



Reigate & Banstead
BOROUGH COUNCIL
Banstead | Horley | Redhill | Reigate

SIGNED OFF BY	Chief Executive
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TO	Commercial Ventures Executive Sub-Committee
DATE	Thursday 7 November 2019
EXECUTIVE MEMBER	Portfolio Holder for Investment and Companies

KEY DECISION REQUIRED	Yes
WARDS AFFECTED	(All Wards);

SUBJECT	Creation of a Housing Association
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RECOMMENDATIONS
<ul style="list-style-type: none">(i) That the Head of Legal and Governance be authorised to complete and file the necessary paperwork to establish a Community Benefit Society (CBS) for the purpose of becoming a housing association.(ii) That the Head of Legal and Governance be authorised to take the necessary steps to establish the CBS as an arm's length company through an appropriate company structure in consultation with the Members of the Commercial Ventures Executive Sub-Committee.

REASONS FOR RECOMMENDATIONS
<p>On 5 September 2019, the Commercial Ventures Executive Sub-Committee (CVESC) authorised John Jory, in his capacity as Director of Pathway for Care Limited, to approve the sale of Pathway for Care Limited's 70 A Ordinary shares from Fairhome Care plc. The Sale of the shares was completed on 27 September 2019.</p> <p>Currently, the supported living facilities tenancy and maintenance work are provided by housing associations based in the north of England. It has been identified by Pathway's directors and shareholders (which includes the Council) that a closer working relationship between care provider and housing association would minimise the risk of poor tenancy and maintenance provision for the properties where the care service is provided. The Head of Legal and Governance was tasked with investigating the possibility of the Council creating a Housing Association through the vehicle of a Community Benefit Society.</p>

The financial business case for the establishment of the CBS, the costs associated with incorporation and operation and the completed governance checklist are provided attachments to the exempt report set out in the Part 2 section of this agenda.

The Commercial Ventures Executive Sub-Committee has the authority to approve the above recommendations

STATUTORY POWERS

1. The Council has wide ranging powers to promote the economic, environmental and social well-being of the borough. These powers are derived from the Local Government Act 2000 and also include the powers of general competence under section 1 of the Localism Act 2011 to do anything that individuals with full capacity generally may do, subject to the provisions of the Act.

BACKGROUND

2. Following the creation of Pathway for Care Limited ('the Company') in August 2016 to offer a better care service to local residents, the Company diversified into supported living which required further investment which the Council was not prepared to support and the then Directors sought external investment from Fairhome Care plc for 70% of its business. That change in shareholding took place in April 2018.
3. The current landlords for Pathway for Care's supported living properties are located at quite some distance from the Borough of Reigate and Banstead.
4. Should the Council opt to establish a housing association either directly, or through a holding company, the various regulatory bodies which scrutinise housing associations, require detailed business plans to take account of (amongst many matters) cash-flows and void provision. This gives an added layer of assurance to the Council around the financial security of such entities as clearly, housing associations have a significant role to play in the delivery of stable and secure housing and it is in no-one's interest to allow a housing association to operate in anything other than a strong financial environment.
5. It would also be possible for the CBS to carry out the role of tenancy and maintenance support for the Council's own properties in the future and not just support Pathway for Care Limited.

KEY INFORMATION

Extent of External Advice

6. Confidential external legal advice has been obtained to support the work around this and whilst it is not disclosed in this report, some of the salient points which could be found in the public arena are summarised below:
 - a) the powers that the Council has as a local authority to establish a housing association as a CBS;
 - b) the process and documentation that would be required;
 - c) relevant considerations on formation such as content of the Rules, number of

- members, personnel requirements;
- d) timescales for registration;
- e) the ongoing regulatory requirements and accounting requirements; and
- f) eligibility requirements to be registered as an registered provider, application process and timescales and regulatory framework.

Local Authority Powers

7. If the Council provides this service directly by establishing a housing association, it will rely on its general power of competence (GPOC) to do so. A council can rely on GPOC to charge for services (and it is recommended that the Council do charge for the provision of this service as part of the commercial activities of the Council). Operating a housing association directly requires that the income from charges does not exceed the costs of provisions i.e. this prevents the Council making a surplus on the provision of such a service.
8. The Council does have the authority to set up arms-length companies. Due to the possible surplus aspect, it is recommended that the housing association, if established, is set-up as a subsidiary company of the Council; on the current cash flow projections for the proposed new property, the housing association should generate a modest surplus (after provision for generous void coverage and a maintenance fund). This could present a problem for a directly held housing association function.
9. A review of the Commercial Governance Checklist has been completed and the supporting financial information and checklist are provided as attachments to the exempt report set out in the Part 2 section of this agenda.

Process and Documentation

10. A community benefit society must be carrying on an 'industry, business or trade' which must be 'being, or intended to be, conducted for the benefit of the community'. This is the condition for registration. A community benefit society would be registered with the Financial Conduct Authority (FCA) under the Co-operative and Community Benefit Societies Act 2014. Societies are limited by shares. All societies must have share capital which is its initial finance. Housing associations invariably satisfy the criteria for community benefit.
11. The purpose of a community benefit society is to benefit 'the community'; which can be said to be the community at large. Societies can specify a defined community, such as a locality but in serving the needs of any defined community, the society should not inhibit the benefit to the community at large.
12. To register a society, the required application form must be completed and submitted together with one electronic copy of the signed rules. An application using the pre-published model rules is recommended as the more time efficient registration process.
13. A community benefit society can be wholly charitable or benevolent but it doesn't have to be as long as it is conducting its business for the benefit of the community. There are some advantages to being charitable as this allows applications to be made for grants from various bodies such as Homes England. The FCA's view is that the conduct of a community benefit society's business must be entirely for the benefit of the community.

14. Any surplus made by a community benefit society must be used for the benefit of the community, which may include ploughing the money back into the business so that the society can continue to benefit the community. Alternatively, additional surplus, if properly accounted for, could be used to advance the Council's work within the community as that would satisfy the criteria.

Formation and Timescales

15. The legislation sets out the specific formation rules as any company incorporation provides for. In addition, societies can decide that specific rules are 'fundamental' to the operation of the CBS and require a higher threshold of shareholder action for change. They can also seek to entrench rules to try and prevent those rules from amendment in the future.
16. A community benefit society can also put in place a statutory asset lock which imposes a legal restriction on how the society can use its assets. Societies can include the relevant wording at the time the society is registered, or the wording can be added at any point in the society's lifetime by special resolution. Once included, the wording cannot be removed and the asset lock will apply for the rest of the society's life. In this way, the community benefit can be guaranteed. The work of the housing association would expect to continue irrespective of any potential change of political direction and this facility is recommended to the Council to safe guard the independence of operation of the CBS, if established.
17. The FCA assess at least 90% of the application within 15 working days. It is expected that if the Council approved the establishment of a CBS at the meeting, the Society would be operational within approximately 8-9 weeks. This allows time to draft the rules, prepare the application, consult with the appropriate members, submit the application and receive approval.

Ongoing Responsibility

18. Every society must keep proper books of account giving a true and fair view of the state of the society's affairs and explaining its transactions. Societies are also required to maintain satisfactory systems of control of their books, cash holdings and receipts, and payments. The accounts and revenue account(s) together with any balance sheet must give a true and fair view of the society's income and expenditure and of its affairs at the date of the balance sheet. Filing of audited annual returns is also required and on-going compliance with the FCA rules.
19. If a CBS were established, it is recommended that this financial function be supported by external providers until such time as the Council has the necessary internal skills and capacity to support this work. This would be in line with how the other Council companies are supported.

Registered Provider Status

20. There are limited circumstances where registration is compulsory. This may arise where:
 - funding provided by Homes England or the Greater London Authority to an entity to develop low cost rental accommodation imposes a condition that the entity who will be landlord of the accommodation must be registered as a registered provider

of social housing (section 31 of the Housing and Regeneration Act 2008);

- a local authority is providing social housing or is intending to provide social housing. The local authority is under an obligation to notify the Social Housing Regulator (SHR) as soon as it becomes subject to compulsory registration (section 114A of the Housing and Regeneration Act 2008). This would arise where the local authority is providing or intending to provide social housing itself or in-house without setting up a separate entity such as a CBS.

21. Whilst registration would not be necessary at the outset, it is a status that is recommended to the Council for additional assurance around business plans as the Governance and Financial Viability Standard would have to be met as this means that sustainable financial viability has to be demonstrated. This would give additional comfort to any tenant of a Pathway for Care Limited property. It has the additional benefit of allowing the CBS, if established, to attract Homes England funding.

OPTIONS

22. The options available to the Commercial Ventures Executive Sub-Committee are set out below:

Option 1: (i) authorise the Head of Legal and Governance to prepare and submit the necessary paperwork to establish a CBS for the purpose of becoming a housing association; and (ii) authorise the Head of Legal and Governance to establish the CBS as a subsidiary company of the Council, for the reasons detailed in the exempt report set out in the Part 2 section of this agenda, in consultation with the members of the CVESC. **This is the recommended option** to enable the Council to support the on-going work of Pathway Care Limited in the short-term and to support the housing work of the Council in the longer term against the back drop of ensuring good governance for all commercial related activities.

Option 2 establish a CBS directly held by the Council. **This is not the recommended option** given the surplus aspect of establishing a CBS in this way.

Option 3 would be for the CVESC to do nothing. **This is not the recommended option** as Pathway for Care Limited would need to find an alternative housing association to provide the required services and an unrelated housing association would not have the same commitment to the provision of care to residents in our community.

LEGAL IMPLICATIONS

23. Beyond the legal implications set out above in reference to the establishment of the CBS, there are no further direct legal implications.

FINANCIAL IMPLICATIONS

24. The financial implications of the CBS establishment, including income and expenditure forecasts, have been prepared by Pathway for Care Limited and are provided as an attachment (Annex 1) to the exempt report set out in the Part 2 section of this agenda.

25. The costs of establishing the CBS can be accommodated within existing council budgets.

EQUALITIES IMPLICATIONS

26. The Council has a Public Sector Equality Duty under the Equality Act (2010) to have due regard to the need to:

- Eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act;
- Advance equality of opportunity between people who share those protected characteristics and people who do not;
- Foster good relations between people who share those characteristics and people who do not.

27. The three parts of the duty applies to the following protected characteristics: age; disability; gender reassignment; pregnancy/maternity; race; religion/faith; sex and sexual orientation. In addition, marriage and civil partnership status applies to the first part of the duty.

28. The Committee should ensure that it has regard for these duties by considering them through the course of its work. This should include considering:

- How policy issues impact on different groups within the community, particularly those that share the nine protected characteristics;
- Whether the impact on particular groups is fair and proportionate;
- Whether there is equality of access to service and fair representation of all groups within the Borough;
- Whether any positive opportunities to advance equality of opportunity and/or good relations between people, are being realised.

29. Should a CBS be established, it will also be expected to act in line with the Council's equality objectives. The implications of this regard for equalities will be considered during the development of the associated business case and due diligence.

RISK MANAGEMENT CONSIDERATIONS

30. The risks associated with establishing and operating a CBS, beyond the requirements set out above, will be considered during the development of the associated business case and due diligence.

POLICY FRAMEWORK

31. The recommendations of this report are compatible with the Council's Policy Framework.