



Cabinet
9 November 2020

**Report from the Strategic Director
of Regeneration and Environment**

Commercial Trading Company

Wards Affected:	All
Key or Non-Key Decision:	Key
Open or Part/Fully Exempt:	Part Exempt – Appendices 1 and 2 are exempt as they contain the following category of exempt information as specified in Paragraph 3, Schedule 12A of the Local Government Act 1972, namely: “Information relating to the financial or business affairs of any particular person (including the authority holding that information).
No. of Appendices:	Two Appendix 1: Financial Implications (<i>Contains exempt information</i>) Appendix 2: Business Case (<i>Contains exempt information</i>)
Background Papers:	None
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1. Purpose of the Report

- 1.1. This report seek Cabinet approval to form a general trading company, name to be determined, as a vehicle to trade commercially and take advantage of the of the powers introduced under the Localism Act 2011 and the Local Government Act 2003.
- 1.2. The report presents the business case for a specific trading initiative in the Regeneration and Environment department to be undertaken through the proposed company; it enables an early stage discussion to ensure any potential risks are understood and mitigations are put in place before arrangements are entered into.

2. Recommendations for Cabinet

2.1. That Cabinet:

- consider the options and recommendation
- agree the making of arrangements by the Director of Legal, HR Audit & Investigations, in consultation with the Lead Member for Environment and the Strategic Director of Regeneration and Environment, for the establishment of a general trading company, including any additional legal or constitutional issues to be reserved to the Council as shareholder and any necessary agreements between the company and the Council.
- consider and make recommendations regarding the governance arrangements and possible board members.

3. Rationale Summary

- 3.1. The concept of the Brent funeral service was threefold; to provide low cost funerals to reduce funeral poverty, to manage the cost in delivering the legal duty for public health funerals and to increase income to offset other Council expenditure.
- 3.2. The number of funerals undertaken by Brent Funeral Service have increased year on year from 76 in the first full year of operation to 183 in the last 12 months. This equates to a current income forecast of £366k in this financial year.
- 3.3. This service has resulted in around £713k of savings for the residents per year (based on the Sun Life Cost of Dying estimates for London) of which many may be affected by funeral poverty.
- 3.4. An initial report to senior management was based on reproducing the current model that is then delivered through a trading vehicle. However, a subsequent more detailed financial review has shown that the relevant costs associated with trading as a company would reduce the operating profit and mean that the funeral service would incur losses until 2022/23 and then after only a relatively small profit there in after. Therefore a revised option of operating on a more commercial basis has been evaluated.
- 3.5. The current 'low cost' funeral package is £1500 for a basic cremation and £1250 for a burial (not including the plot). It is worth noting that the third party cost such as cremation fees and coffins have increased and therefore there may be a need to increase the price to around £1700. By increasing this by a further £1000 - £1500, the price would remain competitive compared to a UK average of £3858 and still provide a substantial benefit to residents and help those in funeral poverty.
- 3.6. Members and senior management considered a range of trading options that could be an alternative to a limited liability company, of which none

came forward as a viable option to meet the objectives of the service set out at 3.1.

4. Options

Option a) Trading Company

- 4.1. To establish a trading vehicle that operates on a fair but competitive structure that has clear objectives to reduce funeral poverty and provide a good deal for families and Brent residents in terms of costs. The cost of a basic funeral would increase to around £2,700-£3200 but with an option to reduce where other trading opportunities offset the costs.
- 4.2. This option has the potential to contribute to the Council's financial savings through dividends and would allow for further expansion into the market across London and seek contracts with NHS trusts.
- 4.3. A trading vehicle ensures legal compliance with any trading requirements placed on local authorities and does not adversely affect the local funeral businesses.
- 4.4. The most common local authority trading vehicle is a limited liability company. This allows the Council to have governance control over the company and its assets, and for profits to be returned to the shareholder.
- 4.5. It is possible to have other types of company, but there may be limitations on the Council's control of the company and its assets, and if the company makes a profit, it may not be possible to return it to the Council and as such it may not be available to offset Council savings elsewhere.

Option b) Retain In-house

- 4.6. To continue to operate the service as currently provided as an in-house function and maintain a non-profit level; – some operational costs of parish funerals can be offset with those of the low cost funeral service.

Option c) Public Health Funerals Only

- 4.7. Provision of a Public Health funeral service only. The current level of public health funerals is sufficient to equal the cost of contracting the service out to a private funeral company. However, reduced numbers in future years would reduce the viability compared with a contracted out option. There are other operational reasons for maintaining in house service, such as timely removal from the public mortuary and control over where and when the funeral takes place. It is also worth noting that the Council could be subject to market variations in funeral prices as previously experienced.

Option d) No Brent Funeral Service

- 4.8. The Council could revert to a contracted public health funeral services and cease the low cost funeral service. This would result in a reduction in one

Full Time Employee (FTE) manager and 4.3 FTE funeral staff. Giving the lease term of the private ambulance it would be financially beneficial to wait until January 2021 before ceasing the public health funerals element and retain a reduced staff 2 x FTE until full services cease or a suitable contract is in place.

- 4.9. This would revert to local provision of funerals and leave it to the funeral industry and the regulators to tackle funeral poverty, and the council only delivering Public Health funerals

5. Recommendation

- 5.1. The detailed review of the options has shown that a trading company could provide the Council with a financial benefit of circa £260k per annum by 2022/23. As there are significant opportunities to also tender for NHS contracts this has the potential to increase further if resources are in place. The Council is in early stage market discussions with a number of providers who have expressed a keen interest in the products and services Brent can provide.
- 5.2. Joint employment contract between the Council and company would mean that the company would not have to pay VAT on the salaries of staff. Otherwise, costs would increase by around £50k per annum since the company would not be able to reclaim VAT.
- 5.3. Whilst this moves away from the original low cost criteria this still offers a very competitive rates to residents, helps to reduce funeral poverty and increases the Council's overall income. As the business builds, the company could offer further reductions and options for residents. Therefore option a), set out in a paragraph 4 above, using joint employment contracts is recommended.

Trading Arm

- 5.4. If no trading mechanism is put in place the Council would need to decide if it wishes to cease the service.
- 5.5. The preference is not to externalise functions but given the legal limitations this method is the only route in which we can continue to provide a quality low cost funeral service and take advantage of opportunities to increase the income to the Council.

6. Background

- 6.1. The Council in managing its budgets in the face of reduced central government funding has prioritised income generation. Several functions have been successful in creating significant opportunity to bring revenue to the Council to offset service costs. Following the Covid-19 outbreak and the significant impact it has had on the Council and resources it is critical to look in detail at opportunities to reinvent how the services are delivered. This report suggests an opportunity to build on this.

- 6.2. There are a number of powers given by statute to Local Authorities, which have enabled them in the past to charge for the provision of services and in some cases to trade. More recently local authority powers in these respects have been greatly increased. The Local Government Act 2003 (the 2003 Act) introduced a general power to charge for services that local authorities have a discretion (but not a duty) to provide and a power to trade on a commercial basis, provided the criteria in legislation are met and guidance is taken into account. One important criterion for the use of this power is that the trading (meaning generating income over and above the full cost of providing a service) take place through a company. The Localism Act 2011 has provided further powers to carry out commercial activities subject to such activities being carried out through a company.
- 6.3. This report, seeks the agreement of Cabinet for the arrangements be made for the establishment of a General Trading company for Brent Council. This will enable the Council to be in a position to trade on a Commercial basis in the activities covered by both the 2003 Act and the 2011 Act should circumstances arise in which this is appropriate and advantageous; and presently for the delivery of the low cost funeral service currently offered by the Brent funeral service.
- 6.4. There are various powers to charge and trade available to the Council. Whether trading through a company is the most appropriate and advantageous way in which to provide particular services (to individuals or to public or private sector organisations) will depend upon the purposes of the service provision, whether it is intended to make a profit and the nature of the recipient.
- 6.5. 'Profit' in this sense is income that is over and above the full cost of providing the service, including capital costs, corporate overheads and centralised budgets such as energy and bad debt provision.
- 6.6. Discretionary services can be grouped together according to their 'type of service' in order to calculate the full cost of the provision. For example, all Environmental and Regulatory discretionary services can be grouped together.
- 6.7. Trading with public bodies is permitted under the provisions of the well-established Local Authorities (Goods and Services) Act 1970 which has no requirement for such activity to be conducted through a company. The Council uses this power to sell a range of services including, for example, various different consultancy services to schools and several other local authorities.

7. Operation of the trading company

- 7.1. It is intended that, initially at least, the company would not own assets. The Council will lease these to the company at market rates where appropriate.

- 7.2. There are a number of options in respect of the initial staffing arrangements which are set out in detail in the Staffing Implications section.
- 7.3. Any remaining costs will be charged to the company on a full cost recovery basis via a service contract.
- 7.4. If the company is successful, grows and is profitable, it is likely that dedicated staffing and assets will be required at a later date.
- 7.5. It is anticipated that initially only trading with individuals and commercial companies would be channelled through the trading company.

Company Requirements

- 7.6. In setting up the trading company a number of issues need consideration, in particular, the following:
 - Purpose of the Company/ Aims of the Company
 - Governance Arrangements
 - Company Name
- 7.7. Consideration for these matters generally are set out below. More detailed proposals in respect of the funeral service specifically, are contained in Business Case at Appendix 2 to this report. Costs associated with setting up the company are identified in the Financial Implications.

Company functions

- 7.8. It is not necessary at this stage to decide in detail the scope and nature of the functions that may be undertaken by the company, as the company can be established with very broad remit, with a business case approval process put in place to govern how additional services are identified to be provided through it. This could allow for business cases below a specified financial threshold to be approved by the relevant Strategic Director in consultation with the relevant Lead Member, so the Lead Member can ask for a business case to be referred to Cabinet if they consider appropriate. Alternatively, at least initially, all new business cases could be required to be considered by Cabinet.

Governance

- 7.9. In order to ensure robust governance a board should oversee and scrutinise the company to ensure it maintains fairness and adopts the Council's principles. For each service area where the proposed company commissions its functions there will need to be a clear and agreed Service Level Agreement (SLA).
- 7.10. The company board should consist of at least three directors, at least two Brent Council directors and potentially one elected Member representative. It is preferable not to include on the Board officers responsible for areas which are likely to provide service to or through the company.

Trading Name

- 7.11. As the proposed trading vehicle is anticipated in due course to cover a wide range of services, careful consideration will need to be given to the company name. Some Councils that have created new names that do not make any reference to the Council for example London Borough of Newham's pest control service is now called 'London Network for Pest Solutions'.
- 7.12. The value of the Brent name is difficult to fully assess. It is known that many existing customers use Brent as they trust the Council and that it offers a fair service and there is a robust complaints system and ultimately elected Members if matters cannot be resolved. However, in some areas this has a counter effect, especially when trying to attract high value commercial customers.

8. Staffing Implications

- 8.1. It is not envisaged that the company will employ its own staff separately from the council, at least in the short to medium term. The options for staffing the services to be provided via the company are therefore as follows.
- 8.2. If services are provided by the council to the company under an SLA arrangement, all staff would remain employees of the council. The services supplied by the council to the company would be vatable supplies. This would mean that for as long as the company only provide VAT exempt service (such as the funeral service) it would not be able to reclaim any input VAT. This will add up to 20% to what must be charged to recipients of the company's service before a profit can be made, depending on the extent to which the companies cost consist of staffing costs. This would reduce the company profit by around £50k per annum when compared to option (c).
- 8.3. If council staff are seconded to work for the company, the same VAT issue is likely to apply. In addition, the following issues need to be considered:
 - the Council will be liable for redeployment or for bearing the cost risk of potential redundancy of the employees if the company loses the contract in respect of which they have been seconded.
 - in the longer term, or for any significant number of employees, secondment is unlikely to be a suitable approach for the effective operation of the company.
 - provision of HR/payroll services for a significant number of staff seconded to an external company may incur additional costs; and
 - the External Auditor may query the inclusion of staff on the Council's payroll who are not employed at all in the provision of Council services.

- where secondment is not limited to a fairly short period for a specific purpose, there is a risk that a TUPE transfer may be deemed to have taken place.
- 8.4. If staff were jointly employed by the council and the company, VAT would not be chargeable on staff costs. The following would apply in respect of joint employment arrangement:
- staff would need to agree to enter into a new joint contract of employment.
 - terms and conditions could be the same as now.
 - the LGPS would still be available.
 - the Council will be liable for redeployment or for bearing the cost risk of potential redundancy of the employees, although this risk would be shared with the company.
 - staff could continue to be paid through the council's Payroll service and supported by the council's HR team.
- 8.5. As the company will initially be operated on the basis of a service contract with the company, a joint employment contract with the Council or part-time secondments from the Council, it is considered that TUPE will not apply; however this is subject to the risk identified above in the case of secondments; and subject to potential risk that if the new joint employment arrangement amounted to simply a move of existing work from the council to the new joint arrangement, then the risk of TUPE applying would increase.
- 8.6. Whilst the concept of a joint employment would mean that VAT would not be chargeable on staff costs, it should also be noted that joint employment arrangements are generally entered into in order to maximise staff flexibility to provide work according to need to more than one employer, rather than to simply provide work for one company but be employed by both.
- 8.7. If the trading company itself employs staff, and/or former Council staff are transferred to the Company under TUPE, it will be required to offer any new staff comparable terms and conditions including pension rights. Under the Best Value Authority Staff Transfers (Pensions) Direction 2007, which came into force on 1 October 2007, staff who are TUPE transferred to an external contractor have the legal right to pension rights that are the same as, or broadly comparable to, or better than those s/he had as an employee of the authority.
- 8.8. Presently, there has been no discussion with the trade unions on the outline proposals to create a trading company, such discussions would need to follow. The trade unions may be particularly concerned about a model where the staff do not remain in the council's sole employment. In the event that it is not possible to secure agreement to the proposal to enter into joint employment contracts, then it may be that consideration would need to be given to other options, e.g. dismissal and re-engagement.

9. Alternative Options Considered

- 9.1. If no company is established, the Council could decide to provide only the statutory funeral service at a non-profit level. This would have a net cost to the Council, as the service does not recover full costs from all the recipients' estates.
- 9.2. The alternative options for the other potential services will be considered in individual business cases on a case by case basis.
- 9.3. These services could also be provided by way of contract with existing companies, in partnership or joint venture.

10. Financial Implications

See Appendix 1

11. Legal Implications

The Company

- 11.1. S1 of The Localism Act 2011 provides powers for a local authority to do anything that an individual generally may do (the general power of competence) and they may exercise the general power of competence for a commercial purpose provided the following conditions are met:
 - it should be possible for the authority to carry out the traded activity in question for purposes other than commercial gain.
 - there should be no statutory requirement in relation to the traded activity in question requiring the authority to provide that service.
 - the trading must be undertaken by a company.
 - the company must be formed and registered under the Companies Act 2006 or a society registered or deemed to be registered under the Co-operative and Community Benefit Societies and Credit Unions Act 1965.
- 11.2. The Local Government Act 2003 and The Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009 empower a best value authority to do for a commercial purpose anything which it is authorised to do for the purpose of carrying on any of its ordinary functions. Prior to exercising this power a local authority must prepare a business case in support of the proposed exercise. The business case must demonstrate the following:-
 - the objective of the business.
 - the investment and other resources required to achieve those objectives.
 - any risk the business might face and how significant these are and,
 - the expected financial results of the business, together with any other. relevant outcomes that the business is expected to achieve.
- 11.3. Section 95 of the Local Government Act 2003, enables authorities to provide on a commercial basis, anything that is related to a function of the authority or is ancillary, conducive or facilitative to the exercise of that

power. The power is widely drawn to include all functions whether express or implied or incidental

- 11.4. The Council has power to establish the company under section 111 of the Local Government Act 1972 as a step which is reasonably incidental to the power to trade under the 2003 Act and 2011 Act.
- 11.5. The usual rules in relation to members' interests will apply to any member appointed a director of the company and any officer or councillor who becomes a director will need to be fully aware of their duties both to the company and to the Council and of how any conflict of interest must be handled. The Council will wish to consider giving indemnities for officers and members who undertake company directorships on behalf of the Council under section 101 of the Local Government Act 2000 and the Local Authorities (Indemnities for Members and Officers) Order 2004.
- 11.6. The company would have to comply with all the regulatory requirements of the Companies Acts and additionally with the regulatory regime for local authority companies under the Local Government and Housing Act 1989 as amended. This requires that local authorities ensure any directors appointed to a Local Authority Trading company are not disqualified from being a local authority member and information must be provided to the Local Authorities Auditor as well as being transparent to members of the public.
- 11.7. Any contracts with the company for future work for the Council would be subject to the usual procurement rules and the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") might well operate to transfer the staff to the new trading company as a matter of law if it were to provide services to the Council.
- 11.8. In accordance with the Constitution Part 3, clause 10(g), Responsibility for Functions, it is necessary to seek Cabinet's approval of the establishment of the trading company.
- 11.9. The Cabinet is responsible for approving the contractual arrangements for any work for third parties or external bodies where those contracts exceed the financial thresholds above which officers may not award contracts, as set out in the Constitution and the contract standing orders. The specific trading initiative proposed in this report does not require Cabinet approval. Future proposals to trade through the company may need Cabinet approval.
- 11.10. The Council must ensure that any financial assistance to the company is state aid compliant. The legal description of state aid is set out under Article 107 of the Treaty of the Functioning of the European Union (TFEU). To be "aid" as defined in Article 107(1) TFEU, a measure must:
 - amount to a grant of public money or a transfer of public resources
 - favour certain undertakings;
 - distort or threaten to distort competition in the European Union; and

- affect trade between the Member States of the European Union.
- 11.11. All four elements set out above must be present for state aid to exist. It should be noted that the default position is that state aid will be unlawful unless permitted under State Aid law.
- 11.12. There may be a possible need for third party contracts to be transferred to the trading company where these are relevant to the delivery of the service.

Provision of Funeral Services

- 11.13. The Council is responsible for the funeral arrangements for any person who dies, or is found to be dead within the borough, where no suitable arrangements have been made or are being made otherwise than by the authority. This includes, for example, where the relatives of the deceased cannot or will not arrange a funeral (s46 (1) Public Health (Control of Diseases) Act (PH (CD)A 1984). Historically, this was referred to as a pauper's funeral and in Brent they are referred to as parish funerals.
- 11.14. Equally, the Council is responsible for the burial of a deceased person who immediately before their death was being provided with accommodation under Part 1 of the Care Act 2014 (s46 (2) PH (CD) A 1984).
- 11.15. Legislation prohibits the Council from cremating the deceased, where we have reason to believe that a cremation would have been contrary to the wishes of the deceased (s46 (4) PH (CD) A). In such circumstances, the usual practice is to check the deceased person's home and council records to ascertain if any requests have been made in relation to the religious, cultural or personal choice of burial, or to ascertain if the deceased already owned a grave plot. In the absence of preferences being identified, it is for the authority to determine the disposal. If a burial has taken place, the body is typically placed into a common grave, unless special circumstances apply for example religion. If the body has been cremated the ashes are kept for six months (to allow any relatives/friends to claim them) after this period they are dispersed in the garden of remembrance.
- 11.16. The Council is permitted to recover the expenses incurred from the estate of the deceased or from any person liable to maintain the deceased person immediately before their death, (such sums can also be recoverable summarily as a civil debt by proceedings brought within three years after the sum becomes due s46(6) PH(CD)A 1984. Any costs of the funeral payable out of the estate must be reasonable (assessed in relation to the deceased's status in life and the size of the estate) or authorised by the will.
- 11.17. Expenses for funeral arrangements covers what is reasonably required in order to arrange for the proper disposal of the deceased's body. Whilst "reasonable" allows for a degree of interpretation, legislation has identified some elements of what is to be classified as a funeral expense. For example:

- s9 Cremation Act 1902, provides that payment of . . . charges or fees, for the burning of human remains in any crematorium provided by [a local authority] . . . , and such charges or fees, and any other expenses properly incurred in or in connection with the cremation of a deceased person, shall be deemed to be part of the funeral expenses of the deceased. A similarly worded provision is set out in the Local Authorities Cemeteries Order 1974 in relation to burials within cemeteries.
 - Article 15 (2) of Local Authorities Cemeteries Order 1974 provides that where a local authority requests the services of a minister or grave digger (sexton), they shall also be paid by the local authority; save for services rendered by a minister of the Church of England, in such cases the fees shall be paid to the diocesan board of finance.
- 11.18. Where suitable funeral arrangements can be made by a family member or third party, the statutory obligations pursuant to s46 PH(CD)A do not apply. Presently, in addition to the parish service the council provides a low cost funeral service with the option for additional services (e.g. choice of coffin, including eco/sustainable options, repatriation etc.). In accordance with the Localism Act, where a local authority does things for a commercial purpose, the authority must do them through a company (s4(2) Localism Act 2011).

12. Equality Implications

- 12.1. Under section 149 of the Equality Act 2010, the council has a duty when exercising its functions to have “due regard” to the need to eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act, advance equality of opportunity and foster good relations between persons who share a protected characteristic and persons who do not. This is the public sector equality duty. The protected characteristics are age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.
- 12.2. An initial equality impact screening on the proposal for a funeral service indicates a generally positive impact as the service is targeted at the vulnerable and caters for all faiths. There is a risk that as a trading body the operating cost will increase and that may increase the pressure to increase charges impacting those with lower incomes. If this occurs appropriate mitigation will need to be put in place. However, an increased revenue may also allow for charges to be reduced due to operational efficiency.

13. Human Resources/Property Implications

- 13.1. The existing services have use of Brent Council buildings, land and facilities. Where land or buildings are used by the company a fair rent would need to be agreed along with any lease agreements and their maintenance.
- 13.2. It is proposed that the staff remain Brent employees and that the company pays Brent Council an agreed rate for each employee. It is envisaged that

some employees may work exclusively for the company and others on a limited project bases. Therefore, HMRC contractor rules may need to be considered.

Report sign off:

Alan Lunt

Strategic Director of Regeneration and Environment