

Agenda Item No: 4
Report To: Selection & Constitutional Review Committee



Date of Meeting: 14 March 2019

Report Title: Chilmington Management Organisation ("CMO") – Appointment of Directors

Report Author & Job Title: Jeremy Baker
Principal Solicitor – Strategic Development
Portfolio Holder: Cllr. P N H Clokie
Portfolio Holder for: Planning & Development

Summary: The incorporation of the community governance body for Chilmington Green, which is to be known as Chilmington Management Organisation ("CMO"), as a registered company limited by guarantee, is expected in April 2019. It is necessary to clarify the arrangements for the appointment of a Director by the Council. Also, Kent County Council has decided not to take up its right to appoint a Director, and agreed to pass its right to appoint a Director to this Council for two years. It is therefore necessary to agree the arrangements for appointing a second Director for a period of two years.

Recommendations: **The Committee is recommended to:-**

- I. Note that, pursuant to this Committee's previous decisions, Cllr Neil Shorter will be appointed as a Director of Chilmington Management Organisation once it has been created;**
- II. Delegate authority to the Director of Law & Governance to appoint Cllr Mrs Blanford as a Director of Chilmington Management Organisation, in the event that Cllr Shorter does not take up or ceases to hold that office for any reason;**
- III. Nominate Mr Ben Lockwood to be appointed as a Director of Chilmington Management Organisation once it has been created, to hold office only until the second anniversary of its incorporation;**
- IV. Agree the proposals in the report for the exercise by others of the duties and functions of Chief Finance (Section 151) Officer in relation to all matters concerning CMO and related arrangements while Mr Lockwood is both the Council's Section 151 Officer and a Director or recent Director of CMO.**

Policy Overview: The adopted Chilmington Green Area Action Plan (July 2013) includes:-

- a Vision that “Chilmington Green ... fosters a strong community that develops a sense of pride and local ownership with the capacity to help manage Chilmington Green on a day to day basis”.
- Policy CG10 which states, “In order to help establish a strong community at Chilmington Green, the council supports a community led management arrangement. ... there is scope for a community development trust arrangement to take on the responsibility for managing and maintaining a variety of uses, facilities and space to be delivered as part of the development.” The policy requires “a local community management body in a form agreed by the council (e.g. a Trust)” to be set up and operationally effective.
- Para. 8.14 which states that such a ‘trust’ “will only succeed if it has the active support of the local community and works with local private sector businesses (including the development partners, and the future housing associations) as well as local voluntary groups, St Mary’s Great Chart and other faith groups and the statutory service providers, including the borough and county councils.”

Financial Implications:

Changes in the appointment arrangements for Directors of CMO will not have any direct financial implications. The operations and costs of CMO will be funded in the same way, namely from:-

- financial contributions from the developer consortium,
- endowments of property to be provided by the developer consortium,
- an estate rentcharge to be levied on all properties in Chilmington Green.

These are all secured in the section 106 Agreement with the developers.

The role of Director of CMO does not carry remuneration, unless the Director is employed as a CMO employee and this would not be the case for Council-appointed Directors. There may be some small additional indirect costs of ensuring that the duties of Section 151 (Chief Finance) Officer in relation to any matters concerning CMO and related arrangements are carried out by others.

Legal Implications

The appointment of a second Director by the Council will mean that, under the Local Authorities (Companies) Order 1995, CMO becomes a company influenced by the Council. Such a company is known as a regulated company, and must adhere to certain requirements as explained in the report.

Equalities Impact Assessment

As this report relates to appointments to an outside organisation, there is no impact on those with protected characteristics stemming from the recommendations.

Other Material Implications:	See report regarding implications for the Council's statutory chief finance officer.
Exempt from Publication:	NO
Background Papers:	Section 106 Agreement relating to the Chilmington Green development, dated 27 February 2017. Letter from the Director, Economic Development, Kent County Council, dated 22 November 2018.
Contact:	Jeremy.Baker@Ashford.gov.uk – Tel: (01233) 330574

Report Title: Chilmington Management Organisation (“CMO”) – Appointment of Directors

Introduction and Background

1. On 15 October 2014, the Planning Committee resolved to grant Outline Planning Permission for the development of Chilmington Green. A highly complex Section 106 Agreement was then negotiated between the Council, Kent County Council (“KCC”) and the developer consortium. This was signed on 27 February 2017 and provides that no new dwelling may be occupied until a community management organisation company, limited by guarantee as set out in the Agreement, has been created.
2. Prior to the creation of that company, the s.106 Agreement required the developer consortium to set up a Chilmington Green Community Management Organisation Partnership Working Group (“PWG”) to assist and advise the developers and the Council on the creation of the company and its business plan and facilities, and to interact with the local community and parish councils. PWG will cease to exist once the company is created.
3. This Committee resolved on 8 December 2016 to nominate Cllr Neil Shorter as the Council’s representative to the PWG for the period up to the formal creation of the community management organisation company. It was also agreed to appoint a shadow Member to assist and provide continuity and back-up for the role - this was suggested, but not resolved, to be Cllr Mrs Blanford, in view of her role as Ward Member for Great Chart with Singleton North.

Arrangements for the Appointment of a Director by the Council

4. Discussions between the Council and the developer consortium about the nature of the community management organisation company resulted in agreement that this company should be set up in such a way as to be able to seek and obtain charitable status. This meant that its Directors would become charity trustees as well as company directors.
5. On 11 May 2017, this Committee considered a detailed report on the appointment of a Trust Director to the board of the new community trust for Chilmington Green, in anticipation of its creation. That report gave information and advice about its governance, and the role of its directors/trustees. This advice is still relevant and the report can be read at <https://ashford.moderngov.co.uk/Data/Selection%20&%20Constitutional%20Review%20Committee/201705111800/Agenda/SCR%2011.05.17%20-%20Item%205.pdf>
6. This Committee resolved that Cllr Neil Shorter be nominated to the new body. Cllr Mrs Blanford was not appointed because the report advised that there is no provision for substitutes in the governance arrangements for the trust.

Later in the same meeting, the role of Cllr Mrs Blanford as “shadow” member of the PWG was confirmed.

7. On 13 July 2017, this Committee considered a wide-ranging report on the Review of Appointments to Outside Bodies, which set out the legal obligations of trustees and directors of charities and limited companies to act in the best interests of those organisations at all times, regardless of whether that action is also in the best interests of the Council. This duty means that those appointed to such organisations can have no involvement (on either side) in a decisions on whether the organisation should enter into any contract or other arrangement with the Council.
8. This Committee agreed that in future, Councillors would only be appointed as “Liaison Members” to many organisations, rather than as trustees or directors, to avoid Councillors being hampered by such conflicts of interest. However, the appointment of a Director to the Community Trust for Chilmington Green was felt to be an exception to this, as it would help get the community trust “off to a strong start and support the Council’s continuing close relationships and engagement”.
9. Therefore, the nomination of Cllr Shorter as both a Director/trustee of the community trust, and a member of the PWG, was re-confirmed. Cllr Mrs Blanford was re-appointed as “shadow” member of the PWG, and was also nominated as “shadow” Director/trustee of the community trust.
10. On 1 May 2018, Cllr Shorter’s position on the PWG was confirmed, and Mrs Blanford’s position as “shadow” re-confirmed, for the municipal year 2018/2019. Also, the nomination of Cllr Shorter as a Director of the community management company/trust was confirmed for 2018/19, again alongside Cllr Mrs Blanford’s role as “shadow”.
11. Cllr Shorter will therefore be appointed as a Director of the community management company pursuant to these previous decisions of this Committee. But the role of “shadow” director has never been clearly defined, and it is now necessary to clarify this, as the formal incorporation of the community management company is expected to occur in April 2019.
12. It has recently been agreed with the developer consortium that the name of the community management trust/company will be “Chilmington Management Organisation”, abbreviated to “CMO”. As a company limited by guarantee, CMO will not need to use the epithet “Limited”.
13. It is intended that CMO will apply to the Charity Commission for charitable status at a very early stage, and this is built into the draft business plan for CMO which the Council approved last year under the s.106 Agreement. The grant of charitable status will give CMO’s Directors the status of Charity Trustees. Charity Trustees are expected to act personally in that capacity and are not permitted to delegate their functions to Substitute Directors who attend Board Meetings in their stead. Therefore, CMO’s Articles (its constitution) do not allow for substitute directors, as this would not be acceptable to the Charity Commission. Moreover, the term “shadow director” is not appropriate, as in company law this refers to a non-director on whose instructions a

company is accustomed to act, and this is not permitted for charitable companies either.

14. Therefore it will not be possible for Cllr Mrs Blanford to have any formal role in CMO. However, it is recommended that the Committee nominate her as its preferred replacement for Cllr Shorter in the event that Cllr Shorter were not to take up his role on the Board of CMO, or were to cease to be a Director for any reason. By giving delegated authority to Officers to nominate Cllr Mrs Blanford as a Director of CMO should Cllr Shorter cease to hold that office, a quick and smooth transition could be carried out so that the functioning of CMO's Board is not delayed by the need to call a meeting of this Committee to identify and appoint a replacement Director. This is particularly important because CMO's Articles give weight to the participation of Council-appointed Directors in order to ensure a quorum and effective voting at Board Meetings.
15. The appointment of Cllr Shorter as a Director of CMO, and the delegated power to appoint Cllr Mrs Blanford in his stead should that be necessary, will be reviewed annually at the meeting of this Committee held in May each year, as is the Council's normal practice.

The involvement of Kent County Council in CMO

16. The original intention and commitment within the s.106 Agreement, which KCC signed, was that this Council would appoint one Director to CMO, and KCC would appoint one Director. However, KCC decided in November 2018 that it does not wish to take up its right to appoint a Director at this time.
17. If the position of KCC-appointed Director were left vacant, this would dilute the 'public sector' input to CMO's Board, and the careful balance between developer-appointees and others' appointees would be undermined (see the report referred to in para. 5 for further details). This balance of interests on CMO's Board is especially important in the early stages of CMO's life, because immediately after the creation of CMO, there will be 5 developer-appointed Directors and only 2 from the public sector (ABC's and KCC's appointees), together with one from the voluntary sector. It will be a while before development of Chilmington Green has advanced to the stage when there are Registered Providers of Social Housing onsite who are able to appoint a Director, and it is not clear how long it may take to recruit the first Resident Director.
18. Therefore, KCC agreed to pass to this Council its right to appoint a Director for the first two years after incorporation of CMO. After two years, the right to appoint that Director will revert to KCC and this Council's appointee will leave office.
19. In order to avoid complicated legal delegation procedures at KCC, which have not proved easy to progress, it has been agreed that the Articles of CMO will be changed immediately after incorporation, to include the right for this Council to appoint a second Director until the second anniversary of CMO's incorporation. After that time, the right of appointment of that Director will return to KCC.

20. It had already been agreed between the Council and the developer consortium that, after the creation of CMO in accordance with the constitutional documentation contained in the Section 106 Agreement, a number of small agreed changes to the Articles will be made, with the consent of the Council and the consortium, in order to enable CMO to operate more effectively than under the original Articles unamended. So this change to the Director appointment rights will be made at the same time.
21. The Chief Executive has agreed informally with KCC (as KCC's formal consent is not required) that Ben Lockwood (Director of Finance and Economy) should be appointed to fill this Director position for a period of (up to) 2 years. He has considered this role alongside his professional duties as a chartered public finance accountant and his duties to the Council as its appointed chief finance officer (Section 151 Officer), and he is of the view that there would be no inherent conflict of interest between his roles provided that certain steps are taken.
22. Members of long standing may recall a similar situation during the winding-down of Ashford's Future Company Limited (AFCo.) in 2011. The Council's public sector partner organisations withdrew, and in order to secure a smooth dissolution of AFCo., the Council's then Chief Finance (Section 151) Officer, Paul Naylor, was appointed as company secretary to oversee the winding down of AFCo.
23. Many of AFCo.'s transactions involved the Council, so the inherent conflict of interest between Mr Naylor's roles of Company Secretary of AFCo. and Section 151 Officer of the Council was addressed by formally qualifying his Section 151 role and duties. On 12 April 2012, the Cabinet was advised that, "the Council's Section 151 Officer [has] a conflict of interest in matters concerning AFCo, The S.151 officer had requested that his nominated deputy ... act in his role of advising the Council for all matters relating to AFCo, and related arrangements." On 4 September 2014 following dissolution of AFCo., the Cabinet was advised that, "the Company Secretary's office ... ceased upon dissolution of the Company and thus the s.151 Officer no longer has a conflict of interest in matters concerning AFCo. and has resumed his full responsibilities."
24. Although CMO will be an incorporated body independent from the Council, CMO will need to have transactions with the Council, including receiving significant s.106 monies contributed by the developer consortium to assist its work. Therefore, the same arrangements as those used for the winding down of AFCo. will be put in place in this case.
25. Mr Lockwood has previously used his personal statutory powers as Chief Finance Officer to nominate the Head of Finance as a Deputy Chief Finance (Section 151) Officer, to act in his stead should he be absent.
26. If this Committee agrees the recommendation, Mr Lockwood will become a Director-designate of CMO and will immediately take steps to absent himself from, and formally pass to his Deputy, the duties and functions of Chief Finance (Section 151) Officer in relation to all matters concerning CMO and related arrangements. He will thereafter ensure that there is at all times at

least one such Deputy in place and authorised to act in this way, for as long as he is both the Council's Section 151 Officer and a Director of CMO.

27. When his term of office as a Director of CMO ends, Mr Lockwood may still owe duties (e.g. of confidentiality) to CMO, and if so these arrangements will continue for as long as he owes such duties to CMO that may affect him resuming his full Section 151 Officer role for the Council. This will be kept under review at that time. Eventually, he will be able to resume his full role as Chief Finance Officer.

Implications and Risk Assessment

28. The appointment of two Directors by the Council will mean that, under the Local Authorities (Companies) Order 1995, CMO will become a company influenced by the Council, known as a regulated company. As a regulated company, CMO will need to adhere to certain requirements.
29. These include placing a disclosure statement regarding this influence on all CMO's letters, notices and other publications, order forms, invoices, receipts and other correspondence and documentation; limits on Directors' remuneration, expenses and political publicity; and providing certain information to the Council's auditors and Members. CMO's Articles and other governance documents (e.g. the Framework Agreement between its participants) will need to secure these matters, in order to ensure that this legislation is complied with.

Consultation Planned or Undertaken

30. A number of discussions were held with KCC to seek to persuade it to appoint a Director of CMO. However, eventually it became clear that KCC would not do so for internal reasons.
31. Cllr Shorter, KCC and the developer consortium were all informed of the proposal to appoint Ben Lockwood as a Director, and all were content with it.

Other Options Considered

32. Not filling the intended KCC-appointed position on CMO's Board was considered, but this was not felt in the best interests of CMO's operation for the reasons set out above.
33. The possibility of appointing as a Director of CMO the retiring Strategic Lead – Chilmington Management Organisation (Mr Paul Naylor) was considered, but he did not wish to have this role after his retirement from the Council's service.

Reasons for Supporting Option Recommended

34. Cllr Shorter has been a member of the PWG for several years, and is well versed in the preparations to set up and operate CMO. Cllr Mrs Blanford has performed a supporting role for PWG, and the confirmation of Cllr Shorter's appointment as a Director of CMO, and her role as a substitute appointee should this be required, are both felt highly appropriate in the interests of

maintaining continuity and experience as CMO moves into its formal setting-up phase.

35. In his capacity as Director of Finance and Economy, Ben Lockwood has been involved in preparations for the creation of CMO for some time. He scrutinised the draft business plan for CMO which was prepared last year and approved by the Council as local planning authority. Then, on the retirement of the Strategic Lead – Chilmington Management Organisation in August 2018, he took over responsibility for the line-management of the Chilmington Management Organisation officer team within the Council, and began to attend the meetings of PWG. He is felt suited to the role of CMO Director for a period of up to two years.

Next Steps in Process

36. Once CMO has been incorporated, the Council will formally notify the company secretary of its appointments of Cllr Shorter and Mr Lockwood as Directors.
37. Induction and training sessions for CMO's Board members, appointed by the Council, by the developers and from the voluntary sector, and the first Board meeting, are expected to be held during April and May 2019.
38. The Council's normal arrangements are that an annual report on their activities will be requested from the Council's appointed Directors of CMO each year in May, when all appointments made by the Council to outside bodies are reviewed by this Committee.

Conclusion

39. The proposals in this report will help to ensure that CMO is provided with Directors who are appropriate to serve and direct CMO's activities in the interests of the new community at Chilmington Green. This will help to achieve the Council's long-standing policy objectives to establish genuine community-led management arrangements for the new community there.

Contact and Email

Jeremy Baker, Principal Solicitor – Strategic Development.

Email: Jeremy.baker@ashford.gov.uk; Tel: (01233) 330574.