

MUNICIPAL YEAR 2018/2019 REPORT NO. 166

MEETING TITLE AND DATE:

Cabinet 13th February
2019

REPORT OF:

Commercial Director

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Agenda – Part: 1

Item: 11

Subject: Approval of List of Shareholder Reserved Matters

Wards: All

Non Key

Cabinet Members consulted: Cllrs

Caliskan, Anderson, Oykener, Lemonides, Maguire, Cazimoglu

1. EXECUTIVE SUMMARY

The Council must be able to exercise appropriate control and influence over its wholly-owned companies in order for them to contribute to its objectives and manage risks whilst at the same time allowing the companies appropriate freedoms and flexibilities to operate commercially.

This should be reflected in the 'shareholder reserved matters' i.e. decisions/matters which must be referred back to the Council as shareholder for approval before being actioned by each company.

A list of shareholder reserved matters has been produced which balances the need for the Council to retain strategic control with the importance of providing each company with the commercial freedom to maximise its chances of success.

The Recommendations contained in this Report were taken to, and approved by, the Shareholder Board on 29th January 2019.

2. RECOMMENDATIONS

(As approved by the Shareholder Board on 29th January 2019):

2.1 That each company adopts the list of shareholder reserved matters attached at Appendix 1 to this Report.

2.2 That changes are made to the company Articles (if required) in order to give effect to the list of shareholder reserved matters.

2.3 That authority is delegated to the Council's Commercial Director, acting in consultation with the Director of Law and Governance and the Director of Finance, to finalise and implement the list of shareholder reserved matters.

2.4. That the Council works with each company to develop a Shareholder Agreement and timetable for changes needed to governance arrangements.

2.5 That authority is delegated to the Council's Commercial Director, acting in consultation with the Director of Law and Governance and the Director of Finance, to agree the terms of and implement the Shareholder Agreement with each of the companies.

3. BACKGROUND

3.1 The Council has a number of wholly-owned trading companies. As sole shareholder, the Council must be able to exercise appropriate control and influence over its entities in order for them to contribute to its objectives and manage risks whilst at the same time allowing the companies appropriate freedoms and flexibilities to operate commercially. This should be reflected in the extent of the 'shareholder reserved matters' i.e. decisions/matters which must be referred back to the Council as shareholder for approval before being actioned by each company.

3.2 To this end, it is proposed that each company is asked to adopt the attached list of shareholder reserved matters (Appendix 1). In the interests of ensuring a consistent governance framework as far as possible, the lists for all companies are broadly aligned.

3.3 In order to implement these shareholder reserved matters, it is acknowledged that clarity is needed on arrangements and roles within the Council and how the Council will work with companies so that they have the freedoms, flexibility and a constructive relationship with the Council. As set out in 3.10 below, it is therefore proposed that a Shareholder Agreement is developed with each company that helps to implement reserved matters, agrees the roles and responsibilities of Company and Council individuals and arrangements for supporting the companies to thrive and deliver their objectives.

Current Shareholder Reserved Matters

3.3 The shareholder reserved matters currently in force for each company are listed below, as set out in the governance documents (primarily the Articles of Association). In addition, there are certain matters which are reserved to the shareholder as a matter of company law and apply to all companies (such as approval of substantial transactions involving directors, and directors' service contracts of more than 2 years).

3.4 Housing Gateway Limited

The Council as shareholder has a general power under the Articles to direct the directors to take or refrain from taking specified action.

3.5 Enfield Innovations Limited

The Council as shareholder has a general power under the Articles to direct the directors to take or refrain from taking specified action.

3.6 Enfotec

The Council as shareholder has a general power under the Articles to direct the directors to take or refrain from taking specified action.

3.7 Independence and Well Being Enfield ('IWBE')

It should be noted that IWBE is a 'Teckal company', which means that contracts can be awarded freely between the Council and IWBE without the need to go through a competitive procurement process. In order to maintain the Teckal status of IWBE, the Council must exercise a control over IWBE similar to that which it exercises over its own departments (i.e. it needs to demonstrate a decisive influence over both strategic objectives and significant decisions). The shareholder reserved matters must reflect this requirement.

The Council as shareholder has a general power under the Articles to direct the directors to take or refrain from taking specified action.

In addition, the Articles contain a comprehensive list of matters to be referred to the Council as shareholder:

- Adopt or amend Company's business plan.
- Making of any political or charitable donation.
- Change in company status from a limited company to a Plc or from a company limited by guarantee to any other form of legal entity.
- The admittance of a new shareholder or the issue of any shares.
- Issuing any loan capital in the Company or entering into any commitment with any person with respect to the issue of any capital.
- Making or borrowing any indebtedness.
- Altering the company name or its registered office.
- Changing the nature of the Company's business or commencing any new business...which is not ancillary or incidental to its current business.
- Forming any subsidiary or acquiring shares in any other company or participating in any partnership or joint venture (incorporated or not).
- Amalgamating or merging with any other company or business undertaking.
- Any acquisition/disposal of any material asset(s) otherwise than in the course of the business.
- Creating or granting any encumbrance over the whole or any part of the business, undertaking or assets of the Company or agreeing to do so other than liens arising in the ordinary course of business.
- Making any loan or granting any credit or giving any guarantee (other than in the normal course of trading) or indemnity.

- Appointing any agent or other intermediary to conduct any of the Company's business.
- Entering into any arrangement, contract or transaction not in accordance with Company's business plan during the relevant financial year or outside the normal course of its business or otherwise on arm's length terms other than arrangements to sub-let or rent the rooms in certain premises occupied by the Company but subject to the terms of the leases of such premises... (1) Waverley Road, "Formont"); (2) 25 Connop Road ("New Options"); (3) Ground Floor 65c Park Avenue ("Park Avenue") and (4) 55b The Sunny Road ("Rose Taylor").
- Declaring or paying any distribution.
- Incurring any capital expenditure in excess of £10,000 (in respect of individual items and /or where aggregate capital expenditure for the same project exceeds this sum).
- Taking any step to wind up the Company (except where it is insolvent).
- Taking any step to place the Company into administration.
- Proposing or entering into any arrangement, scheme or moratorium, compromise or composition with its creditors.
- Applying for an interim order under Part 1 Insolvency Act 1986 or inviting the appointment of a receiver or administrative receiver over all or any part of the Company's assets or undertaking.
- Approving any merger, liquidation, dissolution or acquisition of the company.
- Employing the managing director of the Company and setting or amending the terms applicable to such employee or dismissing such employee.
- Instituting, settling or compromising any legal proceedings (other than debt recovery...) instituted or threatened against the Company or submitting to arbitration or ADR any dispute... except in the case of employment disputes or proceedings ...whereby the quantum of any compromise agreement and/or settlements is under £10,000 provided the council is notified...at least 5 working days in advance.
- Making any decision regarding the use of trust funds received by the Company which were gifted to the council for the benefit of service users.

3.8 Lee Valley Heat Network Operating Company Limited (trading as 'Energetik')

Energetik was originally set up as a two-tier corporate structure, with a holding company (HoldCo) as the sole shareholder of the operating company (Energetik). That structure enabled strategic direction, accountability and oversight to remain with the Council through the HoldCo Board which was mainly comprised of LBE representatives. Following the creation of this Shareholder Board, the role of HoldCo is obsolete, and a Report has been taken to the Shareholder Board recommending that HoldCo is dissolved.

The shareholder reserved matters were set out in a Delegations Matrix (DM), adopted by both HoldCo and Energetik in 2015. This DM was designed to maximise efficiency by ensuring that operational decisions could be made swiftly by either HoldCo or Energetik, whilst key decisions affecting strategy, or involving financial or reputational risk, remained with the Council as shareholder. It reflected the following list of shareholder reserved matters specifically approved by Cabinet and Full Council ('Mobilisation & Operation of Lee Valley Heat Network', Cabinet – 17 June 2015, Council - 24 June 2015):

- Amendments to the shareholder reserved matters.
- Approval and adoption of the LVHN Business Plan and material amendments thereto.
- Material alteration of the nature/scope of the business, closing down/commencing any new business, which is not ancillary or otherwise incidental to the Business Plan and/or Articles.
- Formation of a subsidiary not within the contemplation of the Business Plan.
- Acquiring shares in any other company (subscription or transfer) or any other similar interest in another entity including a limited liability partnership or limited partnership, entering into joint ventures or partnerships or profit sharing.
- Alteration of authorised or issued share capital, or classification thereof, allotment of share capital or securities, granting options or rights to subscribe to the issuing of share capital, of HoldCo.
- Making any petition or passing any resolution to wind up Holdco or making any application for an administration or winding up order or any order having similar effect in relation to Holdco or giving notice of intention to appoint an administrator or file a notice of appointment of an administrator.
- Entering into of material contracts not contemplated by the Business Plan or "Investment Decision(s)" taken by the Cabinet/Council in respect of LVHN.

- Termination by LVHN companies of any of their material contracts, where this will have a material impact on the delivery of LVHN or the Council.
- Amendments to contracts where material and in excess of £100,000.
- Commencing any claim, proceedings or other litigation brought by or settling or defending any claim, proceedings or other litigation brought against Holdco (or OpCo), except in relation to debt collection in the ordinary course of business (where the claim, proceedings or other litigation has a potentially material impact on the reputation of LBE/HoldCo/OpCo or has a potential material cost implication for LBE/HoldCo/OpCo).
- Disposing of a substantial part of the Business and/or assets outside of the scope of Business Plan.
- Approving the repayment of the external loans (other than in accordance with the terms of the agreement signed by LBE).
- Entering into (or agreeing to enter into) any borrowing arrangement in relation to working capital on behalf of Holdco and giving any security in respect of any such borrowing (including creating any encumbrance over the whole or any part of the undertaking or assets of Holdco or over any capital of Holdco) - above £300,000 (Cabinet and Full Council where above £500,000 and not already in Capital Programme).
- Giving a guarantee, surety ship, bond or indemnity to secure the liabilities of any person or assume the obligations of any person, where above a cumulative value of £500,000.
- Write down of HoldCo asset value, or writing off debts (above £25,000 per event).

The Report to the Shareholder Board recommending that HoldCo is to be dissolved has also recommended that necessary amendments are made to the 2015 DM in the interim to reflect the removal of HoldCo from the company structure.

The Council as shareholder also has a general power under the Articles to direct the directors to take or refrain from taking specified action.

3.9 Proposed Shareholder Reserved Matters

A list of shareholder reserved matters has been produced (Appendix 1) which balances the need for the Council to retain strategic control with the importance of providing each company with the commercial freedom to maximise its chances of success.

In the interests of streamlining governance across all the companies, the shareholder reserved matters for each are broadly aligned, with company-specific commercial and financial matters kept to a minimum and listed separately at the end of Appendix 1.

The list of shareholder reserved matters taken to the Shareholder Board on 29th January 2019 originally included the item 'Payment of a political donation'. Members of the Shareholder Board requested that this should instead be addressed via a blanket prohibition included in all company Articles.

3.10 Shareholder Agreement

The purpose of this Report is to update the way the Council works with its companies as a Shareholder. The Council has obligations to ensure, as a shareholder and in some cases investor and supplier of services, that governance is appropriate to ensure risks are adequately addressed and that companies are successful in delivering their objectives and financially viable.

The Council has over the last few months reviewed its arrangements and engaged with company and council stakeholders, to identify changes that need to be made. This Report proposes new corporate standards for reserved matters.

In order to implement the reserved matters, it is acknowledged that clarity is needed on arrangements and roles within the Council and how the Council will work with companies so that they have the freedoms, flexibility and a constructive relationship with the Council. It is therefore proposed that a Shareholder Agreement is developed with each company that helps to implement reserved matters, agrees the roles and responsibilities of Company and Council individuals and arrangements for supporting the companies to thrive and deliver their objectives.

A Shareholder Agreement is good practice between Councils and their companies and helps address many of the types of areas where more clarity has been needed. For example, clarifying the various roles in the Council, such as Commissioner, Shareholder Board, and support services. It will be developed in partnership with companies addressing the queries they have of the Council and satisfying the Council that its reserved matters are being implemented. An action plan will be produced with each company for implementation of the reserve matters and a shareholder agreement.

4. ALTERNATIVE OPTIONS CONSIDERED

Do Nothing. The companies continue to operate with divergent and in some cases minimal shareholder reserved matters. This option will not improve governance and strategic alignment with the Council's objectives.

5. REASONS FOR RECOMMENDATIONS

These governance changes are required to improve the way the Council works with its companies as a Shareholder and to ensure that suitable and streamlined governance is in place across the companies.

6. COMMENTS FROM OTHER DEPARTMENTS

6.1 Financial Implications

No financial implications arising from this report

6.2 Legal Implications

6.2.1 The recommendations within this report are within the Council's powers and duties. The Council has a general competence powers in s1 Localism Act 2011 which empower it to undertake the actions recommended in this report.

6.2.2 The Council must be mindful of its obligations as shareholder under company law, and seek advice from Legal Services when taking action/steps as shareholder.

6.2.2 The Council must also ensure the directors retain operational control over the companies to avoid being deemed a shadow director, thereby incurring duties and responsibilities similar to those of actual directors. Shadow directors are defined in the Companies Act as "a person (which could include a corporate body) in accordance with whose directions or instructions the directors of the company are accustomed to act". It is theoretically possible for a shareholder (in this case LBE) to be a shadow director, although whether they are or not will always depend on the exact facts and level of influence actually exerted over the company. The Companies Act also says that a parent company will not be regarded as a shadow director of a subsidiary for the purposes of the general duties of directors (and for certain other specified purposes) by reason only that the directors of the subsidiary are accustomed to act in accordance with its directions or instructions. This does not cover all potential shadow director liabilities (e.g. liabilities on insolvency) but is nonetheless helpful. The mere presence of negative controls or veto rights such as those in the list at Appendix 1 will not make a shareholder a shadow director. Reserved matters such as these are extremely common in companies where the shareholders are not involved in day to day management. They are not a list of matters which the Council can insist on, but a list of matters which require the Council's consent to protect its position as shareholder. In the view of company law specialists at Browne Jacobson LLP, the nature of the reserved matters proposed in this Report are entirely normal shareholder protection matters and therefore the risk of any determination that LBE is a shadow director of the

companies as a result of these reserved matters is low. This is on the understanding that LBE does not actually direct the activities of the company and tell the directors how to act.

6.3 Property Implications

There are no property implications arising from this report.

7. KEY RISKS

The key risks are linked to not updating the reserved matters of the Council's wholly owned companies. If the reserved matters are not updated the risk is that the Council as Shareholder may not be able to fulfil its 'ownership function' and influence the strategic objectives for the companies.

8. IMPACT ON COUNCIL PRIORITIES – CREATING A LIFETIME OF OPPORTUNITIES IN ENFIELD

8.1 Good homes in well-connected neighbourhoods

The reserved matters will encourage and allow the companies to deliver the Council's priorities whilst giving them the freedom to operate as independent companies. This will encourage them to deliver and assist in delivering, depending on the company, good quality sustainable homes in well connected neighbourhoods

8.2 Sustain strong and healthy communities

The reserved matters will mean the Council can improve health by influencing the companies to deliver the Council's aims whilst allowing them the operational freedom to do it their way.

8.3 Build our local economy to create a thriving place

The updated reserved matters will ensure the Council retains their control of shareholder matters but allows the companies freedom to deliver the business that they were originally set up to deliver. The companies help build strong and sustainable communities ensuring access to good quality services.

9. EQUALITIES IMPACT IMPLICATIONS

There are no equalities impact implications arising directly from this report however the companies align themselves with the Council's aims to protect those most in need by continuing to deliver the services and safeguarding measures they rely on.

10. PERFORMANCE AND DATA IMPLICATIONS

Companies performance and Data will be reported through the Annual Business Plan Updates and the Quarterly updates to the Shareholder Board.

11. PUBLIC HEALTH IMPLICATIONS

There are no Public Health Implications in the report.

Background Papers

None

Appendix 1: Proposed List of Shareholder Reserved Matters