HOUSING DELIVERY VEHICLES

LOCAL PARTNERSHIPS

“Our broken housing market is one of the greatest barriers to progress in Britain today. We need to build many more houses, of the type people want to live in, in the places they want to live.”

Housing White Paper February 2017

Introduction

The 2017 White Paper 'Fixing our broken housing market' sets out the case for 'radical, lasting reform' of the housing market in England.

It details the crisis of affordability, in both the owner-occupied and private rented sectors and proposes measures to reform the planning process, build homes faster and diversify the range of supply in the housing market.

Local councils are an essential player and are encouraged to be 'ambitious and innovative' in driving supply. This toolkit sets out how they can use their powers, influence and resources to intervene in local markets to increase the scale and pace of housing supply in their areas.

Local Partnerships are grateful for the co-operation of Browne Jacobson LLP who have worked with us on the development and update of this toolkit.

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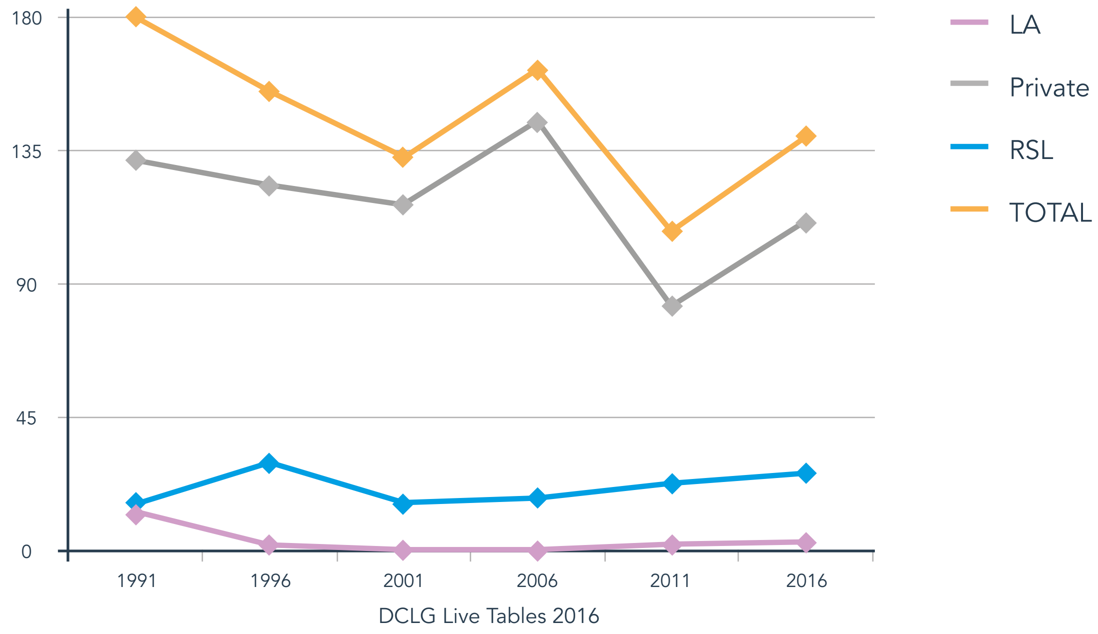
Background

- household numbers in the UK are projected to increase by 23% to 2039
- 140,650 new permanent homes were completed in 2016
- 2.01 million social housing homes have been sold since 1980
- homes to buy are becoming increasingly unaffordable – in England and Wales an average of 7.6 times annual salary was needed to purchase a home in 2016
- the private rented sector has increased to 20% of the total housing stock in England and Wales in 2015, overtaking the social and affordable rented sectors which stood at 17%
- the 10 largest house builders in the UK built circa 60% of new homes
- most commentators agree at least 250,000 new homes per annum are needed, across tenures, to make a significant inroad into supply

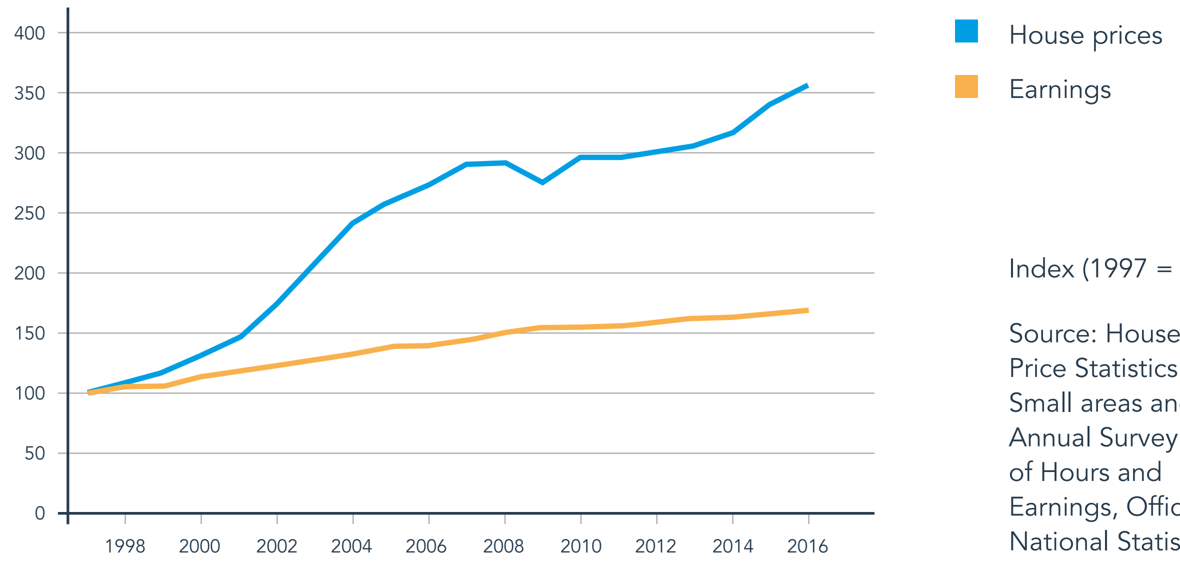
Current position in England and Wales

2014–15	2015–16	Many examples of LAs becoming involved in delivery:	Delivery so far making limited overall impact
Local authorities completed **1,360** homes	Local authorities completed **1,890** homes	Direct development Joint Ventures Wholly owned companies etc.	

Dwellings completed in England 1991 – 2016



Median price paid for property and annual earnings indices in England and Wales 1997 – 2016



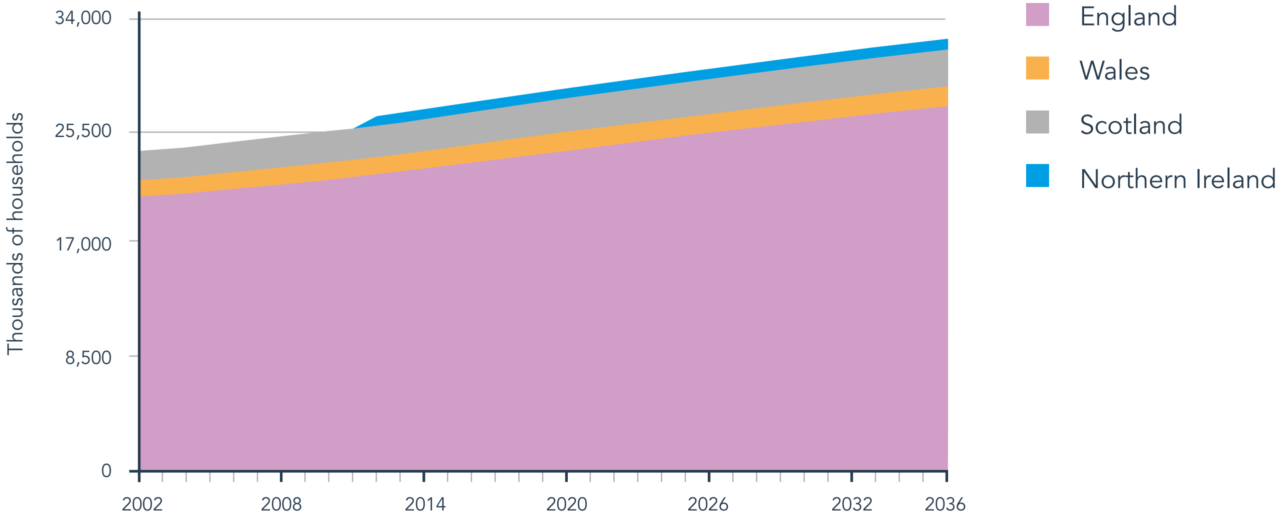
Index (1997 = 100)

Source: House Price Statistics for Small areas and Annual Survey of Hours and Earnings, Office for National Statistics

Projections

The shifts in the demography and patterns of household formation in the UK are leading to increased numbers of households.

Household projections, United Kingdom, 2002 – 2036



Establishing housing delivery vehicles

Goal

To provide a toolkit for local councils setting up housing delivery vehicles to increase and accelerate the supply of the right homes within their areas.

This update of our toolkit focusses on structures, procurement and supply chain.

Context

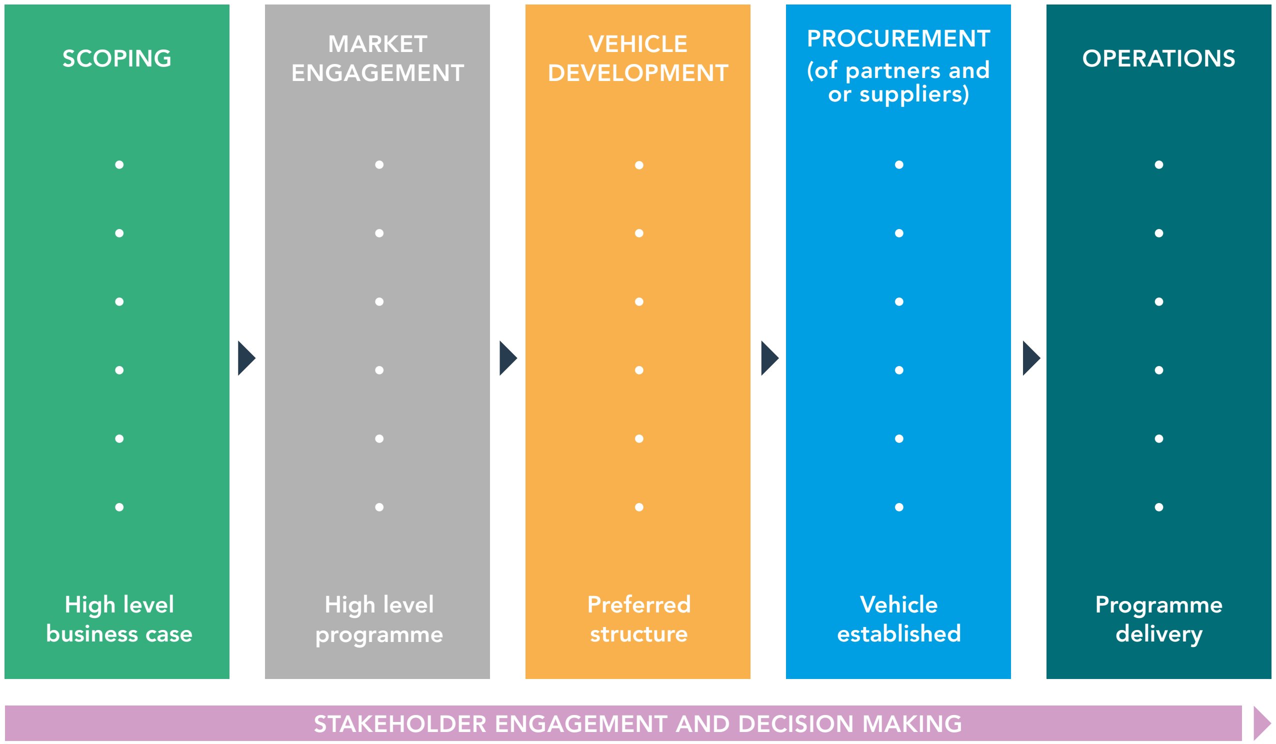
While both housebuilding starts and completions are up, and planning permissions granted have reached an 8 year high, the pace of development is not increasing at a rate that will make a serious impact on the long-standing shortage of supply of new homes.

The government has signalled its intention to bring new suppliers into the housing market and local councils are uniquely-placed to seize this opportunity.

Toolkit structure

This toolkit sets out how local councils can develop a forward strategy and programme to increase significantly housing supply.

Housing delivery vehicles



Flexibility of design

Each has its own context. To address local characteristics the toolkit has been designed so councils can use all of the elements or each can stand alone.

Breaking the Public / Private mould

Successful delivery of more homes will involve more effective working with the private sector. Much of the emphasis in the toolkit is on the best ways of working with the private sector and harnessing its potential.

Process driven

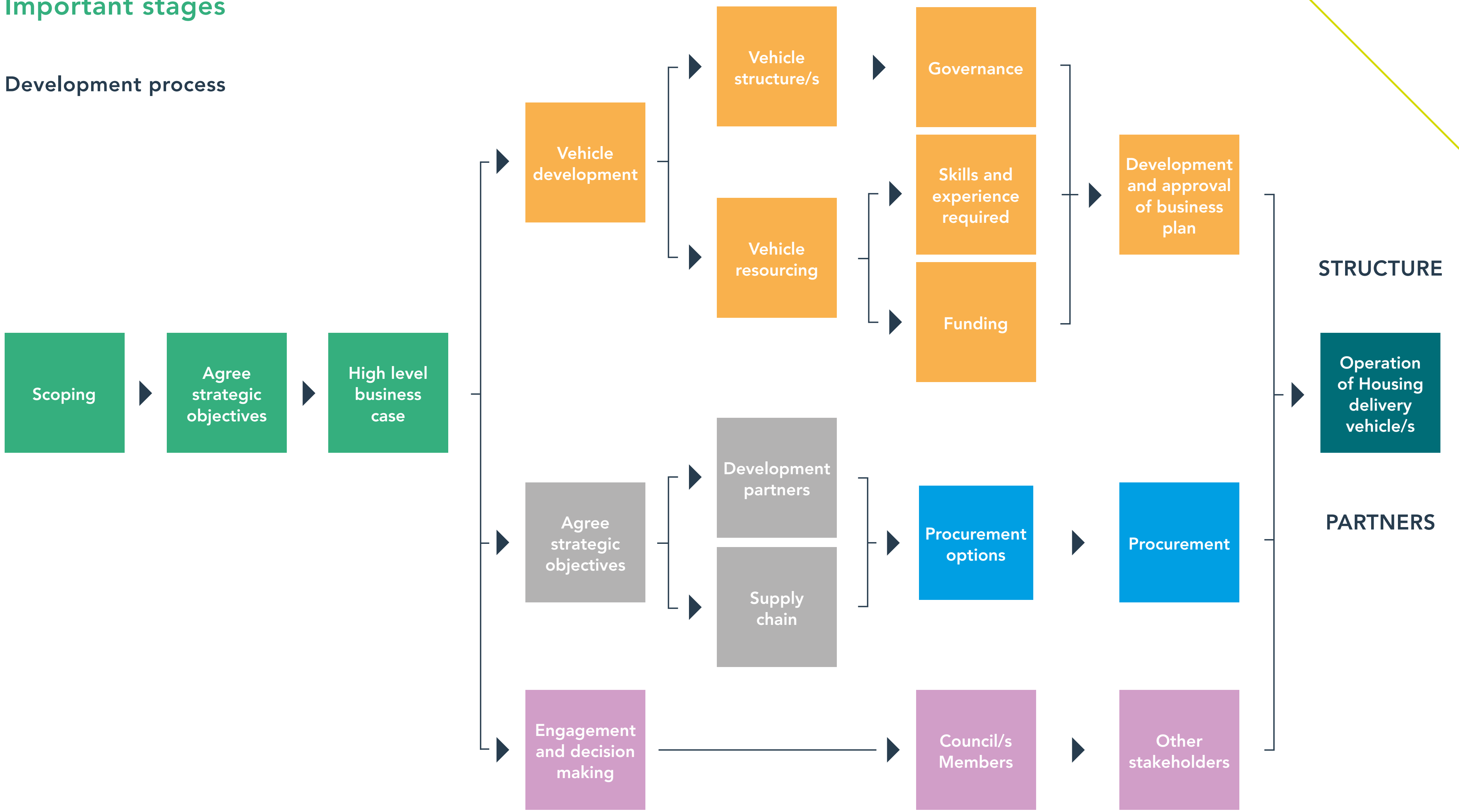
The toolkit moves from initial scoping to operations, guiding councils through the key questions to be addressed at each stage, and ensuring that the important issues are considered.

A tailored solution

The toolkit will assist councils to develop the best solution for their unique circumstances, taking into account context, ambition and scale. The nature and complexity of the solution will depend on these factors, tested in the scoping stage.

Important stages

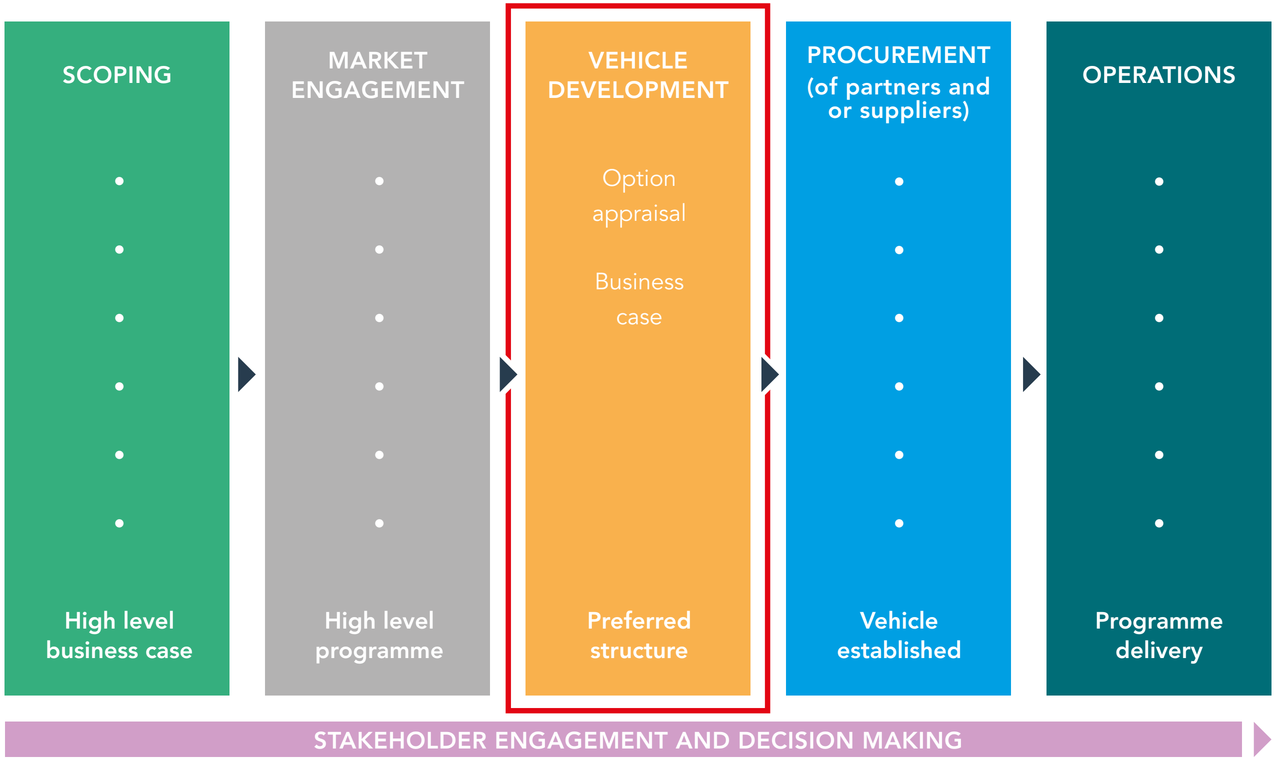
Development process



Vehicle development

In the next pages we focus on vehicle development.

Housing delivery vehicles



Business case

Before setting up a company a council must, by law, prepare a business case. This should follow the HM Treasury Green Book approach to public sector investment, adopting the Five Case Model.

The five case model

Strategic	Economic	Commercial	Financial	Management
the strategic case demonstrates that the spending proposal provides business synergy and strategic fit and is predicated upon a robust and evidence based case for change. This includes the rationale of why intervention is required, as well as a clear definition of outcomes and the potential scope for what is to be achieved	the main purpose of the economic case is to demonstrate the spending proposal optimises public value (to the UK as a whole)	the commercial case demonstrates the "preferred option" will result in a viable procurement and well-structured deal	the financial case demonstrates the "preferred option" will result in a fundable and affordable deal	the management case demonstrates the "preferred option" is capable of being delivered successfully, in accordance with recognised best practice

There are 5 broad options for vehicles, which should be compared against a 'do nothing' option in the commercial element of the business case.

1	2	3	4	5
single wholly owned company for ownership	single wholly owned company with development	wholly owned company with subsidiaries (development and ownerships)	joint venture company	'virtual housing company'

In the following pages we describe these options, along with the pros and cons of each and their risk profiles.

The most suitable vehicle option for a council will depend on the previous scoping work completed.

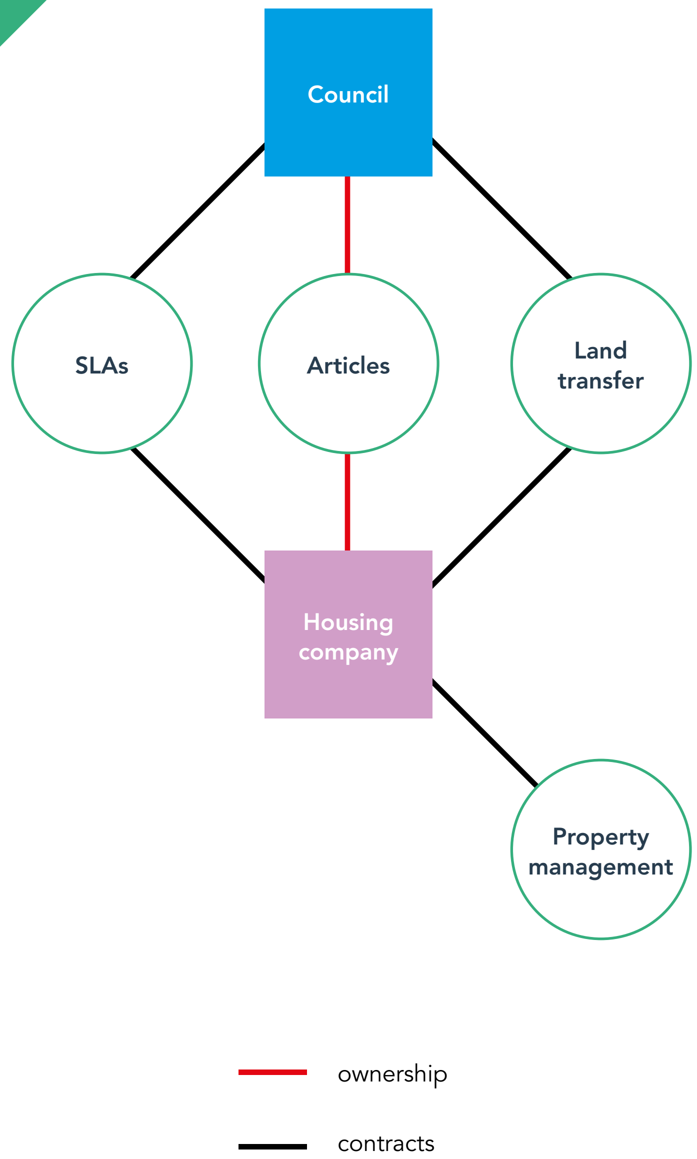
Vehicle options: 1 – single wholly owned company for ownership

This approach limits the company to a role in holding assets and managing them.

Typically, this may mean that where the council is promoting development schemes in the usual way (by development agreements or land sales), the developer may be required to transfer residential units into the company as part of the overall deal. These units would be "sold" to the company on arms-length terms, therefore at a cost to the company (funded by the council or out of any land value transferred from the council to the developer under the development agreement).

The company would then hold and manage the assets, taking in revenue and either passing that up to the council as shareholder, or re-cycling that cash into future acquisitions (or both).

This approach is used where a council is seeking to create revenue streams from assets and/or reduce costs of temporary accommodation for the homeless.



Council moves homes into the company. Its function is essentially one of being a holding-place and “landlord” (non-HRA). The company has no role in delivery of new homes.

Vehicle options 2 – single wholly owned company with development

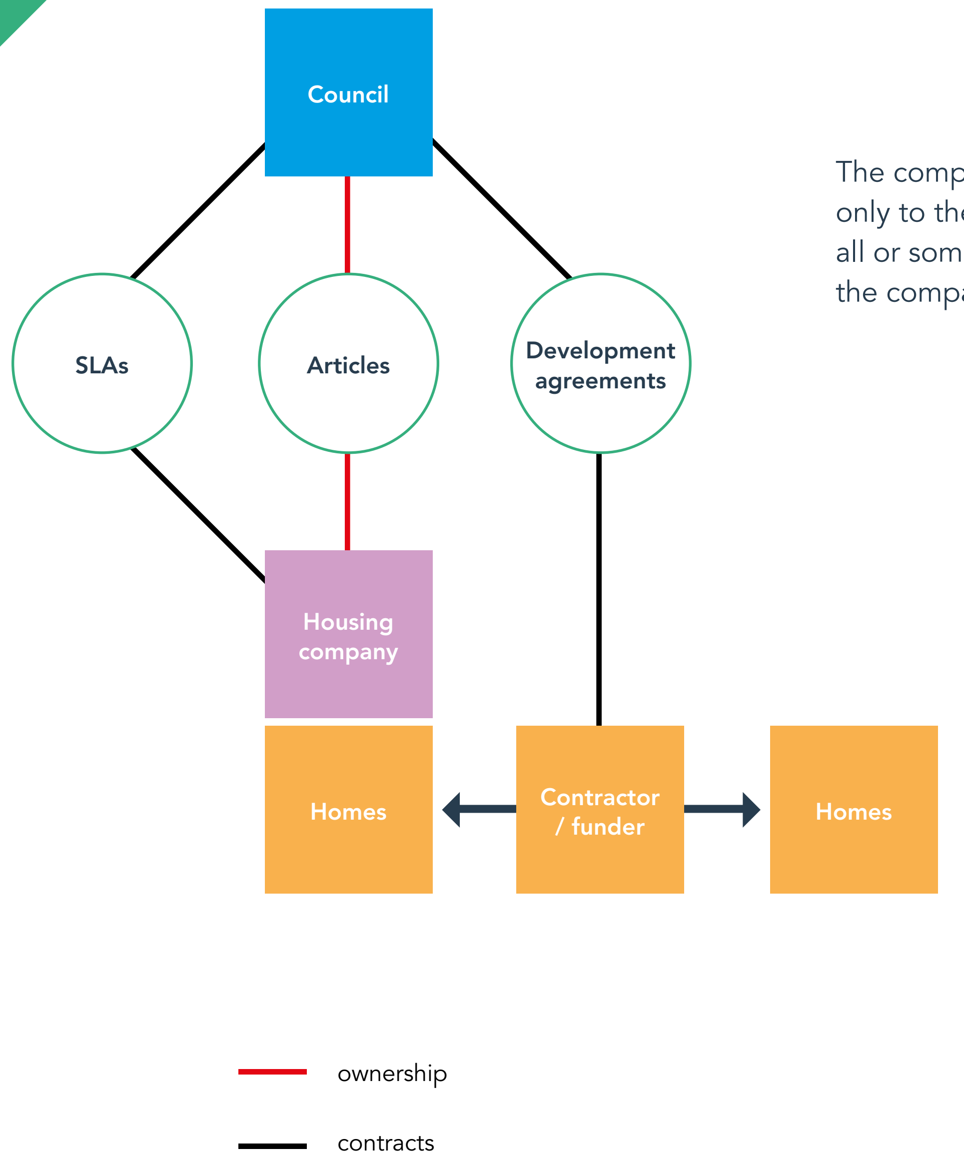
Under this option, the company itself takes on a development/delivery role.

This could be limited to a role in undertaking "difficult" sites which are not attractive to the market and where viability may be marginal.

If not limited, this approach would design the mix of sites to be developed to establish a general presence in the local housing supply marketing, whilst not discouraging other house-builders. In particular, the company has a role to play in bringing sites to market more quickly and by engaging with contractors, investors, funders, etc. to create a sustainable programme of delivery. The company would not adopt a "one size fits all" approach – its general objective being to increase pace and supply.

In carrying out a development role, the company would take on responsibilities that would normally fall on a "developer" – land assembly, planning consents, appraisal, construction, marketing/sales, and so on. Some of these would be contracted out to professional firms and contractors, but the company would carry all or many of the risks and rewards usually taken by a developer/house-builder.

In this option the company would not be stock-holding and would not normally generate revenue streams.



The company plays a role in new homes but only to the extent that the council may require all or some units built to be transferred into the company.

Vehicle options 3 – wholly owned company with subsidiaries

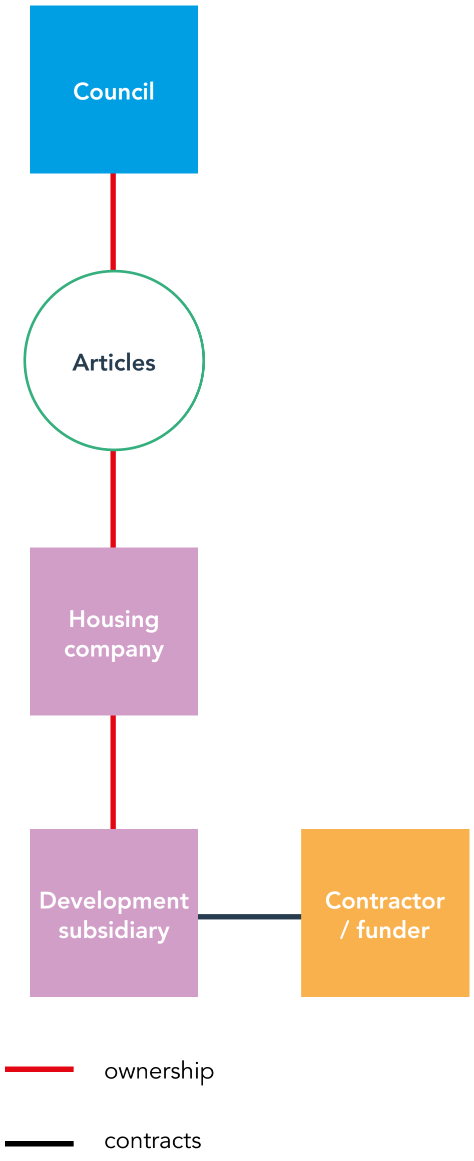
Under this option, the council will carry out a developer role and take a long-term stake in the assets created (notably rented accommodation, but equally that might be some commercial premises from mixed use schemes).

To ring-fence risk, the business would operate via subsidiaries. This would also allow for different funding partners to be brought in to facilitate different developments or types of development.

This model would mean a fully-fledged commercial business, but probably separating out the developer role from that of ownership.

Of course, the subsidiary approach does not need to be created at the start. The company will have the ability (with shareholder consent) to set up subsidiaries as and when needed. This gradual approach can be enshrined in the company's business plan.

The key dynamic here is the deliberate up-front intention for the company to have both a developer role and long term stake in assets created.



The company operates via site (or tenure) specific subsidiaries. This may be advantageous to ring fence risk in development activity or to unbundle differing types of housing/tenure. As an alternative to subsidiaries (the vertical model) underneath the housing company, the council could set up a number of companies (a horizontal model), each having a different focus or role. Equally, this approach can involve an overarching "holding company" not necessarily confined to housing activity. The degree of complexity depends on, and should be driven by, the objectives.

Vehicle options 4 – joint venture

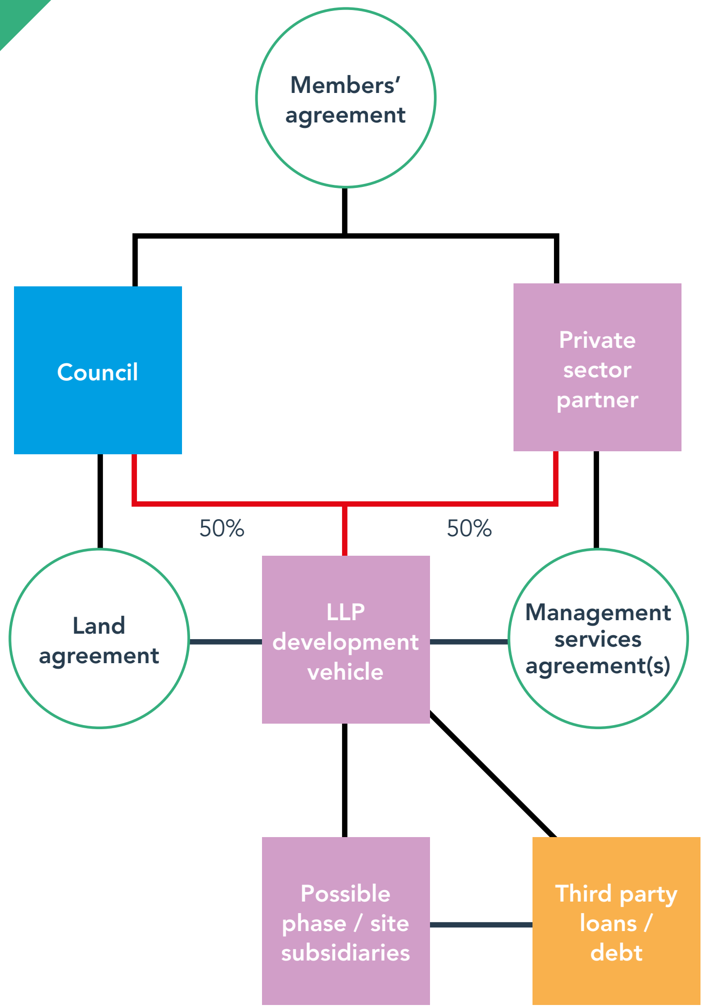
Under this option, the council would engage with developers (private or housing associations) to pursue either a bundle of projects or single projects (where of sufficient size/value to justify the transaction and set-up costs).

This type of approach has been used by other councils where they wish to bring in the resources and expertise (and money) of a developer partner, but without ceding control via the traditional development agreement.

Often these are limited liability partnerships (on the statutory footing that the main objective is regeneration rather than commercial), and are on a 50/50 arrangement. That means a general presumption that the council's land contribution will roughly match the private sector partner's cash contribution; this 50/50 "equity" is then reflected in voting rights and the share of returns.

This does not preclude other models, such as where the council takes a minority stake (with diluted voting rights and share of returns).

The procurement and set-up costs tend to be higher and these models are only attractive where the private sector partner is given exclusivity over a programme of projects or sites – both in respect of the actual development opportunity and, to a degree, to the construction and development management payments.



ownership

contracts

Vehicle options 5 – virtual housing company

Under this option the council ramps up its delivery capacity in-house.

To do this it recruits either fixed-term or permanent staff with the right mix of development management skills. The team would reside in the existing council management structure, and decisions on its programme would be taken via the normal council decision making process.

Any new stock would be managed in-house, either by the council's own housing management function or by newly recruited staff.

Council investment in a housing delivery vehicle: Think State Aid!

A council may wish to transfer land or provide services to its housing delivery vehicle. If this is done or if other forms of assistance are provided at less than market value, this could constitute State Aid. The point to consider is whether this might provide an unfair advantage to the housing delivery vehicle.

What is State Aid?

The State Aid rules are designed to ensure free and fair competition on a level playing field for all those operating businesses (or engaged in commercial activities) throughout the European Union.

A ready-made solution, therefore, is that if a Council follows the public procurement rules and follows an OJEU procurement (or a similar open and transparent procurement) then no issue of State Aid should arise.

However, if an OJEU procurement is not to be followed, the following will need to be considered:

- is public funding or are other advantages to be provided to a housing delivery vehicle?
- could the vehicle be said to be operating commercially (the State Aid rules apply to "undertakings" engaged in "economic activities")?

If the answers to these two questions are "yes", this could be said to be State Aid. Not all State Aid is unlawful. The tests involved in establishing whether or not the assistance is likely to be State Aid can be complex but a further key question to ask is whether a competitor private sector company to the housing delivery vehicle would be at a disadvantage because it would not benefit from such funding or advantages.

What practical steps should the Council take?

As well as considering State Aid issues at the very earliest opportunity alongside various housing delivery vehicle options, the Council must take its own legal advice on the specifics of its proposals and refer to the original EU legislation. The Council may also be able to access advice from the State Aid team at the Department for Business, Energy & Industrial Strategy or within the Welsh Government (as appropriate).

Summary of vehicle options

	VEHICLE OPTION	ADVANTAGES
1	single wholly owned company for ownership	Enables creation of revenue streams and satisfies the legal requirement to carry out commercial activity via a company. It would be dependent however on the pace of delivery, which would stay with the council. Provides an ability to lever in additional asset management capacity and generally engage the council in the local housing supply market, as a landlord.
2	single wholly owned company with development	Provides the ability to lever in additional development management capacity and generally engage the council in the local housing supply market, as a developer. Enables creation of capital receipts and satisfies the legal requirement to carry out commercial activity via a company.
3	wholly owned company with subsidiaries (development and ownerships)	Provides the ability to lever in additional development management capacity and generally engage the council in the local housing supply market as a developer. Enables creation of capital receipts and satisfies the legal requirement to carry out commercial activity via a company.
4	joint venture company	Allows for risk (and reward) sharing with a private sector or housing association partner. Access to skills and capacity via the partner organisation. Access to an experienced development team.
5	virtual housing company	Quick and easy to set up as no new company has to be established.

DISADVANTAGES	RISK
Relies on existing suppliers in the market for delivery.	*Medium* – Involves additional risk as the company will be relying on revenue streams to meet costs and will be a business in the private rented sector (or in other landlord-type ways).
It would not ordinarily create revenue streams.	*High* – Involves risk as the company will be acting as a developer, but also taking rewards. Acting as a developer, risks would be mitigated in the normal ways.
Will require expertise to be procured for the company in both development and asset management.	*High* – Involves risk as the company will be acting as a developer, but also taking rewards. Acting as a developer, risks would be mitigated in the normal ways. Involves additional risk as the company will be relying on revenue streams to meet costs and will be a business in the private rented sector (or in other landlord-type ways).
The private sector partner will require a certain element of exclusivity, which may limit flexibility. Set up costs tend to be higher and time taken to procure longer.	*High* – Involves risk as the company will be acting as a developer and landlord – but also taking rewards. Risk and reward would be shared 50/50.
Profit making activities will not be permitted through this option. This structure in itself does not create the ability to lever in additional cash, skills or resources. The additional capacity recruited has to be paid for from existing council revenue budgets.	*Medium* – the council will bear the risk of employing additional staff and entering into a range of development activity.

Supply Chain

Councils have a variety of supply chain options:

In-house: a council may have an in-house design team, and access to housing contractors through local frameworks

Using contractors as development agents: councils can contract with companies to act on their behalf as development agents, where development risk then lies with the council

HCA frameworks: all councils have access to the HCA frameworks. The DPP3 framework will have smaller contractors available, as well as the major housebuilders, and this will be available, as will the full suite of documents developed by the HCA for its Accelerated Construction programme

Partnering: with housing associations for specific sites or in a joint venture

Partnering: with developers and/or housebuilders for specific sites or in a joint venture

New players to the market: (including modern methods of construction). A council could enter into site or programme specific arrangements with new players

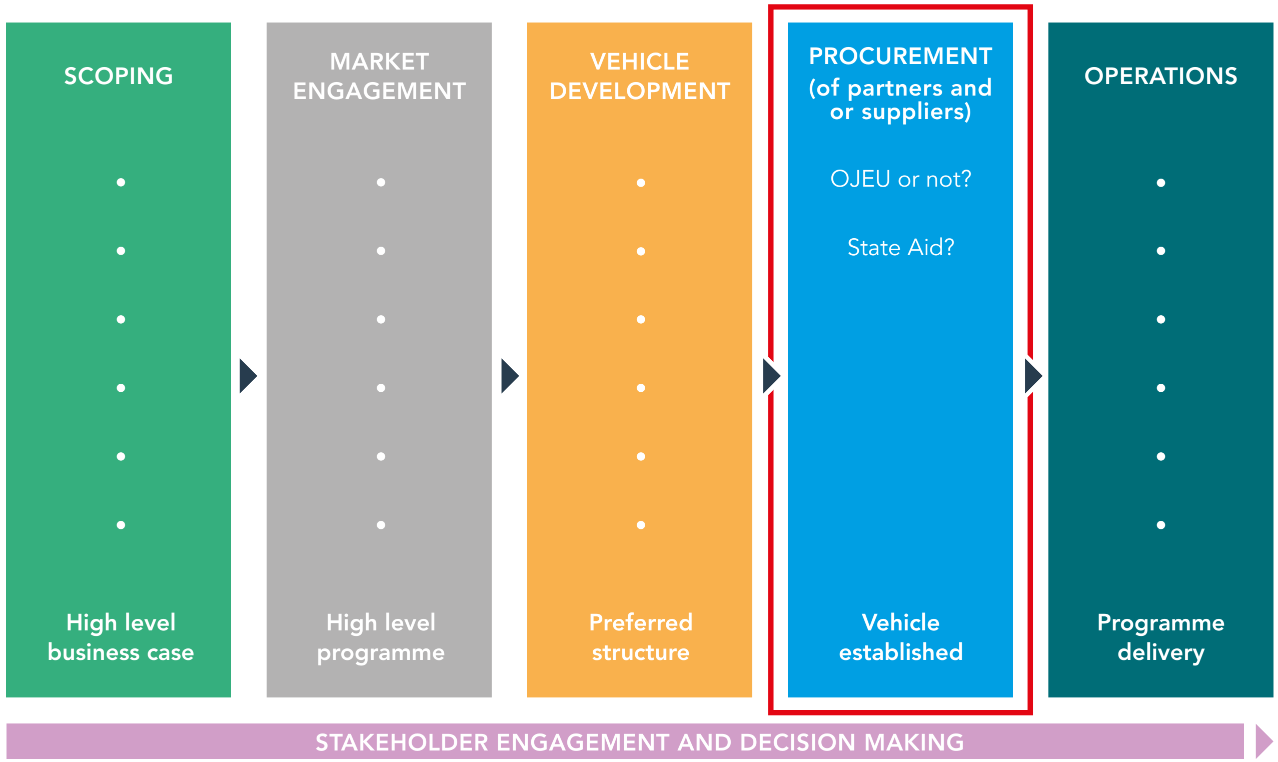
Additional supply chain offered by company structures:

- the company may itself create frameworks of suppliers
- the company may develop a self-delivery capacity, initially in-house professional services, but conceivable for actual construction
- greater agility in procurement by not being bound to follow OJEU procedures to the letter
- acceleration of pace in housing delivery may itself create new market entries for the local supply chain

Procurement

In the next pages we focus on procurement.

Housing delivery vehicles



Public procurement rules can be tricky to navigate. Although designed to ensure that public bodies award contracts in a fair and transparent manner, they are often misunderstood, or they can be seen as creating unnecessary barriers that can hinder the development of land.

It is essential that public bodies understand what is and isn't likely to be subject to current public procurement rules at an early stage when considering the housing delivery options. This is particularly important at a time when many of our towns and cities need significant investment in properties and infrastructure in order to meet the needs of businesses and residents.

The enclosed guide has been developed and updated for 2017 by Local Partnerships, with prior input from developers, leading procurement lawyers and local authorities.

It cuts through the legalese setting out key issues that parties involved in land transactions will need to address, identifying the most common structures used in land developments and, by means of a flow chart, indicating:

- where OJEU tenders will normally be required
- situations where some lesser form of competition may be required
- circumstances where the EU procurement rules are unlikely to apply

We would stress that this guide has been created for general guidance purposes and specific legal advice should always be sought when dealing with any particular sets of facts or circumstances. Further, due to the manifest uncertainties surrounding relevant negotiations, this guide does not take account of the potential impact of Brexit on the procurement regime in the UK.

Is an OJEU or other competition required for a land deal?

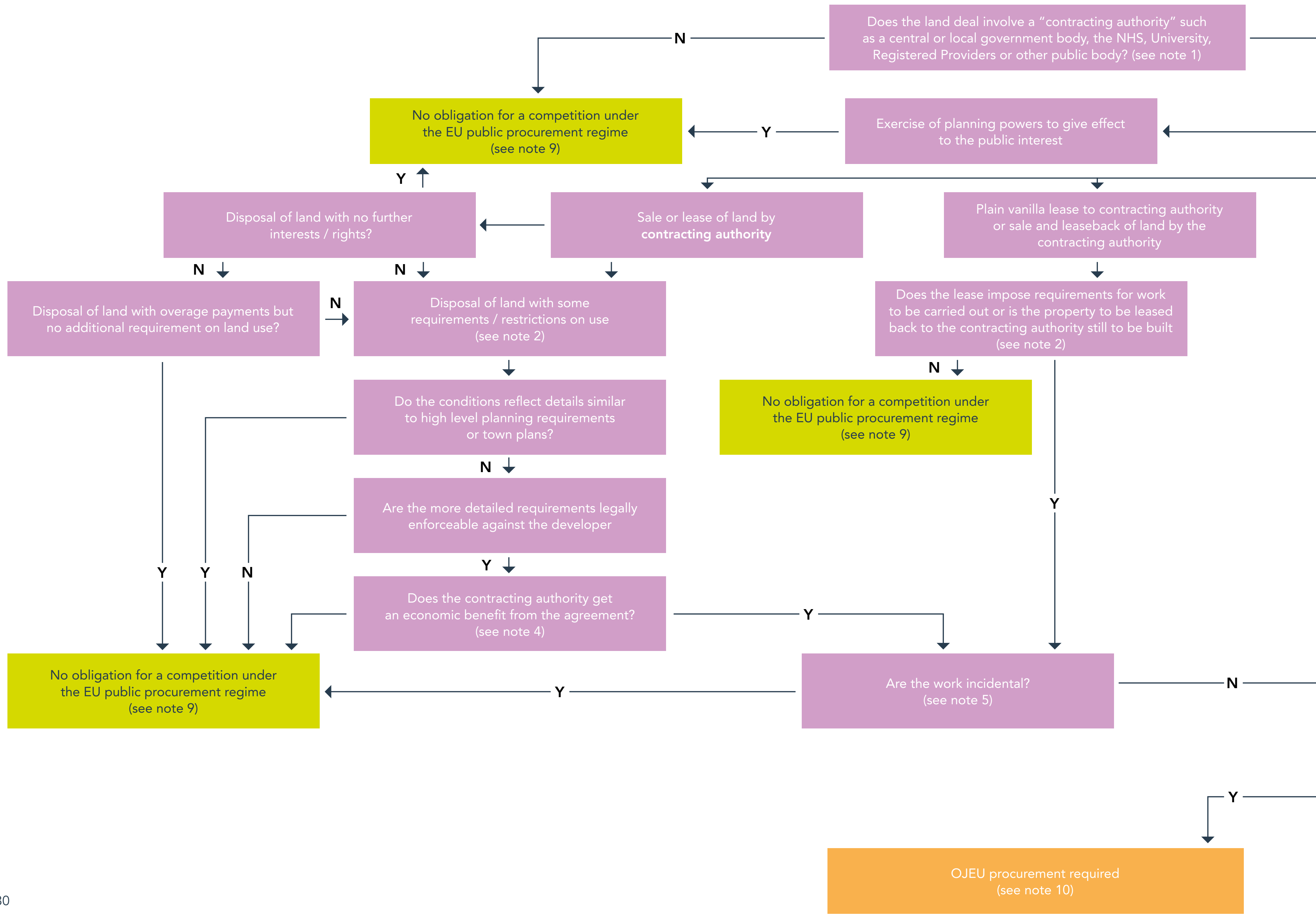
As the European case of C-220/05 Auroux v Commune de Roanne made clear, land transactions are not always exempt from the EU public procurement regime and related tendering obligations.

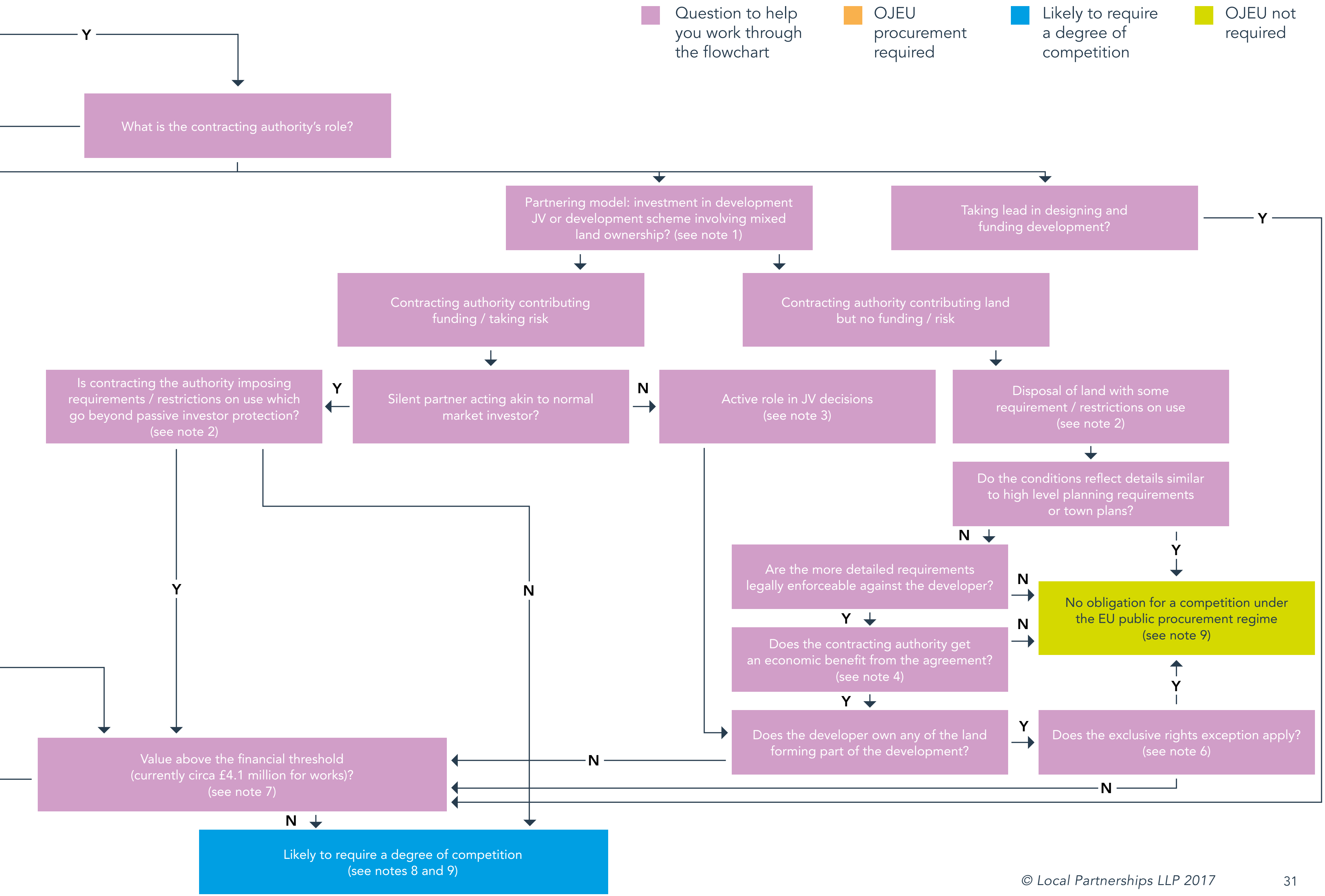
This complex, evolving and often confusing area of law is regarded by many as a real barrier to redevelopment in the UK.

This chart is designed to provide high-level guidance to both contracting authorities and developers on the strategic choices open to them. For ease, tenders that are subject to the full tendering requirements of EU Procurement Directives are referred to as "OJEU" procurements or tenders. This chart identifies the most common structures used in land developments and, through a combination of colour coding and key questions, is designed to help users identify factors that indicate OJEU tenders will normally be required, situations where some lesser form of competition may be required and circumstances where the EU procurement rules are unlikely to apply.

Additional "Notes" boxes provide more detailed explanations of key legal concepts. Even if there is no legal obligation to hold an OJEU or other competition, there may be other factors, such as ensuring eligibility for EU funds or compliance with internal processes or procedures, which may prompt parties to opt for some form of tender process. The risks associated with each of the options below may differ, but none of the options are entirely risk free. As ever, much depends upon the particular circumstances of each deal and this guide is not intended as a substitute for specific legal advice.

Remember, material changes to the terms of an existing deal can trigger fresh OJEU obligations. Other legal obligations will also need to be considered on a case-by-case basis. The chart is based on the law as at April 2017. Further guidance can be obtained from the Cabinet Office (www.gov.uk), among others.


Does the land deal involve a "contracting authority" such as a central or local government body, the NHS, University, Registered Providers or other public body? (see note 1)
N
No obligation for a competition under the EU public procurement regime (see note 9)
Y
Exercise of planning powers to give effect to the public interest
Y
Disposal of land with no further interests / rights?
Sale or lease of land by **contracting authority**
Plain vanilla lease to contracting authority or sale and leaseback of land by the contracting authority
N
N
Disposal of land with overage payments but no additional requirement on land use?
N
Disposal of land with some requirements / restrictions on use (see note 2)
Does the lease impose requirements for work to be carried out or is the property to be leased back to the contracting authority still to be built (see note 2)
N
No obligation for a competition under the EU public procurement regime (see note 9)
Do the conditions reflect details similar to high level planning requirements or town plans?
N
Are the more detailed requirements legally enforceable against the developer
Y
Y
Y
Y
N
Does the contracting authority get an economic benefit from the agreement? (see note 4)
Y
No obligation for a competition under the EU public procurement regime (see note 9)
Y
Are the work incidental? (see note 5)
N
Y
OJEU procurement required (see note 10)


Question to help you work through the flowchart
OJEU procurement required
Likely to require a degree of competition
OJEU not required
Y
What is the contracting authority's role?
Partnering model: investment in development JV or development scheme involving mixed land ownership? (see note 1)
Taking lead in designing and funding development?
Y
Contracting authority contributing funding / taking risk
Contracting authority contributing land but no funding / risk
Is contracting the authority imposing requirements / restrictions on use which go beyond passive investor protection? (see note 2)
Y
Silent partner acting akin to normal market investor?
N
Active role in JV decisions (see note 3)
Disposal of land with some requirement / restrictions on use (see note 2)
Do the conditions reflect details similar to high level planning requirements or town plans?
N
Y
Are the more detailed requirements legally enforceable against the developer?
N
No obligation for a competition under the EU public procurement regime (see note 9)
Y
N
Does the contracting authority get an economic benefit from the agreement? (see note 4)
Y
Y
Y
N
Does the developer own any of the land forming part of the development?
Y
Does the exclusive rights exception apply? (see note 6)
N
Value above the financial threshold (currently circa £4.1 million for works)? (see note 7)
N
N
Likely to require a degree of competition (see notes 8 and 9)

Notes

1 Definition of contracting authority

The EU procurement rules contain a long list of public bodies which are "contracting authorities", including central government, local authorities, police and fire authorities, schools and health bodies. Other quasi-public or publicly funded bodies, such as Registered Providers / housing associations and universities, are also contracting authorities. A body which is wholly or partly owned by another contracting authority, e.g. a joint venture company, may itself be a contracting authority depending on its objectives and functions and the level of control exercised and/ or funding provided by the owning contracting authority.

2 Additional requirements for works or services

EU case law makes clear that land deals which also include elements of works or services will often need to be the subject of OJEU tender processes. This may include deals where the developer provides project management services to the contracting authority, builds new buildings where the contracting authority has detailed input into the specification/plans, or where significant, bespoke fit-outs of premises are required before leasing to contracting authorities.

3 Active and passive roles in a Joint Venture Company (JV)

Passive investors can typically prevent the sale or winding up of the JV or changes to the level of capital. Active investors will normally have a more hands on role including influencing the budget and/ or day-to-day operations as well as veto rights over other strategic commercial behaviour.

4 What constitutes an economic benefit?

Works are likely to be carried out for the economic benefit of the contracting authority where they are of direct and immediate benefit to the authority (beyond those benefits which it would derive from the exercise of its planning powers). The most obvious examples are where the authority will own part or all of the development or receive income from it. Community facilities (e.g. a school or library) or public realm provided as part of the development which would otherwise have been paid for by the authority may also constitute an economic benefit, although recent UK case law indicates that section 106 agreements will not trigger OJEU tendering obligations.

5 Incidental works

Works will be incidental to a disposal of land where their scope and value is insignificant compared to the total size and value of the area being disposed of. Another relevant factor is if the works would not have been carried out in absence of the disposal.

Works which are of significant value (e.g. above the OJEU threshold) or extensive in terms of scope and programme may require greater scrutiny.

6 Exclusive rights

One exception to the tendering obligations is when, due to "exclusive rights", no-one else can perform the contract. In land transactions, the fact that a developer owns some or all of the land to be developed may trigger this exception. However, in addition to owning the land it is generally necessary to show there is no alternative site where a similar development could occur. In other words, owning the south side of a street won't help if a similar development could occur on the north side. The ability of a local authority to purchase the site under a CPO may also be a relevant factor.

7 Assessing contract value

The thresholds are updated every two years by the European Commission. Valuations should be based on good faith estimates, exclude VAT and must take account of revenues generated from third parties, not just payments by a contracting authority. EU rules prevent the artificial splitting up of contracts to depress the valuation.

8 Non-OJEU competitions

Even if particular deals are not subject to OJEU tender obligations, other rules may still require a tender to be run. EU court rulings make clear that wider EU Treaty obligations do require EU-wide tenders for below threshold contracts. The Public Contracts Regulations 2015 also impose advertising obligations for low value contracts.

Equally, there may be a requirement under domestic legislation or other duties to demonstrate best market value on disposal. One way of doing that might be to hold a competition. Such competitions do not have to follow any particular OJEU process or timetables and might, therefore, provide greater flexibility. Best value can also be established by independent valuations.

9 Assessing and managing risk

There are risks whichever approach a public body takes to market. Burdensome tendering obligations may reduce bidders' willingness to respond. EU funding, such as ERDF, is however often conditional on contracts being awarded via an OJEU process.

Failure to run an OJEU tender, if it is required, runs the risk of an ineffectiveness challenge (the requirement for the courts to set aside a contract) which will be an important issue for all parties. Ineffectiveness challenges must be brought within 6 months of the contract entered into unless a contract award notice was published in the OJEU, which reduces the time limit for challenge to 30 days.

Other ways to mitigate procurement risks include: i) the publication of a voluntary transparency notice (VTN) in the OJEU before entering into the direct award. Waiting 10 days from the day after publication of the notice before entering into the contract, means the ineffectiveness remedy will no longer be available; ii) including provisions in the contract to allocate the procurement risk between the parties in the event of challenge; and iii) running a voluntary tender process to help mitigate the risk that a developer is later alleged to have been "over-compensated" and thus in receipt of illegal state aid which should be repaid.

Changes to the terms of a deal after an OJEU process may also trigger obligations to hold a fresh tender.

Publication of notices is intended to draw attention to the award of the contract and may increase the risk of challenge. Careful risk assessment and legal advice is crucial.

10 OJEU options

The EU procurement regime is designed to provide fair, transparent and uniform processes for selecting developers to undertake opportunities. There are advantages of OJEU, including mitigation of both state aid and ineffectiveness risk. It is however important to ensure that the appropriate procedure is selected to avoid unnecessary burdens on bidders.

There are several processes to choose from: ranging from the open procedure to those permitting negotiation, as well as the voluntary use of OJEU. Whichever process is used it is crucial to follow best practice and run the competition in an efficient way. The pre-OJEU planning and market testing stage will be particularly important. Concession contracts are now subject to a separate Directive with more flexible processes. See also note 9.

Success factors for housing delivery vehicles

Low carbon communities

Integrated energy infrastructure

Good understanding of market and housing need

Full understanding of risk and reward

Commercial expertise

Well thought out strategy

Defined objectives and strong leadership

Clear strategy for use of land and funds

Procurement of the right partners

Development and delivery skills

Access to a cost effective supply chain

Choice of the most appropriate vehicle

How we can help

Local Partnerships LLP is a joint venture between HM Treasury and the Local Government Association. We help the public sector deliver major projects and change at the local level ensuring key priorities are delivered and clients secure excellent value for money.

Local Partnerships will bring an experienced, senior, multi-disciplinary team to work with you through a series of workshops and targeted assistance to help you assess your options. Our team includes experts in housing and development, legal structures and local authority finance.

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To date Local Partnerships have brokered effective working relationships with key private sector investors in the City, bringing to the table knowledge and understanding of current market conditions as well as deeper insight into the role and behaviour of the development industry. Not only has this resulted in positive outcomes in terms of bringing residential development sites forward into the supply chain but is upskilling City Council officers in the process.”

Louise Follett, Principle Planner, Gloucester City Council

LOCAL PARTNERSHIPS

Local Partnerships is jointly owned by

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