

**GOVERNANCE SERVICES COMMITTEE  
6 MARCH 2014**

**ITEM 7**

**GOVERNANCE UPDATE**

Report of the Director & Company Secretary

**1. SUMMARY**

The aim of this report is to update the Committee on the progress of key governance documents.

**2. RECOMMENDATION**

- 2.1 The Committee recommends that officers bring a report back to the next meeting of the Committee on the updated Management or Partnership Agreement.
- 2.2 The Committee considers the detailed queries of the HCA with respect to changes to our M&As and approves a response to the HCA in line with its recommendations.

**3. MATTER FOR CONSIDERATION**

- 3.1 The Council have proposed a refresh of the Management Agreement in lieu of a formal Partnership Agreement. A draft of the same has been received and there are no significant issues.
- 3.2 Officers are reviewing the document and meeting with Council colleagues to clarify certain points. A verbal update will be provided at the meeting.
- 3.3 A copy of the Memorandum and Articles (M&As) were filed with the Housing and Communities Agency (HCA) following the Council's approval of changes last year. As a registered provider (RP), formal HCA approval is required to any amendment to the objects (Memorandum) of Derby Homes. The HCA has raised points they would like us to address in terms of our M&As before they grant us permission to amend our objects – that is to work outside of Derby. Derby Homes is prohibited from trading outside of Derby except in limited circumstances until our objects are formally changed. The Board and Council will therefore either have to accept the HCA's suggested changes to our M&As or accept that trading outside Derby is not permitted. We will seek to reach agreement on the detailed suggestions of the HCA and it is hoped that agreement on changes might be possible with the HCA and the Council during this year. The points raised by the HCA are attached at Appendix A, along with a draft response, to be discussed at this meeting.

#### **4. LEGAL AND CONFIDENTIALITY IMPLICATIONS**

- 4.1 Any amendments to the Management Agreement must be signed off by the Board and the Council as a variation of the contract
- 4.2 Consent will also be required from the Council should changes be made to the Memorandum & Articles.
- 4.3 This report contains confidential information as defined in Standing Order 20.2 (n) of Part IV of the Derby Homes Governance Arrangements.

#### **5. COUNCIL IMPLICATIONS**

This is a matter which requires the approval of the Council to vary the M&As. The Council has consented for Derby Homes to trade outside of the City.

The areas listed below have no implications directly arising from this report:

Consultation  
Financial and Business Plan  
Personnel  
Environmental  
Equalities Impact Assessment  
Health & Safety  
Risk  
Policy Review

If Board Members or others would like to discuss this report ahead of the meeting please contact:

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Background Information: None  
Supporting Information: None

## M&amp;As

The HCA have raised the following points they would like Derby Homes to consider before it is minded to allow us to change our objects and trade outside the city

To view the “Appendix” press “Ctrl” and “click” on the highlighted yellow text.

To get back to the “Main table” Press “Ctrl” and click on the highlighted green on the text on the appendix.

<u>No</u>	<u>Point raised:</u>	<u>Memorandum or Article wording or Legislation</u>	<u>Response</u>
1.	As previously discussed the change you wish to make at Mem 3 (A) requires the consent of the Regulator under s.214 (2) (a)	Mem 3 A States  (A) <i>Within the administrative area of the City Council to:</i>	Accepted We cannot make our proposed change trade outside Derby without HCA consent as consent is need to amend our objects in accordance with HRA 2008 section 214 (2) (1) 0
2.	I would also like to point out that at Mem 3 – as you will see in the guidance in the links at the start of the email, the objects of a Registered Provider must include reference to: <ul style="list-style-type: none"> <li>• ‘the provision of ‘social housing’</li> <li>• ‘not for profit’,</li> <li>• and ‘non distribution of assets’</li> </ul>	Our objects already state:  (A)  (1) <i>acquire, provide, construct, improve, or manage Social Housing or any other housing;</i>	Agree – when the M&A’s were originally drafted we were not a Registered Provider in our own right.  The Social Housing point is covered in existing Memorandum but other two points are not.  Derby Homes could accept that it is a Not For Profit organisation and cannot distribute assets. Our Articles already cover the non-distribution of assets.  This would prevent DH & DCC (unless we obtained Regulatory Consent) from changing our M&A’s to become a profit making and distributing company. However, this is not the purpose of DH and is unlikely to be so in future especially as we are already an RP. We are registered with

	Please can these references be explicitly added into the objects		the HCA as non profit making anyway and conceding this point is therefore unlikely to restrain our realistic options.
3.	<p>As you do require our consent to changes to objects, we prefer what we call open objects.</p> <p>Would you consider reviewing all the current objects (A (1) to (12) (C ) to consolidate them where possible and ensure they all meet the requirements of s.115, HRA 2008.</p>	Section 115 HRA 2008 please see <a href="#">Appendix 1</a>	<p>Derby Homes considers that its objects are fit for purpose other than the point that restricts the area in which it operates.</p> <p>Derby Homes has bespoke objects developed through best practice for the ALMO sector. The objects also achieve the objectives of Derby Homes as a Registered Provider.</p> <p>With the exception of the “Not for profit” element of section 115 below our existing all other points raised in the section are covered in our M&amp;As. We therefore accept that we will insert a reference to ‘not for profit’ and this should bring our M&amp;As in line with s115.</p>
4.	Mem 4 (25) a formal amalgamation would be subject to Regulator consent (s.163, HRA 2008)	<p><i>MEM</i></p> <p><i>(25) to amalgamate with any organisation which has objects similar to its objects;</i></p>	<p>S 163 HRA 2008 does not apply as it relates to industrial and provident societies and not a company limited by guarantee.</p> <p>However section 160 (see <a href="#">Appendix 2</a>) of the Housing and Regeneration Act 2008 relates to Company: arrangements and reconstructions where a not for profit registered provider is also a registered company. This would apply to Derby Homes.</p> <p>Our main response could be “<i>Derby Homes will comply with its legislative obligations and feel that it should not include each and every obligation explicitly in its M&amp;A’s as it would mean that if/when the provision was repealed, amended or replaced we would have to change our M&amp;A’s</i>”</p>

5.	<p>Any changes to Memorandum 6 would need Regulator consent under s.214 (2) (b) 0</p> <p>It would be beneficial to amend 6 (3) as it currently suggests that Derby Homes Limited must have regard to guidance from DCLG, rather than the Regulator and</p> <p>There would also be restrictions under s.122, HRA 2008 to be adhered to</p>	<p>Memorandum 6 relates to the application of income and property. It states:</p> <p><i>The income and property of the Organisation shall be applied solely towards the promotion of its objects as set forth in the Memorandum of Association and no portion thereof shall be paid or transferred, directly or indirectly, save as provided below by way of dividend, bonus or otherwise howsoever by way of profit, to the City Council and no Board Member or Committee Member shall be appointed to any office of the Organisation paid by salary or fees or receive any remuneration or other benefit or money or money's worth from the Organisation PROVIDED THAT nothing herein shall prevent any payment in good faith by the Organisation:-</i></p> <p>6 (3) states:</p> <p><i>(3) to any Board Member or any Committee Member (for the avoidance of doubt, in each case in their capacity as a Board Member or Committee Member), of reasonable out-of-pocket expenses and in the case of Board Members such other sums as may be determined by the Organisation in compliance with the Articles of Association and with the approval of the City Council PROVIDED THAT no sum shall be paid to a Board Member or Committee Member who is an elected member of the City Council in excess of that permitted by the Order and PROVIDED FURTHER THAT in making any payment under this Clause 6(3) the Organisation shall have regard</i></p>	<p>We agree change to the Reference from the DCLG to the "regulator" where appropriate</p> <p>We are not proposing to change the memorandum in question, but by accepting the HCA's suggestion to change the reference.... we would formally have to ask for their consent to do so as the change is included in a sub clause that deals with the distribution and application of income and assets. The HCA may be linking this to section s122.</p> <p>We accept that the restrictions of s122 apply. Clarification is needed on exact issue the HCA want Derby Homes to address in the requirements of s122</p>
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		<p><i>to any guidance issued by the Department of Communities and Local Government;</i></p> <p>S.122 HRA (See <b>Appendix 3</b>) relates to making gifts, payment of dividends and bonuses</p>	
6.	Mem 10– would benefit from a reference to the Regulators powers under s.167, HRA 2008 in a Wind Up situation	.	<p>Our response could be</p> <p><i>“Derby Homes will comply with its legislative obligations and feel that it should not include each and every obligation explicitly in its M&amp;A’s as it would mean that if/when the provision was repealed, amended or replaced we would have to change our M&amp;A’s”</i></p>
7.	Mem 11 – these would be better moved to be within the other Definitions and Interpretations section of the Articles as also mentioned in the Article review		<p>This is only a suggestion from the HCA. It is a minor point and the definitions were placed in the Memorandum because they are only relevant to that part of the M&amp;A’s.</p> <p>We do state the following in our memorandum:</p> <p>(a) terms defined in the Articles of Association of the Organisation shall have the same meaning in this Memorandum of Association.</p>
8.	<p>The following explains what we need to see in the Articles of Association:</p> <p>The Definitions and Interpretations section should contain:</p> <ul style="list-style-type: none"> <li>• A definition of ‘social housing’.</li> </ul>		<p>1. We have referenced Social Housing:</p> <p>“Social Housing” shall have the meaning assigned to it in Part 2 of the Housing and Regeneration Act 2008</p> <p>We do already state that:</p> <p>(b) terms defined in the Articles of Association of the Organisation shall have the same meaning in this Memorandum of Association.</p>

	<p>would suggest using wording similar to the definition from the NHF Model Rules which is <i>“social housing means low cost rental accommodation and low cost home ownership accommodation as defined in section 68 and social housing as defined in section 77 of the Housing and Regeneration Act 2008”</i> I can see a definition has been included on page 8 of the Memorandum but it would be better placed with the others in the Articles and made clear that this section applies to the Memorandum as well.</p>		
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9.	The powers the “City Council” have appear to make it the ‘Parent’ as defined under s.271, HRA 2008 so we would expect it to be defined using its name and registered company number as a ‘Parent’ in the Definitions and Interpretations section and referred to as this throughout the M&As	Section 271 See 0	<p>The Council does not have a company number but is the “Parent” of Derby Homes</p> <p>Derby Homes could define the Council as “Parent” once in the definitions and leave wording as the “Council” so it is consistent with all our other documents and define the Council as our parent organisation. Either way it is of no substantial importance.</p>
10.	We would prefer Article 14 (3) be updated to make it explicit that Derby City Council are the Parent by giving them power to ‘appoint or remove all or a majority of the board of Directors’ (in accordance with s.271 (2) (b). HRA 2008)	<p>Article 14 (3) states:</p> <p><i>“(3) Notwithstanding any other provisions in these Articles the City Council shall have power at any time by notice in writing to the Secretary to remove any Board Member.”</i></p>	<p>The current definition already gives the Council this power so there appears little point in this change? Again it is not of any consequence if the change were to be insisted upon.</p>
11.	Article 9 (1) We do not normally see quorums of less than 3. Please can you increase this, unless I have read it incorrectly, it appears that the quorum is currently one ‘representative of the City Council’ which		<p>There are different Quorum requirements for Board meetings attended by our Directors and Annual General Meeting/ General Meetings attended by our sole owner the Council.</p> <p>We have 2 forms of Meeting (covered in our articles Clauses under headings “GENERAL MEETINGS AND RESOLUTIONS” and “PROCEEDINGS OF BOARD</p>



	would not meet good governance standards		<p>MEETINGS"</p> <p>At our General meetings including the AGM- the Council and owner as sole shareholder has the only vote, therefore the quorum is one (equalling the entire shareholding).</p> <p>All Board Meetings attended by our Directors the quorum is 4 ( one from each category plus one)</p> <p>Other than Annual General Meetings there has not yet been a General Meeting of the Company.</p>
12.	<p>Article 18 (4) The Mental Health Act 1983 has been recently updated and the Mental Health (Discrimination) Act 2013 has now come into force. In line with the introduction of <u>section 3(1)(a) of the Mental Health (Discrimination) Act 2013</u> The wording at the beginning of (4) and within (a) and (b) does not appear to meet legislation. Please can it all be replaced with just the following suggested wording <i>"a registered medical practitioner who is treating that person gives a written opinion</i></p>	<p>Our existing wording in the Disqualification or removal of Board Members states:</p> <p>(1) is, or may be, suffering from mental disorder and either:-</p> <p>(a) is required by law to be admitted to hospital because of that disorder; or</p> <p>(b) an order is made by a court having jurisdiction (whether in the United Kingdom or elsewhere) in matters concerning mental disorder for his/her detention or for the appointment of a receiver, curator bonis or other person to exercise powers with respect to his property or affairs; or</p>	<p>We accept that the suggested wording is acceptable and suggest that we adopt it:</p> <p><i>"a registered medical practitioner who is treating that person gives a written opinion to the association stating that that person has become physically or mentally incapable of acting as a member and may remain so for more than three months"</i></p>

	<i>to the association stating that that person has become physically or mentally incapable of acting as a member and may remain so for more than three months"</i>		
13.	Article 44 - would benefit from a reference to s.128, HRA 2008 (submission of accounts to the Regulator)		<i>"Derby Homes will comply with its legislative obligations and feel that it should not include each and every obligation explicitly in its M&amp;A's as it would mean that if/when the provision was repealed, amended or replaced we would have to change our M&amp;A's"</i>
14.	Finally at the moment the M&As do not appear to portray Derby City Limited as a registered provider in its own right we would need some assurance on the independence of Derby City Limited from the Council, to ensure it meets the obligations under 1.4 of the Governance and Viability standard	We presume that by Derby City Limited the reference should be to Derby Homes Limited.	<p>Derby City Council and Derby Homes have taken the separation of duties and independence of Derby Homes seriously since Derby Homes incorporated as a Company and Arm's Length Management Organisation in 2002.</p> <p>When recent changes have been made to encourage closer partnership working between the Council and Derby Homes the independence of the Company has been a paramount consideration. When the Council nominated the Member for Housing and Advice to sit on the Board of the Company his commissioning role within the Council was moved away from him to another elected Member. Where the sharing support services was considered between the Company and Council a decision was taken for the Company retain independent Finance, Human Resources &amp; Legal officers to retain independent advice.</p>

Section 214 Housing and Regeneration Act 2008

**214 Companies: change of articles**

(1) This section applies to a registered company.

(2) An amendment of the company's articles of association requires consent if it—

(a) alters the company's objects, **1**

(b) makes provision about the distribution of assets to members, or **5**

(c) enables the company to become, or cease to be, a subsidiary or associate of another body.

(3) An amendment of the articles of association which requires consent is effective only if the regulator has first consented.

(4) The regulator may not consent to an amendment which it thinks would turn the company into a profit-making organisation.

(5) The company must notify the regulator—

(a) of an amendment of the articles of association which does not require consent, or

(b) of a change to its name or registered office.

(6) In relation to an amendment which requires consent the requirement in section 30 of the Companies Act 2006 (c 46) (sending copy of resolution to registrar) is satisfied only if the copy is accompanied by a copy of the regulator's consent.

(7) The Secretary of State may by order amend the list in subsection (2).

Appendix 1. Section 115 Housing and Regeneration Act 2008

**115 Profit-making and non-profit organisations 3**

(1) Each entry in the register shall designate the body registered as either—

(a) a non-profit organisation, or

(b) a profit-making organisation.

(2) A body is a non-profit organisation if it is a registered or non-registrable charity.

(3) A body is also a non-profit organisation if it satisfies the following conditions.

(4) Condition 1 is that the body—

(a) does not trade for profit, or

(b) is prohibited by its constitution from issuing capital with interest or dividend at a rate exceeding that prescribed under section 1(1)(b) of the Housing Associations Act 1985 (c 69).

(5) Condition 2 is that a purpose of the body is the provision or management of housing.

(6) Condition 3 is that any other purposes of the body are connected with or incidental to the provision of housing.

(7) The Secretary of State may make regulations providing that a specified purpose is to be, or not to be, treated as connected with or incidental to the provision of housing.

(8) A body which is not a non-profit organisation under subsection (2) or (3) is a profit-making organisation.

(9) If the regulator thinks that what was a profit-making organisation has become a non-profit organisation, the regulator must change the registered designation accordingly.

[(10) Subsection (1) does not apply to the entry of a local authority in the register (and, accordingly, references to “profit-making” and “non-profit” in connection with a registered provider do not refer to a local authority).]

Appendix 2.      Section 160 Housing and Regeneration Act 2008

**160 Company: arrangements and reconstructions 4**

- (1) This section applies to a non-profit registered provider which is a registered company.
- (2) A voluntary arrangement under Part 1 of the Insolvency Act 1986 (c 45) in relation to the company is effective only if the regulator has first consented.
- (3) An order under section 899 of the Companies Act 2006 (c 46) (court sanction for compromise or arrangement)—
  - (a) is effective only if the regulator has first consented, and
  - (b) does not take effect until a copy of the consent is delivered to the registrar of companies.
- (4) An order under section 900 of the Companies Act 2006 (powers of court to facilitate reconstruction or amalgamation) is effective only if the regulator has first consented.
- (5) The requirement in section 900(6) of the Companies Act 2006 (sending copy of order to registrar) is satisfied only if the copy is accompanied by a copy of the regulator's consent.

Appendix 3. 122 Payments to members etc **5**

(1) This section restricts the making of gifts, and the payment of dividends and bonuses, by a non-profit registered provider to—

- (a) a member or former member of the registered provider,
- (b) a member of the family of a member or former member,
- (c) a company which has as a director a person within paragraph (a) or (b).

(2) A gift may be made, and a dividend or bonus may be paid, only if it falls within one of the following permitted classes.

(3) Class 1 is payments which—

- (a) are in accordance with the constitution of the registered provider, and
- (b) are due as interest on capital lent to the provider or subscribed in its shares.

(4) Class 2 is payments which—

- (a) are paid by a fully mutual housing association (within the meaning of section 1(2) of the Housing Associations Act 1985 (c 69)),
- (b) are paid to former members of the association, and
- (c) are due under—
  - (i) tenancy agreements with the association, or
  - (ii) agreements under which the former members became members of the association.

(5) Class 3 is payments which—

- (a) are in accordance with the constitution of the registered provider making the payment (“the payer”), and
- (b) are made to a registered provider which is a subsidiary or associate of the payer.

[(5A) Class 4 is payments which—

- (a) are in accordance with the constitution of the registered provider,
- (b) are paid for the benefit of tenants of the provider, and
- (c) are in any particular case paid to assist the tenant to obtain other accommodation by acquiring a freehold, or long-leasehold, interest in a dwelling.

(5B) For the purposes of subsection (5A)—

“long-leasehold interest”, in relation to a dwelling, means the lessee's interest under a lease of the dwelling granted, for a premium, for a term certain exceeding 21 years;

“acquiring”, in relation to a long-leasehold interest in a dwelling, includes acquiring by grant and acquiring by assignment.]

(6) If a registered company or industrial and provident society contravenes this section—

- (a) it may recover the wrongful gift or payment as a debt from the recipient, and
- (b) the regulator may require it to take action to recover the gift or payment.

[(7) The Secretary of State may by order amend this section for the purpose of—

- (a) adding to the permitted classes, or
- (b) modifying or removing a permitted class added by order under this subsection.

(8) Before making an order under subsection (7), the Secretary of State must consult—

- (a) the Charity Commission,
- (b) the regulator, and
- (c) one or more bodies appearing to the Secretary of State to represent the interests of registered providers.]

**Section 271 Subsidiary and associate 9**

**271 Subsidiary and associate**

- (1) A company is a “subsidiary” of a person if any of the following conditions is satisfied.
- (2) Condition 1 is that the person—
  - (a) is a member of the company, and
  - (b) has power, independent of any other person, to appoint or remove all or a majority of the board of directors.
- (3) Condition 2 is that the person holds more than half in nominal value of the company's equity share capital.
- (4) Condition 3 is that the company is a subsidiary, within the meaning of the Companies Act 2006 (c 46) or the *Friendly and Industrial and Provident Societies Act 1968* [Co-operative and Community Benefit Societies and Credit Unions Act 1968] (c 55), of a company which is a subsidiary of the person by virtue of Condition 1 or 2.
- (5) In relation to a company which is an industrial and provident society a reference to the board of directors is a reference to the committee of management.
- (6) “Associate” of a provider means—
  - (a) a body of which the provider is a subsidiary, and
  - (b) any other subsidiary of that body.