

Report on the proposed new Partnership Agreement between Southend-on-Sea Borough Council and South Essex Homes and South Essex Property Services and the Member Agreement between Southend-on Sea Borough Council and South Essex Homes

The new form of Partnership Agreement will be more output-based than the current Management Agreement. This reflects not only the need to up-date the provisions but also the fact that the relationship between Southend-on-Sea Borough Council (the **Council**) and South Essex Homes is a mature one and is to be based on partnership principles. The agreement now also includes South Essex Property Services (**SEPS**) as a party in order for there to be a single point of contractual reference. This section of the report summarises the main provisions of the draft Partnership Agreement so not every single clause is referenced. All capitalised terms have the same meaning as defined in the Partnership Agreement, unless otherwise stated.

1 Clause 1 - Partnership

1.1 The Council, South Essex Homes and SEPS (the **Parties**) agree to adhere to the principles set out in the Partnership Protocol. This is set out at Schedule 1.

1.2 Under the Partnership Protocol the parties agree to work together based on shared values of openness, respect, honesty, trust, negotiation and accountability. A number of key principles for the relationship are specified, including contracting on arm's length terms, establishing clear lines of delegation, operating on a 'no surprises basis', promoting a positive attitude, working together to solve problems, valuing each other, celebrating success jointly, mutual support and sharing information.

2 Clause 2 – Partnership Plan

2.1 South Essex Homes will develop and deliver a Partnership Plan in relation to the Housing Management Services. The Partnership Plan will detail the outputs to be achieved by South Essex Homes, the Key Performance Indicators, the business plan for South Essex Homes, The strategy to deliver the Council's key goals and the financial resources required to carry out the Partnership Plan.

3 Clause 4 – Tenant Involvement

3.1 South Essex Homes will encourage tenant involvement, including having strategies for "hard to reach" groups. The Partnership Plan will include sufficient resources to ensure commitments to tenants can be met.

4 Clause 5 – Value for money

The parties acknowledge the fundamental importance of delivering value for money and will operate on an open-book basis.

5 Clause 6 – Partnership Plan reviews

5.1 The annual sections of the Partnership Plan, namely the Business Plan and the performance plan, will be presented to the Council by South Essex Homes by 31 December each year. The Business Plan will be prepared on three year rolling basis but presented annually for approval. The sections on stock maintenance and improvement will also be prepared on a three yearly basis but will also be reviewed annually as part of the Partnership Plan review mechanism. This mechanism will involve a meeting between

the Council and South Essex Homes within 20 working days of the Partnership Plan having been submitted followed by notification by the Council as to whether the Partnership Plan is approved or requires amendments. Ultimately the matter can be referred to dispute resolution if agreement cannot be reached. The dispute resolution mechanism is contained in Schedule 6 and includes 4 stages which can also be fast tracked to a referral to an expert for consideration. Please note however that the final say will always be with the Council, who can take into account the views of the expert but is not bound by it. This preserves, in an obvious way, the Council's control over South Essex Homes and of SEPS (via its ownership of South Essex Homes).

6 Clause 10 – Housing Management Services

6.1 South Essex Homes will carry out the housing management services to the reasonable satisfaction of the Council and in accordance with the Partnership Plan, the KPIs, and reasonable instructions from the Council, all relevant legislation and all requirements of health and safety legislation and best practice.

7 Clause 11 – Stock maintenance and Improvement

7.1 South Essex Homes will assist the Council in delivering the Stock Maintenance and Improvement Programme by administering or letting third party contracts. The Programme will be reviewed by the Parties as part of the Partnership Planning process and, will take account of any changing standards (such as energy efficiency), future stock condition surveys and legal and regulatory requirements. As with the other Services, the Stock Maintenance and Improvement Programme will take account of any variation in the works element of the Fee.

8 Clause 12 - Maintenance Works Contracts

8.1 South Essex Homes will carry out and/or let and administer such Works Contracts as the Parties deems necessary to deliver the Maintenance element of the Stock Maintenance and Improvement Programme following the expiry / termination of the current arrangement.

8.2 In the procurement of any Maintenance Works Contracts South Essex Homes must comply with all applicable European Union and other regulations and take reasonable steps to adhere to best procurement practice and achieve value for money. The Council agrees that the cost of complying with this clause is an additional cost for South Essex Homes which will be reflected in the Fee.

9 Clause 13 – Improvement Works Contracts

South Essex Homes will carry out and/or administer or let the Works Contracts to deliver the Improvement element of the Stock Maintenance and Improvement Programme.

10 Clause 14 – KPIs, monitoring and Liaison

10.1 The housing management KPIs and the SEPS Services KPIs will be reviewed by the parties annually with a view to agreeing new KPIs for the following years. The new KPIs will reflect the service standards achieved by other providers in comparable circumstances and reflect the resources made available by the Council.

11 **Clause 15 – Additional income generation and use of surpluses**

11.1 South Essex Homes can pursue and exploit opportunities for income generation, either by itself or through SEPS, with third parties, providing that:

11.1.1 they are consistent with South Essex Homes' and SEPS' objects;

11.1.2 they can be legally pursued by a wholly owned subsidiary;

11.1.3 South Essex Homes' and SEPS' ability to perform its obligations under the Partnership Agreement are not adversely affected;

11.1.4 any such activity would not result in the opportunities / income generation being equal to or greater than 20% of South Essex Homes' and SEPS's individual annual turnover (securing their respective 'Teckal status'); and

11.1.5 any such arrangements are approved by South Essex Homes'/SEPS' boards and recorded at the next meeting between South Essex Homes and the Council.

11.2 The Council will always bear South Essex Homes and SEPS in mind when looking to undertake new relevant projects.

11.3 South Essex Homes will be entitled to use any available reserves in accordance with the agreement of the Council as part of the Partnership Plan approval process.

12 **Clause 16 - Assisting in the Council's new build programme**

South Essex Homes will work with and support the Council to maximize opportunities for carrying out new development with the HRA.

13 **Clause 19 – Personnel and Clause 50 - Employees**

13.1 South Essex Homes and SEPS will employ sufficient staff to enable them to carry out their respective services and that they are appropriately qualified and supervised, At the end of the agreement the Council is entitled to offer employment to anyone employed by South Essex Homes in connection with the housing management service.

13.2 South Essex Homes will inform the Council of any significant changes it may make to its staffing structure and in particular will promptly tell the Council of any funding requirements resulting from restructuring the workforce.

14 **Clause 20 – Appointment of Representatives**

Each party will appoint a senior person as it representative empowered to act for it under the agreement. All parties still need to list their named representatives in the agreement.

15 **Clause 23 – Access to Information**

On the provision of appropriate notice and in accordance with the Data Protection Laws, South Essex Homes and SEPS agree to give the Council access to data and information used for the provision of the services which are stored on its computer systems.

16 **Clause 24 – Data Protection Law**

The Parties agree to comply with the requirements of the Data Protection Law. This includes the Data Protection Act 2018 and the General Data Protection Regulation (EU) 2016/679. The provisions of clause 24 remain applicable following the expiry or termination of the Partnership Agreement.

17 **Clause 28 - Insurances**

South Essex Homes and SEPS must maintain such insurance policies as the Council may from time to time reasonably require.

18 **Clause 29 – Regulation**

The Partnership Agreement confirms that South Essex Homes will co-operate fully with relevant statutory and regulatory bodies in respect of any assessment of the provision of housing management services and the Council's own service.

19 **Clause 45 – Fee**

19.1 South Essex Homes will be entitled to receive the Housing Management Fee calculated in accordance with Schedule 3.

19.2 The Fee can be varied in accordance with the procedure set out in clause 45.3. Discussions to vary the fee should commence no later than 1 July each year and the discussions should be based on the Schedule 3 Fee Principles. Any variation in the Fee should be commensurate with a corresponding variation in the Services provided. If a variation to the Fee cannot be agreed or is disputed, the dispute resolution clause applies. The Fee should be paid monthly in advance, and it is CPI index linked on an annual basis.

20 **Clause 47 – SEPS Services Fee**

SEPS will be entitled to receive the Housing Management Fee calculated in accordance with Schedule 4. The SEPS service may be varied which would then result in a South Essex Homes shall send the current Business Plan to the Council when available (and at least once per calendar year) and invite the Council to provide comments on the proposed Business Plan.

20.1 The Council will respond to South Essex Homes on the proposed Business Plan as soon as reasonably practicable (but within three months). South Essex Homes then should consider and, if appropriate, adopt an updated and revised Business Plan. The adoption / variation / amendment of the Business Plan requires the consent of the Council.

20.2 If a proposed Business Plan has not been approved and adopted by South Essex Homes as stipulated in accordance with the process set out in clause 16, then the relevant current Business Plan continues in operation until a new / amended one is agreed. If a Business Plan cannot be agreed, this would be subject to the dispute resolution process set out at clause 40.

21 **Clause 52 - TMOs**

21.1 In the event that any tenants propose to form a Tenant Management Organisation under the Right to Manage, the Council shall be legally responsible for dealing with all aspects of

such a proposal, and South Essex Homes agree to provide such assistance as the Council may require. If the Right to Manage is exercised, the Council may instruct South Essex Homes to make arrangements to transfer responsibility for the Services in relation to the Right to Manage Dwellings to a TMO.

22 **Clause 54– Term**

The Partnership Agreement will expire on the fifth anniversary of the Commencement Date unless it is terminated earlier under clause 56 or extended under clause 54.2. Clause 54.2 allows the Council to extend the term of the agreement for one or more further periods of up to five years.

23 **Clause 55 - Variations**

The Council may at any time vary the Services by giving notice to South Essex Homes of SEPS as appropriate. This will be six months' notice for matters requiring tenant consultation under s105 of the Housing Act 1985 or 3 months' otherwise. Dispute resolution will apply in the event of disagreement over the variation. The parties will work together to agree the necessary variation to the relevant fee.

24 **Clause 55 - Termination**

The Council is entitled to terminate the Management Agreement if South Essex Homes, in respect of the housing management services, or SEPS, in respect of the SEPS services, commits a material breach which is not remedied in a reasonable period of time or has a director or senior manager convicted of dishonesty (and that reasonably calls into question the ability to deliver the services), applies for insolvency or similar and related winding up/liquidation matters.

25 **Clause 59 – Freedom of Information**

This clause acknowledges that both the Council and South Essex Homes are subject to the Freedom of Information Act 2000 and the Environmental Information Regulations 2004. Both parties agree to co-operate with the other in meeting their respective obligations under this legislation.

26 **Clause 58 – Whistleblowing**

This clause provides that South Essex Homes must ensure that it has a Whistleblowing procedure which specifies a senior manager responsible for ensuring the independence and probity of the whistleblowing process. South Essex Homes confirms that the Council is authorised as a person to whom its staff may make a qualifying disclosure under the Public Interest Disclosure Act 1998.

27 **Schedule 1 – Partnership Protocol**

See clause 1.2 above.

28 **Schedule 2 – Scheme of Delegation**

This schedule identifies the delegation of housing management services to South Essex Homes under the general headings including, tenancy management, empty properties,

asset management, estate management, tenant involvement and capital programme amongst others.

29 **Schedule 3 – Financial Arrangements**

This sets out the principles on which fee discussions will be based and states that the Management Fee consists of:

- A core Management Fee that relates to the Services determined by the Council
- Payments relating to repairs and some capital works, as detailed below.

Repairs and Capital Works

These sums will be payable on account for the provision of repairs and capital works:

- The whole of the Housing Repairs Account Budget determined by the Council.
- Part of the Housing Capital Programme that the Council's cabinet determines should be allocated to South Essex Homes.

Any capital payments will be made on account. A full reconciliation will be undertaken at the end of the financial year so that all actual costs relating to the relevant activities are chargeable to the relevant Council account.

The actual costs will include overheads and any redundancy costs payable in relation to any of the Employees undertaking capital contracts.

Payment Arrangements

The Management Fee and all interim payments will be payable by twelve equal monthly instalments.

This schedule has not yet been finalised so is subject to any changes that might be agreed.

30 **Schedule 4 – The SEPS services fee**

This schedule will be used to encapsulate the way the fees for the various services provided by SEPS are calculated. At present it is not populated.

31 **Schedule 5 – The Premise**

This schedule will list the various properties that South Essex Homes occupies and on what basis. The agreement will also need to ensure that tied accommodation continues to be leased to South Essex Homes so that security of tenure is not granted to the various tenants.

32 **Schedule 6 – Dispute Resolution**

The Partnership Agreement contains a dispute resolution procedure designed to facilitate agreement between the parties. There is also a fast track dispute resolution process whereby the Parties can proceed straight from a meeting of the Representatives of the

Parties to consideration by an Expert but as stated above the Council is the final determiner of disputes.

33 **Schedules 7-10 Services and KPIs**

These schedules will set out the actual services that are being provided by South Essex Homes and SEPS and the different KPIs that will apply.

Main Terms of the Member Agreement

The Member Agreement is intended to encapsulate the parent/subsidiary relationship between the Council and South Essex Homes. SEPS is not a party to this agreement (as it is not a direct subsidiary of the Council) but pursuant to clause 3.6, South Essex Homes is required to ensure that none of the matters that would require the Council's consent if done by South Essex Homes are carried on by SEPS without getting the Council's written consent first.

1 **Clause 2 – Business**

1.1 The parties (being the Council and South Essex Homes only in this agreement) agree to adhere to the principles set out in the Schedule 5 Partnership Protocol (the same as is set out above for the partnership Agreement). The Business of South Essex Homes is described as being:

1.1.1 to carry out all housing management activity in relation to the Council's housing stock;

1.1.2 to perform the other functions and activities as set out in the Partnership Agreement;

1.1.3 to carry out such other activities from time to time as are permitted and/or contemplated within the Partnership Plan,

together with any activities reasonably incidental to the above.

1.2 The Business Plan approval / review process is the same as set out in clause 16 of the Management Agreement, which is explained above at paragraph 15.

1.3 South Essex Homes agrees not to acquire any property either within or outside the Council's administrative area or carryout any business that is not in the Business Plan without the Council's consent.

2 **Clause 3 – Conduct of South Essex Homes' Affairs**

2.1 This clause sets out certain governance arrangements of South Essex Homes. The Directors must meet no less four times each year at not more than three monthly intervals.

2.2 All matters of management of South Essex Homes are vested in the Directors, except for those matters which require consent of the Council. These matters are set out in Schedule 1. The Directors can appoint and/or remove a chief executive officer for South Essex Homes (with consent of the Council).

- 2.3 Directors will determine the manner in which the Business is carried out in accordance with the Business Plan, the Member Consent matters, alignment with the Council's own procedures and strategic objectives and the contents of the Member Agreement.
- 2.4 The chair of the South Essex Homes board (or another Director) can discuss the affairs, finances and accounts of South Essex Homes with designated officers and executives of the Council.
- 2.5 South Essex Homes agrees to maintain effective and appropriate control systems in relation to the financial, accounts and record keeping functions of South Essex Homes. South Essex Homes also agrees to report to the Parent board within ten business days of each Quarter with such information as may reasonably be required to demonstrate South Essex Homes' delivery of the Services. This will include details of performance against KPIs and formal complaints. The parties will agree the format of these reports, and the review process will be notified by the Council to South Essex Homes.
- 2.6 As stated above, clause 3.6 brings the activities of SEPS under the control of the Council by requiring that South Essex Homes (as the parent of SEPS) ensures that none of the matters listed in Schedule 1 can be carried out without the consent of the Council

3 **Clause 4 – Group Policies**

This clause is still subject to discussions as to whether it will be included and will have greater application if a Group Structure (involving the establishment of other companies owned by the Council) is set up. The purpose of this clause is to enable the Council to propose, where relevant, a degree of consistency amongst subsidiary companies of which the Council is parent. The Council would have power to adopt policies and standards (after consultation with the Group Members) which relate to all Group Members. These will ensure compliance with statutory and regulatory requirements which are applicable to the Group or any Group Member. They may also cover financial and business probity and efficiency, good governance practice, risk assessment and each Group member carrying on its business in accordance with its own corporate plan. Matters of operational policy will not be the subject matter of Group Policies. Agreed Local Variations will be permitted to the Group Policies where there are reasonable grounds for this.

4 **Clause 5 – Covenants**

- 4.1 South Essex Homes covenants to the Council that it will adhere to the terms set out in Schedule 2. These covenants are as follows:
- 4.1.1 Only to acquire land or assets or carry out additional service from those set out in the Management Agreement if any such acquisition and/or service provision is in accordance with the Business Plan and the Council has given consent.
 - 4.1.2 It will conduct its Business in a manner commensurate with the Council's strategic objectives.
 - 4.1.3 To comply with the Financial Regulations, Contractual Standing Orders, Board Member Expenses Policy and an Executive Performance Appraisal Framework.

5 **Clause 6 - Subsidiaries acceding to this Agreement**

This clause links with the form of Deed of Accession set out at Schedule 3. It is a mechanism by which new Group Members accede to the Member Agreement as if it had always been a party to it, agreeing to abide by all of its terms.

6 **Clause 7 – Termination**

6.1 The Member Agreement can be terminated in the following circumstances:

- 6.1.1 the written agreement of the Parties;
- 6.1.2 when a resolution is passed by the Member or creditors of South Essex Homes, or any order made by a court or other competent body or person instituting a process that shall lead to South Essex Homes being wound up and its assets being distributed among the creditors, the Council or other contributors;
- 6.1.3 South Essex Homes ceases to carry on its Business;
- 6.1.4 South Essex Homes is convicted of a criminal offence;
- 6.1.5 the termination of the Partnership Agreement;
- 6.1.6 the Council giving not less than 90 days written notice to South Essex Homes of the date on which all or part of the Member Agreement will terminate.

7 **Clauses 8 to 17 – Various**

7.1 These clauses provide as follows:

- 7.1.1 Nothing in the Member Agreement creates a partnership between the Parties or makes one Party an agent of the other.
- 7.1.2 The application of the Contracts (Rights of Third Parties) Act 1999 is excluded.
- 7.1.3 The rights of each Party to the Member Agreement are not affected by completing, rescinding, failing to rescind, or failing / delaying exercising a right or remedy available to it. Waiver of a breach of a term of the Member Agreement, or a default under it, does not constitute a waiver or another breach or default of the Member Agreement.
- 7.1.4 Any rights or powers of the Council under the Management Agreement which shall or may be exercised after the termination or expiry of the Management Agreement (and are expressed as such) survive and remain in full force and effect notwithstanding termination or expiry. Any obligations of South Essex Homes provided for in the Management Agreement which remain to be discharged after the termination or expiry of the Management Agreement remain in full force and effect notwithstanding termination or expiry.

- 7.1.5 The Member Agreement can only be varied as set out in the Member Agreement and any variation must be in writing, and signed on behalf of each Party.
- 7.1.6 If any provision of the Management Agreement is declared invalid or unenforceable then the other provisions of the Management Agreement remain in full force and effect. The Parties are to negotiate a replacement term in good faith which can be substituted for any provision found to be illegal or unenforceable.
- 7.1.7 In the event of any ambiguity or discrepancy between the provisions of the Management Agreement, the Articles, and the Member Agreement, the terms of the Management Agreement will prevail.
- 7.1.8 Consents, notices, approvals or agreements to be given by the Council must be given in writing. Where the Member Agreement provides that a matter is subject to the consent, approval or agreement of a Party, it shall be in the absolute discretion of the Party concerned as to whether (and if so, on what terms and conditions) the consent, approval or agreement is made.
- 7.1.9 Notices under the Member Agreement should be sent in writing (personally, by post or email) to the named persons and addresses set out in clause 15.
- 7.1.1 The Member Agreement is governed and construed according to English Law and the Parties submit to the exclusive jurisdiction of the English Courts.

8 **Schedule 1 – Member Consent Matters**

- 8.1 Please refer to the full list of Member Consent Matters, which are 28 in total. The following are some of the included matters:
 - 8.1.1 varying South Essex Homes' Articles;
 - 8.1.2 permitting the registration of any person as a member of South Essex Homes other than the Council;
 - 8.1.3 adopting or amending its Business Plan;
 - 8.1.4 appointing or removing a management director or chief executive;
 - 8.1.5 make any borrowing; or
 - 8.1.6 passing any resolution for its winding up or present any petition for its administration (unless it has become insolvent); or
 - 8.1.7 engaging in any business other than as contemplated by the Business Plan or defray any monies other than in good faith for the purposes of or in connection with the carrying on of such business; or
 - 8.1.8 forming any Subsidiary or acquire shares in any other company or participate in any partnership or joint venture (incorporated or not); or

- 8.1.9 amalgamating or merging with any other company or business undertaking;
or
- 8.1.10 making any loan (otherwise than by way of deposit with a bank or other institution the normal business of which includes the acceptance of deposits) or grant any credit (other than in the normal course of trading) or give any guarantee (other than in the normal course of trading) or indemnity (other than in the normal course of trading); or
- 8.1.11 dismissing any Director; or
- 8.1.12 acquiring any land or assets not set out in the current Business Plan.

9 Schedule 2 – Covenants

These are set out above at paragraph 4.

10 Schedule 3 - Deed of Accession

This is discussed above at paragraph 5.

11 Schedule 4 – Group Policies

There are none at this stage.

12 Schedule 5 - Partnership Protocol

This is the same as set out at paragraph 1 above for the Management Agreement.

This report has been prepared for the Council only and is not to be shared with or relied upon by third parties without our prior written consent. We understand that this report will be shared with South Essex Homes Housing.

Trowers and Hamlins LLP

28 October 2019