The little booklet of regeneration

Guidance for local authorities and others

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Contents

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Key features of three common joint venture structures

1. Contractual Joint Venture

Structure

Parties keep own land, until it is disposed of to the ultimate purchaser.

Contractual joint venture (JV) documents (e.g. collaboration agreement) deal with sharing of costs and receipts and decision making.

Advantages

Simple concept – normal contract law principles apply.

Parties retain ownership of/control over own land.

Disadvantages/other considerations

As parties keep own land until later disposal, some parties may be concerned about lack of security for performance of the others' contractual obligations.

Procurement: who will appoint contractors and consultants or will all parties appoint jointly? Consideration of public contracts procurement regimes will be required. Warranties may be required by any non-appointing party.

Dealings with other third parties and authorities can be a challenge, particularly where one party is also a planning or highway authority.

Tax considerations*

Stamp Duty Land Tax (SDLT):
N/A (broadly) unless there are property transfers or leases between the JV parties.

Direct taxes (e.g. corporation tax, CGT, income tax):
No separate taxable JV vehicle, so each JV party checks its own tax on any land disposal or income: local authorities have a statutory exemption; nonlocal authority JV party may be taxable on its income and gains.

VAT:
provided no co-ownership or partnership, JV parties unlikely to want to set up a separate VAT registration; each party would account for/recover VAT through its own VAT registrations.

* *The previous comments on tax are brief selected points only; they do not cover all the tax issues which may arise in using these structures and are not intended to represent tax advice to any particular person, company or body. We recommend that any party involved in any such structures and transactions should take tax advice as appropriate.*

Key features of three common joint venture structures
2. Land Pooling/Trust

Structure

Parties transfer their land to a trustee or trustees – which may be the parties themselves (subject to a legal maximum of four trustees) or a new company, LLP, partnership or other joint venture vehicle. This gives each of the parties an agreed percentage interest in the overall development site.

Trust documents detail the sharing of costs and receipts and decision making.

Advantages

Parties fully bound and each acquires a beneficial interest in all the land.

Procurement: the Trust can appoint contractors and consultants (but procurement regime cannot be ignored).

Dealings with other third parties and authorities simple – the Trust enters into contracts and statutory agreements.

Disadvantages/other considerations

Parties part with legal title to own land – this may not be appropriate until later in the development promotion timeline.

Tax considerations*

The following are assumptions that assume a bare trust is used

SDLT:
May be possible to structure so that no SDLT arises on the initial land pooling (subject to HMRC policy at the time); take advice before altering beneficiaries' interests, or extracting property from the trust.

Direct taxes:
On initial land pooling into the trust, non-local authority parties holding land on capital account may be able to pool without a capital gains charge (following case law); take advice before altering beneficiaries' interests, or extracting property from the trust. Local authorities have a statutory exemption.

VAT:
Trust may want/require separate VAT registration; pooling of land into Trust likely to be a disposal for VAT purposes so check if VAT chargeable; consider the Trust's VAT recovery position.

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Key features of three common joint venture structures
3. SPV/Options

Structure

Parties form an Special Purchase Vehicle (SPV) and grant options to purchase land to the SPV.

The parties acquire shares in a corporate SPV and shareholders agreement deals with sharing of costs and receipts and decision making. LLPs are now also widely used as SPV vehicles.

Advantages

Parties retain own land until later disposal, but all parties are bound by option agreements.

Procurement: SPV can appoint contractors and consultants (but procurement regime cannot be ignored).

Dealings with other third parties simple in theory as SPV can enter into contracts.

Disadvantages/other considerations

As with Land Pooling/Trust – may be premature for options to be granted to the SPV at the outset.

Contractors/consultants may require guarantees from parties/ security over parties' land.

Third parties may require guarantees from parties/security over parties' land.

Dealings with authorities may be more complicated than Land Pooling/ Trust in that the SPV will not (at least initially, and maybe not later either as property may be sub-sold) acquire the land itself, only an option over it. The relevant authorities are likely to require parties to join into statutory agreements as landowner.

Calculations of sums due to parties on exercise of options will be complicated and require interim calculations and payments and reconciliations, but some parties may have transferred all of their property before payments can be reconciled.

Forming an SPV will require additional corporate administration.

Tax considerations*

SDLT:

May be due on transfer of land into the SPV (on deemed market value if transferring to a connected company), subject to any SDLT statutory reliefs being available (check relief conditions). SDLT may be due on the grant of options depending on how much the option fee is.

Direct taxes:

Company SPV subject to corporation tax on its profits and gains, which can create an additional tax layer in the structure; an LLP is transparent for direct taxes, so each LLP member checks its own tax on its shares of the LLP's profits and gains (local authorities have their statutory exemption).

VAT:

The SPV may want/be required to register for VAT in its own name. NB: unlike with direct taxes, an LLP is not transparent for VAT purposes.

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Design and build procurement
Prior to construction commencing

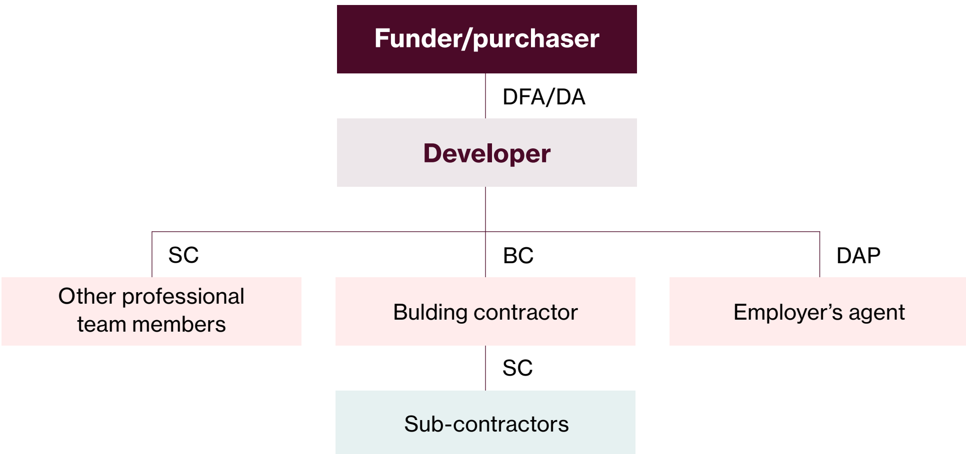
Key

DFA/DA Development and funding agreements/development agreement

DAP Deed of appointment

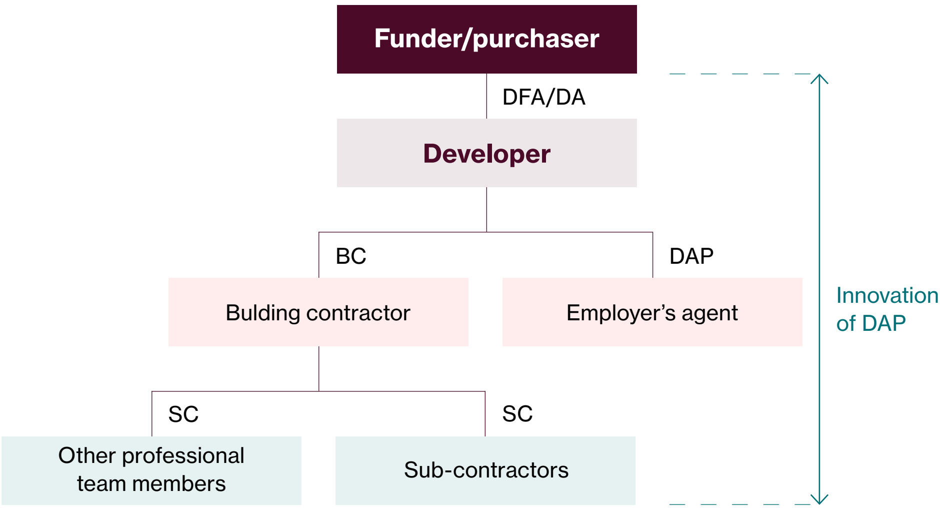
BC Building contract

SC Sub-contract



Note: Funder/purchaser and any pre-let tenants will require collateral warranties from building contractor, employer’s agent, other professional team members and sub-contractors. Developer/employer will require collateral warranties from sub-contractors.

Design and build procurement
During construction



Note: Funder/purchaser and any pre-let tenants will require collateral warranties from building contractor, employer's agent, other professional team members and sub-contractors. Developer/employer will require collateral warranties from sub-contractors and, post novation, from other professional team members.

Forward funding

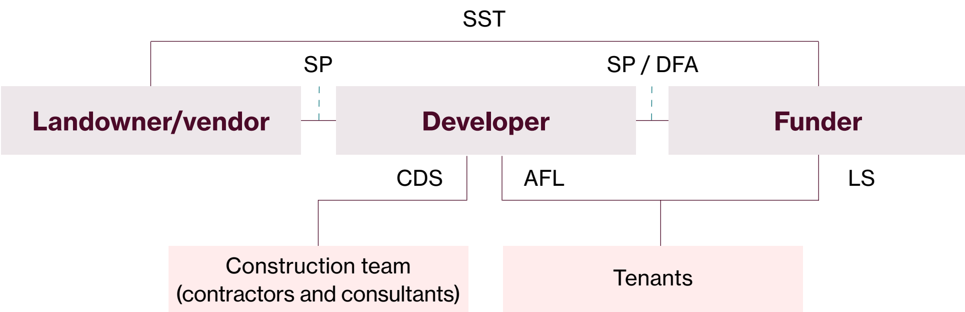
In a typical forward funding transaction, a developer (who may have contracted to acquire a property from a landowner/vendor and be entitled to require a transfer of it by way of sub-sale to the fund) will sell the property as a bare site to a fund, with pre-let agreements (agreements for lease containing development obligations) in place with at least one occupational tenant.

A separate development and funding agreement (DFA) will be entered into between the developer and the fund. The developer will, under the DFA and the pre-let agreements, be responsible for appointing a construction team (a building contractor and professional consultants) to design and carry out the development and will draw down development funding.

The fund and the occupational tenants will require contractual warranties from the construction team (as may the developer in relation to any consultants it has “novated” to the building contractor).

Following practical completion of the development, the fund will grant the leases to the occupational tenants and the developer will draw down the balance of the funding (less specified retentions) under the DFA (and so will usually not obtain any profit payment until after all leases have been granted).

The developer will remain responsible for the remedy of defects, at least until the expiry of any building contract defects liability or rectification period (usually one year). The following diagram illustrates a typical forward funding structure:



Key

SP	Sale and purchase agreement	**CDS**	Construction documents (building contracts and professional appointments)
DFA	Development and funding agreement		
AFL	Agreement for lease		
LS	Leases	**SST**	Sub-sale transfer

Subsidy control in regeneration projects

The transition from state aid to subsidies

From 1 January 2021, the EU state aid rules no longer apply to subsidies granted in the UK (apart from where the grant of a subsidy may trigger application of the Northern Ireland Protocol, which applies to measures which affect trade between Northern Ireland and the EU).

The Subsidy Control Act 2022 (Act) came into force in January 2023, and now represents the law in the UK in relation to subsidy control – replacing the interim UK EU Trade and Cooperation Agreement (TCA).

The UK is also as a member of the World Trade Organisation (WTO) and is bound by the WTO Agreement on Subsidies and Countervailing Measures and the Free Trade Agreements, which regulate the granting of subsidies. However, these are international agreements and do not impose direct obligations upon public bodies and other entities operating within the UK.

The Act sets out a new subsidy control regime for the UK and whilst is similar to the TCA, it contains some new features not previously provided for within UK subsidy control law, for example an obligation upon public bodies to have regard to the impact that a subsidy may have on domestic trade and investment and scrutiny of subsidy control measures through the Competition and Markets Authority. Authorities should ensure that they apply the subsidy control rules which apply at the time the relevant subsidy is made.

Arrangements that will require scrutiny in the context of regeneration projects includes:

- The provision of grant funding.
- The grant of relief from taxes, duties or other charges that would normally be payable.
- Providing loan facilities other than on market terms.
- Disposing or allowing use of property at less than market price.
- Provision of guarantees against third party liabilities.
- Allowing deferral of payment obligations.
- Grant of an option and completion of disposal if option exercised.

This list gives a few examples only – it is **NOT** exhaustive.

The following may also have potential to give rise to subsidies:

- Contracts not open to competitive tendering.
- Public-private partnerships.
- Infrastructure projects benefiting specific users.

Again, these are examples only.

The following are unlikely to constitute subsidies:

- Circumstances where the state is paying market price.
- The market investor principle – where the state is investing in undertakings in circumstances where an ordinary market investor might do so and on the same terms.

As the subsidy control rules might impact upon a number of aspects of a public-private venture, and the consequences of infringing them can have serious consequences, it is always advisable to seek early expert legal advice from subsidy control lawyers.

Easy as a-b-c or 1-2-3: are we getting best consideration?

Section 123

- Section 123(2) Local Government Act 1972.
- Does it apply?
- Does not apply to short term leases (seven years or less – grant or assignment).
- Unless a short term lease, Secretary of State consent is required unless...
- “Best consideration reasonably obtainable” is obtained.
- Do we have an up to date professional valuation?

Will General Disposal Consent apply and will it help?

- General Disposal Consent (England) 2003 (NB. This does not apply in Wales).
- Does not apply to all land e.g. not land held for planning purposes (Section 233 Town and Country Planning Act 1990) nor land held under powers derived from Housing Act 1985: separate regimes apply.
- Where it applies, as long as undervalue less than £2m, Secretary of State consent not required.

- Only applies where purpose of disposal will contribute towards achievement of promotion or improvement of the economic, social, environmental wellbeing of the relevant area/residents of that area.
- Undervalue is difference between "unrestricted use value" and actual consideration.
- Don't forget subsidy control compliance. Please refer to the information on page six. Subsidy control considerations may still be relevant even where the General Disposal Consent applies.

Don't forget the second limb to Section 123 – Section 123 (2A)

- Disposal of "open space".
- Requires notice in local newspaper for two consecutive weeks and consideration of objections.
- Open space: public garden/used for public recreation/disused burial ground.
- Recent case: *R v Durham County Council ex p Galaxy [2015] EWHC 16 (Admin).*

When does disposal take place?

- Completion of transfer/lease not exchange of contracts – *R v Hackney LBC ex p Structadene [2001] 2 All ER 225.*
- Grant of an option, and completion of disposal if option exercised.
- Section 128 (2) only protects purchasers/tenants once completion has taken place.
- Options and long term arrangements problematic – can we "future-proof" the deal?

What are we getting and what can we legitimately treat as consideration?

- Price/option fee/other financial payments to be paid/made.
- Guaranteed deferred payments and "guaranteed" overage (please see *R v Barnet LBC* case below).
- Not Section 106 payments/affordable housing provision but query value of nomination rights that would be triggered by development: *R v Barnet LBC ex p Jewish Girls High [2013] EWHC 523 (Admin).*
- Not job creation/social value (although may be relevant in terms of General Disposal Consent as to objects/undervalue).
- Highest offer not always the best – *R v Swale BC and Aldi ex p Lidl [2001] EWHC Admin 405.*
- How does the consideration compare with our valuation?

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