Bevan Brittan

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.

<u>State Aid</u>

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.

[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-

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

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

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.