

REPORT OF THE LEADER OF THE COUNCIL

EAST MIDLANDS FREEPORT GOVERNANCE

Purpose of the Report

1. This report updates Cabinet on the progress of the East Midlands Freeport and the recommendations of the last report to Policy Committee on 10 February 2022.
2. The report also seeks approval of the governance arrangements for the East Midlands Freeport Limited (“the Company” or “EMF”) and for the Council to join the Company and participate in its incorporation, together with various enabling approvals to support the Council’s effective participation in the Company.
3. This is a Key Decision because it may result in expenditure of £1 million or over, or it will have significant effects on two or more electoral divisions.

Information and background

4. Freeports are a type of special economic zone designed to create a favourable business environment which attracts inward investment and international trade to support jobs and growth. Within freeports, trade is facilitated by reducing the direct and administrative costs of trading goods with the rest of the world. Goods entering a freeport zone are not subject to typical import procedures but can be processed and re-exported from the zone, without being considered to have entered the host county. Import duties and procedures are only borne at the moment goods enter into the domestic economy.
5. Appendix 1 to this report includes frequently asked questions to aid a fuller understanding of the East Midlands Freeport.
6. The Nottinghamshire Plan sets out an ambitious long-term strategy towards a healthier, more prosperous, and greener future for everyone. The Council’s engagement and involvement with the EMF as part of its economic development priorities was included in the public consultation exercise relating to the development of the Council’s current 10 year Nottinghamshire Plan. This report supports Ambition 7 – attracting investment in infrastructure, the economy and green growth of the Plan. A key component of this ambition is the delivery of the EMF. The recommendations contained within this report seek approval

to appropriate governance structures to oversee this significant investment in the regional economy.

7. Some information contained in this report is not for publication by virtue of paragraph 3 of part 1 of Schedule 12A of the Local Government Act 1972 as it contains information relating to the financial and business affairs of the partners collaborating with the County Council (including the Council) to develop these proposals and paragraph 5 of part 1 of Schedule 12A of the Local Government Act 1972 as it contains legal advice to the Council which is professionally legally privileged information. Having regard to all the circumstances, on balance the public interest in disclosing the information does not outweigh the reasons for exemption because the information would add a limited amount to the public understanding of the issues and would significantly damage the Council's and the partners commercial position. The exempt information is contained in the Exempt Appendix.
8. On 10 February 2022 Policy Committee approved, in principle, the draft East Midlands Freeport Full Business Case ('FBC') subject to a number of outstanding issues being resolved. The delegation to endorse the final version of the FBC was as follows:
 - a. Satisfaction that the final draft FBC does not increase the risk or financial exposure of the Council beyond the parameters set out in this report; and
 - b. Sufficient detail of the governance structure for the Company and associated safeguards being agreed between the parties to protect the Council's interest prior to incorporation of the Company, including setting the amount of any contributions to a contingency reserve for the Freeport or its general funding.
9. On 12 April 2022, the delegation to endorse the final version of the FBC was discharged by the Chief Executive following consultation with the Leader of the Council, the s151 officer and the monitoring officer and considering technical, legal and financial advice which included the following regarding a number of key issues:
 - a. Liability for overspends – Initial guidance suggested sponsoring authorities would be responsible for any overspend, regardless of the cause. Following discussion, it has been agreed that a mechanism will be developed to return back through the business case process to request additional funds in the event of an unavoidable cost overrun. The total costs of approved projects will need to be contained within the overall retained business rates (RBR) available.
 - b. No Detriment – The principle of no detriment to local authorities because of Freeport has been included in the OBC and FBC and is to be protected through a Business Rates Equalisation Mechanism (BREM) and through a Memorandum of Understanding between collection authorities and Leicestershire County Council (the accountable body for the Freeport). This will ensure that the Freeport would pass back RBR to the relevant authorities to ensure the principle is maintained.
 - c. Amendments to the retained business rates ('RBR') – Following queries from Government on the financial model a review has been undertaken and adjustments have been made to the final FBC version which have reduced the forecast RBR over the lifetime of Freeport. The revised figures are in line with RBR estimates from other Freeport bids. A fully planned and costed infrastructure programme matching the RBR has not yet been developed. Bids

for infrastructure funding from the RBR will need to be submitted for formal approval to the Public Sector Directors' Group (this is the group formed by each of the public sector parties to the EM Freeport currently; Leicestershire County Council, Nottinghamshire County Council, Derbyshire County Council, South Derbyshire Council, North West Leicestershire Council and Rushcliffe Borough Council). Each of the Councils' has one vote in terms of its approval (or not) to support bids. The East Midlands Development Corporation Ltd (EM Dev Co Ltd) will be able to submit plans for infrastructure in respect of those EMF sites where it has an interest, alongside all other parties involved in the EMF. Further information in respect of EM Dev Co Ltd.'s rights are set out in the Exempt Appendix.

- d. Browne Jacobson external legal advice concluded that in broad terms the governance documents are acceptable.
 - e. Agreement to the FBC was conditional on the County Council being satisfied with sufficient details of the governance structure for the Company and associated safeguards being agreed between the parties to protect the Council's interest prior to incorporation of the Company, including settling the amount of any contributions to a contingency reserve for the EMF or its general funding (if necessary). Further information about these matters is addressed in this report.
10. Approval by the County Council was followed by the EMF Board approving the FBC on 13th April prior to its submission to Government.
11. Since the February Policy Committee report, work has progressed on the governance arrangements for the Company which are now in an agreed form subject to formal approvals from each of the proposed founding members. The County Council has contributed to the development of the governing documents and has received external legal advice ahead of making the recommendations in this report.

Governance and legal considerations

12. The governance of the Company is described in the Articles of Association, and the Members Agreement. An executive summary of the governance arrangements is set out in the Exempt Appendix to this report.
13. The Freeport is currently in set up phase and the Council is currently represented on the shadow East Midlands Freeport Board by the Cabinet Member for Economic Development and Asset Management. On 2 September 2021, Policy Committee endorsed the decision taken under delegated authority to add the shadow Board to the Council's Outside Bodies Register.
14. The shadow Board has agreed to move to an incorporated governance structure and establish a Freeport Company limited by guarantee as previously reported and set out in the FBC. 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 on its incorporation subject to approval by Government and other matters being resolved including subsidy control.

15. A company limited by guarantee is a company that does not have shareholders. Instead, it is owned by a group of members who all agree to pay a certain amount of money (the guarantee) 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, the guarantee amount would in the ordinary course be the full exposure of the Council – this is explained in the FAQ and the Exempt Appendix. Inter-Member liabilities are also limited, and this is further explained in the Exempt Appendix. Therefore, the County Council's exposure to debts and liabilities associated with its membership of the Freeport Company will be limited.
16. As with any company, EMF 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. The Council, as a founding Member, has the right to appoint a director to the Board with voting rights.
17. Certain important decisions are reserved to Company Members as opposed to the Company Directors (e.g. the Council in its corporate capacity) and some require unanimous consent. These are set out in the Members Agreement and key points about this are set out in the Exempt Appendix to this report. The Council will also be represented on the S151 Officers Group and Public Sector Directors Group that will play a key role in reviewing and approving business cases for funding approval by the Company.
18. The Freeport itself has been approved and designated by Government under the Designation of Freeport Tax Sites (East Midlands Freeport) Regulations 2022. On incorporation the Company and the Lead Authority (Leicestershire County Council) will be accountable to Government for delivery of the proposals as set out in the final Full Business Case and in accordance with a Memorandum of Understanding to be entered into by the Lead Authority (Leicestershire County Council), the Company, each of the billing authorities within the Freeport area (Rushcliffe Borough Council, North West Leicestershire District Council and South Derbyshire District Council) and the Department for Levelling Up, Housing and Communities (DLHUC). This Council is not a party to this MOU. This MoU will govern the working relationship between the parties and sets out the mutual understanding of the governance model, grant funding arrangements/financial arrangements, strategic and Freeport delivery, reporting requirements and performance management of the Freeport.
19. 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.
20. 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 Company.
21. The Freeport, the East Midlands Development Corporation and the emerging East Midlands Combined County Authority (incorporating an East Midlands Investment Zone) have some areas of potential overlap in terms of roles, powers and responsibilities. This is because all of these entities are focused at least to an extent on improving inward investment into the East

Midlands, and on economic growth. At the moment it is unclear how the relationship between them all will operate but Government is clear that there will need to be streamlined and integrated governance arrangements in place. As a result, the organisations involved in each of the above existing or emerging bodies will need to engage in proactive dialogue to ensure that agreement can be reached which will best benefit the areas in question using the most appropriate powers and organisation to do so. Within the Freeport's governance documents, there is recognition that the advent of a Combined County Authority for the East Midlands will necessitate a review of the Company's governance arrangements.

County Council EMF Co membership

- 22. As EMF will become a company limited by guarantee registered at Companies House, the County Council's representative will be appointed as a Director of the Company.
- 23. The responsibility of the County Council's nominated Director will be to represent the County Council at the EMF Board. However, it is recognised that the Council's appointed director will be a statutory director of the EMF meaning that the director will need to comply with his/her director's duties under the Companies Act 2010 and in particular ensure that all decision making is in the interests of the Company. The Council will also be permitted to appoint an Alternate Director to act if the relevant Cabinet Member is unable to attend any specific meetings. An officer will be permitted to attend the EMF Board as an observer in support of the Cabinet Member. The County Council will also have senior officer representation on the various EMF Sub Committees and subgroups.
- 24. It is proposed that the changed status of the Board (following incorporation) and the addition of the various sub-committee and sub-groups be reflected within the Council's Register of Outside Bodies.

Other Options Considered

- 25. In the event the County Council chose not to approve the governance documents, this would compromise County Council support for the Company and its ability to be involved in the Company, including by taking decisions in respect of those matters reserved to members, nominating a Director to the EMF Board and representatives to the Company's sub-committee structures. This would reduce the Council's influence in the project and how any funding is allocated. It would also compromise the achievement of benefits and opportunities outlined in this and previous reports for Nottinghamshire and its residents. In addition, the Freeport would fail a key criterion in the Government assessment of the EMF without ongoing support of key local authorities. At the same time, Freeport sites would remain active, but the County Council would not have the same kind of influence as a member of the EMF.

Reason/s for Recommendation/s

- 26. The County Council has contributed to the production and refinement of the legal governance documents and external legal advice has confirmed that these are broadly acceptable. Approving the governance documents and agreeing to join EMF Co will enable the County Council to continue to play a role to ensure the delivery of the benefits for residents and businesses in the East Midlands.

Statutory and Policy Implications

27. This report has been compiled after consideration of implications in respect of crime and disorder, data protection and information governance, finance, human resources, human rights, the NHS Constitution (public health services), the public sector equality duty, safeguarding of children and adults at risk, service users, smarter working, sustainability and the environment and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

Financial Implications

28. Although there are no immediate direct financial implications arising from this report, membership of the Company will bring with it financial obligations and budgetary decisions. As referenced above the Council's liability will be subject to a nominal contractual limit of the amount of the guarantee in the event of winding up. During the set-up phase and the first years of operation Leicestershire County Council, as Lead Authority/Accountable Body, will incur operating costs estimated as at the end of 2022/2023 financial year just under £2m. Given the expected timelines of when new premises will be occupied with the tax sites (and retained business rates funds available), it is anticipated that this will increase further over 2023/2024 financial year to around £3m. Leicestershire County Council agreed earlier this year to increase the upper limit on its loan facility to £4m, with conditions for draw down of any amount over £3m to be agreed between Leicestershire's Director of Corporate Resources with the EMF's Chair. 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 RBR. In the longer term the RBR 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.

Implications for Sustainability and the Environment

29. Core components of the Freeport are focused on enhancing natural capital, environmental sustainability and the journey to a zero carbon future. One of the formal sub-committees in the Freeport governance structure will focus on net zero and as such, Members can have assurance that implications for the environment will be actively considered by the Freeport during implementation.

30. The proposition at Ratcliffe on Soar includes proposals to bring research, innovation and enterprise together with industry and investors on one site to accelerate the design and delivery of new zero carbon technologies and manufacturing. Moreover, the Ratcliffe on Soar vision includes provision of new forms of energy production including through the use of hydrogen which will further enhance our transition to a low carbon economy.

31. The proposals at EM Intermodal Park and the Airport sites in the Freeport bid are expected to include low carbon industries.

Public Sector Equality Duty implications

32. The Freeport is targeted at 'levelling up' and improving employment, productivity and prosperity outcomes. It is important that the region has an economic plan and programmes of activity such as that embodied by the Freeport which will accelerate the creation of new higher value jobs and provide access to skills and training so that local people can benefit from new opportunities. There are no equality implications that arise from these proposals.

RECOMMENDATION/S

It is recommended that Cabinet:

- 1) Approves the Council becoming a member of the Company on its incorporation and the governance documents described in this report subject to:
 - a. resolution of any outstanding subsidy control issues through government guidance or by way of acceptable legal advice.
 - b. all other current East Midlands Freeport public sector partners agreeing to incorporate the Company on like terms; and
 - c. the Director Place (or his nominee) in consultation with the Cabinet Member for Economic Development and Asset Management approving and finalising any further minor drafting changes required to the Articles of Association and Members Agreement for the Company and any other documents required to facilitate the Company's incorporation in light of any other technical, legal or financial advice which may be relevant;
- 2) Authorises that the existing inclusion of the shadow East Midlands Freeport Board within the Council's Outside Bodies Register be amended to reflect the change to Company status on incorporation and the addition of subgroups and sub-committees, and that the Cabinet Member - Business Management makes the required Member appointment/s (including the provision for a Member appointment as an alternative Director) and any officer appointments in consultation with the Chief Executive.
- 3) Authorises the Chief Executive or his nominee to cast a vote on behalf of the Council, as a member of the Company, in relation to member decisions, or member consent matters whether at a member meeting or otherwise, when necessary, having first taken legal, technical and financial advice as appropriate; and
- 4) Agrees that periodic progress reports are brought to Cabinet or the appropriate County Council Cabinet Member or Committee.

**COUNCILLOR BEN BRADLEY MP
LEADER OF THE COUNCIL**

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Constitutional Comments (SSR 27/10/2023)

33. These recommendations fall within the scope of matters which may be determined by Cabinet. Information about the legal issues has been provided by external legal advisors and is covered in the Exempt Appendix.

Financial Comments (KRP 25/10/2023)

34. The overall risk and potential financial exposure associated with the Freeport has significantly reduced due to:-

- a. The appointment of a Freeport Chief Executive and other staff. Freeport has appointed consultants to review and update the RBR model. The revised model confirms the level of RBR and the cashflow required to repay the startup loan and interest by 2024/25. The model will continue to be updated and monitored with input from private sector partners and District Councils. The model has been agreed by the Freeport Board.
- b. Ongoing work by Freeport and District legal advisors to confirm that operation of the Business Rates Relief scheme meets all subsidy control legislation. There is engagement with DLUHC to confirm the correct route for approval of this.
- c. Cabinet has approved an updated Dev Co annual report and ongoing funding. This was prepared to take account of Freeport and any other changes which may impact its operation (e.g., devolution). The report states:

“The year 3 business plan deliverables set out above have been endorsed by EM DevCo’s Oversight Authority and sit within the context of a longer delivery timescale. In particular this work is highly complementary to other regional initiatives, including HS2, EM Freeport and devolution, through providing clear proposals and delivery mechanisms for growth and infrastructure.”

The report recognises that there will need to be further consideration of NCCs contribution in future years, taking account of “...legislative and machinery of government changes that are likely to impact upon EM DevCo in the next 12 months and whether the Business Plan objectives continue to offer value for money and support delivery of NCC strategic objectives.”

35. The exempt appendix identifies provisions regarding liability between Members. This liability would only crystallise where NCC is not acting in accordance with its obligations under the Members’ Agreement, either by not doing something that it is required to do or by doing something that it should not do. The risk of this occurring is regarded as low hence the associated financial risk is minimal provided the Council acts in accordance with its rights and obligations and monitors this continuously.

Background Papers and Published Documents

Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

- February 2022 Policy Report
- Freeport Bidding Prospectus
 - a. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/935493/Freeports_Bidding_Prospectus_web_final.pdf
 - b. January 2021 – Policy Committee report
- September 2021 – Policy Committee report

Electoral Division and Member Affected

- All