

APPENDIX C

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Date: 6 May 2020
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Dear Mr. Leader,

**STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED – PROPOSED MERGER OF
BOSTON AND EAST LINDSAY COUNCILS OFFICERS UNDER JOINT CHIEF EXECUTIVE.**

Background

This letter sets out the advice of Eversheds-Sutherland about the proposal of Boston and East Lindsay Councils to appoint a joint Chief Executive, with the aim of future close joint working around a set of shared strategic priorities in a Strategic Alliance. The aim of the arrangement is to create shared capacity for higher performance, improved service delivery, efficiency and economy as well as joint working on strategic infrastructure and other sub regional projects. Each Council will remain separate democratic and political entities. The intention is to approach the Strategic Alliance in an incremental way, starting with the appointment of a joint Chief Executive by 1 July 2020. The next phase will be for the Chief Executive to appoint a joint management team. Further details of the plans are described in the draft report which will be considered initially by the executives for each Council and ultimately by the respective Full Councils. You have also helpfully provided a copy of a draft Memorandum of Agreement.

Advice sought

We have been asked to review the approach taken in the Memorandum of Agreement and in particular whether the arrangement is lawful. If it is lawful, can it be more effectively achieved another way?

Summary of Advice

The arrangements described in the draft report to the Councils and set out in the Memorandum of Understanding are sensible and lawful. They describe a lawful process for appointing a Joint Chief Executive and the development of a joint senior management structure.

The suggested incremental approach has been adopted by other Councils as a prelude to closer integrated collaboration and shared services which has in turn in some cases led to effective new unitary Councils, often as part of wider devolution arrangements which have secured additional local funding, often for infrastructure or transport projects. You will no doubt be aware of the consultation and statutory process required for establishing a new Council. It requires a lengthy lead in time, significant commitment from senior officers and members and engagement with central government to develop the proposals and work out the new statutory powers to be set out in formal regulations.

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In the following sections of this letter we have made some comments and suggestions about the content of the report and agreement. Additionally we have highlighted some of the key employment law and policy issues you need to be mindful of as you implement the changes.

General comments

The draft report sets out a sensible and clear rationale for the proposals. The recommendations to be considered by Full Council agree to enter into the arrangements, appoint a Joint Chief Executive, deal with the allocation of the costs of funding the retirement of the redundant Chief Executive and give delegated authority to the Chief Executive to appoint Chief Officers and undertake and management restructure.

It will be important to take care with the practical steps needed to action these recommendations to ensure that the correct legal procedures to appoint and dismiss Chief Executives and Chief Officers are followed. The detail for this is set out in The Local Authorities (Standing Orders) England Regulations 2001, as amended in 2015 and the revised JNC Conditions of Service.

As well as the appointment of the new Joint Chief Executive by Full Council it will be necessary to follow the standard statutory notification to the Executive members procedure set out in the Regulations and also in Council Standing Orders. There is also reference in the draft report to appointments of a Joint Monitoring Officer and a Joint Section 151 officer which will also need to be in accordance with the process in the JNC Handbook, requiring the approval of Full Council and the statutory notification process. We are happy to advise further on the detail of this if necessary.

Any costs of retirement or salary changes will need to be consistent with Boston and East Lindsay Councils Pay Policies and be reported to and approved by the Full Councils, to comply with the requirements of Section 40 of the Localism Act 2011 and the statutory government guidance. The key issue is to show that the salary or retirement costs comply with the pay policies for the year and represent value for money for taxpayers. The Council will be aware that for some time we have been expecting the implementation of the public sector exit payment regulations, which would cap any severance payment at £95,000. However, given that those regulations have yet to come into play and are unlikely to come into force imminently, given the current pressures on government, this is not an immediate consideration. It may however be a relevant consideration in the context of the Councils' Pay Policy.

The draft report we have seen sets out the expectations of the Strategic Alliance, referring to economic transformation, managing future financial pressures, achieving economies of scale, potential for increased funding, reducing duplication and sharing best practice. These are described in broad terms at the moment. This is understandable and not unusual, in our experience, when local authorities are in the early stages of a strategic alliance. It is however important to consider developing a clear business plan with a budget to assist with providing a robust audit trail in respect of the arrangements. This will also demonstrate to auditors and the public that there has been good use of public funds and show regard to efficiency and economy.

Memorandum of Agreement

The draft agreement describes the initial arrangements for the integrated management structure and the development of the strategic alliance between Boston and East Lindsay. It will be important to keep it under review. The agreement is drafted in sufficient detail for present purposes. We have set out below our general observations which we hope will be helpful in finalising the agreement:-

- In clause 4, it would be sensible to include a reference to Sections 19 and 20 of the Local Government Act 2000. so it is clear that the jointly appointed senior officers can make decisions about executive matters as well as non-executive matters.

- In Clause 5.3, there is reference to the Joint Strategy Board not being a formal joint committee, "unless and until resolved otherwise This means that the committee will be advisory and any decisions will be made by the respective Cabinets or Full Councils as appropriate. Other Councils which have had an incremental approach to strategic alliances or collaboration have also operated with a shadow Joint Committee in the initial stages. As the arrangements develop it can help with embedding the collaborative arrangements and streamlining decision making if there is a joint committee with decision making abilities.
- Clause 6.7 refers to a future agreement between the Councils about the allocation of pension liabilities and is not precise about how pension contributions and deficits will be allocated on the transfer of staff within the shared management team. These costs could be significant and to avoid either Council being faced with an unexpected cost, audit challenge or concerns we suggest that as far as possible these are costed and referred to in a schedule to the agreement.
- You may wish to amend the termination provisions so they are more specific, for example so that termination is only permitted for a fundamental breach of the agreement by one of the Councils before the end of the agreement. Alternatively you could simply have an ongoing right to terminate by choice on giving a suitable period of notice. How long that should be depends on how embedded the relationship is. At this stage the current clause 8.5 which suggests 6 months seems sensible. There is also reference in Clause 8.3 and 8.4 to the possible termination of the agreement if there are proposals to dismiss a particular member of staff either by the employing Council or the other Council, which may create practical and immediate service delivery issues, so you may want to consider removing this as a basis for termination.
- Clause 8.6(b) refers to "using best endeavours to secure an amicable and equitable financial settlement" in the event of termination. We suggest that you consider clarifying how this will be calculated and including that in a schedule in the agreement. For the purposes of this initial phase the calculation could be by reference to the costs and contributions of each Council.
- Subject to consideration of the comments above about the process for termination and calculating exit costs, the current wording in this section of the agreement is workable for the proposal for a shared senior management team.
- Clause 24 refers to Freedom of Information and Data Protection obligations. Care will be needed if each Council shares personal data with each other as part of the arrangements to ensure each Council manages its own obligations in respect of the use, sharing and processing of personal data. This can be achieved by a review of the purposes for which data is held and the development of data sharing protocols. We are happy to assist with more detailed specialist advice if required.

Specific Employment and Staffing Issues

We agreed to provide you with a brief summary of the potential employment issues which arise in respect of the plans to have a shared Chief Executive and senior management team. The report suggests a lawful approach of officers being employed by one Council with their services being made available to the other Council. In our comments below we describe this as the "current employer model".

In our experience of working on similar projects in the past, one of the challenges facing the two Councils is that the law is slow to catch up with developments on the ground and in particular does not recognise the concept of joint employment. Essentially therefore, employees have to be employed by one or other of the Councils as legal entities and cannot be jointly employed by both Councils and nor can they be employed by a non-legal entity such as a joint committee.

- Employment model

Typically, there are two potential options. One option is the "host authority" model, in which one or other of the two partner councils becomes the employer in law for employees of both councils. The Councils anticipate that this will require a transfer of staff to one or other of the partner Councils, which could trigger the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

The second option is the "current employer" model. In this model, employees will remain with their existing Council employer but are allowed to work for the partner Council under powers set out in section 113 of the Local Government Act 1972 as part of the merged officer structure.

- Changes to terms and conditions

Any changes to terms and conditions that are necessary to achieve effective service delivery would need to be agreed with individual employees (and possibly trade unions) in advance. This would include matters such as a need to work in a different location, to work different patterns, or to be managed in a different way. Consideration would also need to be given as to how matters such as grievance and disciplinary processes would be utilised for employees working across both Councils.

In most employment situations, terms and conditions can only be varied by agreement between the employer and the employee and this will need to be factored into the process.

- Consultation

Key to any changes and ensuring that the employees are "on board" with the proposed changes is to involve them at an early stage and to be open and transparent with them wherever possible, as to the proposals and the reasons for those proposals and how individuals employees to be affected. This may also involve engaging in consultation with trade union representatives. We can advise further if necessary.

- Equal Pay

The Equality Act 2010 provides equal pay for equal workers between men and women and ordinarily to make a successful claim where individuals believe that they are not being paid the same, they must compare themselves with an individual of the opposite gender employed by the same employer or "associated employer". Again, depending on the level of integration and decision making, it may be possible for employees of one Council to compare themselves with employees of the other Council. This will not in any way act as a barrier to the Strategic Alliance but may raise some legal and wider human resources and industrial relations issues around ensuring parity and fairness. To equal up is likely to be costly, but to equal down may well raise challenging legal issues, assuming employees are not going to be prepared to agree to lower salaries. Again, this is an area that can be looked at in more detail.

- Redundancy

Changes to terms and conditions of employment including changes of location could give rise to redundancy situations and, as you will be aware, the relatively generous redundancy provisions under the Local Government Pension Scheme could have significant financial impact in the event that redundancies are triggered, deliberately or otherwise. It will therefore be necessary to consider the implications of any changes and whether there is a risk of triggering redundancy situations.

In summary, none of these employment issues should act as a barrier or indeed a deterrent to the proposals but we thought it was useful to flag up these issues at this stage so that they can be factored into the Councils' decision making process.

General Comments

Based on our experience of similar collaboration arrangements you may wish to consider the following practical issues:-

- Ensuring detailed, timely and sensitive consultation with staff about the plans.
- An effective clear transparent and consistent communication strategy as the plans are taken forward.
- Member approval should be supported by a business case for the strategic alliance.
- Consideration will need to be given to amending Constitutions and delegations to reflect the alliance arrangements.
- It is important to establish a clear process for delegation of functions and recording of decisions.
- Other Councils have found it helpful to set up officer strategic management boards and individual officer project boards as well as Joint member decision making through Joint Committees, Joint Cabinets and Joint Full Council in the more embedded models. Some Councils still maintain independent decision making for some or all purposes.
- Consideration can be given to each of the Councils acting as host Council for specified purposes. For example, one Council could lead on planning issues, another on general regulatory services.
- Consideration needs to be given to providing officer indemnities to cover the joint working arrangements.

We hope the above comments are helpful and either Huw or I would be happy to assist further if you need anything clarifying or more detailed advice.

Yours sincerely,

Frances Woodhead.

Consultant.