency. Both latter members retired and the vehicle is now wholly owned by Liverpool City Council. The vehicle is limited by guarantee and is currently changing in its scope and remit. This example, and its development, will be of particular interest to the Council, given its preferred option.

Common issues for the Council to consider – (a) Control and "Teckal" status and (b) State Aid

<u>Control and "Teckal" status</u>

In this Report, references to "control" (as in a controlled arm's length company) should be read in the context of the EU case known as "Teckal". In that case, the EC court concluded that:

(1) the contracting authority must exercise over the proposed contractor a control which is similar to that which it exercises over its own departments; and

(2) simultaneously, the proposed contractor to which a contract would be awarded must carry out the essential part of its activates with the contracting authority or authorities

As regards limb (1) of the Teckal test, case law has shown that the contracting authority (in this case, the Council) must have the power of decisive influence over both the strategic objectives and the significant decisions of the contractor (i.e. the company). The Council would need to have that power of decisive influence at a constitutional as well as an actual operational level (i.e. it actually exercises its powers). From a commercial standpoint the company will need to function as an entity and be able to make decisions about its everyday activity (as internal departments at the Council would be able to do) without having to refer back to the Council for every small decision. The Teckal exemption would not require all decisions to be unanimously approved by the Council.

As regards limb (2), we assume for these purposes that the business undertaken by the company for any organisation or entity other than the Council would be of marginal significance only. No absolute rule exists confirming what constitutes marginal significance and cases have been decided on their particular facts rather than on underlying principles (in one case, the court considered anything up to 10% of a company's activities to be marginal, but this does not establish a precedent threshold).

Teckal company status must be continually reviewed and limbs (1) and (2) satisfied for the benefits of the Teckal exemption to apply. There is a proposal to codify and modify the existing rules around the Teckal exemption through the "Proposal for a Directive of the European Parliament and of the Council on public procurement" – currently this is in draft form only. However, the company would need to ensure that it continued to fall within the codified exemption if, as and when this becomes law.

State Aid

State Aid may arise where the Council provides aid to select undertakings (any entity which puts goods or services on the given market), which has the potential to distort competition and affect trade between member states of the European Union. When setting up a new company, the Council should consider State Aid in relation to the establishment of a separate company, the activities of the company and the proposed funding arrangements. State Aid may arise in the following circumstances:

- transfer of assets at under value
- loans or funding to the company at non-commercial rates
- award of contracts without competition where required under EU procurement legislation
- guarantees provided for the company's performance in contracts with 3rd parties

There are a number of State Aid exemptions which may be available including the De-minimis exemption where State Aid may be granted up to a maximum of €200,000 over a three year period without notification to the European Commission. There are also exemptions under the General Block Exemption Regulations which may apply, for example aid for new SMEs. The Council will need to address whether any State Aid risks will arise and whether mitigation is possible. Granting unlawful State Aid has potentially serious consequences including repayment of aid with interest.

Option 1: Status quo – continuing with self-delivery using the current programme with existing team capacity and capability

Whilst the Council could consider continuing with disposing, maintaining or developing assets in the current manner, whether through a disposal programme, ad hoc development agreements and frameworks, or asset-specific joint ventures, we understand that there are overriding reasons why this Option is not viable:

- ***lack of capacity*** – the current aggressive disposal programme is consuming all available capacity. The Council is not sufficiently resourced to meet its growth ambitions
- ***lack of expertise*** – the Council is not a developer and it lacks a development executive and asset manager
- ***lack of flexibility*** – the Council's current constitution and working practices are restrictive to the Council's ability to develop

Option 2: Self delivery – strengthening and redirecting current team capacity and capability and making new provisions/alterations to current working practices and the Councils constitution

This Option would seek to address the key deficiencies with Option 1, namely the lack of capacity, lack of expertise and lack of flexibility. Under this Option, the Council would use the current team as a starting point, strengthening where necessary through external hires and internal movement of Council employees. We note that the Council is currently undertaking an internal re-organisation of functions to draw out and create focus around the asset development programme.

In addition the Council is reviewing and drafting changes to its constitution and working practices. This is retained work by the Council and whilst the Council will share its findings with Bevan Brittan LLP for consideration, this has not occurred to date. Unlike Option 1, this Option is a real possibility.

Risks	Benefits
• No separate entity to undertake development, so risk of development budget and personnel being "swallowed" up by wider Council objectives or future restructurings • No new brand or perception of "new start" for Council asset development strategy	• Council maintain direction of and control over delivery – no conflicts of interest for participants above those which would ordinarily arise (e.g. Council as landowner and planning authority) • Flexible as allows Council to retain its full range of options in dealing with its assets (to include a future JV or framework)

• No risk transfer – Council retains development risks (but also rewards). Council may be perceived as directly undertaking more "speculative" developments (rather than through an arm's length entity or JV) • No or limited private sector innovation and expertise to enhance and realise asset value or provide additional funding/share cost (Council access to required funds may diminish over time) • Delivery potentially no quicker than currently achievable by the Council • EU procurement regulations apply to contracts awarded by Council	• Council perceived as investing in own workforce – morale builder • No separate vehicle, so no additional tax leakage between the development business and the Council[1] • No duplication of work /counter-productive work between Council staff and a separate entity – central charges offset • Council takes development rewards – after paying suppliers, net profit returns to Council. • Potentially cheaper to establish, given lack of separate corporate vehicle • Council has strong covenant strength to substantiate its dealings with third parties in relation to its assets • No state aid issues in bolstering up an arm's length company

Option 3a: Delivery through wholly-owned (or jointly-owned with a neighbouring authority) and controlled arm's length company (a "Teckal company") where the Council transfers ownership of the assets

A Teckal company could be established as a wholly-owned subsidiary of the Council or jointly with one or more neighbouring authorities.

Appendix 1 provides a breakdown of risks and benefits associated with common corporate vehicles for wholly owned companies.

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1 See Deloitte Report for tax position.

Risks	Benefits
• Company limited in the amount of income which can be received from organisations that do not satisfy the "Teckal" test. Risk that Teckal status soon lost. • Not intended to be used for commercial purposes. Should be akin to in-house provision. • Limited independence from Council, given Council control is key requirement of Teckal status. • Delivery potentially not much quicker than currently achievable by the Council if company is intended to be regulated in accordance with Council policies and procedures • Company will be a contracting authority given Council ownership and control – procurement regulations apply to contracts awarded by the company. • Conflicts of interest can arise between Council and company – can be dealt with, but conflicts policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected Members and officers should be wary of sitting on both shareholder council and board of company, or exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)). • Resources required to effect transfer of assets – see section 4.4 below. • As the Council would be the acquiring authority of CPO land, this would lead to mixed asset ownership. • SDLT liability on transfer of assets and some tax leakage, partly dependant on choice of vehicle – see Deloitte Report. • Will entity with no trading history have better reception from the market than the Council? The Council may be called upon to bolster company activity through guarantees (consider State Aid).	• Council can award contracts directly to the company free from procurement requirements (albeit company caught by EU regulations) provided Teckal tests met. • Council maintain direction of and control over delivery, although company can have separate management team dedicated to delivery of asset development programme. Council's strategic role could be co-ordinated through a "shareholder council". However, notional shareholding insufficient to satisfy Teckal. • Risk transferred down to company, although Council may need to give guarantees or other financial support (especially in initial phase). • Opportunity to develop new brand with separate vehicle – a clearer, more focussed remit for the development function, away from the other operational distractions of working within the Council. • A separate company can better promote the Council's assets for development through the local plan and planning process. • A Council owned and controlled entity may have more potential to be a LEP (and possibly other public sector body) development arm than an "in-house" operation, as per Options 1 and 2, or non wholly controlled entity, as per Options 4 and 5.

State Aid issues may arise on a transfer of assets to the company – see section 3 above. • Consider council's in-house function – seek to avoid duplication of work /counter-productive work between Council staff and a separate entity – how will central charges be offset/claimed? Would a back office agreement back to the Council be acceptable in the short, medium and long term? • No or limited private sector innovation and expertise to enhance and realise asset value or provide additional funding/share cost (Council access to required funds may diminish over time) • Transferring assets to the company commits the Council more than Option 3b.	

Option 3b: Delivery through wholly-owned (or jointly-owned with a neighbouring authority) and controlled arm's length company (a "Teckal company") where the Council retains ownership of the assets

A Teckal company could be established as a wholly-owned subsidiary of the Council or jointly with one or more neighbouring authorities.

Appendix 1 provides a breakdown of risks and benefits associated with common corporate vehicles for wholly owned companies.

Risks	Benefits
• Company limited in the amount of income which can be received from organisations that do not satisfy the "Teckal" test. Risk that Teckal status soon lost. • Not intended to be used for commercial purposes. Should be akin to in-house provision. • Limited independence from Council, given Council control is key requirement of Teckal status. • Delivery potentially not much quicker than currently achievable by the Council if company is intended to be regulated in accordance	• Council can award contracts directly to the company free from procurement requirements (albeit company caught by EU regulations) provided Teckal tests met. • Commercial/delivery risks will not be transferred down to the company, as the Council retains the relevant assets • Opportunity to develop new brand with separate vehicle – a clearer, more focussed remit for the development function, away from the other operational distractions of working within the Council. • A Council owned and controlled entity may have more potential to

with Council policies and procedures • Company will be a contracting authority given Council ownership and control – procurement regulations apply to contracts awarded by the company. • Conflicts of interest can arise between Council and company – can be dealt with, but conflicts policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected Members and officers should be wary of sitting on both shareholder council and board of company, or exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)). • Some tax leakage, partly dependant on choice of vehicle – see Deloitte Report. • Will entity with no trading history have better reception from the market than the Council? The Council may be called upon to bolster company activity through guarantees (consider State Aid). State Aid issues may arise on a transfer of assets to the company – see section 3 above. • Consider council's in-house function – seek to avoid duplication of work /counter-productive work between Council staff and a separate entity – how will central charges be offset/claimed? Would a back office agreement back to the Council be acceptable in the short, medium and long term? • No or limited private sector innovation and expertise to provide additional funding/share cost (Council access to required funds may diminish over time) • As the company will be acting as agent for the Council, the Council will in most cases be bound by the company's actions on its behalf • Commercial/delivery risks remain with the Council given it retains the relevant assets	be a LEP (and possibly other public sector body) development arm than an "in-house" operation, as per Options 1 and 2, or non wholly controlled entity, as per Options 4 and 5. • No doubling up of resources required to affect transfer of assets – see section 4.4 below. • As the Council would be the acquiring authority of CPO land, this would avoid mixed asset ownership. • More flexibility for the Council to retain the assets.

Option 4a: Delivery through wholly-owned but not controlled arm's length company where the Council transfers ownership of the assets

A company established under this Option could be intentional or could arise where, for example, the company no longer qualifies as a "Teckal company".

Appendix 1 provides a breakdown of risks and benefits associated with common corporate vehicles for wholly owned companies.

Risks	Benefits
• Separate vehicle gives rise to potential tax leakage at company level.[2] • Council has less day to day control – greater potential for disputes to arise between Council and company over direction and control of business. • Council cannot award contracts directly to company free from procurement requirements – company in competition with other potential suppliers. Less partnership with the Council. • Company still likely to be a contracting authority unless established for purely commercial purposes. • Conflicts of interest can arise between Council and company – can be dealt with, but conflicts policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected Members and officers should be wary of sitting on both shareholder council and board of company, or exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)). • Resources required to effect transfer of assets – see section 4.4 below.	• Company not limited in the amount of income which can be received from organisations that do not satisfy the "Teckal" test. • More freedom and flexibility from Council decision making. Delivery should be quicker than under Options 1 and 2 and commitment of assets (depending on how committed) may offer greater freedom from Council control. • Opportunity to develop new brand with separate vehicle – more potential to be a LEP (and possibly other public sector body) development arm than if asset development undertaken "in-house" per Option 1. • Risk transferred down to company, although Council may need to give guarantees or other financial support (especially in initial phase) leading to State Aid risks – see section 3 above. • Opportunity to develop new brand with separate vehicle – a clearer, more focussed remit for the development function, away from the other operational distractions of working within the Council. • A separate company can better promote the Council's assets for development through the local plan and planning process.

[2] See Deloitte Report on tax treatment.

• As the Council would be the acquiring authority of CPO land, this would lead to mixed asset ownership. • Will entity with no trading history have better reception from the market than the Council? The Council may be called upon to bolster company activity through guarantees (consider State Aid risks). State Aid issues may arise on a transfer of assets to the company – see section 3 above. • Consider council's in-house function – avoid duplication of work /counter-productive work between Council staff and a separate entity – how will central charges be offset/claimed? A separate back office agreement may be less likely to be acceptable. • No or limited private sector innovation and expertise to enhance and realise asset value or provide additional funding/share cost (Council access to required funds may diminish over time). • Transferring assets to the company commits the Council more than Option 4b, and as the Council has limited (shareholder) control, less flexibility and more risky for the Council.	• A Council owned but not controlled entity may have more potential to be a LEP (and possibly other public sector body) development arm than an "in-house" operation, as per Options 1 and 2.

Option 4b: Delivery through wholly-owned but not controlled arm's length company where the Council retains ownership of the assets

A company established under this Option could be intentional or could arise where, for example, the company no longer qualifies as a "Teckal company".

Appendix 1 provides a breakdown of risks and benefits associated with common corporate vehicles for wholly owned companies.

Risks	Benefits

• Separate vehicle gives rise to potential tax leakage at company level.[3] • Council has less day to day control – greater potential for disputes to arise between Council and company over direction and control of business. • Council cannot award contracts directly to company free from procurement requirements – company in competition with other potential suppliers. Less partnership with the Council. • Company still likely to be a contracting authority unless established for purely commercial purposes. • Conflicts of interest can arise between Council and company – can be dealt with, but conflicts policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected Members and officers should be wary of sitting on both shareholder council and board of company, or exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)). • Will entity with no trading history have better reception from the market than the Council? The Council may be called upon to bolster company activity through guarantees (consider state aid risks). State aid issues may arise on a transfer of assets to the company. • Consider council's in-house function – avoid duplication of work /counter-productive work between Council staff and a separate entity – how will central charges be offset/claimed? A separate back office agreement may be less likely to be acceptable. • No or limited private sector innovation and expertise to provide additional funding/share cost (Council access to required funds may diminish over time).	• Company not limited in the amount of income which can be received from organisations that do not satisfy the "Teckal" test. • More freedom and flexibility from Council decision making. Delivery should be quicker than under Options 1 and 2. • Opportunity to develop new brand with separate vehicle – more potential to be a LEP (and possibly other public sector body) development arm than if asset development undertaken "in-house" per Option 1. • Risk transferred down to company, although Council may need to give guarantees or other financial support (especially in initial phase) leading to State Aid risks – see section 3 above. • Opportunity to develop new brand with separate vehicle – a clearer, more focussed remit for the development function, away from the other operational distractions of working within the Council. • A Council owned but not controlled entity may have more potential to be a LEP (and possibly other public sector body) development arm than an "in-house" operation, as per Options 1 and 2. • Commercial/delivery risks will not be transferred down to company, as the Council retains the relevant asset • No doubling up of resources required to affect transfer of assets – see section 4.4 below. • As the Council would be the acquiring authority of CPO land, this would avoid mixed asset ownership. • More flexibility and less risky for the Council to retain control over the assets, particularly where it has limited (shareholder) control over the Company.

[3] See Deloitte Report on tax treatment.

• If the company is acting as agent for the Council in relation to Council developments, the Council will in most cases be bound by the company's actions on its behalf • Commercial/delivery risks remain with the Council given it retains the relevant assets	

Option 5: Public/Private Corporate JV

It is possible to structure a joint venture of this type contractually - an example of this would be development agreement with a private sector partner to develop a scheme to agreed plans and specifications. Fundamentally this structure has, at its heart, a contractual position between the Council and the private sector partner (PSP), where the partner is motivated by realising development profit on each phase or site. This Option could still be employed in part by the Council as part of the available actions at Option 2 (bolstered self delivery) but there would be greater concerns about "cherry picking" than passing all the development sites over.

However, a corporate joint venture such as a Local Asset Backed Vehicle (or LABV) creates a number of advantages, as set out below, but in comparison to a contractual joint venture, the key advantages include:

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

The establishment of a LABV is an example of a corporate joint venture, with its own legal personality and interests. A LABV is a limited liability special purpose vehicle owned 50/50 by the public and private sectors with the specific purpose of carrying out regeneration and/or renewal of development and/or operational assets. The public sector invests property assets into the vehicle which are then "value matched" by cash from the private sector. The JV may then use these assets as security to raise finance to bring forward further development. The public and private sector are equal equity holders and share profits equally.

Appendix 1 provides a breakdown of risks and benefits associated with common corporate vehicles for JV companies.

Risks	Benefits
• EU procurement implications. Selection of JV partner and any associated award of contracts to JV and/or partner subject to single EU procurement procedure. • Establishment and operation are resource intensive. Not securing the agreement of the Council to proceed and high start-up costs to establish the JV that will be abortive if the Council decides not to proceed/deadlock arises • Potential conflict between the Council as a 50% JV partner, the statutory objectives of the local planning authority and any future changes in political priority. Also conflict of interest between elected Members / Officers and their role on the JV Board (see above on conflicts policies) • Potential market saturation with demand outstripping supply of suitable JV partners - not being able to secure the right JV partner following procurement (market testing helps) • Council to retain in-house function and consider offsetting of its central charges. Duplication of work /counter-productive work between Council staff and JV staff? • Council capacity to match the capacity of JV partner to serve on the JV Board and make decisions • Requires defined development pipeline to maximise success and investment opportunities - may not achieve best value due to property market and funding market • Separate vehicle gives rise to potential tax leakage at JV level – see Deloitte Report • State Aid risks to be mitigated – see section 3 above.	• Likely to fulfil all of the Council's regeneration objectives • Delivery of holistic and comprehensive regeneration across a number of sites, including cross-subsidisation – less likely to be "cherry picking" of commercial sites for development rather than community sites • Flexibility to retain the ability to include additional development sites, without the need for a separate procurement • Establishment of a partnership where profit can be reinvested in future, more challenging projects • Transfer of some development costs and risks to the private sector and sharing of costs with private sector • Council benefits directly from private sector experience and expertise to enhance and realise asset value • Leverage of significant private sector investment • Council has control through participating directly in decision making and through the adoption of business plans agreed with the Council at the outset • Council will take a share of the profit • Council has control and influence over the terms of the contractual documentation • Incentivises the PSP to deliver over the long term • A 50/50 partnership that allows the Council to "deadlock" unacceptable private sector proposals • Business opportunities for the JV (as a separate entity) to competitively tender for regeneration and property development projects/opportunities in Cheshire East and beyond its boundaries • A separate company can better promote the Council's assets for

	development through the local plan and planning process.

4 Additional considerations

4.1 Whether the vehicle can use any existing Council frameworks and/or the soon to be formed HCA Delivery Partner Panel.

Existing Council frameworks

The Council should review its existing framework contracts to determine:

- The scope of works and services which are included in the framework agreement
- Who the framework agreements are with and whether the suppliers will meet the Council's requirements
- The remaining terms of the framework agreements
- Whether any other contracting authority (including a Teckal company) may call off the framework under its terms.

The Council may call off its existing frameworks provided that the services or works are included in the scope of the framework agreement and that any contracts are called off within the framework terms. Where the Council is setting up a company and that company is a contracting authority it will only be able to use the Council's existing frameworks if it is named in the OJEU and for works/services in line with the terms of the framework when set up. Any call-offs from the framework agreements outside of these conditions and which are not within their permitted use will create a procurement risk. Such call-off contracts may be challenged as a direct award of contract with a remedy of ineffectiveness to the challenger if successful. Where the arm's length company is wholly owned and controlled by the Council and a "Teckal" company, it is likely to be a contracting authority and its usage of the Council's framework, whilst not permissible if the vehicle is not named in the OJEU, may be regarded as "low risk". Further consideration would be needed on the facts. The Council is advised to name the company in any new frameworks it sets up. The company, where a contracting authority, may be able to take advantage of national frameworks procured on behalf of a number of public contracting authorities e.g. GPS or HCA.

Private sector contractors and public/private sector bodies will not be able to call-off contracts from the Council's existing framework agreements.

HCA Delivery partner panel

The HCA's current panel expires at the end of 2013. Any new framework contracts should be called-off using the new Delivery Partner Panel (DPP2). DPP2 covers the procurement of housing led development and is not intended for the procurement of commercial or commercially led sites. Developers appointed to the panel will cover all areas of activity required to develop houses such as the raising of development finance, obtaining planning permission, supply chain management, design and construction of houses including the provision of affordable housing in association with a registered provider, design and construction of buildings and infrastructure to support housing, sales and marketing of houses, aftercare and maintenance.

DPP2 is available to a wide range of public sector bodies. Potential users must register with the HCA to access the panel and agree to sign up to its terms. DPP2 will be available to the Council but not to private sector developers.

4.2 Whether the vehicle can sell land and part fund development.

Councils can generally dispose of land in any manner they wish but must generally obtain "best consideration"; this can be avoided via a specific consent from the Secretary of State or if under £2m in value by use of the general disposal consent if there are commensurate benefits to the disposal of the land. The general disposal consent would not apply to land acquired by way of CPO. In terms of funding development, it is unlikely that the Council could through setting up a company avoid the rules which relate to Local Government Finance such as the Prudential Code It is worth noting that local authorities may not mortgage or charge their land.

4.3 Consideration of CPO issues.

The CPO powers would apply so far as all of the options continue to rest with the Council which would have to use such powers in accordance with the relevant provisions of the Planning and Highways Acts and related guidance. However, these powers are very wide and the development for which they are to be used does not have to be carried out by the Council itself; so the Council could CPO land if required for development which the Company was going to carry out- provided that this was within the very wide provisions of the Act.

4.4 Anticipated costs of the land transfer from the Council to the vehicle to include consideration of SDLT, POS advertising, Land Registry fees, external legal, valuation and financial advice for the vehicle.

Where the Council is considering transferring the asset to the vehicle (Options 3a or 4a – not preferred), SDLT will be due on those land transfers, at 4% (plus VAT), we anticipate that costs of the transfer are going to be a minimum of 4.2%. If the property advisers/valuers work on the basis of a percentage fee, then one would probably want to budget on the basis of 6% of the transfer value to include all possible legal, financial, valuation and taxation costs. In terms of any POS (Public Open Space) advertising, we would anticipate our legal costs to be minimal, no more than two hours per site, to deal with the advertisement only. As the Council is aware, Land Registry fees are based on the consideration in the transfer(s) or where there is no consideration, on the land value transferred, with a fee of £910 for a land value in excess of £1,000,000.

4.5 How the vehicle can work for and with the LEP and other authorities such as the Fire Authority.

If the Council chooses to set up a corporate vehicle, the vehicle is free to contract, subject only to its objects, with any LEP that is an entity in its own right or any of its accountable bodies. The vehicle would also be free to contract, subject only to its objects, with other authorities which are separate from the Council such as the Fire Authority.

4.6 TUPE and Pensions considerations.

If the Council chooses to set up a separate corporate vehicle (under Options 3 or 4) or instead to explore the JV option (under Option 5) in all probability there will be a transfer of existing Council staff under TUPE to the separate corporate vehicle and/or JV entity. While there will obviously be the need to comply with the requirements of the TUPE Regulations in connection with any such transfers, given that all existing rights and liabilities in relation to such existing Council staff will transfer to the separate corporate vehicle or JV (as appropriate) then the Council will be expected to indemnify the separate corporate vehicle or JV (as appropriate) in connection with those transferring rights and liabilities.

While the TUPE Regulations do not protect certain rights to membership of occupational pension schemes (such as the LGPS) on transfer, the Council will have to comply with the requirements of the HM Treasury Guidance – A Fair Deal for Staff Pensions and also the Best Value Authorities Staff Transfers (Pensions) Direction 2007. Therefore the Council would have to ensure appropriate 'pension protection' for the staff that transfer by either:

(a) the transferring staff being provided with continued access to the LGPS following the transfer; or

(b) membership of a pension scheme which has been certified as offering broadly comparable benefits to those enjoyed under the LGPS (together with the right to transfer their accrued rights from the LGPS to the broadly comparable pension scheme by means of an agreed bulk transfer arrangement).

In addition, while the Council is currently focusing on its options for what to do with the services currently, the Council should not forget that if it chooses the separate corporate vehicle or JV approaches (as appropriate), it will need to provide for any potential transfer of staff should those arrangements come to an end. Those transfers could either be back to the Council or on to a new provider depending on what the Council decides to do in relation to the services at that time.

Where the Council prefers to second staff to the separate corporate vehicle and/or JV entity, it will remain the employer of the staff. It will therefore need to consider how day to day management issues are addressed such as appraisal, managing annual leave, sickness absence, discipline and grievance matters; and should put in place an HR protocol to address this. Further consideration would also need to be given to the arrangements which would be put in place when the secondments are brought to an end. TUPE applies by operation of law and the parties cannot contract out of TUPE; where operational responsibility for the services in question has transferred to the corporate vehicle/JV company, there is the risk of a challenge that this is a TUPE transfer and not a "true" secondment. This can be addressed by staff "objecting" to the transfer and being offered new terms and conditions of employment under which they are seconded.

5 Delivery options: quantitative assessment and preferred option

5.1 See Deloitte Report on the quantitative assessment.

5.2 Given the Council's objectives set out in section 2 above, the preferred option is **Option 3b**, i.e. delivery through wholly-owned (or jointly-owned with a neighbouring authority) and controlled arm's length company (a **"Teckal company"**) where the Council retains ownership of the asset. Section 5 below sets out mitigation strategies in relation to the risks identified with Option 3b.

5.3 In terms of the type of corporate vehicle to be used, the preferred option is a **company limited by shares**.

5.4 A company limited by shares is a "tried and tested" corporate vehicle used widely within the public and private sectors, with a separation of risks between shareholder and company and a clear decision-making forum for the formulation of business strategy (the board). Whilst both a company limited by shares and a company limited by guarantee are able to distribute any profits made (with a share-based company being marginally easier), a company limited by shares is more readily capable of being transferred to another party if required in the future. This means that if the company had value (i.e. another party was willing to pay to own the company in place of the Council), the Council's shares could easily be transferred to that other party.

5.5 Whilst there are some tax benefits to the use of a limited liability partnership over a company limited by shares or guarantee, we understand that profit generation and distribution will be limited, hence an LLP structure is not critical (see the Deloitte Report for details). In addition to this, there is a legal consideration for discounting the LLP model. Under section 4(2) of the Localism Act 2011, if an authority does anything for a commercial purpose in the exercise of its general power of competence, it must do so through a company. Exercising the power for a "commercial purpose" is not defined in the 2011 Act, but the definition of "company" does not include LLPs. Where the development vehicle is generating profits from outside the Council's area and/or those profits are not then recycled towards wider Council aims (for example, regeneration, housing, public realm), it is more likely that the development vehicle's purpose is seen as commercial in nature. Using a company structure rather than an LLP structure avoids any later issues under section 4(2) of the Localism Act 2011.

6 Risk mitigation in relation to the Preferred Option

Risks	Mitigation of risks
Company limited in the amount of income which can be received from organisations that do not satisfy the "Teckal" test. Risk that Teckal	Teckal status relevant only where the Council seeks to place contracts which would otherwise need to be EU procured, with the company, without going through an EU compliant procurement

status soon lost. Not intended to be used for commercial purposes. Should be akin to in-house provision. Limited independence from Council, given Council control is key requirement of Teckal status.	process. Effective Council control of the company could be structured through a variety of mechanisms, all documented in the company's articles of association. For example, the Council would approve any business plan (i.e. the overarching "envelope" of the company's activities), scrutinise the company's performance and Board activities (directing the Board where necessary to act or not act in a certain way) and exercise a veto at Board level on all or key, strategic decisions affecting the company.
Delivery potentially not much quicker than currently achievable by the Council if company is intended to be regulated in accordance with Council policies and procedures.	Council reviewing its own constitution and processes to determine whether constitutional changes can be made and how any existing Council processes can be streamlined and/or delivered differently. The company's articles of association will determine, to a large extent, how streamlined and efficient the company's own processes will be. In this regard, and subject to the Council's overall control and legal requirements under the Companies Act 2006, the articles of association would be drafted to enhance any available flexibilities (for example, through shortening periods required for Board and shareholder meetings). The Council, as sole shareholder, is also able to amend the articles at a later date to incorporate any further flexibility required.
If the company is acting as agent for the Council, the Council will in most cases be bound by the company's actions on its behalf. Commercial/delivery risks remain with the Council given it retains the relevant asset.	Given the Council will be retaining ownership of the assets, any arrangements relating to the acquisition, development and/or realisation of those assets will be between the Council and the relevant counterparty. If the Council is intending to appoint the company as its agent, the agency arrangement should be documented to give comfort to the Council, the company and any counterparty. This arrangement could be documented through the business plan or a separate agreement between the Council and the company. Whilst this is not a mitigation strategy in itself, the allocation of rewards follow the allocation of risk, with the Council in this case taking the rewards of retaining the commercial/ development risks.

Conflicts of interest can arise between Council and company - can be dealt with, but conflicts policies need strict enforcement to combat actual conflicts and perceived conflicts (e.g. elected Members and officers should be wary of sitting on both shareholder council and board of company, or exercising more than one role in relation to a given development (e.g. on behalf of the Council as landowner and planning authority)).	See Appendix 2 for details of this issue. The wording below is the summary conclusion from that Appendix: It is easier to manage the conflicts for an "officer director", as the Council can agree to the officer continuing to act as an officer despite potential conflicts; agree not to take action against him where he is required to act contrary to the interests of the Council due to his role as a director; and agree to his or her remuneration as a director. The involvement of senior officers acting as directors to the company will require careful consideration. Where a "councillor director" is concerned the Council, as owner of the company and controller of the Board of Directors, can agree to his acting as a director even with a conflict, but under the provisions of the Localism Act 2011, the councillor would need a dispensation to enable him to act as a councillor where a conflict of interest arises. Dispensations may be able to be granted as the provisions of the Localism Act are fairly wide and, for example, a dispensation can be granted if the authority, "considers that granting the dispensation is in the interests of persons living in the authority's area", or "considers that it is otherwise appropriate to grant a dispensation". The member must apply for the dispensation in writing and it does not avoid the requirement for registration of interest or of disclosure whenever a matter of Council business affecting the company is being discussed. It is also important to remember that despite all of the above being in place it is very difficult to avoid the perception of bias, which if proven, can invalidate the decisions of the Council and give rise to a public perception of wrongdoing which can be very difficult to resolve.
Some tax leakage - please see the Deloitte Report.	Tax leakage may be mitigated if profits are minimal (given most business is undertaken at cost for the Council's benefit) and no material assets transfer into the company.
Will entity with no trading history have better reception from the market than the Council? The Council may be called upon to bolster company	If the Council wishes the company to succeed then until such time as the company is able to "self-fund", the Council will need to

activity through guarantees (consider state Aid). State Aid issues may arise on a transfer of assets to the company – see section 3 above.	consider funding the company. A robust business planning process would help mitigate against unplanned cost increases. In addition, the Council will need to be mindful to ensure it is not distorting the market and falling foul of State Aid and, where there may be any doubt, that it seeks advance advice and clearance. As the Council is not seeking to dispose of assets to the company, best consideration/undervalue issues on disposal are not relevant.
Consider council's in-house function - duplication of work /counter-productive work between Council staff and a separate entity - how will central charges be offset/claimed? Would a back office agreement back to the Council be acceptable in the short, medium and long term?	Council to review processes to determine whether and how any existing processes can be streamlined and/or delivered differently to avoid a significant retained contract management role (and duplication of cost). Council to consider carefully its staffing and secondment requirements and ensure properly documenting any secondment arrangements. See section 4.6 above.
No or limited private sector innovation and expertise to enhance and realise asset value or provide additional funding/share cost (Council access to required funds may diminish over time).	To be reviewed in time following a period of business – the company, or a subsidiary of the company, could be a partner in a future public/private joint venture. Whilst the company is controlled by the Council, the company's articles of association would be drafted to take advantage of any decision-making/process flexibilities available to it – see earlier mitigation comment in relation to delivery speed and flexibility.

7 CONCLUSION AND NEXT STEPS

7.1 Given the Council's Core Aim and objectives set out in section 2 above, the Council's preferred option is **Option 3b**, i.e. delivery through wholly-owned (or jointly-owned with a neighbouring authority) and controlled arm's length company (a "Teckal company") where the Council retains ownership of the assets. The Council considers that the principal advantage of this Option, over all others, is that it allows the Council to focus its delivery through the separate arm's length company, without distracting the company's management and personnel with the Council's other day to day operational requirements. The company can also better promote the Council's assets for development through the local plan and planning process. In addition, the company can be used flexibly by the Council as an agent without tying the Council down to a single delivery model (as would a LABV or transfer of assets). In addition, the Council believes that this vehicle may be regarded as more attractive by the Cheshire and Warrington LEP and possibly other public sector bodies as a delivery vehicle for their purposes, than direct contract with the Council or a non-wholly controlled Council company/joint venture.

7.2 In terms of the type of corporate vehicle to be used, the preferred option is a **company limited by shares**. A company limited by shares is a "tried and tested" corporate vehicle used widely within the public and private sectors, with a separation of risks between shareholder and company and a clear decision-making forum for the formulation of business strategy (the board). The Company would be able to distribute any profits made (albeit the company is not expected to make significant profit), and is more readily capable of being transferred to another party if required in the future.

7.3 Whilst there are some tax benefits to the use of a limited liability partnership over a company limited by shares or guarantee, we understand that profit generation and distribution will be limited; hence an LLP structure is not critical (see the Deloitte Report for details). In addition to this, there is a legal consideration for discounting the LLP model. Using a company structure rather than an LLP structure avoids any later issues under section 4(2) of the Localism Act 2011.

7.4 Section 6 above sets out mitigation strategies in relation to the risks identified with Option 3b. It is important for the Council to:

- Identify the scope of the agency role and arrangements with the company
- Consider who will be a board director and how such a role is to be reconciled with any role within the Council, taking into account actual and perceived conflicts of interest and bias
- Consider the necessary constitutional and administrative processes which the Council has, to ensure that the company can be used effectively and efficiently to improve delivery timescales
- Consider the effective drafting of the memorandum and articles of association of the company to give the Council the necessary degree of control (e.g. the Council would approve any business plan (i.e. the overarching "envelope" of the company's activities), scrutinise the company's performance and Board activities (directing the Board where necessary to act or not act in a certain way) and exercise a veto at Board level on all or key, strategic decisions affecting the company)
- Consider the clearly defined funding model for the company
- Consider the clearly defined staffing role for the company.

APPENDIX 1

OVERVIEW OF KEY RISKS AND BENEFITS BETWEEN COMMON CORPORATE VEHICLES

See Deloitte Report on Tax Treatment

The following three corporate vehicles form the structural basis for most local authority wholly-owned and joint venture vehicles, whether (in the latter case) a local authority joint ventures with other public sector bodies or private sector parties.

Additional variations are also used where a specific objective is fundamental to the vehicle's existence – for example, a vehicle set up with a "not-for-profit" could be incorporated as a charitable company, a community interest company or an Industrial & Provident Society. As a general principle, unless such a specific objective is paramount, the extra regulatory burdens of charitable, community interest or Industrial & Provident status usually outweigh the benefits.

On the understanding the Council wishes to pursue some form of wholly-owned vehicle we have tailored the following overview towards that type of vehicle. However, most risks and benefits would apply equally (or with slight modification) to joint venture vehicles.

The Deloitte Report deals with the tax treatment of these vehicles.

Corporate vehicle	Risks	Benefits
Company limited by shares (CLS)	• Potential conflicts of interest for public sector directors (e.g. Council (as Planning Authority) officers or elected Members making decisions at Council and company Board level), particularly for profit distributing structures. There are particular difficulties in relation to members acting as directors, relating to the councillor's duties to the Council; these are likely to preclude a Cllr acting within the council on any matter which has a significant impact on the company. In the case of an Office Director, the Council may choose to waive his duty to the Council and direct him to act in the best interests of the company,. Council also needs to be alert to ***perception of conflict*** even if no actual conflict	• Flexible and familiar structure – local authorities already use CLS's widely. The company's objects can be restricted in such manner as the Council, as sole shareholder, determines and approves through the articles and/or by means of day to day board control on some or all matters • The Council can structure its participation in future JVs through a CLS or the CLS itself could become a JV (this is less favourable to potential JV partners given potential historic risks with the company) • CLS can trade commercially • Simple mechanism for (a) introduction of new equity (although if the company is established as a wholly-

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Corporate vehicle	Risks	Benefits
	exists. • Maintenance of share capital requirements –rules in the Companies Act 2006 on withdrawing capital are reasonably inflexible (they exist primarily for the protection of creditors) • Cannot make distributions to shareholders in excess of distributable profits. Also, if a Teckal company, then services back to Council should be (broadly) at cost so little ability to generate profits. Income from parties not in a Teckal relationship with the company (i.e. as an independent source of revenue for the company) will be limited. • Market facing activity limitations if Teckal company. • Transfer of shares may be subject to stamp duty • Tax levy at JV company level – no credit for no-tax paying investors. See Deloitte Report. • Termination, voluntary or involuntary, of the company could result in a financial loss, especially if Council is the only funder to the company • Value issues arise on transfer of membership (i.e. Council may need to incur time and cost to establish fair value if it sought to sell its stake in the company) • Potential shadow directorship for the Council, if the company's board defers too heavily to the Council for **board** decisions (note that this is not the same as the Council exercising its rights to veto or approve matters reserved to it, in its capacity as a shareholder)	owned vehicle, no further shares need to be issued to the Council. Debt can be used to fund the company, if required) and (b) equity (i.e. share) transfers • Limited liability for Council as shareholder in the ordinary course of business • Appropriate risk sharing and management – split role of board of directors (day to day operations) and Council as shareholder (for strategic reserved matters) well understood. Sole shareholders often have greater control over their company through control of the Board and/or extensive commercial matters which are reserved for the sole shareholder's decision. • Corporate management structure allows a degree of independence from Council, although Council ultimately has control over continued existence of the company, can direct the Board to act in a certain way and can alter the management of the business through amending the articles of association • Can convert into a public company (PLC) or a company limited by guarantee (CLG), if appropriate • CLS can distribute dividends • Rewards are linked directly to risks taken, generally in direct proportion to the proportion of shares held – if shares are held solely by the Council, then any net distributable profits generated could be distributed to the Council.
Company limited by	• Potential conflicts of interest for public sector directors (e.g. Council (as Planning Authority) officers or	• Familiar structure – local authorities already use CLGs widely. The company's objects can be

Corporate vehicle	Risks	Benefits
guarantee (CLG)	elected Members making decisions at Council and company Board level), particularly for profit distributing structures. There are particular difficulties in relation to members acting as directors, relating to the councillor's duties to the Council; these are likely to preclude a Cllr acting within the council on any matter which has a significant impact on the company. In the case of an Office Director, the Council may choose to waive his duty to the Council and direct him to act in the best interests of the company, In addition, the Council needs to be alert to ***perception of conflict*** even if no actual conflict exists • Tax levy at JV company level – no credit for no-tax paying investors. See Deloitte Report. • Termination, voluntary or involuntary, of the company could result in a financial loss, especially if Council is the only funder to the company • Difficult for CLG to make distributions although still legally possible (unless prohibited by the articles of association). If profit is a key driver for the Council, then a CLS would be more appropriate (from a profit distribution perspective) • Value extraction more complicated than for a CLS (which has transferable shares) – if the Council is considering selling its interest in the company at a later date, a CLS would be a more appropriate than a CLG • Potential shadow directorship for the Council, if the company's board defers too heavily to the Council for **board** decisions (note that this is not the same as the Council exercising its rights to veto or approve matters reserved to it, in its capacity as a member of	restricted in such manner as the Council, as sole member, determines and approves through the articles and/or by means of day to day board control on some or all matters • CLG can trade commercially although structure flexible to accommodate "not for profit" principles if required • The Council can structure its participation in future JVs through a CLG (although unlikely given the more difficult extraction of profits and/or potential "not for profit" objects of the company) or the CLG itself could become a JV (this is less favourable to potential JV partners given potential historic risks with the company). Any third party looking to extract profit from a JV would be less interested in a JV structured as a CLG • Can convert to an unlimited liability company (not attractive), but to a CLS • Limited liability for Council as member (of the company) in the ordinary course of business • Appropriate risk sharing and management – split role of board of directors (day to day operations) and Council as member (for strategic reserved matters) generally well understood. Sole members often have greater control over their company through control of the Board and/or extensive commercial matters which are reserved for the sole shareholder's decision. • If the Council is not considering selling its interest in the company at a later date, then a CLG often provides a more useful model. No value issues are created with a membership interest (the Council's guarantee is a future obligation, not an investment like

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Corporate vehicle	Risks	Benefits
	the company) • Market facing activity limitations if Teckal company.	shares in a CLS) – for this reason, it is often easier for CLG members to join and leave
Limited liability partnership (LLP)	• Limitation for local authorities to trade through an LLP • Given "Teckal" exemption vehicles are designed (broadly) to be providing services to their controlling authority on a cost basis rather than for profit and the ability to generate income from parties not in a Teckal relationship with the LLP (i.e. as an independent source of revenue for the LLP) is limited, there would be less taxable income in the first place to benefit from an LLP structure • Less familiar structure, though becoming more widely understood. (Lack of established case law (LLPs have only been in existence since 2000). Please note risks relating to new Localism Act 2011 referred to at paragraph 5.5. • Requires two members (i.e. for partnership) – usually this means the Council establishing a wholly-owned nominee company which then holds c.0.01% of the capital interests with the Council holding the remaining 99.99% - administratively, this is more burdensome that a CLS or CLG • Potential conflicts of interest for public sector managers sitting within the LLP (e.g. Council (as Planning Authority) officers or elected Members making decisions at Council and LLP "board" level). In addition, the Council needs to be alert to ***perception of conflict*** even if no actual conflict exists • Transfer of interests may be subject to stamp duty	• Corporate body with limited liability for members • The Council can structure its participation in future JVs through an LLP or the LLP itself could become a JV (this is less favourable to potential JV partners given potential historic risks with the LLP) • Council can structure its strategic and day to day operational control by means of an LLP or Members Agreement which sets out how decisions are made. Significant control can be retained by the Council through the creation of a "management board" with Council appointees sitting on the board and/or reserved matters requiring Council approval. There are no statutory directors, so no Companies Act directors' duties to consider. • Flexible mechanism for equity/introduction of new members - membership interests in the LLP can be issued to new additional members and can be assigned/transferred to other new members • Flexible basis for distributing profits and return of capital • Tax transparent in relation to profits of the business, so non-tax-payers do not suffer tax leakage. See Deloitte Report. • Tax efficiency. See Deloitte Report. • Investors in LLPs can get their capital back more easily than from other corporate entities

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APPENDIX 2

CONFLICTS OF INTEREST

General duties of directors

A director's general duties to the company are defined in the Companies Act 2006. A director must:

- act in accordance with the company's constitution and only exercise powers for the purposes for which they were conferred
- act in a way in way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members (which will be the Council)
- exercise independent judgment (this means that they are not able to merely act on instructions from the Council)
- avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company (by virtue of his status as an elected member or officer, a director appointed by the Council would not be able to avoid this conflict of interests). Unless that conflict is specifically authorised by the Council (as sole member of the company) or the board of directors under the procedural rules in section 175 of the Act, or pre-authorised under the company's articles, that director cannot continue to act. We would favour pre-authorising the director's conflict of interest in this case
- not accept benefits from third parties conferred by reason of his being a director or his doing or not doing anything as a director
- declare any direct or indirect interest in any proposed transaction or arrangement with the company

Where members or officers of the Council are also on the board of the company, conflicts of interests will almost certainly arise. The potential conflicts of interest which may arise for members and officers - although they can be equally significant - have to be addressed separately because of the different responsibilities and status of elected members and officers.

Councillors/ elected members as directors

Where a director is a councillor, then he or she must observe his/her obligations as a councillor to disclose potential conflicts of interests and observe the requirements of the Code of Conduct of the Council required under the Localism Act 2011. The director must also be careful to behave in ways which avoids suggestions of bias or predetermination.

Whereas the Council could grant a dispensation which covers a DPI under the Localism Act 2011, it is not possible for the Council to avoid accusations of basis of predetermination. It is, for example, difficult for the leader, should he also be a director of the company, to propose a budget which benefits the company. Despite dispensations, it is difficult in practical terms for him to deal with such a matter and it lays both him and the Council open to allegations of bias and potential challenge. Equally, it would be advisable to ensure that membership of for example, the Planning Committee is considered, so that any directors of the company who are members of the Planning Committee are not involved in making decisions on applications from which the company would benefit.

Directors' remuneration with the wholly-owned company will be governed by the provisions of the Local Authority Order 2005, which restricts the amount of remuneration that an elected member may receive. In effect, this means that they cannot receive any additional remuneration from the company for acting as a director, which is beyond the special responsibility allowance they would have received had the activities of the company been discharged by the Council. Any remuneration they receive will be deducted from the SRA that they receive within the Council and they may only claim mileage and subsistence at the rates that apply to councillors.

Officers as directors

Officer directors cannot avoid their duties as directors of the company, but their obligations to the Council are different from those of a member. Officers owe a duty to the Council which arises both under statute and also under their contracts of employment.

An officer is required under the provisions of the Local Government Act 1972 to disclose to the Council any interest he may have in any contract or other matter, which would include contracts with a company where he is a director. However, as the requirement to act in the best interests of the Council and withdraw in the event of a conflict is purely contractual (through the contract of employment), the Council can waive that requirement and instead direct the officer to act in the best interests of the company in the event of a conflict and to authorise him or her to continue to act within the Council even with the outside interest as a director.

This would not avoid accusations of bias and determination and predetermination where an officer is both a director and deciding on a matter within the Council which affects the company, and so once again care should be taken to make sure that undue influence is not seen to be exercised by an officer director when matters affecting the company are being decided within the Council. Where matters are decided by members who are not connected to the company (for example, through being directors of the company), this should be less of an issue, but it would still be wise to look at the remit of an officer director and to ensure that appropriate line management arrangements are in force.

As regards officers' remuneration, it is a criminal offence for an officer to accept anything other than his proper remuneration and so an officer may not accept payment from the company for his services as a director, unless the Council agrees that the additional payment will form part of his/her proper remuneration.

Summary

In summary, therefore, it is easier to manage the conflicts for an "officer director", as the Council can agree to the officer continuing to act as an officer despite potential conflicts; agree not to take action against him where he is required to act contrary to the interests of the Council due to his role as a director; and agree to his or her remuneration as a director. The involvement of senior officers acting as directors to the company will require careful consideration.

Where a "councillor director" is concerned, the Council, as owner of the company and controller of the Board of Directors can agree to his acting as a director even with a conflict, but under the provisions of the Localism Act 2011, the councillor would need a dispensation to enable him to act as a councillor where a conflict of interest arises. Dispensations may be able to be granted as the provisions of the Localism Act are fairly wide and, for example, a dispensation can be granted if the authority, "considers that granting the dispensation is in the interests of persons living in the authority's area", or "considers that it is otherwise appropriate to grant a dispensation". The member must apply for the dispensation in writing and it does not avoid the requirement for registration of interest or of disclosure whenever a matter of Council business affecting the company is being discussed.

It is also important to remember that despite all of the above being in place it is very difficult to avoid the perception of bias, which if proven, can invalidate the decisions of the Council and give rise to a public perception of wrongdoing which can be very difficult to resolve.

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