

Report for: Leader Signing

Item number: 4

Title: Management Agreement with Homes for Haringey for Housing Services

Report authorised by : Tracie Evans, Chief Operating Officer

Lead Officer: Raymond Prince, Assistant Head of Legal Services and Deputy Monitoring Officer

Ward(s) affected: All

**Report for Key/
Non Key Decision:** Key Decision

1. Describe the issue under consideration

- 1.1** On 15th March 2016, Cabinet resolved to approve a new 10 year Management Agreement with Homes for Haringey, retaining it as its Arm's Length Management Organisation, expiring on 31st March 2026. It further resolved that this new agreement would take effect from 1st April 2016 or from such date that approval was received from the Secretary of State "if later than 1 April 2016". Statutory approval was to be sought under section 27 of the Housing Act 1985 ("section 27").
- 1.2** At all times from 1st April 2016 onwards, both the Council and Homes for Haringey have acted on the basis that the earlier agreement made by them on 7th September 2011 ("the 2011 Agreement") has been extended in order that Homes for Haringey may continue to perform those management functions until approval is given, permitting entry into the new 10 year agreement. The Council considers that this continuation was authorised by the resolutions made by Cabinet on 15th March 2016, although it is right to note there was no express resolution to that effect.
- 1.3** The point has now been taken in an ongoing judicial review claim to which the Council was recently joined, that Cabinet's resolutions of 15th March 2016 are insufficient to provide this authorisation.
- 1.4** The issue under consideration is, therefore, whether to take retrospective decisions, for the avoidance of doubt, that:
- (1) the extension of the 2011 Agreement was and is duly authorised, and
 - (2) all the management functions undertaken by Homes for Haringey, on the Council's behalf, since 1st April 2016, are similarly ratified.

1.5 On 8th June 2016, the Homes and Community Agency (“HCA”) - which has been considering the Council’s application for approval of the new management agreement under section 27 - sent an email to the Council informing it that it must undertake further tenant consultation before it considers that application further.

2. Cabinet Member Introduction

N/A

3. Recommendations

It is recommended that the Leader:

3.1 Notes that Homes for Haringey has exercised housing management functions on the Council’s behalf, as permitted by section 27 Housing Act 1985, from 1st April 2006.

3.2 Notes that on 15th March 2016 Cabinet (i) resolved to approve a new 10 year management agreement between the Council and Homes for Haringey, to take effect from 1st April 2016 or, if later, from the receipt of approval under section 27 Housing Act 1985; (ii) had been advised that steps were in place to obtain consent, but that the existing 2011 Agreement would need to roll over to regulate service delivery in the event that consent was not obtained before 1st April 2016; and (iii) therefore intended that the 2011 Agreement should remain in force beyond 1st April 2016 until consent was given.

3.3 Notes that, consistent with the Cabinet decision of 15th March 2016, both the Council and Homes for Haringey have continued to act on the basis that the 2011 Agreement remains in force and have continued to perform their respective obligations under that agreement from 1st April 2016 to the present.

3.4 Notes that, consistently with the above, on 15th May 2016 the Leader noted that the Council’s tenancy management functions continued to be contracted out to Homes for Haringey on the terms of the 2011 Agreement until replaced by the new management agreement.

3.5 Insofar as it is necessary to do so, and for the avoidance of doubt:

(1) Ratifies the continuation of the 2011 Agreement with Homes for Haringey for all purposes, beyond 31st March 2016 and continuing until the HCA determines the Council’s application for approval of the new proposed management agreement.

(2) Ratifies the performance by Homes for Haringey of all the management functions undertaken by it on the Council’s behalf in pursuance of section 27 of the Housing Act 1985, and in accordance with the 2011 Agreement, with effect from 1 April 2016.

These ratifications are to have effect both retrospectively and prospectively.

3.6 In the light of the communication from the HCA dated 8th June 2017, directs that a report be brought to the next available Cabinet meeting so that the matter may be considered further and any necessary decisions can be taken.

4. Reasons for decision

4.1 It is necessary for the decision to be taken in order to retrospectively ratify the extension of the 2011 Agreement for the avoidance of doubt, it being the view of officers and legal advisers that Cabinet approval for that course of action was necessarily implicit in the decision of 15th March 2016. The extension (referred to in the March 2016 report as “roll[ing] over” was and remains necessary to ensure that there is a legally valid agreement in place for the discharge by Homes for Haringey of the Council’s housing management functions. In the absence of a legally valid agreement, it is arguable that the Council is acting unlawfully in allowing Homes for Haringey to discharge those functions on its behalf

5. Alternative options considered.

5.1 The Council could continue to participate in the forthcoming judicial review without taking these decisions. As already explained, the legal advice is that the Council’s position is defensible. However, given the potentially serious implications outlined above, it is appropriate and prudent for the Council to take any steps reasonably available to it to protect its position and mitigate the inevitable litigation risk as far as possible.

6. Background information

6.1 On 7th September 2011 the Council entered into the 2011 Agreement, being for Housing Management and Other Services, with Homes for Haringey. This was to expire on 31st March 2016, with an option to extend, as provided for within the agreement. On 15th September 2015, Cabinet resolved that Homes for Haringey should be retained as the Council’s Arm’s Length Management Organisation with a new contract for 10 years, to expire on 31st March 2026. It further resolved that approval of the new agreement be brought back to Cabinet for approval no later than March 2016.

6.2 On 15th March 2016 Cabinet considered a report which appended a draft version of the new 10 year management agreement. The report sought Cabinet approval for this agreement and to delegate authority for the Chief Operating Officer to enter into the agreement on behalf of the Council. Within the report it was acknowledged that the new management agreement would require the approval of the Secretary of State under section 27 (in fact the HCA). Cabinet was informed that legal advice had been taken which had confirmed that, subject to anything unforeseen happening, no difficulties were envisaged in obtaining consent.

6.3 The report addressed the possibility that approval might not be obtained until after 31st March 2016 and that “there would be a need for the existing management agreement to roll over to regulate service delivery until such time as consent is obtained if after 1st April 2016”. As at the date of the Cabinet meeting, no application for approval had yet been made. There was nothing

within the report to suggest that if approval was not obtained by 1st April 2016 any of the functions being undertaken by Homes for Haringey should revert to the Council and nor was any such recommendation made by officers. As the Council has no members of staff who could undertake those functions, more than 600 odd having been transferred to Homes for Haringey in 2006, such a temporary reversion would have been unfeasible. It would also have been contrary to the Cabinet report of 15th September 2015, where the option of returning housing management functions to the Council had been considered, but rejected.

6.4 Cabinet resolved:

- (i) to note that the management agreement required the consent of the Secretary of State,
- (ii) to approve the new 10 year agreement, to take effect from 1st April 2016 or from such date that approval was received from the Secretary of State “if later than 1 April 2016”, and
- (iii) to delegate authority to the Chief Operating Officer.

6.5 On 20th May 2016, the Leader made a Key Decision in response to a report titled ‘Statutory Homelessness Decisions’, and which was partly concerned with the continued performance by Homes for Haringey of the Council’s Part VI and VII Housing Act 1996 functions, undertaken by it in accordance with the 2011 Agreement. The Leader expressly noted, as part of the resolution that “the Council’s tenancy management functions continue to be contracted out to Homes for Haringey on the terms of the old management agreement until replaced by the new management agreement”. The extension and continued existence of the 2011 Agreement was also noted and acknowledged by Homes for Haringey at a Board meeting on 5th April 2016.

6.6 At all times since 1st April 2016 Homes for Haringey has continued to provide all the services to be provided to the Council under the 2011 Agreement, in accordance with the term of that 2011 Agreement. The Council has continued to pay the management fee.

6.7 Homes for Haringey is the defendant to a claim for judicial review (claim number CO/4120/2016) brought by three individual claimants, on their own behalf and on behalf of an unincorporated association known as the Haringey Leaseholders’ Association. The claimants are challenging a decision by Homes for Haringey in May 2016 to end certain arrangements for the ‘recognition’ of borough wide groups. The claim was initially brought on the basis that there had been an unfair consultation exercise. However, a new ground of challenge was raised in December 2016, alleging that Homes for Haringey’s decision had been unlawful because it was made after 31st March 2016, the claimants contending that the 2011 Agreement had expired by then. This was responded to by Homes for Haringey on the basis that the agreement had not expired, but had been extended.

6.8 The High Court granted permission for the claim to proceed to a full hearing, following an oral hearing on 1st March 2017. In a skeleton argument filed in advance of that hearing, the claimants’ legal counsel raised a further issue that,

if there had been an extension of the 2011 Agreement, it was unlawful because the extension was variation of the agreement which itself required the section 27 consent, and that had not been sought. In granting permission to the claimants to proceed with the claim, the Court also joined the Council as an Interested Party because it was directly affected by the claim insofar as it challenged the legality of the 2011 Agreement and the extension thereof.

- 6.9** The judicial review hearing is now listed for two days, on 14th - 15th June 2017.
- 6.10** On 30th May 2017, the claimants' legal counsel served their skeleton argument for the final hearing. Within that document, *for the first time*, a further point was raised about the Cabinet decision of 15th March 2016. The Claimants are alleging that "Cabinet did not resolve to authorise the Council's officers to agree a variation or extension of the 2011 Management Agreement beyond 31 March 2016" and it is further argued that, in the absence of such a resolution, the extension or "rolling over" of the 2011 Agreement was unauthorised.
- 6.11** The Council's legal advisers are satisfied that by its resolutions on 15th March 2016 Cabinet did sufficiently resolve to authorise the continuation of the 2011 Agreement beyond 31st March 2016 in the event that section 27 consent was not received before that date (being a matter which the resolution expressly referred to). They also advise that this is consistent with the Leader's resolutions of 20th May 2016.
- 6.12** The Council and Homes for Haringey will object to the Court against the claimants being allowed to raise this new argument.
- 6.13** However, it is recognised that (a) there is a risk the Court will allow the new argument to be raised, and (b) a further risk that the Court may not be satisfied that the resolutions made to date are sufficient. It is therefore prudent, for the avoidance of doubt and to ensure that the Council's position is protected to the greatest extent possible, to make the resolutions recommended. If there has been an error made, it is one of form and not substance.
- 6.14** The application to the HCA for approval under section 27 was made in late May 2016. There has since been a very substantial delay, beyond anything that could have been foreseen in March 2016.
- 6.15** Indeed, on 8th June 2016, an email from the HCA was received. The HCA have stated that having reviewed the application, responses to their enquiries and representations made by residents, it is of the view that there has been insufficient consultation with tenants about the renewal of the agreement with Homes for Haringey for a further 10 years. It has asked the Council to undertake tenant consultation before it will consider the application further. Officers are considering the Council's response.

7. Special urgency and Call-In and urgency

- 7.1** The Council's Constitution provides that, in normal circumstances, at least 5 clear days' notice will be given of any meeting (Part Four, Section D, Rule 4). However, in respect of 'key decisions' (which are reserved to the Leader,

Cabinet, a Committee of the Cabinet or individual Cabinet Member or the Chief Executive as per Part 4, Section F, Rule 1.3), the Constitution requires that, in addition to the normal 5 days' notice, a notice of intention to make the decision has been made available for 28 clear days (Part Four, Section D, Rule 13).

7.2 The 28-day and 5-day notice requirements are, however, subject to the general exception in Rule 16 and the special urgency procedures in Rule 17. Rule 16 applies where it is impracticable to give the 28 days' notice of intention, but the procedure still requires that 5 clear days' notice is given of the decision to be made. Rule 17 applies where compliance with Rule 16 is impracticable (i.e. the decision must be taken before the expiry of 5 clear days). In such cases, the decision can only be made with the agreement of the Chair of the relevant Overview and Scrutiny Committee (or, if unable to act, the Mayor or – in the Mayor's absence – the Deputy Mayor) "that the taking of the decision is urgent and cannot reasonably be deferred".

7.3 The decision to ratify the extension of the management agreement with Homes for Haringey beyond 31st March 2011 and pending the consent of the HCA to the new 10 year agreement is clearly a key decision.

7.4 The use of the special urgency procedure is justified because:

(i) the hearing of the judicial review claim is less than 5 clear days away. As such it is not practicable to comply with either the 28-day notice requirement in Part Four, Section D, Rule 13 or the 5-day notice requirement in Part Four, Section D, Rule 4. If the decision is deferred, it will not be taken until after the hearing of the judicial review claim, which will defeat the purpose of making the decision.

(ii) the reason for the urgency arises because of a new legal issue which was raised for the first time by the claimants' legal counsel in a skeleton argument dated 30th May 2017. Prior to the receipt of that document, no issue had been raised about the legality of the 15th March 2016 Cabinet decision. That is despite the fact that the legality of the extension from a contractual and statutory perspective had been raised since December 2016 and March 2017 respectively.

(iii) In the period between receipt of the skeleton argument and the writing of this report, it was necessary for the Council's legal advisers to consider that document, take instructions from the Council, and advise. The Leader will also be aware that the General Election took place on 8th June 2017, which imposed further burdens on the availability of officers.

(iv) if the claimants' arguments are correct, there is a risk the Court could conclude that the delivery of the Council's housing management functions since 1st April 2016 has taken place in the absence of legal authority. That is a serious matter which must be resolved urgently as far as it is possible to do so.

7.5 For the above reasons, officers advise that the conditions in Part Four, Section D, Rule 17 are met.

- 7.6** Further, reliance is also placed on Part Four, Section H Rule 18 of the Constitution. That rule enables urgent key decisions to be taken without the need to apply the Call-In Procedure Rules where the action being taken is “urgent or time critical”. Urgency is defined by Rule 18(b) as being where “any delay in implementation likely to be caused by the call-in procedure would seriously prejudice the Council’s or the public’s interests”.
- 7.7** Officers advise that the test on what is “urgent or time critical” and that “any delay in implementation likely to be caused by the call-in procedure would seriously prejudice the Council’s or the public’s interests” is met for the reasons set out at paragraph 7.4 above.
- 7.8** In accordance with Part Four, Section D, Rule 17, and Part Four Section H, Rule 18 of the Constitution, Councillor Wright has been consulted on this report in his capacity as the Chair of Overview and Scrutiny Committee, and his agreement was obtained.

8. Contribution to strategic outcomes

- 8.1** The adoption of a management agreement contributes to the strategic outcomes under Priority 5 of the Corporate Plan, and provides the framework that enables the Council to ensure that Homes for Haringey continues to deliver and improve the services it provides.

9. Statutory officers comments (Chief Finance Officer (including procurement), Assistant Director of Corporate Governance, Equalities)

9.1 Finance and Procurement

- 9.1.1** There are no new financial implications due to this decision. Budgets for the relevant functions have already been agreed by Cabinet and will continue to be managed by Homes for Haringey. Given the pressures of the Council’s General Fund due to increased rent costs and reduced Housing supply within the Homelessness budget it is important that arrangements to minimise the impact of these factors remain in place.

9.2 Legal

- 9.2.1** The Assistant Director of Corporate Governance has been consulted in the preparation of this report and his views, and any legal implications, are set out in the report.

9.3 Equality

- 9.3.1** The Council has a public sector equality duty under the Equalities Act (2010) to have due regard to:

- tackle discrimination and victimisation of persons that share the characteristics protected under S4 of the Act. These include the

characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex (formerly gender) and sexual orientation;

- 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.

9.3.2 Residents in receipt of Homelessness services are typically vulnerable and in need of help. One way that they are protected is through the statutory decision making responsibilities given to Local Authorities. By authorising the extension of the existing arrangements, the Council is ensuring that these residents continue to receive the services they are entitled to, which protect them and help them.

9.3.3 Cabinet took into consideration the Council's public sector equality duty when on 15th March 2016 it authorised entry into the new management agreement. The present decision raises no new equalities considerations.

10. Use of Appendices

None

11. Local Government (Access to Information) Act 1985

None