



# Cabinet



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<b>Report for:</b>	Cabinet
<b>Title of report:</b>	West Herts Crematorium Joint Committee
<b>Date:</b>	12 <sup>th</sup> July 2022
<b>Report on behalf of:</b>	Councillor Graeme Elliott, Portfolio Holder for Corporate Services
<b>Part:</b>	I
<b>If Part II, reason:</b>	N/A
<b>Appendices:</b>	Options Assessment – Anthony Collins Solicitors (appendix 1)
<b>Background papers:</b>	None
<b>Glossary of acronyms and any other abbreviations used in this report:</b>	None

## Report Author / Responsible Officer

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<b>Corporate Priorities</b>	Building strong and vibrant communities Ensuring economic growth and prosperity Ensuring efficient, effective and modern service delivery
<b>Wards affected</b>	All

<p><b>Purpose of the report:</b></p>	<p>To seek approval to new governance arrangements for the West Herts Crematorium Joint Committee</p>
<p><b>Recommendation (s) to the decision maker (s):</b></p>	<ol style="list-style-type: none"> <li>1. That Cabinet notes that the West Herts Crematorium Joint Committee has resolved to agree to the adoption of a Lead Authority model for the future operation of the Joint Committee</li>   <li>2. That Cabinet agrees that the Lead Authority model be adopted and that Three Rivers District Council be the Lead Authority.</li>   <li>3. That Cabinet agrees that a new Joint Committee Agreement be developed along with any other legal documents required to facilitate the new governance structure and delegates authority to the Strategic Director (Corporate and Commercial Services) in consultation with the Assistant Director, Legal and Democratic Services and the Council's nominated member of the Joint Committee to finalise and complete the new Joint Committee Agreement and any other legal documents required.</li> </ol>
<p><b>Period for post project review</b></p>	<p>The revised governance arrangements will be kept under continuous review by the Joint Committee and its performance will be reported at least annually to Strategic Planning and Environment Overview and Scrutiny Committee, Finance and Resources Overview and Scrutiny and Cabinet.</p>

## **1 Introduction**

- 1.1 The West Herts Crematorium Joint Committee has been in existence since 1973 and is made up of 5 councils in South West Hertfordshire, including Dacorum, Hertsmeare Borough Council, St Albans City and District Council, Three Rivers District Council and Watford Borough Council. The Joint Committee has had the responsibility of running the crematorium in Three Rivers, employing the staff and entering into all contracts related to the operation of the crematorium.
- 1.2 The Joint Committee is also in the process of building a second crematorium at Bunkers Farm in Dacorum which is due to complete in December and open in January 2023.
- 1.3 It has become clear that the existing governance structure requires development as the activities of the Joint Committee expand into the development and operation of a second crematorium. Formal legal agreements need to be in place relating to the ownership and management of the crematorium and stronger governance is required in relation to the overall operation of the Joint Committee's activities. In particular, the Joint Committee's legal status, its ability to enter into contractual arrangements, employ staff, sharing of surplus and liabilities need to be developed to provide an appropriate governance and decision-making framework going forward.

## **2. Proposed Arrangements**

- 2.1 Independent legal advice was commissioned by the partner authorities from Anthony Collins solicitors on governance options for the future. Anthony Collins have produced a detailed advice note on the issues, the options considered and the recommended approach going forward. This is attached as appendix 1.
- 2.2 The Honorary Secretary of the Joint Committee has met with the Chief Executives of the councils involved in the Joint Committee, and all authorities are recommending that the Joint Committee operates as a Lead Authority model. What this means in practical terms is that, rather than the Joint Committee itself, which is not a separate legal entity, one of the councils will be responsible for employing the crematorium staff, for entering into any contracts necessary for the operation of the crematorium and for entering into a land management or lease arrangement with the council that the crematorium is in and who currently owns the land.
- 2.3 It would still be overseen by the Joint Committee who would act as now, on behalf of the 5 councils to have overall management responsibility. Each partner authority has one nominated councillor representative who represents its authority on the Joint Committee. The Council's current appointed representative is Councillor Terry Douris.
- 2.4 Three Rivers District Council has volunteered to undertake the Lead Authority role. The existing crematorium in Garston is in their area and they currently lead on providing administrative and financial advice and support to the Joint Committee.
- 2.5 Subject to all partner councils agreeing the new governance arrangements, work will then commence to draft a new Joint Committee Agreement and also to put in place appropriate indemnity agreements between each of the councils to ensure that the Lead Authority is indemnified and will only incur its fifth share of the costs and liabilities. The current staff employed by the Joint Committee will be consulted and TUPE transferred from the Joint Committee to Three Rivers. Contracts in existence will need to be assigned over as well. This work to transition from the current way of operating to the new operating model will be led by Three Rivers as the proposed Lead Authority.
- 2.6 The intention would be for the new arrangements to take effect from 1 January 2023 in time for the opening of the new crematorium.

### **3. Management arrangements and Joint Committee Agreement**

- 3.1 The Lead Authority will be responsible for employing staff, entering into contracts to manage the facility, overseeing the direct financial management of the two sites, but this will be done in accordance with the framework agreed in a new Joint Committee Agreement.
- 3.2 The new Joint Committee Agreement will provide a much clearer and detailed framework which the Lead Authority will be required to operate within. The Agreement will be developed once all partners have agreement from their respective authorities to progress this model, and will cover:
- The decision-making process for strategic and major operational decisions, including the identification of the decisions which will be reserved for the Joint Committee itself, and those which can be delegated to the Lead Authority.
  - The financial governance arrangements, including profit/loss share, share of risk and liabilities, audit and scrutiny requirements.
  - Agreements with regard to land interests required to operate the two sites.
  - The performance monitoring arrangements
- 3.3 The new Joint Committee Agreement must be in place by the time the new crematorium is open in early 2023 and will be developed by officers with support from external legal advisers. It will be signed off formally in accordance with the delegations set out in recommendation 3 of this report.

### **4. Options and alternatives considered**

An options report considering different governance options is annexed to this report. The report assessed three different options. The first was keeping the current structure with no Lead Authority; this was discounted because it did not provide the required separate legal entity to enable the partnership to employ staff, enter into building or service contracts.

The report also considered setting up a local authority company, but the complexities of setting up and running a company and the tax implications make this option less favourable than the Lead Authority model.

The Lead Authority model provides the separate entity the partners require to make it legally sound and will enable Three Rivers as Lead Authority to employ staff directly and enter into the required contracts to operate the two sites successfully. This model also has a favourable tax position when compared to the separate company option.

### **5. Consultation**

The Joint Committee itself, which includes a councillor representative from each authority, has considered the structure proposed and agreed to the proposed governance structure set out in this report.

### **6. Financial and value for money implications:**

Under the Lead Authority model, financial transactions relating to the West Herts Crematorium Joint Committee will form part of the Three Rivers District Council statement of accounts. Financial support to the Joint Committee is already provided by Three Rivers District Council and there are no issues anticipated with the transition. The Joint Committee is currently registered separately for VAT. Advice on VAT matters will be sought, however, it is not anticipated that the proposed changes will have an impact on the VAT efficiency of Three Rivers District Council or the Joint Committee. The new Joint Committee agreement will be a critical document to ensure that liabilities, risks and rewards remain shared between the members of the Joint Committees.

### **7. Legal Implications**

Independent legal advice has been sought by the partner authorities from Anthony Collins Solicitors and is attached to this report. They will continue to assist with the drafting of the new Joint Committee Agreement and other legal work required to effect the change.

**8. Risk implications:**

Failure to have an effective and legally sound governance structure in place will impact the operation of the two crematorium sites and may increase the likelihood of legal challenge related to the operations. The proposed new Joint Committee Agreement will also make each partners' obligations and liabilities clearer which should assist the effective running of the two sites.

**9. Equalities, Community Impact and Human Rights:**

There are no Equalities, Community Impact of Human Rights implications arising from this report.

**10. Sustainability implications.**

There are no direct sustainability implications arising from this report.

**11. Council infrastructure (including Health and Safety, HR/OD, assets and other resources)**

Staff are currently employed directly by the Joint Committee and they will need to be formally consulted on the proposal and would TUPE transfer to Three Rivers. In addition, Three Rivers will need to enter into an agreement with the Pension Provider to ensure that any pension liabilities are agreed.

A land management or lease will need to be entered into between Three Rivers acting on behalf of the Joint Committee for the new crematorium. The form of agreement will be developed alongside the Joint Committee Agreement.

**11 Statutory Comments**

**Monitoring Officer:**

The proposed governance framework is appropriate to ensure that the two crematoria can operate efficiently within a sound legal structure. The Joint Committee Agreement will be developed to ensure that each authority's obligations, liabilities and share of any surplus are clearly defined and agreed. This will be developed with support from external solicitors who will help to ensure that a balanced approach is agreed across the partnership.

**S151 Officer:**

The single lead authority structure should provide a clear transparent approach to operations reporting and governance, with the board overseeing key decisions making. The Joint Committee Agreement that will be developed, by the partnership, will provide greater detail of the shared financial risks and rewards and will also set out a clear reporting and performance monitoring framework.

**12 Conclusions:**

The governance arrangements proposed in this report are required to ensure that the Joint Committee has an appropriate framework in place to facilitate effective decision making and the day to operation of the crematoria. The recommendations in the header of this report are therefore presented to Cabinet for approval.

## OPTIONS PAPER

### WEST HERTS CREMATORIUM JOINT COMMITTEE

#### BACKGROUND

1.1 A facilitated workshop took place with some officers of the West Herts Crematorium Joint Committee (“the Committee”) on 10 June 2021, during which the current arrangements for the provision of crematorium services were discussed and a number of matters of concern were identified.

1.2 We then produced an advice note looking at some of the wider issues in terms of how the Joint Committee currently operates and considering a “Lead Authority” model for future delivery of crematoria services. We also produced an advice note looking at the employment law and pension implications looking at the current arrangement and moving to a lead authority model.

1.3 A meeting took place involving the Member Authorities in October 2021 and a further meeting took place on Wednesday, 2 February 2022. Afterwards, further advice was requested in relation to the options and this was provided in April 2022.

#### OPTIONS

2.1 We have been asked to set out the options in respect of the provision of crematorium services, particularly in light of the fact of the new crematorium that is being built in Dacorum.

2.2 We have seen some financial information which suggests that the Joint Committee is operating the crematoria services in surplus this financial year, although the surplus is forecast to be less than the budgeted surplus figure. We are unsure of the projected financial position once the new crematorium is operational.

2.3 Essentially, the options available to you are as detailed below.

2.4 We understand that the view of members is that they would like to continue with the Joint Committee and it should be noted that the Joint Committee can continue to be the senior decision making body under any of the options; including if the option of a company, LLP or Joint venture was chosen.

A change to the way in which the services were structured would mean that the Terms of Reference and other documentation relating to the way in which the Joint Committee operated should be reviewed, including scrutiny arrangements and a new agreement drawn up between the participating authorities in relation to indemnities, risk, assets and liabilities.

2.5 We also understand that the second crematorium is under construction and expected to open by the end of the calendar year. More staff will be recruited and so there is a consideration needed as to decide whether they will be employed under the current arrangements or be employed by the Lead Authority, if this is the solution decided upon.

<b>Options</b>	<b>Advantages / disadvantages</b>
<p>Continue to run crematorium services through the Joint Committee</p>	<p><b>Advantages</b> – it avoids the upheaval involved with other options; there is an established way of working that is producing a surplus, albeit it there are improvements that the Lead Authority model offer which the Joint Committee cannot benefit from.</p> <p><b>Disadvantages</b> - The challenges with this approach are (i) the lack of a developed management structure at the Crematorium to allow staff to progress and upskill; (ii) the lack of senior officer oversight into the day to day operation of the crematoria services (iii) the management of the service and (iv) if an employee was to bring a claim against the Joint Committee in an Employment Tribunal (or indeed any other legal forum), it is not currently clear who would pick up liability beyond the Joint Committee’s ability to pay. We understand that the authority (Dacorum) where the new crematorium is being built is concerned about the legalities relating to the building and the difficulties of creating a lease with a Joint Committee as the lessee.</p>
<p>Designate one of the five Member Authorities as the “Lead Authority”</p>	<p><b>Advantages</b> – (i) Liability for any employment dispute would sit with the Lead Authority and an agreement would need to be put in place between the five Member Authorities of how liability would be shared; (ii) staff will operate within a wider management structure (ie in the Lead Authority) and there will be greater development opportunities for them as well as greater opportunity for the Lead</p>

	<p>Authority to input into the day to day management of the service.</p> <p><b>Disadvantages</b> - An exit payment would fall due from the Local Government Pension Scheme on the Joint Committee ceasing to have any active members and the Hertfordshire LGPS fund are likely to want to put in place a subsumption agreement whereby the amount of the exit payment is added to the liabilities of the Lead Authority. Alternatively, the five Member Authorities may decide to share liability (either directly with the Fund or between the Member Authorities and the Lead Authority).</p>
<p>Set up a Local Authority Company -including a Joint Venture with the Private Sector</p>	<p><b>Advantages-</b> setting up a company or LLP would in theory take the delivery of the service out of the control of the authorities and into a private limited company. A company limited by shares would be most appropriate if the councils wished to receive income from the profits of the company. If the company is to employ staff, any existing employees would be TUPE transferred to the company on existing terms and conditions. However, it is possible for new staff to be employed on different terms and conditions (including pension terms), although care should be taken with this as it can be seen as creating a two-tier workforce and may be subject to equal pay claims.</p> <p>If the company is to employ staff who are in the LGPS it would need to gain admitted body status.</p> <p>The councils would be able to loan the company money provided that the necessary rules around subsidy control were observed; and provided that the loan was within the councils' investment strategies. The interest payable on the loan would be classed as income to the councils; and would be an expense so far as the company was concerned.</p> <p><b>Disadvantages-</b> There is considerable work in setting up and then running a local authority company owned jointly by the councils; any company needs to operate under the requirements of the Companies Acts and the requirements of the regulator, Companies House, which is a not inconsiderable burden. A joint committee would still be needed, and the councils would have to decide on what functions that joint committee was to have, including how the shareholder function is to be exercised for each council. (Where councils operate an Executive model of</p>

	<p>governance, the shareholder function is an executive function.)</p> <p>A business case would be required in order to make the decision to set up the company and the company would need to draw up detailed business plans. Directors would need to be appointed, and care taken to avoid conflicts of interest between the company and the councils.</p> <p>Whilst the service delivery would be the responsibility of the company, the councils cannot avoid ultimate liability; and would need to agree amongst themselves how to share any liabilities that might arise.</p> <p>Any profits made by the company would be subject to corporation tax; which is levied at 19% on trading profits. This is a disadvantage against the current position where councils are not subject to pay corporation tax on any surplus.</p> <p>If the council were to consider a Joint Venture, with a private sector partner, an alternative to a company for the councils would be a LLP arrangement. In such a scenario each party to the LLP would be taxed in accordance with the tax regime which applied to that body and so the councils would not pay corporation tax on any profits. However, setting up a JV is both a costly and time-consuming arrangement; the selection of a partner alone can take a long time and inevitably the councils would lose some control over the service.</p> <p>If the service is going to be provided by a third party, care must be taken with how the company is set up so as to avoid any procurement implications.</p> <p>This advice does not deal in detail with the implications of the situation with the current arrangements for financing the second crematorium. However, if the councils are minded to consider further setting up a company or entering into a joint venture, detailed legal and financial advice would be required in relation to the implications of this on these arrangements.</p>
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2.6 If the decision is taken to go down the 'Lead Authority' route then questions that will need to be addressed are as follows:

- 2.6.1 Which member authority will be the 'Lead Authority'?
- 2.6.2 How will the Member Authorities share the risks, surplus, assets and liabilities?
- 2.6.3 How will the Member Authorities seek to share liability for the pension exit payment that will arise on the Joint Committee ceasing to have any active members?

- 2.6.4 How will crematorium staff fit into the staffing structure at the Lead Authority?
- 2.6.5 What is the timeline for seeking agreement from the Member Authorities to a Lead Authority model?
- 2.6.6 What is the timeline for implementing the Lead Authority model (to include a timeline to ensure sufficient engagement with employees and trade unions)?
- 2.6.7 What is the current position on the development of the second crematorium in Dacorum? How many new staff will need to be employed to run it and over what timescales?
- 2.7 If the councils wish to consider the setting up of a company further detailed legal, tax and financial advice should be taken on the implications of this for the authorities; both in terms of the funding arrangements and the implications due to corporation tax. The councils would need to fund this, and the costs of setting up and then administering the company; setting up the Board of Directors and dealing with the shareholder requirements.
- 2.8 In reality, for most councils the costs of setting up a company, combined with the additional administrative burdens; the loss of control and the taxation burden, mean that many decide that it is better to keep the services in house unless there are other issues which mean that a company makes corporate and financial sense. Often this relates to housing issues; or to situations where the setting up of a company or a Joint Venture enables additional investment and expertise to be provided which outweighs the disadvantages outlined above.

Anthony Collins Solicitors LLP

4 April 2022

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