

## REPORT TO CABINET

<b>Open</b>		Would any decisions proposed :			
<b>Any especially affected Wards</b> No	Discretionary	<b>Be entirely within Cabinet's powers to decide</b> YES  <b>Need to be recommendations to Council</b> NO  <b>Is it a Key Decision</b> NO			
<b>Lead Member:</b> Cllr Graham Middleton E-mail: cllr.graham.middleton@west-norfolk.gov.uk		<b>Other Cabinet Members consulted:</b> N/a			
		<b>Other Members consulted:</b> N/a			
<b>Lead Officer:</b> Alexa Baker, Monitoring Officer Direct Dial: 01553 616270		<b>Other Officers consulted:</b> Lorraine Gore, Chief Executive Michelle Drewery, section 151 officer Becky Box, Assistant Director for Central Services			
<b>Financial Implications</b> YES	<b>Policy/ Personnel Implications</b> YES	<b>Statutory Implications</b> YES	<b>Equal Impact Assessment</b> NO	<b>Risk Management Implications</b> YES	<b>Environmental Considerations</b> NO

Date of meeting: 15 November 2022

### GOVERNANCE REVIEW OF THE COUNCIL'S COMPANIES

<p><b>Summary</b></p> <p>This report sets out proposed actions to improve the governance arrangements surrounding the Council's three operating wholly owned trading companies: Alive West Norfolk, West Norfolk Housing Company Limited and West Norfolk Property Limited, following a governance review.</p> <p>The primary recommendation is the creation of a 'Shareholder Committee', which is proposed to be a decision-making sub-committee of Cabinet, which shall exercise the function of Shareholder. This will involve holding the companies to account against their business plans and approving governance documents in the Shareholder capacity. This will be a Council body which all Members may attend under their Standing Order 34 rights and its decisions will be subject to the scrutiny call-in procedure.</p> <p>To allay concerns around conflict of interest, it is proposed that for two out of the three companies, Members should be no longer act as directors, so that the Member role is fulfilled through the Shareholder function and holding the directors to account via the Shareholder Committee. The report details the reasoning for holding back at this stage on the third company for now.</p> <p>To improve openness and transparency, it is also recommended that a 'Shareholder data room' be created through Mod Gov which will contain all relevant documents pertinent to the Council's Shareholder function, which Members will have full access to, on a confidential basis (where required).</p>
--

## **Recommendations**

- 1) Cabinet hereby establishes a sub-committee to be known as ‘the Shareholder Committee’ and sets the terms of reference as shown in Appendix 1 to this report as the terms of reference for the Shareholder Committee. Cabinet delegates full authority to the Shareholder Committee to carry out its terms of reference.
- 2) Authority is delegated to the Chief Executive in consultation with the Leader to enter Service Level Agreements between the Council and each of its wholly owned companies in respect of all support provided by the Council to that wholly owned company.
- 3) The Corporate Governance Action Plan attached at Appendix 2 be approved.

## **Reason for Decision**

To improve the governance of the Council’s wholly owned companies.

## **1. Purpose of Report**

- 1.1 The purpose of this report is to set out proposed actions to improve the corporate governance of the Council’s wholly owned trading companies. The report sets out an action plan to take forward recommendations arising out of the governance review that has been undertaken.

## **2. Background/Current Position**

- 2.1 This Council has three wholly owned operating trading companies:

- i. Alive West Norfolk (limited by guarantee) (“AWN”)
- ii. West Norfolk Housing Company Limited (limited by shares) (“WNHC”)
- iii. West Norfolk Property Limited (limited by shares) (“WNP”)

- 2.2 Summary details of the companies are set out at Appendix 3, but for the ease of reference, the companies are engaged in the following:

- i. AWN: Operation of sports and arts facilities
- ii. WNHC: Renting and operating of Housing Association real estate (company is a registered social housing provider)
- iii. WNPL: Other letting and operating of own or leased real estate

- 2.3 The Council’s owner/shareholder function is an executive function and presently sits within the Portfolio for Business, Culture & Heritage.

- 2.4 The board of directors of each company is made up of current or former Cabinet Members and senior officers, with WNHC also having independent non-executive director appointments to the board.

- 2.5 The Council’s Chief Executive is recorded at Companies House as the company secretary to WNHC and WNPL (a legacy appointment). There is no Company Secretary appointed for AWN.

- 2.6 Bespoke Articles of Association have been adopted for all three companies. They are not as aligned with each other as they could be.
- 2.7 There is no Shareholder Agreement between the Council and AWN or WNP. There is no mandatory requirement for these to be in place, however they are a mechanism by which robust governance requirements can be adopted and monitored.
- 2.8 The governance documents in relation to WNHC are more advanced. There is a Shareholder Agreement, Intragroup Agreement, Board Terms of Reference, Chair role description and Director Services Agreement.
- 2.9 The Council has been providing each of its companies with back office support, for example company secretarial work, finance, HR, etc. The extent of this back office support has developed on a piecemeal basis and has not been properly captured into formal agreements.
- 2.10 There have been no changes to officer job descriptions to set out the requirements of them to act as a company Director and how this interfaces with their Council officer role.
- 2.11 The Agendas and Minutes of the companies' board meetings are published and accessible to Members, however Members are not permitted to attend company board meetings under the Standing Order 34 rights as the companies are private limited companies and are not 'Council bodies' under the Constitution.

### **3. Governance actions**

#### The Shareholder Function:

- 3.1 The Shareholder function is an executive function, and therefore the responsibility for the exercise of the shareholder function sits with the Council's Executive – the Leader and Cabinet. The Council's owner/shareholder function presently sits within the Portfolio for Business, Culture & Heritage.
- 3.2 For the ease of reference, the term 'Shareholder' in this report is intended to cover AWN which is a company limited by guarantee.
- 3.3 Going forwards, it is proposed that a Shareholder Committee be established which will be a sub-committee of Cabinet with authority and decision-making powers delegated by Cabinet to exercise the shareholder function. The proposed Terms of Reference for this sub-committee are set out at Appendix 1.
- 3.4 The Shareholder Committee would be responsible for approving the companies' governance documents, business plans, holding directors to account against the delivery of the business plans and the Shareholder Agreement and determining the shareholder reserved matters that are set out in the Shareholder Agreement (see below examples).
- 3.5 Recommended Shareholder reserved matters are as follows (this is not intended to be an exhaustive list):
  - i. approval and modification of the company business plan;
  - ii. appointment and removal of the directors;
  - iii. varying the Articles of Association;
  - iv. relevant staff recruitment and remuneration (including directors);
  - v. changes in ownership or membership of a company;
  - vi. acquisition/disposal of other entities or an ownership stake in another entity;

- vii. acquisition and disposal of assets by the company (utilising a cap if required);
- viii. approval of borrowing;
- ix. termination/winding up of the company.

3.6 The Shareholder Committee is proposed to consist of three Cabinet Members. The list of the Shareholder functions are set out within paragraph 4 of the proposed Terms of Reference at Appendix 1.

3.7 The Shareholder Committee will be supported by officers internally within the Council who do not have responsibility for acting as directors (or in any other capacity) for the companies.

#### Roles of Other Council Bodies:

##### Audit Committee

3.8 Audit Committee has recommended revising its terms of reference (awaiting Full Council approval) to include:

*Receive assurance that there is sound system of internal control and risk management process in place for each of the Councils Local Authority Trading Companies.*

##### Policy Review and Development Panels

3.9 The Shareholder Committee will be holding the companies to account against their business plans, delivery and performance. The Council's scrutiny function will include holding the Shareholder Committee to account in ensuring the effective exercise of the shareholder function, and assessing whether the Council's interests and investment in the companies are protected.

3.10 The appropriate panels may scrutinise the decision making of the Shareholder Committee, including via the call-in procedure. The Panels may add items to their agendas within their remit which involve the Council companies, to include requiring directors of the companies to attend meetings and provide information, however for effective public administration there should not be a duplication of the companies being required to account to the Shareholder Committee and the scrutiny panels in the same way. Scrutiny's primary role with regards to the Council companies will be to scrutinise the Shareholder Committee's performance in carrying out the shareholder function.

#### The Company Board of Directors:

3.11 It is essential to good governance that all those involved in a corporate structure clearly understand their respective roles and responsibilities, and those of others within the corporate structure.

3.12 Appointed company directors are responsible for (not intended to be an exhaustive list):

- i. Acting in the statutory role of a company director with fiduciary duties to the company;
- ii. Acting in the best interest of the company;
- iii. The day-to-day operational control and running of the company;
- iv. Development of new business opportunities within the parameters of the agreed business plan;
- v. Staff terms and conditions;
- vi. The development and implementation of its internal procedures;
- vii. Running the company in accordance with the governance documents and business plan;
- viii. Developing and delivering new business plans at the regularity required in the governance documents;

- ix. Regular reporting on progress of the business plan to the Shareholder;
- x. Accounting to the Shareholder for the performance of the company.

3.13 The Statutory duties imposed on a director under the Companies Act 2006 are as follows:

- i. act within their powers;
- ii. promote the success of the company;
- iii. exercise independent judgment;
- iv. exercise reasonable care, skill and diligence;
- v. avoid conflicts of interest;
- vi. not accept benefits from third parties.

The duty under S.172 of the Companies Act 2006 to promote the success of the company is an overarching duty. This must be considered by directors in all decisions that are made for the company

3.14 The question that arises for every Council setting up and maintaining a wholly owned company is the extent to which its officers and Members are placed on the Board of Directors. CIPFA guidance on Local Authority owned companies states as follows at page 49:

*The law does not prohibit or restrict appointments of officers or members to non-executive director positions for a local authority company, but it is good practice to have some 'distance' between key authority decision makers and company decision makers in terms of personnel.*

3.15 When a Member or an officer acts as a director of a wholly owned local authority company, there is an overriding duty to always act in the best interests of the company. This creates a more pressing conflict for Members because their public law duty to the Council can never be avoided or delegated. Where Members do act as Directors, checks and balances can be put in place to manage and mitigate potential and actual conflicts, and the Member Code of Conduct continues to apply. Members therefore run the risk of challenges to their actions and decisions as directors of the company through the standards regime, as well as potential liability under the Companies Act 2006.

3.16 In contrast, officers' relationship with the Council is contractual, and their terms and conditions of employment can be amended to set out that they are required to act as director, and where they so act, the officer must put set aside their contractual duty to the Council and must put the interests of the company first.

3.17 Best practice is that the Council's statutory officers should not serve as directors on the boards of the Council's companies, as they need to keep their discretion unfettered to fulfil their roles within the Council as shareholder.

3.18 To make clear the respective roles and responsibilities as regards the Shareholder Committee, it is therefore proposed in the Action Plan at Appendix 2 as follows:

- i. AWN change the composition of its Board of Directors to: Managing Director of AWN, two Council Officers not holding a statutory post and two independent non-executive directors;
- ii. WNPL change the composition of its Board of Directors to: three Council Officers not holding a statutory post and two independent non-executive directors;
- iii. That AWN and WNPL create a non-voting Shareholder representative seat on their respective Boards (intended to take effect once the changes at i) and ii) have been made).

- 3.19 These proposed changes would need to be set out in amended governance documents, the approval of which is proposed to be delegated to the newly created Shareholder Committee. It would be for the Shareholder Committee to approve the skills appraisal and personal specification for the identified independent non-executive director roles.
- 3.20 As WNHC has registered status from the Regulator of Social Housing, which included submission of its governance documents, it is not proposed to alter the make up of this company's board structure yet until all governance improvements emanating from the Action Plan have been implemented, in order to provide assurance when seeking approval for future changes from the Regulator.
- 3.21 The Shareholder Committee ought to begin carrying out its shareholder functions as soon as possible, in line with the Action Plan, to bring about the governance improvements required. It is recognised that the recruitment of independent non-executive directors with the relevant and appropriate skillset is a process that will take some time. This will mean (for the interim) Cabinet Members taking decisions on the Shareholder Committee in relation to companies on which other Cabinet Members sit as Directors. This interim position will need to be managed by carrying out an immediate conflict of interest assessment, identifying the checks and balances that can be put in place to mitigate the risks and perceived risks and providing targeted training to those Members and officers that are affected.
- 3.22 The proposed non-voting Shareholder representative is recommended to be a Cabinet Member who would attend the company Board meetings as an observer, to participate in discussions and advance the shareholder's position. This will support the continuation and sharing of knowledge and experience around the companies that current Cabinet Member Directors have built up over their tenure in post. The Shareholder representative is not a Director and would not count for quorum purposes or be able to vote on Board resolutions. The Shareholder representative would be expected to attend Shareholder Committee meetings in this capacity, to relay to the Shareholder Committee their observations at the Board meetings.
- 3.23 Directors of the Council companies are not currently remunerated and it is not proposed to change this. Any future changes would be a decision reserved to the Shareholder within the governance documents. Members would not in any event be entitled to receive more than the equivalent of Member allowances, with their Member allowance being duly reduced by the same amount. Officers are not entitled to receive separate remuneration from the Council companies. Remuneration is therefore only really engaged with respect to independent non-executive directors on the board of directors.

#### Governance Documents

- 3.24 Key to good governance are the documents which set the parameters in which the companies are to operate.
- 3.25 There is a Shareholder Agreement in place with WNHC but not AWN or WNPL.
- 3.26 The Shareholder Committee can, through a Shareholder Agreement, set out the performance levels required for the companies and set out how the relationship between the Council and the companies will work. Securing alignment of the governance documents with all the companies, so

far as is possible, will promote consistency for the Shareholder Committee to carry out their role with all companies.

3.27 It is therefore proposed that the following be undertaken:

- i. Shareholder Agreements be agreed between the Council and AWN and WNPL respectively;
- ii. Updated Articles of Association to reflect and support the content of the Shareholder Agreement and align all three companies' governing documents so far as possible;
- iii. Minor clarificatory changes to the governance documents for WNHC;
- iv. Refreshed business plans for AWN and WNPL;
- v. The formalising of support services provided to the companies by the Council, under service level agreements.

#### Company Secretary

3.28 The company secretary function is an important role akin to that of a local authority Monitoring Officer. Duties should encompass company and Companies House administration, statutory and regulatory compliance, corporate governance, supporting the directors in ensuring they are complying with their duties and liaising with the shareholder.

3.29 It is proposed that one of the first decisions of the newly created Shareholder Committee be to select a new Company Secretary for all companies, proposed to be a member of the Council's legal team (not the Monitoring Officer) under the provisions of the Service Level Agreements proposed to be entered into, or an external provider suitably qualified in providing this role.

#### Shareholder Documents

3.30 In order to provide a centralised location where all Members can locate documents relevant to the Council's Shareholder function, it is proposed that a 'data room' be created in Mod Gov which will contain current and historic business plans, signed Shareholder Agreements, Articles Association, agendas and minutes of company board meetings, etc

### **4. Other options considered**

#### Shareholder function

- 4.1 There are several ways in which the Cabinet can exercise its shareholder function. The Cabinet, as a whole, may exercise the shareholder function, the Cabinet may delegate the function or certain shareholder decisions to an individual cabinet member or to an officer of the Council.
- 4.2 A shareholder advisory committee could be established which would advise the Portfolio Holder delegated to carry out the executive function, prior to the taking of a decision. This would not be a formal sub-committee of the Cabinet and given its advisory capacity, would have no decision-making authority.
- 4.3 The composition of a shareholder advisory committee, its remit and terms of reference would be for the Cabinet to decide. The shareholder advisory committee could comprise of elected members from the Council's administration and other groups, as well as external non-members with sector specific expertise who would act in a similar capacity to independent non-executive directors appointed to the companies' boards and who would be recruited in a similar way.
- 4.4 A Shareholder Advisory Committee is not considered to be appropriate for the Council's wholly owned companies, as this adds another layer of meetings before decisions are taken at the executive level. Additionally, this does not absolve the Portfolio Holder of the duty to make their

own decisions rather than just following the Advisory Committee's recommendations. It is therefore considered that the Shareholder function is best met by a Shareholder Committee, rather than requiring the decision making of the shareholder function to be taken ultimately by one person.

#### The Company Board of Directors

- 4.5 Consideration has been given to replacing the current executive Cabinet Members with non-Cabinet Councillors, aka 'back-benchers'. This would be more in line with CIPFA's stated good practice to keep some 'distance' between key authority decision makers and company decision makers, however would not remove the Member conflict issue entirely in terms of not being able to delegate or fetter their duty to the Council.
- 4.6 In the event that recruitment of suitable independent persons to fulfil the identified seats on the Board of Directors of AWN and WNPL is not successful, it is proposed that the matter be taken to the Shareholder Committee to determine whether the seats should be opened up to 'back-benchers'.

#### **5. Policy implications**

- 5.1 Bolstering the Shareholder function will serve to enable the Council to set the strategic direction of its companies in line with the Council's own policies, the Corporate Business Plan, Capital programme, etc.
- 5.2 The publication of non-statutory guidance by CIPFA provides a notable model to compare with the council's current arrangements and inform work to enhance the current governance framework.

#### **6. Financial Implications**

- 6.1 The recommendations will ensure that the Council can operate within standards of best practice and ensure that the Council's strategic objectives are being met across companies in which it has a financial interest in.
- 6.2 The recommendations will have implications for the Council and its subsidiary companies. The companies will be able to operate more effectively and will be accountable to the Council in its role as Shareholder.
- 6.3 Having improved and more robust corporate governance arrangements in place will help improve the underlying financial viability of the Council. The recommendations will allow an approach which will provide clarity on what is expected from the Council's companies such as key deliverables, supplemented with reports on financial and operational performance. This will result in provision of up to date and consistent information to support the Council when setting the budget and carrying out other financial responsibilities such as monitoring and year end financial reporting.
- 6.4 The UK Corporate Governance Code 2018 makes reference to the benefits of clear relationships and integrated business objectives between companies in a group arrangement.
- 6.5 There are likely to be some costs associated with implementing the recommendations. The review of SLA's will result in confirmed arrangements for support services and the associated charges to each company. The Council's financial plan will need to be updated to reflect these. It should be noted that the companies have the autonomy to consider whether these services can be provided more economically from alternative external providers. Other costs may be associated with



consideration of remuneration as set out in section 3.23. Again, these will need to be reflected in the financial plan if required. The impact in the current financial year is likely to be minimal and will be met within budget.

## **7. Personnel Implications**

- 7.1 The proposed revisions to the roles of Officers acting as Directors of the Council's wholly owned companies will be managed in accordance with the normal procedures for revising terms and conditions of employment and job descriptions, including consultation with individual employees as appropriate. Any changes to the Council's organisational structure to support the revised governance structure for Council owned companies will also be implemented in accordance with normal procedures for managing organisational changes.
- 7.2 Council officers have previously supported the recruitment of independent members for the WHNC Board, and this experience can be utilised to assist with similar recruitment activities for AWN and WNPL as required.
- 7.3 Officer time will be required for the development and ongoing management of service level agreements detailing the support services provided to the three Council companies to support the revised governance arrangements.

## **8. Statutory Implications**

- 8.1 The companies are controlled companies under Part V of the Local Government and Housing Act 1989 and therefore must comply with the requirements thereto.
- 8.2 Section 1 of the Localism Act 2011 provides local authorities with the power to do anything an individual may do, subject to a number of limitations. This is referred to as the 'general power of competence'. A local authority may exercise the general power of competence for its own purpose, for commercial purpose and/or for the benefit of others. In exercising this power a local authority is still subject to its general duties (such as fiduciary duties it owes to its rate and local tax payers) and to the public law requirements to exercise the general power of competence for proper purpose.
- 8.3 The Local Government Act 2003 sets out various powers relating to trading, borrowing and investing.
- 8.4 The Companies Act 2006 sets out the comprehensive governance regime under which the Council's companies are required to operate.
- 8.5 The proposed Shareholder Committee meetings will be held in public (subject to exemption provisions under Schedule 12 A of the Local Government Act 1972) and will operate within the relevant Standing Orders in the Council's Constitution, including the call in provisions.
- 8.6 The Cabinet has the authority to create the Shareholder Committee and adopt its terms of reference.

## **9. Equality Impact Assessment**

- 9.1 Public authorities are required to have due regard to the aims of the Public Sector Equality Duty (Equality Act 2010) when making decisions and setting policies.

9.2 The decisions recommended are not considered to have an impact under the Equality Act 2010, as the recommendation are to improve internal governance structures rather than impact on the service provision to the end user.

## **10. Risk Management Implications**

- 10.1 The corporate risk register currently includes a risk relating to AWN not performing against its business plan. This report proposes an enhanced relationship with regular oversight of the performance of all wholly owned companies by a shareholder committee and additional assurance by Audit Committee of company arrangements relating to matters such as risk management and business continuity.
- 10.2 Improving the governance of the Council companies and the way in which the Council undertakes its shareholder role will support and promote the effective risk management for the Council. The Shareholder Committee and Audit Committee will be assessing the risk management surrounding the Council companies within the remit of their Terms of Reference.

## **11. Declarations of Interest / Dispensations Granted**

11.1 Cabinet members who are board directors of the Council companies are recommended to declare this interest.

## **12. Environmental considerations**

12.1 No direct implications. The company business plans could include specific objectives and targets regarding environmental issues such as carbon reduction.

## **Background documents**

- Local Authority Owned Companies: A Good Practice Guide, May 2022, CIPFA