

**Report to all Councillors of Nottingham City Council under s.114 of the Local Government
Finance Act 1988**

Report of: Clive Heaphy, Section 151 Officer

Date of Report: 15th December 2021

Purpose of report and executive summary

- 1.1 Matters have come to my attention which require me to make a report under Section 114(2) of the Local Government Act 1988. Members of the Council are asked to consider this report within 21 days of the date of this report. I also draw members' attention to a further report at the end of this document issued by the Monitoring Officer under the Section 5 of the Local Government and Housing Act 1989.
- 1.2 I have briefed extensively the Leader of Nottingham City Council, leaders of political groups, chairs of relevant committees, members of the Council, the Council's auditors, representatives of the Department for Levelling Up, Housing and Communities, the Improvement and Assurance Board and the Board of Nottingham City Homes on these matters. Briefing has been both verbal and written.
- 1.3 The Local Government Finance Act 1988, Section 114(2), requires that the chief finance officer of a relevant authority shall make a report under this section if it appears to him that the authority, a committee of the authority, a person holding any office or employment under the authority or a joint committee on which the authority is represented—
 - (a) has made or is about to make a decision which involves or would involve the authority incurring expenditure which is unlawful,
 - (b) has taken or is about to take a course of action which, if pursued to its conclusion, would be unlawful and likely to cause a loss or deficiency on the part of the authority, or
 - (c) is about to enter an item of account the entry of which is unlawful.
- 1.4 The acts of unlawfulness and the purpose of this report relate to
 - 1.4.1 The treatment by Nottingham City Council of annual 'management fee rebates' from Nottingham City Homes since 2014/15 (funds derived from the Housing Revenue Account (HRA)) as General Fund (GF) income in breach of the HRA Ring Fence under the Housing Act 1989 (S74).
 - 1.4.2 The receipt by Nottingham City Council since 2014/15 of annual 'management fee rebates which are paid by Nottingham City Homes Limited (a wholly owned and controlled company of NCC), in breach of its Articles of Association.

- 1.5 Under this report, I am not requiring the cessation of spending by the Council but rather bringing to members' attention acts of unlawfulness. However, I have imposed a management action prohibiting NCC entering into new agreements and spending commitments with Nottingham City Homes unless expressly approved in writing by myself in consultation with the Head of Paid Service (Chief Executive) and Monitoring Officer as appropriate.
- 1.6 The background, legal framework, findings and recommendations are set out in this report and the report from CIPFA which is attached. In summary,
- 1.7 Having completed their review, CIPFA conclude that *'however the payment made by NCH to NCC since 2014-15 is defined or described, the GF has benefited from these payments totalling £15,858,500 in the period from 2014-15 to 2020-21. As discussed this seems to be a breach of the HRA ring-fence which is, potentially, unlawful.'*
- 1.8 CIPFA also conclude that *'furthermore, if it is determined, on the basis of legal advice, that the payments NCH has made to NCC are prohibited distributions of surpluses these are also, potentially, unlawful.'*
- 1.9 An External Barrister has reviewed the CIPFA report and is of the opinion that in respect of the statements at 1.7 and 1.8, these constitute acts of unlawfulness.
- 1.10 This unlawful position appears to be the result of a systematic and planned approach between NCC and NCH since 2014/15 whereby Nottingham City Council received an annual 'management fee rebate' from NCH in breach of its Articles of Association which NCC subsequently treated unlawfully as General Fund income.
- 1.11 Additional issues have also come to CIPFA's attention which raise further question about more breaches which could further threaten the integrity of the HRA ring-fence and which will be the subject of further investigations.

2. Legal framework for a Section 114 report

- 2.1 Section 114 (2) of the Local Government Finance Act 1988 requires the Chief Finance Officer of a relevant authority to make a report under this section if it appears to him that the authority, a committee of the authority, a person holding any office or employment under the authority or a joint committee on which the authority is represented
 - (a) has made or is about to make a decision which involves or would involve the authority incurring expenditure which is unlawful,
 - (b) has taken or is about to take a course of action which, if pursued to its conclusion, would be unlawful and likely to cause a loss or deficiency on the part of the authority, or
 - (c) is about to enter an item of account the entry of which is unlawful.

- 2.2 The process for issuing a s.114 report and the effect of it are set out in the 1988 Act. Subsection 3(A) requires the Chief Finance Officer to consult, so far as reasonably practicable, the Head of Paid Service (Chief Executive) and the Monitoring Officer. The Council's Chief Executive as Head of Paid Service and the Monitoring Officer have been fully engaged prior to this report being issued.
- 2.3 Section 115 requires Council to consider the report at a meeting where it shall decide whether it agrees or disagrees with the views contained in the report and what action (if any) it proposes to take in consequence of it. The meeting must be held no later than 21 days beginning with the day the report was sent and this decision is reserved to full Council.
- 2.4 Section 116 requires the Council to notify its external auditors of the report and the time, date and place of the Council meeting. The external auditors also need to be informed of the outcome of the meeting as soon as practicable. The external auditors have been kept informed of the emerging financial position and the planned work. The external auditors will need to consider the implications of this report on their statutory functions and the implications for their opinion on the 2021/22 or prior year accounts.
- 2.5 CIPFA guidance recommends that contact is made with Department for Levelling Up, Housing and Communities, lead members and statutory officers in advance of issuing a s.114 report, to undertake some scenario testing and to ensure a robust action plan to address the issues raised. Lead members have been kept up to date on the emerging budget situation, as have the Executive Board including the key statutory officers and there has been regular liaison with the Improvement and Assurance Board, DLUHC officials and CIPFA.

3. Background

- 3.1 As Section 151 officer, I have sought assurances in relation to the financial relationship between the Council and its wholly owned and controlled subsidiary, Nottingham City Homes and in particular
 - a. The basis on which NCC has budgeted for and received annual payments into its General Fund from NCH given the statutory ring-fence in operation for HRA funds;
 - b. The basis on which transactions have been made between NCC and NCH for services provided;
 - c. The basis of transactions between NCH companies:
 - i. Nottingham City Homes Limited (NCH);
 - ii. Nottingham City Homes Registered Provider Limited (NCHRP);
 - iii. Nottingham City Homes Enterprises Limited (NCHE).
- given that each company operates independently under their own Articles of Association.

- 3.2 Having sought assurances from NCC and NCH colleagues as to the legitimacy of these transactions of concern, I was unable to satisfy myself and I commissioned, with the knowledge and support of the Head of Paid Service and Monitoring Officer, in consultation with the Leader of the Council and the Chartered Institute of Public Finance and Accountancy (CIPFA) to undertake investigatory work to inform my S151 opinion in respect of financial legitimacy. The CIPFA report dated 10 December 2021 is appended and I quote extensively from it throughout my Section 114 report. It is important that the two documents are read together.
- 3.3 In conjunction with the Head of Legal & Governance (Deputy Monitoring Officer), an external barrister's opinion was sought, to review the lawfulness questions raised by myself and the CIPFA report.
- 3.4 The Statutory Officers have reviewed and fully accepted the findings and recommendations of the reports.

4. Operation of the HRA

- 4.1 The Housing Revenue Account (HRA) is intended to record expenditure and income on running a council's own housing stock and closely related services or facilities, which are provided primarily for the benefit of the council's own tenants.
- 4.2 The main features of the HRA are:
- it is a landlord account, recording expenditure and income arising from the provision of housing accommodation by local housing authorities (under the powers and duties conferred on them in Part II of the Housing Act 1985 and certain provisions of earlier legislation).
 - it is not a separate fund but a ring-fenced account of certain defined transactions, relating to local authority housing, within the General Fund.
 - the main items of expenditure included in the account are management and maintenance costs, major repairs, loan charges, and depreciation costs.
 - the main sources of income are from tenants in the form of rents and service charges.
 - the HRA should be based on accruals in accordance with proper accounting practices, rather than cash accounting.
- 4.3 The HRA is governed by legislation and the key legislation relating to the HRA is:
- Housing Act 1985 (Part II);
 - Housing Act 1988;
 - Local Government and Housing Act 1989 (section 74);
 - Local Government Act 2003;
 - Localism Act 2011.

- 4.4 Legislative features are that:
- it is a ring-fenced account within the General Fund.
 - Credits and Debits are prescribed by statute.
 - There is no general discretion to breach the ring-fence.
 - The Local Housing Authority (LHA) (NCC in this instance) cannot budget for a deficit within the HRA.
 - all borrowing within the HRA is in line with the CIPFA Prudential Code.
- 4.4 The latest guidance published by the [then] Ministry of Housing Communities and Local Government (MHCLG) on the operation of the HRA ring-fence on 10 November 2020 replaced Circular 8/95 which had been published by the former Department of the Environment (DoE) on 1 May 1995. The latest guidance restates Ministers' established policy for the HRA and introduces no new issues of principle. In fact, since the introduction of the HRA ring-fence in 1990, there has been no change in relation to policy or issues of principle in respect of the HRA ring-fence.
- 4.5 The latest guidance, as was the case previously, makes it incumbent on NCC to be fair to both tenants and to council tax payers in applying the "who benefits?" test to ensure there is no breach of the HRA-ring-fence in contravention of the legislation and guidance governing the HRA. The "who benefits?" test guards against, on the one hand, tenants subsidising council taxpayers (and the services provided to them through the General Fund) and, on the other hand, council taxpayers subsidising tenants (and the services provided to them through the HRA).

5. ALMOs and Companies Limited by Guarantee

- 5.1 An arms-length management organisation (ALMO) is a not-for-profit company that provides housing services on behalf of a local housing authority (LHA). Establishment of an ALMO separates the day-to-day housing management role of the landlord from the wider strategic housing role of the LHA. The LHA retains the strategic housing function and ownership of the housing and tenants remain secure tenants of the LHA.
- 5.2 ALMOs were first established in 2002. The main driver for the establishment of ALMOs was access to funding through the Decent Homes Programme. Since this came to an end with the introduction of HRA self-financing in 2012, the number of ALMOs has reduced significantly as LHAs have questioned the rationale for continuing with their ALMOs. Some LHAs have taken services back in-house whilst others have transferred their stock to their ALMOs (having made constitutional changes to the ALMO and registered it as a Registered Provider (RP) of social housing).
- 5.3 A company limited by guarantee is a type of corporation used primarily for non-profit organisations that require legal personality. A company limited by guarantee does not have a share capital or shareholders. Instead it has members who act as guarantors of the

company's liabilities: each member undertakes to contribute an amount specified in the Articles of Association in the event of insolvency or of the winding up of the company.

- 5.4 A company limited by guarantee is not prohibited from distributing its profits by the Companies Act or any other law if allowed to do so by its Articles of Association but it is commonplace for such restrictions to be put on profit distribution in the Articles of Association.

6. Legal status of Nottingham City Homes and its subsidiaries

- 6.1 **Nottingham City Homes Limited (NCH) is NCC's ALMO.** NCH was incorporated on 22 November 2004 and is a company limited by guarantee. NCC is the sole member and is thus, a company controlled by NCC.

- 6.2 NCH manages NCC's affairs in relation to its housing stock and tenants through a Partnership Agreement, but NCC remains the owner of the stock and manages the HRA including its policies and strategies. A management fee is paid by NCC to NCH for these services based on delivering to a specification.

- 6.3 An extract from Clause 8 of the Articles of Association adopted by NCH in September 2019 stated in relation to the Application of Income and Property:

6.3.1 *"The Income and property of the Organisation shall be applied solely towards the promotion of its objects as set forth in the Articles of Association and no portion thereof shall be paid or transferred, directly or indirectly, save as provided below, by way of dividend, bonus or otherwise howsoever by way of profit, Provided That nothing herein shall prevent any payment in good faith by the Organisation..."*

- 6.4 The remainder of Clause 8 (subsections 1-6) set out the circumstances whereby income and property can be applied and includes at subsection 4

6.4.1 *"of reasonable and proper remuneration to the Council Member or employees thereof (not being Board Members) in return for services rendered to the Organisation."*

- 6.5 Thus, there is a clear prohibition as set out in the Articles of Association adopted in September 2019, on the distribution of profits (which can be taken to include surpluses in the case of a not-for-profit organisation) through a dividend to NCC.

- 6.6 **Nottingham City Homes Registered Provider Limited (NCHRP)** is also a company limited by guarantee. NCHRP was incorporated on 5 October 2015. NCHRP is a controlled subsidiary of NCH, NCH being the parent company NCHRP.

- 6.7 NCHRP is, in addition, registered as a not-for-profit Registered Provider of social housing with the Regulator under the Housing and Regeneration Act 2008.

- 6.8 The Articles of Association of NCHRP, adopted in September 2019 state at Clause 7

6.8.1 *The Company shall not trade for profit. The income and property of the Company must be applied solely towards the Objects and (except to the extent authorised by this Article 7):*

6.8.1.1 *no part may be paid or transferred directly or indirectly by dividend, bonus or profit to a Member; and*

6.8.1.2 *a Board Member may not directly or indirectly receive any money or benefit from the Company*

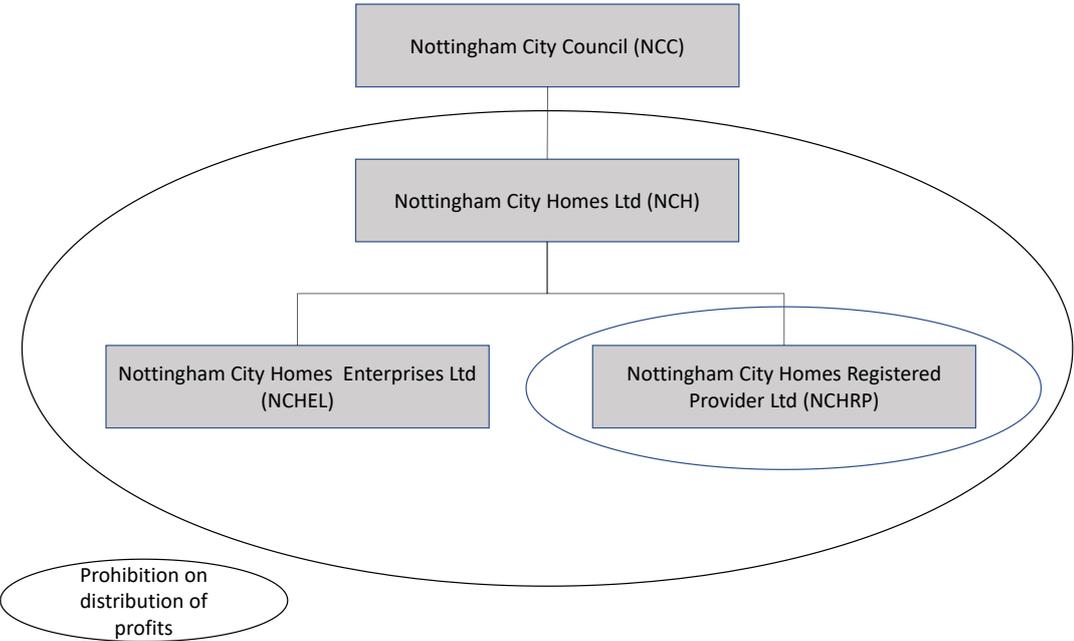
6.9 **Nottingham City Homes Enterprises Limited (NCHE)** is a company limited by shares. NCHE was incorporated on 2 October 2015 and 100% of the shares are owned by NCH. Thus, like NCHRP, NCHE is a controlled subsidiary of NCH, NCH being the parent company.

6.10 Clause 37.1 of NCHE's Articles of Association adopted in September 2019 states, in relation to dividends:

6.10.1 Subject to the Act, the Company may by ordinary resolution declare dividends in accordance with the respective rights of the shareholders. No dividend may exceed the amount recommended by the Board

6.11 **Nottingham City Homes Group (NCHG)** comprises NCH and its subsidiaries NCHRP and NCHE. Given NCH is controlled by NCC, by extension all entities in the group are ultimately controlled by NCC.

6.12 The Articles of Association of NCH, NCHRP and NCHE, taken together, prohibit the distribution of any profits (through a dividend) to NCC as is illustrated in the diagram below.



7. Summary of Key Findings from CIPFA

- 7.1 CIPFA established that 'management fee rebate' payments made by NCH to NCC since 2014-15 have been described in various ways. The payments made by NCH to NCC have been consistently budgeted for by NCC since 2014-15 and subsequently accounted for in the Council's GF. CIPFA comment that these payments have directly supported NCC's General Fund in coping with the financial challenges faced by the City Council.
- 7.2 None of the payments in question made by NCH to NCC has been returned to the HRA despite the HRA accounting for more than 95% of the funding provided by NCC to NCH.
- 7.3 CIPFA considered the nature and various descriptions applied to these payments taking into account the accounting concept of substance over form. On this basis CIPFA's consideration of the nature of the payments made by NCH to NCC which started in 2014-15 concluded that:
- *If the monies paid by NCH to NCC were a legitimate management fee refund (rebate), then they should have been paid back to the HRA, which pays the management fee (and is the single largest source of funding of NCH); or*
 - *if related to NCH savings and/or efficiencies, then the beneficiary in NCC, if such savings and/or efficiencies were not retained by NCH, should have been the HRA through a reduction in the management fee.*
- 7.4 In both cases, CIPFA are clear that it should have been the HRA that benefited from any rebate and not the General Fund.
- 7.5 Instead, given that payments made by NCH to NCC have been accounted for by NCC to the benefit to the GF rather than to the HRA, CIPFA conclude that the payments could reasonably be argued to be '*a mechanism conceived to divert HRA funds to the GF*' and that if so, in CIPFA's view, this is '*an illegitimate use of HRA funds and a clear breach of the HRA ring-fence which is, potentially, unlawful*'.
- 7.6 Legal opinion in relation to the CIPFA report concludes the HRA ring fence has been breached and that such a breach is unlawful in contravention of Section 74 of the Local Government and Housing Act 1989.
- 7.7 Moreover, CIPFA's view is that 'if, in fact, the payments made by NCH to NCC are distributions of surpluses conceived as a mechanism by NCC to divert HRA funds to the GF, the issue for NCC is exacerbated since NCC has made NCH complicit in this.'
- 7.8 CIPFA say in their report that '*Importantly, NCH cannot pay a dividend (distribute a surplus) to NCC since it is prohibited by NCH's Articles of Association. Subject to further work it is quite possible that NCH may have entered into illegitimate transactions which have not been accounted for properly in NCH Group Financial Statements. Consequently, the actions of NCH's Directors in entering into these transactions and potentially breaching NCH's articles of Association will need further explanation given that this is also, potentially, unlawful*'.

- 7.9 Legal opinion confirms that however labelled, in substance they are a dividend and/or a distribution of a surplus. As a result, the Council has been in receipt of payments which were in contravention of NCH's Articles of Association.
- 7.10 CIPFA have raised concerns about a potential conflict between NCH's Articles of Association and the Partnership Agreements between NCC and NCH. In the event of a conflict, the Articles of Association prevail.
- 7.11 CIPFA also state that *'during the course of our work, a number of other issues, separate from the payment NCH makes to NCC, have been raised which are relevant to the management of the HRA and to safeguarding the integrity of the ring-fence. It has been suggested to us that decisions have been taken by NCC that could be challenged as having undermined the integrity of the HRA ring-fence. These decisions fall into two key categories*
- i) Decisions that have resulted in a loss of income to the HRA to the benefit of the GF*
 - ii) Decisions that have resulted in the HRA bearing disproportionate costs to the benefit of the GF*
- CIPFA have been provided with a schedule of issues which will require further investigation. NCH is not party to these potential breaches of the ring-fence'*
- 7.12 CIPFA further state that *'concern has been raised during the course of our work about the possibility of HRA funds (or resources paid for by the HRA) being utilised by NCH on non-HRA activities.... This could potentially lead to breaches of the integrity of the HRA ring-fence.'*
- 7.13 Finally, CIPFA note that *'Following a restructuring in 2016, the HRA client function [within NCC] was significantly reduced. NCC as the Local Housing Authority (LHA) retains the strategic housing role. Concern has been raised as to whether NCC has retained sufficient capacity to provide the strategic direction necessary to fulfil this strategic role. The question of whether NCC has adequate capability to properly scrutinise the activities of NCH has also been raised.'* *A full review of governance arrangements will be undertaken including the strengthening of the client function and a review of the Partnership Agreement.*
- 7.14 The issues at 7.11-7.13 will require further investigation.

8. Remedies

- 8.1 The payments of the 'management fee rebate' funds into the GF are unlawful. That unlawfulness cannot be undone but NCC can rectify the wrong done to the HRA financially and proposes the following;
- 8.2.1 In respect of financial years 2014/15 -2019/20, set aside in its General Fund reserves the sum of £14.366,500 to repay the HRA (this is net of 8.2.2 below). Interest will be added to bring the payment to 2021/22 prices. Repayment will be made as soon as the sum for each individual year is validated following further detailed work (see below).

- 8.2.2 In respect of the financial year 2020/21, NCC's draft published accounts will be amended by £1,492,000 to remove this 'management fee rebate' from being recognised within the GF and no invoice will be raised by NCC.
- 8.2.3 For 2021/22, no 'management fee rebate' will be due from NCH and NCH's management fee for the year will be adjusted by a corresponding amount.
- 8.2.4 From 2022/23 onwards, the management fee will be set at the correct level to deliver our required specification and any small surplus made by NCH can be retained for investment in HRA services. A genuine rebate is permissible only retrospectively and if NCH do not perform a function for which they have been contracted and paid. Such a rebate is to the benefit of the HRA not the GF. It can never be budgeted for.
- 8.2.5 A review is underway on the process and systems that failed to prevent these unlawful beaches to ensure that they cannot be repeated. This includes a review process in respect of 'novel' proposals by appropriately trained and experienced staff. Further training of members and officers in relation to the Housing Revenue Account and housing management function is planned.
- 8.3 Inevitably, this will weaken the Council's General Fund reserves and its ability to withstand future financial shocks. The provisions of section 25 Local Government Act 2003 require that, when the council is making the calculation of its budget requirement, it must have regard to the report of the Chief Finance (section 151) Officer as to the robustness of the estimates made for the purposes of the calculations and the adequacy of the reserves.

9. Recommendations

- 9.1 Council are asked to note and endorse at its meeting to be held within 21 days of the issue of this Notice, the actions proposed by the Section 151 Officer in paragraphs 8.2.1 – 8.2.5
- 9.2 Council are also asked to endorse recommendations made by CIPFA at 9.3 – 9.9 below (which have been accepted by the Section 151 and other Statutory officers) and recommendation 9.10.
- 9.3 *In addition to commissioning legal advice on the lawfulness of the transactions, NCC will need to consider, in consultation with the Department for Levelling Up, Housing and Communities (DLUHC), formerly MHCLG (and the Improvement and Assurance Board), and NCC's auditor and subject to that legal advice, what further actions are necessary.*
- 9.4 *that NCC examines in detail the chronology of events in relation to the payments NCH has made to NCC including who conceived the payment, the accounting transaction detail, who authorised it, who knew about it, how challenges to the legitimacy of the payment were dealt with and by who and any other facts that can provide insight into how the situation came to be.*

- 9.5 *In the event that the S151 considers that the GF is required to repay the HRA or NCH, consideration should be given to how the HRA or NCH should be additionally recompensed to reflect the opportunity cost of not having access to funds they may have been entitled to.*
- 9.6 *As a consequence of the concerns raised by the S151 and the work undertaken and the conclusions that CIPFA have drawn, the examination and resolution of other potential breaches of the HRA ring-fence referred to in the main report is recommended*
- 9.7 *Further analysis of the finances of NCHG to provide assurance to NCC that HRA funds have been properly applied and have not been used inappropriately to fund non-HRA activities undertaken by NCH, which could potentially breach the integrity of the HRA ring-fence. This would involve a forensic financial examination of:*
- i) Transactions for services flowing between NCC and NCH,*
 - ii) Transactions for services flowing between NCH and its subsidiaries;*
- 9.8 *Review of the adequacy of NCC's HRA client function in order to assess whether it is sufficient to properly scrutinise the activities of NCH and provide the proper strategic direction, controls and assurance on behalf of NCC as the Local Housing Authority (LHA).*
- 9.9 *Consequential to CIPFA's work and in light of the changes that have taken place in how LHAs provide housing management since the end of the Decent Homes programme, they also recommend that NCC commission a review of the NCC/NCH group relationship and future operating model to include the purpose, structure, finances and governance in relation to the housing management function as set out in the Recovery and Improvement Plan.*
- 9.10 Until the review as set out at 9.9 is concluded, management controls are being applied prohibiting NCC entering into new agreements and spending commitments with Nottingham City Homes unless expressly approved in writing by Section 151 Officer in consultation with the Head of Paid Service (Chief Executive) and Monitoring Officer, as appropriate.

10. Next Steps/Timescales

- 10.1 The obtaining of the opinion of legal Counsel has been actioned.
- 10.2 The matter has been discussed with the Improvement and Assurance Board, the Department for Levelling Up, Housing and Communities and NCC's Auditor.
- 10.3 The Chief Executive has commissioned an independent investigation through the Local Government Association in accordance with recommendation 9.4 above.
- 10.4 CIPFA have been commissioned to undertake further forensic analysis detailed at 9.5 and 9.6 above.
- 10.5 Subject to the agreement of the Lord Mayor, Council will consider this item at its meeting of 4 January 2022.

- 10.6 The Director for Growth and City Development will bring forward proposals for strengthening the Housing Client function and governance arrangements to be able to effectively manage the strategic aspects of housing and to provide adequate scrutiny of NCH.
- 10.7 The scope and timetable for a review of the NCC/NCH group relationship and future operating model to include the purpose, structure, finances and governance in relation to the housing management function as set out in the Recovery and Improvement Plan will be drawn up
- 10.8 I will monitor the Council's response to this Notice to ensure that sufficient action is taken at pace to address the issues I have identified.

Clive Heaphy

Corporate Director, Finance and Resources (interim) and Section 151 Officer

15th December 2021

Report to all Councillors of Nottingham City Council under s.5 of the Local Government & Housing Act 1989

Report of: Malcolm Townroe, Monitoring Officer

Date of Report: 15th December 2021

- 1.1 The report of the Chief Finance Officer (S151 Officer) under s114 Local Government Finance Act 1988 dated 15 December 2021 and set out above identifies matters which could equally be the subject of a report by me as Monitoring Officer under s5 Local Government and Housing Act 1989 (LGHA 1989).
- 1.2 I have concluded, having, as required, consulted both with the s151 Officer and the Head of Paid Service, that a separate report under s5 LGHA would only duplicate the information provided by the s151 Officer and upon which he has already consulted me as Monitoring Officer along with the Head of Paid Service. As a consequence, I have decided not to prepare a separate report under s5 LGHA 1989 as I am satisfied that the relevant information will be brought to the attention of all members of the authority, as required by s5 LGHA 1989, by virtue of the s114 report.
- 1.3 I would ask that this endorsement is considered in that light and for all intents and purposes considered to be a fulfilment of my s5 obligation.

Malcolm Townroe

Director for Legal and Governance and Monitoring Officer

15th December 2021