

Cabinet Report

6 June 2023

GOVERNANCE CHANGES AFFECTING MILTON KEYNES DEVELOPMENT PARTNERSHIP LLP

Name of Cabinet Member	Councillor Pete Marland Leader of the Council
Report sponsor	Michael Bracey Chief Executive
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Exempt / confidential / not for publication	No
Council Plan reference	Not in Council Plan
Wards affected	All wards

Executive summary

Milton Keynes Development Partnership LLP ('MKDP') is a limited liability partnership whose partners are Milton Keynes City Council (MKCC) (owning 99.9%) and DEVELOPMK Limited (owning 0.1%). Established in 2012, MKDP's primary purpose was to hold and develop land transferred from the Homes and Communities Agency ('HCA' – now Homes England).

Since its creation, MKDP has successfully disposed of a number of development sites, and in the process delivered significant capital receipts whilst enabling more people to live and work in our city. It is a notable example of a successful local authority arms-length organisation which has continuously delivered the objectives of MKCC. As a result of its success, MKCC has asked MKDP to play a more prominent and pro-active placemaking role, including the formation of a local housing company to deliver much needed affordable housing in MK.

Currently MKCC's scrutiny and oversight of MKDP is undertaken primarily through cross-party councillor and chief officer membership of MKDP's Board and through reserving specific decisions to MKCC. Although this model has worked well to date, the refocussing of MKDP as a primarily placemaking organisation means a change in the model of governance is now proposed.

Under this new model, MKCC's strategic oversight and assurance of its arm's length organisations will be undertaken through an Owners Advisory Group comprising three councillors and the Chief Executive. The OAG will formulate recommendations to advise Cabinet in making its decisions. Its membership, scope and purpose are set out in detail at Annex A. As the OAG will undertake oversight and assurance, MKCC will no longer nominate councillors nor the Chief Executive to MKDP's board.

As a consequence of this new model, MKDP will no longer be subject to day to day management or supervisory control by MKCC meaning it can fully utilise the flexibilities legally available to an independent Limited Liability Partnership. In particular, it would no longer be considered a 'contracting authority' under public procurement rules. MKDP will become more nimble and flexible, the significant benefit of which being that MKDP will be much better able to pursue strategic partnerships in a timely and cost effective manner.

These changes also reflect the growing expertise of MKDP's Board, MKDP's demonstrable alignment with good governance principles and MKCC now having an established strategic voice in guiding the long term objectives of MKDP.

This decision comes at a time when the governance of arm's length entities is a current topic of debate in local government circles. In developing this proposal for a new model of governance, MKCC has studied in detail both good and bad models of governance elsewhere in local government. This learning has been reflected in the governance proposal set out in this paper.

1. Proposed Decisions

- 1.1 That a new body called the Owners Advisory Group (OAG) maintaining political membership on a proportionate basis with the Terms of Reference in Annex A be constituted to advise the Cabinet on MKDP matters.
- 1.2 That the Members Agreement be amended to:
 - a) recognise the OAG;
 - b) remove the Commissioning Statement and the Reserved Matters listed in this report; and
 - c) reflect the role of Develop MK's as a consultee in the approval of the Business plan.
- 1.3 That authority be delegated to the Director of Law and Governance to amend the Members Agreement in accordance with this decision and make any other non-material drafting amendments deemed necessary.
- 1.4 That authority be delegated to the Director of Law and Governance in consultation with the Leader and the members of the OAG to amend the Terms of Reference.
- 1.5 That the Leader's intention that decisions in relation to MKDP be reserved to Cabinet be noted.
- 1.6 That these changes take effect on the 1 September 2023.

2. Why is the decision needed?

- 2.1 The current relationship between MKCC and MKDP is set out in a Members Agreement signed by MKCC and DevelopMK Ltd as the two members of MKDP. Develop MK was incorporated on 25 March 2020 and is a non-trading company created to be the second partner of the LLP. There are three directors, all of whom are senior MKCC officers. Develop MK met on the 24 May 2023 and agreed the proposed changes (subject to minor amendments explained below) to the Members Agreement.
- 2.2 Since its creation MKDP's primary purpose has been to facilitate growth in Milton Keynes and support MKCC's vision for the city. To achieve this, MKDP has been disposing of its own land assets for capital receipts and using these to both reduce its initial loan financing from MKCC and to invest in placemaking initiatives. Any residual surplus has been passed to its owners.
- 2.3 Whilst this has been a successful approach, MKDP has recently embraced a major change in its strategy involving the creation of a subsidiary Local Housing Company and a more prominent and pro-active role in the city's placemaking agenda. This new strategy has led to MKDP disposing of its land in return for newly built homes rather than a simple capital receipt as in the past. To enable this enhanced placemaking activity, MKDP has been exploring opportunities to procure strategic development partners.
- 2.4 The proposed new model of governance also reflects MKDP's track record of success, good internal governance as exemplified through the expertise and stability of MKDP's Board, and the now experienced and structured professional team. Examples of good governance at MKDP include an appropriate schedule of meetings, a Code of Conduct for board members and employees, annual declaration of interests for board members and employees, its own scheme of delegations (which includes Members' approval), and financial and performance management policies. Given MKDP's track record, good governance and strong leadership, the proposed new governance model where MKCC is less involved in management, supervision or day to day operations is a proportionate one.
- 2.5 MKCC currently secures assurance and oversight of MKDP by: one, appointing the chair of the Board; two, by nominating three cross-party councillors and the Chief Executive as members of MKDP's Board; three, through the annual scrutiny of MKDP's Business Plan; and four, by reserving decision making in relation to reserved matters as listed in the Members Agreement. Although the model of governance has worked well to date, the refocussing of MKDP as a primarily placemaking organisation means that this model of governance is no longer optimum.
- 2.6 Under the new model a forum called the Owners Advisory Group (OAG), comprised of three councillors and the Chief Executive, will introduce a regular forum for MKCC to review MKDP's delivery. The OAG will formulate recommendations to help inform decisions by Cabinet. OAG's consideration and feedback will help MKDP to better shape their operations and help steer the formation of its business plan. It also better reflects the relationship between MKCC and MKDP, giving MKDP the freedom

and agility to achieve its objectives while retaining effective oversight for MKCC to safeguard its investment and values.

- 2.7 The OAG is akin to a shareholder's panel/board in other local authorities where a limited liability company is involved. Its establishment signals MKCC's approach to dealing with its arm's length organisations. Once created it can act in relation to any other arm's length organisations that may be established by MKCC in the future.
- 2.8 For clarity, the OAG will not have decision making powers although it can use a vote to agree its recommendations to Cabinet. Decisions in relation to MKDP will continue to be taken by MKCC and the Leader has expressed a preference that they sit with Cabinet. Decisions related to MKDP will be of two types: planned, cyclical items such as annual approval of MKDP's business plan (which will be brought to Cabinet in July this year) and ad hoc reactive items such as approval for any reserved matters. The intention is that these are routed through the OAG first so they can formulate recommendations to inform decisions by Cabinet.
- 2.9 One consequence of the proposed new model of governance relates to MKDP's status in respect of the public procurement rules. Under the current arrangements set out in the Members Agreement, MKDP is considered 'a body governed by public law' and is subject to public procurement rules. Whilst a degree of negotiation is permitted under 'Competitive Dialogue', it does not allow for any re-negotiations once a contract is awarded. The ability to continue negotiations and respond to challenges is fundamental to the delivery of the MKDP business plan and in particular the greater focus on placemaking.
- 2.10 MKDP has reiterated its continued commitment to acting openly, transparently, and with integrity in all its future transactions. The approach proposed by MKDP whilst offering similar levels of transparency to the formal public procurement process, accelerates timescales and reduces costs whilst delivering the same outcome. The formal public procurement process is time consuming and expensive, requires formal negotiation with all bidders, regardless of the attractiveness of their bid, and necessitates a team of legal representatives present at all meetings. While this may achieve the most unchallengeable outcome, due to the burdensome nature of the process, there are substantial up-front time and costs involved. Due to these burdensome costs, there is a real risk that potential strategic partners may be less attracted to invest in MK. Due to the somewhat unique characteristics of the residential and commercial property industry, the viability of bids may have altered significantly by the end of the formal procurement process. Under a formal procurement process even if the economics of the UK property market have starkly changed over the course of the formal procurement process, it is not possible to initiate a renegotiation. The formal process must restart with all parties re-incurring costs for a second time. This represents a significant disincentive to potential strategic partner looking to engage in a formal procurement process.
- 2.11 For larger, less defined procurements, such as placemaking partnerships in Central Milton Keynes, the flexibility to amend the contract requirements and adapt to proposals put forward by potential strategic partners is vital to securing the best partner for such significant projects.

2.12 MKDP Board considered the merits of being able to operate outside of the public procurement rules at its Board meeting on 28 February 2023. Following deliberations, MKDP concluded that the opportunity to act outside of the public procurement rules would better allow it to deliver its strategic objectives in a timely and more cost effective manner. A letter from the Chair of MKDP's Board setting out the benefits is at Annex B

2.13 MKCC has sought legal advice about the public procurement regime and in particular the circumstances under which an arm's length organisation has to participate in the regime. This legal advice confirmed that MKDP would not be caught by the regime under the proposed new governance model. The specifics of this advice can be summarised as follows:

- a) **The MKDP Board needs to be able to appoint at least 50% of its Board who are independent of the Owners.** Under the current Members Agreement there is a maximum of eight Board Members. At present, the owners are capable of appointing five of those positions. Removing the ability of the owners to appoint to the Board is the clearest way of achieving this. MKCC will continue to appoint the Chair MKDP.
- b) **The Commissioning Statement needs to be retired.** Legal advice has suggested that the current format is prescriptive and could amount to management supervision by the Owners. The MKDP business plan, which has to be agreed by MKCC Cabinet on an annual basis, is the most appropriate way of ensuring the Owners have appropriate oversight of MKDP's strategic direction and assurance that it aligns with the overall vision and ambition for Milton Keynes.
- c) **The Reserved Matters, which are designed to ensure that MKDP does not carry out certain activities without the express approval from the Owners, needs updating.** Legal advice has identified that some of Reserved Matters are overly onerous and could amount to management supervision or control over MKDP. The Reserved Matters which are to be amended are
 - i) Remove the words that are struck through:

Any sale or long lease or property of MKDP LLP ~~for less than Best Consideration~~ that does not maximise the consideration in accordance with the obligations imposed through the Business Plan and/or the Development Brief process
 - ii) In the 'all the circumstances' category remove:
 - Entering into any joint venture, partnership or other profit-sharing arrangement with any person (or making changes to an existing arrangement)
 - Entering into any transaction outside the ordinary course of business
 - Entering into any transaction not on an arm's length basis
 - Making any appeal against an MKC planning decision
 - iii) In the 'to the extent not provided for in the Business Plan' category remove the following:

- Any acquisition of land
- Any disposal of any freehold or long leasehold in any land where planning permission has not been obtained in respect of the proposed development of such land
- The sale, leasing, disposal or acquisition of any non-land assets or business

2.14 An amended Members agreement reflecting these changes is at Annex B.

2.15 The financial relationship with MKDP remains the same including that any loans to MKDP from MKCC are at commercial and competitive rates so as not to create subsidies.

2.16 During their Board meeting on 24 May 2023, DevelopMK requested that they be included any of the strategic discussions which influence the Business Plan and receive the same reports as the OAG. This has been incorporated into the Members Agreement and OAG TOR.

2.17 Although MKDP Board are keen to see the governance changes implemented, during deliberations at their board meeting on 28 February 2023, independent board members recognised the valuable contribution of the three cross-party councillors nominated to MKDP Board and specifically the valuable challenge and also support they provided given their intimate understanding of MK as locally elected officials. The creation of the OAG would not preclude councillors who are members of the OAG from being invited to observe parts of MKDP Board meetings. For example, to listen and provide feedback to presentations by developers on future development proposals.

2.18 Legal safeguards will remain in place to ensure ward councillors are able to participate in scheme specific consultations and these can be reviewed and possibly strengthened in the redrafting of the Members Agreement if considered necessary. One of these safeguards that remains in the Members Agreement is the specific objective for MKDP to ensure appropriate consultation and engagement with elected members, parish/town councils and other stakeholders which will be amended to make clear that this applies in all business including when bringing development sites forward. There is an existing protocol to produce MKDP development briefs, the latest draft of which was agreed by Cabinet on the 10 September 2013 and is at Annex E.

2.19 The Chair MKDP commits to engaging with MKCC councillors on site specific developments in her letter at Annex C. In addition, as a practical point, MKDP's General Counsel and Company Secretary will ensure that MKDP report templates include a prompt to consider public and political engagement.

3. Implications of the decision

Financial	Y	Human rights, equalities, diversity	
Legal	Y	Policies or Council Plan	
Communication		Procurement	Y
Energy Efficiency		Workforce	

(a) Financial Implications

There are no direct financial implications of this decision.

(b) Legal Implications

Control and oversight

It is a legal requirement that an LLP has a minimum of two members. The Members' Agreement is a legally binding contract between MKCC and DevelopMK as members of the LLP. It outlines the rights, duties, responsibilities, and liability of each member and sets out how the partnership is managed and run. The Board of Develop MK has already approved the proposed changes in a meeting on the 24 June 2023

The proposed changes to the Members Agreement still allow MKCC to retain oversight over MKDP including through the OAG and approval of the Business plan and reserved matters. It is also possible to use the loan agreement between MKDP and MKCC to introduce some control although these relate to MKCC as a lender not as a Member of the LLP.

As owner of MKDP, ultimately, MKCC has the ability with Develop MK to wind up MKDP.

The changes to the Members Agreement are:

- a) Amendment to the Reserved matters as set out in paragraph 2.13 above;
- b) Removal of the Commissioning Statement
- c) Removal of reference to the tariff risk reserve
- d) Confirmation of MKDP's obligation to ensure appropriate consultation and engagement with elected members, parish/town councils and other stakeholders at all times.

Public procurement

Jointly procured (by the Owners and MKDP) legal advice has identified that if MKCC reduced its management supervision and control of MKDP, MKDP would fall outside of the public procurement rules. While the governance changes recommended in this report were directly informed by this external legal advice to achieve a situation where MKDP operates legally outside of the public procurement rules, the risk of challenge cannot be removed altogether and in the event of a procurement challenge, it will be a matter for the Court to determine whether MKDP sits within the public procurement rules or not.

When it falls outside the public procurement regime, MKDP will no longer have ‘Teckal exemption’ status which means that MKCC will need to procure MKDP’s services. MKCC will still be able to provide services to MKDP at commercial rates. MKDP already has a procurement policy which is at Annex D. This will need to be amended to give effect to this decision and should be brought to the first OAG meeting for information.

Scrutiny

The Cabinet can be held to account on the role and performance of MKDP and governance of arm’s length entities by MKCC’s scrutiny committees. Representatives of MKDP may be asked by the relevant Cabinet Member or Cabinet to attend scrutiny meetings to support the Executive. This will be made clear in MKCC Overview and Scrutiny constitutional provisions as well as the Members Agreement.

Status of a Cabinet Advisory Group

Cabinet Advisory Groups (CAGs) are not formal meetings of the council and do not have the status of advisory committees under the Local Government Act 1972 Section 102 (4). While there is no legal requirement to hold the meetings in public, MKCC will act transparently the agenda and minutes of the meetings will be published subject to preserving the privacy of exempt information.

(c) Other Implications

None

4. Alternatives

- 4.1 Do nothing which is not recommended because of the reasons set out in this report for change in a governance model.

5. Timetable for implementation

June-July 2023	Complete changes to Members Agreement	Director of Law and Governance
No later than August 2023	MKCC councillors attend their last MKDP meeting	MKDP
September-October 2023	Changes to take effect and the first meeting of the OAG	Head of Democratic Services

List of annexes

- Annex A Owners Advisory Group (OAG) Terms of Reference
- Annex B Draft Members Agreement showing the proposed changes
- Annex C A letter from the Chair of the MKDP Board
- Annex D MKDP Procurement Rules
- Annex E Preparing Development Briefs for MKDP and other Council-Owned Land: step by step process

List of background papers - None