

BUCKINGHAMSHIRE LOCAL ENTERPRISE PARTNERSHIP

ADVICE ON CORPORATE APPROVALS AHEAD OF THE PROPOSED TRANSFER OF FUNCTIONS AND  
SUBSEQUENT WIND UP OF BUCKINGHAMSHIRE LOCAL ENTERPRISE PARTNERSHIP LIMITED

**1 INTRODUCTION**

- 1.1 We are instructed by Buckinghamshire Local Enterprise Partnership Limited (the **LEP**) to advise on certain legal aspects of the proposed integration of the LEP functions into Buckinghamshire Council (**the Council**).
- 1.2 The purpose of this advice note is to set out the legal requirements and anticipated corporate process for the integration of the LEP's functions into the Council. The current target date for the transfer of LEP functions (to include asset and staff transfer) is 1 March 2024. We suggest that this advice is treated as a 'live' document as it is likely that certain elements of the advice will need updating as the integration process progresses.
- 1.3 This advice note will concentrate on the following areas:
- 1.3.1 The corporate approvals required for ahead of the proposed transfer of functions, to include advice on whether directors representing private sector organisations should resign ahead of this transfer.
  - 1.3.2 Following the transfer, the process for winding up the legal entity of the LEP.
  - 1.3.3 Other legal issues to be considered as part of the transfer and wind-up processes.

**2 CORPORATE APPROVALS**

- 2.1 The decision that sees LEPs being required to transfer their functions into appropriate first tier authorities is one mandated by the UK government. However, as the LEP in its current form is established as a company limited by guarantee it is required to follow both its own corporate approvals process and the relevant provisions of the Companies Act 2006 (the **Act**) ahead of the transfer taking place.

**Governance within the LEP**

- 2.2 As with all limited companies, governance within the LEP takes place at two broad levels. At the top level, members of the company (the shareholders) are its subscribers and guarantors. Members will, by law, be required to make certain decisions that are significant in nature. Below the members sit the directors, who are entrusted by the members to run the company on its behalf in accordance with the company's constitution that was adopted by the members. The board of directors take most company decisions and are responsible for running the LEP on a day-to-day basis. In the case of the LEP (as with many other companies limited by guarantee) the members and the directors are one and the same. The integration process will see decisions made at both the member level and the director level. It is important that the two decision-making forums are noted as being distinct, with separate meetings being held where appropriate with records that indicate that the relevant decision was taken in the correct forum.
- 2.3 Unlike other companies, incorporated local enterprise partnerships need to adhere to the terms of their adopted assurance framework, which is a document that supplements the LEP's articles of association (its constitution) and sets out the systems and processes to ensure value for money, greater transparency, and visibility of its activities across a range of local interventions. Local enterprise partnerships also need to have regard to the National Assurance Framework (the **NAF**), which is a document written by the UK government to ensure local enterprise partnerships have in place the necessary systems and processes to manage the differing needs and demands of each area.

- 2.4 The corporate approval processes that the LEP needs to follow will therefore need to comply with the LEP's articles of association, the Act, the LEP's assurance framework and the NAF. This is not only relevant for determining the correct approvals process, but also in the context of the ordering of certain events (for example, the potential resignations of the private sector directors in advance of the proposed transfer date).

#### Early resignation of private sector directors

- 2.5 It is understood that, in other local enterprise partnerships going through the integration process, the directors representing the private sector have resigned ahead of the transfer of functions into the relevant local authority. We are asked to consider whether this is advisable in the case of the LEP. We consider this point early in the advice as the corporate approvals process is driven largely by the make-up of the board and this issue will impact on the processes that follow.
- 2.6 **Summary:** *we advise that private sector directors should remain on the board until the transfer of the LEP functions to the Council.*
- 2.7 Our initial analysis suggested that there may be a way in which the early resignation of the private sector directors could be facilitated. It is still possible to implement this approach, but our view is that for as long as the LEP is carrying out the functions entrusted to it and as stipulated by the NAF, the board should be composed in accordance with the government guidance. The NAF states that the LEP should have a private sector Chair and at least 50% of the rest of the board should also come from the private sector<sup>1</sup>. The NAF was not of course written with the Government dissolving LEPs in mind, but current Government guidance stipulates that the governance rules (and the NAF as a whole) should apply for the time that the LEP is carrying out the functions entrusted to it<sup>2</sup> – something that it will be doing to the point that these functions are transferred to the Council.
- 2.8 In addition to the NAF, the LEP also has its own Assurance & Accountability Framework (**BAF**). While there are provisions that deal with how a director can resign<sup>3</sup> (by giving written notice to the board), the BAF should be read as a whole. Clause 3.2 deals with the need for private sector membership of the Board<sup>4</sup> and again sets out clearly that up to 10 directors should be representatives of the private sector<sup>5</sup>. It follows that if the private sector directors resign, the LEP will be operating (admittedly for a short period of time) in contravention of both the NAF and the BAF.
- 2.9 Article 7.2 states that decisions of the LEP should be carried out in accordance with the BAF. Decisions on Board membership should reflect clause 3.2.2 of the BAF – board makeup should include up to 10 private sector directors. Article 13.2 sets the quorum for Board meetings at 7 directors and without those 7 directors present, any business to be dealt with at that meeting cannot be decided on (other than a decision to appoint more directors)<sup>6</sup>. Both Article 7.2 and 13.2 conflict with the potential desire to keep a skeleton number of directors on the Board while the LEP continues to carry out its functions. Moreover, it would arguably make the decision to transfer the assets and functions of the LEP to the Council *ultra vires* i.e. it could be considered void if challenged.
- 2.10 If it still wished to proceed with this route, the LEP would need to amend its articles to allow a skeleton number of directors to remain on the board. This is possible but given the newly compressed timetable our view is that undertaking this additional corporate step would result in unnecessary cost, would add a layer of complexity, and may also put the LEP in breach of the NAF. We suggest that keeping the board

<sup>1</sup> Clause 1.1, bullet point 1, NAF [https://assets.publishing.service.gov.uk/media/5a7f83c6ed915d74e33f6e86/161109\\_LEP\\_Assurance\\_Framework.pdf](https://assets.publishing.service.gov.uk/media/5a7f83c6ed915d74e33f6e86/161109_LEP_Assurance_Framework.pdf)

<sup>2</sup> Para 51, Guidance for Local Enterprise Partnerships (LEPs) and local and combined authorities: integration of LEP functions into local democratic institutions: <https://www.gov.uk/government/publications/local-enterprise-partnerships-integration-of-lep-functions-into-local-democratic-institutions/guidance-for-local-enterprise-partnerships-leps-and-local-and-combined-authorities-integration-of-lep-functions-into-local-democratic-institutions>

<sup>3</sup> Clause 3.2.10, BAF <https://www.buckslep.co.uk/wp-content/uploads/2022/08/Bucks-LEP-Assurance-Framework-25.pdf>

<sup>4</sup> Clauses 3.2.2 and 3.2.4, BAF <https://www.buckslep.co.uk/wp-content/uploads/2022/08/Bucks-LEP-Assurance-Framework-25.pdf>

<sup>5</sup> Clause 3.2.2, BAF <https://www.buckslep.co.uk/wp-content/uploads/2022/08/Bucks-LEP-Assurance-Framework-25.pdf>

<sup>6</sup> Article 13.3

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composed until the final transfer documents have been approved would be the most appropriate approach.

### Corporate approvals timeline

2.11 What follows is a table that sets out the corporate approvals that we consider would be necessary to take the LEP from its current position to its final wind up. It should be noted that these timescales can be compressed if the board / members agree to shorter notice periods than those that are set out in the LEP's articles of association. For the reasons set out later in this note, we have also assumed that the LEP will not go through a formal liquidation process. Rather, the simpler voluntary strike off procedure will be used.

Date	Decision and/or action	Decision-making forum
<i>Up until February, standard board meeting cycles, but it is acknowledged that these will be called as required to transact necessary business in the run up to LEP integration</i>		
Not less than 10 Business Days before 1 March 2024 (latest would be 14 February 2024).	Notice of board meeting to be circulated. A shorter notice period can be agreed amongst directors, but that notice should be reasonable.	n/a
On or around 1 March 2024  (although could be held in advance if all documents are ready or almost ready for signature)	Board meeting of the LEP to approve the entry by the LEP into the following final form draft documents ( <b>Completion Documents</b> ): <ul style="list-style-type: none"> <li>Business and asset transfer agreement (including TUPE provisions)</li> <li>Any contract novations or assignments from the LEP to the Council, including loan recipients</li> <li>Any contract terminations.</li> </ul> Board will also need to approve the delegation to one/two directors to agree final changes to the documents and to execute the Completion Documents.	Board of directors
1 March 2024	<b>Completion of the Completion Documents</b>  <b>Transfer of functions from the LEP to the Council</b>	n/a
On or just after 1 March 2024	Following completion of the Completion Documents, the assets and functions of the LEP will have been transferred. A subsequent short board meeting can be held to note the resignations of most of the board of directors.  One or two directors should remain in place to oversee the wind-up process.	Board of directors
	Once the resignations of the directors are noted, the remaining directors should meet or sign a written resolution to agree a form of member resolution to adopt new articles that will be 'vanilla' articles to allow for a smaller board and without the LEP's current governance regime	Board of directors to agree form of written resolution  <i>then</i>  Members to approve adoption of new articles

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Period of three months to comply with statutory period of inactivity		
1 June 2024	Assuming no trading activity during this period, written resolution of remaining directors to approve application to strike of the company. Notice of the proposed strike off to be given to any remaining employees, creditors or members.	Board of directors
August 2024	Assuming no objections are received to the winding up, Companies House will strike off the company within two months, which will likely be in August 2024 if timescales are maintained.	n/a (the strike off will happen automatically)

### 3 WINDING UP THE LEP

- 3.1 In this section we consider the methods by which the LEP should be wound up.
- 3.2 A solvent company is ordinarily wound up and removed from the Companies House register in one of two ways:
- 3.2.1 Voluntary Strike off and Dissolution (**Voluntary Strike Off**); and
- 3.2.2 Members Voluntary Liquidation (**MVL**).
- 3.3 **Summary:** *our view is that a voluntary strike off process is the most appropriate due to its simplicity, speed and cost effectiveness. It is a process that is typically used when a company is no longer required and has had its assets transferred to leave it inactive.*
- 3.4 We consider both processes below.

#### Voluntary Strike Off

- 3.5 Voluntary Strike Off allows a solvent company to be removed from the register of companies and dissolved after following the relevant process in Chapter 1 Part 31 CA 2006.
- 3.6 Application for Voluntary Strike Off is made using Companies House form DS01. When the application is made, the directors must confirm that within the past three months the company has not:
- 3.6.1 Changed its name;
- 3.6.2 Traded or carried on its business;
- 3.6.3 Disposed of, for value, property or rights which it held for the purpose of disposal in the normal course of business; and
- 3.6.4 Engaged in any activity other than ones necessary for concluding the winding up of the company or complying with statutory requirements.
- 3.7 Further to these restrictions, the application must not be made at any time when the proceedings set out at section 1005, CA 2006<sup>7</sup> are ongoing.

<sup>7</sup> Section 1005 CA 2006 lists numerous insolvency related proceedings including: Scheme of arrangements, Part 26A restricting plans; Company Voluntary Arrangements, Administration, Moratoriums, Winding Up Petitions, appointment of a receiver of property. These are highly unlikely to be relevant.

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- 3.8 The key point to note from the above requirements is that Voluntary Strike Off is a process which can only be utilised by dormant companies. Whilst CA 2006 does not define what is meant by “*traded or otherwise carried on business*” (other than section 1004(2) which excludes payments to creditors), normal rules of statutory interpretation would hold that trading or carrying out business would entail a company conducting any of its ordinary activities. In the case of the LEP, this would mean carrying out the functions that had been entrusted to it.
- 3.9 It is therefore a requirement that following the transfer of the functions of the LEP to the Council the LEP experiences a period of dormancy where only matters relating to the wind up are dealt with. As noted above, this can include paying or otherwise dealing with any remaining creditors.

### MVL

- 3.10 MVL is a procedure through which the value of a solvent company’s assets are realised and the proceeds are distributed to the company’s creditors and members by a liquidator before the company is dissolved.
- 3.11 The procedure for MVL is set out in the Insolvency Act 1986 (**IA 1986**) and the Insolvency (England and Wales) Rules 2016 (**IR 2016**) and is summarised in the diagram at Annex A to this advice note.
- 3.12 The procedure is as follows:
- 3.12.1 **Statutory Declaration:** The company must make a statutory declaration of solvency made by the majority of directors to the effect that, having made a full inquiry into the company’s affairs, they are satisfied that the company will be able to pay its debts in full, together with any interest, within a specified period not exceeding 12 months from the winding up.
  - 3.12.2 **Special Resolution:** The Company will go into MVL for its winding up after the members pass a special resolution for its winding up within 5 weeks of the statutory declaration (Section 84 IA 1986 and Section 283 CA 2006).
  - 3.12.3 **Appointment of Insolvency Practitioner:** At the same general meeting at which the special resolution is passed, the members of the company must also appoint an insolvency practitioner to act as liquidator for the purposes of the winding up.
  - 3.12.4 **Winding Up:** Once the liquidator has completed their work and all tax matters have been finalised, the liquidator files a final return at Companies House and the company is automatically dissolved and struck from the register after three months.

### Differences between the processes

- 3.13 We set out in summary the key differences between the two winding up processes:

	Voluntary Strike Off	MVL
General responsibility.	The directors remaining following the transfer will have the legal responsibility for ensuring that the company is wound up in accordance with the legal process. This is a straightforward process for a company like the LEP and one that requires only light touch legal support.	Once the members have passed the resolution to put the company into liquidation, the responsibility for winding up passes from the directors to the appointed liquidators. One of the advantages of an MVL process is that the liquidators contact any creditors and deal with the payments required. However, as all assets and liabilities are being transferred to the Council, this is probably excessive.

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	Voluntary Strike Off	MVL
Directors' responsibilities and liabilities ( <i>in both cases the risk of personal liability is very low as both processes deal with solvent wind-ups</i> )	Directors are responsible for the process, but as stated the LEP's strike off process is likely to be simple. If following a strike off creditors do come out of the woodwork, they can apply to have the company restored to the roll so the debt can be recovered. However, in practical terms they will simply rely on the indemnity from the Council.	As a liquidation is carried out independently of the company any creditors are unlikely to be able to make a claim once the liquidation process has been completed.
Remaining net assets	If net assets exist in the business following the strike off, these will be held <i>bona vacantia</i> and become the property of the Crown. The risk of this occurring is low as there will be a "sweep-up" clause in the transfer agreement.	The liquidators will ensure all net assets are passed in accordance with the company's articles of association (in this case, this will be to the Council anyway – see below for further information).
Cost	The application itself costs £8.00. Legal support for this aspect should be no more than £2,000	An MVL process is generally more expensive. Simple companies, which the LEP is, often attract fees around the £10,000 mark.
Timescale	From the point of transfer of functions, 5 months (3 months dormancy, 2 months awaiting strike off approval)	6-12 months from appointment of liquidator (likely to be at the shorter end given the simplicity of the LEP)

### Distribution of surplus assets

- 3.14 In both the voluntary strike-off and MVL procedures described above, the provisions of Article 5 of the LEP's Articles need to be considered. It states that:

*"On the winding up or dissolution of the Company, after provision has been made for all its debts and liabilities, any assets or property that remain available to be distributed or paid, shall not be paid or distributed to the Members but shall be transferred to similar bodies or another body with similar objects to those of the Company within the LEP Area."*

- 3.15 Under the Voluntary Strike Off route, the directors will need to ensure that all assets and liabilities of the LEP are transferred or assigned to the Council. Any surplus assets that
- 3.16 A liquidator appointed to carry out a MVL would distribute surplus assets in accordance with this Article 5 to "similar bodies or another body with similar objects to those of the Company within the LEP Area". This presumably would include the Council.

## 4 APPROACH TO THE INTEGRATION PROCESS

- 4.1 A consequence of the Government's requirement for local enterprise partnerships to incorporate into limited companies in 2018 was to make them independent organisations subject to company law. Whilst each local enterprise partnership was required to incorporate into its constitution an assurance framework (for the LEP, the BAF) and to adhere to the provisions of the NAF, this is ultimately as far as Government's reach



was intended to go. Local enterprise partnerships, once incorporated, were independent organisations that, through the board, were empowered to make decisions in accordance with what each board felt would best achieve its objectives as set out in its articles of association.

- 4.2 It is important to raise this point as this independence continues to exist notwithstanding Government's intention for the functions of local enterprise partnerships to be transferred to first tier authorities, as does the requirement for each individual director (and the board collectively) to act in the best interests of the company in pursuance of the objectives that it adopted upon incorporation in 2018.
- 4.3 Government recognises the independent nature of local enterprise partnerships and acknowledges in its guidance that "*As private enterprises, LEPs may choose to continue operating...*"<sup>8</sup>. The government is ceasing core funding for local enterprise partnerships and is anticipating that these functions will transfer to first tier authorities, but it is not mandating this. This is important as it highlights the need for the board of the LEP to consider carefully the proposed transfer of functions and assets to the Council and whether it feels it would be acting in pursuance of its objects by agreeing to such a transfer.
- 4.4 At this point, it is worth restating the adopted objectives of the LEP, which are set out in article 2 or the articles of association:

**2. OBJECTS**

2.1. The objects for which the Company is established (**Objects**) are:

- 2.1.1. to stimulate economic growth, productivity, employment, community development, job creation, inward investment, training and development, and commerce in the LEP Area; and
- 2.1.2. to promote the LEP Area positively at regional, national, European and international levels on matters affecting its economic development.

- 4.5 When considering the terms upon which the LEP is proposed to transfer its functions (and assets) to the Council, directors will need to be mindful of the LEP's objects and each director should be satisfied that the decision to transfer will be in the best interests of the company (*section 172, Companies Act 2006*)<sup>9</sup>. Section 172 also requires that, when considering whether a decision is in the best interests of the company, directors should also have regard to (amongst other things) the interests of the company's employees. These interests should not drive the decision, but they must be considered as part of the wider picture<sup>10</sup>.
- 4.6 Notwithstanding these considerations, directors may feel that the decision to transfer functions is in all but name a requirement as the Council's intention is to fulfil the functions of the LEP going forward and the LEP as a company will no longer receive the core funding from Government. Directors may therefore be concerned that they will not be seen to have adhered to their duties as company directors. However, it is important to note that claims against directors for breach of duty are in most cases made in the context of claims made against directors by liquidators where a company is insolvent. This will not be the case here – the LEP as a corporate entity will be wound up in a solvent state and the Council will be taking on not only

<sup>8</sup> Para 3, Guidance for Local Enterprise Partnerships (LEPs) and local and combined authorities: integration of LEP functions into local democratic institutions: <https://www.gov.uk/government/publications/local-enterprise-partnerships-integration-of-lep-functions-into-local-democratic-institutions/guidance-for-local-enterprise-partnerships-leps-and-local-and-combined-authorities-integration-of-lep-functions-into-local-democratic-institutions>

<sup>9</sup> It is a requirement of s.172 of the Companies Act 2006 that a director of a company must act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. Where a company is set up other than for the benefit of its members (as is the case of the LEP), this is to be read as if the success of the company is the pursuance of its purposes i.e. its stated objectives.

<sup>10</sup> In making a decision in the best interests of the company, directors should have regard to: (a) the likely consequences of any decision in the long term; (b) the interests of the company's employees; (c) the need to foster the company's business relationships with suppliers, customers and others; (d) the impact of the company's operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct; and (f) the need to act fairly as between members of the company [*not relevant here*]

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the assets of the LEP, but also the liabilities. In this context, there is unlikely to be any individual or company that may have a claim of any sort against the company, let alone the directors.

- 4.7 However, LEP directors may want to consider the following:
- 4.7.1 Requiring that the Council indemnify them individually against any liabilities that may result from the transfer of functions from the LEP to the Council;
  - 4.7.2 Negotiating a clause into the transfer agreement that requires the Council to use the assets and cash that is transferred in pursuance of the objects for which the LEP was established (i.e. those objects set out above). The Council may consider this unacceptable, but it should be reminded that it is the intention of Government that the LEP functions be transferred, not that those functions should change or that assets be used for other purposes.
- 4.8 We are happy to advise further as required.

**7 December 2023**  
**Sharpe Pritchard LLP**