
Development Agreements and Funding Urban Regeneration

28 April 2016

AGENDA

- 9.45 Introductions
- 9.50-11.15
 - Development Agreements
 - Appropriation as a Regeneration tool
- 11.15-11.30 Coffee
- 11.30 – 1.00 - Geldards & Urban Delivery
- **1.00 Lunch**

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Development Agreements

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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

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

- 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 general purpose)
- Appropriate to “planning purposes” pursuant to section 122 LGA 1972
- Engages s.237 TCPA 1990 to allow “Overriding” of private rights
- Engages s.241 TCPA 1990 to help protect against TVG registration

Section 237 & Appropriation - Overview

- Section 237 TCPA 1990
- Allows “Overriding” of private rights, where land “appropriated” for “planning purposes”:
 - Enables works to be done in breach of the private rights
 - Converts interests into a compensation claim
- Similar to CPO
- Crucially, prevents an injunction stopping works

Section 237 TCPA 1990

“...the erection, construction or carrying out or maintenance of any building or work on land which has been acquired [eg by CPO] or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves—

(a) interference with an interest or right to which this section applies, or

(b) a breach of a restriction as to the user of land arising by virtue of a contract.

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
 - Appropriation is necessary and in the public interest
 - Additional requirements for open space/ recreation land
 - 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 Issues for Local Authorities

- 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 will want development agreement conditional on appropriation
- Form of Committee report and resolution is key
- If correct requirements not met – ineffective and potential for injunction and abortive development costs

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".

Questions?

Alternative Delivery Structures – For Regeneration & Development

Andrew Evans - Partner, Geldards LLP

Tiffany Cloynes - 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

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

Alternative Delivery Structures – For Regeneration & Development

Tiffany Cloynes

Partner, Geldards LLP

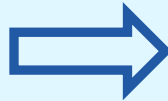
The Drivers for Change – Setting the Scene



CIPFA 2016

The Changing Role of Publicly Owned Assets

Recession/Austerity/Cuts



Using Publicly Owned Assets



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

Asset Management Approaches & Local Government Funding



Centre for Cities 2015

Making our Towns & Cities Investor Ready – Thoughts to Consider (1)

- What is the goal?
- Who are the partners/shareholders/collaborators?
- Is there alignment?
- What is the strategy?

Making our Towns & Cities Investor Ready – Thoughts to Consider (2)

- Are the proposals financially robust?
- How can strategy be delivered?
- Do the proposals work?
 - Legal structure
 - State aid
 - Procurement
 - Vires
 - Tax

Structures: Legal Characteristics

- Key distinction is between contractual and corporate structures
- Procurement - Public Contract Regulations 2015

Structures: Legal Characteristics

(2)

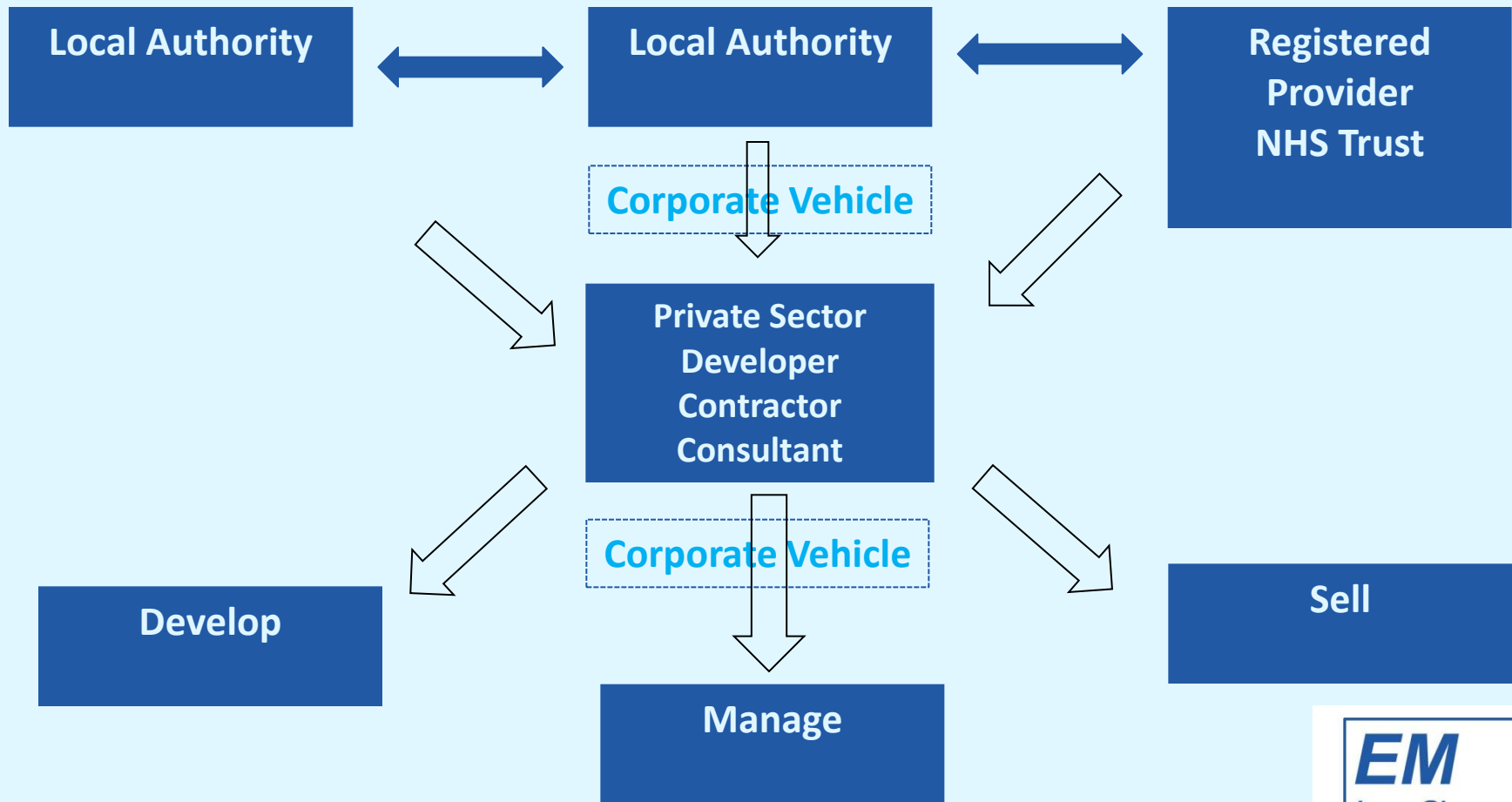
- State Aid:
 - » Market economy investor principle
 - » Public policy remit
 - » Altman criteria
 - » Leipzig-Halle case

Structures: Legal Characteristics

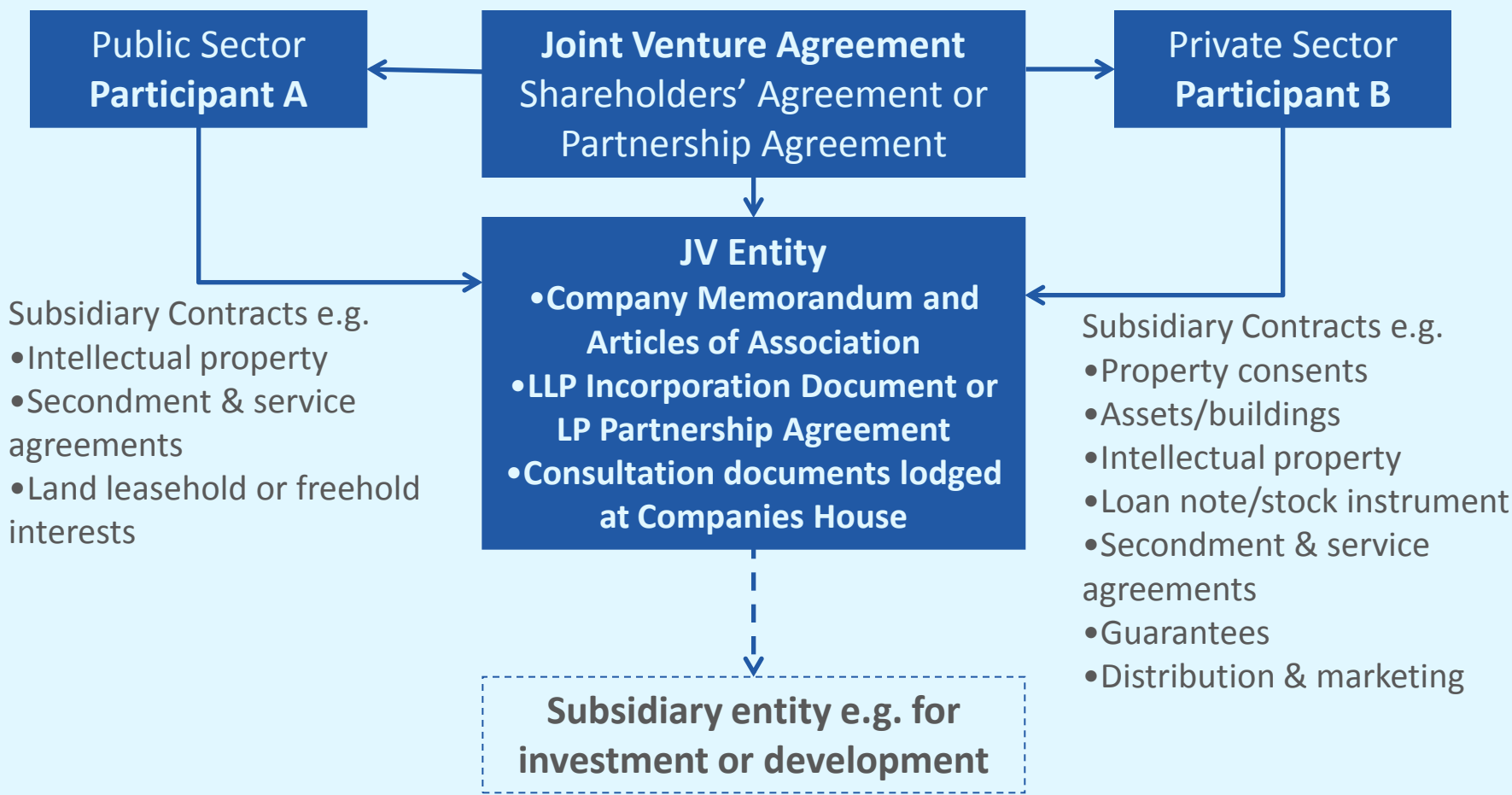
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- Vires:
 - » DCLG revised best value statutory guidance 2015
 - » General power of competence

What is a Collaboration?



Public-Private JV



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

Factors to Consider (1)

Contractual v Corporate

1. Achievement of objectives
2. Flexibility
3. Governance
4. Management and control

Factors to Consider (2)

Contractual v Corporate

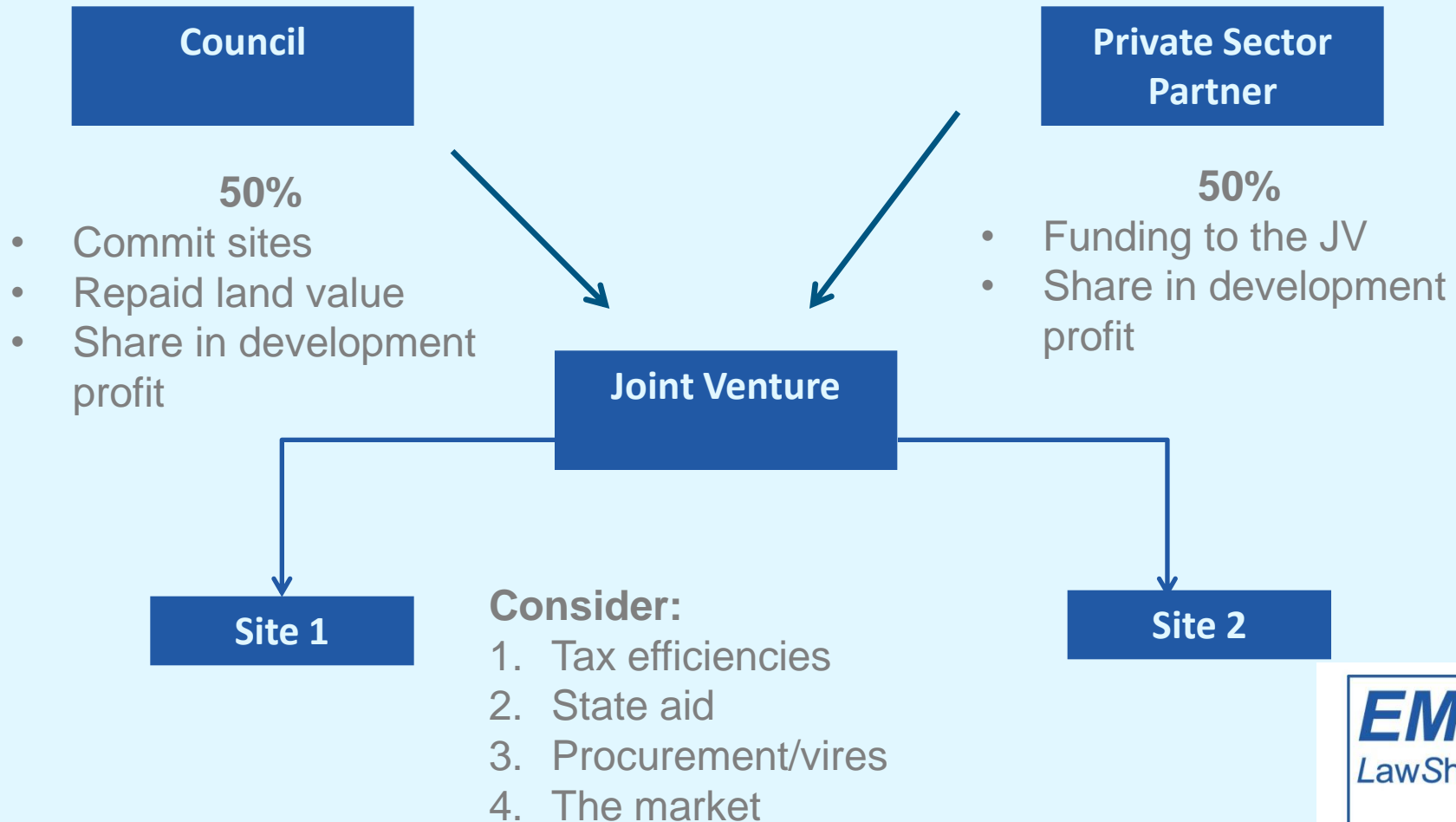
5. Reputation and risk
6. Conflicts
7. Shared risk and reward

Factors to Consider (3)

Contractual v Corporate

8. Set-up costs
9. Investment readiness
10. Extraction of profit
11. Exit strategy

What is an Asset Backed Vehicle?



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?

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

Hybrid transactions

Things to consider:

- Risk of acting as a developer
- Expertise
- Joint ventures
 - Contractual
 - JV Co
- Tax Treatment of JV Co
- What can you use the profits for?

Audience participation

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

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

What taxes would a JV Co consider?

- A. Corporation tax
- B. VAT
- C. SDLT
- D. All of them

Case Study

Context

- New rail infrastructure expected by 2020
- High demand for new housing
- Substantial local authority land holding
- Development partner to be procured

Case Study

- Need for appraisal of options for delivery and advice on structures:
 - » Disposal
 - » Contractual joint venture
 - » Corporate joint venture
 - » Direct delivery

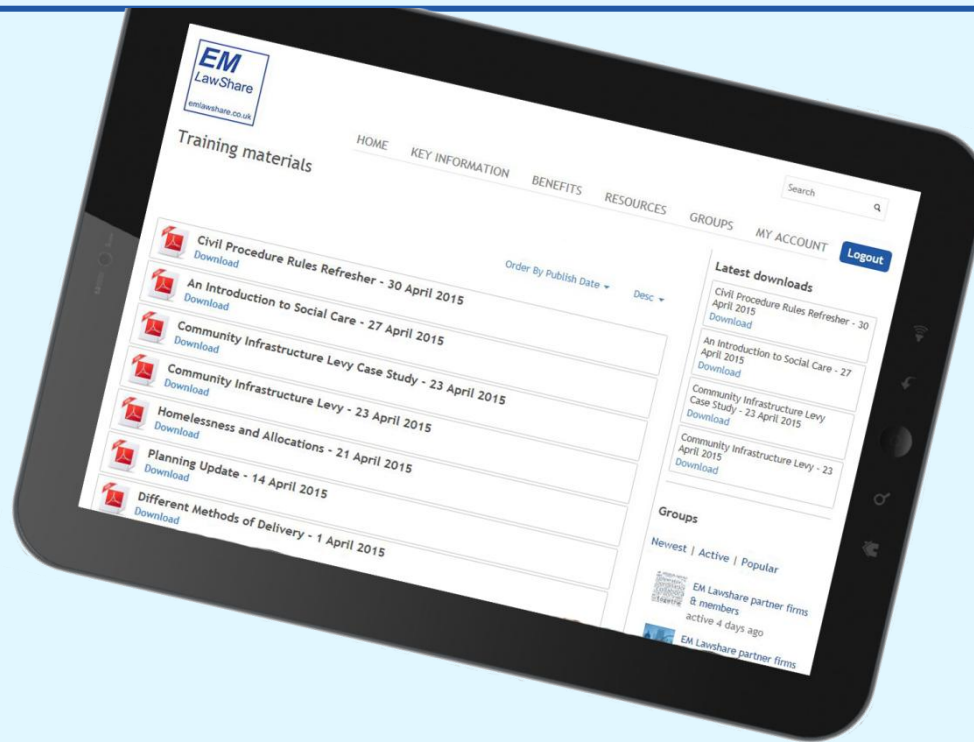
Case Study

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

What other issues would you think about?

- A. How much does it cost?
- B. State aid?
- C. What on earth is State aid?
- D. When is lunch?

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