
Development Agreements and Funding Urban Regeneration

24 November 2016

AGENDA

- 9.45 Introductions
- 9.50-10.30 Weightmans: Development Agreements
- 10.30 – 11.15 Guest Speaker: Anthony Everitt
- 11.15-11.30 Coffee
- 11.30 – 12.15 Geldards: Development and Funding Urban Regeneration
- 12.15 – 1.00 Weightmans: Appropriation as a Development Tool
- 1.00 Lunch

Development Agreements

Zo Hoida – Weightmans

Types of Development Agreement: Quiz !

- A Agreement for Lease
- B Forward Purchase Agreement
- C Forward Funding Agreement
- D Standalone Development Agreement

Types of Development Agreement

- Landowner appoints and pays Developer to build out OR grants Developer a long lease/Freehold on completion with Developer paying for build
- A B C or D?

Types of Development Agreement

- Developer is building out, fund commits to acquire on practical completion
 - Payment made by fund on completion
 - Developer funds construction costs
 - Title transfers on exchange or completion

- A B C or D?

Types of Development Agreement

- Developer is building out, fund provides finance to cover cost of development
 - Title transfers prior to building
 - Developer draws down costs monthly
 - Fund pays developer on completion

- A B C or D?

Types of Development Agreement

- Developer landowner building out and tenants commit to taking a lease

- A B C or D?

Analysis of terms in a Development Agreement

- Conditionality
- Development obligations
- Defects
- Assignability
- Target Dates
- Transfer of Title

Analysis of terms in a Development Agreement

- Conditionality
 - Ground Conditions
 - Pre-lets
 - Site Assembly

 - Planning
 - Compulsory Purchase & Indemnity
 - Appropriation

Planning Conditionality – Key Considerations

- Who submitting planning application and costs?
- Longstop Date? What if an appeal or JR?
- Buyer Perspective:
 - Flexibility - ability to pull out/ deduct purchase price
 - Generic onerous conditions – “in Buyer’s opinion...”
 - Avoid unforeseen onerous obligations
 - Eg cap on s.106 contributions, amount of affordable housing etc
 - Obligation on Seller to cooperate and sign s.106 agreement
 - Ability to rely on CIL exemptions (ie “in-use” buildings)

Planning Conditionality – Seller Perspective

- Limit ability to walk away
- Avoid site being tied up too long
- Specific genuine onerous conditions only
- Avoid generics – in effect a Buyer “option” with no option fee
- Clean break – no residual liability under section 106 or CIL
 - Indemnity
 - CIL notices – Assumption of liability
 - Section 106 obligations triggered by commencement (not grant of pp)
 - Avoid early access triggering commencement



Concept - Economics – Funding - Delivery

Please contact Anthony Everitt, ADE, should you require any assistance:

ADE Regeneration; email – aeveritt@ade-regen.co.uk; tel. 07880 907431



The context for local growth

The logo for Greater Birmingham & Solihull Local Enterprise Partnership, consisting of several overlapping rectangular blocks in shades of green and blue.

Greater Birmingham
& Solihull
Local Enterprise Partnership



Decentralisation and
the Localism Bill:
an essential guide

**MIDLANDS
ENGINE**  HM Government

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Strong foundations

**What is
the problem?**

**What are the
council's
regeneration
objectives?**

**Can the
private
sector deliver
these
objectives?**

**What are the
Council
prepared
to spend /
risk?**

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Making projects deliverable



- Grant funding
- Property structures (head-leases, subletting, de-risking etc)
 - The Council acting as developer
 - Prudential borrowing

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Case-study – BioCity Nottingham



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Case-study – Cotgrave town centre



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Case-study – Northallerton



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Case-study – Incubator space



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Legal issues I come across

- **Councils setting up companies**
- **Procurement – speed to deliver**
- **Procurement / land sale – working with one developer**
- **State-aid – creating a surplus**
- **Local Authority capacity**

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Questions

Q. Q.

Q. Q.

Q. Q. Q.

Q. Q. Q.

Q. Q.

Q. Q. Q.

Q. Q. Q.

Q. Q.

Q. Q. Q.

Alternative Delivery Structures – For Regeneration & Development

Thursday 24th November 2016

Andrew Evans - Partner, Geldards LLP

Paul Hilsdon - Partner, Geldards LLP

Local Authorities & Developments: Tax

Andrew Evans

Partner, Geldards LLP

Outline

- VAT
- SDLT
- Corporation Tax
- CIS

VAT

- Special VAT regime
 - statutory powers
 - non-business activities
- Trading activities
 - bound by the VAT regime

VAT – development agreements (s106)

- Dedication of roads and sewers
 - no charge by developer, no VAT
- Section 106 agreements
 - buildings and public amenities
 - cash contributions for upkeep
 - not treated as a supply, no VAT

SDLT

- New commercial rates
- Specific concessions for local authorities

SDLT – new rates (from 17 March 2016)

- “Slice” regime for SDLT
- Up to £150,000 – 0%
- Next £100,000 – 2%
- Over £250,000 – 5%
- Cut off at £1,050,000 compared to old regime

Mergers

- Reorganisation of public bodies
- No SDLT on property transfers
- Specific list of public bodies

Compulsory purchase

- To facilitate development
- By someone else
- CPO (purchase can be by agreement)
- Avoids double charge to SDLT
 - No SDLT for LA

Compliance with planning obligation

- Enforceable against vendor
- Purchase by LA
- Within 5 years of date of planning obligation

Corporation tax

- LAs not liable for corporation tax (s984 CTA 2010)
- LAs not liable for CGT (s271(3) TCGA 1992)

Construction Industry Scheme

1. Consider your position under CIS
2. Registration with HMRC
 - Contractor
 - Sub-contractor
3. Checking payment obligations and deduction at source

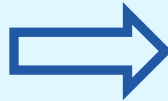
The Drivers for Change – Setting the Scene



CIPFA 2016

The Changing Role of Publicly Owned Assets

Recession/Austerity/Cuts



Using Publicly Owned Assets

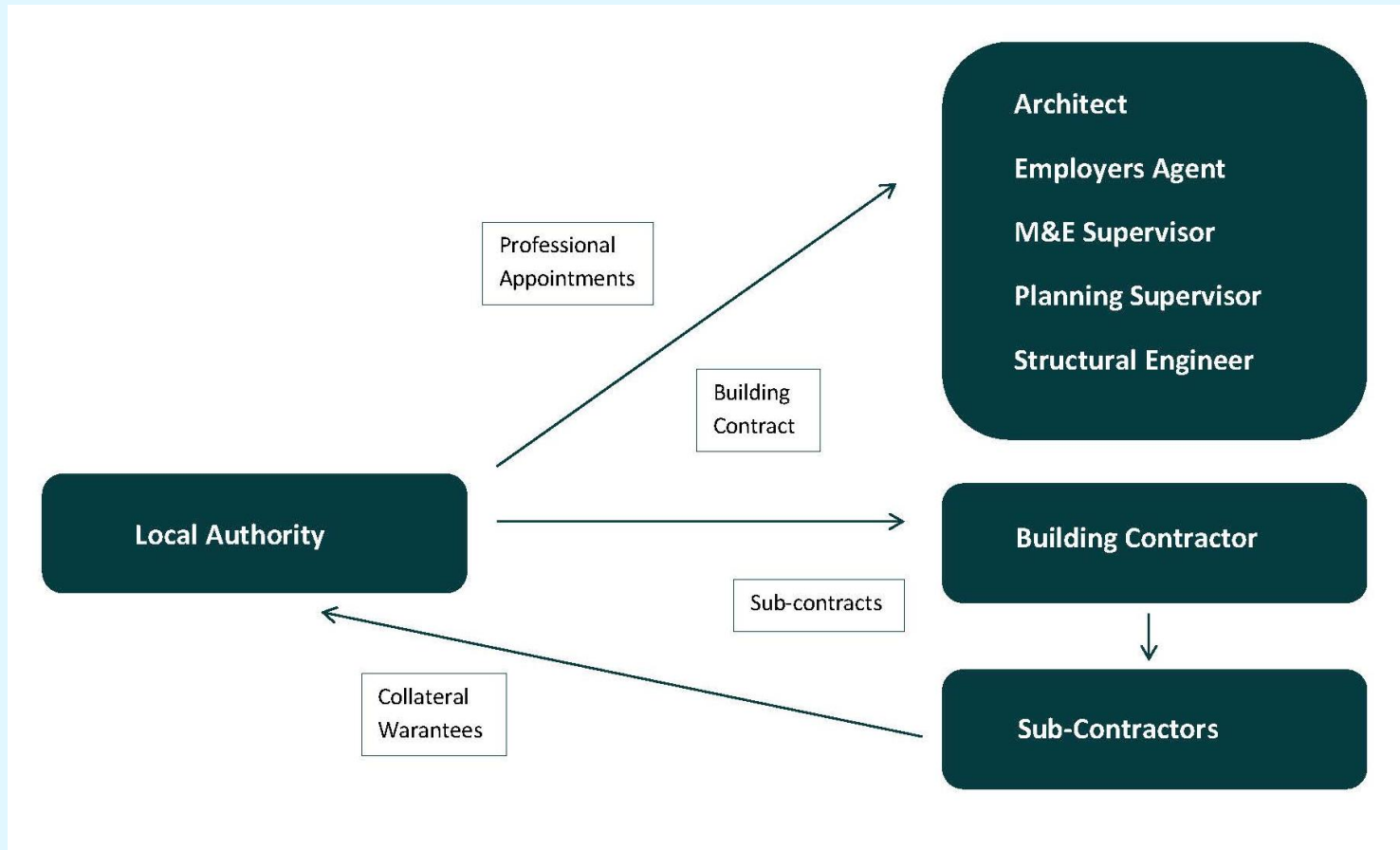


- **Support Economic Growth**
- **Generate Revenue Funding**

Delivery Options

1. Direct Delivery
2. Land Sales
3. Contractual - Development Agreement
4. Contractual Joint Venture
5. JV Corporate Structures
6. Case Study

Direct delivery

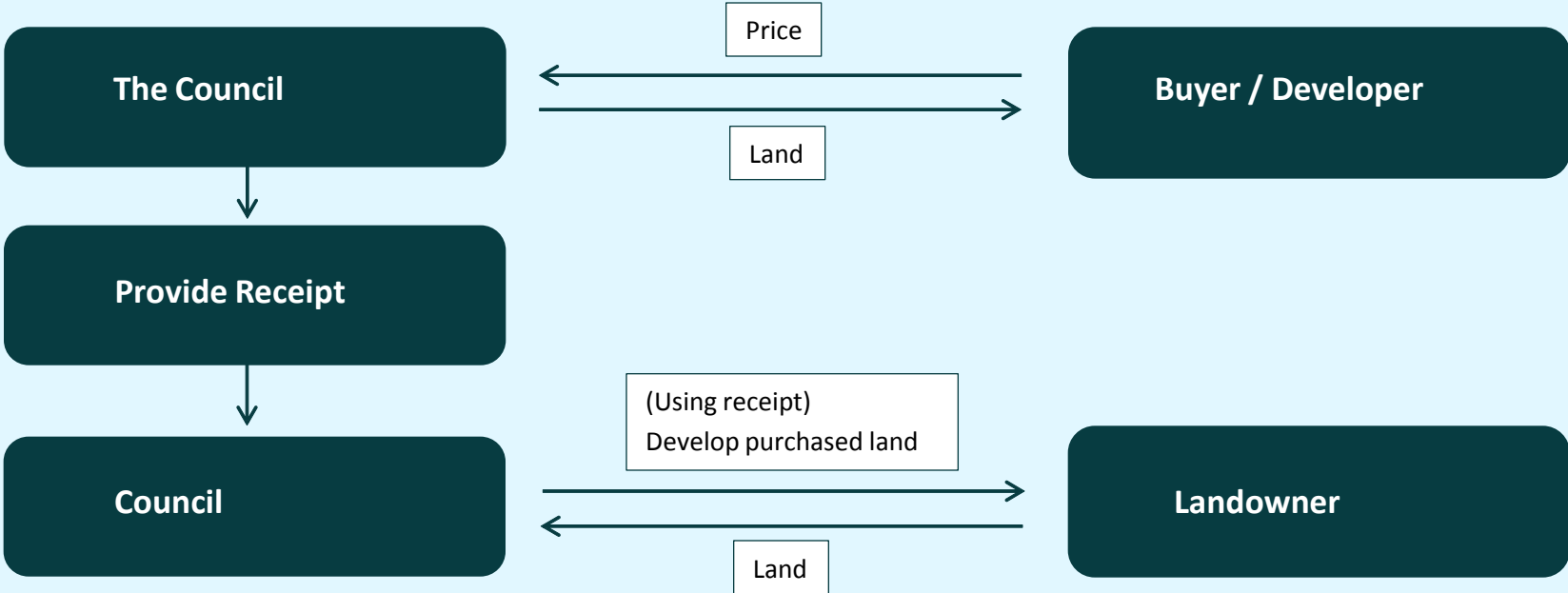


Direct delivery

Key Features

- Procurement
- Resource
- LA takes risk of development funding and onward disposal
- Greater control
- Significant returns possible but only after cost & sales risk
- Useful where the market will not intervene or when risk may be high

Land Sales / Developers

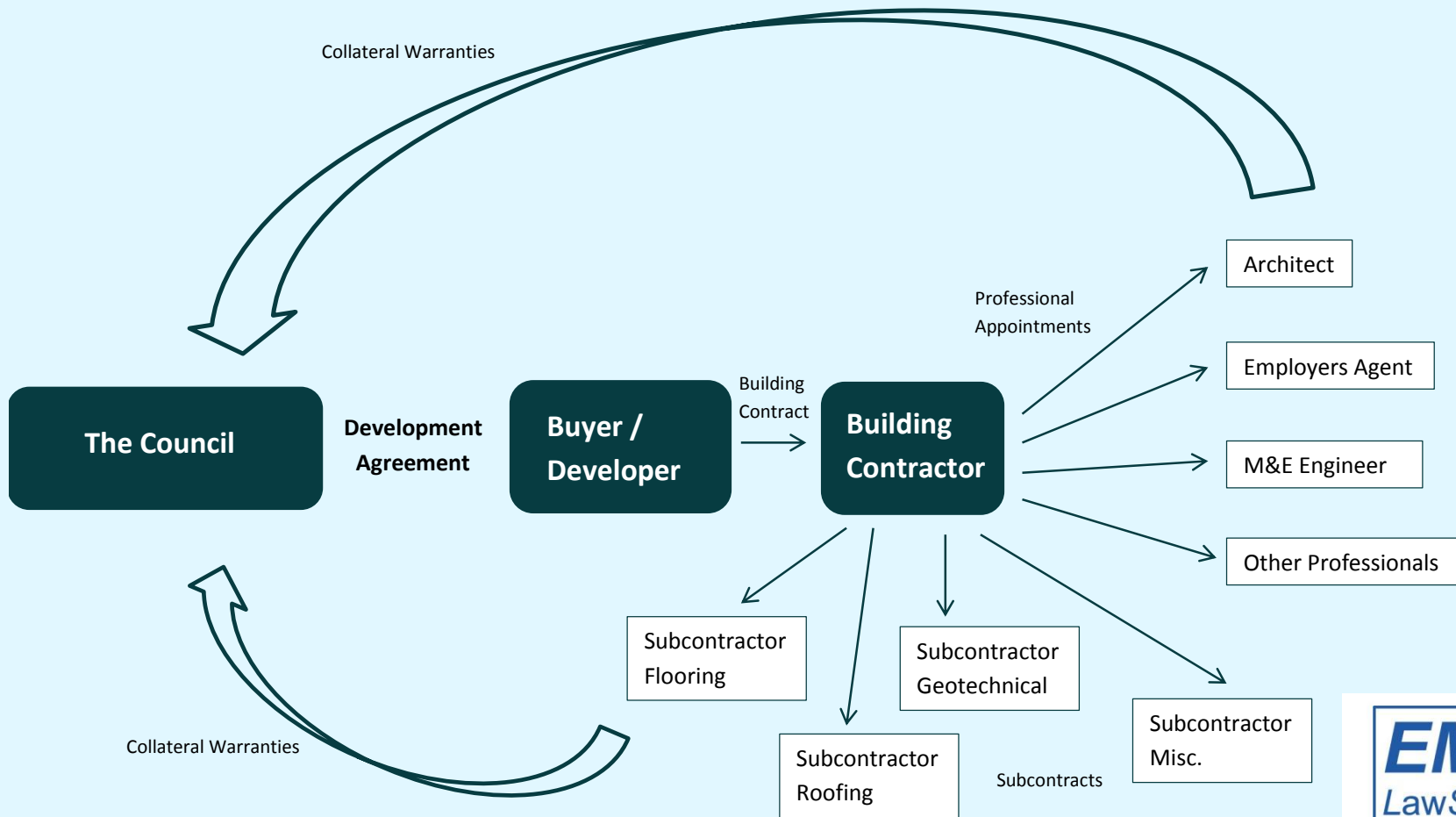


Land Sales

Key features:

- If no development/services obligations, generally no EU procurement required
- Section 123 Local Government Act 1972
- Sale of Land guidelines – March 2016
- No development obligations
- Buyback rights / overage

Contractual engagement with Development Partner



Contractual engagement with Development Partner

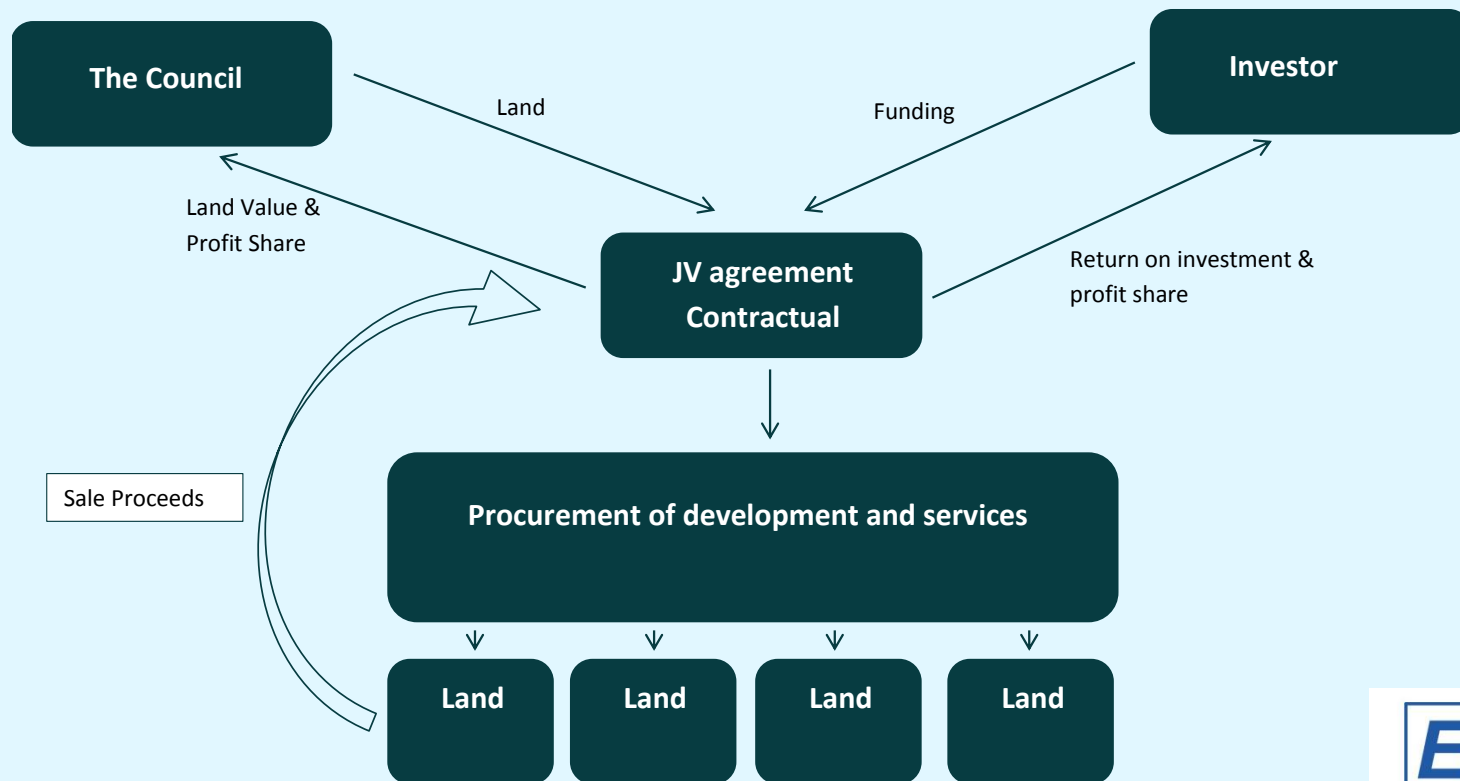
Key features:

- Procurement required (EU Procurement, if over EU threshold – currently £4,101,394)
- Access to developer expertise/resource and its funder(s)

Contractual engagement with Development Partner

- **Following conditions can be incorporated:**
 - Availability of development & planning funding
 - If public funding used, stage payments against outputs
 - Deferred grant of land interest
 - Step in/ termination rights
 - Development programme/milestones
 - Development approval rights
 - Balancing funders requirements

Contractual Joint Venture /Collaborations

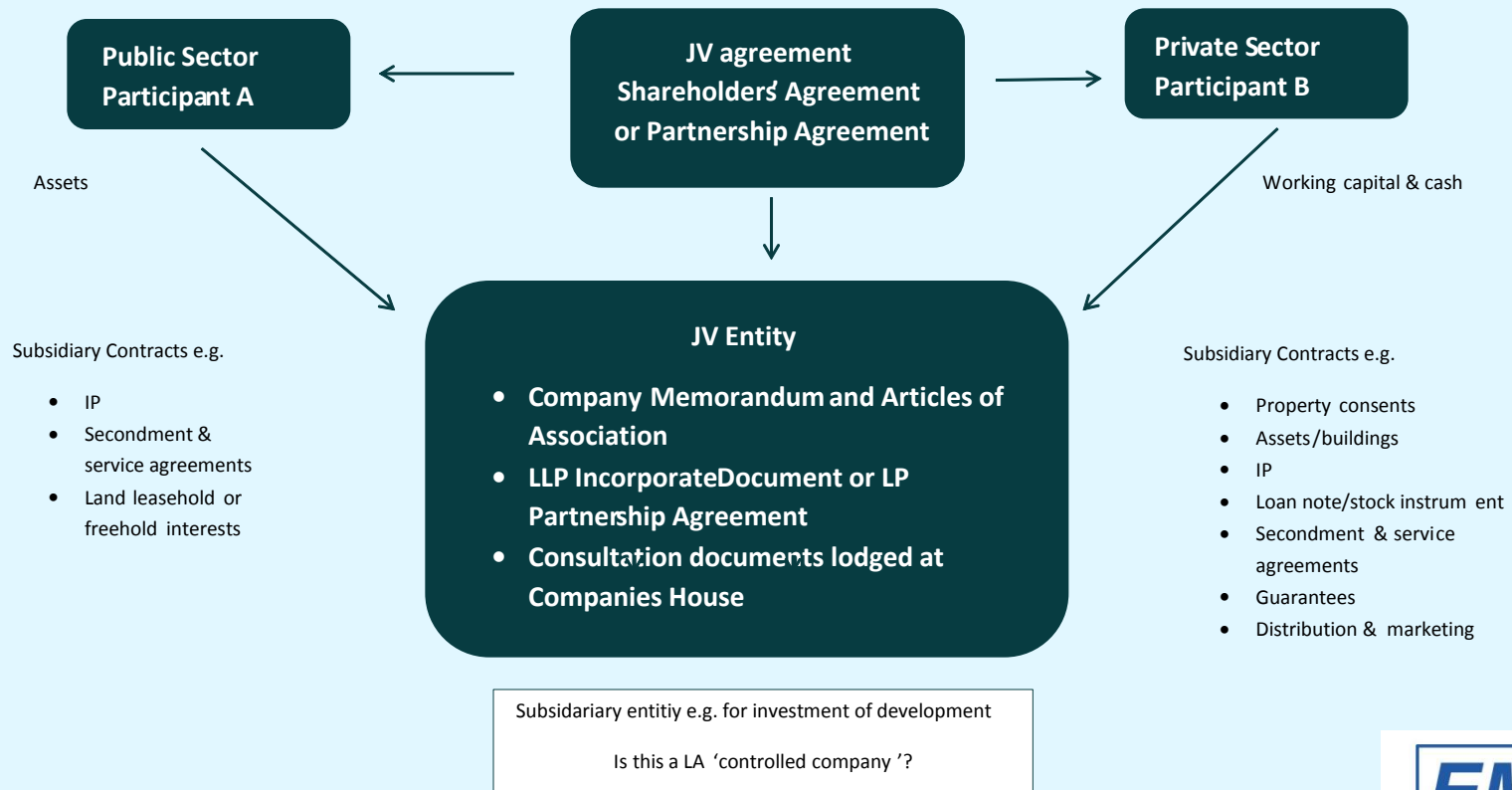


Contractual Joint Venture

- **Key features:**
 - Risk sharing between the partners
 - Retention of influence and control
 - Private funding may be easier
 - EU procurement may not be required if JV private sector party is providing funding
 - Retention of land initially

Corporate JV

HM Treasury



In this example the public sector participant provides access to intellectual property and some staff and services, and the private sector participants provide complementary skills and financial resources.

Corporate JV

Key features:

- Vehicle – limited liability
- JV co controls development & delivery
- Matched contributions – land & cash
- 50/50 shareholding & deadlock – so some control
- 10-20 years arrangement
- Working capital as and when required

Regulatory Regime: Companies/LLPs

Light touch

- Company limited by shares
 - Company limited by guarantee
 - Corporate JV
 - LLP
- Register at Companies House
 - File annual accounts, which may need audit
 - File annual return
 - Ad hoc filings on changes in directors, share capital (if relevant), grant of charges
 - Simple

JV Company structures

Pros:

- Incentivises private sector to deliver over time
- Leverages private sector skills
- Economies of scale
- Long term returns potential – share in development uplift
- Projects 'downstream' may not be subject to OJEU / procurement
- Business plan

JV Company structures

Cons:

- Amount of land and land values
- Deadlock could lead to breakdown
- Sale of private sector interest
- Resource commitment – time & cost
- Up front procurement

Summary: The Key Differences

Corporate

- Separate legal entity
- Separate governance
- Holds its own assets
- Limited liability (usually)
- Party to contracts
- Borrowings, grants and security in own name
- Taxed separately (in most cases)
- Separate regulation
- Harder to unravel?

Contractual

- No separate legal entity
- No separate governance
- Assets held by participants
- No limited liability
- Cannot contract
- Borrowings, grants and security by participant
- Not taxed separately
- Regulation as part of “parent” entities
- Easier to unravel?

Case Study

Context

- Privately owned 1970's shopping precinct with adjoining land owned by the Council
- Developer wishes to enlarge shopping precinct and Council wants housing
- Development partner to be procured

How would you consider carrying out a town centre “development”?

- A. Do it ourselves
- B. Contractual JV
- C. JV Co
- D. Ask for advice

Case Study

	DISPOSAL	CONTRACTUAL JOINT VENTURE	CORPORATE JOINT VENTURE	DIRECT DELIVERY
KEY CHARACTERISTICS				
PROS				
CONS				

Planning - Appropriation as a Regeneration Tool

Lee Gordon - Weightmans

Planning – Appropriation as a Regeneration Tool

- Limited time so will focus on “appropriation” and how this can assist development projects
- Increasingly requested by developers
- Will discuss in the context of a typical development scenario

Scenario

- Green field site in Council ownership
- Proposal is to develop a large mixed use office and residential tower on the site
- Officers suspect there has been dog walking across site for 20 years
- Overlooked by a residential tower
- Development proposals being worked up, but no planning application made and not allocated in the Local Plan
- Land previously formed part of a larger parcel of land

Key Potential Issues for the Development?

Please discuss

Key Potential Issues/ Risks

- Rights of Light
 - Injunction rather than damages appropriate remedy (*Heaney* (2010) EWHC 2245 (Ch))
 - Developers & funders nervous following this
- Village Green
 - 20 years use “as of right” for lawful sports & pastimes
 - Criminal offence to develop a TVG
- Private Rights of Way (eg easements)
- Restrictive covenants

Appropriation for Planning Purposes

- Powerful regeneration tool for projects involving local authority land
- Appropriation – transferring allocation of land held by LA for a different purpose
- Land usually held/ allocated by LA's for a particular purpose pursuant to statutory powers (eg Public Health Act 1875, or construction of Housing under HA 1985)
- Appropriate to “planning purposes” pursuant to section 122 LGA 1972

Appropriation (2)

- Recent law change
- Appropriation engages s.203 Housing & Planning Act 2016
- Allows “Overriding” of private rights
- S.237 TCPA 1990 now revoked
- Engages s.241 TCPA 1990 to help protect against TVG registration – still in force

Section 203 & Appropriation - Overview

- Section 203 Housing & Planning Act 2016
- Allows “Overriding” of private rights, where land “appropriated” for “planning purposes”:
 - Enables works and use to be done in breach of the private rights
 - Converts interests into a compensation claim
- Similar to CPO
- Crucially, prevents an injunction stopping works

New Law – Section 203

- “(1) *A person may carry out building or maintenance work to which this subsection applies even if it involves-*
 - (a) Interfering with a relevant right or interest, or*
 - (b) Breaching a restriction as to the user arising by virtue of a contract”*
- Also applies to use of land (s203(4))
- Successors in title can benefit

New law - Section 203 – Conditions/ Limits

- Land appropriated for “Planning purposes” under s.122 LGA 1972 (discuss later)
- “Planning purposes” = purposes for which land can be CPO’d under s.226 TCPA 1990
- New test - the LA “could acquire the land compulsorily” for the work in question
 - Broad or narrow interpretation?
- “The building or maintenance work is for purposes related to the purposes for which land appropriated”
 - Breadth of purposes?

New law - Section 203 – Conditions/ Limits

- “The building or maintenance work is for purposes related to the purposes for which land appropriated”
 - Breadth of purposes?
- Must be planning permission for the works or use at time carried out
- Special protections for:
 - Stat undertakers & telecoms
 - National Trust
 - Consecrated land & burial grounds

Appropriation under Section 122 LGA 1972 – Key Requirements

- Detailed report & resolution from Cabinet covering:
 - Purpose land currently held for
 - Land no longer required for such purpose
 - The “planning purposes” and reason for this
 - Link to s.226 purposes
 - Appropriation is necessary and in the public interest – justify – level of detail following law change?
 - Additional requirements for open space/ recreation land (s.122(2A):
 - Prior advert for 2 weeks in newspaper
 - Have regard to objections received

Appropriation – known rights

- Particular care required where interference with known rights
 - Same “necessity” requirement as CPO applies (R v Leeds City Council (1997) 73 P & CR 70)
 - Identify interests
 - Attempt to negotiate release
 - Quantify potential liability
 - Human Rights considerations eg rights of light for residential properties – address these in the report

Key Challenges for LA's

- Liability for compensation
- Lengthy time period for claims to be made
- Indemnity from developer
- Security – treat like CPO
- Decision is subject to judicial review
- Developer may want development agreement conditional on appropriation
- Form of Committee report and resolution is key
- Dealing with change of law
- JR risk
- Risk of injunction if appropriation ineffective

Village Greens & Appropriation

- Increased protections under Growth & Infrastructure Act against TVG's, where:
 - Planning application submitted; or
 - Land allocated in development plan
- But there remain significant gaps (as per scenario)
- Appropriation can help to cover these gaps provided land not already registered as a TVG – section 241 TCPA 1990

Section 241 TCPA 1990

Notwithstanding anything in any enactment relating to open space, where land has been appropriated for planning purposes the land may be used by any person in any manner in accordance with planning permission

Supportive Case Law

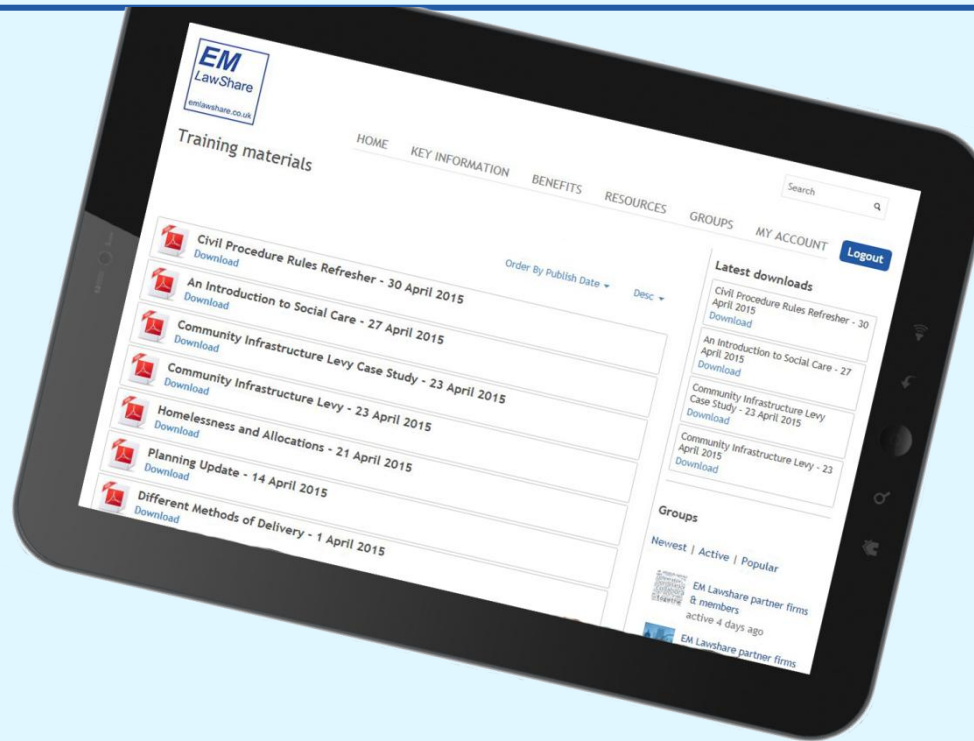
BDW Trading v Spooner [2011] EWHC 1486

- The rights of a developer under the [Town and Country Planning Act 1990 s.241](#) to build on land previously appropriated by the local authority for planning purposes prevailed over a TVG application

R (Barkas) v North Yorkshire CC [2014] UKSC 31

- People enjoying recreational activities on land held by a local authority pursuant to the [Housing Act 1985 s.12\(1\)](#) did so under a licence, rather than "as of right".

Check out the website



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