

Cabinet Sub-Committee (Medway Development Company Ltd Shareholder Board)

31 January 2024

Governance arrangements

Portfolio Holder: Councillor Naushabah Khan, Housing and Property

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Summary

At the July 2023 meeting of the Cabinet, it was agreed to change the then governance arrangements for the Local Authority Trading Companies (LATCOs) and establish Cabinet Sub Committees to as the as shareholder boards. A number of delegations were also approved (see below).

Since that meeting the Assistant Director Legal and Governance has:

- produced terms of reference for the sub committees;
- reviewed the Articles of Association for each company;
- developed a Memorandum of Understanding and a scheme of delegation.

The above documents are now presented to the Sub Committee for consideration.

1. Recommendations

1.1 The Cabinet Sub Committee is asked to:

1.1.1. note the terms of reference, as set out in Appendix 1 to the report;

1.1.2. approve the Articles of Association, as set out in Appendix 2 to the report and the Memorandum of Understanding (including the scheme of delegation), as set out in Appendix 3 to the report;

1.1.3. recommend that Medway Development Company Ltd at its next board meeting adopts the revised Articles of Association and the Memorandum of Understanding.

2. Suggested reasons for decision(s)

2.1 The Sub Committee is requested to approve the recommendations above to improve the corporate governance of the Council's LATCOs.

3. Budget and policy framework

- 3.1 The decision is within the Council's policy and budget framework including the Council Plan. The creation of shareholder boards and decision making in public will also enhance transparency and accountability of the Council's interactions with the LATCOs.

4. Background

- 4.1 In July 2023 the Cabinet received a report in respect of the Council's wholly owned trading companies (LATCOs) recommending a number of changes to the governance arrangement for the companies. The Cabinet determined that three Cabinet Sub Committees would be established, one for each LATCO, namely, Kyndi Ltd, Medway Development Company (MDC) Ltd and Medway Norse Ltd.

- 4.2 Additionally, the Cabinet also agreed the following:

4.2.1. The Cabinet approved the establishment of three shareholder boards (Cabinet sub committees) for each LATCO (inclusive of their subsidiaries (decision no. 112/2023).

4.2.2. The Cabinet agreed to delegate authority to the Assistant Director, Legal and Governance, in consultation with the Leader of the Council, to:

- finalise the terms of reference for each shareholder board;
- review and, where necessary, amend the articles of association for each LATCO, to improve transparency, accountability, oversight and refine matters reserved for shareholder approval (decision no. 113/2023).

4.2.3 The Cabinet agreed to delegate authority to each shareholder board to exercise decisions that are reserved to the shareholder and to respond to matters raised by the board of directors (decision no. 114/2023).

4.2.4 The Cabinet agreed to delegate authority to the Assistant Director, Legal and Governance, in consultation with the relevant Chairperson for each shareholder board, to take decisions that are required as a matter of urgency (decision no. 115/2023).

4.2.5 The Cabinet agreed to request the Leader of the Council to determine the membership of each shareholder board and the chairperson (decision no. 116/2023).

- 4.3 The Leader of the Council has informed the Assistant Director Legal and Governance that the membership of each Sub Committee would be as follows;

	MDC	Kyndi	Norse
Chairperson elect	Cllr Khan	Cllr Murray	Cllr Curry
	Cllr Edwards	Cllr Osbourne	Cllr Osbourne
	Cllr Curry	Cllr Curry	Cllr Mahil

- 4.4 **Terms of reference (TOR)** - the Sub Committees have been established with a membership of three members and the quorum for each has been set at the minimum level of two. The TOR, identical for the Kyndi and MDC Sub Committees, reflect that the most shareholder decisions will be undertaken by the Sub Committee, with a number of specific substantive decisions reserved for the Cabinet. Cabinet at its July 2023 meeting delegated authority to the Assistant Director for Legal and Governance to finalise the terms of reference. The terms of reference were shared with the Leader and also with the members of the Sub Committees who express their contentment with the drafts, as set out in Appendix 1. Therefore, the Assistant Director Legal and Governance has exercised his delegated authority set out in Cabinet decision no. 113/2023 with regards to approving the terms of reference for both Kyndi and MDC Cabinet Sub Committees. Therefore, Members are requested to note the terms of reference for this Sub Committee.
- 4.5 **Articles of Association** - it is a statutory requirement that each company has a set of Articles of Association, which once adopted, have to filed at Companies House and are available for inspection by the public. The Articles of Association for a company set out the company's purpose and are to a large extent the equivalent of the Council's constitution. They set out the internal rules and the agreement between the directors who manage the company on a day to day basis and the shareholders who own the business. They can also include a scheme of delegation and restrictions on decision making.
- 4.6 When each of the existing companies (MDC and Kyndi) were established a set of Articles of Association were adopted, differing for each company and they have not been reviewed since. Articles of Association can be drafted bespoke for each company, or they can adopt a generic set known as the model articles, for a particular type of company, set out in the Companies Act 2006. To ease administration and streamline governance, the model set of articles have been adapted to suit the Council's requirements.
- 4.7 The draft articles were shared with members of each Sub Committee, senior officers at the Council who would be acting as client leads, the Chief Executives of each company and their Boards of Directors. Resultant comments received were then shared, discussed with Sub Committee members at two meetings held (28 September and 24 October), where consensus was sought on the articles to be adopted. The resultant Articles of Association are attached as Appendix 2, key provisions include;
- Shareholder reserve power, to direct the board to take or refrain from taking certain action
 - Distribution of board papers to shareholder nominee
 - Board to consist of between 5 and 10 directors

- Directors appointed for fixed term of four years, maximum of two terms
- Quorum for board meeting to be three directors (unless there are vacancies in which case one) provided the shareholder nominee and company chief executive are present
- “Well founded objection” procedure to apply to appointment of directors
- Chair to have a casting vote
- Sub Committee to approve remuneration policy for directors
- Company Chief Executive to act as company secretary
- Conflict of interest provisions (ability to speak but not vote nor count as part of quorum).

4.8 The Sub Committee is requested to consider and approve the Articles of Association, as set out in Appendix 2 to the report. Further, that they request the company’s board of directors to adopt the document at their next board meeting.

4.9 **Memorandum of Understanding** - Once company directors have been appointed, their primary duty is to act in the best interest of the company (this is distinct and different to the Council’s interests). Whilst that obligation cannot be fettered, the company through its board of directors can voluntarily enter into a Memorandum of Association with the shareholders (the Council) which sets out how the two parties will work together, setting out roles, responsibilities and expectations. Such a document helps to crystallise the shared ambition, which later can be developed into an operational business plan detailing how accountability and responsibility will be discharged.

4.10 As with the Articles of Association, the draft Memorandum of Understanding was shared members of each Sub Committee, the senior officers at the Council who would be acting as client leads, the Chief Executives of each company and their Boards of Directors. Comments received were then shared, discussed with Sub Committee members at two meetings held on 28 September and 24 October, where consensus was sought on the memorandum to be adopted which is attached as Appendix 3. Key provisions include;

- The approval of a business plan within 56 days
- Appointment of board members in accordance with an appointment protocol (to be approved by the Sub Committee)
- Board decisions to be approved by a simple majority, with a casting vote to the Chair
- Conflict of interest provisions
- Retained power to direct board to take or refrain from taking specific action
- A scheme of delegation
- Detailed quarterly reporting provisions
- Access to book, accounts and records
- Power to determine a dividend policy
- Sharing of board papers with the shareholder nominee

- 4.11 The Sub Committee is requested to consider and approve the Memorandum of Understanding, as set out in Appendix 3 to the report. Further, that they request the company's board of directors to adopt the document at their next board meeting.
- 4.12 Included as part of the Memorandum of Understanding (Schedule 2 therein) is the proposed scheme of delegation setting out responsibility for decision making between the Cabinet, the Sub Committee, Board of Directors and the Chief Executive.
- 4.13 The Sub Committee is requested to consider and approve the scheme of delegation as set out in Schedule 2 to the Memorandum of Understanding.

5. Options

- 5.1 Option 1: Keep existing Articles of Association - the existing Articles of Association were adopted at the incorporation of each company and are thus dated. They differ for each company and have not been reviewed since adoption. Whilst they do not inhibit the operation of the companies, with revised governance mechanisms and improved reporting requirements sought, it is an apt opportunity to review the whole of the governance mechanisms to ensure they are fit of purpose.
- 5.2 Option 2: Adopt revised documents - as stated above, with the revised governance mechanisms being sought and improved reporting, it makes sense at this time to review the existing governance framework to make sure it is fit for purpose and by following a consultative process with existing board members and chief executives of both companies, that they meet the needs and expectations of all stakeholders. Further, by adopting the same documents for Kyndi and MDC it helps to streamline the administrative burden.

6. Advice and analysis

- 6.1 For the reasons set out above, Option 2 is the preferred option.
- 6.2 A Diversity Impact Assessment (DIA) has not been prepared as the changes to the governance documents only impact on operational detail regulating the relationship between the shareholder and company.
- 6.3 For the Sub Committee's information, the client lead at the Council for MDC Ltd is the Assistant Director Regeneration. The shareholder nominee is the Assistant Director Legal and Governance.

7. Risk management

- 7.1 Risk management is an integral part of good governance. The Council has a responsibility to identify and manage threats and risks to achieve its strategic objectives and enhance the value of services it provides to the community.

Risk	Description	Action to avoid or mitigate risk	Risk rating
The documents do not meet the needs of all stakeholders	The documents prevent/ inhibit/ hinder activity	All relevant stakeholders have been consulted to minimise such risk	CIV
		These are living documents and can be reviewed periodically or when the need arises to make sure they remain suitable	CIV
Slower decision making by the LATCo	The requirement to consult with the shareholder prior to decisions by the LATCo board will slow decision making by them	A mechanism for the provision an urgent steer by the shareholder has been proposed	CIII
		A scheme of delegation is proposed to make sure the right decisions are taken at an appropriate level	CIV

For risk rating, please refer to the following table

Likelihood	Impact:
A Very likely B Likely C Unlikely D Rare	I Catastrophic II Major III Moderate IV Minor

8. Consultation

- 8.1 A copy of this report has been shared with Sub Committee members, senior officers at the council, the Chief Executive for each LATCO and they were requested to share it with the current directors, all of whom were asked to provide any feedback in time for consideration by the Sub Committee.

9. Climate change implications

- 9.1 [The Council declared a climate change emergency in April 2019](#) - item 1038D refers, and has set a target for Medway to become carbon neutral by 2050.

- 9.2 There are no direct implications arising from this report.

10. Financial implications

- 10.1 There are no direct financial implications for the Council arising from this report.

11. Legal implications

- 11.1 These are contained within the body of the report. The periodic review and adoption of revised governance frameworks documents following changes to good practice is part and parcel of good governance.

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Appendices

1. Terms of reference for the Sub Committees
2. Articles of Association
3. Memorandum of Understanding (incl. scheme of delegation)

Background papers

None