



## Community Right to Challenge Protocol

### 1. Introduction

- 1.1 The Localism Act ('LA 2011') introduced the 'Community Right to Challenge' ('CRtC') which enables relevant bodies<sup>1</sup> to express an interest in running a local authority service. This Protocol outlines the CRtC process for those relevant bodies wishing to submit an expression of interest ('Eol') in providing or assisting in providing a service on behalf of North Hertfordshire District Council (NHDC).
- 1.2 The Protocol is based on the legislative requirements<sup>2</sup> and the recent review of Community Rights.<sup>3</sup> This CRtC Protocol covers the right to apply to NHDC to deliver certain **relevant services**. It does not cover the Community Rights relating to Assets which are different and are dealt with separately on the NHDC website.
- 1.3 ***Please note that a successful Eol does not guarantee that the relevant body will run the service. If the Eol is accepted it will trigger a procurement process which other parties may bid for.***

### 2. Purpose of delegating services

- 2.1 The Open Public Services White Paper in 2011 set out the core principles of opening up the commissioning process and decentralisation of services. One of the stated aims of this Paper was to break down barriers that prevent Councils, charities, social enterprises and voluntary groups working together, sharing responsibilities and budgets for the benefit of the community. The provisions in the LA 2011 and related Regulations were designed to bring this into fruition and encourage new ways of providing or transforming public services. The 2015 review<sup>4</sup> of the Community rights introduced under the LA 2011 and the Government response indicated that further follow up work and consideration of the process would be undertaken (and this Protocol will be reviewed and updated in the light of any changes).
- 2.2 NHDC acknowledges as one of its Corporate Objectives that it aims to ensure that the Council delivers cost effective and necessary services to its residents that are responsive to the developing need and financial constraints. Decentralising provision of certain services and of revitalising local communities could assist with that Objective and the NHDC vision. This Protocol aims to explain and assist in the process.



### 3. Who can ask to run or help to run a Council service?

3.1 Any “**relevant body**” can approach NHDC to run or help to run a service that the Council is responsible for by submitting an Eol. Under the legislation it includes:

- A **voluntary body**<sup>5</sup> or a **community body**<sup>6</sup> which means a body, other than a public or local authority, that carries on activities primarily for the benefit of the community and not for profit. However, if a surplus is created, it does not, in itself, prevent a body from putting in an Eol so long as that surplus is used for the body’s purpose or invested in the community. This therefore includes organisations such as registered societies [formerly industrial and provident societies, such as co-operatives and community benefits societies] and community interest companies<sup>7</sup>.
- A **Trust or body of persons that has been established for charitable purposes only**;
- A **Parish Council** (which includes **Town Councils**<sup>8</sup>);
- **NHDC employees or former employees** (two or more)<sup>9</sup>, formed wholly or partly to participate in procuring or providing a relevant service. Employees are expected to form an employee-led structure to take on the running of services but are not expected to have finalised all of their arrangements before submitting an Eol<sup>10</sup>;
- **Business Improvement District body** (‘**BID**’)<sup>11</sup>.

Note the Secretary of State has the power to designate other persons or bodies as a relevant body under Regulations<sup>12</sup>. The relevant bodies that may apply are currently set out above as at the date of this Protocol.

3.2 A relevant body may submit an Eol in partnership with other relevant bodies or other non-qualifying bodies. Providing one of the bodies qualifies they may submit an Eol (and must be the body that signs / submits the Eol). In the case of a contractual joint venture (co-operative arrangements between two parties that keep their separate identities), again, one or more of those bodies must meet the statutory definition, and together these arrangements will be considered as a “consortium” Eol application.

### 4. Services eligible for delegation under this Protocol

4.1 NHDC will consider a request to run or help run any “**relevant service**”<sup>13</sup>. This is a statutory definition and covers any service *unless specifically excluded* in Regulations. It *can be* a



service which is currently delivered by another body or contractor on NHDC's behalf – or one that is delivered in partnership for NHDC.

4.2 NHDC cannot, however, legally agree to delegate a function (also known as a statutory duty) under this community right. Most can be described as regulatory functions that a District Council undertakes; they are numerous and some examples are set out below:

- Local strategic planning, planning applications, development control, conservation areas, listed buildings, building control and tree preservation;
- Licensing (alcohol, entertainment, taxi, animal, gambling and caravans);
- Environmental health (food safety, health and safety, environmental permits and noise).

These functions/ duties cannot be “challenged” /transferred to a relevant body under this CRtC statutory procedure. That does not mean that *services linked* to the provision of these functions cannot be transferred to a relevant body - but the responsibility stays with NHDC even if the Council accepts an EoI and runs a procurement exercise. Equally NHDC may still delegate a service or function under different legislation to other bodies/ partners or under contract; however, where a relevant body applies to take on a service, then the process that shall be followed is set out in this Protocol.

4.3 To the extent that any of NHDC's relevant services are shared, jointly commissioned or jointly provided by NHDC, then any consideration of an EoI will be within the timescales in this Protocol unless, having discussed this with any joint authority / body this is an unreasonable timescale. This will, for example, be on the basis that joint arrangements for considering and responding to an EoI and a potential procurement exercise for the relevant service could not be achieved within the timescale in this Protocol. If the latter case applies, then a different timescale will be confirmed to the relevant body.

## 5. Excluded services

5.1 Some services have been “excluded” under The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 ('EoI Regulations'). None of these exclusions, however, currently apply to NHDC<sup>14</sup>.



## 6. Eol requirements

- 6.1 The Eol is a pro-forma document on NHDC's website (Appendix A). This is the document a relevant body **must** submit if it wishes to proceed with its application for a NHDC service.
- 6.2 The legislation allows Councils to specify a period when an Eol may be submitted<sup>15</sup> and considered. NHDC allows Eols (that meets all the necessary requirements) to be submitted under the CRtC annual window of **1st September to 31 October**. This is to allow sufficient time to consider and consult any affected staff, relevant groups, seek approval, run a procurement exercise and incorporate any potential changes into the Council's budgetary cycle.
- 6.3 To ensure that the relevant body complies with the requirements under the LA 2011<sup>16</sup> and Eol Regulations<sup>17</sup> the Eol must contain certain information. Where there is a consortium of relevant bodies, or the relevant body intends to provide the service with sub-contractors or other bodies then the information and evidence (below in 6.4 and the form) **must be given** for each relevant body/ party.
- 6.4 In summary the required information and evidence is about:
- the relevant service that the relevant body wishes to provide (which may be geographically specific – and if so this should be set out clearly).
  - the financial resources of the relevant body/ bodies submitting the Eol.
  - the capability of the relevant body to deliver the relevant service at the time of submitting the Eol (this will necessarily go beyond finances, for example cover previous experience or expertise).
  - the outcomes to be achieved, **in particular:**
    - (a) how the provision or assistance will promote or improve the social, economic or environmental well-being of the NHDC area;<sup>18</sup>
    - (b) how it will meet the relevant service users' needs.<sup>19</sup>
  - Where the relevant body is made up of NHDC employees (or former employees), details of how that relevant body proposes to engage other NHDC employees affected by the Eol.

*These requirements are contained in the template Eol appended at A.* The Eol must be signed by a person who has authorisation to do so on behalf of the relevant body (for example the



Chairman, Clerk or Trust Director) and must be accompanied by a copy of the minutes of the meeting at which the decision was taken to submit an EoI.

6.3 NHDC will, in the first instance, request additional information if it believes there is insufficient detail to make a decision. If the additional information is not provided, the EoI will still be considered. However, if the EoI lacks sufficient detail it may be rejected at first consideration – on the basis that it is *“inadequate or inaccurate”*<sup>20</sup> and therefore fails to comply with the legal requirements under the legislation.

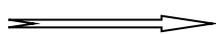
## 7. Consideration of an EoI

7.1 When NHDC receives an EoI it will acknowledge it<sup>21</sup> and in summary the process followed will be:

- Check whether the information provided is sufficient i.e. “validate”.



Reject an invalid EoI;



Seek further information – if the annual window allows;



Consider if EoI has potential to be accepted and if so provide Outline Service Scope;



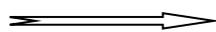
- Relevant body considers and confirm that they wishes to proceed with the EoI; *if so may need to put on Forward Plan; detailed Service Specification prepared; then*



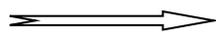
- NHDC consults on the EoI (for example: employees/ joint consultative groups, partners, interest groups); *then*



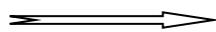
- Refer the EoI, Service Specification and consultation responses to Cabinet for consideration, who may accept EoI and:



Refer the relevant service (part or whole) for a procurement exercise; or



reject the EoI; or



modify the EoI if it is felt that it would not otherwise be capable of acceptance and the relevant body agrees to the modification.

From validated EoI to final determination, it should, under normal circumstances take no more than **10 months**. The procurement exercise following this may take longer, see below.



- 7.2 Initial validation of the Eol will take no more than 10 working days. It will be considered in the first instance by the Corporate Legal Manager, who has authority to validate or reject the Eol (in consultation with the Leader of the Council). If further information is required, then those wishing to submit should have sufficient time to do so within the annual window/ or as may be agreed by the Corporate Legal Manager. If the Eol relates to Legal Services then the initial validation will be considered by the Chief Executive or a Strategic Director.
- 7.3 The validation is an administrative process on the face of the Eol application. If the Eol is valid the Corporate Legal Manager will then consider whether the Eol has the potential to be accepted (i.e. it appears to meet all of the requirements and none of the rejection grounds see below). This is not a final determination or acceptance of the Eol, as the final decision is reserved to Cabinet. In coming to this initial conclusion, the Corporate Legal Manager will liaise with relevant Senior Officers and the Executive Member for the relevant service. If applicable, the relevant body will then be provided with an 'Outline Service Scope' for the service under consideration, **by 31 December** following submission of the Eol. The details in the Outline Service Scope will vary dependent on the nature and complexity of the service. The information will be a high level outline of the specification and is intended to assist the relevant body in understanding whether they wish to proceed with their interest. If the Eol proceeds a more detailed Service Specification will be provided later in the process. The Outline Service Scope will include a description of the service, including where applicable:
- Users;
  - users needs;
  - geographical location and spread;
  - the duties/ activities that need to be provided under the service;
  - any specific service standards or targets;
  - staffing levels/ training/ qualifications and experience;
  - the approximate current cost of providing the service;
  - any existing contractual arrangements, including the expiry of the existing contract.
- 7.4 Upon receipt of the Outline Service Scope, the relevant body has **6 weeks** to consider whether they still wish to proceed. During this time the relevant body may wish to contact the Council for further clarification regarding the Eol, for example, whether TUPE rules<sup>22</sup> apply and/ or whether there are any pension implications of transfer.



- 7.5 By the end of the 6 weeks the relevant body ***must confirm*** their continued interest in exercising their CRtC *in writing*. **Failure to do so will be regarded as a withdrawal of the Eol.**
- 7.6 If the relevant body wishes to continue with Eol, then NHDC may need to communicate and consult with, for example, employees, service users and the wider community (or such parties that NHDC believes is appropriate). This is to ensure that the potential changes to service provision would have the support of those most likely to be affected and to assess the level of impact that the changes could have on differential groups (as per the Equality Act 2010 and the Equality Standard for Local Government). Any consultation process would be expected to take up to 45 days. Where relevant this will include following the procedure under the Reorganisation Policy/ Guidance with such consultation responses taken into account as part of the further consideration of the Eol by Cabinet. During this period a more detailed Service Specification will be prepared for consideration by Cabinet as part of its decision on whether or not to accept the Eol.
- 7.7 The Eol, Service Specifications and consultation responses will then be referred to Cabinet for consideration. NHDC will notify the relevant body of the date that this meeting will take place and the relevant body may make a public presentation at the meeting (under the appropriate rules). This does not mean that all of the meeting will be held in public; if confidential information is discussed the Cabinet may go into private session under the normal requirements for meetings (see Section 15 of the Council's Constitution for further information). If the decision is to refuse the application, NHDC will specify the reasons for the decision and publish the decision on the Council's website, as per normal decision-making and the Rejection Regulations requirements.
- 7.8 If NHDC accepts the Eol, it will carry out a procurement exercise relating to the provision of that service in accordance with the Council's Constitution and Contract Procurement Rules. As indicated above, *the relevant body expressing the interest has no guarantee that they will be able to take over the service* and whilst only relevant bodies can submit an Eol, *any subsequent procurement process has to be open to any party*, including private companies and/ or existing contractors or partners. The relevant body will be informed about the Cabinet



decision and the procurement exercise, but will have to compete with any other bidder or tenderer as part of the process.

7.9 The procurement process resulting from the acceptance of EoI by Cabinet will normally start between 3 – 6 months of acceptance of the EoI. The length of this period reflects the varying nature, scale and complexity of the services (including whether they are currently jointly procured) and aims to allow the Council and the relevant body time to prepare and complete the procurement exercise effectively. The relevant body will be advised of the timescale of the procurement, however, at the point that the Council enters into such an exercise the normal Contract Procurement Rules (set out under Section 20 of the Council's Constitution) will apply.

## **8. Grounds on which an EoI may be rejected**

8.1 NHDC can reject an EoI if any of the following grounds apply:

- (i) the EoI is not submitted in the CRtC annual window;
- (ii) is not submitted by a relevant body or those in partnership with a relevant body;
- (iii) is not in writing;
- (iv) the information in the EoI is inadequate or inaccurate;
- (v) based on the information in the EoI, the relevant body or, where applicable-
  - (a) any member of the consortium of which it is a part, or
  - (b) any sub-contractor referred to in the EoI,is unsuitable to provide or assist in providing the relevant service.
- (vi) the EoI relates to a relevant service that NHDC has already made the decision to stop providing;
- (vii) The EoI relates to a relevant service:
  - (a) which is provided in whole or in part by or on behalf of the relevant authority to persons who are also in receipt of a service provided or arranged by an NHS body which is integrated with the relevant service; and
  - (b) the continued integration of such services is, in the opinion of the relevant authority, critical to the well-being of those persons.



- (viii) The relevant service is already the subject of a procurement exercise;
- (ix) NHDC and a third party have entered into negotiations for provision of the service and negotiations (which at least in part have been conducted in writing);
- (x) NHDC has published its intention to consider the provision of the relevant service by a body that two or more specified employees of that authority propose to establish;
- (xi) NHDC considers that the EoI is frivolous or vexatious; or
- (xii) NHDC considers that acceptance of the EoI is likely to lead to contravention of an enactment or other rule of law or a breach of statutory duty.

## 9. Modifying an EoI

- 9.1 If NHDC believes it would otherwise reject an EoI, the Council may seek agreement with the relevant body to modifying the EoI. If an agreement cannot be reached, the EoI is likely to be rejected.

## 10. The Procurement exercise

- 10.1 If NHDC's Cabinet accepts an EoI it will then authorise a procurement exercise to be undertaken for the service. ***It has to be emphasised again that there is no guarantee that at the end of that process the relevant body will be awarded the contract.*** NHDC has to comply with procurement law and certain standing orders in its Constitution when it does so (the Council's Constitution and Contract Procurement Rules - Part B Section 20 are available on NHDC's website – or a hard copy can be review at NHDC's reception). The procurement process will vary dependent on the value and nature of the contract that may be awarded, as may procurement law at the time of applying. You are therefore advised to check what would apply at the time of completing your EoI.<sup>23</sup>
- 10.2 The economic benefits of re-tendering a service or going out to tender for the first time must be considered by NHDC. **The Council has an obligation to consider whether both EoI and procurement exercises would promote or improve the economic, social or environmental well-being of the District.** Full details of the procedures that apply to various types of service contract are set out in the Contract Procurement Rules and in any procurement specifications.

**For further advice/ information contact the Corporate Legal Manager.**

Appendix A – EoI template (available on webpage: <http://www.north-herts.gov.uk/home/community/community-right-challenge>)



<p>Relevant information: Community Right to Challenge: statutory guidance <a href="https://www.gov.uk/government/publications/community-right-to-challenge-statutory-guidance">https://www.gov.uk/government/publications/community-right-to-challenge-statutory-guidance</a> NHDC Reorganisation Policy</p>	<p>Dated: 30 September 2015 To be reviewed no later than : <b>December 2018</b> Policy Sponsor: <b>Corporate Legal Manger/Monitoring Officer</b></p>
--	--

<sup>1</sup> Section 81(6)(a)-(e) LA 2011

<sup>2</sup> LA 2011, the Community Right to Challenge 'Statutory Guidance' (27 June 2012), The Community Right to Challenge (Expressions of Interest and Excluded Services) (England) Regulations 2012 ('Eol Regulations'), The Community Right to Challenge (Fire and Rescue Authorities and Rejection of Expressions of Interest) (England) Regulations 2012 ('Rejection Regulations'), and The Community Right to Challenge (Business Improvement Districts) Regulations 2015 ('BID Regulations').

<sup>3</sup> Government response to the Communities and Local Government Select Committee Inquiry into the Community Rights March 2015

<sup>4</sup> Government response to the Communities and Local Government Select Committee Inquiry into the Community Rights, March 2015

<sup>5</sup> Section 81(7) and (8) LA 2011

<sup>6</sup> Section 81(9) LA 2011

<sup>7</sup> Statutory Guidance paragraph 1.5-1.8

<sup>8</sup> "Parish Meetings" are not covered in the definition.

<sup>9</sup> Section 86(4) relevant body includes former employees.

<sup>10</sup> Statutory Guidance paragraph 1.12.

<sup>11</sup> As defined under The Community Right to Challenge (Business Improvement Districts) Regulations 2015

<sup>12</sup> Most recently under the BID Regulations 2015.

<sup>13</sup> Definition under section 81(5) LA 2011.

<sup>14</sup> i.e. A relevant service: commissioned or provided for a named person with complex individual health or social care needs; for advice and information to clinical commissioning groups for health improvement - ss2A and 2B of the National Health Service Act 2006; and children aged under five years, in so far as it consists of the provision of health visiting services –up to 30 September 2016.

<sup>15</sup> Section 82(2),(2)(4) LA 2011.

<sup>16</sup> section 81(1).

<sup>17</sup> Schedule 1.

<sup>18</sup> The Statutory Guidance gives examples - such as creating local jobs / improving local skills and volunteering opportunities / or improving environmental conditions.

<sup>19</sup> Eols will be considered where NHDC already has a contract with a third party to provide that service. However, it should be noted that the Council has an obligation to assess best value/ value for money in any re-procurement of a contracted service.

<sup>20</sup> Regulation 2 Rejection Regulations

<sup>21</sup> Legally this should be within 30 days with timescales on when the Council will consider whether to accept the Eol.

<sup>22</sup> TUPE: "Transfer of Undertakings (Protection of Employment) Regulations 2006" as amended by the "Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2014". TUPE rules apply to all sizes of organisations and protect employees' rights when the organisation or service they work for transfers to a new employer.

<sup>23</sup> It is anticipated that the standard contract term would be for a period of 3 years; however the contract term may vary depending on the nature of the service. The value of the delegated service will therefore be based on a 3 years aggregate valuation of the delegated service for the procurement (Contract Procurement Rules) purposes, or the length of the proposed term in the Eol if longer.