



FOR PUBLICATION

DERBYSHIRE COUNTY COUNCIL

CABINET

7 July 2022

Report of the Director - Economy & Regeneration

Proposal to become a Member of the Incorporated East Midlands Freeport Company and to Nominate a Company Director

(Cabinet Member for Strategic Leadership, Culture, Tourism and Climate Change)

1. Divisions Affected

1.1 County-wide.

2. Key Decision

2.1 This is a Key Decision because it is likely to be significant in terms of its effect on communities living or working in an area comprising two or more electoral areas in the County.

3. Purpose

3.1 The purpose of this report is to seek approval for Derbyshire County Council to become a member of the East Midlands Freeport (EMF) Company and to appoint a Director to the Company and a representative of the Council to act in its role as a member of the company.

4. Information and Analysis

Background

- 4.1 Cabinet and Cabinet Members have received a number of reports over the past two years which chronicle the development of proposals to create an East Midlands Freeport (EMF) and sought approval to: submit an expression of interest to Government on 4 February 2021 (Minute No. 09/21 refers); submit an outline business case (3 September 2021, Minute No.13/21 refers); and more latterly, to submit the Full Business Case (FBC) to Government (Cabinet report 15 February 2022, Minute No 49/22 refers and subsequent delegated officer approval on 13 April 2022).
- 4.2 At the February meeting, Cabinet duly considered the range of benefits, opportunities and risks associated with the East Midlands Freeport proposals and on balance, approved in principle to support submission of the FBC to Government.
- 4.3 In approving submission of the FBC in principle, Cabinet was advised that some matters had not been fully resolved and that further work was required by all partner organisations; these were:
 - Confirmation and finalisation of the proposed inclusion of the extended tax site at East Midlands Airport.
 - Confirmation of all geographies, including outer boundaries, site maps and travel to work areas within which development projects would be eligible for funding.
 - Completion of the Articles of Association and Members' Agreement to ensure all the necessary safeguards are in place to protect the Council's interest (e.g. voting, quoracy etc) and level of risk exposure, including assessing whether any retained risks can be mitigated by appropriate controls.
 - Considering the draft Liability Sharing Agreement and ensuring risks to the Council were mitigated.
 - Finalisation of the governance arrangements – particularly the roles and responsibilities allocated to sub committees such as the Sites and Infrastructure Group and the S151 Group.
 - Finalisation of the 'no detriment clause' on retained business rates.
 - Confirmation of the nature of the EMF's relationship with the East Midlands Development Corporation and commitment to progress to alignment over an agreed timescale.
 - Details around custom and tax sites operation and management.
 - Finalisation of seed funding allocations.
 - Limits to subsidy control for off-site works.
- 4.4 Final approval to support submission of the FBC was delegated to the Managing Director, in consultation with the Leader of the Council, S151

Officer and Monitoring Officer, subject to the following conditions having been met:

- Satisfaction that the final version of the Final Business Case did not increase the risk of financial exposure of the Council beyond the parameters set out in the Cabinet report; and
- Sufficient detail of the governance structure for the Freeport company and associated safeguards being agreed between the parties to protect the Council's interests, prior to incorporation of the company, including setting the amount of any contributions to a contingency reserve for the Freeport or its general funding.

- 4.5 During the period February 2022 to April 2022, work was undertaken through officer working groups (led by Leicestershire County Council as the Lead Authority and supported by Ernst & Young) to address the above issues and bring development of the FBC and governance proposals to a satisfactory conclusion. This work also involved regular liaison with Government officials, particularly in relation to levels of retained business rates and the 'no detriment clause'.
- 4.6 The officer delegated report of 13 April 2022 confirmed which issues had been fully resolved and which risks had been mitigated. It also set out additional issues which had emerged over the three month period and their potential impact on the Council's exposure to financial and other risks.
- 4.7 Having regard to the update presented in the report, the Managing Director approved the final Full Business Case and approved, in principle, the Articles of Association and Members' Agreement for submission to Government.
- 4.8 Since this time, work has continued to be progressed through officer working groups and new sub-committees on matters around seed funding and project development; retained business rates Memorandum of Understanding; and finalising governance proposals.

Governance arrangements

- 4.9 The governance of the Freeport Company is prescribed in the Articles of Association, and the Members' Agreement, copies of which are set out in the appendices to this report. The Articles of Association is the legal constitutional document of the Company which sets out the basic rules around how the EMF Company will operate - effectively, its Constitution. The Members' Agreement is a "private" contract between the Limited Company and its Members, of which the Council will be one. These two

key documents will be supported by additional operational documentation.

- 4.10 By virtue of Paragraph 3 of the Schedule 12A of the Local Government Act 1972, Appendices 2 and 3 are considered exempt as they contain information relating to the financial and business affairs of partners collaborating with Derbyshire County Council to develop the East Midlands Freeport Company.
- 4.11 Having regard to all the circumstances, on balance, the public interest in disclosing the information does not outweigh the reason for exemption because the information would add a limited amount to the public understanding of the issues but would significantly damage the Council's and partners' commercial position. The version of the Members' Agreement and Articles of Association contained in the Exempt Appendices are subject to approval and final sign off at the East Midlands Freeport Board on 7 July 2022, ahead of submission to Government later in July 2022.
- 4.14 Officers from the Council have contributed to the drafting of these key governance documents through the Governance Group and have concluded they are acceptable. Cabinet is asked to approve the Members' Agreement and Articles of Association and agree the Council should become a member of the East Midlands Freeport Company. Points to note from the documents are set out below:

A) Articles of Association:

- The Company will be established as a company limited by guarantee, which means that the Council will only be liable for the amount of the guarantee (being £1) should the Company be wound up. Although should the Council decide to guarantee any obligations of the Company directly or loan it some money, it would be at risk under any such agreements. At this point, the Council has not been asked to provide this.
- The Board of Directors shall be 13, made up of six public sector directors (one from each council that is a member), six private sector directors (one from each private sector member) and an independent Chair. Each founding member has the right to appoint a director and remove that director. The independent Chair will be an independent director and will not have a casting vote.
- The quorum for Board meetings requires the Lead Authority's (Leicestershire County Council) director to be present, along with two public sector directors and three private sector directors.

- The Board will endeavour to make decisions on a unanimous basis. Where unanimity is not achieved, it will be decided on a ‘Public/ Private Sector Majority’, which requires a majority of the public sector directors agreeing and a majority of the private sector directors agreeing.
- Member decisions will be made at Company general meetings or potentially in writing. The quorum for those general meetings mirrors the board meeting requirements and requires the Lead Authority to be present, along with two public sector members and three private sector members.
- The situation for Billing Authorities and Principal Ports is different but for the Council, it may exit the Company by giving not less than six months’ notice. Although it may have made commitments for specific projects etc. which may have a practical effect on the ability to utilise this right.

B) Members’ Agreement:

- The Agreement confirms the Company’s day to day working capital and expenditure is to be funded by: capacity funding provided by DHLUC; a member loan from LCC as Lead Authority; and retained business rates. There is no requirement for other members to contribute to the day to day working capital and/or expenditure of the Company.
- Capital projects and infrastructure projects may be funded by the Company but the Agreement is clear that the entity or public sector body that will ultimately own or have responsibility for the capital asset or infrastructure will be primarily responsible for procuring, commissioning and funding that project.
- The Company’s Board will set the strategy for retained business rates. There will be a ‘Public Sector Directors Group’ which consists of all the directors of the public sector members and that Group will be responsible for making decisions on the use and allocation of retained business rates.
- Certain decisions are reserved to Members (rather than the Board of Directors) and those are contained in the Reserved Matters Schedule. Some of those decisions require all of the Members to agree and some decisions require only a Public Private Majority. The Reserved Matters Schedule also contains some decisions that are reserved to the Board of Directors and some decisions that require the consent of the Lead Authority.

Role of Directors and the Council as Member of the Company

- 4.15 Subject to Cabinet agreeing the Council should become a member of the Freeport Company, the Council will be entitled to appoint one director to the Board. It is proposed the Leader of the Council is appointed as the Director. The Council's nominated Director will represent the County Council at the Board and at the Public Sector sub group/ sub committee, which will have responsibility for the allocation of Retained Business Rates. Further information about the role of a director of a company is contained in the Guidance to Councillors appointed to Outside bodies at Appendix 19 to the Constitution. As Director, the Leader is permitted, with the approval of the Chair (in his or her discretion), to appoint a person to be his or her Alternate at a specified Board meeting, if they are unable to attend. The Alternate must be another member of the same Public Sector Member, holding an appropriate portfolio.
- 4.16 An officer will be permitted to attend the EMF Board as an observer in support of the Leader. The County Council will also have officer representation on the various EMF sub committees and subgroups.
- 4.17 As a Member of the Freeport Company, the Council will also have a role in decisions reserved to Members of the Company. Such decisions may be taken at a Members' meeting or by written resolution. It is proposed that the Managing Director is appointed to represent the Council in its role as a Member of the Company, in relation to decisions reserved to Members of the Company whether at a Member meeting or by written resolution, when necessary. Any decisions should be taken after taking legal, technical and financial advice as appropriate.

Funding

- 4.19 The work being undertaken to set up and establish the EMF effectively is incurring significant expenditure. These costs are being cash flowed by the Accountable Body (Leicestershire County Council). The costs incurred by Leicestershire County Council could be in the region of £2m by the point that EMF is operational and would be recognised as a loan to EMF. A term loan facility has been arranged with a principal amount of £2.5m comprising £2m 'pre-designation loan' and a working capital loan of £0.5m to support the set-up costs and expenses as outlined in the Full Business Case.

4.20 The Council's S151 Officer is a member of the Freeport Section 151 Sub Group which has responsibility for advising on a range of financial matters, including retained business rates policy and reviewing business cases for investment. The Group has continued to ensure the appropriate financial processes and procedures are developed such as business case reviews, modelling of business rates income and policy for business rates relief. The Group will ensure there is robust scrutiny of any submitted business cases and that projects are sufficiently financed to address infrastructure requirements, utilising retained business rates accordingly.

5. Consultation

5.1 Not applicable. Public consultation on the documents and proposals subject of this report is not required.

6. Alternative Options Considered

6.1 Do nothing – doing nothing is not considered an option as the Full Business Case has already been submitted with the Council's approval and is currently subject to active discussion and feedback from Government. The key decision now required of the Council is whether to agree to join the EMF Company and who to nominate as company director.

6.2 Do not agree to the Council joining the East Midlands Freeport company and nominating a company director – Derbyshire County Council is a key partner in the EMF arrangements, being the relevant transport and highway authority for the East Midlands Intermodal Park site in South Derbyshire. The work that has taken place over the course of business case preparation and drafting of the Articles and Association and Members' Agreement has helped identify, consider and mitigate risks to Council – see Appendix 1. On balance, it is considered that such risks are outweighed by the significant opportunities presented by the Freeport in helping the County to level up and facilitate greater prosperity in the local economy.

7. Implications

7.1 Appendix 1 sets out the relevant implications considered in the preparation of the report.

8. Background Papers

- a) Proposals to Submit Outline Business Case to Create a Freeport: Cabinet member meeting 3 September 2021.
- b) Proposals to Submit Full Business Case to Create a Freeport: Cabinet meeting 15 February 2022.
- c) Proposal to Submit Final Full Business Case to Government to Create an East Midlands Freeport: delegated officer decision, 13 April 2022.

9. Appendices

- a) Appendix 1 – Implications
- b) Appendix 2 – Final East Midlands Freeport, Members' Agreement (exempt)
- c) Appendix 3 – Final East Midlands Freeport, Articles of Association (exempt)

10. Recommendations

That Cabinet:

- a) Agrees the Articles of Association and Members' Agreement for the East Midlands Freeport Company;
- b) Approves the Council becoming a member of the East Midlands Freeport Company on the basis of the approved Articles of Association and Members' Agreement and authorises the Director of Legal and Democratic Services to agree any documentation necessary to facilitate incorporation of the Company;
- c) Agrees to nominate the Leader of the Council as the East Midlands Freeport Company Director on behalf of Derbyshire County Council;
- d) Notes that the Leader of the Council, as a Director, will have the power under the Articles of Association to appoint an Alternate to attend a Board meeting in their absence; and
- e) Authorises the Managing Director (or their authorised representative) to cast a vote as a Member of the Company, in relation to decisions reserved to members of the Company whether at a member meeting or by written resolution, when necessary, having taken legal, technical and financial advice as appropriate.

11. Reasons for Recommendations

- 11.1 All partners are required to affirm support for joining the Freeport Board and incorporated Company to meet a key Government criterium for the Freeport to be designated. Whilst there are known and accepted costs

to the development of the East Midlands Freeport, in the case of the County Council, there are also clear synergies between the benefits offered and the stated priorities of Derbyshire County Council in the Council Plan to drive economic prosperity across the county in support of the levelling up agenda and commitments expressed in the COVID-19 Economic Development Recovery Strategy.

- 11.2 To enable the Council to formally commit to joining the incorporated EMF Company at the EMF Board meeting on 7th July 2022..
- 11.3 To ensure the Council has appropriate representation on the Board of Directors and as a Member of the Company.

12. Is it necessary to waive the call in period?

- a. Yes, it is necessary to waive the call-in period as the decision is urgent and any delay likely to be caused by the call-in process would seriously prejudice the Council's or the public interest. Councillor Tony Kemp, Chair of Place Improvement and Scrutiny Committee has approved the waiver of the call-in period and agreed both the decision proposed is reasonable in all the circumstances and that it should be dealt with as a matter of urgency.

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Appendix 1

Implications

Financial

- 1.1 During the set-up phase and the first year of operation Leicestershire County Council, as Lead Authority/Accountable Body, will incur operating costs estimated to be approximately £2m. These costs will be funded in the form of a commercial loan to EMF, which will be paid back to Leicestershire County Council from the retained business rates. The Freeport is expected to generate retained business rates income of approximately £0.9bn over the 25-year life of the Freeport.
- 1.2 The loan facility, as set out in paragraph 4.19, will be coordinated by Leicestershire County Council and will be subject to its Treasury and Investment Strategy and considerations of the Chartered Institute of Public Finance and Accountancy's Prudential Code.

Legal

- 2.1 The EMF is currently in set up phase and the County Council is represented by the Leader of the Council on the EMF Board. The Board has agreed to move to an incorporated governance structure and establish a Freeport Company limited by guarantee. The governance of the Freeport is therefore now transitioning from strategy and development into implementation and delivery. Approval is sought from Cabinet for the Council to join the Company. A company limited by guarantee is a company that does not have shareholders. Instead, it is owned by a group of members known as 'guarantors' who all agree to pay a certain amount of money should the company be wound up. Such guarantee has been agreed at a nominal amount and because of this, and the concept of limited liability, this in the ordinary course would be the full exposure of the Council. Inter-Member liabilities are also limited. Therefore, the County Council's exposure to debts and liabilities associated with its membership of the EMF will be limited; however, there is a small risk that the cap on liability for breaches of the Members' Agreement by other members is exceeded and the Council is unable to recover losses.
- 2.2 As with any company, the proposed Freeport Company will have a board of directors and these individuals will be responsible for the day to day decisions and owe their duty to the Company and not the Council. Company Directors have various duties to the Company, including those codified in the Companies Act 2006. They include ensuring the Company follows its constitution, acting in good faith and

in the interests of the Company, exercising independent judgement and avoiding any conflicts of interest, promoting the success of the Company, exercising skill and care, ensuring company compliance and having oversight of the work of the Executive Team. The Council, as a founding Member, has the right to appoint a director to the Board with voting rights. Certain important decisions are reserved to Members (e.g. the Council in its corporate capacity) and some require unanimous consent. These are set out in the Members Agreement. The Council will also be represented on the S151 Group and Public Sector Directors Group that will play a key role in reviewing and approving business cases for funding approval.

- 2.3 The EMF will need to be approved and designated by Government and in order to mitigate and manage the risk to the Council, the Freeport Company should be incorporated prior to the Government granting the Freeport status. On incorporation, the Freeport governing body will be accountable to Government for delivery of the proposals as set out in the final Full Business Case.
- 2.4 The Council has the power to join a company limited by guarantee under the General Power of Competence in Section 1 of the Localism Act 2011 (“the 2011 Act”). This gives the Council the power to do anything that an individual might do. The Power is restricted by Section 4 of the 2011 Act which requires that: a thing done for a commercial purpose must be something that the Council may also do for a non-commercial purpose; it must not be something that the Council is required to do by statute; and if done for a commercial purpose, then it must be done through a company.
- 2.5 The aim of the Freeport is to attract investment and spur local and regional economic growth as well as enhancing international trade, by simplifying the customs procedures for firms within the Freeport zone and reducing administrative costs of trading goods with the rest of the world thereby increasing competitiveness. These are not activities that the Council is required to do by statute and are activities that can be done for a non-commercial purpose, therefore, the General Power of Competence is engaged and can be relied upon to join the Freeport Company.
- 2.6 It is not intended that Derbyshire County Council cedes any power or responsibility to the Freeport Board, as it is currently proposed, and will retain decision making responsibility over relevant statutory powers, including that of Highway Authority.

3 Human Resources

- 3.1 There are no direct human resource implications associated with this report. DCC officer input into the EMF working groups has been provided through the Economy and Regeneration Service, Legal and Finance Service on a project basis. The Council's financial contributions to the Freeport arrangements, along with those of other partners and capacity funding from Government, will support funding for the proposed Executive Delivery Team and other associated human resources. Additional officer input is likely to be required, primarily from the Place Directorate and corporate services such as Finance and Legal to support the final stages of EMF set up and the subsequent implementation of the programme.
- 3.2 There is potential, in due course, for the Council to assume the role of project sponsor for infrastructure associated with the Freeport, which would require officers to be identified as Senior Responsible Owner and supporting roles. This has the potential to require additional posts to be added to the establishment on a temporary basis, depending upon the scale and complexity of the projects.

4 Information Technology

- 4.1 None directly associated with this report.

5 Equalities Impact

- 5.1 None directly as a result of this report but the EMF proposal seeks to positively impact on levelling up and opportunities for skills development and employment for all local residents.

6 Corporate objectives and priorities for change

- 6.1 The Freeport proposal is fully in line with the Council's priority to secure a green and prosperous economy as confirmed in the Council Plan.

Other

7.1 Summary of Risks

There is a range of legal, financial, legal, delivery and reputational risks. These risks are summarised below (but not limited to):

- That all parties do not formally commit to joining the incorporated EMF Company or the Government refuses to grant Freeport status;
- That the level of retained business rates has been over-stated and/or isn't fully realised;
- That sufficient retained business rates are not received in time to fund infrastructure or other mitigation works and that there is an expectation or obligation for DCC to cashflow, loan or take responsibility for such funding;
- That majority voting at EMF Board results in a decision that is contrary to that of DCC;
- That given the untested nature of the Freeport, there is insufficient capacity in the Executive Delivery Team and wider governance arrangements to mobilise and deliver for the business plan at pace or on time;
- That there is insufficient capacity within Derbyshire County Council to actively support the operational delivery of the Freeport, to the detriment of the Council and its residents;
- That the cap on liability for breaches of the Members Agreement by other members is exceeded and the Council is unable to recover losses.