

Classification: Public
Key Decision: No

Gravesham Borough Council

Report to: Report to the Commercial Cabinet Committee
Date: 08 July 2019
Reporting officer: Stuart Bobby, Director (Corporate Services) and Michelle Batstone, Corporate Change Manager
Subject: Local Authority Trading Company (LATCo) Briefing Paper

Purpose and summary of report:

To provide Members with a briefing paper to provide background to the formation of a Local Authority Trading Company (LATCo) and the council's potential approach to formation of such as company.

Recommendations:

None – the paper is for information purposes.

1. Background Information

- 1.1 Given the financial pressures that have been placed on councils in recent years, there has been a drive for local authorities to consider the way in which they operate and provide their services. This has resulted in councils exploring other options for income generation such as purchasing of commercial properties, but most noticeably there has been an increase in the number of council's looking to form trading entities to deliver council services.
- 1.2 There are two key pieces of legislation which allow a local authority to trade in the services it provides:
 - The Local Government Act 2003 which allows local authorities to trade in the ordinary day to day functions of the council.
 - The Localism Act 2011 which allows local authorities to trade in any area (unless expressly prohibited or limited by statute).

Should the council wish to trade in council services such as private repairs and maintenance, house clearance and vehicle repairs then a local authority trading company would have to be set up to enable this.
- 1.2 It should be noted that there is no intention to transfer existing functions of the Council into a trading company (such as back-office services).

- 1.3 In recent years, there has been an increase in the number of local authorities establishing trading companies (or similar) to deliver services to the public. A recent report by Grant Thornton in September 2018 stated that they had identified 743 LATCos in Great Britain, and that 59.2% of local authorities owned at least one. These figures include commercial property companies, which make up 23.2% of all LATCos.
- 1.4 The services provided range from the provision of housing, repairs and maintenance, social services, property services and education services. Appendix two to the report provides some examples of the types of trading companies that are already in operation across the country.

2. Legal Framework

- 2.1 Section 95 of the Local Government Act 2003 enables best value authorities such as Gravesham Borough Council to provide, on a commercial basis, anything that is related to a function of the authority. The powers under the Act require Local Authorities to trade with private bodies and persons for profit (i.e. charges fixed at more than the cost recovery) through a company.
- 2.2 The Localism Act 2011 has expanded a local authority's trading powers to include areas not related to their existing functions and removes geographical boundaries so trading can take place for a wider variety of service provisions and anywhere in the UK through a company. These powers are still subject to any explicit statutory restrictions on local authorities in relation to the specific trading activity.
- 2.3 Local Authorities are also able to procure services from their own companies (for example housing maintenance services). Normally, the provision of services over certain values from a company to a local authority is subject to the public procurement regime set out in the Public Contracts Regulations 2015. There is an exception to this rule that means, in certain circumstances, a contract let by a local authority to a company it controls will not be deemed to be a contract for the purposes of the public procurement regime. This exception is known as the "Teckal" exemption and was established by a European legal case but is now set out in section 12 of the Public Contracts Regulations 2015.
- 2.4 In order to be Teckal compliant (and exempt from EU procurement rules), the company would need to abide by the Teckal rules:
 - the company should be controlled as a department of the local authority; and
 - the major part of the company's business must be with the local authority owner (more than 80% of revenues); and
 - there is no private sector ownership of the company.
- 2.5 "Control" is defined in section 12 of the Public Contracts Regulations 2015 as:
 - The local authority exercises a decisive influence over both strategic objectives and significant decisions of LATCo; or
 - the control is exercised by another legal person which is itself controlled in the same way by the local authority.

- 2.6 Local authorities are able to establish an “umbrella” company structure to facilitate this if they wish which would see the main parent company being non-Teckal, but with Teckal compliant subsidiaries (and equally non-Teckal compliant subsidiaries) as the need arises.
- 2.7 A ‘controlled company’ is one which is either:
- a “subsidiary” of a Local Authority i.e. a wholly-owned company; or
 - one which is not a subsidiary but the local authority:
 - controls a majority of votes.
 - has the power to appoint or dismiss a majority of the directors.
- Alternatively, the company is under control of another controlled company
- 2.8 It should be noted that a ‘controlled’ company is treated in the same way as the local authority and is therefore subject to the same restrictions/requirements as a local authority. Specifically, this means that:
- The financial implications of the company on the Local Authority must be reflected within the council’s financial accounts as set out in the *Prudential Code for Capital Finance in Local Authorities* (CIPFA Code).
 - The company must provide the local authority’s auditor with information and explanation about the affairs of the company for the purposes of the audit of the Local Authority’s account.
 - Local Authority companies are subject to the requirements of the Freedom of Information Act 2000 and must also meet the requirements as set out in the General Data Protection Regulation (GDPR).
 - Controlled companies are “public bodies”, accordingly they are subject to the Human Rights Act 1998.
 - Under the Equality Act (2010) companies are legally required not to discriminate against employees or potential employees due to issues such as race, gender, age or disability.
 - Decisions made by controlled companies can be subject to judicial review, in the same way as a decision by any public body.

3. Establishing a LATCo – Governance Arrangements

- 3.1 The decision to set up the company, and subsequent shareholder decisions, would be for either Cabinet or full Council, depending on whether the services to be provided by the company are executive or non-executive functions. As such, any company entity would need to be formally established in accordance with the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 and the Council’s Constitution.
- 3.2 Although most decisions depend on the type of service being delivered by the company, some decisions outside of service delivery are reserved to Full Council. These include decisions such as appointing Members or officers to the company. Full Council would be responsible for decisions that would not be wholly in accordance with the Budget, or for key decisions such as expenditure over £100,000 for a loan to the company. However, the way in which the company reporting lines could be established, is open to consideration.

- 3.3 A suggested way forward for establishing the company and setting out the governance arrangements would be for the council to set up a Member sub-group (with a purely advisory role) or a committee/sub-committee with delegated decision making powers.

Proposed Reporting Lines for LATC



This approach would enable all new companies to be established formally through Full Council or Cabinet (as appropriate) but enable the Company Board to report to the sub-group/committee of the Council or Cabinet, in order to ensure that there is an effective and timely reporting mechanism.

4. Roles and Responsibilities

- 4.1 Officers and Members will have a role to play in both the establishment of a company but also the management of the company operations. This will be a new challenge for all involved and there is a need to be clear about the roles and responsibilities within a company entity.
- 4.2 Research has been undertaken into how other local authorities have structured their company arrangements. There are pros and cons of all approaches and consideration needs to be given to the following, when determining the correct 'make-up' of any Board of Directors:
- Conflicts of interests.
Potentially officers/Members will have a dual-role in terms of representing the Council and the Company and therefore need to be able to manage such conflicts.
 - Skills and expertise
Establishing and running a company requires a specific set of skills and officers/Members elected to the Board need to either have these skills or be provided with the training to ensure they are able to undertake the roles to the best of their ability.
 - Statutory officer involvement
Whilst officers who hold a statutory role (Section 151 Officer and Monitoring Officer in particular) may have suitable skills for undertaking roles within the company, there is a need to consider the potential conflicts that may arise in these specific areas; statutory officers are not recommended to be part of the Board structure.

- 4.3 A topic review undertaken by the Overview Scrutiny Committee during 2018-19 into the proposed establishment of the LATCo suggested that:

“...officers on the Board should be those who only have a sole interest. As such, this would mean that statutory officers of the council (Section 151 Officer and Monitoring Officer) could not be members on the Board as they have a specific interest to the council which could present a conflict of interest.”

- 4.4 There is also a need to be clear on the roles of Directors to the Board, whether they are Executive or Non-Executive Directors:

- An executive director (ED) is a member of the board of a company who also has management responsibilities for running the company's business. ED's carry an added responsibility of having to ensure that the information laid before the board by management is an accurate reflection of their understanding of the affairs of the company.
- A non-executive director (NED's) is a board member without responsibilities for daily management or operations of the company and tend to be picked for their personal qualities, experience and specialist knowledge. They primarily provide objective criticism on board matters and monitor the executive management. NED's duties are of an intermittent nature to be performed at periodic board meetings.

There is no legal distinction however between NED's and ED's. The legal duties, responsibilities and liabilities of ED's and NED's are the same. Both have a fiduciary duty to the company and must act in the best interests of the company.

- 4.5 Members and officers who sit as Directors of companies need to be aware of their statutory responsibilities in that role and as such training will be provided. Appendix three to the report provides a more detailed summary of the duties, as set out in s171-177 of the Companies Act 2006.

5. Establishing a Local Authority Trading Company for Gravesham

- 5.1 As has previously been detailed, if Gravesham Borough Council wishes to establish a LATCo, this needs to be formally approved through Full Council. Appendix four to the report provides an indicative timeline for establishing the trading company.
- 5.2 Regular updates on the progress towards establishing a LATCo will be presented to the meetings of the Commercial Cabinet Committee of the course of the year.

6. Background Papers

- 6.1 Background papers pertaining to this report are held by the Corporate Change Team. Anyone wishing to inspect background papers should, in the first place, be directed to Committee & Electoral Services who will make the necessary arrangements.

IMPLICATIONS	APPENDIX 1
Legal	The legal frameworks that will need to be adhered to if the council chooses to progress the establishment of a company are set out in section two of the report. Should this council progress this option, a fully detailed business case will be prepared to ensure all specific legal requirements are considered and understood.
Finance and Value for Money	The council's Medium-term Financial Strategy 2016-17 to 2019-20, sets out a funding gap by 2019-20 of £2.9m. Whilst considerable action has been taken to 'bridge the gap' in term of identifying savings and new income stream, there is a need to identify a further £1m of savings and commercialisation is a key step to closing this additional funding gap.
Risk Assessment	Establishing a wholly-owned trading company on behalf of the council does come with risk and if/when this option is progressed, a fully detailed business case will be prepared (in line with the Localism Act 2011) to fully detail, analyse and identify actions to mitigate such risks.
Data Protection Impact Assessment	<p><i>A data protection impact assessment (DPIA) should be carried out at the start of any major project involving the use of personal data or if you are making a significant change to an existing process.</i></p> <p>a. Does the project/change being recommended through this paper involve the processing of personal data or special category data or criminal offence data? Once the council decides to pursue the formation of a LATCo, the council's Information Governance Manager will be consulted to ensure that all Data Protection issues are considered, including the completion of a Data Protection Impact Assessment (DPIA).</p> <p>b. If yes to question a, have you completed and attached a DPIA including Data Protection Officer advice? N/A (at this stage)</p> <p>c. If no to question b, please seek advice from your nominated DPIA assessor or the Information Governance Team at gdpr@medway.gov.uk. N/A (at this stage)</p>
Equality Impact Assessment	<p>a. Does the decision being made or recommended through this paper have potential to cause adverse impact or discriminate against different groups in the community? If yes, please explain answer. No</p> <p>b. Does the decision being made or recommended through this paper make a positive contribution to promoting equality? If yes, please explain answer. No</p> <p><i>In submitting this report, the Chief Officer doing so is confirming that they have given due regard to the equality impacts of the decision being considered, as noted in the table above</i></p>

IMPLICATIONS	APPENDIX 1
Corporate Plan	<p>The information set out within this report contributes to the following Corporate Plan Objectives:</p> <ul style="list-style-type: none"> - <i>Strategic Objective 1 – Safer Gravesham:</i> <ul style="list-style-type: none"> - Pursue commercial opportunities for our Direct Services Organisation to improve our environment and generate income for vital services. - <i>Strategic Objective 4 – Sound and Self-sufficient Council:</i> <ul style="list-style-type: none"> - Commit relevant resources to implement a culture of innovation and commercial awareness, generating vital income for future services. - Deliver on opportunities for the sharing and selling of council services. - Continuously review and adapt how we deliver our services to achieve financial efficiencies and improved performance.
Crime and Disorder	There are now specific crime and disorder implications resulting from this report.
Digital and website implications	At this stage, there are no specific digital or website implications. This will need to be considered in more detail if/when a decision is made to progress with the development of a company.
Safeguarding children and vulnerable adults	There are now specific safeguarding children and vulnerable adults implications resulting from this report.