



FOR PUBLICATION

DERBYSHIRE COUNTY COUNCIL

CABINET

19 October 2023

Report of the Executive Place

East Midlands Freeport, Proposals to Accept Amendments to Articles of Association and Members' Agreement and nominate alternative 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 the amended Articles of Association and Members' Agreement of the East Midlands Freeport (EMF) Company and to change the nominated Director to the Company and representative of the Council to act in the role as a member of the Company.

4. Information and Analysis

Background and Summary of Activity

- 4.1 Members will recall that Leicestershire County Council has undertaken the role of accountable body during the development period of the Freeport, supported initially by Ernst & Young. For the last six months or so, the activity of the Freeport Board has been supported by a small core team of executive officers who are now charged with ensuring delivery of the approved business case over the coming years.
- 4.2 Cabinet and Cabinet Members have received a number of reports over the past three years which chronicle the development of proposals to create the East Midlands Freeport (EMF). These reports have 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); 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); and more latterly, approve the Articles of Association and Members Agreement (Cabinet report 7 July 2022 – Minute No. 128/22 refers).
- 4.3 Over the course of these reports, members have duly considered the range of benefits, opportunities and risks associated with the East Midlands Freeport proposals. In approving submission of the FBC in February 2022, Cabinet was sighted on:
- *Confirmation of the Freeport geography and outer boundary.*
 - *The overall GVA uplift anticipated from the Freeport designation.*
 - *The ability to retain business rates uplift from the three named Tax sites (East Midlands Airport (EMAGIC), Ratcliffe on Soar and East Midlands Inter-modal Park (EMIP))*
 - *Details around custom and tax sites operation and management.*
 - *Travel to work areas within which development projects would be eligible for funding.*
 - *Governance risks and the need to ensure the necessary safeguards were in place to protect the Council's interest e.g. voting, quoracy, roles and responsibilities allocated to sub committees such as the Sites and Infrastructure Group and the S151 Group.*
 - *Level of financial risk exposure - including potential shared liabilities, setting the amount of any contribution to a contingency reserve for the Freeport or its general funding, confirmation of the 'no detriment clause' on retained business rates and assessing whether any retained risks could be mitigated by appropriate controls.*

- *Need for clarity on the EMF's relationship with the East Midlands Development Corporation.*
- *Process for seed funding allocations.*
- *Risks for billing authorities on subsidy control*

4.4 In the intervening period between February 2022 and July 2022, Council officers worked hard to address the risks and issues summarised above, providing robust input into the finalisation of the Articles of Association and Members' Agreement through the working group arrangements. All members of the Freeport Board were required to formally sign off the documents prior to the end of July 2022.

4.5 As a result, Derbyshire County Council Cabinet considered a report on 7 July 2022 which advised that the Articles of Association was the legal constitutional document of the Company that sets out the basic rules around how the EMF Company will operate and that the Members' Agreement is a "private" contract between the Limited Company and its Members, of which the Council will be one. The report sought approval to sign off the documents (which were attached as exempt appendices) and in so doing, duly considered the following:

- **An outline of the Articles of Association** document which advised:
 - *The Company will be established as a company limited by guarantee, - meaning the Council will only be liable for the amount of the guarantee (£1) should the Company be wound up. It also explained that should the Council decide to guarantee any obligations of the Company directly or loan it money, it would be at risk under any such agreement. Members were advised that at the time of the report in July 2022, the Council had not been asked to provide this.*
 - *The Board of 13 Directors would be made up of six public sector directors (one from each member council), six private sector directors (one from each private sector member) and an independent Chair. Each founding member has the right to appoint and remove a director. The independent Chair would 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 other public sector directors and three private sector directors.*
 - *The Board would endeavour to make decisions on a unanimous basis and where this 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 would 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 other public sector members and three private sector members.*
- *That the situation for Billing Authorities and Principal Ports (East Midlands Airport) 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.*
- **An outline of the Members' Agreement** document which advised that:
 - *The Agreement confirmed how the Company's day to day working capital and expenditure was to be funded by: capacity funding provided by DHLUC; a member Loan from Leicestershire County Council (LCC) as Lead Authority; and retained business rates.*
 - *There was 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.*
 - *The Agreement was clear 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 – supported by a 'Public Sector Directors Group' that will be responsible for making decisions on the use and allocation of retained business rates.*
 - *Certain decisions were 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 contained some decisions that are reserved to the Board of Directors and some decisions that require the consent of the Lead Authority.*
- **The role of directors and the Council as a member of the Freeport Company.** Cabinet was advised that:
 - *Subject to agreeing the Council became a member of the Company, the Council would be entitled to appoint one director to the Board. At the time, it was proposed the Leader of the Council be appointed as the Director and noted that as such, the Leader would represent the Council at the Board and at the public sector*

sub-group/ sub-committee which would have responsibility for the allocation of Retained Business Rates.

- *An officer would be permitted to attend the Board as an observer in support of the Leader and that other Council officers would attend relevant sub committees and subgroups.*
 - *The Council would have a role in decisions reserved to Members of the Company. Such decisions may be taken at a Members' meeting or by written resolution. At the time, it was proposed the Managing Director be appointed to represent the Council in its role as a Member of the Company.*
- **An overview of the funding arrangements.** Cabinet was advised that:
 - *The Freeport was expected to generate retained business rates income of approximately £0.9bn over the 25-year life of the Freeport.*
 - *The establishment of the Freeport had incurred significant expenditure and that those costs were being cash flowed by the Accountable Body (Leicestershire County Council) – likely to be in the region of £2m by the time the EMF was operational; this would be recognised as a loan to the EMF. A term loan facility had 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*
 - *The costs would be funded in the form of a commercial loan which would be paid back to Leicestershire County Council from the retained business rates.*
 - *The Council's S151 Officer was a member of the 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.*

4.6 A summary of legal, financial, delivery and reputational risks was included in the report presented to Cabinet. Noted risks were as follows:

- *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; and*
- *That the cap on liability for breaches of the Members Agreement by other members is exceeded and the Council is unable to recover losses.*

4.7 Having considered the issues outlined above – and balanced the relative risks and merits of the proposals - Cabinet approved the Articles of Association and Members’ Agreement for the East Midlands Freeport Company; agreed to become a member of the Company; agreed to nominate the Leader of the Council as the Company Director and noted the Leader will have the power to nominate an alternative member to attend Board meetings in their absence; and authorised the Managing Director (or authorised representative) to cast a vote as a Member of the Company, in relation to decisions reserved to members of the Company. Delegated authority was also given to the Director of Legal and Democratic Services in consultation with the Leader to agree minor amendments to the governance documents prior to submission to Government (Minute No.128/22 refers).

Changes to East Midlands Freeport Governance Documents Since July 2022

- 4.8 Although all EMF member organisations were requested to approve the Articles of Association and Members’ Agreement by the end of July 2022, only Derbyshire County Council did so. There are various reasons for other EMF members not signing off the documents at the time, including concerns over subsidy control for the billing authorities. The result is that over the last year, a number of amendments have been made to the two documents previously approved by Cabinet which, in the opinion of the Director of Legal and Democratic Services, are substantial enough to warrant a new Cabinet decision.
- 4.9 The Council has sought external legal advice in considering the revised documents and an executive summary and detailed comparison/assessment of the changes that have been made to the July 2022 version of the Articles of Association and Members’ Agreement is set out in exempt Appendices 2 and 3 respectively. However, the remainder of this report summarises the main changes and their implications for Derbyshire County Council.

4.10 A number of drafting amendments have been made and the main changes across the two documents are summarised below:

- **Definition of various key terms**
- **Intra-group and permitted transfers** – the originally approved documents would only permit transfer of private sector interests in the EMF without Board consent. The revised documents provide for two intra-group transfer mechanisms by which a private sector member may transfer its membership without Board consent, with certain conditions included that must be met before a permitted transfer can occur. This is an important addition from the Council’s perspective as, along with a number of other amendments, it provides the relevant safeguards to ensure the transferee is an entity incorporated within the UK and is not an ‘unsuitable person*’ (**term is defined*). The provisions will ensure a reasonable level of control over the private sector member who is transferring their membership.
- **Withdrawal of tax site operator and principal port operator** from the Freeport – the initial delivery period of the Freeport is defined as expiring on 30 Sept 2026 – however, it is possible this may be extended by the Government. If this turns out to be the case, it would provide the Freeport with more time to develop out the tax sites and ensure benefits are secured. A number of amendments have been made to ensure any withdrawal by a TSO from the Freeport before the end of the delivery period is appropriate, timely and consented – either by the founding members and/ or DLUHC. A number of other conditions are also set out in the documents which help protect the Council’s position and these are summarised in exempt Appendix 3.
- Development of a **Code of Conduct** for Tax Site Operators.
- **Member liability** if required to provide a financial contribution to the Company and/ or sponsoring a capital project. Amendments are considered to be non-material over and above those previously reported in July 2022.
- Responsibilities of **billing authorities** in relation to business rates.
- **Role of s151 officer group** – which will be to assess whether to impose consequences under the Tax Site Operator Code of Conduct, Tax Site Occupier Code of Conduct and make recommendations to the Board on such matters. The Council is represented on the s151 group.
- The **use of ‘reasonable endeavours’** by Members to facilitate a change in the TSO or owner of the principal port on the occasion that land or ownership is being transferred. However the terms are drafted in such a way so as not to fetter discretion.
- Working **capital and expenditure of the Freeport** is funded by the Loan (from LCC) and retained business rates funds (RBR) –

- amendments clarify that LCC, as accountable body, has primary call on the RBR to repay the Loan and other costs incurred.
- Clarifying that whilst the **Freeport Board will set the RBR Strategy, it is not involved in decision making** regarding the use or allocation of such funds; this responsibility is a public sector reserved matter to be taken by the Public Sector Directors' Group, based on the recommendations of the s151 Sub-group (working with the Billing Authorities).
 - **Review periods**, processes and approvals for the Freeport governance structures, liability caps – a sub-committee is to be established to undertake the work at least six months from the end of the initial delivery period (Sept 2026).
 - **The cap on Member liabilities** has been reduced from £1m (as of July 2022) to £750,000 in the revised documents – this reduces the potential liability of the Council within each liability cap period, but at the same time increases the risk that the Council is unable to recover all losses arising from breach of the Members Agreement by another Member.

Other Changes and Updates Since July 2022

- 4.11 It is worth members noting that in the period since July 2022, a number of other changes have taken place either directly relating to the Freeport or within the context of the wider operating environment.
- 4.12 It is important to make clear that although the Full Business Case was signed off by Government in March 2023, the Freeport is still in the 'set up phase' of the Company and has not yet been incorporated; incorporation will only take place once the Articles and Agreements outlined above have been signed off by individual Members and by the Board itself. This is currently planned for December 2023, following a review by the Legal and Governance Group in October on which Derbyshire County Council is represented. NB it is possible that an 'agreement in principle' to sign off the documents will be sought at the November Board meeting. Noting that further changes may be required following these meetings, it is proposed that Cabinet delegates authority to the Director of Legal and Democratic Services in consultation with the Leader to agree any amendments to the Members' Agreement and Articles of the Association.
- 4.13 The Memorandum of Understanding that is to be signed by the Freeport, the billing authorities and the Government is being finalised and it is likely that reference will be included to keep governance arrangements under review. This will help ensure the changing nature of relationships with the emerging East Midlands County Combined

Authority (EMCCA), the East Midlands Development Corporation (DevCo) and the East Midlands Investment Zone (EMIZ) can be reflected – see below. Reference to the relationship between the Freeport and the EMCCA is also included in the Members' Agreement.

- 4.14 To help maintain progress through the set up phase, the Freeport has now appointed a number of officers to the Executive Delivery Team; these include a chief executive, a senior programme manager and posts supporting finance, engagement and human resource functions. Budget for these posts is being taken from the Loan funding (from LCC) in the first instance, with the retained business rates being used to fund the team in the long term.
- 4.15 The three Billing Authorities (Rushcliffe, North West Leicestershire and South Derbyshire district councils) have continued to work through issues regarding the application of subsidy control; these matters, although well progressed, are not yet fully reconciled and it is likely this work will be concluded after the date of the Council's Cabinet meeting. Any updates on the progress or conclusion of the subsidy control work which become available prior to the time of the meeting will be reported verbally by officers.
- 4.16 At the moment, the completion of work on subsidy control is likely to take place at the end of October and into November – with a report being considered at the December Board, alongside the final version of the Articles of Association and Members' Agreement. Given that Cabinet will have already considered the revised documents by this date, it is proposed that a delegation be given to the Director of Legal and Democratic Services in consultation with the Leader to agree any final amendments to the Articles of Association and Members' Agreement should they be impacted by the report on subsidy control. Any such amendments are not expected to be material.
- 4.17 Progress on the development of the EMIP site in South Derbyshire (adjacent Toyota) has slowed. Whilst disappointing, Goodman's (the developer) and Etwall Land Limited (the site owner) continue to engage with existing and potential customers to promote the site and have indicated they still aim to bring forward development within the tax window of the initial delivery period (ie before 30 September 2026). This would mean tax benefits would still be attributable to the site. Obviously, the County Council's interest in the Freeport arrangements is predicated on Goodmans and Etwall Land Limited being a Member of the EMF company and the inclusion of a site within the County's boundary; therefore, it is proposed that the decision of Cabinet is subject to

necessary approvals by Goodmans and Etwall Land Limited to be a Member of the company. To ensure there is clear understanding of progress and commitment to the development of the EMIP site, the Council is working with the Freeport executive to understand the delivery and key milestones for site development. If the Council is minded to sign off the revised Articles of Association and Members' Agreement, provision will need to be made to review the situation should there be no development site within Derbyshire. In the event the Council determined it wished to withdraw from membership of EMF, at least six months' written notice would need to be given to the Board.

- 4.18 Over the last 12 months, the Freeport Board has reviewed the list of proposed sites suitable for 'seed capital funding'; this is an incentive pot to pump prime early development across the three Freeport sites and facilitate interest in the development market. Members will recall that a scheme to create a 1km cycle path in South Derbyshire adjacent the EMIP site was included on the initial list and a business case approved for £1m funding. However, given the above issues regarding progress of EMIP, the Freeport Board re-evaluated the seed funding criteria and considered a revised list of projects at its meeting on 20 July 2023 – this resulted in the withdrawal of the cycle way project and grant allocation for the time-being. Whilst disappointing, this is understandable given the need to facilitate early development at active sites elsewhere in the Freeport
- 4.19 Earlier in 2023, Government launched its Investment Zone (IZ) initiative and confirmed that existing combined authorities, plus those in an advanced stage of development, would be given the chance to create a zone within their geography; the EMCCA was included in the list of combined authority areas. Over the past three months or so, work has been undertaken to develop an IZ proposition which includes identifying a number of sites for retained business rates and tax incentives. Although the geography of the East Midlands IZ does not overlap with the geography of the Freeport, Government has requested that work is undertaken to align governance arrangements – primarily due to the similarity of work that will be undertaken on inward investment and business rates investment strategies. This work is at an early stage of development but will need to meet IZ delivery timescales and be completed by early November 2023.
- 4.20 Cabinet previously agreed to nominate the Leader of the Council as a Director of the Company and noted that as such, the Leader would represent the Council at the Board and at the public sector sub-group/ sub-committee which would have responsibility for the allocation of Retained Business Rates. Since this time, it has been determined that

as the work of the Freeport has a strategic focus on supporting economic growth and the levers of regeneration, (most notably inward investment, business support and skills capital) it is considered the Council would be more appropriately represented by the Cabinet Member for Clean Growth and Regeneration. As a Director, the Cabinet Member for Clean Growth and Regeneration, will have the power under the Articles of Association to appoint an 'alternate' to attend a Board meeting in their absence.

- 4.21 On 7 July 2022, Cabinet also agreed 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. It is proposed that this decision be reaffirmed.

Additional Information and Advice

- 4.22 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.
- 4.23 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. Specifically, the information contained in Appendices 2 and 3 contains legal advice which is subject to professional legal privilege. 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 in December 2023, ahead of the company being formally incorporated.

Conclusion

- 4.24 A summary of the key risks which have been taken into account is set out below. These reflect the risks considered by Cabinet in making its previous decision in July 2022 (see paragraph 4.6 of this report) but also reflect the updates and change in circumstances over the past 12 months:

- That all parties do not formally commit to joining the incorporated EMF Company or the Government refuses to grant Freeport status;
- That subsidy control issues are un-resolved and the relevant billing authorities are not able to sign up to the Freeport;
- 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 reasonable alignment between the governance arrangements of the Freeport, IZ and EMCCA cannot be reached, leading to duplication of activity or confusion in the developer market;
- That development sites within Derbyshire do not come forward either in time or at all with resulting implications for the Council's role on the Freeport Board;
- 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; and
- That the cap on liability for breaches of the Members Agreement by other members is exceeded and the Council is unable to recover losses.

4.25 Members should note that Council officers have contributed to the drafting of the amended governance documents through the Governance Group, supported by external legal advice. On balance, it is concluded the proposed changes are either non-material or are acceptable, given that appropriate checks and balances are in place to mitigate the risks that have been summarised above. These checks and balances are confirmed in Appendices 1, 2 and 3 of this report.

4.26 Cabinet is therefore asked to approve the revised Members' Agreement and Articles of Association attached at exempt Appendices 4 and 5 of this report.

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. The Council has previously agreed to join the EMF Company (Minute No. 128/22 refers). Although the Council signed off the Articles of Association and the Members' Agreement in July 2022, this version has now been superseded so consideration needs to be given to the acceptability of the revised documents which is the purpose of this report.
- 6.2 Nominate an alternative Company director. The Council previously agreed to nominate the Leader as a company director and Board representative. However, for the reasons set out in paragraph 4.21, this nomination is no longer considered appropriate. The proposal is to nominate the Cabinet Member for Clean Growth and Regeneration instead. Other portfolio holders have been considered but given the scope of work involved in the Freeport, the roles and responsibilities most closely align to those of Clean Growth and Regeneration.

7. Implications

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

8. Background Papers

- 8.1 Proposals to Submit Outline Business Case to Create a Freeport: Cabinet member meeting 3 September 2021.
- 8.2 Proposals to Submit Full Business Case to Create a Freeport: Cabinet report 15 February 2022.
- 8.3 Proposal to Submit Final Full Business Case to Government to Create an East Midlands Freeport: delegated officer decision, 13 April 2022.
- 8.4 Proposals to Become a Member of the Freeport Company and Nominate a Director: Cabinet report 7 July 2022

9. Appendices

- 9.1 Appendix 1 – Implications.
- 9.2 Exempt Appendix 2 – External legal advice on revised proposals – including summary of risks.
- 9.3 Exempt Appendix 3 – Comparison and Assessment of July 2022 and September 2023 Articles of Association and Members’ Agreement.
- 9.4 Exempt Appendix 4 Final East Midlands Freeport, Members’ Agreement.
- 9.5 Exempt Appendix 5 – Final East Midlands Freeport, Articles of Association.

10. Recommendations

That Cabinet, subject to:

- I. Resolution of outstanding subsidy control issues through Government guidance or by way of acceptable legal advice; and
- II South Derbyshire District Council, Goodman EMIP (UK) Limited and Etwall Land Limited also confirming its approval to become a member of the Freeport and agreeing the revised Articles of Association and Members’ Agreement:
 - a) Approves the Council becoming a member of the East Midlands Freeport Company.
 - b) Agrees the revised Articles of Association and Members’ Agreement for the East Midlands Freeport Company as set out in exempt Appendices 4 and 5.
 - c) Authorises the Director of Legal and Democratic Services, in consultation with the Leader, to agree amendments to the Articles of Association and Members’ Agreement.
 - d) Authorises the Director of Legal and Democratic Services, in consultation with the Executive Director – Place, to complete any documentation necessary to facilitate incorporation of the Company, following confirmation of c) above.
 - e) Agrees to amend the previous approval to nominate the Council Leader as Company Director and instead nominate the Cabinet Member for Clean Growth and Regeneration as the East Midlands Freeport Company Director on behalf of Derbyshire County Council.
 - f) Notes that the Council’s Cabinet Member for Clean Growth and Regeneration, as a Director, will have the power under the Articles of

Association to appoint an Alternate to attend a Board meeting in their absence.

- g) Reaffirms the decision to authorise the Managing Director (or 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.
- h) Agrees that periodic progress reports are brought to Cabinet or another appropriate forum by way of updates for members.

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 and subsequent growth strategies that are now emerging.
- 11.2 To enable the Council to formally commit to joining the incorporated EMF Company at the EMF Board meeting due to take place in December 2023. The decision is subject to approvals from key partners in order to protect the Council's position and ensure its continued involvement in the Freeport is necessary and appropriate.
- 11.3 To ensure the Council has appropriate representation on the Board of Directors and as a Member of the Company.
- 11.4 To ensure that members are kept up to date with emerging issues and progress of the Freeport development.

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

- 12.1 No.

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Implications

Financial

- 1.1 The costs of the set-up phase and the first year of operation will incur operating costs estimated to be approximately £2.5m. These costs will be funded in the form of a commercial loan to the EMF from Leicestershire County Council as Lead Authority/Accountable Body. The value of the loan was originally £2m but earlier this year LCC agreed to increase the upper limit on the loan facility to £4m with conditions for draw down of any amount over £3m to be agreed between LCC's Director of Corporate Resources and the EMF's Chair.
- 1.2 The loan facility is being 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.
- 1.3 The Loan will be paid back to Leicestershire County Council from the retained business rates and, as set out in the Articles of Association and Members' Agreement, the primary call on business rates will be repayment of the Loan. The Freeport is expected to generate retained business rates income of approximately £0.9bn over the 25-year life of the Freeport.
- 1.4 Although there are no immediate, direct financial implications arising from this report, membership of the Freeport Company will bring with it financial obligations and budgetary decisions. As noted in the report and Appendix 3, the Council's liability will be subject to a nominal contractual limit of the amount of the guarantee in the event of winding up. The Council will also be liable for breaches of the Members' Agreement, subject to a cap of £750,000. Following repayment of the Loan, the retained business rates for the Freeport area will fund both the operation of the Company and the delivery of a range of projects in accordance with an agreed business case.
- 1.5 The governance arrangements in place ensure the financial risks to the Council are being managed effectively. This includes both the S151 Group and Public Sector Directors Group which will play a key role in reviewing and approving business cases for funding approval.

Legal

- 2.1 The EMF is currently in set up phase and the County Council is proposed to be represented by the Cabinet Member for Clean Growth and Regeneration on the EMF Board. As Cabinet has previously been advised, the Board has agreed to move to an incorporated governance structure and establish a Freeport Company limited by guarantee, subject to approval of the appropriate governance documents and confirmation of subsidy control measures. 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 has a board of directors and these individuals are 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 is also 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 currently proposed, and will retain decision making responsibility over relevant statutory powers, including that of Highway Authority.
- 2.7 A number of amendments have been made to the Articles of Association and the Members’ Agreement since they were previously approved by Cabinet which are not minor. As a result, the Director of Legal and Democratic Services is unable to exercise her delegation and approval for the revised version needs to be given by Cabinet. Cabinet should consider the external legal advice on the revised proposals, including the summary of risks at exempt Appendix 2, when making its decision.

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 Services on a project basis. The Freeport Executive Delivery Team has now been established and appointments almost complete. Additional Council 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.

Information Technology

- 4.1 None directly associated with this report.

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.

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 (for example, Health and Safety, Environmental Sustainability, Property and Asset Management, Risk Management and Safeguarding)

Summary of Risks

- 7.1 External legal advice has provided a summary of risks and potential mitigations. These are covered in exempt Appendices 2 and 3.