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Regeneration Projects - Managing risk in a downturn

Today's challenging economic climate is stress-testing many deals negotiated in more buoyant times. Commercial drivers - for example on residential-led schemes - have all but dissolved, leaving many projects to fail or to be deferred.

Accordingly, it is now more important than ever for regeneration proposals to undergo a rigorous and continuing risk assessment from an early stage. If market conditions dictate a delay before a scheme is offered to the market, then time should be invested now to maximise the opportunity for delivering a successful scheme once the economy recovers.

This pamphlet offers an overview of our approach to the risk assessment process and addresses the following risks:

- risk of arriving at the wrong solution.
- risk of the Council being unable to deliver the solution.
- risk of failure to achieve value for money.
- risk of failure to deliver the right solution.
- risk of opposition.

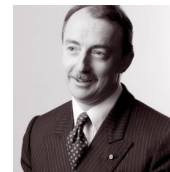
Risk assessment requires a dialogue between the Council and its legal and property advisors. The starting point is to establish a clear statement of the Council's objectives, and their respective priorities. Next is to produce a risk matrix identifying each risk and assessing its magnitude and the likelihood of occurrence. This leads to a risk mitigation strategy plan. The whole process is then subject to continuous review.

Risk should not be assessed in isolation. In parallel there is a continuous process of identifying opportunities to improve value. And there is usually a risk in doing nothing - political risk, continuing decay of buildings or an area, and lost opportunities.

In a recovering economy, with potentially a large number of delayed regeneration schemes hitting a smaller market of developers, it is not simply a question of allocating all risk to the developer. Councils will need actively to engage the market. That includes convincing the market of the Council's commitment to the regeneration scheme; creating a degree of certainty in the planning and procurement processes; assistance with infrastructure (e.g. CPO) and being creative (and enabling creativity in developer's bids) by exploring innovative models for delivering the project, (e.g. through the use of overage, or joint venture or asset-backed vehicles).

We highlight some of the common areas of risk in the following pages.

Tim Smithers
Partner
0117 314 5311
tsmithers@wv.co.uk



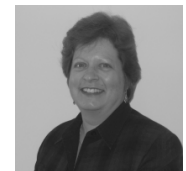
Gary Philpott
Partner
0117 314 5283
gphilpott@wv.co.uk

Simon Baker
Head of Local
Government
0117 314 5310
sbaker@wv.co.uk



Michelle Bendall
Partner
0117 314 5326
mbendall@wv.co.uk

Rachel Stott
Associate
0117 314 5284
rstott@wv.co.uk



Polly Reynolds
Associate
0117 314 5276
preynolds@wv.co.uk

Mary Tate
Solicitor
0117 314 5624
mtate@wv.co.uk



Claire Osman
Solicitor
0117 314 5478
cosman@wv.co.uk



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Risk of arriving at the wrong solution

A successful project procurement identifies solutions which meets all the Council's objectives and results in the appointment of a development partner with the financial strength, technical capability and track record to deliver them.

Roanne and subsequent court decisions have focussed attention on the application of EU procurement rules to the procurement of development partners. One of the more challenging aspects is the requirement to fix the evaluation scheme and weightings in advance of receiving a bid, and the consequent loss of discretion to determine what, with hindsight, might be considered to be the best value solution for the Council.

Accordingly there is a risk that the procurement process results in a solution which fails to deliver the Council's project objectives.

Alongside identifying the project objectives and preparation of the risk assessment we therefore advocate the early preparation of a procurement strategy and sensitivity-testing of the evaluation scheme.

Risk of the Council being unable to deliver the solution

There are a number of issues which the Council should identify and address at an early stage:

- **Title.** A full title audit is an essential early step to identify and, where possible, address site constraints that may inhibit or delay development (e.g. third party covenants and easements, leases, vacant possession issues, rights of light, crane oversail, party walls, services diversions and telecoms equipment).
- **Administrative law compliance.** Issues such as delegation, vires, best value, competition law and state aid.
- **VAT** and local government finance constraints.

Risk of failure to achieve value for money

Achieving the Council's regeneration objectives, minimising costs (or loss of revenue) to the Council, and maximising returns, requires consideration of a range of issues, including:

- **Share of future development value.** The Council may wish to consider preserving an interest in the future value of the completed scheme, or on any future redevelopment. The key issues here will be financial transparency, cost controls and an obligation on the developer to maximise development value.
- **Amount and timing of cash receipts.** The developer may be able to offer additional cash benefits to the Council by deferring capital payments over the initial phases of the development (subject to suitable security being offered).
- **Minimising disruption during redevelopment.** For example decanting car-parking facilities or disturbance to residents and businesses.
- **Provision of public facilities.** Achieving a high quality of design for any facilities to be returned to Council ownership, and public spaces. This encompasses both securing delivery of the facilities plus a robust regime for the future maintenance and management .
- **Capping the Council's liabilities.** Ensuring that the developer funds the planning application, and all preparatory consultancy reports and assessments.
- **Tax planning.** Ensuring VAT and SDLT efficiency and benefiting from land remediation relief.



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Risk of failure to deliver the right solution

- **Financial viability of the scheme.** It is essential to establish an early understanding of the financial viability of the scheme, and anticipate the issues likely to be of concern to prospective developers and their funders.
- **Selecting the right development partner.** It is perhaps an obvious point, but the choice of the right development partner is one of the most important elements. The ideal partner will have the financial strength and technical capability to undertake a multi-million pound project and a strong track record demonstrating an ability to work collaboratively on similar projects. It is also important to understand the group structure of the bidders and call for a parent company guarantee or performance bond where appropriate.
- **Beware of conditions introduced by developer.** These may delay the scheme or entitle the developer to walk away - eg pre-letting/ pre-funding conditions, or capping s106 contributions.
- **Control under the delivery structure.** Whether the structure is a development agreement, joint venture or corporate vehicle, the documentation will need to reflect the right balance of:
 - control for the Council - in terms of the scope and quality of the development; timescales; financial controls, security and enforcement mechanisms; and
 - commercial flexibility allowing the developer to generate sufficient value to achieve a viable scheme and deliver any required benefits to the Council, and to satisfy the requirements of its funders.
- **Timescales.** The developer may be reluctant to invest time and money ahead of securing commitments from its funders or prospective occupiers or investors. A pre-agreed promotion and development programme, with appropriate milestones is therefore an essential element of the delivery agreement.
- **Managing the unknown** - issues such as contamination, ground stability or archaeology.

Addressing the risk of opposition

Although the project will inevitably involve opportunities for public consultation, it is important to identify the risk of delay to the project by formal objection to the planning, CPO or other statutory procedures, or challenge to the procurement process or administrative decisions.

Veale Wasbrough Vizards, Local Government and Regeneration

Local government and property development work are core areas of our business. Within the last 4 years we have advised 52 Authorities over a wide range of issues. We are on a number of public sector panels including Catalist (panels 1 - 7 inclusive) and the ACSeS panel.

Our 65-strong Real Estate team advises public and private sector clients over the life-cycle of property activity, from land assembly and acquisition, through tax and corporate structures, planning and environmental issues, to construction, funding, lettings and disposals, and estate management and dispute resolution. It is a measure of our expertise that our partners Tim Smithers and Gary Philpott are advisory editors for the current edition of the 3-volume property development section of the lawyer's bible "the Encyclopaedia of Forms and Precedents".



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Veale Wasbrough Vizards - Regeneration services

We have considerable expertise in dealing with development projects of all types, particularly regeneration and redevelopment projects. We have a team of individuals who bring together extensive experience in dealing with the whole range of matters which arise in such projects including:

- Procurement strategies and implementation including mechanisms for maximising competition and minimising the risk of challenge.
- Site assembly/acquisition strategy and procedures and strategy for resolving title problems and legal constraints to development.
- Advice on development vehicles, including joint ventures, corporate structures, limited liability partnerships and asset-backed vehicles.
- Advising on public law generally, including procurement (including EU procurement and competition law); propriety in decision taking; separation of regulatory functions (e.g. planning) from discretionary and other functions (e.g. landowning); fiduciary duties; best value (including under Section 123 of the Local Government Act 1972); governance and executive arrangements; standing orders (particularly on contracts); local government finance, audit and state aid; trading and charging; the well being powers and vires generally.
- Advising on planning and environmental impact issues to landowners, developers and occupiers (including assisting on planning applications, appeals and inquiries, listed building consents, drafting s106 agreements, transportation infrastructure issues and car parking and traffic orders).
- Development implementation issues - including minimising impact on existing retail activity, maintaining integrity of transport infrastructure, addressing decant issues (eg car parking).
- Profit sharing mechanisms such as overage and geared leases.
- Drafting and negotiating options, collaboration agreements, development agreements, conditional contracts, leases, nomination agreements, joint venture structures, overage arrangements and funding agreements.
- Advising on strategies for a disposals and implementation.
- Advising on VAT and SDLT implications.
- Advising on environmental law, including issues of ownership and occupation of contaminated land (particularly in connection with redevelopment of brownfield sites).
- Advising on CPO strategy, drafting CPO documents (including side road orders), conduct of CPO proceedings and implementation of CPOs (including notices to tenants, vesting orders and sheriff warrants).
- Funding issues.
- Negotiation/procurement of construction contracts and construction-related professional appointments and warranties in relation to such projects.