

<b>Report of:</b>	Director of Finance and Executive Member for Finance and Governance
<b>Submitted to:</b>	Council
<b>Date:</b>	29 March 2023
<b>Title:</b>	Border to Coast Governance Arrangements
<b>Report for:</b>	Decision
<b>Status:</b>	Public
<b>Strategic priority:</b>	All
<b>Key decision:</b>	Not applicable
<b>Why:</b>	Not applicable
<b>Urgent:</b>	Yes
<b>Why:</b>	Decision required before 1 April 2023 so documents can be approved before Cumbria County Council (administering authority of one of the other Border to Coast Partner Funds) changes status.

**Executive summary**

This Report informs the Council of proposed changes to the governance documents relating to Border to Coast Partnership Pensions Limited ('Border to Coast') and its relationship with the Council and seeks Council approval for amended versions of those documents.

## **Purpose**

1. The purpose of the report is to ask Council to approve some required updates to the documents setting out how Border to Coast is governed.

## **Background and relevant information**

2. At its meeting on 15 February 2017, the Council agreed to take up shares in and become a member of a separate company Border to Coast Pensions Partnership Limited (“Border to Coast”) as the Council’s chosen means of meeting its obligation as Administering Authority of the Teesside Pension Fund to pool the investment of its Pension Fund assets with other Funds.
3. Border to Coast is jointly owned by the following eleven (initially twelve before the Northumberland / Tyne and Wear Pension Fund merger) administering authorities:
  - Bedford Borough Council
  - Cumbria County Council
  - Durham County Council
  - The East Riding Of Yorkshire Council
  - Lincolnshire County Council
  - Middlesbrough Council
  - North Yorkshire County Council
  - The Council of the Borough of South Tyneside
  - South Yorkshire Pensions Authority
  - Surrey County Council
  - Warwickshire County Council
4. As part of the decision to join Border to Coast, the Council agreed to enter into certain documents setting out the way in which Border to Coast would be governed. In particular, the Council has entered into the following two agreements.
5. Firstly, there is an Inter Authority Agreement between the local authorities that are part of the pooling arrangement, this governs the relationship between the authorities and the co-ordination of the management and monitoring of Border to Coast. This Agreement records the intention of the local authorities to pool their fund assets through the Border to Coast arrangement and establishes the existence and Terms of Reference of a Joint Committee of the pooling authorities to oversee the pooling arrangements and the work and performance of the company.
6. Secondly (along with the other local authorities that are part of the pooling arrangement) the Council entered into a Shareholder Agreement governing the relationship between Border to Coast as a company and the pooling authorities as shareholders of the company. This Agreement sets out the basis on which the company was established as a company jointly under the control of local authorities and so one to which the authorities are able to award contracts without going through the competition requirements of procurement law. The Shareholder Agreement establishes the internal company decision-making arrangements which evidence the necessary degree of local authority control to be able to utilise this exception to procurement rules.

7. It is over five years since Border to Coast was established, and six years since the initial governance framework was approved by Council. Since then, the business has matured (as of the end of March 2022 it was responsible for managing c. £38 billion of Partner Fund assets), Tyne and Wear and Northumberland pension funds have merged, there has been regulatory change, and best practice with respect to both corporate governance and the governance of arms' length public bodies has evolved.
8. A review has therefore been undertaken of the shareholder governance arrangements. In undertaking the review, consideration was given to:
  - The lessons learnt from the first few years of pooling from Border to Coast;
  - Lessons learnt from other pools in the UK;
  - Lessons from other Local Authority jointly owned companies; and
  - Lessons learnt from other pools internationally.
9. This has led to proposed amendments to the Inter Authority Agreement and the Shareholder Agreement together with the Articles of Association of the company, which outline the rules and regulations of the company.
10. Approval of the Inter Authority Agreement and Shareholder Agreement are a matter for Council and copies of the amended versions of these Agreements are attached as Appendix A and Appendix B to this Report respectively. The versions of the documents attached at Appendices A and B are clean copies which do not show the changes from the original. However, the changes are described in general terms below.

### **The Inter Authority Agreement (IAA)**

11. The main changes to the IAA comprise the following (please note this is not an exhaustive list and does not note typographical amendments or minor drafting changes):
  - a) Updating statutory references, for example in relation to data protection laws;
  - b) Updating the document to take into account the merger of Northumberland County Council into the Council of the Borough of South Tyneside (and adding some enabling provisions should other mergers take place in the future);
  - c) Removing provisions that related to the period before the establishment of Border to Coast as they are no longer relevant (for example, the establishment of the Joint Committee);
  - d) Adding provisions to make clear that when an Authority withdraws from the Agreement it will cease to be a member of the Joint Committee (clause 11.1.2);
  - e) Updating the terms of reference of the Joint Committee (at Schedule 1) to take into account that the first phase (pre establishment of Border to Coast and commencement of operations) has been completed;
  - f) Clarifying the terms of office for the Chair and Vice Chair of the Joint Committee, to terms of two years with a maximum of two terms (Schedule 2 – Constitution of the Joint Committee); and

- g) Adding a new term of reference for the Joint Committee which permits, in cases of urgency, decisions to be taken on behalf of the Joint Committee by the Host Authority in consultation with the Chair and Vice Chair.

### **The Shareholder Agreement (SHA)**

- 12. The SHA documents the relationship of the Border to Coast Partner Funds to each other in their capacities as shareholders of Border to Coast and overrides the provisions of the Articles.
- 13. The main changes made to the SHA include (again please note this is not an exhaustive list and does not note typographical amendments or minor drafting changes):
  - a) Removing provisions relating to pre-establishment that are no longer relevant;
  - b) Altering the proportion of Shareholders required for majority consent from 75% to 66.6%, which will continue to be in line with public procurement requirements for joint control of a company.
  - c) Including provisions from a Supplemental Agreement executed on 6 October 2020. This amended the SHA to include additional provisions relating to when capital contribution calls may be made on the Partner Funds for expenses resulting from Border to Coast's capacity as an authorised alternative investment fund manager (clauses 4.11 – 4.19). It should be noted that the original drafting from the Supplemental Agreement related to the Border to Coast Authorised Contractual Scheme; this has been extended to cover unregulated arrangements (such as limited partnerships);
  - d) Amending the provisions relating to record keeping so it is not necessary for Partner Funds to use their powers to ensure Border to Coast maintains accounting and financial records. The company is responsible for ensuring compliance in this area (clause 6.8);
  - e) Removing the requirement for Partner Funds to approve Border to Coast's conflicts policy, as this is not necessary (clause 6.9);
  - f) With respect to the provision of information to Shareholders, management accounts will now need to be provided within 90 days of the end of the quarter instead of 30. This provides greater flexibility for the Company which experience has shown would be useful (clause 14);
  - g) Including a framework in a new schedule to the agreement with details of how a merger of two authorities may be managed (although allowing flexibility depending on the circumstances) (clause 15.3);
  - h) Updates to the Reserved Matters which require unanimous Shareholder approval, including:
    - i) Excluding agreements to provide services to Shareholders as customers approved under the Strategic Plan (Schedule 1 Part A paragraph 3);

- ii) Excluding amendments to the Articles required by a direct request from the Financial Conduct Authority (FCA) or following legal advice (it should be noted that a special resolution requiring the consent of 75% of the Shareholders will still be required) (Schedule 1 Part A paragraph 12);
  - iii) Excluding the approval of the removal or appointment of interim directors (previously Schedule 1 Part A paragraph 15);
  - iv) Excluding the requirement for consent to defend claims (although consent is still required to commence or settle any claims); and also excluding non-material claims of £1m or less (Schedule 1 Part A paragraph 15); and
  - v) Excluding the formation of a subsidiary of Border to Coast if done in accordance with the Strategic Plan (Schedule 1 Part A paragraph 17).
- i) Updates to the Reserved Matters which require approval by Shareholder Majority (which is now 66.6%) including:
- i) Rather than approving the annual accounts of the Company, Shareholder Approval is required for any proposal not to table the accounts at the Company's AGM (Schedule 1 Part B paragraph 5);
  - ii) Excluding the need to determine directors' remuneration, and instead approving a remuneration policy for directors (Schedule 1 Part B paragraph 6);
  - iii) Excluding approval being required to amend a pension scheme for employees of the Company (Schedule 1 Part B paragraph 7);
  - iv) Excluding entering into agency, distribution or similar agreements (previously Schedule 1 Part B paragraph 8);
  - v) Increasing the threshold for leases requiring consent to £500,000 (from £100,000) (Schedule 1 Part B paragraph 9).
- j) Finally, the list of shared objectives in Schedule 2 has been amended to include the objective to primarily invest assets through the collective investment vehicle operated by Border to Coast, which was already recorded in the IAA.

## Articles of Association

14. The Articles of Association are a company document, approved through company decision-making. The changes being made to the Articles of Association have been approved on behalf of the Mayor who exercises the Council's company shareholding in Border to Coast. It does not require approval from the Council as part of this decision.

15. Minor updates are being made to the Articles, which include:

- a) Increasing the maximum number of directors from 8 to 10;
- b) Amending the required quorum for General Meetings of Shareholders to 66.6% to match the majority requirements that will now be set out in the SHA; and

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

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

17. In addition, the Head of Pensions Governance and Investments has reviewed the documents, has no issues with the documents and is in agreement with the external advice.

### **Future Decision-Making**

18. As can be seen from the Report, Border to Coast is now a well-established company with robust governance and access to specialist legal and other advisors. Given the generally administrative nature of the changes made to the governance documents as a result of the recent review it is felt that a delegation to the Pension Fund Committee to approve such changes in future is appropriate. This would not prevent future reports coming to Council where changes to the governance documents raised fundamental issues of principle. This proposal would be affected through the approval of the third recommendation below.

### **What decision(s) are being recommended?**

19. That the Council:

- Agree to approve the revised Border to Coast Inter Authority Agreement attached at Appendix A.
- Agree to approve the revised Border to Coast Shareholder Agreement attached at Appendix B.
- Agree that approval of future amendments to the Border to Coast governance documents is delegated to the Pension Fund Committee.

### **Rationale for the recommended decision(s)**

20. The revisions to the Border to Coast governance documents are appropriate, proportionate and necessary to ensure the company can continue to deliver positive outcomes for the Partner Funds.

### **Other potential decision(s) and why these have not been recommended**

21. The only other option would be not to approve these documents. This is not recommended because it would be to the detriment of the Teesside Pension Fund, the Council and the other Partner Fund administering authorities.

## **Impact(s) of the recommended decision(s)**

### ***Legal***

22. As set out above.

### ***Strategic priorities and risks***

23. The continuing success of pension fund investments through Border to Coast will ultimately keep employer pensions contributions at a lower level so allowing more resources to be available to spend on the Council's key priorities.

### ***Human Rights, Equality and Data Protection***

24. No direct implications of this specific decision in relation to human rights of the Equality Act 2010 have been identified. References to Data Protection laws within the Border to Coast governance documents have been updated.

### ***Financial***

25. There are no direct implications arising from the report. The costs of obtaining legal advice in relation to the preparation and review of the governance documents has been met jointly with other Partner Funds through the Pension Fund budget, which does not directly impact on Council budgets.

## **Actions to be taken to implement the recommended decision(s)**

<b>Action</b>	<b>Responsible Officer</b>	<b>Deadline</b>
Arrange execution of the governance documents	Nick Orton, Head of Pensions Governance and Investments	31 <sup>st</sup> March 2023

## **Appendices**

<b>1</b>	<b>Inter Authority Agreement</b>
<b>2</b>	<b>Shareholder Agreement</b>
<b>3</b>	

## **Background papers**



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