

## 1. INTRODUCTION

- 1.1 We are instructed by Mr Julian Wilkins, the Legal Services Manager of Colchester City Council (the “Council”) We are asked to advise on the governance and decision-making arrangements on the potential winding-up or ‘hibernating’ (of Colchester Amphora Energy Ltd (“CAEL”).
- 1.2 We understand that in due course the Council may commission wider advice on options for the treatment of CAEL. As such this report is not concerned with the merits of either winding-up (dissolving the company) or hibernating it (placing the company into a state of dormancy), or the means by which the either course of action may be effected and what is involved. We understand the Council may require advice on such matters in due course which we would be happy to provide, however, they are beyond the scope of our immediate instructions.
- 1.3 CAEL is a subsidiary of Colchester Commercial (Holdings) Ltd (“CCHL”). CCHL is sole shareholder of CAEL. CCHL is wholly owned by the Council and as such the Council is the ultimate shareholder of CAEL.
- 1.4 In preparing this report we have reviewed and considered the following documents:
- 1.4.1 CAEL – Articles of Association and Companies House record;
  - 1.4.2 CCHL – Articles of Association and Companies House record;
  - 1.4.3 Group Governance Agreement dated 28 November 2017;
  - 1.4.4 The Council’s Constitution (dated November 2022):
    - Part 3 A, Responsibility for Functions;
    - Part 3 C, Scheme of Delegation to Cabinet Members;
    - Part 3 D, Scheme of Delegation to Officers;
    - Part 4 G, Governance and Audit Committee Procedure Rules.

## 2. CAEL

- 2.1 CAEL is a private limited company limited by shares and was incorporated under the Companies Act 2006 (the “CA2006”) on 1 June 2017. Pursuant to a special resolution of the shareholder (CCHL) the company adopted new Articles of Association (the “CAEL Articles”) on 17 October 2017. CAEL is a subsidiary of CCHL..

- 2.2 On 28 November 2017 CAEL entered into a Group Governance Agreement (the “Governance Agreement”) with Colchester Borough Council, CCHL, Colchester Amphora Trading Ltd and Colchester Amphora Homes Ltd. The Governance Agreement takes precedence where there is any inconsistency between its provisions and the CAEL Articles.
- 2.3 Subject to the CAEL Articles and the Governance Agreement, the CAEL Directors are responsible for the management of the company’s business, for the purpose of which they may exercise all the powers of the company. Under the CAEL Articles, CCHL has a reserve power pursuant to which, by way of a special resolution, CCHL may direct the CAEL directors to take or refrain from taking a specified action.
- 2.4 Decisions of the CAEL Board are determined by a majority decision of the CAEL Directors at a meeting of the CAEL Board, or a unanimous decision where the decision is in the form of a written resolution.
- 2.5 The CAEL Articles provide that shareholder decisions are determined by a show of hands on a resolution put to the vote at a general meeting (unless a poll vote is demanded). The CAEL Articles make no reference to written shareholder resolutions, however, they are provided for under the CA2006. An ordinary shareholder resolution is determined by a simple majority; a special shareholder resolution must be approved by not less than 75% of the shareholders entitled to vote on it.
- 2.6 Companies House records the board of directors of CAEL (the “CAEL Board”) as comprising two directors (the “CAEL Directors”).

### **3. THE CURRENT STATUS OF THE MATTER**

- 3.1 We understand that discussions and considerations for the future treatment of CAEL are in the initial stages and follow a review undertaken by CIPFA and recommendations made in light thereof. We understand that in due course the Council may require substantive advice on options for the company which are likely to include it being wound-up or prepared for dormancy.

### **4. CCHL**

- 4.1 CCHL is a private limited company limited by shares and was incorporated under the Companies Act 2006 (the “CA2006”) on 1 June 2017. Pursuant to a special resolution of the shareholder (the Council) the company adopted new Articles of Association (the “CCHL Articles”) on 17 October 2017. CCHL is the holding company of CAEL and CAEL’s shareholder.
- 4.2 On 28 November 2017 CCHL entered into the Governance Agreement with Colchester Borough Council, CAEL, Colchester Amphora Trading Ltd and Colchester Amphora Homes Ltd. The Governance Agreement takes precedence where there is any inconsistency between its provisions and the CCHL Articles.

- 4.3 Subject to the CCHL Articles and the Governance Agreement, the CCHL Directors are responsible for the management of the company's business, for the purpose of which they may exercise all the powers of the company. Under the CCHL Articles, the Council (as shareholder) has a reserve power pursuant to which, by way of a special resolution, the Council (as shareholder) may direct the CCHL directors to take or refrain from taking a specified action.
- 4.4 Decisions of the CCHL Board are determined by a majority decision of the CCHL Directors at a meeting of the CCHL Board, or a unanimous decision where the decision is in the form of a written resolution.
- 4.5 The CCHL Articles provide that shareholder decisions are determined by a show of hands on a resolution put to the vote at a general meeting (unless a poll vote is demanded). The CCHL Articles make no reference to written shareholder resolutions, however, they are provided for under the CA2006. An ordinary shareholder resolution is determined by a simple majority; a special shareholder resolution must be approved by not less than 75% of the shareholders entitled to vote on it.
- 4.6 Companies House records the board of directors of CCHL (the "CCHL Board") as comprising four directors (the "CCHL Directors").

## **5. THE GOVERNANCE AGREEMENT AND DELEGATIONS SCHEDULE**

- 5.1 The Governance Agreement provides for an advisory "Shareholder Committee" the purpose of which in respect of CAEL (and the other CCHL subsidiary companies) is to:
- 5.1.1 *(6.1.1) Receive, review and comment on or recommend any amendments to the CCHL business plan;*
  - 5.1.2 *(6.1.2) Review the financial performance of the group;*
  - 5.1.3 *(6.1.3) Make recommendations to the Council on how it should exercise the function flowing from its ownership of shares.*
- 5.2 The Shareholder Committee has no power to make decisions on behalf of the Council or CCHL – its remit is to advise CCHL and the Council in its capacity as the shareholder of the companies.
- 5.3 The Governance Agreement provides that until otherwise resolved by the Council, the Council's "Trading Board" shall fulfil the role of the Shareholder Committee.
- 5.4 We understand that Shareholder Committee function is now performed by the Council's Governance and Audit Committee. The procedure rules for the Audit and Governance Committee set out at Part 4, Section G of the Council's Constitution include its terms of reference as the Shareholder Committee for Colchester Commercial (Holdings) Ltd, as set out below at paragraph 6.2.4.
- 5.5 In accordance with the Governance Agreement, the CCHL Board reports to the Shareholder Committee or the Council both as the board of CCHL, and in the CCHL Board's capacity as the 'first instance' shareholder of CAEL and the other subsidiary companies. In exercising the Council's shareholder function in respect of the subsidiary

companies the CCHL Board determines those matters delegated to it for the purpose set out in schedule 1 of the Governance Agreement.

- 5.6 Schedule 1 to the Governance Agreement is a “Delegations Schedule” which details particular matters for the determination of the Council or the delegation of their determination to CCHL or CAEL. The Delegations Schedule provides that the following matter is for the determination of the Council:

*Making any petition or passing any resolution to wind up the relevant party or making any application for an administration or winding up order or any order having similar effect or giving notice of intention to appoint an administrator or file a notice of appointment of an administrator.*

As such, a decision to wind up CAEL is to be made by the Council in its capacity as the company’s ultimate shareholder.

- 5.7 Additionally, the Delegations Schedule includes various matters categorised as “corporate”, “operational” or “finance” which may also be required in the winding up of the company or in preparing for it to become dormant. Under the Delegations Schedule, decisions on such matters may be reserved to the Council or delegated to CCHL or CAEL.
- 5.8 Once the future of CAEL has been determined it will be possible to identify all the matters which need to be determined to effect the company’s winding up or dormancy and whether, under the Governance Agreement, decisions on such matters are also to be made by the Council, or if they have been delegated to CCHL or CAEL.
- 5.9 Those matters which fall for the Council’s determination (along with the decision to wind up the company or prepare it for dormancy) could be included in a single set of shareholder resolutions (with conditions or limits if necessary) which once approved by the Council would negate or reduce the need for further resolutions. Alternatively, provided sufficient information was available to the Council for the purpose, the Council may resolve to approve the given course of action (winding up or dormancy etc) and delegate to CCHL / CAEL overarching authority to take such steps as necessary to effect the given course of action (again with conditions or limits if necessary). Either way, it will be necessary to check whether any of the matters falling for the determination of the Council are required to be resolved as special resolutions under the CA2006.
- 5.10 The operational winding up of CAEL or its preparation for dormancy will be the responsibility of the CAEL Board.

## **6. COUNCIL DECISION-MAKING AS SHAREHOLDER**

- 6.1 The Council operates an ‘executive arrangement’ model of governance and as such the Council’s role and decision-making as shareholder of its companies is an executive function. This is reflected in the arrangements for the Council’s exercise of its shareholder function and shareholder decision-making provided for in the Council’s Constitution.

6.2 The Council's Constitution provides that:

6.2.1 **Part 3, Section C: Functions Retained by the Leader of the Council and Portfolio Holder for Strategy:**

(16) *Client role for Colchester Commercial (Holdings) Ltd*

6.2.2 **Part 3, Section C: Delegation to Deputy Leader of the Council and Portfolio Holder for Local Economy and Transformation:**

(9) *To review and monitor the performance of Colchester Commercial (Holdings) Ltd and its subsidiaries: Colchester Amphora Housing Ltd, Colchester Amphora Trading and Colchester Amphora Energy Ltd together with the commercial aspects of Sports and Leisure.*

6.2.3 **Part 3, Section D: Scheme of Delegation to Officers**

Delegated to All Strategic Directors:

1. *Authority to act as client officer for the Council in relation to matters related to Colchester Commercial (Holdings) Limited and its subsidiary companies.*

2. *Authority to act as the Council's shareholder representative in relation to Colchester Commercial (Holdings) Limited and to cast the Council's vote at any relevant Board or shareholder meeting.*

6.2.4 **Part 4, Section G: Audit and Governance Committee – Rules of Procedure**

Terms of Reference as Shareholder Committee for Colchester Commercial (Holdings) Ltd:

6.2.4.1 (8) *Consider and review the activities and financial performance of Colchester Commercial (Holdings) Limited and its subsidiary companies i.e. Colchester Amphora Housing, Colchester Amphora Energy and Colchester Amphora Trading.*

6.2.4.2 (9) *Receive, review and recommend to Cabinet Colchester Commercial (Holdings) Limited's business plans (including its subsidiary companies) annually and to review performance including delivery of the dividend.*

6.2.4.3 (10) *Monitor, challenge and make recommendations to Cabinet regarding Colchester Commercial (Holdings) Limited and its subsidiary companies.*

6.2.4.4 (11) *Make recommendations to Cabinet on how it should exercise the functions flowing from its ownership of shares in Colchester Commercial (Holdings) Limited and its subsidiary companies.*

6.3 We note that pursuant to its terms of reference the Audit and Governance Committee, in its capacity as the Shareholder Committee, makes recommendations to the Cabinet

as to the Cabinet's execution of the shareholder function in respect of CCHL and the subsidiary companies. The terms of reference make no mention of the Strategic Directors to whom the shareholder function has been delegated as detailed above at paragraph 6.2.3. However, in our view this does not put the Shareholder Committee terms of reference at odds with the scheme of delegation to officers which is still operable but may not in fact be the current arrangement.

- 6.4 The Cabinet is the Council's ultimate shareholder body and may retain and / or delegate the shareholder function and shareholder decision-making as deemed appropriate. As such, it would be expected that the terms of reference provide for the Shareholder Committee's reporting to the Cabinet as the ultimate shareholder body. As seemingly the Cabinet has delegated the shareholder function to each Strategic Director, a Strategic Director would be advised and assisted by the Shareholder Committee in the same way the Cabinet would be.

## **7. DECISION-MAKING AND THE DECISION-MAKING PROCESS**

- 7.1 As detailed above, a decision to wind up CAEL falls to be made by the Council in its capacity as the company's ultimate shareholder, and whilst not expressly provided for in the Delegations Schedule, in our view so too would be a decision to effect the dormancy of the company given that such a course of action is likely to be outside of the company's current business plan, and involve matters which must be determined by the Council pursuant to the Delegations Schedule.
- 7.2 The exercise of the Council's shareholder function as regards CCHL and as the ultimate shareholder of CAEL and the other subsidiary companies is currently delegated to each of the Council's Strategic Directors. In making the Council's shareholder decisions a Strategic Director should be advised by the Shareholder Committee.
- 7.3 The delegation to the Strategic Directors is permissible under the Local Government Act 2000, pursuant to which the delegation of executive functions, and as such the delegation of the shareholder function and shareholder decision-making is within the gift of the Leader of the Council. The Leader's retention or delegation of executive functions is set out in the Constitution at Part 3 Section 3 and Section 4 as detailed above under paragraph 6.2. The Leader may require that a given shareholder decision is made by themselves, an individual Cabinet Member, another officer or committee of the Cabinet, or the Cabinet collectively. However, given that the Leader has retained the exercise of the 'client role' for CCHL (as detailed above at paragraph 6.2.1) which we take to mean the Council's commissioning function in respect of CCH, the Leader would likely be conflicted if also exercising the shareholder function in respect of CCHL or the subsidiary companies. As such, in our view it would be preferable for the Leader to delegate a shareholder decision to a Cabinet Member where the decision is not being made by Cabinet or a Strategic Director – as currently delegated.
- 7.4 Subject to the Council's Constitution, a shareholder decision may also be a key decision and / or subject to 'call-in'. In such an instance the decision will need to be

taken in accordance with the procedure for determining key decisions and if applicable so too the call-in procedure provided for in the Constitution.

- 7.5 Whether it is a Strategic Director, Cabinet Member or Cabinet who, acting in the capacity as CAEL's ultimate shareholder, determines that the company should be wound up or put into dormancy, the decision-making process will start with a resolution of the CAEL Board. To avoid the need to call general meetings to effect shareholder resolutions, we recommend using written shareholder resolutions and the process set out below is based on the same.

### **CAEL**

- 7.6 At a duly convened and quorate meeting of the CAEL Board the CAEL Directors will need to resolve a proposed course of action as regards the company for the approval of the Council as the company's ultimate shareholder. The CAEL Board will need to have the information and any advice required to make an informed decision, and the CAEL Directors will each need to be satisfied that in making the decision s/he is acting in the best interests of the company and in compliance with his/her duties as a director.
- 7.7 Assuming the CAEL Board agrees on a proposed course of action, the CAEL Board will need to approve the form and circulation of a written shareholder resolution to the CCHL Board, with a recommendation that the CCHL Board approves the proposed course of action and circulates to the Council as shareholder a written resolution with a recommendation from the CCHL Board that the Council resolves to approve the written shareholder resolution put by the CAEL Board. The resolution may provide for the approval of specific matters set out within it which fall to be determined by the shareholder under the Delegations Schedule and / or a general authorisation for the CAEL Board to take such steps as necessary to effect the given course of action proposed for CAEL (e.g., winding up or dormancy).

### **CCHL**

- 7.8 At a duly convened and quorate meeting of the CCHL Board the CCHL Directors will need to consider the course of action proposed by CAEL and the written shareholder resolution circulated by the CAEL Board. The CCHL Board will need to have the information and any advice required to make an informed decision in exercising its role as the 'first instance' shareholder of CAEL.
- 7.9 Assuming the CCHL Directors agree with the CAEL Board's proposed course of action, the CCHL Board will need to resolve accordingly and approve the circulation to the Council of the CAEL written shareholder resolution and the CAEL Board's recommendation that the Council approve the resolution. The CCHL Board resolution approving the form and circulation to the Council of the CAEL written shareholder resolution must be circulated to the Council with the original written shareholder resolution and recommendation put by the CAEL Board.



## **The Council as Ultimate Shareholder of CAEL**

- 7.10 The written shareholder resolution put by the CAEL Board, and the CCHL Board resolutions in respect thereof, should be circulated in the first instance to a Strategic Director as they have the standing delegation under the Constitution. The Strategic Directors have each been delegated shareholder decision-making in respect of CAEL where, under the Delegations Schedule, a shareholder decision cannot be made by the CCHL Board acting as the first instance shareholder of CAEL.
- 7.11 If the decision remains with the Strategic Director s/he will determine the written shareholder resolution on behalf of the Council as the ultimate shareholder of CAEL.
- 7.12 The Strategic Director, Cabinet or Cabinet Member Cabinet determining the resolution will need to be satisfied that they have the information and advice required to make an informed decision and have consulted as may be required or appropriate. If the resolution is also a key decision under the Council's Constitution, it will need to be made in compliance with the rules and procedures for determining key decisions as set out in the Constitution, including if applicable, as regards call-in. The shareholder decision-maker would be assisted and advised by the Shareholder Committee.
- 7.13 Once the resolution has been determined the decision may be subject to call-in but then must be notified to the parties concerned with the duly executed written shareholder resolution returned to CAEL and copies retained by the Council and CCHL. Any special shareholder resolution will need to be filed with Companies House. As per paragraph 7.12 above, if the resolution is also a key decision, its determination, recording and publication will need to accord with the relevant rules and procedures of the Council's Constitution.

## **8. CONFLICTS OF INTEREST**

- 8.1 At each stage of the decision-making process care will need to be taken to guard against potential conflicts of interest. Those making decisions on behalf of CAEL or advising them should not also be involved in decision-making on behalf of the shareholder or advising them.

## **9. SUMMARY**

- 9.1 A decision to wind up or place CAEL into dormancy is a matter for the Council as the ultimate shareholder of the company in accordance with the Group Governance Agreement and Delegations Schedule.
- 9.2 The decision will be effected by a (written) shareholder resolution(s) proposed by the CAEL Board and circulated in the first instance to CCHL Board acting as the 'first instance' shareholder of CAEL. In turn, the CCHL Board will circulate the resolution to the relevant Strategic Director (or as may otherwise have been decided) for determination on behalf of the Council as CAEL's ultimate shareholder.



- 9.3 The operational implementation of the resolutions and thereby the winding up of CAEL or preparing it for dormancy will be the responsibility of the CAEL Board. There are procedures to be followed for either course of action in respect of which we would be happy to advise if required.
- 9.4 Effecting the board and shareholder resolutions required to implement the course of action determined for CAEL is not complex as a matter of law but is very much process driven. The requirements for shareholder decision-making are provided for under the CA2006 and the process is somewhat administratively burdensome as well as potentially confusing for those not familiar with it. In addition to the requirements of the CA2006, the decision-making process must give effect to the governance arrangements in place for the Council and its companies in accordance with the Constitution.
- 9.5 The key to effecting the decisions required to implement the course of action determined for CAEL is preparation and ensuring that the operational issues, actions and decisions required at each stage of winding up or preparing the company for dormancy (or any other course of action) and the decision-makers are identified in advance. We would expect that much can be agreed between the parties informally and then provided for in reports and the documents prepared to give effect to the agreed arrangements.
- 9.6 Resolutions can be formulated and 'bundled' where possible and circulated to the decision-maker with the information required to make an informed determination. This should then reduce the number of occasions on which a matter needs to be referred to a given decision-maker.
- 9.7 Potential conflicts of interest arising for decision-makers and those advising them need to be guarded against. It is important that the parties each understand the course of action decided upon for CAEL, what is required at each stage of the process and who needs to make the necessary decisions.

## 10. NEXT STEPS

- 10.1 Once the preferred course of action for CAEL has been decided we would be happy to advise further on the resolutions needed, the resolutions process, and to draft the necessary resolutions and reports if required.
- 10.2 Please do not hesitate to contact us with any queries or if any further information is required.

**Anthony Collins**

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