

## **Committee: Council**

**Date: 1 February 2017**

Wards: All

## **Subject: Merton Priory Homes Governance**

Lead officer: Simon Williams, Director of Community and Housing

Lead member: Councillor Martin Whelton, Cabinet Member for Regeneration, Environment & Housing.

Contact officer: Steve Webb, Housing Business Support and Relationship Manager

---

### **Recommendations:**

That, Council resolves:

- A. That members note Circle Housing plans to collapse the group structure and consolidate the separate housing associations into one association.
- B. That members note the powers that the council has in order to affect and influence decision making.
- C. That members note the proposed Community Panel for Merton and that any changes to the panel's Terms of Reference will be with the council's consent.
- D. That members note how the Housing and Planning Act 2016, Section 93, impacts on the council's powers and those of the council's nominated board members to the Merton Priory Homes board.
- E. That members note the recent Homes and Community Agency regulatory notice issued against Clarion Housing Group (appendix 2).
- F. Subject to acceptable final terms for the variations to the Stock Transfer Agreement (STA), council supports these governance proposals and gives its consent to vary the STA and that the council will use its shareholder vote to agree to the proposed changes at shareholder meetings.
- G. That members delegate authority to the Director of Community and Housing to agree final terms of the variations to the STA which will include the Terms of Reference for the Community Panel.

---

### **1. PURPOSE OF REPORT AND EXECUTIVE SUMMARY**

- 1.1 The primary purpose of this report is to update members on the Circle Housing plans to simplify the group structure and consolidate the nine housing associations in the group, including Merton Priory Homes (MPH), into one association and to seek members support for these plans.
- 1.2 Circle Housing are implementing a programme known to Circle as "Resurgence". Circle are not currently in a position to implement this in Merton without the council's approval, which they have requested with regards to variations to the Stock Transfer Agreement.

- 1.3 The council is a shareholder of MPH. It is necessary, in its role as shareholder, for the council to also agree a position on how to exercise its vote in forthcoming shareholder meetings on the proposals and whether they are in the best interests of tenants and leaseholders in providing accountability for their performance and services within Merton.
- 1.4 The report seeks to set out Circle's plans, the powers of the council, the impact on the MPH residents.
- 1.5 The council has taken its own legal advice on these plans.

## **2. DETAILS**

This section of the report covers:

- Background on the stock transfer
- Circle restructure / resurgence
- The council as a shareholder
- Housing and Planning Act 2016
- Impact on Stock Transfer Agreement
- Merton community panel
- Resident consultation
- Impact on regeneration
- HCA Regulatory Notice
- Factors for consideration when reaching decisions

### Background on stock transfer

- 2.1 The council transferred its former housing stock to Merton Priory Homes on 22 March 2010 following a positive ballot of tenants in June 2009.
- 2.2 Merton Priory Homes (MPH) [known later as Circle Housing Merton Priory] is a subsidiary of Circle Housing (Circle Anglia Ltd) and at the time of formation was one of the nine distinct housing associations in the Circle Housing group. The company is still registered as Merton Priory Homes, and for consistency will be referred to as Merton Priory Homes or MPH in this report.
- 2.3 There were 91 promises arising from the offer document to transferring tenants and leaseholders. 88 of these have been completed.
- 2.4 The stock transfer is underpinned by the Stock Transfer Agreement (STA). This is a legally binding agreement between LBM and MPH (or its successors.) The STA is independent of the restructure or merger.

### Circle restructure / resurgence

- 2.5 Circle report that following the governance downgrade by the HCA in April 2015 they worked with the HCA and sector consultants to improve their decision making processes and services for their customers.
- 2.6 They determined that a key element for Circle Housing to overcome adverse events in the future and maintain good service standards was to consolidate the group of charitable registered providers / housing associations. According to Circle, the collapsing of the groups nine registered providers (RPs) is intended to provide them with greater financial resilience and clearer accountability.
- 2.7 The consolidation from nine RPs to one RP would take the form of a “transfer of engagements” of eight of the RPs to Circle 33. Transfer of engagements is a statutory process available to community benefit societies. Merton Priory Homes and Circle 33 are both community benefit societies. The process is that a society may, by approval at two meetings of its shareholders, agree to transfer its engagements to another society (the receiving society), which agrees to undertake those engagements. The “engagements” of the transferring society (i.e. all assets and liabilities) then pass automatically to the receiving society when the relevant resolutions of the shareholders are registered at the FCA. The liabilities which pass to the receiving society include the obligations under a stock transfer.
- 2.8 There is a planned consolidation of RPs from July 2016 to March 2017 in four phases. Merton Priory Homes are in phase 4 and the Circle Resurgence plans are for this to be completed by March 2017. Three RPs have already transferred to Circle 33 and MPH is currently one of six RPs in the group.
- 2.9 The council, as a shareholder, has not received notification from Circle of the outcome of any board decisions to move forward on scheduling special shareholder meetings to vote on the “transfer of engagements.”
- 2.10 In the event that Circle Resurgence goes ahead as planned, this would result in the disbandment of MPH and its Board.
- 2.11 Circle express an intention to retain a local focus through the implementation of a local community panel and the transition of the resident scrutiny panel to the new Service Quality Panel. These will operate alongside a regional panel for south London.

### The council as a shareholder

- 2.12 The council’s role as a shareholder is enshrined in the Company’s Rules.
- 2.13 Rule C8 states “...*The Parent and the Council shall be shareholders.*”. To that end, under the Rules, it is not possible for the Council to be removed as a shareholder unless it agrees to be removed.
- 2.14 The council is a shareholder of the company and has 33% of the voting rights. This provides the council with the ability to block any resolution which requires a 75% majority of shareholders to vote in favour of a resolution.

This means the council has the ability to block any resolution to dissolve or wind-up the company.

- 2.15 However, the council will not be able to block a resolution in relation to a transfer of engagements or an amalgamation, which only requires a two-thirds majority decision of the shareholders. The rules provide that each of the council shareholder, the independent shareholders and the resident shareholders hold 33% of the voting rights each, with the Parent holding the additional 1%. To that end, it would be possible for the independent shareholders, the resident shareholders and the parent to form the required majority to pass a resolution for the company to transfer its engagements or amalgamate.
- 2.16 The council's powers as a shareholder may be reduced or removed if Section 93 of the Housing and Planning Act 2016 is enacted. (Further details are in the next section).
- 2.17 It should be noted that MPH resident board members and independent board members are all shareholders. Council nominated board members are not shareholders and it is "the council" that is the shareholder.
- 2.18 Circle Housing are proposing a special meeting of shareholders in order to vote on the proposal to transfer Merton Priory Homes to Circle 33. The meeting is likely to take place after the council has agreed on how it will use its shareholder vote. No date has been confirmed for the Special meeting of shareholders, however Circle are keen to meet soon after 1 February 2017.

#### Housing and Planning Act 2016

- 2.19 Section 93 of the Housing and Planning Act 2016 ("the Act") contains provisions which seek to reduce the influence local authorities have over private registered providers. The Act came into force in part on the 12 May 2016. Section 93 has not yet been enacted.
- 2.20 Section 93 of the Act enables the secretary of state to make regulations for the purpose of limiting or removing the ability of local authorities to exert influence over private registered providers through appointing or removing officers and exercising or controlling voting rights. For the avoidance of doubt, the definition of 'officers' under the act includes board members. Section 93(2) provides that any such regulations may in particular:
  - i. limit the number of officers a local authority may appoint
  - ii. prohibit a local authority from appointing officers
  - iii. confer powers on a private registered provider to remove officers appointed by a local authority
  - iv. prohibit a local authority from doing things that would result in it obtaining voting rights in a private registered provider
  - v. require a local authority to take steps to reduce or get rid of any voting rights that it has in a private registered provider.
- 2.21 Section 93(3) as drafted proposes that any such regulations *may* override or modify any contractual or other rights (wherever created) or anything in a private registered provider's constitution. This could mean that the contractual provisions written into the Transfer Agreement and the

protections set out in the company's rules (relating to the governance of the provider) could be overridden by the enactment of Section 93.

- 2.22 These provisions are not yet enacted. If, or when, such regulations are made, the council's protections relating to governance could be removed in their entirety. This would leave the council with no ability to influence or control the ability of the Parent to collapse the Company, along with the other eight registered providers in the Circle Anglia group, into one entity.

#### Impact on Stock Transfer Agreement

- 2.23 As outlined earlier in the report, if the transfer of engagements to Circle 33 were to go ahead the liabilities of Merton Priory Homes pass to Circle 33, and this includes the obligations agreed under the stock transfer.

- 2.24 There are three clauses in the Stock Transfer Agreement that require consent or consultation between MPH and the London Borough of Merton.

- I. Paragraph 27 of Schedule 4 (the Deed of Covenant) requires MPH to obtain the council's consent (not to be unreasonably withheld or delayed) before changing the Company's status as a separate legal entity. This obligation is time limited. Council's consent will not be required after 22 March 2017.*

A transfer of engagements may take place before this date, and so Circle ask for the council's consent to this.

- II. Paragraph 12 of Schedule 4 requires MPH not to change its constitution in so far as it relates to local authority and tenant and leaseholder representation without the council's prior consent in writing (which in the case of tenant and leaseholder representation shall not be unreasonably withheld or delayed). There is no time limit on this provision.*

As set out above the effect of a transfer of engagements from MPH to Circle 33 is to transfer this obligation to Circle 33. After Circle 33 has accepted transfers of engagements from the other eight housing associations in the group, it will be bound by the provisions of 10 separate stock transfer agreements. Circle note that it will not be possible to have representation from each of the local authorities at the Board level and therefore are asking each local authority with the benefit of a restriction regarding such governance arrangements to agree to vary the stock transfer so as to remove this provision after the transfer of engagements.

- III. Paragraph 19 of Schedule 4 contains a commitment to consult the council if MPH intends to move its headquarters outside Merton. After a transfer of engagements this obligation would apply to Circle 33, whose headquarters would not be in Merton.*

Circle initially requested to vary this clause so that it requires consultation if there is any proposal to move an existing office outside of the Borough of Merton, rather than the headquarters alone. Varying this clause, as initially proposed by Circle, would mean that Circle would only need to consult the council if they wished to move any of their offices outside the borough.

Following further discussion Circle have confirmed their commitment to retaining an office in the borough and have agreed that any variation should reflect that commitment. The exact wording of the variation is still to be finalised.

#### Merton community panel

- 2.25 Circle Housing are prepared to recognise the need for a local body to support and monitor the housing operations in Merton. With the planned disbandment of the MPH Board, they are proposing the creation of the Merton Community Panel. (see Appendix 1: Merton community panel draft terms of reference)
- 2.26 The Merton community panel is proposed to be a consultative panel established to support Circle Housing in monitoring the following in Merton:
- regeneration activity,
  - delivery of the housing and estates services,
  - development and delivery of the Group's Community Investment strategy
- 2.27 The panel shall consist of between 8 and 12 members, ideally (at full membership) 6 residents, 4 independents and 2 nominees from LBM. Employees shall not be members. The chair shall be an independent member appointed by Circle Housing. The panel may co-opt up to 3 (non-voting) co-optees, to fill temporary vacancies or to meet a skill gap on the Panel.
- 2.28 Circle propose that the panel shall continue for a period of 10 years or such shorter period as Circle Housing, with the consent of LBM, might reasonably determine having regard to the Panel's effectiveness. There will be a review at the end of each period of 2 years to consider the effectiveness, terms of reference, activities and membership. Any changes arises shall be with the consent of LBM.
- 2.29 Council Officers have worked with Circle Housing to review the terms of reference for the panel in order to ensure that any new structure ensures that the voice of residents is heard and that there is accountability for their performance. Agreement has been reached on all matters and the Terms of Reference will be included in the STA Deed of Variation.

#### Resident consultation

- 2.30 Circle commenced a 6 week period of resident consultation on 19 October 2016 for all MPH tenants and leaseholders. Circle note that the consultation

follows accepted HCA guidelines and was discussed with their tenant representatives.

- 2.31 The consultation document was sent to 9,500 MPH tenants and leaseholders and the consultation period closed on 30 November. There was also an online facility available, through Circle Voice.
- 2.32 Resident feedback to the consultation was low – 41 responses. 17 positive, 9 Negative and 15 Neutral. Circle have indicated that the low level of feedback has been consistent with consultation in other areas within the group, largely, Circle believe, this is because most tenants are concerned with rents, tenancy rights and service issues, none of which are impacted by changes to the legal structure.

#### Impact on regeneration

- 2.33 Circle have indicated that regeneration is dependent upon the completion of their resurgence plans.
- 2.34 Circle have made indications that the group cannot take forward financial plans for regeneration until resurgence has completed.

#### HCA Regulatory Notice

- 2.35 In December 2016 the regulator issued a notice that concluded that Clarion's predecessor organisation Circle Anglia Ltd (Circle) has breached the Home Standard and risked serious detriment to its tenants.
- 2.36 The main points were that the regulator received
- a large number of complaints and referrals in relation to the performance of the repairs and maintenance service provided to tenants of Circle Anglia Limited, particularly in east London
  - information in relation to the performance of Circle's customer contact systems and complaints in relation to those systems
  - information relating to Circle's performance on general statutory compliance
- 2.37 The regulator is considering what further action should be taken, including whether to exercise any of its powers. The full regulatory notice is attached as Appendix 2.

#### Factors for consideration when reaching decisions

- 2.38 Circle's review of their governance is identified by Circle as a driver for the Resurgence programme.
- 2.39 There is an agreed need for there to be a local voice and oversight of how a very large housing group performs operationally and delivers regeneration. The Community Panel which is specific to Merton, alongside the regional panel for south London, is intended to provide for this. The issue is whether the proposed terms of reference enable this panel to perform this function

adequately and whether there is accountability for their performance in Merton that provides a voice for residents.

- 2.40 Resurgence is a distinct set of plans specific to Circle Housing. It is not part of the merger with Affinity Sutton and was planned before the merger and the creation of the Clarion Group. Given the merger, the new organisation will be even bigger.
- 2.41 In discussion with Circle it is proposed to address these issues via the implementation of the Merton Community Panel. (Appendix 1 - Merton Community Panel Draft Terms of Reference)
- 2.42 Operational performance, especially on responsive repairs, is separate to these plans, but sets the backdrop against which the large group deliver improved performance. Currently a number of indicators are below target. MPH performance has been monitored at Sustainable Communities Overview and Scrutiny panel.
- 2.43 The HCA issued a Regulatory Notice to the Clarion Group dated December 2016 as it had concluded that the group's predecessor Circle Anglia Ltd had breached the Home Standard and risked serious detriment to its tenants. The regulator is considering what further action should be taken. The Regulatory Notice is attached as Appendix 2. Circle argue that this notice should not be taken to signify poor performance in Merton as the complaints came from elsewhere in London. However, we have been provided with no comparative figures from Circle Housing to compare performance.
- 2.44 The STA has a sunset clause to 22 March 2017 which requires the council's consent before changing the Company's status as a separate legal entity. However, there is no sunset clause regarding consent to change the Board's constitution in so far as it relates to local authority and tenant and leaseholder representation (and it could be argued that any changes to the board constitution by definition include such representation as it is embedded in the current arrangements). This council would retain the ability to block this after March 2017, subject to section 93 of the Housing and Planning Act being enacted.
- 2.45 The third STA amendment requested is to vary Schedule 19 Paragraph 4 to consult the council if they have any proposals to move an existing office outside of the borough, from the current obligation to consult the council if they propose to move the headquarters outside of the borough. Agreeing to this variation runs the risk of watering down the obligation to keep a housing office in the borough. Circle have subsequently confirmed their commitment to retaining an office in the borough and will ensure that the wording within the variation reflects this.

### **3. ALTERNATIVE OPTIONS**

- 3.1 The council could decline to use its shareholder vote to support the amalgamation of MPH with Circle 33. The council's 33% share is in itself not enough to stop the plans. For the plans to be blocked by shareholders would require a minimum of one additional shareholder to vote against the plans.



- 3.2 The council could decline to sign off any amendments to the Stock Transfer Agreement before March 2017. The requirement for the council to consent to change MPH's status as a separate legal entity lasts until 22 March 2017. The council has no option to consent after this date on that particular clause.
- 3.3 The council's written consent is required for MPH to change its constitution in so far as it relates to local authority, tenant and leaseholder representation. If the council refused to give its consent they could face a challenge by Circle if the refusal was found to be unreasonable. However, this may also mean that Circle would need to agree an alternative mechanism for such representation in the new governance structure. The need to ensure appropriate representation is why the proposed Community Panel assumes such importance.
- 3.4 MPH are required to consult the council if they wish to move their headquarters outside of the borough. The council's consent is not required. However MPH are still obliged to maintain offices open to the public during normal office hours in the borough. This variation will be changed in order for Circle to seek the council's consent to move offices outside the borough rather than simply consult the council.

#### **4 CONSULTATION UNDERTAKEN OR PROPOSED**

- 4.1 Circle Housing have completed a period of resident consultation between 19 October 2016 and 30 November 2016.
- 4.2 Circle note that the consultation is conducted in accordance with HCA Guidelines.
- 4.3 Officers have consulted with council nominees to the MPH Board.

#### **5 TIMETABLE**

- 5.1 Circle Housing are seeking to complete their Resurgence plans by the end of March.
- 5.2 A Special Shareholder meeting will be held following the February 2017 full council meeting.

#### **6. FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS**

- 6.1 All obligations laid out in the Stock Transfer Agreement (with the exception of the three clauses referred to earlier) between MPH and LBM would remain in place and MPH's obligations would transfer to Circle 33.
- 6.2 There is no anticipated financial impact on the council.
- 6.3 Any property related contractual agreements between MPH and LBM would transfer to Circle 33 and LBM.

## **7. LEGAL AND STATUTORY IMPLICATIONS**

7.1 The council's relationship with Circle is twofold, one as shareholder and the other a contractual relationship under the Stock Transfer Agreement. The advice in relation to the council's relationship under the Stock Transfer Agreement is set out below.

7.2 Under the Stock Transfer Agreement

7.2.i Paragraph 27 of Schedule 4 to the agreement. MPH promise for a period of 7 years from the 22 March 2010 not to change the Company's status as a separate legal entity within its group ... without the written consent of the council provided that during the last two years the council shall not unreasonably delay or withhold its consent.

MPH must obtain the council's consent to alter its status and the council must act reasonably in giving it.

'Reasonable' is very wide and can have different meanings. To simply say No would be unreasonable, the council should be able to show that it has considered the request and the decision they have come to is rational, reasonable, proportionate and balanced.

The council is able to withhold consent to a request from Circle until March 2017.

In the event MPH proceed without consent they will be in breach of contract and the council would be able to bring an action for breach of contract.

7.2.ii Paragraph 12 of schedule 4 of the Agreement. MPH promises not to change its constitution in so far as it relates to local authority and tenant and leaseholder representation without the council's written consent. There is no requirement in this clause for the council to act reasonably. There is a general implied duty to do so.

The council's written consent is required by MPH under the agreement to allow a change to be made. Failure to obtain it would leave MPH open to challenge by the council.

7.2.iii Paragraph 19 of schedule 4 to the Agreement requires MPH to consult with the council if they wish to locate their headquarters outside the borough. MPH are obliged to maintain offices open to the public during normal office opening hours in the borough of Merton.

MPH have a duty to consult with the council before they implement any changes. If they failed to do so the council would be able to challenge them.

Varying Paragraph 19 of Schedule 4, would allow MPH to move their offices outside the borough on consultation only. Their subsequent commitment to retain an office in the borough should be reflected in a legally binding agreement between the council and MPH to protect it.

The Housing and Planning Act 2016 came in to force in part on the 12 May 2016. Section 93 has not yet been enacted and it remains unclear when it will be. Section 93 is intended to reduce the influence a local authority has over private registered providers.

### 7.3 The council as shareholder.

7.3.i The council is a shareholder of the Company and has 33% of the voting rights. This provides the council with the ability to block any resolution which requires a 75% majority of shareholders to vote in favour of a resolution. This means the council has the ability to block any resolution to dissolve or wind-up the Company.

7.3.ii However, the council will not be able to block a resolution in relation to a transfer of engagements or an amalgamation, which only requires a two-thirds majority decision of the shareholders. The Rules provide that each of the council shareholder, the independent shareholders and the resident shareholders hold 33% of the voting rights each, with the Parent holding the additional 1%. To that end, it would be possible for the independent shareholders, the resident shareholders and the Parent to form the required majority to pass a resolution for the Company to transfer its engagements or amalgamate.

7.3.iii The council's powers as a shareholder may be reduced or removed if Section 93 of the Housing and Planning Act 2016 is enacted.

7.3.iv MPH Resident board members and Independent board members are all shareholders. Council nominated board members are not shareholders and it is "the council" that is the shareholder. Those board members act as nominees for the council.

## **8. HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS**

8.1 There is a need to ensure that proposed organizational changes are such that there is still a voice for local people.

## **9. CRIME AND DISORDER IMPLICATIONS**

9.1 There are no crime and disorder implications anticipated.

## **10. RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS**

### Risk assessment

10.1 No immediate financial risk. The obligations laid out in the STA will transfer from MPH to Circle Housing. Commitments will still need to be met by both parties.

10.2 Lack of a distinct organisational local voice.

Health and Safety Implications

10.3 No specific health and safety implications have been identified.

**11. APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT**

1. Merton Community Panel – Draft Terms of Reference
2. HCA Regulatory Notice – December 2016

**12. BACKGROUND PAPERS**

**NONE.**