



DEVELOPMENT PARTNER FOR CENTRAL WINCHESTER REGENERATION

DOCUMENT 5 - KEY COMMERCIAL PRINCIPLES



Winchester
City Council

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1 Background

- 1.1 Winchester City Council (**the Council**) is procuring a development partner to deliver the redevelopment of the Development Site (as identified as the defined site in the Development Brief (Document 4)), working with the Council, and as described in the Development Brief (**the Development**).
- 1.2 The purpose of this document is to explain the key commercial principles underpinning the approach that the Council will take in structuring its commercial arrangements with the Developer and for delivery of the Development.
- 1.3 The Developer will, subject to conditions, have the exclusive right to develop that part of the town centre described in the Development Brief as the defined site in accordance with the terms of the Development Agreement. The Development Brief sets out the Council's core requirements and vision for the Central Winchester Regeneration and will be a Schedule to the Development Agreement (subject only to final revisions that are agreed by the Council (and as necessary in order to be scheduled to the Development Agreement)). The Developer's approach (i.e. Delivery Plan) will be settled through the competitive process and will also be a Schedule to the Development Agreement.
- 1.4 This document sits alongside the issued Draft Development Agreement (Document 7). Where any inconsistency exists between this document and the Draft Development Agreement, the latter will take precedence.
- 1.5 At ITPD stage Bidders will be required to review, accept and/or mark-up the Draft Development Agreement (and its Schedules) in accordance with Question 6 (Legal) of the Part [B] - Technical Evaluation section of the Invitation to Participate in Dialogue (Document 3) (**the ITPD**). The legal mark-up will be supported by a detailed commentary table to explain and justify proposed amendments. The form of commentary table to be used is provided [as an Appendix to the in ITPD]. These responses will be evaluated in accordance with the scoring and weighting given in the ITPD.

2 Overall approach

- 2.1 The Council's key objectives and core requirements for the Central Winchester Regeneration are described in the Development Brief (which in turn refers to a number of important supporting documents, including the Supplementary Planning Document). It is therefore of crucial importance to the Council that the Developer has a clear plan for the delivery of the Development which satisfy the core requirements of the Development Brief. This principle is further amplified in paragraph 7. The Council also expects the Developer to commit appropriate financial and human capital resources to meet these objectives.
- 2.2 The Council and the Developer will be parties to the Development Agreement, the Developer supported by a parent company guarantee where this is required by the Council. The Council and Developer will work in partnership to deliver the Development and both will play an active role in engaging with other landowners and the wider community.
- 2.3 The Council will commit its land interests to the scheme and will oversee any further land assembly (the Developer having obligations to facilitate land assembly

and vacant possession, all as will ultimately be written into the Delivery Plan). Independently of its role as landowner the Council will perform its statutory functions as planning authority.

- 2.4 The Developer will contribute funding and provide expertise in respect of the delivery of the Development and will have responsibility for sourcing third party funding. The parties will work together to identify and secure available grant or other sources of financial support for the scheme.
- 2.5 Funding of pre-development costs will be for the Developer (other than in relation to any residual land assembly that the Council has agreed to fund or in respect of statutory consents that only the Council may obtain).
- 2.6 The drawdown of the Council's land will be governed by the Development Agreement and will be in phases, subject to satisfaction of primary conditions, and for a value established under the Development Agreement which will satisfy the Council's duty to obtain best consideration.
- 2.7 Development finance is anticipated to be sourced externally or from the Developer's own resources. The Council will wish to have the ability (but not an obligation) to provide the required finance itself (or part thereof) should that be beneficial in terms of viability.
- 2.8 All financial arrangements will need to comply with the "subsidy control" regime replacing State aid, and the Council's land must be drawn down on terms which satisfy its statutory duty to obtain best consideration.
- 2.9 As part of the phase delivery process under the Development Agreement the 'exit strategy' for each land parcel will be agreed, including the long-term ownership of any private rental or commercial units constructed as part of the development works. Equally important will be the arrangements for the long-term stewardship of public realm delivered by the scheme.
- 2.10 Each phase of development will be subject to a Development Phase Plan originated by the Developer and agreed with the Council (and also describing the exit strategy and long-term public realm stewardship). Its content may generally mirror that of the overall Delivery Plan, but at the phase-specific level of detail.
- 2.11 For these purposes "exit strategy" means how an asset might be held by the Developer, sold to an investor, leased to an occupier (direct from the Council), or howsoever dealt with as will be proposed and agreed.
- 2.12 The Developer will be responsible for providing or procuring the provision of its professional team in support of planning, design, and other disciplines, as well as the contractor and wider supply chain delivering each phase. The principle members of the professional team will be identified during the procurement process and will be embedded within the Development Agreement. Through the Delivery Plan the Council will be looking for assurance of value for money (and quality). Moreover, the Council will expect the Developer's Delivery Plan to articulate how the Developer will ensure that each phase has the right blend of professional support, especially in respect of design, sustainability and public realm.
- 2.13 Delivery of the Development will be phased and therefore the Phasing Plan of the Developer will be a crucial component of its Delivery Plan. The Development

Agreement will reference target dates and longstop dates, the latter being a trigger for termination.

3 Development Agreement (Overview)

3.1 Development Brief. The Development Agreement sets out the objectives and core requirements of the Council by reference to the Development Brief (Schedule 1 of the Development Agreement).

3.2 Delivery. The Developer shall be under a general obligation to procure the carrying out of and completion of the Development and shall pursue all or some of the following activities to achieve the scheme objectives for each phase (all as further regulated by the Delivery Plan (Schedule 2), which may (and is likely to) be updated from time to time by agreement, and each agreed Delivery Phase Plan):

3.2.1 the pre-development activity needed to bring forward each phase of the development, e.g. the planning and design process;

3.2.2 ongoing engagement and communication with stakeholders, which includes landowners, interest groups and statutory stakeholders in collaboration with the Council;

3.2.3 consultation and communication with the wider community and interest groups in collaboration with the Council;

3.2.4 obtaining planning and other consents;

3.2.5 commissioning construction phases and entering into appropriate construction contracts;

3.2.6 entering into development management contracts and estate management and maintenance contracts in relation to a phase (and its related infrastructure/public realm);

3.2.7 marketing and managing sales and entering into any necessary sales agency contracts;

3.2.8 deciding the long-term ownership of the development phases, including where rental income is to be retained by the Council as a strategic investment;

3.2.9 entering into partnering agreements, development/works agreements or services contracts with third parties to deliver the scheme;

3.2.10 securing third party funding; and

3.2.11 all such other activities as necessary or desirable to achieve the objectives and core requirements of the Council.

3.3 Land assembly. The roles of the Council and the Developer in respect of land assembly will be regulated by the Development Agreement.

3.4 Land Transfer. The Council's land will transfer (on a phased basis) on satisfaction of phase conditions and for best consideration. Phase conditions will cover an

approved Development Phase Plan, planning consent, other necessary consents, funding, construction contract entered into, occupiers secured (where relevant), vacant possession, and any other pre-conditions that must be satisfied. The value will be ascertained through a valuation methodology set out in the Development Agreement, and so as to secure best consideration.

4 Guarantee

The Council reserves the right to require the Developer to procure a parent company guarantee (PCG) in relation to its obligations under the Development Agreement (save where the developer has no parent and/or is of sufficient standing in its own right). Where no PCG is required when entering into the Development Agreement, the agreement will nonetheless require a guarantee in the event of a permitted assignment or a later change in the financial standing of the Developer.

5 Governance

5.1 The Development Agreement will regulate the engagement between the Council and Developer throughout the life of the Development and ensures regular reporting and decision-making. The relevant Schedule anticipates a Board and separate Project Team. In core areas under the Development Agreement, matters are subject to the Council's prior agreement/consent and Bidders should make themselves aware of these.

5.2 Bidders should pay particular attention to these governance arrangements and, in dialogue, develop their proposals for structured and meaningful engagement with the Council and wider stakeholders (see Section 6 of this paper).

6 Community and Stakeholder Engagement Plan

The Community and Stakeholder Engagement Plan (attached to the Development Agreement at Schedule 18) is binding on the Developer. It will be a product of the competitive process but aligned with the Council's requirements (under the Development Brief) and policies, as well as any statutory or other legal requirements.

7 Development Brief and Delivery Plan

7.1 The Development Agreement shall have appended to it the Development Brief (at Schedule 1). This will establish the Council's objectives and core requirements under the Development Agreement.

7.2 The Agreement will allow for a limited right of review of and variations to the scheme as a whole and to each phase delivery plan. The Agreement will regulate the process by which changes can be proposed and agreed. Given the phasing of the scheme and the likely need to make adjustment for changes in market conditions over time, this mechanism is essential. However, the right to vary the Agreement will be limited and the Agreement will anchor the scheme to certain core requirements (in the Development Brief). In addition, the Council will have the ability (reasonably) to refuse changes.

7.3 Sitting alongside the Development Brief will be the Developer's Delivery Plan. This will be developed with the successful Bidder during the preferred bidder stage, based on the competitive dialogue and the successful Bidder's final tender

submission. It will be capable of periodic and justified amendment by agreement, both parties acting reasonably. The Development Agreement therefore prescribes how the Developer may propose changes to its Delivery Plan and the basis on which that must be justified to, and approved by, the Council.

- 7.4 The Delivery Plan will address all aspects of the Development, including phasing, proposed uses in each phase, programme, infrastructure and public realm, design ethos and approach, the core delivery team and wider professional support, and so on.

8 Design proposal

- 8.1 The Development Agreement will, in addition to the Delivery Plan, contain a Design Proposal. Like the Delivery Plan, this will derive from the successful Bidder (and therefore dialogue) and will be the overall framework for subsequent design work and planning applications. It will not contain actual designs for any of the scheme but will complement the Development Brief as a framework from which subsequent designs will be generated.

- 8.2 The Development Brief (either itself or by reference to other documents) emphasises the importance placed on the quality of “design” both in relation to buildings and public realm. Accordingly, this framework for design is critically important to the Council. Bidders should therefore pay particular attention to how they will meet this objective and build that into their submission.

9 Phase delivery

- 9.1 The Development Agreement places obligations on the Developer for delivery of the Development. In particular, the Developer will be under obligation to pursue the necessary phase conditions for carrying out the development on a phased basis, and for overall development of the defined site. This will include: the design; planning application; obtaining of funding; and securing of occupiers/purchasers. These activities will be at the Developer’s cost and risk. The appointment of suitable professionals and contractors will be by the Developer in line with a collaborative approach established and agreed during the procurement process.

- 9.2 For each phase, the Development Agreement requires the Developer to bring forward more detailed Development Phase Plans - for review and approval by the Council.

- 9.3 The Council’s core obligation will be to obtain vacant possession and to transfer land for development (on a phased basis). The Developer may also have a role to play in securing vacant possession, for example by way of relocations and the carrying out of demolition works (where that is needed).

10 Variations

No amendment or variation of the Development Agreement itself will be valid or binding unless agreed by the Council, made in writing and executed by both parties.

11 Land transfer approach

- 11.1 The Council will be entitled to receive payments for the value of land transferred (on a long lease unless agreed otherwise).

- 11.2 Land value payments may be made on an upfront basis or where agreed deferred (and include overage); the approach will be discussed in the procurement and may differ between phases. The Council will be looking to secure an uplift in the overall land payment where higher values are achieved above the level which underpins the land transfer price.
- 11.3 The process for the transfer of the land will be such that it may transfer freehold or leasehold (by agreement) to the Developer, or may entail transfer or lease direct to third parties where that is consistent with the phase in question (and agreed Development Phase Plan). Leasehold transfer is the Council's default position and freehold transfers will only occur where the Council agree.

12 Finance

- 12.1 The Development Agreement obliges the Developer to fund the development costs - both pre and post planning. It may do so from its own resources or by introducing third party development finance.
- 12.2 The Development Agreement governs how the Developer may establish the viability of each phase, by reference to a financial model (attached to the agreement). This will fix the Developer's profit and the development management fee - by reference to that model. The Development Agreement also governs how the residual land value is to be calculated (i.e. the land value payable to the Council), and will provide for a method of valuation that satisfies the Council's obligation to obtain best consideration.
- 12.3 The final make-up of each land value payment will depend on the phase and its overall financial make-up (and might include the Council taking a revenue stream). This will be determined by reference to the Developer's overall Delivery Plan and the more detailed development of each Development Phase Plan.
- 12.4 Where a phase (or scheme as a whole) is not viable the Development Agreement provides a mechanism for the parties to assess how best to achieve viability or to proceed with the development on a different financial basis (by agreement) but subject to the position on the Development Brief articulated in paragraph 7.
- 12.5 The Council will recover its procurement costs from the Developer as an upfront payment (being the external advisor fees incurred by the Council in relation to the procurement). The timing (and quantum) of that payment will be settled in dialogue as well the terms that may govern any repayment.
- 12.6 The Council will also oblige the Developer to fund (in whole or part) the Council's project monitoring costs through the life of the scheme (recognising that this will be treated as a development cost and therefore impacting on land value).

13 Exit and termination

- 13.1 The Development Agreement provides for a natural expiry on completion of the overall development. In addition, terms provide for early termination in the event of default. This covers Developer insolvency, material defaults, and failure to meet longstop dates. Where an early termination occurs, the Council will have rights to recover land transferred (including under the relevant lease but subject to any third party's position), and any direct losses by way of indemnity. Where desirable, the Development Agreement allows for completion of a phase under development (i.e. the termination will only cover future phases). Where undeveloped phases are

handed back following termination for default, the Developer shall meet any costs for making good the site and indemnify for the Council's losses (including re-procurement costs. The Development Agreement recognises the rights of any third-party funder (enjoying step-in rights).

13.2 Council default is provided for and a mechanism to compensate the Developer in that event (by reference to recovery of sunk costs).

14 Other matters dealt with in the Development Agreement

14.1 **Disputes.** Provision is made for resolving disputes by means of escalation and then arbitration/mediation. There will also be terms for the parties to refer matters for expert determination, where the matter at hand is amenable to that.

14.2 **Tax.** The basis on which tax matters are to be dealt with (i.e. SDLT, VAT) is covered.

14.3 **Indemnities.** These are provided for in circumstances of death and personal injury, loss or damage to property and third party claims, where arising from breach, performance and non-performance of the Development Agreement by the Developer. The Developer is also indemnified by the Council where the Council is in breach (for abortive costs).

14.4 **Insurance.** The Development Agreement prescribes the insurances that the Developer is required to take out or procure for the scheme.

14.5 **Assignment and change of control.** Under the Development Agreement, the Developer can only assign, novate or otherwise transfer its rights and obligations to an entity which is associated with it (i.e. a member of its corporate group) and in each case, this will be subject to the Council's consent. The Development Agreement also recognises the ability of the Developer to assign for funding purposes. Any consent may be conditional on a deed of covenant. Assignment to a third party will be subject to the Council's consent (in its absolute discretion). Change of control is also regulated. These terms are important for the Council.

14.6 **Confidentiality and FOI.** The Development Agreement governs the way in which matters are to be kept confidential and how any freedom of information request is to be dealt with.

14.7 **Open book.** The Development Agreement is premised on, and provides for, an open book approach.

14.8 **Anti-corruption.** The Development Agreement provides for termination where this occurs (as a Developer default).

14.9 **Data Protection.** This is provided for.

14.10 **Modern Slavery.** This is provided for.

14.11 **Non-fetter.** The Development Agreement expressly states that nothing under the agreement fetters the discretion of the Council when acting in a statutory capacity (e.g. as planning authority).

14.12 **Non-compete.** The Development Agreement includes terms to prevent the Developer from carrying out or being involved in developments which compete with, or are likely to compete with, this development.

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