

CABINET SUB-COMMITTEE
(Local Authority Trading Companies' Shareholder)
01 March 2023

PART 1 – PUBLIC DOCUMENT

TITLE OF REPORT: HERTFORDSHIRE BUILDING CONTROL – DELEGATION OF FUNCTIONS & GOVERNANCE ARRANGEMENTS

REPORT OF: SERVICE DIRECTOR: REGULATORY

EXECUTIVE MEMBER: PLANNING & TRANSPORT

COUNCIL PRIORITY: PEOPLE FIRST / SUSTAINABILITY / A BRIGHTER FUTURE TOGETHER

1. EXECUTIVE SUMMARY

To seek approval and delegation from the Cabinet Sub-Committee acting as the Council's shareholder representative in the Hertfordshire Building Control Consortium of companies for the Service Director: Regulatory to vote in favour of the Governance matters within this report and to undertake such actions as necessary in consultation with the Service Director for Legal Community to complete these matters.

2. RECOMMENDATIONS

2.1. That the Cabinet Sub-Committee considers the contents of this report and having done so:

2.1.1 Agrees the option of 'Proper Officer' function via the 'secondment' model, including cancellation of the delegation of the building control approval function to LA1 and the appointment of a 'Proper Officer' via a secondment.

2.1.2 Agrees that the Service Director for Regulatory enters into a new rolling contract term with Hertfordshire Building Control Ltd to provide Building Control functions on behalf of the Council.

2.2. Delegates any action required to complete the above actions and as a result of the review of the client-side Commissioning Panel, to the Service Directors for Regulatory and Legal and Community on behalf of the Council as shareholder.

3. REASONS FOR RECOMMENDATIONS

3.1. To enable the Council to deliver its building control service in an effective and efficient manner.

4. ALTERNATIVE OPTIONS CONSIDERED

4.1. Alternative options are discussed within Section 8 of this report.

5. CONSULTATION WITH RELEVANT MEMBERS AND EXTERNAL ORGANISATIONS

- 5.1. The Executive Member for Planning and Transport and Deputy have been briefed with regard the matters within this report.

6. FORWARD PLAN

- 6.1 This report contains a recommendation on a key Executive decision that was first notified to the public in the Forward Plan on the 23 January 2023.

7. BACKGROUND

- 7.1 Cabinet Sub-Committee members will likely be aware of much of the background to the initial collaboration of 7 Hertfordshire local authority building control services which began in 2013 (Stevenage, Hertsmere, Three Rivers, North Herts, East Herts, Welwyn Hatfield and Broxbourne). The 7 authorities delivered their statutory building control services through a single trading company known as Hertfordshire Building Control Limited (HBC). The company is a subsidiary of Broste Rivers Limited, as is The Building Control Company (Hertfordshire) Limited (TBCC) which delivered the commercial aspect of the building control service. Broste Rivers Limited is a wholly owned local authority company with each authority holding an equal share. All three companies were incorporated on 4 February 2016.
- 7.2 In September 2019 the Cabinet Sub-Committee approved Dacorum joining the collaboration as an eighth equal shareholder.
- 7.3 In December 2021 the Cabinet Sub-Committee approved the acquisition of a further group of companies to enhance the commercial opportunities available.
- 7.4 The Council is represented by the Service Director: Regulatory as the Shareholder representative and the Service Director: Enterprise as a Director of the companies.
- 7.5 Local Authorities have a statutory duty to provide a Building Control service. This means that if an application is submitted to the authority, it has a duty to ensure that the works comply with building regulations. For North Herts Council those functions that can be delegated such as plan assessment, site inspections, are undertaken by HBC. Functions that cannot be delegated, such as statutory decisions are delegated, effectively to a single local authority within the consortium known as LA1, who issue Certificates and Notices through a Contracts Manager (although this was delegated to two authorities in 2022)¹. LA1 also audits HBC and monitors service levels. An annual support sum is paid to LA1 by all the building control authorities.
- 7.6 Since the start of the consortium until August 2022 LA1 was designated as Three Rivers District Council (TRDC). Following notice to cease the arrangement, East Herts and Three Rivers District Councils agreed to temporarily host the LA1 function whilst an alternative permanent solution was agreed for a proposed implementation date of 01 April 2023.

¹ [Delegated Decision Building control 21 July 2022](#)

8. RELEVANT CONSIDERATIONS

- 8.1. The Board and Shareholder representatives have over the past months been considering alternative options for the issuing of non-delegable functions under the Building Act 1984 such as the issuing of statutory decisions, as well as contract management and audit functions. These discussions have been supported by expert external legal advisors, Trowers and Hamblins, who supported and advised on the original business plan for the consortium in 2014.
- 8.2. The options considered are outlined in Table 1 below. In the table, the 'Proper Officer' means an officer discharging the non-delegable functions under the Building Act 1984 (the 1984 Act) which must either be made by each local authority or discharged by an officer of each local authority. Currently these functions have been delegated to Three Rivers and East Herts Council's.

Table 1:

Option	Legal position	Issues
Each Local Authority employing its own "Proper Officer".	Clear legal position	Cost. Inefficient, as all 8 authorities would be seeking to recruit a similar officer in a hard to recruit and retain service area. Difficult interface between work undertaken by HBC and eight individual officers.
Single "Proper Officer" jointly employed by each Local Authority.	Clear legal position except for potential complications of joint employment	Not attractive for an employee to have eight employers. Lack of resilience for 8 authorities as relying on a single officer. Risk of aggrieved employee taking advantage of joint contract of employment (e.g., cherry picking T&Cs). Real practical difficulty in day-to-day management.
"LA1" Model	Clear legal position Track record of delivery in Hertfordshire	Need for a single Local Authority to "volunteer" to be LA1, of which there are none.
Secondment model-formal "secondment" of named HBC employees to each local authority	Legal position established - In 2010, the High Court considered whether an "officer" must be an employee of the local authority in the case of <i>Pinfold North Ltd v Humberside</i>	Need to revise legal agreements between the shareholders to record the basis of secondment – in particular there would need to be a secondment agreement to cover each local authority

through secondment agreements. The secondment arrangements would be limited to the discharge of the non-delegable functions which they would do in the name of each relevant local authority	<i>Fire Authority [2010 EWHC 2944 (QB)] (Pinfold)</i> . The court decided that a local authority could appoint a person as an officer even if that individual was not an employee of that authority.	separately (so each employee acting as a "proper officer" would need to enter into 8 separate agreements with HBC and each relevant local authority).
Hybrid model of LA1 and secondment- i.e., authorities delegate to LA1 and LA1 function then discharged by a secondee	Legal position more vulnerable to challenge (because both the delegation and secondment arrangements offer scope for argument)	No material advantage to either secondment or LA1 model

- 8.3 As none of the partner authorities wish to be considered for the established role of LA1 and following significant scrutiny and evaluation of the options the Board and Shareholders / Representatives recommend the Secondment Model. As this offers an existing pool of qualified and experienced officers, negating the need for each local authority to recruit their own 'proper officer' in a hard to recruit profession, provides resilience that recruitment of a single proper officer does not and has an established legal position.
- 8.4 The Secondment Model would entail a formal "secondment" of named Hertfordshire Building Control Ltd (HBC) employee(s) (likely a minimum of two to cover absences) to each local authority through secondment agreements. This will require each authority to enter into a secondment agreement (limited to the discharge of non-delegable functions) with each named person and HBC. The secondment agreement will record the appointment of those persons as "proper officers" and provide them with the type of indemnity which an employed officer of the local authority would expect to benefit from in the discharge of their public duties. Furthermore, there will be a nominal payment to ensure the arrangement is enforceable.
- 8.5 To facilitate this approach the Inter Authority Agreement (IAA) will need to be amended, the IAA includes delegation of functions to LA1 which will need to be cancelled and the appointment of 'Proper Officers' in respect of non-delegable functions.
- 8.6 The IAA also regulates The Commissioning Panel (CP) on which each local authority has a representative. The role of the CP includes providing guidance and supervision to and receiving reports from the Contracts Manager through who LA1 issues Notices and Certificates. With the proposed change to a Secondment Model the role of the CP will need to be reviewed within the IAA, as such it would be appropriate to consider all the functions of the CP to see if they are better placed elsewhere, such as, with the Board or the Shareholders/Representatives.
- 8.7 In addition to a review of the IAA, the Service Agreement (SA) through which building control services are contracted from the building control authorities to HBC is also due for renewal. The original SA had a term of 5 years from 17th August 2016, with an

extended term agreed through to 31st of March 2023. Given the success of the building control consortium it is proposed to move from a fixed term services contract to a rolling contract for the provision of Building Control services and that this is in place prior to the expiration of the current arrangements.

9. LEGAL IMPLICATIONS

- 9.1. Under 5.11 of the Council's Constitution the roles and functions of the Cabinet Sub-Committee (Local Authority Trading Companies' Shareholder) include:
- (a) To represent the Council's interests as shareholder in wholly owned and other companies.
 - (b) To undertake all functions of the Council as shareholder under the Company Act, unless delegated otherwise.
 - (c) To ensure that actions taken by the companies accord with the interests of the Council as shareholder and contribute to the Council's objectives.
 - (d) To consider (and approve in principle where appropriate) any proposed or amended company documentation (save minor administrative documentation) including Memorandum and Articles of association and shareholder agreements.
- 9.2. Under the Shareholder Agreement the day-to-day conduct of the company's affairs are vested in the Directors, save any Reserved matters. Reserved matters include the following and the company cannot undertake the following without the prior written consent of all the Shareholders:
- 7.1.5 Changing the nature of the business.....
- This means that the relevant authorities, as shareholders, are required to authorise the change proposed in respect of delegations and secondment principle.
- 9.3 Under 14.6.10 (b) (i) of the Council's Constitution the Service Director – Regulatory has delegated powers with regard Building Control including client-side Building Control company operational matters as required under any agreements, in addition to all activities relating to discharge of the Council's function as the Local Building Regulation Authority.
- 9.4 Section 14.6.4 (a) (General Authorisations) delegates Service Directors at (ii) to enter into contracts to carry out works and/or for the supply of goods and services within approved budgets. Entering into the rolling contract would be such a supply of goods and services.
- 9.5 Expert external legal advice has been sought from Trowers and Hamlin on the matters within this report. The Duty of Care from Trowers and Hamlin has been extended to all eight local authority partners, currently provisionally – although at the point of finalising the report this is to be co-ordinated by the Chair of the Board and the final letter from Trowers is yet to be received. This would need to be signed by all effective Heads of Legal of the relevant authorities to enable them to rely on the advice. It should be received and executed before this decision is therefore taken by this authority.

10. FINANCIAL IMPLICATIONS

- 10.1 There are no direct financial implications (either revenue or capital) arising from this report. Paragraph 8.4 refers to a nominal payment being made to the secondees. The Council already pays for this role to be provided through the existing model, and the overall cost is expected to be the same.

11. RISK IMPLICATIONS

- 11.1. The options appraisal has been considered by all eight local authorities by their Board and Shareholder representatives. Expert legal advice has been provided on the options.
- 11.2. Without an alternative the host functions for statutory building control sign off will no longer be provided at the end of the month. The Council and other partner authorities do not have the in-house provision for this. Without alternative arrangements there is a direct risk to the Council and HBC in being unable to meet its statutory duty. For the reasons set out in section 8, this is the most practical way of delivering the required role and therefore minimises risk.

12. EQUALITIES IMPLICATIONS

- 12.1. In line with the Public Sector Equality Duty, public bodies must, in the exercise of their functions, give due regard to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 12.2. The recommendations within this report seek to provide building control services in a more commercial/cost effective manner that could positively impact the cost/service delivered to customers in the longer term.

13. SOCIAL VALUE IMPLICATIONS

- 13.1. The Social Value Act and “go local” requirements do not apply to this report. The services are supplied to the relevant authorities by a wholly owned company, HBC. Any benefits rest with the authorities in any event.

14. ENVIRONMENTAL IMPLICATIONS

- 14.1. There are no known Environmental impacts or requirements that apply to the actions or recommendations within this report.

15. HUMAN RESOURCE IMPLICATIONS

- 15.1. There is an existing member of staff to whom TUPE is likely to apply. This is currently being worked through by the host council.
- 15.2. Each authority provides an officer as a shareholder/representative, director and commissioning panel member. The review of the Commissioning Panel may allow the reduction in officers and/or workload required to service the consortium.

16. APPENDICES

- 16.1. None

17. CONTACT OFFICERS

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18. BACKGROUND PAPERS

- 18.1 Confidential legal advice from Trowers as to proper officer functions and other relevant matters (subject to Part 2 regulation 5 exemption if requested).