**DATED 2017**

**(1) KINGSTON BOROUGH COUNCIL**

**(2) [STRATEGIC INVESTMENT PARTNER]**

**and**

**(3) [JV LLP]**

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**HEADS OF TERMS**

relating to Cambridge Road Estate Regeneration

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**THIS AGREEMENT** is made on 2017

**BETWEEN**

1. **ROYAL BOROUGH OF KINGSTON UPON THAMES,** of [●] (**“RBK”**);

2. **[STRATEGIC INVESTMENT PARTNER],** a company incorporated in England and Wales (company number [●]) whose registered office is at [●] (the **“SIP”**); and

3. **[JV LLP],** a limited liability partnership incorporated in England and Wales (LLP number [●]) whose registered office is at [●] (the **“JV”**).

**BACKGROUND**

1. RBK and the SIP wish to collaborate on the regeneration of the Cambridge Road Estate in Kingston Upon Thames (the “**Regeneration Site**”) by way of a joint venture property development vehicle. It is the intention that the JV will be established as a long-term partnership, currently anticipated to be a minimum period of 15 years.
2. The parties agree that a separate corporate entity will afford the partners the required levels of corporate governance, financial and operational efficiency. RBK and the SIP’s interests in the JV will be established through the procurement process[[1]](#footnote-1).
3. RBK’s current preferred vehicle is a limited liability partnership (LLP). The operational detail for the JV will also be developed jointly with bidders during the dialogue. However, irrespective of the form of vehicle which the structure takes, it is anticipated that the structure will need to have the required levels of corporate governance, financial and operational efficiency.
4. The JV will take control of certain Council land interests transferred to it. The land interests to transfer to the JV are to be discussed during the procurement process.
5. The JV will assist in fulfilling the aims of the regeneration of the Cambridge Road Estate by redeveloping and managing (or procuring the redevelopment and management) of the Cambridge Road Estate regeneration plan (“**the Project**”).

The parties agree as follows:

1. Members’ agreement
   1. A members’ agreement will identify the key constitutional arrangements between RBK and the SIP covering constitutional arrangements:‑
      1. objectives of the JV;
      2. duration;
      3. business plans;
      4. governance and reporting;
      5. decision making and delegations;
      6. capital contributions;
      7. transfer of interests;
      8. conflict matters;
      9. deadlock and default.

More detail on each of these principles is set out below.

1. TRANSFER OF LAND ASSETS
   1. The land interests in the Regeneration Site to transfer to the JV are to be discussed with bidders, however RBK will be retaining its freehold interest in the Regeneration Site and careful consideration will be given to mitigating any adverse tax consequences by minimising the number of land interests transferred into the JV.
   2. The timing and phasing of the grant of any land interests will be determined by the planned development sequencing (to be discussed during dialogue) and will be subject to the JV achieving certain pre-conditions set out in the development agreement to be entered into between the Council and the JV (the "**Development Agreement**"). These will likely include (in relation to each site / asset):
      1. the JV obtaining detailed/outline, implementable planning permission;
      2. the existence of an agreed site-specific Business Plan in accordance with the overarching Business Plan (see paragraph 7 below);
      3. demonstration of commitment of finance required to deal with the asset in accordance with the Business Plan on acceptable terms; and
      4. agreed delivery obligations and milestones.
   3. The land interests in the Regeneration site will be granted together with development obligations. If there is a default in performing these obligations by the JV, consequences may include a right for RBK to forfeit the relevant land interest(s) and/or terminate the Development Agreement (or part of it).

* 1. RBK will require Bidders to propose delivery milestones (i.e. long stop dates for completion of each stage of development for each phase of the Regeneration Site). Any delivery obligations placed on the JV should be reflected in and imposed on the JV supply chain.

1. OTHER DEVLEOPMENT OPPORTUNITIES
   1. Over the life of the JV potential further development sites may be identified by RBK for the JV.
   2. Details of any additional sites identified during the dialogue stage will be made available to bidders. If further sites are transferred by RBK, the terms of transfer (including value and consideration) will be agreed at the time.
2. FUNDING AND FINANCIAL PRINCIPLES
   1. **Land Contribution Mechanism**

The Regeneration Site will be transferred to the JV in accordance with paragraph 2.2. It is proposed that the land interests in the Regeneration Site will be granted direct the JV. The mechanism for determining the entry land value for the relevant land interest will be discussed during the dialogue and will need to be Section 123 LGA 1972/state aid compliant.

* 1. **Loan Note Structure**

Once granted the value of the land interest will be treated as a loan from RBK to the JV (the “Loan”). It is anticipated that SIP will provide funding to match the value of the Loan.

* 1. **Repayment of Loan Notes**
     1. Loan repayment will be triggered on the following events:‑
        1. receipt of returns on the JV’s activities;
        2. the JV being, or being deemed for the purposes of law to be, insolvent;
        3. the enforcement of security granted to a JV funder;
        4. the JV being wound up.
     2. In these scenarios, the JV’s distributions will be in the following order of priority:‑
        1. servicing existing senior debt (if any)
        2. payment of interest on loans
        3. repayment of loan capital
        4. repayment of capital.
  2. **SIP Loan Match**

It is intended that the value of the Loan committed by RBK (see above) will be matched by the SIP in cash. The SIP may not be required to contribute the entirety of the Loan at the same time as RBK, however, it will be required to contractually commit to matching the Loan at financial close. The JV will draw down the SIP's Loan commitment when required (and as set out in the agreed Business Plans of the JV). RBK may require a guarantor for the SIP's funding obligations.

* 1. **Senior debt**
     1. It is proposed that the JV obtains senior debt secured against its assets to help fund the development. RBK envisages that the JV will have a gearing threshold, details of which will be made available during the competitive dialogue.
     2. The granting of any security over the JV’s assets would be a decision for the JV based on the terms of the security and the JV's funding needs. It is intended that the bidders' approach to third party funding and potential sources will be discussed during the dialogue process as part of the financial modelling.

1. RETURNS AND PROFIT DISTRIBUTION
   1. It is envisaged that the JV’s returns will be generated as the phases of the Regeneration Site are either sold or developed and plots sold. The returns to the JV will be calculated by its appointed auditors in each accounting period in accordance with applicable accounting principles and will be recorded in the JV’s accounts.
   2. The principles of profit distribution will be enshrined in the JV’s constitutional documents and a returns distribution policy will be agreed and set out in the Business Plans prior to financial close. It is likely that the distribution policy will identify an agreed proportion of returns for reinvestment back into further development activity of the JV and for working capital. Any decision by the JV to make distributions would be taken in accordance with its profit distribution policy.
   3. Where there are profits available for distribution, it is likely that they will be split equally between RBK and the SIP (or in such other portion as is agreed).
   4. Where a partner commits an event of default (such as failure to contribute funding when required) it may temporarily lose its entitlement to receive any share of returns until either the event of default is remedied or waived by the other partner.
2. SERVICES
   1. The services the JV will require will include development management of the Regeneration Site.
   2. RBK is currently flexible regarding how such services will be delivered. They could be procured through an external appointment or through staff directly employed by the JV. There is therefore the potential for SIP to provide some or all of these services should it have the requisite skills and if value for money can be demonstrated. This would be evaluated though the SIP procurement process.
   3. The JV will need to employ appropriate staff to deliver the development.
3. OPERATION OF THE JV – DECISION MAKING AND BUSINESS PLANNING
   1. **Business Plans**
   2. In order to drive and govern the activities of the JV, three categories of business plans ("Business Plans") will be required:‑
      1. an overarching business plan (the "**JV Business Plan**"). This will set out the overall objectives of the JV for the life of the vehicle with its overarching objectives for each accounting period and will be updated annually;
      2. a business plan for the Project as a whole (the “**Development Business Plan**");
      3. a specific business plan for each of the development phase (each a "**Phase Business Plan**");

(together the "**Business Plans**").

* 1. The JV Business Plan and the Development Business Plan will be submitted and agreed through the dialogue process and will be annexed to the constitutional documentation for the JV. The JV will be required to comply with and deliver to the Business Plans (as reviewed and revised from time to time) throughout the life of the vehicle.
  2. The Business Plans will need to be reviewed and updated by the JV Board (and potentially approved by the partners) regularly. Any material variation to any of the Business Plans shall require the same approval.
  3. **Governance and Reporting**

There will be a clear JV governance regime to ensure transparency and probity. Where there are services provided by the SIP (or members of its group) through the JV supply chain, the SIP (through the JV) may be expected to provide information to RBK on a regular basis for example management/audited accounts and progress reports against milestones. RBK will inform bidders of the reporting requirements for the JV during the procurement process.

* 1. **JV Governance Structure, Decision Making and Delegations**

In outline, it is proposed that the decision-making will comprise different levels of decision making within the JV structure and that this will be set out in a delegations policy (to be included in the members' agreement. For example, certain matters will be reserved for determination by the members, others will be delegated to the JV Board and, below that, to management level.

* + 1. **JV Board level:[[2]](#footnote-2)** 
       1. The JV will establish a Board to sit underneath the partners and be responsible for the day to day management of the JV affairs and would operate in terms of quorum, voting etc. It is proposed that the Board will be comprised of [●] representatives appointed by each of the SIP and RBK.
       2. RBK's representatives ("**Council Representatives**") and the SIP representatives ("**SIP Representatives**") will each have one collective vote on all matters falling to be determined by the Board. Each meeting of the Board will require the attendance of [●] Council Representatives and [●] SIP Representatives to be quorate.
       3. Save where a matter is a Conflict Matter (see paragraph 8 below), matters which fall to be determined by the Board will require unanimity. Where the representatives cannot agree on a matter due to lack of unanimity then the deadlock procedure outlined at paragraph 9 will be triggered.
       4. The Board will take decisions relating to strategic activities of the JV as set out in the delegation policy. This will likely include:‑
          1. approval of the statutory accounts/appointment of auditors;
          2. contracting or entering into a commitment to contract expenditure which is within the budgets set out in the Business Plans;
          3. appointing parameters of authority of the development manager/ asset manager;
          4. approving material contracts;
          5. appointment of employees; and
          6. entering into litigation.
    2. **Member level:** 
       1. certain JV decisions will be reserved for determination by the partners. Save where a matter is a Conflict Matter (see below), matters which fall to be determined by the partners will require unanimity. Where the partners cannot agree on a matter due to lack of unanimity then the deadlock procedure outlined below will be triggered. Matters to be reserved to the partners will include:‑
          1. approval and adoption of each of the Business Plans (and any amendments/variations to them);
          2. alteration in the nature/scope of the JV's business;
          3. taking any action outside the parameters of the JV's Business Plans (including approving additional funding requirements);
          4. admitting new members to the JV;
          5. making any petition to wind up the JV;
          6. material acquisitions or disposals;
          7. variation of policies previously adopted by the JV; and
          8. other usual member protection matters.
  1. **Management Matters**

For operational efficiency, the JV will likely require a management team (which could be an external appointment or internal employment) to whom the day-to-day management of the JV's activities in accordance with the Business Plans would be delegated.

1. CONFLICT MATTERS
   1. On certain decisions to be made by the JV (whether at Board or partner level) there is potential for a partner (or its Representatives) (as appropriate) to have a conflict of interest ("**Conflict Matters**"). In such circumstances the relevant partner (or its Representatives) will be disenfranchised within the decision making mechanism. Example Conflict Matters will include:‑
      1. any decision by the JV to enforce the provisions of any guarantee for the SIP's (or member of its group's) obligations under the members' agreement (or any JV supply chain contract to which it is party);
      2. any decision by the JV to take enforcement action in relation to a development/services agreement to which the SIP (or member of its group) is party;
      3. any decision by the JV to enter into an arrangement or transaction with any persons connected with a partner (or member of its group); or
      4. any matter requiring an approval or consent of the JV under any development/services agreement to which the SIP (or member of its group) is a party.
2. DEADLOCK
   1. Due to the unanimous decision making structure, there is potential for a deadlock to arise (whether at Board or partner level). It is proposed that a deadlock will trigger the following sequence of events in an attempt to reach a resolution:‑
      1. within a specified period, either partner will be able to give the other notice of the deadlock and the parties will then use their reasonable endeavours to resolve the issue;
      2. if the issue is not resolved by the partners within an agreed period then each party will nominate senior officers to resolve the issue;
      3. if the senior officers agree on how the matter is to be dealt with then the JV and the parties must abide by such decision but if the senior officers cannot agree how the matter is to be dealt with, where appropriate (taking into account the nature of the particular matter), the issue will be referred to mediation or an independent expert for determination;
      4. if the matter in dispute is not settled by mediation, (if the parties agree) by reference to an independent expert or where the matter is not appropriate for such measures then there will be an orderly winding up of the JV as set out at paragraph 12.
3. DEFAULT
   1. Some default scenarios will be identified in the JV constitutional documents at financial close. For example, a default will arise in relation to either partner:‑
      1. where it (or in the case of the SIP, a member of its group) commits a material breach of any of its obligations within the JV or any works/service agreement (eg. at JV supply chain level) to which the SIP (or a member of its group) is a party, which (if capable of remedy) has not been remedied; or
      2. where it (or in the case of the SIP, a member of its group) brings the reputational standing of the other party or the JV into serious disrepute;
      3. where it fails to provide its funding commitment when required to do so by the JV;
   2. A default will arise in relation to the SIP (or any guarantor or any member of its group of any of its associates as applicable):‑
      1. where the SIP's or the SIP's guarantor's (as applicable) net asset value falls below a specified threshold; and/or
      2. where there is an insolvency event or unauthorised change of control. On a default the JV winding up process set out at paragraph 12 will be triggered
4. TRANSFER OF INTERESTS
   1. It is proposed that:‑
      1. either partner may transfer the whole (but not part) of its interest in the JV to another group company (definition/scope to be agreed through the dialogue process) (or public body in the case of RBK) at any time with the other partner's consent (exercised reasonably and by reference to agreed gateway criteria); and
      2. there will be an initial lock in period during which neither party will be permitted to transfer its interest in the JV to a third party (such period to be agreed between the parties but to be sufficient in length to take account of the fact that RBK will have undertaken a rigorous selection process to appoint a JV partner to facilitate delivery of the Project). Following the initial lock in period either partner will be able to transfer the whole (but not part) of its interest in the JV to a third party with the other partner's consent (exercised using its absolute discretion) if it has first offered the interest to the other partner.
   2. The transfer of any interest in the JV will include the transfer of all obligations in relation to the JV.
5. WINDING UP / JV TERMINATION
   1. It is envisaged that the JV will exist for a period of 15 years - subject to extension if the partners. In addition to termination through default or deadlock (see above) the JV shall terminate on any of the following events:‑
      1. the written agreement of the partners to terminate; and/or
      2. usual insolvency scenarios; and/or
      3. where the continuation of the JV becomes unlawful and

in which case a liquidator will be appointed to liquidate the assets of the JV as follows (subject to insolvency laws):‑

* + - 1. any land interest within the Regeneration Site which has not transferred to the JV will remain in the ownership of RBK;
      2. RBK will have the first option to either:‑
         1. purchase the JV's interest in any of the part of the Regeneration Site (in accordance with an agreed asset valuation mechanism) or to extinguish (on payment of appropriate consideration) any leasehold interest granted to the JV where RBK owns the freehold in any asset; or

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* + - * 1. set off the value of such assets against outstanding capital or interest on the Loan;
      1. all sites vested in the JV on which no works have commenced (which RBK opts not to acquire) will be sold on the open market (with the SIP being restricted from bidding for these assets); and
      2. sites vested in the JV in relation to which works contracts have been awarded will be developed out/ completed and (if applicable) sold in the ordinary course of JV’s business and in accordance with the relevant Business Plan;
      3. the proceeds of any disposals (as set out above) and other JV assets will be distributed in accordance with the waterfall set out in paragraph 4.3.2.

1. PARENT COMPANY GUARANTEES
   1. RBK may require appropriate parent company guarantees in relation to the SIP's obligations (including under any supply chain contract). Any such guarantor will be required to guarantee to both RBK and the JV that:‑
      1. the SIP (or relevant contracting entity) will observe and perform any obligations it has to the JV (whether present, future, express or implied);
      2. undertake to the JV that if the SIP (or relevant contracting entity) does not pay any sums due from it punctually, the guarantor will immediately and on demand pay such amount as if principal obligor; and
      3. indemnify the JV and RBK against any loss, liability, costs, claim or expense which the public sector or the JV may suffer as a result of any failure by the SIP (or relevant contracting entity) to perform any of its obligations.

1. It is proposed that the members of the JV will hold an equal (50%) stake in the JV and will jointly manage the JV and its assets, however this will be tested through the procurement process. [↑](#footnote-ref-1)
2. Composition of the Board to be agreed during dialogue [↑](#footnote-ref-2)