

**Appendix 2- West Midlands Rail Ltd Governance Evolution Addleshaw
Goddard Legal Advice on Making Changes to Articles of Association**

WMRE Articles of Association

15 July 2020 – DISCUSSION DRAFT



Note of advice for West Midlands Rail Limited t/a WMRE

Background and advice sought

West Midlands Rail Executive Limited, trading as West Midlands Rail Executive, (**WMRE**) is considering options for its core governing document - its Articles of Association (**Articles**) - to create a role for the Mayor of the West Midlands (**Mayor**). WMRE has asked Addleshaw Goddard to provide further detail on its preferred option - **Option 6: Mayor as non-voting non-Director Chair**.

Summary of advice

- The Mayor's formal appointment as Chair of the WMRE Board of Directors, which would enable the Mayor to preside over meetings of the WMRE Board of Directors and speak on behalf of the company to key stakeholders (but not be a Director or have a vote), requires amendment to the Articles.
- The addition of the Vice-Chair roles also requires amendment to the Articles. The Vice-Chairs may deputise for the Mayor in presiding over meetings of the WMRE Board of Directors and also offer protection.
- The Vice-Chairs will be Directors of WMRE and will be required to comply with statutory duties. This means that they will be required to act in the best interests of WMRE and provide oversight of the Mayor's actions on behalf of WMRE.
- The WMRE Board of Directors already has the ability to delegate its Powers under its Articles. This could be used to delegate certain Powers to the Mayor.
- Certain responsibilities of directors cannot be delegated by law and delegating powers does not remove directors' responsibilities in relation to their statutory duties.
- This means that directors should supervise any matters which have been delegated and ensure the scope of any delegation is carefully defined, as well as carrying out ongoing supervision of the Mayor's role. The Vice-Chair roles will add a check and balance here as the Vice-Chairs will be Directors and will be bound by the statutory duties.
- The Articles can only be changed by a special resolution of the eligible Members of WMRE (which would be the LTA Members). There are a number of formalities required here and the Special Resolution which are set out below.
- Amendments to the Articles should include the right for WMRE to provide for the Mayor to consent to acting as Chair and in doing so the Mayor will agree to confidentiality provisions and to remain within the Powers delegated to the Mayor.

Please ensure you read this note in full. The detailed analysis and reasoning is set out below.



IN DETAIL

Glossary of terms

- **Associate Members:** Member authorities of WMRE who are not local transport authorities.
- **Board Resolution:** a resolution which is passed by 50% or more of the WMRE Board of Directors eligible to vote.
- **LTA Members:** Member authorities of WMRE who are local transport authorities.
- **Members:** All LTA Members and Associate Members.
- **Objects:** the purpose and range of activities which the company can carry out.
- **Powers:** the specific authorities set out in a company's articles, which can be exercised by its Board of Directors in order to fulfil its Objects.
- **Special Resolution:** a resolution which is passed by 75% or more of those Members eligible to vote (which would be the LTA Members).

Amending the Articles

1 What changes are required to the Articles?

- 1.1 Article 17.1 currently sets out that the Directors appoint one Director to be Chair and one to be Vice-Chair at meetings of the WMRE Board of Directors.
 - 1.2 This Article would need to be changed so that the Mayor (from time to time if the Mayor so consents) shall be the Chair of WMRE (confirming that the Mayor can speak, but not vote at meetings) and that there shall be two Vice-Chairs, who shall each be Directors (one appointed by each category of Member).
 - 1.3 Article 17.2 currently sets out that the appointment of the Chair and/or Vice-Chair can be terminated at any time by the WMRE Board of Directors provided they are replaced. WMRE will need to consider whether this right to remove the Chair remains.
 - 1.4 Article 17.3 provides for where the current Chair or Vice-Chair cannot chair a meeting of the WMRE Board of Directors. Again, this will need to be amended to reflect the new roles.
 - 1.5 Minor consequential amendments will also be needed to Article 35 which covers the chairing of general meetings of the Members to accommodate the new roles.
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2 How are the Articles amended?

- 2.1 Articles must be amended by Special Resolution of the Members eligible to vote. The first step is for the Directors to propose, at a meeting of the WMRE Board of Directors, that the Members be asked to enter into a Special Resolution to change the Articles.
- 2.2 At this meeting, the WMRE Board of Directors should consider the amendments to the Articles proposed and the draft resolution and then resolve to propose this to the Members. This should be minuted formally.
- 2.3 The Special Resolution can either:
 - (a) be voted on at a General Meeting of the Members; or
 - (b) circulated and passed by way of written resolution signed by each of the eligible Members.
- 2.4 A written resolution may be preferable here, as this would enable the constituent authorities to move the resolution through their own internal governance procedures for approval, as has been the case in the past.
- 2.5 The Members eligible to vote would be the LTA Members.

3 What are the specific requirements for a written resolution?

- 3.1 A copy of the written resolution agreed by the WMRE Board of Directors must be sent to every Member who is eligible to vote, either in hard copy or electronic form.
- 3.2 Copies of the written resolution must be sent at the same time (so far as reasonably practicable) to all Members eligible to vote – the same copy of the resolution may be submitted to each eligible member in turn if this is possible to do without creating under delay.
- 3.3 The Articles are silent on written resolutions of Members, therefore a written resolution will lapse within the period of 28 days following the circulation date as set out in the Companies Act.¹ The circulation date is the date on which the written resolution is first sent to a Member. The lapse date must be specified in the written resolution itself or in any accompanying documents. Any agreement given after the lapse date will be invalid.
- 3.4 A written resolution will be passed as soon as the requisite majority has reached, i.e. when 75% of the required approvals to pass the written resolution have been received – if a 75% majority is reached without all eligible Members' approval, there is no need to wait for all responses.² Practically, this means that in order for the written resolution to pass, this must pass through at least 75% of the

¹ Section 297 of the Companies Act 2006.

² Sections 282(2), 283(2) and 296(4) of the Companies Act 2006.



constituent authorities' respective governance processes, with it being agreed and returned within 28 days of the circulation date in order for it to be approved.

- 3.5 In terms of further formality, WMRE must keep copies of written resolutions for at least 10 years and written resolutions (as they are special resolutions) must be filed at Companies House, in this case along with the new Articles, within 15 days of the resolution being passed and the new Articles taking effect.

Delegating powers to the Mayor

4 What powers can be delegated?

- 4.1 A company's board of directors has the responsibility for the day-to-day management of the company. However, a board of directors is able to delegate its functions to others when permitted by, and in accordance with, its Articles.
- 4.2 Under Article 7.1 of WMRE's Articles, the WMRE Board of Directors may exercise all of the Powers of WMRE for the purposes of managing WMRE's business. These powers are linked to Objects, both of which are set out in the Appendix to this note.
- 4.3 Article 9.1 of WMRE's Articles allows the WMRE Board of Directors to "delegate any of the powers which are conferred on them under the Articles:
- (a) to such person or committee;
 - (b) by such means (including by power of attorney);
 - (c) to such an extent;
 - (d) in relation to such matters; and
 - (e) on such terms and conditions;
- as they think fit."
- 4.4 This would permit the WMRE Board of Directors to delegate any of the specific Powers of WMRE to the Mayor. Other more general powers can be delegated (for example the power to sign a contract) by the WMRE Board of Directors.

5 What powers cannot be delegated?

- 5.1 By law, directors cannot delegate their responsibility to act as a director, because the role of director is personal to the individual holding it and the role can only be carried out by that individual. Certain acts also cannot be delegated due to the Companies Act, such as authorising a director's conflict of
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interest.³ Directors cannot delegate the power to execute a deed on behalf of a company unless following specific formalities.⁴

- 5.2 Directors must always act in accordance with the statutory duties imposed on them by the Companies Act, such as using reasonable care, skill and diligence in carrying out their role⁵ and promote the success of the company.⁶ Delegating responsibilities to another individual does not mean that Directors are no longer accountable for their statutory duties and the Directors should still to supervise the delegated acts to ensure they are not in breach of their statutory duties.
- 5.3 This means that where powers are delegated, the Board of Directors (including the new Vice-Chairs) must still correctly manage the company's affairs and failing to supervise the delegation correctly may result in a breach of the statutory duties. The Board of Directors need to bear this in mind when setting the delegated Powers of the Mayor.
- 5.4 Similarly, delegating certain Powers to the Mayor would not preclude the Board of Directors of WMRE from exercising those Powers themselves, for example speaking on behalf of the company (subject to the terms of the delegation).
- 5.5 One of the ways in which the WMRE Board of Directors can satisfy its statutory duties is by careful control and record-keeping around the delegations, clearly setting the terms of the delegation as set out below to the Mayor and any other relevant restrictions (e.g. confidentiality).
- 5.6 Depending on what the Mayor actually does, consideration will need to be given as to whether the Mayor is acting as a Shadow Director.⁷

6 How can powers be delegated?

- 6.1 The WMRE Board of Directors has the collective responsibility for managing WMRE's business and decisions concerning the running of WMRE should be taken by a Board Resolution of the WMRE Board of Directors at a board meeting. Any delegation should be carried out and documented in this way.
- 6.2 Any board resolution delegating authority when that delegation is not permitted by the company's articles may be held to be invalid. It is therefore important to fully agree and document:
 - (a) the basis for delegating the powers validly (in this case, Article 9.1);
 - (b) the specific powers being delegated; and

³ Section 175(4)(b) of the Companies Act 2006.

⁴ The company must grant a power of attorney to the person signing the deed as attorney on its behalf, and the company must execute the power of attorney as a deed in accordance with section 44 of the Companies Act 2006.

⁵ Section 174 of the Companies Act 2006.

⁶ Section 172 of the Companies Act 2006.

⁷ A person in accordance with whose directions or instructions the directors of the company are accustomed to act.



(c) the extent and limits of the authority.

This can be done through WMRE's formal board minutes.

- 6.3 This method of delegation is flexible and requires less procedure than amendment to the Articles to specify the nature of the Mayor's role and Powers (which would instead have to be passed by Special Resolution of the Members).
- 6.4 This is a process for which the WMRE Board of Directors is entirely responsible under the Articles and this would therefore be outside the control of the Mayor. Any delegation can be revoked by a further Board Resolution of the WMRE Board of Directors at a board meeting, as opposed to having to unwind changes to the Articles.

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Appendix – Objects and Powers of WMRE

Objects

Under the Articles, WMRE's objects are restricted to:

- (a) to promote the devolution of responsibility for rail passenger services and (where appropriate) associated facilities in the West Midlands and Northamptonshire to local transport authorities or other appropriate local authorities or other bodies within that area (acting through the Company);
- (b) to manage or to assist in managing the performance of rail passenger services operating within the West Midlands and Northamptonshire pursuant to rail franchise agreements or other similar agreements;
- (c) to improve rail passenger services and associated facilities within the West Midlands and Northamptonshire; and
- (d) to develop and oversee the implementation of a long-term strategy for rail passenger services in the West Midlands and Northamptonshire as approved by the Members.

Powers

Under the Articles, WMRE has the power to:

- (a) enter into arrangements and/or agreements with the Secretary of State for Transport in relation to the provision of rail passenger services in the West Midlands and Northamptonshire and adjacent areas pursuant to rail franchises awarded by him or her;
 - (b) enter into contracts for the provision of rail passenger services and associated facilities in the West Midlands and Northamptonshire (and outside of that area where associated with the provision of those services and facilities within that area);
 - (c) enter into any other contracts to procure or to provide services of any kind (including on behalf of other bodies);
 - (d) buy, lease or otherwise acquire and deal with any property real or personal and any rights or privileges of any kind over or in respect of any property real or personal and to improve, manage develop, construct, repair, sell, lease, mortgage, charge, surrender or dispose of or otherwise deal with all or any part of such property and any and all rights of the Company;
 - (e) borrow and raise money in such manner as the Directors shall think fit and secure the repayment of any money borrowed, raised or owing by mortgage, charge, lien or other security on the Company's property and assets;
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- (f) invest and deal with the funds of the Company not immediately required for its operations in or upon such investments, securities or property as may be thought fit;
 - (g) subscribe for, take, buy or otherwise acquire, hold, sell, deal with and dispose of, place and underwrite shares, stocks, debentures, debenture stocks, bonds, obligations or securities issued or guaranteed by any government or authority in any part of the world;
 - (h) lend and advance money or give credit on such terms as may seem expedient and with or without security to customers and others, to enter into guarantees, contracts of indemnity and suretyships of all kinds to receive money on deposit or loan upon such terms as the Company may approve and to secure or guarantee the payment of any sums of money or the performance of any obligation by any company, firm or person including any holding company or subsidiary;
 - (i) lobby, advertise, publish, educate, examine, research and survey in respect of all matters of law, regulation, economics, accounting, governance, politics and/or other issues and to hold meetings, events and other procedures and co-operate with or assist any other body or organisation in each case in such way or by such means as may, in the opinion of the Directors, affect or advance the Objects;
 - (j) pay all or any expenses incurred in connection with the promotion, formation and incorporation of the Company and to contract with any person, firm or company to pay the same;
 - (k) provide and assist in the provision of money, materials or other help;
 - (l) open and operate bank accounts and other facilities for banking and draw, accept, endorse, issue or execute promissory notes, bills of exchange, cheques and other instruments;
 - (m) incorporate subsidiary companies to carry on any trade; and
 - (n) do all such other lawful things as are, in the opinion of the Directors, incidental or conducive to the pursuit or to the attainment of any of the Objects.
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