

LONDON BOROUGH OF BRENT**EXECUTIVE - 15 AUGUST 2005****Report from Director of Housing and Customer Services**

For action

Wards affected:
All

Report Title: AMENDMENTS TO BRENT HOUSING PARTNERSHIP'S MEMORANDUM & ARTICLES OF ASSOCIATION

Forward Plan Ref: HSG&CS-05/06-02

Summary

- 1.1 This report seeks Members' approval of a new set of Memorandum & Articles of Association of the Council's wholly owned arms length management organisation, Brent Housing Partnership Ltd ("BHP"). Since it commenced operating on 1 October 2002 BHP has sought agreement to several minor amendments to its Articles, which agreement has been given by the Director of Housing in his role as the Council's representative for the purposes of BHP business. Through oversight BHP has not registered those amendments with Companies House and now that BHP has sought further amendments to both the Memorandum and Articles, officers consider it appropriate for Members to consider the amendments in their entirety. The most significant of the new amendments, if agreed, would allow BHP to operate beyond the geographical boundary of Brent, although each such venture would require the express permission of the Council, enabling a risk assessment to be undertaken. Other amendments relate to the tenure of Board Members and the frequency of elections to the Board. The report also seeks Members' confirmation of the Director of Housing & Customer Services' appointment as the Council's representative for the purposes of the relationship with BHP.

Recommendations

Members of the Executive are asked to:

- 2.1 Agree that the Memorandum & Articles of Association of Brent Housing Partnership Ltd, amended as highlighted in the documents attached at

Appendix 1 & 2, replace the existing Memorandum & Articles, including that:

- 2.1.1 the Objects of BHP be changed to allow the company to operate beyond the geographical boundaries of the London Borough of Brent, subject to specific approval of each such venture, as shown in the highlighted changes to Appendix 1
- 2.1.2 the arrangements for the tenure and election of Tenant Board Members and for Independent Board Members be changed as shown in the highlighted changes to Articles 15 and 16 of the Articles of Association at Appendix 2
- 2.2 Authorise officers to seal the Special Resolution attached as Appendix 3 to give effect to the decision at paragraph 2.1 above.
- 2.3 Agree that the Director of Housing & Customer Services continue to be the Council's representative for the purposes of the management agreement ("the Agreement") between the Council and BHP, as referred to in paragraph 59 of the Agreement, and for the purposes of section 375 of the Companies Act 1985, as amended.
- 2.4 Agree that the Council's representative is authorised to consider, and if s/he deems it appropriate after undertaking a risk assessment, and on the advice of the Director of Finance & Corporate Resources and the Borough Solicitor, approve requests by BHP to trade, whether within or beyond the geographical boundary of the London Borough of Brent.

Detail

- 3.1 Members will be aware that since 1 October 2002 the Council's wholly owned arms length management organisation, Brent Housing Partnership Ltd ("BHP") has been responsible for management of the Council's housing stock, both tenanted and leasehold, and for implementation of the Council's decent homes programme. That core work is governed by a Management Agreement (the Agreement). BHP also manages the Council's Private Sector Leasing scheme which is subject to a separate agreement.
- 3.2 Since it commenced operating BHP has requested some minor amendments to its Articles of Association in order to streamline operations. Using his delegated authority and in his role as the Council's representative for the purposes of the Agreement, the Director of Housing has already agreed the following amendments, (for ease of reference these amendments are highlighted in Appendix 2):
 - a) maximum number of leaseholders on the Board (Article 13(3))
 - b) code of conduct adoption (Article 18(2))
 - c) written resolutions Article 33(1) and (2)
- 3.3 BHP has more recently requested further amendments to the Articles, also as highlighted in Appendix 2, specifically:

- d) frequency of elections/duration of term (Articles 15 &16) – see 3.4 below
- e) eligibility of Board members previously disqualified (Article 18(1)(15)) – see 3.5 below
- f) committee structures (Article 22(2)) – see 3.6 below

3.4 BHP has proposed that elections to both tenant/leaseholder and independent board member positions be held less often than initially required because it takes time for Board members to develop into their role and, although they may stand for re-election, the process of re-election itself can put candidates off, leading to the loss of scarce and valuable human resources. The election process also costs money and can detract from the business of the company. BHP estimate that changing the cycle of elections as proposed could save them around £3,200 a year. The Audit Commission, which is responsible for inspecting ALMOs places importance on ALMOs having strong, well led, fully functioning Boards, if Members decide not to approve this proposal elections will remain as initially drafted i.e. more frequent than BHP would like, which might lead to a loss of skills and perhaps difficulty recruiting appropriately qualified tenant/leaseholder and independent Board members.

3.5 BHP has also proposed that Board members who had previously been removed for the reasons set out in the existing Articles only be re-admitted to the Board if three-quarters of Board members agree to that. Officers support this proposal because it vests control over re-admissions in the Board themselves. Without this amendment, once the reason for removal (which could be one of a wide range of things such as bankruptcy, extended absence or being voted out) lapses, the former Board member can be re-elected/nominated. This new prerequisite to re-joining the Board would apply equally to tenant/leaseholder and independent Board members as well as to Council nominees.

3.6 The Audit Commission report of BHP in August 2003 recommended, among other things, that BHP review its Memorandum & Articles to include reference to a scheme of delegation and procedures for the appointment of sub-committees. The new paragraph (2) at Article 22 of Appendix 2 addresses this by requiring the Board to periodically review these arrangements and sets a commitment to best practice. BHP have not received any feedback from the Audit Commission on this amendment although officers do not envisage any difficulty with it.

3.7 The most significant of the new proposed amendments is the change to the objects of the company set out in the Memorandum of Association, which will give BHP the ability to undertake work outside of Brent. The exact wording of the proposal can be seen highlighted at pages 1 & 3 of Appendix 1.

3.8 BHP have made this request because the management fee payable to BHP by the Council for its core business is partly dependant on the number of Brent properties managed by it; that number reduces as

tenants' exercise their Right to Buy and with the transfer/loss of properties as part of regeneration schemes. While the adjustment to BHP's fee is not in direct proportion to stock loss, it is a factor taken into account when setting the fee. It is therefore an agreed part of the BHP's Business Plan that it seek to replace income lost through stock loss by developing a trading business. There are only limited opportunities for that within Brent, hence BHP's desire, supported by officers, to seek opportunities outside the borough. Your officers support this proposal because it will allow BHP to generate income that will benefit its ability to make improvements in Brent beyond the decent homes programme, while the obligations of the company under the Agreement, and the target setting and monitoring by Council officers, will ensure that BHP will continue to deliver on the Council's priorities. In addition Officers are mindful that the Gershon agenda promotes cross-borough working and using resources to generate income. The proposal is also consistent with central government's encouragement of sub-regional working in the social housing field. If Members decide not to approve this proposal the future financial viability of BHP could be at risk.

3.9 Other minor amendments to the documents have been included to correct faulty numbering, those amendments have not been highlighted in the attached documents.

3.10 The Council is required to appoint a representative for the purposes of conducting business with BHP under the terms of the Agreement, and in order to meet Companies Act requirements. That role has been undertaken by the Director of Housing since BHP's inception although no formal appointment has been recorded – for that reason it is recommended that Members formalise the situation as per paragraphs 2.3 and 2.4 above.

Financial Implications

4.1 Brent Housing Partnership Ltd (BHP) is a Company limited by guarantee and wholly owned by the Council. BHP expenditure forms part of the Council's statutory Housing Revenue Account (HRA) directly through spending HRA resources on items such as repairs and maintenance and indirectly through the fee paid to BHP for managing the dwelling stock.

4.2 Additionally, BHP operates its own financial accounts in which they account for transactions associated with their management fee and other areas. These accounts are totally separate to the Councils' and are managed by BHP in line with the Companies Act requirements. From 2005-06 onwards, it is likely that BHP's own financial accounts will need to be consolidated into the Council's accounts at year end, in order to comply with the accounting requirements for Group Accounts.

4.3 This report is seeking agreement to allow the BHP to operate beyond the geographical boundaries of the London Borough of Brent, subject to specific approval (by the Council's representative) of each venture. It is difficult to set out detailed specific finance issues and risks at this stage, as

these will differ, dependent upon the nature of each venture. It will therefore be necessary for the Council's representative to consider the financial viability of each proposal. In order to do this, BHP will be required to prepare a detailed financial analysis and risk assessment, and to demonstrate that the venture is financially viable.

- 4.4 The rules governing the operation of the Brent's HRA prohibit the income and expenditure associated with such venture from being included in that account. All accounting transactions associated with a new venture will be processed through BHP's own accounts.
- 4.5 Clearly, the overriding financial consideration for any new venture will be to undertake the tasks, to the specified standards, within the available resources, and to make a profit. Any profit generated by BHP will form part of BHP's own financial accounts, and would be used at the discretion of the BHP Board.
- 4.6 Naturally, as with all new business ventures, there is a risk that the venture could run at a loss. Any venture assessed as likely to generate an ongoing loss will not be approved. For ventures that are approved, BHP will need to put monitoring arrangements in place to regularly monitor the financial aspects of any new contract, with BHP taking corrective action where necessary. However it remains a risk that there could be a loss on the account at the year end(s). Any loss generated by BHP on these ventures will be charged to BHP's own financial accounts, and the BHP board would be responsible for taking corrective action. In the event that a loss was significant, and impacted upon BHP's own financial viability, then such a loss may fall to be borne by the Council. Furthermore, a significant BHP loss on any external contracts could have a bearing on the service delivery aspect of the Brent programme. Officers consider that such a significant loss is unlikely, and measures will be put in place to ensure that this risk is minimised. These will include the financial and risk assessments prior to Council approval being granted (as set out above), monitoring arrangements within BHP, and Council monitoring arrangements.
- 4.7 BHP undertake regular budget monitoring and provide regular reports to the BHP board and its finance sub committee. In addition, high level budgetary control is undertaken by the Council's Finance Manager (Housing and Customer Services) and his staff. Financial monitoring of any new ventures would be incorporated into these arrangements.

Legal Implications

- 5.1 BHP is a company limited by guarantee and wholly owned by the Council. The Council transferred to BHP, with the consent of the Secretary of State, the majority of its housing management functions with effect from 1 October 2002, and on that date around 200 Council (Housing Management) staff transferred to the new company. The original Memorandum & Articles of the company, which perform much the same function as the Council's Constitution, followed closely the template Memorandum & Articles that new ALMOs were expected by

the ODPM to use. The work that BHP does in respect of the Council's properties and related responsibilities is governed by the terms of a management agreement, and the business of the company overall is governed by a Business Plan and Development Plan which BHP is required to seek the Council's agreement to annually.

- 5.2 The objects of the company were originally drafted to restrict BHP's sphere of operation to the geographical boundary of the London Borough of Brent. The proposed amendment to the objects will allow BHP to operate beyond that geographical boundary, but is designed to require BHP to seek express permission from the Council to each individual venture.
- 5.3 Under section 95 of the Local Government Act 2003 the Council has power to trade commercially in activities related to its functions subject to various limitations, one of which is that the trading must be carried out through a company. In recommending that the changes be made to the objects of BHP to enable them to provide services to others outside the Brent area officers are not proposing that BHP carry out trading activity on behalf of the Council; trading by BHP will be on its own account. In considering each individual venture it will be necessary for the Director of Housing & Customer Services to take advice to ensure that the arrangements being made are not such that the Council itself could be regarded as carrying out the trading via BHP.
- 5.4 Paragraph 24.4 of the Agreement already requires BHP to seek Council approval for any work it wishes to do for organisations other than the Council.
- 5.5 Paragraph 17.13 of the Agreement requires BHP to ensure that its interests do not interfere or conflict with its obligations to provide services to the Council under the Agreement and the proposed extension of the sphere of operation does not change this. In other words, the core business of managing the Council's housing stock remains the primary function of the company.
- 5.6 In considering each request by BHP to operate out of borough it will be necessary to have regard to the potential liability that could be incurred by the Council either directly or indirectly and to ensure that the core business of BHP, which is management of the Council's housing stock, is not compromised. This will be the case whether it is BHP in its own right undertaking the work or a subsidiary, joint venture company or other body, with which it is involved.
- 5.7 If BHP is successful in obtaining work out of borough it may be required by law to accept the transfer of staff from any organisation that had been undertaking that work.
- 5.8 There are no legal implications arising from the proposed amendments to the frequency of elections to the Board and the tenure of Board Members. The amendments do not affect the number of Board Members or the Council's ability to nominate to the Board.

- 5.9 The proposed amendment to Art 15(1)(18) which would require a three-quarter majority of Board members to vote in favour of the readmission of a Board member who had previously been disqualified/removed from the Board, will impact on the Council's ability to nominate to the Board as it does not discriminate between the constituent parts i.e. tenant/leaseholder, independent representatives and Council nominees are treated in the same way and will be subject to the same additional qualification for re-admission to the Board. The amendment does not intend to allow the Board to disregard on-going disqualification, for example where a person continues to be prohibited by law from becoming a company director; it is intended only to apply to those former Board members who seek to be re-appointed and whose reason for disqualification has since lapsed.
- 5.10 There are no legal implications arising from the proposed changes to the Articles relating to BHP's committee structures, delegations and related matters.
- 5.11 If Members agree to the new Memorandum & Articles a Special Resolution is required to be sealed, as attached at Appendix 3, to be filed at Companies House with the new documents. In accordance with the Council's Constitution, the Borough Solicitor or a person authorised by her, will see to the sealing of the document whereupon it will be delivered to BHP so that its Company Secretary can lodge the Memorandum & Articles with Companies House.
- 5.12 The formal appointment of the Director of Housing & Customer Services as the Council's representative for the purposes of BHP business regularises past practice and will satisfy the requirements of the Agreement and the Companies Act 1985 (s.375). This will mean that the Director will, when dealing with BHP, and when attending formal meetings of the company, be acting as the embodiment of the Council – through him the Council can do anything that it could if it were a natural person.

Diversity Implications

- 6.1 The proposals in this report have been subject to screening and officers believe that there are no diversity implications.

Staffing implications

- 7.1 There are no staffing implications arising from this report although Members are asked to note, as explained briefly at 5.7 above, that particular ventures by BHP may lead to the transfer of staff to BHP, or to any subsidiary or joint venture company set up to undertake the venture.

Background Papers

Management Agreement between London Borough of Brent and Brent Housing Partnership Ltd dated 1 October 2002

Audit Commission Inspection Report of BHP dated August 2003

Contact Officers

Sharlene Atkins, Principal Lawyer, Housing & Litigation Team, Legal & Democratic Services, x2166

MARTIN CHEESEMAN
Director of Housing & Customer Services