URN: 23-153

Report Title : GYN Transfer Project

Report to: Cabinet and Council

Date of meeting: 13 November 2023

14 December 2023

Responsible Cabinet Member: Cllr Graham Plant , Portfolio Holder for Property and Housing Assets

Responsible Director/Officer: Chris Furlong, Director of Property and Housing Assets

Is this a Key decision? Yes

Date added to Forward Plan of Key Decisions if a Key Decision: 5th October 2023

EXECUITVE SUMMARY

The service agreement with Great Yarmouth Norse (GYN) terminates on 30th September 2024. In June 2023, the Cabinet agreed that the Council would transfer the GYN service back into a GYBC Company structure. The project to commence the transfer has begun and the purpose of this report is concerning three key areas – the host vehicle for the company, the procurement of new fleet for the in-sourced service and the approval of the budget to enable the support functions to facilitate the transfer of the service and the future support for the service post October 2024.

RECOMMENDATIONS:

That Cabinet RECOMMEND TO COUNCIL that:

1) the services currently delivered by GYN be insourced and delivered by a direct labour organisation (DLO);
2) a budget of £1,802,420 be agreed to enable the procurement of the fleet as outlined in the report using the using the TPPL framework; and
3) a budget of £145,000 be agreed to fund the set-up costs and enable the support services to be provided as outlined in the report to facilitate delivery of the project.

1. Introduction

1.1 The Councils Contract with GYN terminates on 30th September 2024. The Cabinet authorised a process whereby the Council complete an asset purchase from GYN of those assets needed/left at the date of transfer, transferring the service back to the Council into a GYBC Company structure.

1.2 This process has now commenced with the appointment of a project lead in late August to oversee the insourcing of the service. This report is intended to seek a steer from Cabinet and make recommendations to Council on important decisions that will inform the direction of travel and therefore the mobilisation of the new service. The key areas discussed are the host vehicle for the service and fleet procurement.

2. The Host Vehicle for the Service

2.1 In June 2023, the Cabinet decision was to bring the service back into the Council via a newly-formed Local Authority Trading Company (LATCO) or the existing LATCO, GYS. Since then officers have explored a third option which would be to bring the service back as a Direct Labour Organisation (DLO). Independent legal advice has been sought via Browne Jacobsen who have prepared an options report evaluation all 3 options. The report is attached at Appendix 1. Within each of the options the indicative set up costs have been considered, along with the annual support costs. At this stage these do not include all support costs for example IT software support as this level of detail is not available. It can be assumed that these costs are currently a charge into GYN through the overhead charging mechanism and therefore will be a cost that will continue to be charged whatever the delivery vehicle. At this stage for the analysis of the options, the experiences with the GYS company has been used to inform the costings for the set up and also where there will be additional costs depending on the delivery vehicle, for example additional audit fees for a separate company or setting up new companies on finance systems where applicable.

2.2 Evaluation of the Options – Appendix 1

<u>Option 1 - Transfer into GYS (Existing LATCO)</u>

This approach would follow the exact same path as the insourced GYS. However, GYS has only just been formed in April 2022 and is developing its service offer and implementing a business improvement plan to address long standing issues in the service. A key risk of insourcing GYN into GYS would be that this would put additional pressures on GYS and detract from their current focus on delivering the improvement plan.

This approach does put the company at arms-length to the Council which may reduce the Council's ability to influence and control the management of the service.

The positives of insourcing GYN into the GYS LATCO are that there would be reduced costs incorporating the new vehicle as there will be no requirement to constitute a new company and in the longer term, there could be savings derived through streamlining the management of the merged services and efficiencies identified through collaborative working e.g. fleet, fleet maintenance, procurement etc

Also, by transferring GYN into GYS, GYN can dovetail into existing corporate systems which already exist and those core corporate functions would support a singular company rather than 2 separate LATCO's.

Based on the creation of the new company, GYS, the estimated cost of this approach would be £72,200 initial set up costs and annual costs of £230,000 to support the company.

<u>Option 2 – Transfer into a New Local authority trading company (LATCO)</u>

This option adds a level of complexity and cost to the transfer with the need to set up a new company, with a Management Board and the associated costs of providing separate IT systems and corporate support to the new company. In addition to this, the new company will have its own management structure and there is less opportunity to identify savings in this area, that may be achievable if GYN were to be hosted by GYS.

As with Option 1, this approach does put the company at arms-length to the Council which may reduce the Council's ability to influence and control the management of the service.

The positive would be that GYS are unaffected by this option and therefore able to move forward with their strategic plans and improvement. In addition, GYS can collaborate with the new company where there are benefits or savings to be realised.

This option also enables the new company to develop a separate identity and brand from the existing service at GYN to build a more positive reputation.

Based on the creation of the new company, GYS, the estimated cost of this approach would be £121,400 initial set up costs and annual costs of £243,000 to support the company. The reason for the additional set up costs is that there would be additional system set ups for example finance systems and then ongoing maintenance charges plus audit costs for a separate company.

<u>Option 3 – Transfer the service into a new Direct Labour Organisation (DLO)</u>

This option would see the Council taking the service back in house as a department of the Council. It would be managed and operated directly by the Council and as such, the Council would have complete control over the service delivery. The service can fully integrate into the Council's systems and ongoing support with out the need for additional administration. Whilst the current service costs are all charged within the Housing Revenue Account, operation as a DLO would mean that costs are charged direct to the HRA and managed within the HRA as a service.

This option would also mean that there is no need to absorb GYN into a company or create a new company with the associated complexities and costs associated with Options 1 & 2.

The DLO option does allow the Council to adopt a new brand as "owner" of the service and develop a new identity and create a separation from past performance of the existing service provider.

Set up costs for the DLO will be lower than the other options due to transferring to existing Council systems, for example utilisation of current GYBC finance ledger, there will still be additional HR system set ups for example Payroll and legal costs, in total these are estimated to be £57,200. Annual costs would total approximately £209,000 due to being able to utilise existing GYBC systems for finance and HR.

There is however a singular, key area that make the DLO less attractive financially. There will be a significant cost associated with pensions as all employees would be required to be offered access to the Local Government Pension Scheme at the point of transfer. The financial liability associated with this is estimated to be £230k, plus there will need to be some pay assimilation to GYBC grades which initially will be in the region of £40,000 and will increase annually as progression through pay bands are awarded. It is anticipated that these costs can be mitigated as the service is undergoing a significant transformation and the GYN Business Plan estimates a projected annual saving of £750,000 on the operation which will ensure that the pensions can be absorbed by this.

Recommended option

Based on the legal opinion of Browne Jacobson and the considerations set out above, the recommendation is to insource the service to provide a DLO. This option, in particular, provides the Council with complete control over the service and importantly, will not create added pressures on the GYS Management to absorb another service into the business and allows to continue its progress in delivering its improvement plan. The recommendation is not consistent with the original Cabinet decision to insource the GYN into a Council-owned company structure. Therefore, this report is seeking Cabinet approval to change that decision in respect of insourcing the service into a DLO rather than a new or existing LATCO as originally agreed.

3. Fleet

3.1 The current fleet that is being used by GYN is aged (up to 10 years old), in poor condition and have high levels of maintenance on a regular basis and at significant cost at £7,030 per van. This gives a poor perception of the service and as they break down regularly, they impact on the productivity of the service. In summary, the current fleet is not viable and needs to be replaced. Irrespective of the delivery model, a decision on the fleet procurement needs to be made to enable the procurement timetable and the fleet to be in operation for the commencement of the new arrangement for September 2024.

3.2 The cost of the existing fleet is expensive with the fleet costing in excess of £420k per year. Over a 5 year period, the actual cost is £2.1m. These vehicles are not efficient costing more in fuel and contribute little to the ambitions of having a green fleet.

3.3 The Project Manager has liaised with the GYS transport manager and made an initial contact with the procurement framework, TPPL who supported GYS with fleet procurement. It is clear that the new service could procure a new more efficient and reliable fleet for the start of the new service under the council's control at a reduced cost. The TPPL framework have indicated that the majority of the fleet will be ready for the commencement of the new service with the exception of a small number of specialist vehicles.

3.4 The cost of the new fleet will be less than the current fleet also in terms of procurement and also ongoing maintenance. There will also be a cost saving as the service currently is paying for 6 spare vehicles which are held as spares when the existing fleet is out of action for repairs which is frequent. The new fleet will also contribute to a more productive workforce with less downtime.

3.5 The cost of the new fleet will depend upon whether the Council chooses to lease or purchase the fleet outright. The options are set out below:-

Outright purchase	£2,180,673
5 Year Lease Option	£1,802,420

3.6 **Evaluation of the Options** - The lease option includes maintenance, and the purchased vehicles would need to be maintained at an extra cost over the 5 year option period. Therefore the purchase of the vehicles would be an initial outlay of £2,180,673 which over the five year period would cost an extra £378,253 plus interest charges on the £2,180,673 and maintenance costs for the purchased vehicles.

3.7 **Recommended Option** - Based on the above evaluation, it is recommended that the Council procure the fleet using the TPPL framework and that the fleet are procured through a lease agreement as it would be no large initial out lay plus it would save £378,253 plus interest charges on the initial outlay and maintenance costs over the 5 year period.

3.8 **Green Fleet Strategy -** The Green Fleet Strategy sets out the Council's ambitions to decarbonise the whole of it fleet by moving from traditional diesel vehicles to Ultra Low Emission Vehicles. This is the ambition of the service. However, there are challenges in using this procurement to switch the entire fleet across not least the fact that there is not the infrastructure in place to accommodate the charging of the whole fleet. The vehicles would need a site to park and a power supply that could cope with charging between 20 and 50 vehicles at a time. The only site we have currently is Churchill Road which from a power and parking point of view could not cope with more than 6 vehicles charging at a time. Therefore, there needs to be a clear plan to ensure that the charging infrastructure is in place to support the green fleet strategy.

3.9 However, there is still the ability to procure a number of electric vehicles where the workforce have the ability and are willing to charge their vehicle at home. The approach would involve providing a charging point to the operative's home and reimbursement of the costs of charging the fleet. Further, the Council could offer an incentive to staff for supporting this approach. At this stage, the number of staff who would volunteer is unknown, this option can be explored further.

4. Financial Implications

4.1 The cost of the service currently provided by GYN is allocated in the main to the Housing Revenue Account with a very small element, allocated to the general fund for some minor repair and maintenance works. The following outlines the financial implications for the provision of support services, set up and employee costs for the alternative delivery vehicles.

4.2 The annual cost to the HRA for the GYN services includes the complete service costs including overheads that cover management, support costs for example finance, HR, IT etc. Under the current arrangement the cost of the support services to GYN is not known and therefore the budget for 2024/25 for when the service delivery is changed will need to reflect the full service cost. Whatever the vehicle for future delivery these services have been assumed to be provided by the Council into the company/DLO and the Council will need to be resourced sufficiently to provide these services. Depending on the delivery vehicle, these may differ slightly for example finance support to a company would require a company accountant to be appointed, however for a DLO with the services being closely aligned to the other HRA service provision, whilst there would still be additional support required, the level of support would not be at the same level as that for the company.

4.3 Other support functions for example HR, in terms of the day to day support would be similar irrespective of the delivery vehicle and be dependent on number of employees, complexity of terms and conditions and complexity of employee relation issues, for example sickness management, recruitment and retention. There would also be the same set up/establishment work required for the TUPE process irrespective of the model for delivery.

4.4 The future support to the service will form part of the budget setting process for 2024/25 from the commencement date of the delivery of the new service as this will cover the respective support services functions. Ahead of the 2024/25 financial year and the new service delivery being operational there will need to be additional support costs to facilitate the transfer and enable the set up. These costs will need to be funded from the HRA as part of the set up costs and will cover the support functions for HR, Finance (including external tax advice), IT, Legal, set up. This report is recommending a budget of £145,000 be established to allow for the set up costs and the appointment to the posts that are required to support the provision of the service, namely to the relevant HR and Finance positions to enable the transfer, these will be funded from the HRA and any un utilised amount in 2023/24 will be allocated to an earmarked reserve for the HRA for the completion of the project in 2024/25.

4.5 Employee Costs – As outlined in the attached appendix the different delivery models will result in different employee cost implications, most significantly in respect of pay harmonisation and enrolment in the LGPS for the DLO option. The most significant cost of the DLO option would be the cost of enrolling all staff that TUPE to the LGPS as opposed to the current nest scheme, which on initial estimates would be in the region of £230,000 per annum. There would also be an additional cost of initial pay assimilation for example to slot employees to current GYBC pay scales, no allowance has been included for harmonisation of terms and conditions at this stage as this will be dependent on the detail of the employer liability information that will not be confirmed until close to transfer. Based on previous experience with GYS, there will be a number of different sets of terms and conditions for which the costs of harmonisation will need to be worked through and options to phase implementation depending on affordability will need to be considered.

4.6 The following provides a summary of the initial estimates of the financial implications for the different delivery vehicles as set out in detail of the report for the set up costs and the employee costs for the insourcing to GYBC.

	GYS	Company	Insourcing
Set Up Costs	72,200	121,400	57,200
One off Support Costs	87,800	87,800	87,800
Employee Costs			270,000

4.7 The final tax implications are being sought and these will be updated verbally and included in the final report to Council as applicable.

4.8 The decision around vehicle procurement will save the council £378,253 the implications of not making the decision will cost the council the above figure plus we will have to asset purchase the aged vehicles from GYN and will still need replacement as soon as possible.

5. Risk Implications

5.1 The financial implications assume a level of future savings to be delivered from the transformation of the service and future delivery model. Until the full future service delivery costs are known the full saving will not be fully quantified.

5.2 It has been assumed that the support for the future service provision will be provided by GYBC, this will be dependent on recruiting to services to support service delivery. As part of the budget setting for 2024/25 the future budget for the service will need to reflect the change in the service provision from October 2024 and assumptions will need to be made accordingly and factored into the HRA business planning process.

5.3 Following the work undertaken for the mobilisation of the GYS contract which went live in April 2023, lessons have been learnt from that project which will inform the delivery of the GYN project to mitigate the risks of any impact to the project.

5.4 A failure to procure new fleet will have a detrimental impact on the productivity of the service and present as a reputational risk to the Council.

6. Legal Implications

6.1 Detailed legal advice regarding the options appraisal work is included in Appendix 1.

Areas of consideration: e.g., does this report raise any of the following issues and if so, how have these been considered/mitigated against?

Consultations	**Comment**
Monitoring Officer Consultation:	
Section 151 Officer Consultation:	Yes
Existing Council Policies:	Outlined in the report
Equality Issues/EQIA assessment:	

Great Yarmouth Norse Limited – Delivery Options (Updated)

Great Yarmouth Borough Council

Confidential and legally privileged advice
September 2023

Browne Jacobson

Great Yarmouth Norse Limited – Delivery Options (Updated)
Confidential and legally privileged advice

This advice note was originally issued in August 2023 and has subsequently been updated following further discussions with the Council which took place on 20 September 2023.

1 Background and instructions

1.1 In 2014 Great Yarmouth Borough Council (**Council**) and Norse Commercial Services limited (**NCSL**) established a joint venture company, Great Yarmouth Norse Limited (**GYN**). GYN provides asset management, construction and building repair services (**GYN Services**) on behalf of the Council. We understand that GYN currently employs approximately 70 staff under (a currently estimated) 13 different sets of terms and conditions.

1.2 We have already advised the Council in connection with GYN and the options available to the Council to exit arrangements with NCSL and ensure continuity of onward delivery of the Services (**Previous Advice**).

1.3 Our Previous Advice was issued in April 2023. We understand that this advice has assisted the Council with its internal discussions in connection with determining the best approach to onward Service delivery, and that the Council has decided that in-sourcing the GYN Services via an asset transfer from GYN is the preferred route.

1.4 The Council is now considering the in-sourcing options available for onward service delivery following asset transfer from GYN. These options include the Council itself taking back the GYN Services and delivering them directly through a Direct Labour Organisation (**DLO**) (i.e., a more “traditional” route to in-sourcing) and also the possibility of delivery through a wholly owned Local Authority Trading Company (**LATCo**).

1.5 The Council recently established a LATCo (Great Yarmouth Services Limited (**GYS**)) for the provision of other important services within the Council’s area. GYS delivers refuse collection and recycling, street cleaning, public toilet cleaning and maintenance, buildings cleaning, grounds maintenance services, vehicle maintenance, arboriculture, leisure, burial services and services relating to pest control (**GYS Services**). GYS was established as a company limited by guarantee (**GLG**) with the Council as the company’s sole member. GYS currently has 3 active directors listed on Companies House, all of whom we understand to be employees/officers of the Council.

1.6 Following on from our Previous Advice, and to assist the Council further in determining the best approach for onward delivery of the GYN Services, we have been asked to advise on the pros and cons and potential issues associated with:

1.6.1 establishing a new wholly owned LATCo (the **NewCo Option**);

1.6.2 utilising GYS (the **Existing Vehicle Option**); or

1.6.3 bringing the services directly back in-house and establishing a DLO (the **DLO Option**),

for onward service delivery. Our advice in relation to these options covers the following:

1.6.4 high-level considerations, such as incorporation;

1.6.5 governance/management structures;

1.6.6 resources and support (such as services which will be provided by the Council to support service deliver, e.g., HR and IT) and the potential for collaboration between NewCo or the Council and GYS;

1.6.7 the application of the *Teckal* exemption and the potential to trade the GYN Services;

1.6.8 specific considerations relating to an Arm's Length Management Organisation (**ALMO**); and

1.6.9 other potential considerations, such as high-level thoughts on employment/pensions, as may be applicable.

1.7 We are not advising on the financial or tax implications associated with either of the proposed options. The Council should secure separate, specialist accountancy advice to assist it in determining which option to pursue. The financial/tax implications of choosing one option over the other may be significant. For example, pursuing the DLO Option may provide some benefits to the Council in relation to the treatment of VAT but is likely to be more costly for the Council from a pensions perspective.

1.8 Furthermore, whilst this advice provides some high-level thoughts in relation to employment matters, these are purely illustrative and included to assist in considering such matters from an operational perspective. This note does not consider the potential legal employment related issues associated with the staff which will transfer from GYN. As with the financial implications of pursuing each of the options, the impact of the employment related issues which could arise in the short, medium and longer term should not be ignored, and full consideration of such issues should be undertaken before determining which option for onward service delivery to pursue.

2 Executive Summary

2.1 It is our view that there is not one single factor which makes one option more attractive than the others, all options have their respective pros and cons. It is likely the Council will want to consider matters in the round, and ultimately the decision is likely to be driven by operational factors (e.g., how the services may be managed, the potential separation of oversight and accountability within the Council, and the ability to share resources and/or reduce costs if a particular approach is taken). Considering what the Council needs from the services in future and potential plans which may be explored to restructure the GYN Services should weigh heavy in the balance. The Council should consider strategically what it expects from service delivery in the medium and longer term (e.g., two to three years' time) and what efficiencies they may need to achieve. Whilst pursuing the DLO Option provides more direct control and oversight of the services when compared to the other options, it may not be the most cost effective solution over the longer term. In this regard, utilising a LATCo (in particular the

NewCo Option) does provide more flexibility should the Council need to explore alternative (e.g., more cost effective and efficient) ways of running the services further down the line.

2.2 For ease of reference, in the table below we have set out those matters which we feel are the most important considerations when comparing each of the options, along with a brief explanation of where similarities and differences arise. Each of these points is expanded upon and discussed in more detail within the main body of the report.

2.3 It should be noted that some aspects will be the same regardless of which option is pursued, such as the initial negotiation and dealings in connection with the asset transfer from GYN, and the need for the staff currently engaged by GYN in provision of the GYN Services to transfer across to the Council or Council owned vehicle.

2.4 Given the inconsistencies in employment terms and conditions for the current workforce and the potential employment issues which are likely to arise as a result of the TUPE transfer as well as further into the future (e.g., if an exercise to potentially harmonise terms and conditions across the workforce were to be undertaken), we strongly advise that separate, specific employment related legal advice is secured by the Council. Such advice will assist in understanding the full range of employment issues which could arise in connection with each of the options for onward service delivery being considered in this note. Securing specific employment advice well in advance of any transfer of staff will be important to help manage matters not just in the short, but also the medium and longer term

2.5 Finally, and as already noted, the importance of securing appropriate financial advice should not be underestimated. There could be a substantial difference in the financial and tax implications of choosing one option over another.

Overview table of the pros and cons of each option

	Existing Vehicle Option	NewCo Option	DLO Option
Asset and staff transfer	The negotiation and preparation of documents required to effect the transfer of assets and staff from GYN would be the same regardless of which option is pursued.		
Identity	Service could operate under its own identity but would still essentially be associated with the GYS brand.	Provides a cleaner break from GYN and essentially a "blank canvas" to establish a new identity and reputation.	The DLO could adopt a trading name for its operations and could establish a new identity for the business, but the services would have closer associations with the Council than the other options.
Corporate structures, incorporation and company's constitution	Would have to continue with CLG structure. Assuming no changes to company's constitution, costs associated with initial set up would be lower than incorporating a new vehicle. Constitution of company could be amended if a different approach to GYS is required, such as changing/amending the list of decisions reserved to the Council.	Flexibility to explore different structures, such as a CLS. Initial costs associated with set up would be higher than the other options (although GYS documents could be used as a base to assist in keeping costs down, assuming a similar approach to GYS is adopted for the NewCo). A separate service agreement to sit between NewCo and the	No option to explore different structures, the DLO would essentially be a department within the Council. Costs associated with set up would be much lower than the other options. No separate agreements would need to be in place between the Council and DLO, but some form of service level agreement/performance criteria in relation service delivery could be established.

	A separate service agreement to sit between GYS and the Council would need to be drafted.	Council would need to be drafted.	
Board and management	Same set of directors for both services, although the option of adding more directors to the GYS board is available. Separate management teams could be established within GYS, but less operational separation. This option could provide more flexibility to restructure management and, potentially, streamline operations by reducing the number of individuals involved in management roles when compared to the NewCo Option.	Allows for different individuals to be appointed to the board. Management structures would be completely separate and no potential blurring of responsibilities/roles across different services which might occur if the Existing Vehicle Option is pursued. However, fewer options to restructure, streamline operations or reduce management roles/numbers when compared to the other options.	The DLO would be managed and operated directly by the Council, as such, the Council would enjoy complete control and oversight of the services. Such close control could provide the best chance for the services to improve and succeed. However, there may be less autonomy for those involved in delivering the services and commercial decisions could take longer (when compared to operational decisions taken by a LATCo) if subject to the Council's internal governance arrangements.
Company dealings	Services would need to be separated out if wishing to develop in certain ways or out-source one of the services in future.	More flexibility to develop and change the services, such as establishing an ALMO. May also be easier to dispose or outsource services in future. If a	Less flexibility to develop and change the services (e.g., a separate vehicle is required if the view is to create an ALMO).

		CLS is adopted as the structure, then this also provides the option of a partner organisation to acquire all or part-ownership of the company with greater ease.	Depending on longer term plans and objectives for the services, they may need to be out-sourced in future to achieve these. Less opportunity to trade the services. A company structure is required if the Council wishes to operate the services on a commercial basis with a view to profit.
***Teckal* compliance**	GYS already *Teckal* compliant – no need to run a procurement process. If seeking to trade with others (i.e., not the Council) there would be greater potential to do this and remain *Teckal* compliant if both services are within one company (e.g., greater turnover so 20% threshold is in effect higher).	Company likely be established as *Teckal* compliant, so no need to run a procurement process. Option of trading services and remaining *Teckal* compliant will be available, but to a lesser degree with just GYN Services within the separate entity (e.g., smaller turnover so 20% threshold is in effect lower).	No need to consider the procurement implications as the services will be delivered by the Council directly.
Ongoing administrative matters and running costs	One set of consolidated accounts can be prepared and filed at Companies House.	Company would require its own accounts to be prepared and filed each year.	No separate company accounts would need to be prepared or ongoing filings required at

	Certain overheads may be cheaper than the NewCo Option with both services in the one company, such as insurance and other running costs. May provide greater opportunity for economies of scale if all services within one company.	Two Council companies may mean duplication of certain overheads/running costs. There may still be the opportunity to secure economies of scale, for example, where two or more entities seek to purchase goods/services together, but this is potentially more complicated than having both sets of services within one company.	Companies House, services would be integrated within the Council's existing financial and administrative arrangements. In terms of ongoing operational costs, this option would provide the most cost-effective solution.
Risk	Operational and reputational risk can cross from one service to another where both sets of services sit within one entity.	Operational and reputational risk would be separate, which helps to reduce the likelihood of issues with one service attaching to the other.	Operational and reputational risk would sit with the Council directly, although the DLO can acquire its own "brand" and appear (on the face of it) to be a separate personality from the Council. However, any such risks would be separate from GYS.
Staff	Will transfer from GYN into GYS. More likely to have a "tiered" workforce with different groups of	Will Transfer from GYN into the NewCo. Any inconsistencies across terms and conditions with the	Will transfer from GYN to the Council. Greater potential for inconsistencies with terms and conditions across the

	staff on different terms and conditions of employment. Different terms and conditions across a workforce can make performance management and grievance issues more complex to handle from a HR perspective. Separate legal employment advice should be secured by the council whichever option is pursued.	transferring staff would be as they currently are within GYN's employment. Management of HR issues likely to be similar to current arrangements within GYN. Separate legal employment advice should be secured by the council whichever option is pursued.	workforce as the transferring staff are highly likely to be on different terms and conditions from existing Council employees. Different terms and conditions across a workforce can make performance management and grievance issues more complex to handle from a HR perspective. Separate legal employment advice should be secured by the council whichever option is pursued.
Pensions	Arrangements regarding pensions and GYS are already established, so transferring employees can simply move into the current scheme (or schemes). Specialist pensions advice should be secured, but the underlying liability in respect of pensions is likely to be similar if either the Existing Vehicle Option or NewCo Option is pursued.	The new company, as a separate employer, will need to establish its own arrangements regarding pensions, such as acquiring scheduled or admitted body status for any LGPS member employees. Specialist pensions advice should be secured, but the underlying liability in respect of pensions is likely to be similar if either the Existing Vehicle	Arrangements in respect of pensions are already established within the Council. However, all employees transferring to the Council will need to be offered membership of the LGPS. The financial liability for the Council attaching to this is likely to be significant. Specialist pensions advice should be secured, but the underlying liability in respect of pensions is likely to be

		Option or NewCo Option is pursued.	most costly if the DLO Option is pursued.
Back-office functions	Systems such as payroll and other HR matters already established for GYS and new employees can simply be added.	Separate payroll and other HR support will need to be provided to the new vehicle separately from GYS and the Council.	The services can fully integrate into the Council's existing systems and ongoing support would be readily available to the DLO without the need for additional administration.
Sharing and collaboration	All assets would be owned (or leased) by one company and, therefore, potentially easier to pool assets and utilise across both services. With one body of staff, employed by one employer, redeploying/changing responsibilities across services would be relatively easy. Similarly, collaboration between both services would arguably be easier with both being within a single company.	Assets would be separately owned (or leased) by the new company, therefore, potentially harder to utilise across the different services without establishing additional structures and/or documenting matters to regulate such a relationship. Harder to move employees between different services as there would be two employing entities. Collaboration would still be possible between the two companies, but may require	All assets would be within Council ownership (or leased by the Council itself). While such assets could be easily utilised by the Council for other services it may deliver directly, sharing these assets with, for example, GYS may require additional structures to be established and/or matters to be formally documented to regulate such a relationship. Harder to move employees between different services (i.e., from the DLO to those services delivered outside of the Council) as there would be more than one employing entity. Collaboration would be possible between the DLO and GYS, but may

		more formal (e.g., contractual) arrangements to be established.	require more formal (e.g., contractual) arrangements to be established.
Council governance	Marginally more difficult to have a separation of responsibilities for each service from a Council internal oversight perspective.	Easier to establish a clear separation of oversight between the GYN Services and GYS Services within the Council.	The DLO would be subject to the internal governance structures and processes of the Council.

3 Common Considerations

3.1 Before analysing some specific considerations in relation to the proposed options (which are set out in section **Error! Reference source not found.**), there are a number of factors which we feel it is useful to consider in the round. Furthermore, some considerations will apply equally regardless of which option is pursued (some of which have already been explained in our Previous Advice). These are set out within the paragraphs which follow.

Staff

3.2 Whichever option is pursued the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) will apply to the arrangements and there will need to be a transfer of staff from GYN to the LATCo or the Council.

3.3 The operation of TUPE is such that the terms and conditions under which staff are currently employed by GYN would need to be maintained. We understand that there are approximately 70 staff employed by GYN under potentially 13 different sets of terms and conditions. Whilst this is likely to already create some difficulties from a HR perspective for the staff employed within GYN (e.g., managing performance and grievance issues could be more difficult across the workforce), this could be complicated further if either the Existing Vehicle or DLO Option is pursued (i.e., there will be greater inconsistencies in the terms and conditions across GYS's or the Council's workforce, as the case may be, depending on where the staff end up). Either of these options may also have a greater potential to give rise to issues associated with discontentment among staff that are employed by the same employer (be it a Council company or the Council itself) but where the workforce appears "tiered" (e.g., different groups of staff with different holiday entitlement and levels of hourly pay).

3.4 Given the inconsistencies in employment terms and conditions for the current workforce and the potential employment issues which are likely to arise as a result of the transfer, and also further into the future (e.g., if an exercise to potentially harmonise terms and conditions across the workforce were to be undertaken), we strongly advise that separate, specific employment related legal advice is secured by the Council to assist it in understanding the full range of employment issues which could arise in connection with each of the options for onward service delivery being considered in this note. Securing such advice well in advance of any transfer of staff will be important to help manage matters not just in the short, but also the medium and longer term.

3.5 We are assuming that staff currently employed by GYS will be fully engaged in providing the GYS Services following the transfer from GYN, and the ability to "redeploy" those staff to assist with delivery of the GYN Services if the Existing Vehicle Option was pursued would be limited. Similarly, we assume that the ability to redeploy any employees which will be engaged in the GYN Services to assist with the GYS Services would also be limited. However, from an operational perspective, the potential to streamline matters and utilise staff in different ways if they are all employees of the same company would be simpler than having staff split across different employing entities.

3.6 That being said, the potential for staff employed by one entity to undertake tasks on behalf of another entity would still exist if the NewCo Option or DLO Option is chosen, although some further consideration would need to be given as to how the Council would want to approach such matters if the option of sharing staff between different entities was pursued in future. For example, a secondment arrangement could be established or a services agreement could be entered into between the two parties to formally document such matters. This would of course be less flexible than having all staff under the employment of one company, i.e., one single employer.

Costs and resources

3.7 The NewCo Option would involve additional cost and duplication of certain ongoing obligations when compared to utilising the Existing Vehicle Option or DLO Option, this would include, for example:

3.7.1 initial set up costs associated with preparation of the company's constitution and incorporation of the company (assuming that no changes would be required to GYS's constitution which could result in some initial set up costs attaching to the Existing Vehicle Option);

3.7.2 there would be two companies both of which would be subject to ongoing filing requirements, for example, two sets of accounts will need to be prepared and filed annually with Companies House and two confirmation statements, one for each company;

3.7.3 depending on insurance arrangements, each company may be required to secure separate business insurance policies (e.g., employer's liability if this is not covered under any existing policies held by the Council);

3.7.4 there may be additional costs associated with separate bank accounts, one for each company;

3.7.5 IT systems, payroll and other support services are likely to be costlier across two companies (although it is acknowledged that separate IT systems to manage the services may be utilised in the first instance if the GYN Services are brought into GYS or the Council, but the NewCo Option does reduce the possibility to streamline/consolidate such systems in the future);

3.7.6 separate pensions arrangements will need to be organised which, depending on the approach taken, will require the company to become an admitted body or acquire scheduled body status;[1] and

3.7.7 economies of scale in relation to certain costs may not be as easily achieved if services are split across two entities.

3.8 In respect of the NewCo Option and Existing Vehicle Option, a services agreement will need to prepared relating to the delivery of the GYN Services which will be entered into between the Council and either GYS or NewCo. This is something which would not be required if the

[1] We were not involved in the pensions arrangements for GYS and are therefore unable to comment on the approach taken, but we would expect the Council to follow the same approach if the NewCo Option is pursued. We advise discussing such matters with relevant individuals at the Council, including securing specific pensions advice, to ascertain whether this element of the arrangements is likely to sway the Council towards one of the particular options being considered.

DLO Option is pursued, although the possibility of having some form of SLA in place or performance measures in respect of service delivery still exists.

3.9 Some costs would be the same regardless of which option is pursued, such as:

3.9.1 the drafting and negotiating of the documentation required to effect the transfer of assets (and anything else which is required for onward delivery of the GYN Services) from GYN;

3.9.2 the costs associated with acquiring those assets (and anything else required) from GYN; and

3.9.3 the cost of ongoing repair and maintenance of assets utilised in service delivery.

3.10 It is also worth noting that some short term costs associated with the transferring staff may be similar across all options being considered (assuming that staff numbers would remain unchanged whichever option is pursued), for example, current levels of pay.

3.11 There would of course be greater potential for a single entity delivering both sets of services to secure greater financial savings where the approach to delivery can be streamlined, for example, through the sharing of assets, staff or other resources. The potential also exists to share assets, staff and resources between two entities (i.e., two Council owned companies or between the Council and a company) with the view to reducing costs, but depending on how matters are approached, this may not be as easy to achieve as it would with both sets of services sat within one company. It may also require the implementation of additional contractual agreements or other structures to ensure things work on the ground. However, these are purely matters of an operational nature and we are unable to comment on this further.

Pensions

3.12 Due to the Best Value Authorities Staff Transfers (Pensions) Direction 2007, the liability attaching to pensions arrangements will be broadly the same if either the NewCo Option or Existing Vehicle Option is pursued (although note the brief thoughts above regarding additional administrative considerations attaching to the NewCo Option and the need for the company to acquire, for example, admitted body or scheduled body status). The number of employees transferring across from GYN eligible for membership to the LGPS and those where it will be necessary to continue to offer them membership of an employer's contribution scheme (such as the National Employment Savings Trust (**NEST**)) should remain the same regardless of whether they are transferring into a NewCo or GYS. However, specialist pensions advice should be secured by the Council to better understand this aspect of the proposed arrangements and whether either option would have a material impact on pensions liability for the Council.

If the DLO option is pursued all employees transferring across from GYN and into the Council's employment will need to be offered membership of the LGPS. Further information would be required to determine the current level of employer contributions required for the relevant LGPS pension fund (possibly Norfolk Pension Fund), but, for example, LGPS employer contributions are typically around 20% as opposed to 5% employer contributions for employees which are members of the NEST. We concluded in our Previous Advice that the additional pensions cost associated with the DLO Option, in our view, made this insourcing option unviable from a financial perspective. The pensions costs for the Council associated with this route will be much greater than those where a separate entity is utilised for onward service delivery. However, we understand that the Council has quantified the ongoing costs relating to pensions and pursuing this option and is comfortable that this can be offset by saving already achieved through service efficiencies and, as such, this additional financial liability is not necessarily a barrier to the Council.

The *Teckal* exemption and opportunity to trade

3.13 Both the NewCo Option and Existing Vehicle Option will permit the Council to take advantage of the so called *Teckal* exemption found in Regulation 12 of the Public Contracts Regulations 2015 so the Council does not have to undertake a procurement exercise. Similarly, there would be no need for the Council to run a procurement exercise if the DLO Option is pursued, but this is simply because the Council would be delivering the services directly (i.e., no contract is being awarded) and reliance on the *Teckal* exemption would not be required.

3.14 There are some specific points to note in relation to the application of the *Teckal* exemption and potential future considerations which will apply if the Existing Vehicle Option or NewCo Option is chose. We have set these out in the paragraphs which follow.

3.15 The *Teckal* exemption permits contracting authorities (e.g., the Council) to directly award contracts to wholly owned and controlled companies provided that certain conditions are met. Those conditions are:

3.15.1 the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments (**Control Condition**);

3.15.2 that more than 80% of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority (**Activities Condition**); and

3.15.3 that there is no direct private capital participation in the controlled legal person with the exception of non-controlling and non-blocking forms of private capital participation required by national legislative provisions, which do not exert a decisive influence on the controlled legal person (**Capital Participation Condition**).

3.16 As noted above, with either the NewCo Option or the Existing Vehicle Option, given the wholly owned and controlled nature of these vehicles and the view that they would be delivering services on behalf of the Council (and not others), we consider that each of the above conditions would be met and the Council will be able to rely on the *Teckal* exemption to directly award a contract to whichever vehicle is chosen to deliver the GYN Services.

3.17 However, we understand that there may be potential to grow the business to be acquired from GYN, and the ability to offer the GYN Services to others other than the Council (such as a range of small to medium sized housing providers in the Council's area) may be explored in future. With either option being considered, such a development of the business would not affect the Control Condition nor the Capital Participation Condition but would impact the Activities Condition.

3.18 The Activities Condition permits up to 20% of the company's activities to be carried out for others, i.e., not the Council. Therefore, utilising the Existing Vehicle Option would provide more opportunity to trade with others before breaching the 20% threshold. This is because the company (i.e., GYS) would be undertaking many more activities for the Council – the provision of both GYN Services and GYS Services. To determine the percentage of activities for these purposes, the average total turnover, or an appropriate alternative activity-based measure such as costs incurred by the Council with respect to services, supplies and works for the three years preceding the contract award should be taken into consideration. With GYS as a single entity delivering both sets of services to the Council, its average annual turnover will be greater than a single entity (i.e., NewCo) delivering only the GYN Services.

3.19 It should be noted that if the 20% Activities Condition threshold is breached, then a company will no longer be *Teckal* compliant, and to avoid any procurement related risks, there would be a need to reprocure the contracts for services being delivered by the company. Therefore, if the Council is serious about developing the business and it is expected that this is likely to go beyond the 20% threshold even when this is calculated against delivery of the GYS and GYN Services combined, having the different services separated across two entities would mean that if NewCo was to fall outside of the *Teckal* exemption, procurement issues would only attach to one set of services.

3.20 Furthermore (if the Council is serious about developing the GYN Services in future), it should be noted that the DLO Option would be the most restrictive out of the three considered within this note. Powers exist under the Local Government (Goods and Services) Act 1970 which would permit the Council to sell the services to other public bodies, but if the Council was seeking to trade the services commercially, in particular with the view to profit (such as to small to medium sized housing providers in the Council's area), then incorporating a company through which this activity can be carried out is likely to be required (further detail in relation to this is set out at paragraph 4.6, below).

4 Other Considerations

4.1 One of the main benefits of incorporating a new vehicle to deliver the GYN Services is that it will provide the opportunity to start completely from scratch – the company's constitution and governance arrangements (e.g., number of directors on the board, specific matters/decisions to be reserved to the Council as sole member of the company) can be determined specifically for the operation of that company and delivery of the GYN Services. However, it may be likely that the Council's governance requirements in the NewCo would be similar to GYS, in which case this would not be a major factor.

4.2 Establishing a new vehicle would also provide a "blank canvas" in other respects. It would be free to develop its own brand and could develop its own reputation separate from the operation of the GYS Services and the GYS company. This route may also help instil a greater feeling of change within the staff transferring across from GYN. Furthermore, having a separate vehicle to deliver the GYN Services would also make it easier for the Council to deal with those services in different ways in future, such as restructuring the company (e.g., by establishing an Arm's Length Management Organisation – see more on this below) or through disposing of the company to another party.

Alternative Vehicles

4.3 Pursuing the NewCo Option provides additional flexibility as to the type of vehicle the Council incorporates and utilises for onward service delivery, while moving the GYN Services into GYS would mean utilising the existing CLG structure of GYS and there would be no separate vehicle from the Council if a DLO is created. If the Council chooses to establish a NewCo, all options would be on the table - the most common (aside from a CLG) often considered are a company limited by shares (**CLS**) or limited liability partnership (**LLP**). However, whether these structures would really provide any additional benefits to the Council will ultimately depend on future plans for the GYN Services.

4.4 For example, a CLS would give the Council the ability to extract any profit generated by the company by way of dividends. This may be desirable if the business is grown and trades with others (notwithstanding any limitations imposed by the potential need to remain *Teckal* compliant, as explained above) generating a reasonable surplus beyond what the Council would be seeking to maintain within the company to deliver, for example, reduction in costs of future services or to reinvest to improve service delivery. A CLS also provides greater flexibility to permit others to get involved in the company, for example, by way of additional investment from a partner organisation which could secure a shareholding in return. Additionally, if the Council wishes to sell the company in future this would arguably be simpler and would be more attractive to potential buyers (as a well-recognised and commonly utilised model in the private sector) if the company is established as a CLS.

4.5 An LLP is often considered an attractive form of corporate structure. An LLP can be described as being "tax transparent" because any profit extracted from the company is taxed in the hands of the LLP's members, rather than the LLP itself paying corporation tax (a CLG and CLS are both subject to corporation tax on profits before they can be extracted from the company). However, while an LLP can potentially provide a tax benefit to the Council in the situation where it was seeking to extract profit from the company, utilising this structure does pose certain challenges in terms of formation and also from a powers perspective.

4.6 The legislation which underpins partnerships requires that, to establish an LLP, two or more legal entities are required. There is the potential that by joining together with GYS as partners, the Council could establish an LLP which, for all intents and purposes, would be wholly owned by the Council. However, there is also a general requirement in the legislation governing partnerships that they are established to undertake an activity in view of making a profit. This does not sit comfortably with the statutory powers of local authorities to act commercially to make a profit (the two broadest powers being the general power of competence found in section 4 of the Localism Act 2011 and the power to trade under section 95 of the Local Government Act 2003) which require that any trading a local authority undertakes must be through a either a limited company (i.e., a CLG or CLS) or an industrial provident society (the latter of which is not appropriate in the context of the Council's plans with GYN).

4.7 These are matters which have been considered by the courts in recent years. Essentially, for the Council to utilise the LLP structure, its dominant purpose for doing so must be one which is not commercial. Therefore, while the option of an LLP may be attractive because of the tax benefits it could provide, and it would be technically possible to establish an LLP as a wholly owned vehicle of the Council, further consideration of the Council's dominant purpose for establishing the LLP would need to be undertaken. On the face of it, the proposed plans for the GYN Services does not appear to be one which is not commercial.

4.8 We mention the potential to adopt an alternative vehicle (i.e., not a CLG) for completeness, and because understanding the options available in order to simply discount them can often assist in reaching the right decision. While establishing a vehicle with the view to extracting profit may not be an immediate concern for the Council, it does help to illustrate the additional flexibilities that pursuing the NewCo Option can provide.

Governance

4.9 A DLO would be a different department within the Council operating as a "trading body" in its own right, rather than a separate entity controlled by the Council. As such, the Council would have more direct control over the operations of a DLO than through a wholly owned company.

4.10 We understand that the Council may wish to employ separate individuals to each oversee the GYS Services and the GYN Services if a LATCo is established, in which case the NewCo Option would be the better choice than the Existing Vehicle Option. By having each set of services being delivered by separate entities, it would be easier to have a clear divide of oversight and accountability for each set of services within the Council. We appreciate that a similar outcome could be achieved if the DLO Option is pursued.

Company structures and board composition

4.11 As with the Council's internal oversight, by having two separate vehicles, a clear distinction in roles and responsibilities of the companies' directors can be achieved – each company would have its own board of directors and different individuals could be appointed to each company (or some different and some the same, depending on how the Council wishes to approach matters).

4.12 Each company would require its own unique management team, which we would expect to be employees of the company, and this again provides for a potentially clearer distinction of management structures and responsibilities if two entities are utilised as opposed to one. However, it would be entirely possible to have two teams of senior individuals sat within GYS with each team assigned to the oversight and management of one set of services and reporting separately and directly to the board of directors.

4.13 Article 24 of GYS's articles of association provides the Council with discretion to determine which individuals are the directors of the company. The articles currently permit a maximum number of six directors. As noted above, GYS currently has three directors listed on Companies House. Therefore, there is potential for additional directors to be appointed to GYS who, for example, have relevant skills, knowledge and experience applicable to the GYN Services.

4.14 However, simply having more directors appointed to GYS does not guarantee that board meetings where decisions taken in relation to the GYN Services would have the relevant directors present (it should be noted that under the current GYS articles the quorum for a directors' meeting is simply two directors). From an operational perspective, the Council would of course have the ability to manage this (e.g., setting appropriate agendas and timetables for board meetings to ensure relevant individuals are present), but ideally such matters would be recognised in the company's constitution, which would require amendments to GYS's articles.

4.15 From a day-to-day management perspective, this is unlikely to be an issue - as noted above, if GYS was to deliver both sets of services, we consider it likely (and also sensible) that a separate management team would be employed and given specific oversight of the GYN Services – but if utilising a LATCo is deemed the most appropriate model for onward delivery, the NewCo Option with a clear separation between the companies delivering each set of services is certainly a neater option.

Arm's Length Management Organisation

4.16 One particular outcome that would be more easily achieved if the NewCo Option is pursued is that the separate vehicle could in future potentially be utilised as an ALMO. The concept of ALMOs was first introduced in 2002, they typically have two key objectives to:

4.16.1 bring the Council's housing stock up to the Decent Homes Standard; and

4.16.2 provide a housing management service which puts the tenant at the heart of delivery.

4.17 ALMOs ordinarily adopt a CLG as their corporate structure and are often wholly owned local authority vehicles (i.e., the local authority would be the company's sole member). ALMOs undertake a range of services on behalf of the council relating to the management, repair and improvement of the council's housing stock. They may also provide other services directly to tenants, such as debt advisory services, counselling, tenant enforcement, and lettings management (e.g., dealing with allocations).

4.18 Whereas some of the GYN Services clearly fall within the remit of those activities typically carried out by an ALMO, the current business of GYN would need to be developed if it was to undertake such a role in its truest sense. It would also likely require a mechanism by which the tenants it serves would have input into the company, such as representation and a voice at board level. As such, any company utilised as an ALMO would need to be constituted differently from GYS, and realistically the Council could only establish an ALMO through a dedicated, standalone vehicle. Therefore, if the Council feels this could be something it wishes to do in future, the NewCo Option provides more opportunity to explore this. However, if the NewCo Option is pursued, we would not recommend constituting the new vehicle as "ALMO ready" because the specific requirements we would need to include in the company's articles are unlikely to be suitable for the new vehicle in the first instance. Instead, we would recommend the company's articles of association are amended at the relevant time to provide for this.

Operational risk

4.19 Whilst certain risks for the Council would remain relatively constant with whichever option is chosen, such as the potential for reputational damage attaching to the services if things go wrong, the ability to separate the risks associated with each of the services into separate entities is an additional benefit of pursuing the NewCo Option. It should also be noted that while reputational damage attaching to services delivered by a wholly owned vehicle of the Council can transfer to the Council (by association), the potential for direct reputational damage is greater where services are delivered directly by the Council (i.e., if the DLO Option is pursued).

4.20 Where a LATCo is utilised, the vehicle would be a company with limited liability, therefore, the financial risks associated with delivery of each of the services would be contained within the company. With direct delivery through a DLO, there would be no separate corporate structure to "contain" financial liabilities and these would be assumed by the Council directly. Although from a practical perspective this may not mean much as even where a company is utilised the Council would inevitably have to step in, potentially assuming financial liability if services fail. However, utilising two companies would allow for separation of certain operational risks and, for example, splitting the services across different entities could help to ensure that if reputational damage is sustained, this only attaches to one company and one set of services, rather than one company delivering both sets of services.

Browne Jacobson LLP

September 2023

brownejacobson.com
+44 (0)370 270 6000

To view our office locations visit brownejacobson.com/contact-us

Browne Jacobson