



Open Report on behalf of Andrew Crookham, Deputy Chief Executive and Executive Director - Resources

Report to:	County Council
Date:	17 February 2023
Subject:	Border to Coast Governance Arrangements

Summary:

This Report informs Council of changes that are proposed to the governance documents relating to Border to Coast Partnership Pensions Limited and its relationship with the County Council and seeks Council approval for amended versions of those documents insofar as they fall within the remit of the Council

Recommendation(s):

That the Council

- 1) approves the amended version of the Inter Authority Agreement between the County Council and local authority members of Border to Coast Pensions Partnership Limited attached at Appendix A;
- 2) approves the amended version of the Shareholder Agreement between the County Council and Border to Coast Pensions Partnership Limited attached at Appendix B; and
- 3) delegates to the Pensions Committee authority to approve on behalf of the County Council future amendments to the Border to Coast Pensions Partnership Limited governance documentation
- 4) authorises the Assistant Director – Finance to exercise the Council’s rights as a shareholder in Border to Coast Pensions Partnership Limited on behalf of the Council as the administering authority of the Lincolnshire Local Government Pension Fund in addition to or in the absence of the Executive Director - Resources

1. Background

- 1 At its meeting on 24 February 2017, the full Council approved the Council taking up shares in and becoming a member of a separate company Border to Coast

Pensions Partnership Limited (“Border to Coast”) as the Council’s chosen means of meeting its obligation as Administering Authority of the Lincolnshire Local Government Pension Fund to pool its assets with other Funds.

- 2 As part of that decision the Council approved the entering into of certain documentation setting out the way in which the Border to Coast arrangement would be governed. In particular, the Council has entered into two agreements.
- 3 Firstly, there is an Inter Authority Agreement between the local authorities that are part of the pooling arrangement which governs the relationship between the authorities and the co-ordination of the management and monitoring of Border to Coast. This Agreement records the agreement of the local authorities to pool their fund assets through the Border to Coast arrangement and establishes the existence and Terms of Reference of a Joint Committee of the pooling authorities to oversee the pooling arrangements and the work and performance of the company.
- 4 Secondly (and along with the other local authorities that are part of the pooling arrangement) the Council entered into a Shareholder Agreement governing the relationship between Border to Coast as a company and the pooling authorities as shareholders of the company. This Agreement sets out the basis on which the company was established as a ‘Teckal’ company and therefore one to which the authorities are able to award contracts without going through the competition requirements of procurement law. The Shareholder Agreement establishes the internal company decision-making arrangements which evidence the necessary degree of local authority control to be able to utilise this exception to procurement rules.
- 5 It is five years since Border to Coast was established, and the initial governance framework was approved by Full Council. Since then, the business has matured (as of the end of March 2022 it was responsible for managing c. £38bn of Partner Fund assets), Tyne and Wear and Northumberland pension funds have merged, there has been regulatory change, and best practice with respect to both corporate governance and the governance of arms’ length public bodies has evolved.
- 6 A review has therefore been undertaken of the shareholder governance arrangements. In undertaking the review, consideration was given to:
 - The lessons learnt from the first few years of pooling from Border to Coast;
 - Lessons learnt from other pools in the UK;
 - Lessons from other Local Authority jointly owned companies; and
 - Lessons learnt from other pools internationally.
- 7 This has led to proposed amendments to the Inter Authority Agreement and the Shareholder Agreement together with the Articles of Association of the company, which outline the rules and regulations of the company.

- 8 Approval of the Inter Authority Agreement and Shareholder Agreement are a matter for full Council and copies of the amended versions of these Agreements are attached as Appendix A and Appendix B to this Report respectively. The versions of the documents attached at Appendices A and B are clean copies which do not show the changes from the original. However, the changes are described in general terms below.

The Inter Authority Agreement (IAA)

- 9 As referred to above, the IAA records the agreement of the local authorities in relation to the pooling of their LGPS assets via Border to Coast. The main purpose of the agreement is to record that the Partner Funds will pursue the Shared Objectives relating to Border to Coast and record arrangements relating to the Joint Committee of the partner Funds, including the terms of reference.

- 10 The main changes to the IAA comprise the following (this is not an exhaustive list and does not note typographical amendments or minor drafting changes):-

- (a) updating statutory references, for example in relation to data protection laws;
- (b) updating the document to take account of the merger of Northumberland County Council Fund into the Council of the Borough of South Tyneside Fund;
- (c) adding enabling provisions should other mergers take place in future (clause 11.5);
- (d) removing provisions that related to the period before the establishment of Border to Coast as they are no longer relevant;
- (e) adding provisions to make clear that when an authority withdraws from the Agreement it will cease to be a member of the Joint Committee (clause 11.1.2);
- (f) updating the terms of reference of the Joint Committee (at Schedule 1) to take into account that the first phase (pre establishment of Border to Coast and commencement of operations) has been completed;
- (g) Clarifying the terms of office for the Chair and Vice Chair of the Joint Committee, to terms of two years with a maximum of two terms (Schedule 2 – Constitution of the Joint Committee); and
- (h) Adding a new provision in the Constitution for the Joint Committee which permits, in cases of urgency, decisions to be taken on behalf of the Joint Committee by the Host Authority in consultation with the Chair and Vice Chair (paragraph 18 of Schedule 2).

The Shareholder Agreement (SHA)

- 11 The main changes made to the SHA include (again please note this is not an exhaustive list and does not note typographical amendments or minor drafting changes):
- (a) removing provisions relating to pre-establishment that are no longer relevant;
 - (b) altering the proportion of Shareholders required for majority consent from 75% to 66.6%, which will continue to be in line with *Teckal* requirements (definition of Shareholder Majority);
 - (c) including provisions relating to when capital contribution calls may be made on the local authority Funds for expenses resulting from Border to Coast's capacity as an authorised alternative investment fund manager to cover Border to Coast's Authorised Contractual Scheme and unregulated arrangements (such as limited partnerships) (clause 4);
 - (d) amending the provisions relating to record keeping so it is not necessary for local authority Funds to use their powers to ensure Border to Coast maintains accounting and financial records. The company is responsible for ensuring compliance in this area (deletion of original clause 6.8);
 - (e) removing the requirement for authority Funds to approve Border to Coast's conflicts policy, as this is not necessary (deletion of original clause 6.9);
 - (f) With respect to the provision of information to Shareholders, management accounts will now need to be provided within 90 days of the end of the quarter instead of 30. This provides greater flexibility for the company which experience has shown would be useful (clause 14.1.2);
 - (g) Including a framework in a new schedule to the agreement with details of how a merger of two authorities may be managed (although allowing flexibility depending on the circumstances) (clause 15.3);
 - (h) Updates to the Reserved Matters which require unanimous Shareholder approval, including:
 - (i) Excluding agreements to provide services to Shareholders as customers approved under the Strategic Plan (Schedule 1 Part A paragraph 3);
 - (ii) Excluding amendments to the Articles required by a direct request from the Financial Conduct Authority or following legal advice (it should be noted that a special resolution requiring the consent of 75% of the Shareholders will still be required) (Schedule 1 Part A paragraph 12);

- (iii) Excluding the approval of the removal or appointment of initial directors (previously Schedule 1 Part A paragraph 15);
 - (iv) Excluding the requirement for consent to defend claims (although consent is still required to commence or settle any claims); and also excluding non-material claims of £1m or less (Schedule 1 Part A paragraph 15); and
 - (v) Excluding the formation of a subsidiary of Border to Coast if done in accordance with the Strategic Plan (Schedule 1 Part A paragraph 17).
- (i) Updates to the Reserved Matters which require approval by a Shareholder Majority (66%) including
- (i) Rather than approving the annual accounts of the company, shareholder approval is required for any proposal not to table the accounts at the company's AGM Schedule 1 Part B paragraph 5;
 - (ii) Excluding the need to determine the directors' remuneration and instead approving a remuneration policy for directors (Schedule 1 Part B paragraph 6);
 - (iii) Excluding approval being required to amend a pension scheme for employees of the company (Schedule 1 Part B paragraph 7);
 - (iv) Excluding entering into agency, distribution or similar agreements (previously Schedule 1 Part B paragraph 8); and
 - (v) Increasing the threshold for leases requiring consent to £500,000 (from £100,000) (Schedule 1 Part B paragraph 9).
- (j) Finally, the list of shared objectives in Schedule 2 has been amended to include the objective to primarily invest assets through the collective investment vehicle operated by Border to Coast, which was already recorded in the IAA.

Articles of Association

- 12 The Articles of Association are a company document and will be approved through company decision-making. This will involve the Council's vote as a shareholder being cast by the Executive Director – Resources in consultation with the Chairman of the Pension Committee in accordance with delegated authority granted by full Council in 2017. It does not require approval from the Council as part of this decision.
- 13 Minor updates are being made to the Articles, which include:
- (a) Increasing the maximum number of directors from 8 to 10;

(b) Amending the required quorum for General Meetings of Shareholders to 66.6% to match the majority requirements that will now be set out in the SHA; and

(c) changes relating to the redeeming of class B shares in order to meet FCA regulatory requirements that in order for shares to qualify as Tier 1 regulatory capital, they must not be redeemable and cannot be reduced or repaid other than on liquidation.

14 Independent external specialist legal advice has been obtained on behalf of all local authority funds to review these documents, and overall the governance framework and legal documentation is considered to be fit for purpose and the exercise has been about evolution of approach. The conclusion of the external legal advice is that the amendments that have been proposed are acceptable from a legal perspective and can be agreed by the local authorities involved in the pooling arrangement.

15 In addition, the Council's Chief Legal Officer has reviewed the documents and has no issues with the documents and is in agreement with the external advice.

16 The proposed amendments were considered by the Pensions Committee at its meeting on 1 December 2022. The Committee supported the entering into of the amended agreements.

17 At the time of that report the Council was waiting on a response to two drafting points that had been raised by the Council. Those points have now been addressed to the satisfaction of the Chief Legal Officer and the changes are incorporated into the documents at Appendix A and B.

18 The meeting of the Committee was also informed that work was being done on additional changes to accommodate the anticipated reorganisation of local government in Cumbria and to include in the documentation a mechanism for the transfer of shares in the event of other instances of local government reorganisation impacting on any of the authorities.

19 This has led to amendments to the Shareholder Agreement to cover the situation where one of the authorities is replaced as Administering Authority of an LGPS Fund and its shares in Border to Coast are not automatically transferred to a replacement administering authority. In those circumstances the outgoing authority can transfer all of its shares to the replacement authority with the consent of the Board and unanimous approval of the shareholders.

Future Decision-Making

20 As can be seen from the Report, Border to Coast is now a well-established company with robust governance and access to specialist legal and other advisors. Given the generally administrative nature of the changes made to the governance documents as a result of the recent review it is felt that a

delegation to the Pensions Committee to approve such changes in future would be appropriate. This would not prevent future reports coming to full Council where changes to the governance documents raised fundamental issues of principle.

- 21 This proposal would be effected through the approval of recommendation 3.
- 22 In addition, full Council in February 2017 appointed the Executive Director – Resources (as the post is now known) to exercise the Council’s functions as shareholder of Border to Coast. The Executive Director has identified that it would be helpful if this role could be shared with the Assistant Director – Finance to ensure that the Council is able to respond appropriately to the requirements of the role within the timeframes required by the company. Recommendation 4 addresses this point.

2. Legal Issues:

Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:

- Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act.
- Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it.
- Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic.
- Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it.
- Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding.

Compliance with the duties in section 149 may involve treating some persons more favourably than others.

The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision-making process.

The duties under section 149 of the Equality Act 2010 have been considered but no direct implications of this specific decision for people with a protected characteristic have been identified.

Joint Strategic Needs Assessment (JSNA) and the Joint Health and Wellbeing Strategy (JHWS)

The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health and Wellbeing Strategy (JHWS) in coming to a decision.

The Joint Strategic Needs Assessment and the Joint Health and Wellbeing Strategy have been considered but no direct implications of this specific decision have been identified.

Crime and Disorder

Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area.

The duties under section 17 of the Crime and Disorder Act 1998 have been considered but no direct implications of this specific decision for those matters have been identified.

3. Conclusion

- 1 A review has been undertaken by Border to Coast and external lawyers on the governance documents of Border to Coast; namely the Inter-Authority Agreement, the Shareholder Agreement and the Articles of Association. The amended documents have been reviewed independently by lawyers

representing the local authority Funds, and by the Council's Chief Legal Officer. The changes are satisfactory.

- 2 Two of the agreement – the Inter Authority Agreement and the Shareholders Agreement – require approval by full Council. The Pensions Committee has considered the Agreements and support their approval.

4. Legal Comments:

The Report seeks approval for amended versions of documents setting out the Council's role in the governance of Border to Coast Pensions Partnership Limited as the Council's chosen vehicle for meeting its obligation to pool its Pension Fund assets with other Funds.

The Pension Funds have been separately represented in discussion of the documents by specialist pensions lawyers who have confirmed that the documents are legally sound.

The Council's functions as Administering Authority of the Local Government Pension Fund is reserved to the Council.

The Council has largely delegated the exercise of those functions to the Pensions Committee and recommendation 3 if approved would clarify that the Pensions Committee would be authorised to approve similar changes to Border to Coast governance arrangements in future.

The decision to approve any or all of the recommendations is lawful and within the remit of full Council.

5. Resource Comments:

Accepting the recommendations within this report, has no material impact on the budgets of the council.

6. Consultation

a) Has Local Member Been Consulted?

N/A

b) Has Executive Councillor Been Consulted?

N/A

c) Scrutiny Comments

The decision has not been considered by a Scrutiny Committee but was considered by the Pensions Committee at its meeting on 1 December 2022 and is supported by the Pensions Committee

d) Risks and Impact Analysis

See the body of the Report

7. Appendices

These are listed below and attached at the back of the report	
Appendix A	Inter Authority Agreement
Appendix B	Shareholder Agreement

8. Background Papers

The following background papers as defined in the Local Government Act 1972 were relied upon in the writing of this report.

Document title	Where the document can be viewed
Report to full Council dated 24 February 2017 entitled "Lincolnshire Local Government Pension Scheme – Requirement for Asset Pooling".	Agenda for Council on Friday, 24th February, 2017, 10.00 am (moderngov.co.uk)
Report to Pensions Committee dated 1 December 2022 entitled "Border to Coast Governance Review".	Agenda for Pensions Committee on Thursday, 1st December, 2022, 10.00 am (moderngov.co.uk)

This report was written by David Coleman, Chief Legal Officer, who can be contacted at david.coleman@lincolnshire.gov.uk