

WELWYN HATFIELD BOROUGH COUNCIL
CABINET – 6 MARCH 2018
REPORT OF THE EXECUTIVE DIRECTOR (PUBLIC PROTECTION, PLANNING AND GOVERNANCE)

TRANSFER OF BUILDING CONTROL FUNCTIONS TO THREE RIVERS DISTRICT COUNCIL

1 Executive Summary

- 1.1 This report updates members on the further work undertaken in connection with the joint building control outsourcing project (“the project”) and asks Cabinet to consider and agree the next steps which need to be taken in order to finalise the project.

2 Recommendations

- 2.1 For the Cabinet to note the work to-date, and to consider the proposals set out in this report, and subject to Cabinet consideration, to agree:

a) To transfer the Council’s statutory building control functions (as set out in Appendix A) to Three Rivers District Council so that they can carry out the duties and responsibilities of LA1 as described in this report, on behalf of Welwyn Hatfield Borough Council.

b) That the Executive Director (Public Protection, Planning and Governance) be given delegated authority to authorise the Services Agreement and Inter-Authority Agreement referred to in this report using the power in Section 5(2)(a) of the Local Authorities (Arrangements for Discharge of Functions) (England) Regulations 2012 to transfer the functions listed in Appendix A to Three Rivers District Council.

c) That the Head of Public Health and Protection is appointed as the Council’s “Commissioning Panel Representative” as part of the Commissioning Panel established in accordance with the Services Agreement and Inter-Authority Agreement.

d) That delegated authority is given to the Head of Public Health and Protection in consultation with the Executive Director (Public Protection, Planning and Governance) to appoint a “Deputy Commissioning Panel Representative” to attend the Commissioning Panel in the event of the Commissioning Panel Representative’s absence.

e) That the Head of Public Health and Protection, in consultation with the Executive Director (Resources, Environment and Cultural Services) as the Council’s Section 151 Officer and Executive Member for Resources to have delegated authority to negotiate and agree fees for both statutory and non-statutory building control activities, in negotiation with other members of the

Commissioning Panel, Three Rivers District Council acting as LA1 and Hertfordshire Building Control Ltd.

f) That consideration is given to any consequential revisions to be made to the Council's Constitution and schemes of delegation with recommendations made to Council for adoption of these revisions.

3 Explanation

- 3.1 The purpose of building control is to ensure buildings and structures within the borough are built to safe standards and there are also particular enforcement powers available to deal with dangerous structures.
- 3.2 The building control functions carried out by District and Borough Local Authorities may be divided into non delegable and delegable functions. Those functions which are non-delegable may only be carried out by a Local Authority, but a Local Authority may choose to ask a private sector entity to carry out delegable functions on its behalf. In the case of the non-delegable functions, it is however lawful for one Local Authority to transfer some or all of these powers to another Local Authority to exercise these functions.
- 3.3 In July 2015, the Cabinet received an exempt report which set out the challenges facing the Council's current building control team. These included private sector competition and the loss of market share to approved inspectors, an ageing staff profile, the lower efficiency and effectiveness of small teams and a lack of resilience due to recruitment and retention difficulties. Cabinet agreed that Welwyn Hatfield Council should explore the principle of transferring its building control services into a Hertfordshire joint arrangement.
- 3.4 In August 2016, Cabinet received a further exempt report which set out a business case and the financial, legal and risk implications of a joint service with other boroughs/districts in Hertfordshire. Having regard to this business case Cabinet agreed with the proposal to form a holding company and two subsidiary companies to provide this service and to transfer the Council's delegable building control functions into these companies. Cabinet also confirmed that the remaining non delegable statutory building control functions could be provided by one of the participating local authorities (termed "LA1") within the joint service.
- 3.5 For clarity, a holding company and two subsidiary companies have now been incorporated:
- Broste Rivers Ltd as the holding company;
- Hertfordshire Building Control Ltd (formerly LA7) which undertakes delegable fee-earning but non-profit-making work such as site inspections and plan checking and non-fee-earning work such as dangerous structures within the joint administrative area;
- The Building Control (Hertfordshire) Company Ltd (formerly H7) which can act like an approved inspector outside of the joint administrative area.
- 3.6 Hertfordshire Building Control Ltd is now fully operational. Staff were transferred from their original local authorities into the company in August 2016 and old IT systems have been replaced by a new cloud-based system that allows staff to

work from a variety of office spaces, at home and on-the-road. The new IT system also makes it possible for the seven co-operating authorities to now consolidate their statutory functions with one participating authority.

3.7 The business case explained the intention that one local authority would, by agreement, be defined as “LA1” to undertake non-delegable functions such as setting fees, making of any approvals, conditional approvals or rejection decisions, issuing of any certificates, consultation with statutory agencies, the keeping of statutory registers in respect of initial notices and the enforcement of unauthorised works, dangerous structures and demolitions.

3.8 However, with the passage of time and further development of the business case, there are a few differences between the original business case and what Cabinet are now asked to consider. These may be summarised as:

a) it has been confirmed that Three Rivers District Council intends to be “LA1” and this means our statutory powers would be transferred to them and they will be responsible for the sign-off and issue of statutory notices, certificates and other formal decisions (so called “competent functions”) on behalf of all seven co-operating authorities and also to manage the procedure for dangerous structures.

b) the mechanism of transfer of powers has been clarified, and will involve using the powers explained in the legal implications section of this report.

c) the original proposal of retaining a qualified building surveyor at LA1 to carryout “sign-offs” and other competent functions has been revised. Instead it is now proposed to employ a non building control qualified individual to carry out such “sign offs” but with a series of effective checks and balances to ensure quality control is maintained. This person will be employed by Three Rivers District Council. The managing director of Hertfordshire Building Control Ltd has confirmed that they recognise the direction of travel for building control quality following Dame Judith Hackitt’s interim report into the Grenfell tragedy. The main reason for not employing a qualified individual within LA1 is to ensure that ‘doing’ functions and ‘monitoring’ functions are properly delineated. Surveyors within the company will make a recommendation to LA1 officers, who then sign off the work, checking that the surveyor was qualified to make that recommendation and that the work was commensurate with their level of experience. Furthermore, the company has created an internal audit post to ensure adherence to an ISO 9001 quality process, in anticipation of the transfer of functions to Three Rivers District Council. The LA1 signatory will be the Head of Planning, and he/she will only sign off work when all of the above is satisfied. This is all explained to be much stronger than the previous arrangements in most councils, where surveyors were qualified but far less overview and scrutiny of their decision-making was in place.

d) Three Rivers District Council will employ a contract manager who will be responsible for carrying out the functions of the contract manager described in the Services Agreement and Inter-Authority Agreement and will act as lead contract manager and monitor the performance of Hertfordshire Building Control Ltd.

e) a Commissioning Panel made up of representatives from all the councils who have transferred powers to Hertfordshire Building Control Ltd and Three Rivers District Council will be formed and will be responsible for ensuring the contract manager performs within the terms of the agreements.

f) a charging regime will be agreed for certain functions, previously performed by the Council's building control officers (Appendix B)

g) a revised Services Agreement and Inter-Authority Agreement setting out how the shared building control service will operate

h) a revised set of resultant risks, as set out in this report.

- 3.9 As a result, Cabinet are now asked to consider the proposals and if in agreement recommend that the Council's statutory building control functions which cannot be lawfully be delegated to either of the subsidiary private companies should be transferred to Three Rivers District Council, who will act as LA1 and for the functions to be carried out in accordance with the Services Agreement and Inter-authority Agreement.

4 Legal Implications

- 4.1 Section 91 of the Building Act 1984 (the Act) states that local authorities (defined as District and Borough councils) are responsible for carrying into effect the requirements of the Act within their areas.

- 4.2 Local authorities are required to provide 'chargeable functions' and 'chargeable advice' in accordance with Building (Local Authority Charges) Regulations 2010. Section 5 defines that these include the passing or rejection of plans of proposed building works, the inspection of building work for which plans have been deposited and the consideration of building notices given to the local authority or reverted from an approved inspector. Section 6(3) asserts that the overriding objective is that the income derived from performing such functions and advice as nearly as possible equates to the costs incurred from doing so.

- 4.3 Trowers and Hamlins acted as legal advisors to the cross council project board during the formation of the joint service agreements. They advised that the transfer of statutory functions from each co-operating local authority to Three Rivers District Council acting as LA1 should take place under Section 5(2)(a) of the Local Authorities (Arrangements for Discharge of Functions) (England) Regulations 2012. Regulation 5 deals with the discharge of an executive's functions by another relevant authority or another relevant executive and section (2)(a) allows a person with power to make such arrangements to discharge functions which are the responsibility of this Council's executive (namely building control) to another relevant authority's executive (namely Three Rivers District Council).

Inter-Authority Agreement

- 4.4 It is intended that the relationship between the seven co-operating authorities and Three Rivers District Council acting as LA1 will be informed by an Inter-Authority Agreement. The Agreement sets out a number of collaborating principles such as a spirit of mutual cooperation, equality of treatment, accountable and transparent decision-making and effective, efficient and economical performance. It also contains sections relating to payments, intellectual property, confidentiality, freedom of information, data protection, dispute resolution and termination.

- 4.5 It is proposed that an authorised individual at Three Rivers District Council acting as LA1 will be the lead contract manager with Hertfordshire Building Control Ltd on behalf of the seven authorities.
- 4.6 It is proposed that one representative from each of the seven authorities will act as a representative and together they will form a Commissioning Panel to oversee the work of the lead contract manager. Chairmanship of the Commissioning Panel will rotate by Local Authority on a yearly basis in ascending alphabetical order.
- 4.7 It is proposed that the Agreement be in place for a minimum period of 36 months. After that date the co-operating authorities may agree to sign another agreement with Three Rivers District Council to act as LA1 or for any other co-operating authority that may wish to do so to act as LA1.

Services Agreement

- 4.8 It is intended that the relationship between Three Rivers District Council acting as LA1 and Hertfordshire Building Control Ltd will be informed by a Services Agreement. This states that Hertfordshire Building Control Ltd will supply the co-operating local authorities with a comprehensive, pro-active and professional service. It also contains sections relating to health and safety, equality and diversity, human rights, equipment, licences, confidentiality, freedom of information, data protection, anti-bribery and corruption, insurance, liability and termination.
- 4.9 The Agreement sets out the expected service levels of the company in respect of performance, indicators, workloads, financial monitoring, site inspections, records and dangerous structures attendance. In particular it is stated that Hertfordshire Building Control Ltd will achieve performance standards in the latest edition of the DCLG Building Control Performance Standards Guide and will adhere to the Local Authority Building Control (LABC) Code of Conduct at all times. There is also an ongoing obligation to identify new or potential improvements in accordance with the Building (Local Authority Charges) Regulations 2010.
- 4.10 The Agreement states that Hertfordshire Building Control Ltd will provide the LA1 and the Commissioning Panel with periodic performance reports. It will also immediately notify of any service failures, provide a remediation plan, carry out the actions in that plan and deploy resources and take all necessary action to rectify or prevent the failure from recurring.

5 Financial Implications

- 5.1 The Council loaned Broste Rivers Ltd £107,000 to establish itself and its subsidiary companies. Interest is being repaid at 4%, and the principal amount is expected to be repaid in instalments in future years.
- 5.2 From April 2018, the Council will be paying around £28,000 per annum towards the costs of the statutory functions and the lead authority costs. Of this, £15,000 will be towards the cost of running statutory services, including maintaining a list of competent persons, an out-of-hours dangerous structures service, assessing, authorising and responding to initial notices. The remaining £13,000 will be a contribution towards the costs of LA1 as the lead authority. It should be noted

that the costs have been apportioned equally between all seven participating authorities.

- 5.3 It should be noted that Hertfordshire Building Control service is currently based at Campus West Tower, from which the Council is receiving a market rent. They have expressed a desire to expand their office space and is currently in discussion with the Council, therefore it is possible that the rental income to the council may increase as a result.
- 5.4 The service prior to the creation of the company, excluding internal charges, generated around £10,000 per annum for the Council.
- 5.5 This arrangement has increased resilience for the Council, which had an aging workforce prior to this arrangement coming into force. This in turn has mitigated the risk of significant agency spend on the Council's Building Control functions, which other local authorities had already seen being incurred prior to this arrangement.
- 5.6 Other statutory Building Control Services will be chargeable on a case-by-case basis as set out in Appendix B, for which the Council has retained a budget within building control to fund these works.

Fee Setting

- 5.7 In terms of fee setting, the Services Agreement states that fees should as nearly as possible equate to the costs of providing the service. It is proposed that Hertfordshire Building Control Ltd will prepare a Joint Services Authority Agreement, to be screened by LA1 and then by the Commissioning Panel.
- 5.8 The Agreement will set out hourly fees for:
- 1) chargeable functions and chargeable advice as defined by the Building (Local Authority Charges) Regulations 2010, to be paid by service users.
 - 2) 'zero chargeable transaction services' defined in the Building (Local Authority Charges) Regulations 2010 as the first hour of chargeable advice and chargeable functions or chargeable advice in respect of building work solely for disabled persons, to be paid by the relevant local authority.
 - 3) an out-of-hours emergency dangerous structure service, to be paid for by each local authority.
 - 4) services that individual cooperating authorities may wish to procure from Hertfordshire Building Control Ltd such as events safety, fire safety audits, energy audits and emergency planning.
- 5.9 These fees will be based on the costs incurred by Hertfordshire Building Control Ltd in carrying out delegable functions and the costs incurred by Three Rivers District Council acting as LA1 in carrying out statutory functions. Hertfordshire Building Control Ltd is planning to unify the fees across a number of authority areas and this report is seeking delegated authority to negotiate and agree the fees going forward.

6 Risk Management Implications

- 6.1 The purpose of building control is to ensure that national building regulations such as structural, electrical and fire safety are complied with to keep the public safe.
- 6.2 Post the tragic Grenfell Tower fire, the Government has asked Dame Judith Hackitt to provide an independent review¹ to “assess the effectiveness of current building and fire safety regulations and related compliance and enforcement issues, with a focus on multi occupancy high rise residential buildings”. The Review’s 2 key priorities are to develop a more robust regulatory system for the future and provide further assurance to residents that the buildings they live in are safe and remain safe. While the Review will cover the regulatory system for all buildings, it will have a specific focus on multi occupancy high rise residential buildings. Obviously the outcome of this review, which is at yet unknown, may be relevant to the way building control regulation works in future.
- 6.3 All of the professional building control surveyors within the joint service are employed by Hertfordshire Building Control Ltd (LA7). It is these officers who will assess applications against national regulations to ensure that buildings are safe, however the strict legal position is that as non-delegable functions cannot be provided by a private company, these officers cannot “sign off” such applications.
- 6.4 As noted in 3.8(c) above, the business case appended to the August 2016 Cabinet report originally proposed that LA1 should be staffed by a building control professional who will be responsible for issuing legal “sign off” certificates. However it is now proposed that Three Rivers District Council do not intend to employ any professionally qualified building control surveyors to act as LA1 or within the Commissioning Panel. The emphasis in the Services Agreement and Inter-Authority Agreement is instead on policies and procedures to ensure that the advice provided by Hertfordshire Building Control Ltd is professional and robust, in order that non-specialised officers within LA1 who have been given the legal responsibility are reassured they can signed it off. This is important as the call for evidence for the Hackitt Review² described above includes investigating the competencies, qualifications, training, accreditation and resourcing of those who are required to comply with or enforce the building regulations. Furthermore legal advice to the project board from Trowers and Hamlins states that exercise of the non-delegable functions must involve some active consideration of the decision, not just pure rubber stamping. The latest proposals from Three Rivers District Council acting as LA1 are that all decisions will be signed off by their Head of Regulatory Services. Officers intend to devise a risk matrix process whereby more complex building control applications will undergo a more complex process of scrutiny. They also intend to invite SIAS³ and LABC⁴ to audit these proposed processes and engage with the HSE⁵ to seek their views as to robustness. As this is a clear departure from the previous method of operation and the proposed original business case and means that “sign off” certificates

¹ <https://www.gov.uk/government/publications/independent-review-of-building-regulations-and-fire-safety-terms-of-reference>

²

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644139/The_call_for_evidence_for_the_independent_Review_of_Building_Regulations_and_Fire_Safety.pdf

³ Shared Internal Audit Service

⁴ Local Authority Building Control

⁵ Health and Safety Executive

issued on behalf of this Council will be issued by an officer who is not a qualified building control surveyor, Cabinet are asked to specifically note this as part of their decision-making.

- 6.5 The Services Agreement allows for audits of Hertfordshire Building Control Ltd's premises, personnel and relevant records as may reasonably be required.
- 6.6 It is intended that Hertfordshire Building Control Ltd will carry out the practical side of enforcement for unauthorised works, dangerous structures and demolitions and operate an out-of-hours emergency dangerous structure services on behalf of the cooperating authorities, so far as the law allows, with any sign off decisions being made by Three Rivers District Council. However, the fees for such work arising within the Borough will be charged to this Council. It then will be a matter for this Council to seek to reclaim such costs from the land or property owner, as such action cannot be initiated by a third party on behalf of the lead party. In some circumstances there is a risk that this Council may fail to reclaim such costs and must therefore be prepared to write-off such debt.
- 6.7 Hertfordshire Building Control Ltd has been granted admitted body status by the pensions authority to enable all existing employees to continue to contribute to the local government pension scheme. Accordingly, this Council will continue to be responsible for any existing pension strain for each qualifying employee up until the point of transfer and will be responsible for meeting any deficits at the point of each member of staff retiring. The Council is required to indemnify the pensions authority on this basis.
- 6.8 A significant amount of work has been undertaken in connection with this project with the aim achieving a more resilient, responsive and cost effective building control service across the partner authorities. Whilst the proposals set out in this report do present some risks, especially in light to the inability to delegate all functions to a private company, there is also a risk that to exit from the project at this stage would not result in an equally more resilient, response or cost effective service for the Borough.

7 Security and Terrorism Implications

- 7.1 There are no specific security or terrorism implications associated with this report, however the out-of-hours service provided by building control officers for dangerous structures is a valued part of the emergency response across Hertfordshire.

8 Procurement Implications

- 8.1 The agreements commit the Council to obtaining building control services in accordance with the agreements. If the Council requires a service which is in the scope of additional charges (Appendix B) then the agreement commits the council to obtaining that service from the building control company. So long as the companies remain 'Teckal' compliant (in summary, wholly controlled by the owner councils, under the direction of the owner councils and where at least 80% of company turnover is for its owner councils) then an exemption can be claimed against procuring these services externally.

9 Climate Change Implications

9.1 There are no specific climate change implications associated with this report, although it should be acknowledged that national building regulations cover the efficient use of energy and water.

10 Link to Corporate Priorities

10.1 The subject of this report is linked to Priority 1 “to maintain a safe and healthy community” and is linked to statutory provisions under building control legislation.

11 Equalities and Diversity

11.1 It is understood that equality impacts would have been considered as part of the original business case and that no differential impacts were identified. It should be noted that building control has a role in connection with the enforcement of building regulations regarding disabled access.

Nick Long

Executive Director (Public Protection, Planning and Governance)

February 2018

Appendices:

A. Schedule of powers to be transferred

B. Functions which will be provided at chargeable hourly rate

Background Papers:

Joint Building Control Service, Cabinet 7 July 2015 (restricted)

Joint Building Control Service, Cabinet 2 August 2016 (restricted)

APPENDIX A

The Local Authorities (Arrangements for Discharge of Functions) (England) Regulations 2012 Section 5(2)(a)

Functions to be transferred from Welwyn Hatfield Borough Council to Three Rivers District Council

Function	Relevant statutory provision
Receiving applications submitted in respect of the Building Regulations 2010	Building Act 1984 Building Regulations 2010
Processing, passing, rejecting full plans applications within statutory timescales	Section 16 of Building Act 1984 Section 5(1)(a) Building Regulations 2010
Advising on the viability of the building notice application	
Undertaking investigations and advising in respect of applications for a Regularisation Certificate	Section 5(1)(b) Building Regulations 2010
Undertaking site inspections to ensure regulatory compliance	Section 5(1)(b) Building Regulations 2010
Recommending the issuing of statutory notices relating to applications and site visits	
Recommending enforcement action through the statutory process	Section 35 Building Act 1984
Recommending outcomes relating to initial notices received from Approved Inspectors	Section 5(1)(e) Building Regulations 2010
Retaining a repository of notifications from people on the competent person scheme	Schedule 1 Building Regulations (Amendment) 2015
Dangerous structures, including out-of-hours provision	Section 76-83 Building Act 1984
Demolitions	Section 76-83 Building Act 1984
Fix charges	Section 3(1) Building Regulations 2010
Requirement to consult fire authority	Section 15 Building Act 1984
Requirement to consult water authority	Section 18 Building Act 1984
Powers of entry	Section 95 Building Act 1984
Duties of local authority, including keeping a register of information and documents	Section 91-94 Building Act 1984

APPENDIX B

As set out in the Services Agreement, all other delegable building control services which may be procured from Hertfordshire Building Control Ltd directly, including but not limited to:

- (a) P2 Housing returns to CLG
- (b) The Party Wall etc Act (1996)
- (c) Safety at sports grounds
- (d) Events safety
- (e) Monitoring planning conditions
- (f) Local land searches
- (g) High hedges
- (h) Street naming and numbering
- (i) Fire safety audits
- (j) Access audits
- (k) Energy audits
- (l) Emergency planning
- (m) Disabled facilities grant work