



CABINET – 15 DECEMBER 2020

**EAST MIDLANDS DEVELOPMENT CORPORATION ‘INTERIM
VEHICLE (DEVCO)’ AND FREEPORT PROPOSAL**

**REPORT OF THE CHIEF EXECUTIVE AND DIRECTOR OF LAW AND
GOVERNANCE**

PART A

Purpose of the Report

1. The purpose of this report is to set out the background, progress to date and expected benefits of the East Midlands Development Corporation Programme, known as “The Alchemy Project” and to seek the Cabinet’s approval for the Council’s participation with four other local authorities (Nottinghamshire County Council, Broxtowe Borough Council, North West Leicestershire District Council and Rushcliffe Borough Council) in the establishment of an Interim Vehicle (EM Devco CLG), to maintain momentum prior to a statutory Development Corporation being created by Parliament (c2024).
2. The Cabinet will be asked to consider an exempt report concerning the formal constitutional arrangements for the Interim Vehicle, which is also on the agenda for this meeting.
3. This report also outlines the latest position with regard to the emerging East Midlands Airport ‘Freeport’ proposal and asks the Cabinet to delegate powers to the Chief Executive in respect of approving the submission of the bid, currently under development with a consortium of stakeholders.

Recommendations

4. It is recommended that:
 - a) The Council’s participation in the Interim Vehicle, based on the outline business case submitted to the Government in March 2020, in the form of a company limited by guarantee, be approved;
 - b) The proposed governance arrangements for the Interim Vehicle, including the establishment of an Oversight Authority Board and Independent Skills Based Board as set out in the report be agreed and

the Director of Law and Governance be authorised to finalise the Members' Agreement and Articles of Association documents;

- c) The Council's contribution of £500,000 per annum for the next 3 years, subject to the appropriate level of contributions being made by the other four constituent councils, be approved;
- d) That the Director of Corporate Resources be authorised to agree the release of funding at c) above;
- e) That subject to consultation with the Director of Law and Governance, who may make alternative nominations as necessary (i.e. in the event of matters such as potential conflicts of interest),
 - i. the Chief Executive following consultation with the Leader of the Council be authorised to agree the appointment of the County Council's member representative to the Interim Vehicle's Oversight Authority Board;
 - ii. the Chief Executive will be the County Council's nominated representative on the Interim Vehicle's Independent Skills Board;
- f) Progress with the project including the Company Business Plan and establishment of the statutory Development Corporation be reported to the Cabinet and the Scrutiny Commission as appropriate;
- g) The Chief Executive, following consultation with the Leader of the Council and the Cabinet Lead Member for Resources, be authorised to support or otherwise, the submission of the final Freeport bid.

Reasons for Recommendation

5. Approval to establish an Interim Vehicle will maintain momentum whilst the legislative processes to establish the statutory Development Corporation are navigated. The Interim Vehicle will lay the groundwork for attracting nationally and internationally significant investment and development into the East Midlands, something which Leicestershire County Council, other stakeholders or landowners could not attract on their own.
6. The Freeport proposal could form a core tenet of the Interim Vehicle's work and given its location in Leicestershire (North West Leicestershire) is central to the County Council's interests in the project. The Freeport bid also encompasses the Ratcliffe on Soar Power station site. Other sites may also be included in the February 2021 submission.

Timetable for Decisions (including Scrutiny)

7. The Scrutiny Commission considered a report on the matter at its meeting on the 4 November 2020 and a summary of its comments are set out in Part B of this report.
8. Approval of the recommendations will allow for the establishment of the Interim Vehicle in early 2021 and the continuation of work on the Development Corporation.

Policy Framework and Previous Decisions

9. In March 2020 the Cabinet supported the Council's continued role in the establishment of Project Alchemy and the bid for a Freeport at East Midlands Airport.
10. The aims and outcomes of Project Alchemy are expected to align with the Council's Strategic Plan which was approved by the County Council on the 8 July 2020.

Resource Implications

11. The core costs for 2019-20 and 2020-21 of the Midlands Engine Development Corporation programme so far (£2m) have been funded by Government, through the Ministry of Housing, Communities and Local Government (MHCLG). The Midlands Engine Development Corporation programme has also received additional resources through a mix of direct funding and in kind support from partner Local Authorities, including support from County Council officers.
12. The County Council's proposed funding to the Interim Vehicle of £1.5m over three years, which will be allocated from the Future Developments Fund, is conditional on the contributions coming forward from the other constituent councils.
13. Additional funding may be required to establish and operate the Interim Vehicle. The Midlands Engine have submitted a bid to the MHCLG for £18.6m. Without any contribution from MHCLG the ability to undertake the necessary work is drawn into question.
14. The Director of Corporate Resources has been consulted on the content of this report.

Legal Implications

15. The Director of Law and Governance has been consulted on the content of this report and detailed legal implications are included in Part B.

Circulation under the Local Issues Alert Procedure

16. None

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PART B

Background

17. In February 2019 the Government approved funding (circa £3m) for a 2-year programme to explore the business case for a Development Corporation for the East Midlands and asked the Midlands Engine (a partnership of public sector partners and businesses to complement the activity of local and combined authorities, LEPs, universities, businesses and others) to lead the work. The Midlands Engine was asked to consider three development locations in the East Midlands; Ratcliffe-on-Soar Power Station and the Toton and Chetwynd Barracks in Nottinghamshire, and East Midlands Airport in Leicestershire.
18. The East Midlands Development Corporation (EMDC) programme is overseen by an Oversight Board (The Alchemy Board) supported by an Executive Group. The Oversight Board is made up of Leaders from the region's upper tier local authorities and directly affected district councils alongside the private sector, business community, central government, LEPs, and university representatives. The Executive Group is a smaller group of executive officers from those organisations. Both are chaired by Sir John Peace, as chairman of the Midlands Engine.
19. The ambition of the EMDC is to lead a new era of growth for the regional economy by enabling projects which build directly on the potential of HS2, the region's status as a major trade and logistics gateway, and its historic strengths in research and development and industrial innovation; particularly research and innovation related to the emerging low carbon economy.
20. In August 2020, the Government's Planning White Paper "Planning for the Future" included positive reference to the Development Corporation work: "As we bring forward planning reform, we also want to ensure we have in place the right delivery mechanisms, including Development Corporations. A good example that we are already progressing is development at Toton in the East Midlands, where we have announced our intention to support the establishment of a Development Corporation to maximise the area's international links and create tens of thousands of new homes and jobs. We want to see more schemes of this kind, backed by modern delivery models, around the country."

Defining the Development Corporation

21. The Midlands Engine considered various potential options for establishing a Development Corporation, with four key features having been identified:
 - To be locally led in order to better meet the needs of the local area. An Oversight Authority, potentially comprised of local authority members, to have oversight and control of various powers of the Development Corporation.

- To have wide financial powers so as to be able to access a wide range of funding including private and public equity and debt finance, and grants and other investments. The Development Corporation would seek powers to become a community infrastructure levy charging authority.
 - To have two streams of planning powers. Firstly, plan-making powers, and secondly operational and enforcement powers.
 - To be able to undertake delivery of projects and infrastructure, including the ability to determine planning applications and grant development orders, thus avoiding multiple applications where applications span more than one local authority area.
22. A number of existing forms of development delivery vehicle were considered, but it was agreed none adequately meet requirements and therefore a new form of Locally Led Urban Development Corporation is proposed. This will require new primary legislation to be passed by Parliament. It is considered that this will offer the greatest benefits to the local authorities going forward.
23. In order to make immediate progress it has been agreed that the establishment of an Interim Vehicle that provides a framework for decision making, is required. Early involvement through the Interim Vehicle will be beneficial to the Council in helping it to shape the nature of the proposed Development Corporation, in particular with a view to ensuring a locally led position is established.

Development Corporation Business Case

24. Significant progress has been made in considering the strategic and economic case for the Development Corporation, with the evidence pointing to transformational benefits for the region, with 84000 jobs, £4.8bn Gross Value Added (GVA) and at least 4,500 homes to be delivered in the coming decades.
25. The EMDC will contribute substantially to inclusive, zero carbon growth and levelling up by initially realising the enormous potential of the three key sites:
- Ratcliffe Power Station and East Midlands Airport Area that together will provide a demonstrator for new technologies and methods of:
 - Production and energy generation and supply
 - Transport and digital connectivity
 - It is proposed that the Airport would be the UK's only Inland Freeport with the Country's largest and only 24-hour dedicated air freight hub being its main entry point to the freeport
 - A global multi-modal hub and centre for trade and logistics with substantial housing growth is proposed across the wider area
 - Creation of 'ZERO' on the Ratcliffe Power Station site, an international centre for the development of market-ready zero emission technologies.

- HS2 Hub at Toton and Chetwynd - a new destination for knowledge-driven jobs and an exemplar zero carbon mixed-use community, showcasing next generation living, with a HS2 hub station offering unrivalled connectivity;

Development Corporation: Benefits for Leicestershire

26. In addition to the broad programme benefits outlined above, specific benefits for the East Midlands Airport site include:
- a) Retaining and enhancing the unique and special qualities of existing communities.
 - b) A world-class green and blue environmental investment programme with Research and Development in climate change and zero carbon.
 - c) Sensitively located and carefully thought through co-location of mixed uses, with the potential for incorporating new homes, employment opportunities and infrastructure investment within that world-class landscape.
 - d) Investment in major infrastructure improvements which include enhancing J24 M1; enhanced links to the A453 and A50 – including the option to dual the A453 connection to the A42, along with improvements to A42 Junction 14.
 - e) An enhanced transport hub at East Midlands Airport connected to the East Midlands Parkway rail station and the HS2 Hub at Toton.
 - f) Enhanced rail head connection from the SEGRO Logistics Park at East Midlands Gateway to the wider rail network.
 - g) Shared benefits from the key sites in the wider East Midlands Development Corporation programme.
27. Work is continuing on the preparation of the detailed business case. It will establish a case for change, a value for money assessment, commercial viability, financial affordability and a route to delivery. It is expected that this will be submitted to Government in March 2021.

Establishing the Interim Vehicle (EM Devco CLG)

28. Pending the creation of the preferred Development Corporation model which will require primary legislation, the intention is to establish an Interim Vehicle which will mirror the proposed Hybrid Development Corporation. Options have been considered including limited partnerships, limited liability partnership, community benefit societies and community interest companies. Having taken advice on various options, the proposed way forward comprises a Company Limited by Guarantee as a separate legal entity distinct from its members and regulated by the Companies Act 2006.
29. In order to make immediate progress it has been agreed that the establishment of an Interim Vehicle that provides a framework for decision making, is required. Subject to approval, the Interim Vehicle, named EM Devco CLG, will be established early in 2021, in the form of a Company Limited by Guarantee (CLG). The five local authorities with administrative responsibilities within the current scope of the programme (covering the sites

at Toton, Chetwynd Barracks, East Midlands Airport and the power station at Ratcliffe on Soar), will be the owners of the company, namely:

- Broxtowe Borough Council
 - Leicestershire County Council
 - North West Leicestershire District Council
 - Nottinghamshire County Council
 - Rushcliffe Borough Council.
30. The Interim Vehicle will mirror the intended form of the statutory Development Corporation and will consist of:
- An Oversight Authority comprising member representatives from the 5 local authorities who will own the CLG;
 - An independent skills-based board including up to 11 directors, made up of a combination of independent and non-independent persons – to be appointed through an open recruitment process; and
 - Local delivery vehicles/special purpose vehicles or joint venture businesses for each site.
31. The Interim Vehicle will not have any statutory powers. Powers will remain with the relevant local authority partner until the establishment of the statutory Development Corporation.
32. As a non-profit CLG, EM Devco will have no share capital, and the Local Authorities will be the guarantee holders and therefore the ‘members’ of EM Devco. A Local Authority cannot pass its guarantee on to another body or organisation and a member's guarantee cannot be sold in the same way that shares can. Any Local Authority may leave EM Devco at any time by giving 12 months’ notice to the other authorities but receives no payment for its guarantee to EM Devco in that instance (indeed, the guarantee represents an obligation of the member rather than an asset, unlike shares in a company limited by shares). Should one or more Local Authorities decide to leave EM Devco, there would be no obligation for the other authorities to top up funding, but financial pressures would be increased as there would be less partner contributions. In the event that the company is wound up, distribution of assets would be subject to the normal rules of insolvency law (i.e. in broad terms, paying off charge holders and creditors, then returning any remaining assets to the Local Authorities as members of the company).
33. As guarantee holders, the local authorities can exercise their control over the company in two key ways:
- By appointing a director to the independent skills led board of directors, who will oversee the operational delivery of the company; and
 - As members, the local authorities together (as the Oversight Authority) can take direction on the ‘Consent Matters’ set out in the Members Agreement.
34. A company limited by guarantee will be subject to governance through a Members’ Agreement and Articles of Association setting out the arrangements

for the company and how it will operate. The Articles govern the constitution of the Company dealing with the powers of directors, members, voting and board and member meetings. All the key issues have now been agreed in principle between the parties and the legal documents are at an advanced stage, with legal drafting details only remaining to be finalised. A delegation to the Director of Law and Governance is therefore proposed to enable final details to be approved.

35. Once established, the first key task will be to recruit Independent Directors to the Board to join the Local Authority nominated Non Independent Directors and to develop a business plan. It will be the responsibility of the Board to deliver the business plan which will need the approval of the Oversight Authority and which will be reviewed on an annual basis. Approval will be required of the Oversight Authority for decisions that fall outside the business plan especially those which have a budgetary implication.

Legal Advice

36. Pending the creation of the hybrid Locally Led Urban Development Corporation which will require primary legislation, the intention is to establish an Interim Vehicle which, will mirror the proposed Hybrid Development Corporation. Options have been considered including limited partnerships, limited liability partnership, community benefit societies, community interest companies. Having taken advice on various options, the proposed way forward comprises a Company Limited by Guarantee as a separate legal. Such a Company may enter into contracts in its own name and is responsible for its own debts and liabilities subject to the liability of members limited to a nominal amount (£1). If the company is wound up the members guarantee of £1 will only be called upon if the company cannot otherwise satisfy its debts. Members of the company do not have the right to share in the profits of the company by way of dividend payments and the arrangement therefore is more akin to one of stewardship of development activities rather than an owner with entitlement to receipts.
37. The County Council has the vires to join such a Company under the provisions contained in the Localism Act 2011 which confers the power on the County Council to do anything that an individual may do subject to various statutory restrictions relating to commercial enterprise. Further details on this matter can be found in the executive summary legal report which is detailed in the separate exempt report on the agenda for this meeting.
38. Legal advice, in relation to state aid, has been obtained on behalf of all of the Councils from external legal advisors, Browne Jacobson. In summary they have advised it will be possible to structure the funding of the EM DevCo Limited and the project specific vehicles either by loans or by the provision of grant funding. In the case of loans, these should be at market rates and grant funding should be direct towards the "public" infrastructure activities of the EM DevCo Limited.
39. Investment from the Councils into the EM DevCo Limited should, with an important exception, be made in accordance with the Market Economy

Operator Principle. In other words, as if the Councils were acting as private sector bodies. Loan funding should therefore be in line with the European Commission's reference rate table. That said, there is a reasonable amount of flexibility in decision making.

40. Other resources provided to the EM DevCo Limited, whether they are land or back office services, should be provided at market rates.
41. The important exception to funding from the Councils in accordance with the Market Economy Operator Principle applies equally to funding from MHCLG. If the funding is being applied by the EM DevCo Limited on public realm infrastructure works, infrastructure works or land remediation (in each case, provided relevant conditions are complied with) then this will not be State Aid.
42. Accordingly, if the EM DevCo Limited is funded by way of loans at market rates and/or by grants to the extent that the EM DevCo Limited will be carrying out "public sector" development along the lines of public realm and other infrastructure works, then funding of the EM DevCo Limited will be State aid compliant.
43. Some grant funding may be used by the EM DevCo Limited for masterplanning and for the appointment of consultants. On balance, it would be State aid compliant to grant fund the masterplanning and consultants' work on the basis that, the main thrust of the project activity carried out by the EM DevCo Limited is likely to be through the State aid compliant "public sector" infrastructure works and work done through the masterplanning and work done by consultants would presumably contribute towards these works being carried out. It would, however, be prudent to provide for clawback in the contractual arrangements with the EM DevCo Limited to ensure that the Councils are able to recover grant funding of the masterplanning/consultants' work that, in the event, directly benefited direct development.
44. Any State Aid will be provided after 1st January 2021. If the UK agrees a trade deal with the EU, then there is (probably) going to be a new UK subsidy regime developed. There are many questions about what that would look like, but it would be unlikely to be resolved by the end of this year, so there would have to be an interim regime. The most realistic option is likely to be to continue the current State aid regime, but for it to be enforceable domestically. The statutory instrument drafted in 2019 to provide the framework for a state aid regime should the UK leave the EU without a withdrawal agreement would work as a basis for this.
45. If there is no trade deal by the end of the year, then the State Aid regime will largely fall away (at least until a deal is actually agreed). The State Aid (Revocations and Amendments) (EU Exit) Regulations 2020 provide for this. However, Article 10 of the Protocol provides that the whole of EU state aid law, including current mechanisms of enforcement by the Commission, national courts, and the Court of Justice of the European Union (CJEU), applies to the whole UK to the extent that UK measures have a potential effect on trade in goods between Northern Ireland and the EU (in particular, of course,

Ireland). Article 10 is enforceable by any person with standing (e.g. a competitor of a business benefiting from State aid falling under Article 10) in the UK courts and anyone can complain to the Commission.

46. Given the uncertainties, the advice obtained is based on State aid law as it stands currently.

Key Risks

47. There are several key risks on establishing the Interim Vehicle. The Risk Table which is detailed in a separate exempt report on the agenda for this meeting summarises the political, financial, commercial and legal risks and associated mitigations.
48. A short summary of risks can be found below:
- a. Government concludes that the preferred location for the HS2 station in the East Midlands is at East Midlands Parkway and not Toton. Such a decision would necessitate a review of the benefits arising from the current 3 site proposal.
 - b. Misalignment of Development Corporation and Freeport proposals could cause issues in relation to governance and funding commitments
 - c. Government approval for the establishment of a Statutory Development Corporation is delayed or is not forthcoming.
 - d. MHCLG grant funding, in the immediate or longer term does not meet the company's needs, and so the proposed activities are not delivered, or the programme does not progress beyond the initial 3-year Interim Vehicle stage.
 - e. There is a risk that after the initial 3-year term, further funding will be required from local authority partners to support the Development Corporation. This will need to be reviewed by each individual partner at that point in time if required and based on outputs delivered to date. There is no commitment from Leicestershire County Council to fund beyond the initial three years (subject to annual review). It is expected that if a statutory Development Corporation is set up by government in the future it will be funded and will be able to borrow and secure investment from private equity firms to deliver the ambitions.
 - f. Conflicts emerge within or between the Board of Directors and/or the Oversight Authority, leading to deadlock and significantly delayed progress.

Freeport Proposal

49. On 2 August 2019 the Trade Secretary announced the intention to create new Freeports, intended to boost international trade and economic growth after Brexit.
50. Freeports are secure customs zones located at ports where business can be carried out inside a country's land border, but where different customs rules apply. They can reduce administrative burdens and tariff controls, provide relief from duties and import taxes, and ease tax and planning regulations.

51. The Government's ambition is that Freeports will enhance trade and investment across the UK, boost growth and high-skilled jobs, and increase innovation and productivity in port regions, particularly those situated in or near areas of deprivation. Freeports will send a strong signal that the UK is an attractive trade and investment location which is open for business.
52. Successful bids will demonstrate the following outcomes
 - a) Increased trade throughput in the Freeport
 - b) Create an increase in investment within the Freeport, local area at a national scale
 - c) Increase number of jobs and average wages in deprived areas in and around the Freeport
 - d) Improve economic activity, particularly within specialist areas with high GVA (compared to pre-Freeport levels)
 - e) Increase local involvement and investment in innovation and R&D, as well as improving productivity
53. In October 2020, Government published further guidance which will be incorporated into the East Midlands Freeport bid. Key points include:-
 - a) Submission deadline is 5 February 2021
 - b) It is expected that 7 winning Freeports will be announced in England, with 1 or more in each devolved administration
 - c) Freeport bids can include up to 3 separate non-contiguous tax sites, with a total maximum area of 600ha (20-200ha per site)
 - d) The Freeport outer boundary must be no more than 45km from the primary tax site (currently East Midlands Airport)
 - e) The primary customs site can be complemented with multiple additional customs subzones
 - f) The tax sites must be located in areas with above average unemployment and below average GDP. The area must also be 'underdeveloped' (underutilised and have high potential for investment growth and job creation). The tax site must not have high levels of existing employment
 - g) Regeneration and job creation are the lead policy objectives, alongside establishing Freeports as national hubs for global trade and investment and hotbeds for innovation
 - h) Successful bidders will be asked to set out a business case in 2021, including outline allocation of seed capital and confirm local commitments of funding
54. The County Council is actively engaged along with other stakeholders in the development of a Freeport submission to Government which encompasses land surrounding the East Midlands Airport. If the bid is successful it will be necessary to integrate both the Development Corporation and Freeport proposals to ensure that the investment, governance and key actions are complementary

Comments of the Scrutiny Commission

55. The Scrutiny Commission considered a report concerning the Interim Vehicle and Freeport at its meeting on the 4 November. The Commission agreed that the principal of looking at and coordinating growth developments across county boundaries was welcomed, as was the proposal that spending of government funds allocated for such projects would be controlled locally through the planned Development Corporation. The Commission agreed this was an important issue and the Council and its partners would be treading new ground which could reap significant benefits in the long term.
56. The Commission expressed concern that given current national spending pressures and the current pause of the eastern leg of HS2 there was a risk that funding for the programme could be withdrawn by Government and it was questioned whether, given the Council's financial investment to the project, an exit strategy had been put in place. It was acknowledged that the project was not without risk. However, Commission Members were reassured that if, for example, Government funding was withdrawn or reduced, or the eastern leg of HS2 did not take place, Midlands Engine would need to reassess the scope of the development corporation and what benefits could still be achieved.

Equality and Human Rights Implications

57. There are no equality or human rights implications arising from these proposals.

Environmental Implications

58. Environmental Implications will be identified, managed and mitigated through the Interim Vehicle 'Biodiversity Net Gain' Workshop throughout the project, which includes representation from relevant subject matter experts at the County Council.

Background Papers

Report to Council – 8 July 2020 – Revised Strategic Plan 2020-2023

<http://politics.leics.gov.uk/ieListDocuments.aspx?CId=134&MId=6040&Ver=4>

Report to the Cabinet on 24 March 2020 "Midlands Engine Development Corporation Proposals".

<http://politics.leics.gov.uk/ieListDocuments.aspx?CId=135&MId=5993&Ver=4>

Report to the Scrutiny Commission on 4 November 2020 - East Midlands Development Corporation 'Interim Vehicle (DEVCO)' and Freeport Proposals

http://politics.leics.gov.uk/documents/s157576/Scrutiny%20Committee%20Report%20-%20Development%20Corporation%20and%20Freeport_F.pdf

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