

[DRAFT]

HEREFORDSHIRE COUNCIL – DEVELOPMENT AND REGENERATION PROGRAMME (DRP)

SUMMARY OF THE OVERARCHING AGREEMENT PRINCIPLES

The draft Overarching Agreement (OA) is a contract made between the Council and the Developer it selects after completing a competitive dialogue procurement under the EU public procurement regime rules.

The OA has been procured so that other public sector bodies can also access the contract via the Council. This broadens the range of possible public sector stakeholders in the local economy who can join the Council in using the Developer to implement projects. In such a case the Council would “wrap” the performance of an allied public sector body accessing the OA.

The effect of the Development and Regeneration Programme (DRP) is for the Council to have appointed a private sector entity as its medium to long term Developer “partner” for an Initial Term period of at least ten (10) years. If successful the Council can extend the “partnership” by a further ten (10) years.

The OA is not a contract which sets the terms and conditions for a particular development.

Instead it describes the overarching governance arrangements for the Council and the Developer to be able to agree a Development Programme of possible development schemes which either the Council or Developer can then “call off” from the Development Programme. There is a rigorous tiered approval procedure included in the OA that has to be passed for a development scheme “called off” from the Development Programme to be implemented.

A Programme Board exists with four Council and four Developer representatives but it is controlled by the Council on deadlock with a casting vote (although will always be subject to dispute resolution). A DRP Team works day to day beneath the Programme Board.

The flexible nature of the relationship between Council and Developer is intended to allow a range of property development and infrastructure projects to be investigated, prepared, evaluated and implemented through a pre-procured Developer.

The Council brings a range of Council Sites which it has identified as being committed to the DRP. The Council should be clear that the DRP is just one opportunity for promoting development and regeneration in Herefordshire. The DRP runs in parallel to more traditional site sales or direct procurements for one-off developments. The difference is that by using the DRP the Council is placing several Council Sites as being exclusively available to the Developer for structuring a balanced Development Programme. Those Council Sites will only be deposited into the DRP by Cabinet decision and will only be used for development where the Developer’s proposal is tested and eventually approved by Programme Board and Cabinet.

The Council may also be able to assist the Developer with site assembly by considering CPO Sites that, should compulsory purchase be successful with the Developer entering a CPO indemnity agreement to pay CPO costs, count as Council Sites and (with Cabinet approval) be made available to the Development Programme. Council officers have skills which can help streamline and make development and regeneration activities more efficient so the OA contemplates a DRP Manager role. The DRP Manager will be the Council officer that co-ordinates Council teams to help speed the approval and implementation of the Development Programme.

The Developer may by choice bring its own Developer’s Sites to complement the Council Sites and increase the critical mass of development opportunities within the Development Programme.

The Developer brings expertise firstly in preparing a balanced, strategic, commercially viable Development Programme. Secondly it then has its own resources and a supply chain which can support the successful implementation of proposed projects which have been approved by Programme Board and Cabinet.

The Developer has two key areas of activity:

- **Services:** The Developer is responsible for writing a draft Development Programme based around the available Council Sites and any Developer Sites. Its draft Development Programme must be submitted for review and approval by Cabinet. Once it has been adopted following Cabinet approval the Developer must maintain and update the Development Programme each year and it is reviewed and considered for Cabinet approval annually. The Developer is not paid for delivering these Services. It is almost an incidental expense to the main thrust of the Development Programme which is to identify, scope, evaluate, approve and implement a series of projects from that always moving Development Programme. The Developer is incentivised to promote viable development and regeneration schemes because only then will it be paid for their implementation and use that income to cover the Services costs. The Council might ask for Further Services akin to Services and will have to pay for those.
- **New Projects:** Once the Development Programme has been adopted then either the Council or Developer can look at the roster of potential schemes described in the Development Programme and ask for a New Project to be investigated. New Projects will require New Build Works and whilst under consideration they are New Projects but once they have passed all their approval hurdles they are classed as Approved Projects. If the Developer does not wish to pursue a New Project “called off” by the Council then it loses exclusivity on that Council Site and the Council can offer that Council Site to other developer(s) outside the DRP.

The Council realises that there is a huge spectrum of potential development scheme models that could be used by the Developer to deliver an Approved Project. The Council has sought to structure the OA around some of the more likely models so that there is a skeleton of process and standard form documents to make some types of Approved Projects easy to repeat. One of the variables that drives the choice of model will be whether the Council will be retaining ownership of the Council Site which forms part of the New Project/Approved Project opportunity. It is assumed that an Approved Project can be implemented by one of three main model types and the Councils are looking to settle template contracts for various scenarios so that repeated renegotiation on each Approved Project is avoided except where due to project specific reasons:

- **Development Agreement:** where the new assets are to be disposed of to the private sector market the Developer will have a building licence to access a Council Site to progress works but the Council does not transfer the Council Site to a buyer/end user until the works are completed e.g. Units in a new build Private Market Housing development are sold by the Council direct to end users, a new development in a new build Affordable Housing development may see the Council Site sold to the Developer at practical completion of the works – assumed to have a 15% deposit of Estimated Land Value paid at start by Developer and the 85% of remainder of Estimated Land Value received by Unit sales “on the drip” from buyers/end users or by the Developer buying the development on works completion
- **Building Contract:** where the new assets are to be retained by the Council e.g. building new Council buildings, key worker or student accommodation to be maintained and operated by the Council or its nominees – could be JCT fixed price contract or NEC3 target cost model forms
- **Partnering Agreement:** where the transfer of Council Site land in as Council's contribution and the subsequent creation of new assets facilitates an element of Council trading to generate future revenue and profits.

The most important part of the OA is the process by which New Projects are evaluated to make sure they offer value for money and meet the Council's objectives. The working assumption is that the majority of New Projects can be described financially using what property developers would recognise as development appraisals to identify Development Costs and Income and come to an Estimated Land Value. Excel spreadsheet template appraisal forms have been agreed in the OA and they are to be used so that Developer overheads and margins etc. are pre-populated and that calculations are run consistently. These Developer assumptions will also factor in future repayment for performing the

Services – but not be front end loaded as a bullet payment as such sums will be “smeared” across a series of New Projects.

There are three discrete stages of a New Project being considered and finally becoming an Approved Project:

- **Stage 0:** Council (via Cabinet approval) placing Council Site exclusively in Development Programme
- **Stage 1:** Preliminary stage – Preliminary Development Appraisal and headline assessment by Developer
- **Stage 2:** Detailed stage – following successful Stage 1 the Detailed Development Appraisal and detailed assessment by Developer.

The Developer focus is on Stage 1 and Stage 2. At Stage 1 it is more of a desktop assessment of New Project viability. At Stage 2 the Developer should be relying on intrusive site investigations to inform its pricing for abnormal ground conditions/contamination.

To provide comfort to the Council that each New Project is being properly assessed the Developer has to provide comprehensive submissions required to support its proposal for a New Project to pass Stage 2. This will include an independent expert view of any development appraisals,

When an Approved Project is achieved following final Cabinet approval the specific contractual terms are set out in a Development Agreement, Building Contract or Partnering Agreement. These should follow basic template forms unless amendments have been agreed as part of Stage 1 and Stage 2 discussions (to reduce risk of Developer shifting risk onto Council across successive Approved Projects).

Once implemented then an Approved Project sits outside of the OA and is measured according to its own terms. However, if there are two Approved Projects which fail and are terminated that is indicative of poor OA programme performance and the OA (and what should have been an enduring relationship with the Developer) can be terminated.

In conducting the Development Programme the Developer will be subject to OA-level programme performance monitoring through Collective Targets, Key Performance Indicators and a Track Record Test. In each Development Agreement, Building Contract or Partnering Agreement for an Approved Project the Developer should also be subject to an Approved Project-level performance regime.

In several circumstances the Developer may either surrender exclusivity over a Council Site by choice or due to OA contract provisions. The Council has the ability, notwithstanding Cabinet decisions at Stage 0 through to Stage 2, to withdraw a Council Site from the Development Programme but it would have to pay the Developer an amount to reflect the wasted costs in progressing that New Project.

Both Council and Developer are subject to a list of early termination events which for the Council can trigger compensation on termination or for the Developer indemnity payments for reprocurement and differential new developer costs. The Council should note that improper rejection by Council misapplying pre-notified evaluation criteria for a number of Developer proposals at Stage 1 or Stage 2 or having Cabinet refuse to implement an Approved Project could lead to early termination for Council fault and Council costs exposure.

The Developer remains subject to open book accounting in delivering its Approved Projects.

The Developer is also subject to Benchmarking of its costs of delivering Services or the New Projects. Approved Projects which have been implemented by a Development Agreement, Building Contract or Partnering Agreement are not liable for modification as a result of Benchmarking, as the Developer has settled its costs base with its supply chain. These agreements will only be reopened where equivalent benchmarking clauses are included in those implementing documents. Benchmarking, like open book accounting, can be used to enhance market knowledge and challenge Developer assertions when they are proposing development appraisals at Stage 1 and Stage 2.

If the Developer is successful in exceeding the Approved Project's stated Estimated Land Value (achieving more income than estimated because it can perhaps sell Units to end users at a higher price or it makes savings on build costs etc.) the Council and Developer share the excess above the Estimated Land Value, the Overage Sum, equally.

If the Developer is unsuccessful in that its income falls below the Estimated Land Value it bears that loss. Also it cannot look to recover such loss from the next or any future New Projects because that is prohibited and will be apparent when looking at the Stage 1 and Stage 2 development appraisals.

On housing Units the Developer may structure sales on a long leasehold basis and then offer the Council a revenue stream for securitised Unit ground rental income and any Council Site freehold reversion sale.

The OA assumes that there is a Programme Account. Each Approved Project has its own set of accounts. The Programme Account could be used to retain Council deposits/land receipts and Overage Sum so that the Council could choose to incentivise the Developer on some development schemes which may not be financially viable e.g. some Affordable Housing projects – yet there is no ring-fencing of sums in the Programme Account and both Council and Developer are free to deploy any receipts as they see fit.

To help “pump prime” the Development Programme the procurement has focussed on bidders working on a pair of actual development scheme prospects at Bromyard and Station Approach. These are already Stage 0 schemes and it is anticipated that as First Batch Projects the work done to date can be completed so there are immediate New Projects available for consideration.

Finally, the Developer may also provide Additional Services, being envisaged by the Council as an outsourcing or commissioning arrangement by the Council or an allied public sector body to deliver a distinct service requirement, by way of an Additional Services Agreement.