Summary of Key Matters – Draft Members Agreement/Draft Articles of Association

The incorporation of the company will involve the Council, as a founding member, agreeing to two company governance documents. The first being the articles of association which is the legal constitutional document of the company, which sets out how the company is constituted and the basic rules around how the company will be run. The second is a members agreement, which is a "private" contract between the members to the company and the company itself that regulates the relationship between them. Whilst you do not have to have a members agreement, it is a very common document in these kind of company arrangements, particularly as in this case we have both public sector and private sector members.

The key points to note from the documents are as follows:

Articles:

- 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.

- 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 director to be present, along with two public sector directors and three private sector directors.

- Decisions made by directors will first be made 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 <u>and</u> a majority of the private sector directors agreeing.

- Member decisions will be made at company general meetings. 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.

Members Agreement:

- The agreement confirms that 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.

- The Council may make a request to withdraw from the company, which will be subject to certain company decisions, depending on its status in the Freeport at the time of the request, as follows:

    - If the Council requests to withdraw prior to the end of the Delivery Period (22 March 2022-30 September 2031) then it will require a Public Private Majority member decision
    - If the Council requests to withdraw after the end of the Delivery Period but it still has a tax site in its area then it will require a Public Private Majority member decision
    - If the Council requests to withdraw after the end of the Delivery Period and it no longer has a tax site in its area then that will only require a decision of the Public Sector Directors' group

- There will be an annual business plan that will be approved by the board of directors each year. The business plan will set out how the company anticipates delivering its objectives over the following four years, including funding considerations.

- The scheme delivery period extends to 30 September 2031 in two discrete five year delivery periods (22 March 2022 to 30 September 2026 and 1 October 2026 to 30 September 2031) (previous drafting was only to 2026 with a potential to extend). Each party's (including the Council's) liability to other parties under or in connection with the Members' Agreement is capped in aggregate at £750,000 for each five year delivery period. In the event of further five year delivery periods being agreed a similar cap will apply. The cap is not applicable to data protection penalties, death or personal injury or fraud liability, but liability for loss of profit, revenue, savings and indirect loss are excluded. Previous drafting only addressed a cap of £750,000 for the first five year delivery period, so needed to change to reflect both the now extended time period and potential future agreed extensions.

- It is usual to provide for liability caps in commercial arrangements between organisations and the figures involved are intended to be reflective of the scope of financial activities that all parties are engaging in. That said, the scope of Council risk is anticipated to be low as its key activity relates to the application of business rates relief in accordance with its adopted policy relating to the scheme, and the application of that policy is and remains solely at the discretion of the Council.