

## **PART II**

**PART II reason:** The report contains information relating to the financial and business affairs of the Council and third party organisations and also contains legal advice.

(LGA 1972, Part V, Schedule 12A, part 1, paragraph 3 and 5).

### **Name of decision maker:**

Chief Executive

**Service Areas:** **Corporate and Commercial Services**

**Title of Decision:** Hertfordshire Building Control Limited – Contract renewal and provision of statutory function

### **Decision made and reasons:**

#### **Decision:**

1. Agree to cancel the existing delegation to East Herts District Council in relation to the LA1 function and agree that the option of 'Proper Officer' function is provided by Dacorum Borough Council for applications within the borough via the 'secondment' proposal set out in the report.
2. Agree that a new post of Lead Building Control Officer be created in the establishment to carry out the 'Proper Officer' functions and agree that an officer or officers from Hertfordshire Building Control be seconded into that role.
3. Agree to a new rolling contract term with Hertfordshire Building Control Ltd to provide Building Control functions on behalf of the eight partner authorities and agree that amendments to the existing Service Level Agreement (SLA) and Inter-Authority Agreement (IAA) be made to reflect this change and any further changes required as a result of ongoing governance reviews.

#### **Background and Reasons:**

1. In 2019, the Council joined the Hertfordshire Building Control Company, which was set up in 2016 by 7 other Hertfordshire Authorities and is now wholly owned by the eight authorities, (including Dacorum), in equal shares. Until August 2022, the statutory functions were undertaken by Three Rivers District Council (TRDC), under the umbrella of LA1. Following notice from TRDC to cease the arrangement, East Herts Council agreed to temporarily host the LA1 statutory function whilst an alternative permanent solution was agreed.
2. Legal advice was commissioned and a number of proposals were evaluated

independently. Following significant scrutiny, the Board and Shareholders agreed that the most favourable option was to implement the secondment model. Full details of the analysis undertaken can be found at Appendix A.

3. Under the Inter Authority Agreement (IAA), the local authorities delegated the performance of the "Delegated Functions" to 'LA1'. The "Delegated Functions" are defined in the IAA as the functions and related matters and activities set out at Schedule 1 paragraphs 1.1.1 and 1.1.2 of the SLA. These include the non-delegable functions. The functions are specifically listed in Schedule 1 but include the main statutory functions for building control including the processing and approval of building regulation applications, dealing with dangerous structures and enforcement action.
4. The preferred option entails a formal "secondment" of named Hertfordshire Building Control Ltd (HBC) employees to each local authority through secondment agreements and these employees would be the "Proper Officer", in Dacorum, who would be responsible for formal sign-off of its statutory functions. The secondment arrangements would be limited to the discharge of the non-delegable statutory functions. These agreements would involve a nominal fee (e.g. £1) and importantly, provide indemnities to those seconded HBC employees to place them in the same position in which an employed officer of one of the local authorities would be in when discharging their responsibilities.
5. This option would require a move away from appointing one of the local authorities as LA1. Instead, each local authority will appoint named persons, (who will happen to be employees of HBC), to discharge the non-delegable statutory functions, which they will do in the name of the relevant local authority.
6. This will require each authority to enter into a secondment agreement 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.
7. Each local authority must provide statutory functions in respect of Building Control and the secondment option will provide clarity of provision of the functions and ensure that all the partner local authorities and named HBC surveyors are protected and able to perform the necessary services.
8. The Governance Steering Group has been undertaking a review of the internal governance for Herts Building Control and Broste Rivers Limited. Some changes are proposed to the governance structure including ceasing the role of the existing Commissioning Panel because its functions are being effectively carried out within

other parts of the structure. The review is ongoing but will necessitate changes to the governance documents to clarify the new structure. Trowers and Hamlins solicitors are advising on the new structure and this advice is being reviewed by the Council's Monitoring Officer before formally documenting the changes in new agreements as noted and authorised in decision 3 above.

**Reports considered:**

Cabinet Report dated 12<sup>th</sup> July 2022

**Officers/Councillors/Ward Councillors/Stakeholders Consulted:**

Leader of the Council/Portfolio Holder Commercial Strategy and Delivery, Portfolio Holder for Corporate Services, Portfolio Holder for Place

**Monitoring Officer Comments:**

Cabinet on 12<sup>th</sup> July 2022 agreed:

To extend the current Services Agreement with Hertfordshire Building Control until 31<sup>st</sup> March 2023 and delegate authority to the Chief Executive in consultation with Assistant Director, Legal and Democratic Services and Chief Financial Officer to agree future extensions. (recommendation 1)

This decision proposes a new rolling contract term which will continue unless terminated by the partner authorities and therefore falls within the authority delegated to the Chief Executive to agree future extensions as set out in recommendation 1.

Cabinet also agreed by recommendation 5:

To delegate authority to the Chief Executive, following consultation with the Portfolio Holder for Commercial Strategy and Delivery, Strategic Director (Corporate and Commercial Services), Assistant Director, Legal and Democratic Services and Chief Financial Officer, to agree and finalise any future arrangements for statutory building control including the LA1 function beyond 31<sup>st</sup> March 2023.

This decision proposes a new option for the Council to second staff from Hertfordshire Building Control to carry out the LA1 function and is therefore within the remit of the delegation in recommendation 5. The Portfolio Holder for Commercial Strategy and Delivery, Strategic Director (Corporate and Commercial Services), Assistant Director, Legal and Democratic Services and Chief Financial Officer have all been consulted and agree with this proposal.

The secondment option will require a minor change in the constitution to ensure that the new role of Lead Building Control officer is named in the Constitution as the role responsible for the statutory building control functions and this will be updated by the Monitoring Officer once this decision is made.

Secondment agreements will also be required with Hertfordshire Building Control and amendments made to the existing Service Level Agreements and Inter Authority Agreements to reflect the changes agreed in this decision.

Hertfordshire Building Control is considered to be a Teckal company. Teckal is an exemption under Regulation 12(4) of the Public Contracts Regulations 2015 which allows the controlling contracting authorities, (in this case the Shareholders), to award the controlled companies, (Broste Rivers Limited and HBC), contracts without a PCR-regulated procurement if certain conditions apply. The applicable conditions have been considered by external lawyers who are satisfied that the conditions apply which would allow the contract to be extended without a regulated procurement exercise.

**S151 Officer Comments:**

The change in approach to provide the building control function via HBC is not anticipated to cost more than the current arrangements, and hence will be delivered within existing budgets.

**Implications:**

**Value for Money and Financial:**

The Annual Support charge that the Council pays to Three Rivers Council is £26K.

The final costs of the new proposal will not increase current expenditure.

**Risk:**

Failure to provide an appropriate structure to discharge building control functions would result in all partner authorities failing to meet their statutory functions.

**Officer Signature:**



**C Hamilton**

**Chief Executive**

Date: 3<sup>rd</sup> March 2023

APPENDIX A



**dated 20 October 2022**

**Hertfordshire Building Control Limited**

**Advice**

in relation to "proper officer" functions

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# OFFICER DECISION RECORD SHEET

## 1 Introduction

- 1.1 We have been asked by Hertfordshire Building Control Limited (**HBC**) to provide advice on a particular option for signing off building control decisions so that a decision can be made about the appropriate way forward.
- 1.2 We have been asked to specifically look into the option to appoint named HBC employees as the "proper officers" of each of the eight local authority shareholders in relation to 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 (**non-delegable functions**).
- 1.3 This would also entail a formal "secondment" of named HBC employees to each local authority through secondment agreements. The secondment arrangements would be limited to the discharge of the non-delegable functions. These agreements would involve a nominal fee (e.g. £1) and importantly, provide indemnities to those seconded HBC employees to place them in the same position in which an employed officer of one of the local authorities would be in when discharging their responsibilities (for brevity, we call this the **Secondment Option**).
- 1.4 Further to discussions with Simon Heywood, we have been asked to limit our advice to the Proper Officer/ Secondment Option and not to look into the joint employment contracts option, as there is no appetite for joint employment contracts from the local authorities at this stage.

## 2 Executive Summary

- 2.1 The "proper officer" option would require a move away from appointing one of the local authorities as LA1 (which is summarised in paragraph 4 below). **Instead, each local authority will appoint named persons (who will happen to be employees of HBC) to discharge the non-delegable functions, which they will do in the name of the relevant local authority.**
- 2.2 **This will require each authority to enter into a secondment agreement 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.**
- 2.3 **The other actions which will be required in order to adopt this option will include:**
- 2.3.1 A decision from / report to each local authority (in line with each local authority's constitution and standing orders) to:
- (a) cancel the delegations to LA1; and
  - (b) appoint the named persons as "proper officers" in respect of the non-delegable functions;
- 2.3.2 Amendments to the existing Service Level Agreement (**SLA**) and Inter-Authority Agreement (**IAA**) to reflect this change.

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2.3.3 Consideration of amendments which might be required to the contract management process between HBC and the local authorities.

2.3.4 In particular, the SLA would need to be updated to make it clear:

- (a) about those matters which the named persons will undertake as "proper officers" for each of the authorities; and
- (b) what is being done by HBC and what is being done by the "proper officer",

We would recommend that the secondment agreements are attached as appendices.

### 3 Proper Officer function

3.1 We have held meetings with Simon Heywood to identify potential solutions to the challenges posed by the LA1 model. One of the driving forces for this is that under the current arrangements, building control expertise for the local authorities sits within HBC.

3.2 As set out above, the Proper Officer/ Secondment Option involves the secondment of named persons (who will happen to be employees of HBC) to discharge (or advise each local authority as one of its officers to enable the local authority to discharge) the non- delegable functions. The named person would be seconded as a "proper officer" to each local authority.

3.3 In terms of the background to this, Section 101(1) of the Local Government Act 1972 (the **1972 Act**) provides that:

*"Subject to any express provision contained in this Act or any Act passed after this Act, a local authority may arrange for the discharge of any of their functions—*

- (a) by a committee, a sub-committee or an officer of the authority; or*
- (b) by any other local authority."*

3.4 In 2010, the High Court considered whether an "officer" must be an employee of the local authority in the case of *Pinfold North Ltd v Humberside Fire Authority [2010 EWHC 2944 (QB)] (Pinfold)*. 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.

3.5 In *Pinfold*, the applicant fire authority (**Humberside**) applied for summary judgment on a claim brought against it by the respondent (**Pinfold**). *Pinfold* was a company formed by an individual called Michael Price. Michael Price had been employed by Hull County Council and had acted as Humberside's chief finance officer. When he retired from his local authority employment, he was asked to stay on as Humberside's chief finance officer. He therefore created a company called *Pinfold*, which entered into a contract with Humberside as a vehicle for remunerating him.

3.6 Humberside subsequently took the view that Michael Price's appointment as its chief finance officer following his retirement was ultra vires because he was a contractor

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rather than an employee. It terminated the contract, and Pinfold claimed damages on Michael Price's behalf in respect of wrongful termination. Humberside's application turned on whether it had had any statutory power to appoint Michael Price following his retirement from the local authority. That in turn depended on the interpretation of section 112 of the Local Government Finance Act 1988 (the **1988 Act**) and whether there was any requirement that an "officer" of the authority should also be its "employee".

3.7 The court found in Pinfold's favour. While there was no doubt that all employees of a local authority were its officers, *the question was whether all its officers were necessarily its employees*. The court found that there was nothing in either the 1972 or the 1988 Act (the Acts which were considered), or in the authorities cited, to require that a statutory chief officer of a combined fire and rescue authority should be an employee of a relevant authority. Pinfold could therefore be appointed as an officer of Humberside without necessarily being an employee.

3.8 The court found that the 1972 Act contained nothing to exclude the appointment of an officer who was not an employee. Interestingly, the Greater London Authority had an express provision under a comparable statutory provision requiring that its chief finance officer should also be an employee. That served to underline the interpretation supported by Pinfold.

3.9 The Pinfold judgment also referred to another relevant House of Lords case (*Miles v Wakefield Metropolitan District Council [1987] IRLR 193, HL*) which concerned a superintendent registrar. Whilst the facts of the case are not as relevant for our purposes as those in Pinfold, the House of Lords did find that the superintendent registrar was not a servant of the local authority under a contract of employment *but was a holder of an office*, thereby distinguishing between the two.

3.10 The 1984 Act also mandates that a number of functions must be exercised by the relevant local authority or its "proper officer" or another of its officers. For example, section 93(1) of the 1984 states that:

*"A notice, order, consent, demand or other document that a local authority are authorised or required by or under this Act to give, make or issue may be signed on behalf of the authority—*

*(a) by the proper officer of the authority or the district surveyor, as respects documents relating to matters within his province, or*

*(b) by an officer of the authority authorised by them in writing to sign documents of the particular kind or, as the case may be, the particular document."*

3.11 The 1984 Act sets out matters which can only be a decision of the local authority acting through an "authorised officer" or "proper officer", including provisions under:

3.11.1 section 35A: initiating prosecutions;

3.11.2 section 61: approval for the repair of drains;

3.11.3 sections 77 and 78: dangerous buildings – emergency measures; and



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- 3.11.4 section 95: power to enter premises.
- 3.12 In section 126 of the 1984 Act, the definition of "authorised officer" means:
- (a) *"an officer of the local authority authorised by them in writing, either generally or specially, to act in matters of a specified kind or in a specified matter, or*
  - (b) *by virtue of his appointment and for the purpose of matters within his province, a proper officer of the local authority."*
- 3.13 "Proper officer" is defined as *"in relation to a purpose and to a local authority... an officer appointed for that purpose by that authority."*
- 3.14 While the Pinfold case did not address the 1984 Act specifically, it did address the appointment of the section 151 officer (one of the few offices which every English local authority is mandated to have by legislation).
- 3.15 The Pinfold case was a decision made in the High Court (it was not appealed) and neither the Court of Appeal nor the Supreme Court have considered the question. This means that it might be open to one of these higher courts to decide the question differently if they were determining whether a local authority officer had to be an employee.
- 3.16 However, we are aware that a significant number of local authorities have appointed interim chief, statutory and senior officers without employing them. On that basis we do not think the relevant local authorities would be acting unreasonably in relying on the Pinfold decision and appoint officers who they did not employ.
- 4 LA1 model**
- 4.1 For completeness, we have set out below our understanding of the LA1 model. HBC currently provides building control services to the following local authorities under a SLA dated 17 August 2016 (as amended by a Deed of Variation dated 18 April 2018 and extended by a further Deed of Variation dated 9 February 2020):
- 4.1.1 Broxbourne Borough Council;
  - 4.1.2 East Hertfordshire District Council;
  - 4.1.3 Hertsmere Borough Council;
  - 4.1.4 North Hertfordshire District Council;
  - 4.1.5 Stevenage Borough Council;
  - 4.1.6 Three Rivers District Council; and
  - 4.1.7 Welwyn Hatfield Borough Council.
- 4.2 We understand that the SLA has been further extended as it was due to expire on 16 August 2022.

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- 4.3 The local authorities have also entered into an IAA dated 18 April 2018 and a Shareholder Agreement from 2016<sup>1</sup> (the **SHA**).
- 4.4 More recently, we understand that Dacorum Borough Council joined:
- 4.4.1 the IAA (although we have not seen any documentation relating to this);
  - 4.4.2 the SHA (we have seen an undated Deed of Adherence signed by Dacorum only);
  - 4.4.3 the SLA (we have seen an undated Deed of Adherence signed by Dacorum only).
- 4.5 Under the IAA, the local authorities delegated the performance of the "Delegated Functions" to LA1 (LA1 was, in the first instance, Three Rivers). LA1 is known as the "Delegated Authority" under the IAA.
- 4.6 The "Delegated Functions" are defined in the IAA as the functions and related matters and activities set out at Schedule 1 paragraphs 1.1.1 and 1.1.2 of the SLA. These include the non-delegable functions.
- 4.7 The responsibilities of the Contract Manager (which up until recently, was performed by the Director of Communities and Environmental Services at Three Rivers) are set out at Schedule 1 of the IAA. This includes performing the functions delegated to LA1 by the other local authorities. We understand that this caused some concerns with the individual who has stepped down from the role.
- 4.8 Three Rivers originally took the role of LA1 but stepped down from this role earlier this year. This has caused some challenges in finding a replacement for LA1 and in the longer term, another solution is sought.
- 5 **Practical considerations**
- 5.1 Secondment is where an employee (the **seconded**) of one organisation (the **employer**) is provided to another organisation (the **end user**) on a temporary basis. Under this model, staff would remain in the employment of HBC, but would agree that they would undertake the "proper officer" functions for the relevant local authority. A secondment does not need to be full time and such an agreement could specifically set out that the activities are unlikely to materially interfere with the time the seconded devotes to HBC.
- 5.2 The seconded continues to be employed and paid by the employer (i.e. HBC). The end user will pay a fee to the employer for use of the seconded's services, which we would suggest is a nominal fee of £1 in these circumstances.
- 5.3 Usually, a secondment is for a particular role and for a set period of time, although in this case, the agreement could be structured so that the role continues until it is terminated or the seconded is suspended by their employer, for example.
- 5.4 If staff are to be formally seconded, they would clearly need to agree to do this as they will be party to the secondment agreement.

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<sup>1</sup> The SHA we have been provided with is signed but undated. We assume a dated version is in existence.

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- 5.5 The benefit of this arrangement is that staff will remain as HBC employees and, other than requiring their explicit agreement to work for the relevant local authority in terms of fulfilling the "proper officer" role (as set out above), there will be no other changes to their terms of employment or their continuity of employment.
- 5.6 We would suggest that if the local authorities agree to go ahead with this option, at least two HBC employees are appointed (by way of secondment) as "proper officers" to each of the local authorities. The reason we suggest at least two officers are appointed is to ensure sufficient cover in the event of sickness or absence etc.
- 5.7 There would need to be a secondment agreement to cover each local 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).
- 5.8 As set out in paragraph 2.2, to provide protection for the secondees, the secondment agreement would provide an indemnity from each local authority to the secondee of a kind which an employed officer of the local authority would expect to benefit from in the discharge of their public duties. An indemnity could also be provided from each local authority to HBC in relation to the secondees.
- 6 **Conclusion**
- 6.1 We hope this is a useful overview of an alternative option to the LA1 model so that a decision can be made about the appropriate way forward.
- 6.2 We would be happy to work with HBC to draft the relevant secondment agreements and make the necessary amendments to the other documentation, as well as considering any further practical details as the work progresses.

### APPENDIX B Hertfordshire Building Control Limited

#### "Proper Officer" functions analysis – to be read in conjunction with Trowers & Hamblins October 2022 advice note

In this table "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

Option	Legal position	Issues
Each Local Authority employing its own	Clear legal position	Cost.

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"Proper Officer".		Inefficient  Difficult interface between work undertaken by HBC and eight individual officers.
Single "Proper Officer" jointly employed by each Local Authority (and HBC?)	Clear legal position except for potential complications of joint employment	Not attractive for an employee to have eight or nine employers.  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 until recently	Need for a single Local Authority to "volunteer" to be LA1.  Interface between HBC and LA1 potentially difficult (reliance by HBC and LA1 officers)
Secondment model-formal "secondment" of named HBC employees to 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	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 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.	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 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- ie 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