

Deficiencies in Blaenau Gwent County Borough Council's governance and oversight arrangements in respect of a Council-owned company, Silent Valley Waste Services Limited

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Summary report

Introduction

- 1 Silent Valley Waste Services Limited (Silent Valley) was established as Blaenau Gwent County Borough Council's (the Council) Local Authority Waste Disposal Company (LAWDC) in 1991. The Council is the owner and 100% shareholder of the Company. The assets held by Silent Valley are public assets, and the finances of Silent Valley are consolidated into the annual accounts of the Council.
- 2 Although Silent Valley was owned by the Council, the Company operated at arms-length from the Council until 2012. Silent Valley had a Board of directors and, while the Council was able to appoint directors to the Board until 2012, the Company appointed the majority of the directors. The relationship between the Council and Silent Valley was governed by a 15-year contract awarded in 1994. The contract end date was extended from 2009 to 2012.
- 3 In 2012 the Council decided that Silent Valley would no longer operate as an arms-length Company and that the Council would exercise control over Silent Valley similar to that which it exercised over its internal departments. This decision led to the Council amending Silent Valley's governing documents and appointing senior Council officers as Silent Valley directors to give the Council a majority on Silent Valley's Board.
- 4 In 2017, the Council received a whistleblowing letter from one of its employees raising serious concerns relating to the Council's oversight of Silent Valley and the conduct of some senior Council officers with regards to Silent Valley. The Council's then Temporary Lead Corporate Director/Head of Paid Service brought the letter to the attention of my auditors and requested an audit be undertaken to examine the matters raised. The Council's Temporary Lead Corporate Director/Head of Paid Service also alerted officers of Gwent Police of the concerns.
- 5 My auditors made a number of audit enquiries and analysed a large volume of documentation. Based on this work, they consulted with Gwent Police to determine whether the Police wished to commence its own investigation. I considered it necessary to consult the Police because some of the allegations contained within the correspondence could be construed as allegations of criminality. I do not have a specific statutory duty to investigate allegations of fraud or other criminality or impropriety, and therefore my auditors do not investigate such allegations as a matter of course. My auditors only examine such allegations to the extent that examining the alleged criminality appears to facilitate or be conducive to the discharge of my statutory duties and, even then, only if it is clear that any audit work undertaken would not prejudice a law enforcement investigation.
- 6 In July 2018, after Gwent Police had carried out an examination of the information available, it made a decision to conduct its own investigation. I decided that I should put my audit on hold to avoid the possibility of the police investigation being prejudiced.

- 7 Having sought advice from the Crown Prosecution Service, in September 2019 Gwent Police decided not to pursue criminal charges against any individuals. I was therefore able to re-commence my audit of matters pertaining to Silent Valley, and I have set out my findings and conclusion in this report.

Overall conclusion

- 8 The Council has a duty to ensure that public resources within its stewardship are safeguarded and that proper arrangements are in place to ensure that public money is well-spent. That duty does not simply apply to resources used directly by the Council, it applies where the Council has provided resources to other organisations to deliver public services. Silent Valley is wholly owned by the Council, and the assets administered by Silent Valley are public assets. The Council should therefore have established robust and effective governance and oversight arrangements in respect of its relationship with Silent Valley. This duty became even more pronounced in 2012 when the Council decided that Silent Valley should become a Council-controlled company.
- 9 My audit examined the Council's governance and oversight arrangements in respect of Silent Valley Waste Services Limited and identified that there were significant deficiencies in those arrangements from 2003 until 2017 when my audit commenced.
- 10 My overall conclusion is that the Council failed to establish robust and effective arrangements in respect of its relationship with Silent Valley throughout the period covered by my audit. The audit identified significant concerns regarding the adequacy of the Council's arrangements. These concerns spanned several years and include findings that the Council failed to:
- correctly approve pay and pension arrangements in respect of Council officers appointed to the Silent Valley Board;
 - comply with procurement regulations in respect of services provided by Silent Valley;
 - ensure that Council appointments to the Board of Silent Valley complied with the Council's constitution;
 - establish proper governance and oversight arrangements in respect of Silent Valley from 2012 onwards to ensure accountability for the use of public resources;
 - establish proper arrangements to manage potential conflicts of interest in respect of Council officers appointed to Silent Valley's Board resulting in those officers being exposed to allegations that some of their actions were motivated by self-interest;
 - ensure that decisions to make termination payments to Silent Valley directors were in accordance with the law and Silent Valley's governing document; and

- put in place competitive and robust arrangements for the recruitment of Silent Valley's new General Manager, (the Company's most senior officer) in 2016.

11 I am pleased to recognise that the Council has taken action to address the deficiencies in its governance and oversight arrangements in respect of Silent Valley. These actions are set out in **paragraphs 253 to 272**. Nevertheless, I remain concerned that the issues identified in this report occurred over such a protracted period, involved several senior Council officials and continued without any apparent challenge until they were brought to the attention of the Council by a whistleblower. This raises a serious question about the Council's organisational culture during the period to which this report relates, and in my view the Council would do well to satisfy itself that the culture that contributed to the deficiencies found by my audit no longer persists.

Detailed conclusions

- The process that led to the Council's former Chief Executive, Mr Morrison, being appointed by the Council as a Silent Valley director was fundamentally flawed. The remuneration arrangements were not properly approved and the pension arrangements for the appointment were potentially contrary to the pension regulations in force at the time.
- The Council breached EU procurement regulations when it extended its 15-year contract with Silent Valley in 2008 and again in 2010.
- The process that resulted in the Council appointing its former Chief Executive, Mr Waggett, as a director of Silent Valley in 2011 was flawed, and the pension arrangements for the appointment were potentially in breach of pension regulations.
- It is unclear how the Council's then Chief Executive, Chief Finance Officer and Director of Environment and Regeneration were nominated as paid directors of Silent Valley in 2012, and their appointments were not approved in accordance with the Council's constitution.
- The Council failed to establish or operate adequate or effective governance arrangements to manage its relationship with Silent Valley from 2012 onwards
- Council officers appointed to the Silent Valley Board as directors in 2012 were remunerated through the Council's payroll for these appointments at a rate determined by the Silent Valley Board, but the Council did not recover the full cost of the appointments from Silent Valley and the pensionable treatment of the remuneration was potentially in breach of pension regulations
- On 3 April 2012 members of the outgoing Silent Valley Board voted to make gratuity payments of £11,569 to each retiring Board member contrary to

Silent Valley's governing document, even though all but one of those present stood to financially benefit from the decision

- Between 2013 and 2016 changes were made to the membership of Silent Valley's Board, but the treatment of Silent Valley remuneration as pensionable under the Local Government Pension Scheme continued.
- The Council's then Chief Finance Officer and its Director of Environment and Regeneration, acting in their roles as Silent Valley Board members, approved a payment of £38,737 to Silent Valley's General Manager, Mr James, when his employment terminated on 31 August 2016. However, Mr James did not have a contractual entitlement to this payment and it is unclear how the decision to approve the payment was in the interests of the Council.
- The process that led to the Council's former Chief Executive, Mr Waggett, being appointed as Silent Valley's new General Manager in June 2016 was uncompetitive and deficient in several material respects.

12 Under section 22 of the Public Audit (Wales) Act 2004 (the 2004 Act), I am required to consider whether in the public interest I should make a report on any matter which comes to my notice in the course of the audit in order for it to be considered by the Council or brought to the attention of the public. In view of the significant deficiencies identified by the audit, I have decided that I should bring these matters to the attention of the public by making a report under section 22 of the 2004 Act.

13 I recognise that since 2017 the Council has taken action to address the identified deficiencies and to significantly strengthen its governance and oversight arrangements in respect of Silent Valley. Details of the actions already taken by the Council are set out in **paragraphs 253 to 272** of this report.

Recommendations

14 This report identifies that the Council's governance and oversight arrangements in respect of its relationship with Silent Valley were inadequate and ineffective, and had been for many years. The matters raised in this report represent very serious shortcomings and reflect poorly on the Council. However, I recognise that, since 2017 the Council has put in place improved arrangements to strengthen its governance and oversight arrangements in respect of Silent Valley. I have therefore decided to only make one recommendation in this report.

Recommendation

The Council should commission a review to seek assurance that its governance and oversight arrangements in respect of other companies in which it has an interest are adequate and effective, and that the deficiencies identified in this report are not more widespread.

Next steps

- 15 In accordance with section 25 of the Public Audit (Wales) Act 2004 the Council must now consider this report at a full meeting of the Council by **27 February 2022**, ie within one month of the date of this report.
- 16 At least seven days before the meeting, the Council must publish a notice in a newspaper circulating in the community stating:
 - the time and place of the meeting;
 - that the meeting is being held to consider a report in the public interest; and
 - a description of the subject matter of the report.
- 17 At the meeting, the Council will need to decide:
 - whether the report requires it to take any action;
 - whether the recommendations in the report are to be accepted; and
 - what action (if any) to take in response to the report and recommendations.
- 18 The Council will then need to prepare a written response and agree the wording of that response with me before publishing its response in a newspaper circulating in the local authority area.

Detailed report

Background to the audit

- 19 As the Auditor General for Wales, I have a statutory duty to audit the accounts of Blaenau Gwent County Borough Council (the Council). This duty includes satisfying myself that the Council has put in place proper arrangements to secure economy, efficiency and effectiveness in its use of resources. In discharging this duty, I have the statutory authority to consider whether the Council has established proper arrangements to ensure that public resources it has provided to third party organisations are used well. This includes the use of public resources by companies owned and/or controlled by the Council.
- 20 Silent Valley Waste Service Limited (Silent Valley) is a company wholly owned by the Council and, in 2017, the Council received correspondence raising serious concerns relating to its oversight of the company, and the conduct of some senior Council officers with regards to it. The Council's then Temporary Lead Corporate Director/Head of Paid Service brought the letter to the attention of my auditors and requested an audit be undertaken.
- 21 I asked my auditors to undertake an audit to examine the concerns that had been raised and to consider more broadly the adequacy of the Council's governance and oversight arrangements in respect of Silent Valley during the period 2003 to the commencement of the audit in 2017. Given the significant passage of time since Silent Valley's incorporation, and the difficulty in locating documentation, I did not ask my auditors to examine the Council oversight and governance arrangements in respect of Silent Valley between 1992 and 2003 within the scope of my audit.
- 22 As set out in **paragraphs 4 to 7**, it was necessary to put my audit on hold for 14 months while Gwent Police was undertaking its own investigation.
- 23 In the course of the audit my auditors sought evidence, examined and analysed a large volume of contemporaneous documentation, and sought further information from the Council, Silent Valley and a number of individuals who had some involvement in the matters set out in this report.
- 24 The audit work undertaken by my auditors identified concerns regarding a number of legal matters. I sought external legal advice on these matters, and the findings and conclusions set out in this report in respect of matters of legality are consistent with the legal advice I received.
- 25 Since my audit commenced, the Council has taken a number of actions to improve its governance and oversight arrangements in respect of Silent Valley, and details of these actions are set out in **paragraphs 253 to 272** of this report.
- 26 This report sets out the findings and conclusions arising from my audit.

The Council established Silent Valley as a Council owned waste disposal company in 1991

- 27 Silent Valley was established as the Council's Local Authority Waste Disposal Company (LAWDC) in 1991. The Council is the owner and 100% shareholder of the Company. The assets held by Silent Valley are public assets, and the finances of Silent Valley are consolidated into the annual accounts of the Council. Silent Valley reported operating income of just over £1 million in both its 2017-18 and 2018-19 accounts.
- 28 Silent Valley was established with two directors appointed by the Council. These directors were the Council's then Chief Executive (who served as a director until June 1992) and another Council officer, Mr James (who was appointed as the Council's Director of Finance and Deputy Chief Executive in April 1992). The Council officers concerned received no additional remuneration for acting in the capacity of Silent Valley directors.
- 29 In June 1992, the Council's Chief Executive resigned as a director of Silent Valley and the Company itself appointed four new directors. The Silent Valley Articles of Association set out that the maximum number of directors that could be appointed to the Board was five (subject to a determination otherwise by the Council), and that the Council could only appoint one fifth of the directors, ie one director. From June 1992 until 15 May 2012 the Council only had one appointed director on Silent Valley's Board (until June 1992, as set out in **paragraph 28**, two Silent Valley directors were Council-appointed). The Council did not therefore have a majority voting interest on the Silent Valley Board during this period.
- 30 In accordance with Silent Valley's governing document, the Memorandum and Articles of Association, the Council was able to determine the remuneration to be paid to Silent Valley directors by ordinary resolution. In practice, however, as is set out in this report, it was the directors of Silent Valley meeting as a Board who determined the remuneration to be paid for the role. Until 2003, Silent Valley paid a fee in respect of Council appointed directors to the Council. The Council appointed director did not receive this director fee.
- 31 At a Full Council meeting on 25 June 1992, the Council considered a report in the name of its then Chief Executive which recommended that Mr James receive an increase of £2,148 to his Council salary to reflect the additional responsibilities arising from his Silent Valley appointment. The recommended increase in pay was significantly below the director fee determined by Silent Valley and paid to the Council. As this uplift was to reflect additional Council duties, the amount determined by the Council was incorporated into Mr James' pensionable salary as the Council's Director of Finance and Deputy Chief Executive. The Council approved this proposal.

- 32 On 8 August 1994, the Council awarded Silent Valley a 15-year contract for the disposal of waste collected in the Council's area, and for the management and operation of civic amenity sites.

The process that led to the Council's former Chief Executive, Mr Morrison, being appointed by the Council as a Silent Valley director was fundamentally flawed. The remuneration arrangements were not properly approved and the pension arrangements for the appointment were potentially contrary to the pension regulations in force at the time

The process that led to the Council appointing Mr Morrison as a Silent Valley director was fundamentally flawed

- 33 Mr James retired as the Council's Director of Finance and Deputy Chief Executive in March 2001. However, the members of the Council resolved to retain Mr James as the Council's appointed Board member until November 2002. I note that Silent Valley's Articles of Association set out that the directorship of any Council appointed director of Silent Valley will automatically end if he ceases to be an employee or member of the Council. In fact, Mr James remained a de facto Council appointed director of Silent Valley until 11 December 2002. In my view, it is uncertain whether Mr James' appointment as a Silent Valley director between March 2001 and December 2002 was in line with Silent Valley's Articles.
- 34 On 27 February 2003, less than 3 months after his role as a Council appointed director of Silent Valley ended, Mr James was appointed by the Silent Valley Board as one of their own appointed directors. Mr James was appointed as Silent Valley's Company Secretary on 20 November 2003. Mr James told my auditors that he was appointed by Silent Valley as a 'director with special financial responsibilities in 2004 before becoming Silent Valley's General Manager in 2006.
- 35 On 11 December 2002, the Silent Valley Board met. In attendance were two members of the Council, Councillor McCarthy and Councillor Welch, who had been invited to the meeting to receive the annual dividend payment due to the Council from Silent Valley. The minutes of the meeting record that these councillors were "representing the shareholders of Blaenau Gwent County Borough Council". The minutes also record that Councillor McCarthy "advised the chairman that it was the decision of Full Council that its current Chief Executive, Robin Morrison be appointed as the Controlling Authority's Director in place of [Mr James]". The

minutes record that "the Chairman expressed his surprise and disappointment that the Council should take such action particularly without even the courtesy of discussing their intentions or at least giving him prior notice of them before [the] meeting". The minutes record that Councillor McCarthy "reiterated that it was the decision of the Council and he and his colleague were under instructions to act upon this decision". Recognising the Council's right to appoint a director to the Silent Valley Board, Mr Morrison's appointment was actioned accordingly. Companies House records show that Mr Morrison signed to accept the appointment to Silent Valley's Board on 20 December 2002.

- 36 I consider the events that led to Mr Morrison's appointment very concerning. Although the Silent Valley Board was advised on 11 December 2002 by Councillor McCarthy that the Full Council had decided that Mr Morrison be appointed to the Board of Silent Valley, this was not the case.
- 37 On 9 January 2003, almost a month after Councillor McCarthy had informed the Silent Valley Board that Full Council had approved Mr Morrison's appointment as a Silent Valley director, the Full Council was asked to approve a recommendation in a report made by the Council's then Chief Legal Officer, Mr John, that Mr Morrison become the Council's appointed Silent Valley director.
- 38 The Chief Legal Officer's report stated that "in 2001 there existed good reasons justifying the retention of [Mr James] as the Authority's Director. However, there is now merit in appointing an officer of the Authority to fulfil the role and based upon his knowledge, experience and expertise in the waste disposal function, the Chief Executive [Mr Morrison] is the obvious officer to undertake the role".
- 39 The report stated that: "Board members are remunerated by the Board but the Board remuneration in respect of the Chief Executive will be paid to the Council. There will be a need to consider the extent to which the additional duties and responsibilities arising from the appointment should result in a change of salary". The minutes of the Council meeting of 9 January 2003 record that Members agreed Mr Morrison be appointed as the Council's Director on the Board of Silent Valley and that a further report should be provided to the Council regarding the remuneration for the role.
- 40 As set out in **paragraph 35**, the minutes of the Silent Valley Board meeting of 11 December 2002 record that Councillor McCarthy told the Silent Valley Board that "it was the decision of Full Council that their Chief Executive, Robin Morrison be appointed as the Controlling Authority's Director in place of [Mr James]." However, this was not the case. The decision to appoint Mr Morrison as the Council's director on the Silent Valley Board was made at the meeting of the Full Council on 9 January 2003. I note that Councillor McCarthy was present at the Council meeting held on 9 January 2003 at which members agreed to appoint Mr Morrison. However, the minutes do not record that Councillor McCarthy informed the Council that Mr Morrison had already been appointed as a Silent Valley director.

- 41 Councillor McCarthy maintains that the minutes of the Silent Valley Board meeting of 11 December 2002 are incorrect. He maintains that he did not inform the Silent Valley Board that it was "the decision of Full Council" to appoint Mr Morrison as a Silent Valley Director, but rather he informed the Silent Valley Board that "the Council" had made the decision.
- 42 Councillor McCarthy explained to my auditors that he and Councillor Welch "as Executive Members (Cabinet Members) were acting on behalf of the Council on the instruction of and in consultation with the Council Leadership and Corporate Management Team", and that "I was doing what I had been asked to do by the Council Leadership".
- 43 Former Councillor Welch has told my auditors that he understood that "the Leadership Team [were responsible for nominations to outside bodies" and he believes that he was first made aware of a decision to nominate Mr Morrison as a Silent Valley director at an informal meeting of the Council's Executive members and the Corporate Leadership Team". He also told my auditors that he "was not made aware by the leadership team of the Council prior to the Silent Valley Board meeting or after the meeting that there could have been any risk to both organisations by changing the Council's Board member before a decision of full Council".
- 44 I accept that members of the Council's Cabinet and officers comprising the Council's Corporate Leadership Team may have been informed of, discussed or even decided to appoint Mr Morrison as a Council nominated director of Silent Valley. However, regardless of how Mr Morrison came to be nominated for this role, the decision was not made in accordance with the Council's constitution and, in my view, Councillor McCarthy should not have informed the Silent Valley Board that the Council had made such a decision. I have reached this conclusion for the following reasons:
- the Council's constitution sets out that only the Full Council will exercise the function of appointing representatives to outside bodies unless the appointment has been delegated by the Council. I have seen no evidence that the function of appointing directors to the Board of Silent Valley was delegated by the Council, and I note that the decision to appoint Mr Morrison to the Silent Valley Board was in fact taken at a meeting of the Full Council on 9 January 2003. In my view, this strongly suggests that no such delegation was in place. Furthermore, if a decision had legitimately been taken under delegated powers to appoint Mr Morrison to the Silent Valley role, there would have been no purpose in asking Full Council to make the same decision on 9 January 2003.
 - Council decisions are required to be recorded and published when those decisions are made, either within the minutes of the meeting in which the decision was taken, or as a decision report when the decision is taken by an individual Cabinet member or by an officer of the Council under delegated

powers. Informal meetings of Council officers and members have no decision-making powers. The Council has been unable to provide me with any written record that a decision was made to appoint Mr Morrison as a Silent Valley director in advance of the Silent Valley Board meeting held on 11 December 2002.

- Councillor McCarthy maintains that he did not inform the Silent Valley Board at its meeting of 11 December 2002 that "it was the decision of Full Council that its current Chief Executive, Robin Morrison be appointed as the Controlling Authority's Director" as stated in the minutes. However, I consider it improbable that the use of the term "Full Council" was an error on the part of the minute-taker. This is a very specific term which I consider would be unlikely to be recorded in the minutes unless it had been specifically used at the Silent Valley Board meeting.

45 The appointment of Mr Morrison as the Council's nominated Silent Valley director without the consent of the Council is problematic for the following reasons:

- if Mr Morrison had done anything of significance in his role as a Silent Valley director in the period 11 December 2002 to 9 January 2002 (the period he served as a Silent Valley Director without the Council's agreement), he would have acted without due authority, potentially putting both the Council and Silent Valley at risk.
- it demonstrates poor governance on behalf of both the Council and Silent Valley.
- it demonstrates flawed behaviour by individuals.

46 Mr Morrison told my auditors that he is unable to explain why his appointment as a Silent Valley Director commenced in December 2002 given that the meeting of the Full Council which approved his appointment did not take place until 9 January 2003. However, I consider it clear that the reason why the appointment commenced in December 2002 was because Councillor McCarthy had informed the Silent Valley Board meeting of 11 December 2002 that the Council had approved Mr Morrison's appointment. Furthermore, I am satisfied that Mr Morrison was aware of and had accepted the appointment in advance of the Council meeting of 9 January 2003. As set out in **paragraph 35**, Mr Morrison signed a Companies House appointment form on 20 December 2002. The form was countersigned by Silent Valley's then Company Secretary on 24 December 2002, and formally filed by Companies House on 3 January 2003.

47 Mr Morrison maintains that he was not involved in making any decisions regarding Silent Valley and did not attend Silent Valley Board meetings until after the meeting of 9 January 2003 at which the Full Council approved his appointment as a Silent Valley director. Mr Morrison also maintains that he had no involvement in the process that led to the Council approving his appointment at the meeting of 9 January 2003 and that "all governance issues arising from [his] appointment were handled by the Chief Legal Officer". Nevertheless, I consider that when Mr

Morrison became aware that the Council was due to consider appointing him as a Silent Valley director at its meeting on 9 January, Mr Morrison should have informed the Council that he had already accepted the appointment in advance of the Full Council making the decision.

The Council failed to properly approve the remuneration to be paid to Mr Morrison in respect of his Silent Valley appointment and the pension arrangements in respect of the appointment were potentially in breach of pension regulations

The Council failed to properly approve the amount of remuneration to be paid to Mr Morrison in respect of his Silent Valley appointment

- 48 The Council's Chief Legal Officer's report to the 9 January 2003 Council meeting, which recommended that Mr Morrison be appointed as a Silent Valley director, stated that "Board members are remunerated by the Board, but the Board remuneration in respect of the Chief Executive will be paid to the Council. There will be a need to consider the extent to which the additional duties and responsibilities arising from the appointment should result in a change of salary".
- 49 However, this advice does not seem to have been properly taken into account at the Council meeting held on 20 February 2003. At that meeting, the Full Council considered a further report of the Council's then Chief Legal Officer. The report stated, "in the past the Council's External Auditors have recognised that the duties associated with Board Membership can be onerous. It is proper therefore to reflect the additional duties and responsibilities in the Chief Executive's salary. It is proposed therefore that the remuneration determined by and received from Silent Valley Waste Services Limited be added to the salary of the Chief Executive". The Chief Legal Officer recommended that the Chief Executive's salary be adjusted as set out in his report. While the Chief Legal Officer's report to the Council meeting of 9 January 2003 set out the general Companies Act duties applicable to all company directors, it did not state the detail and precise nature of the duties and responsibilities of the Silent Valley role to be performed by Mr Morrison. It is therefore unclear how the Council could have considered the extent to which any additional duties and responsibilities justified a change to the Chief Executive's salary. Not only were members of the Council not informed of the detail and precise nature of the additional duties and responsibilities, as set out below, they were not informed of, nor did they approve, the amount of additional remuneration to be paid to Mr Morrison.
- 50 The Council's then Chief Legal Officer, Mr John, maintains that "reports relating to the appointment of officers of the Authority to the Silent Valley Board were always drafted and prepared by an officer of the Council's Resources Department and

issued in [his] name ... in normal circumstances, the appointment of the Authority's representatives on outside bodies was a matter for Democratic Services, a function for which I had no responsibility". While I note Mr John's comment, I consider that, where a report is made to Council members in the name of an officer, it is incumbent upon that officer to confirm that the content of that report is accurate and provides members with sufficient information to make an informed decision, regardless of who has drafted the report.

- 51 The minutes of the meeting of 20 February 2003 record that it was resolved "that the report be accepted, and the Chief Executive's salary be adjusted as detailed therein". The report did not set out the amount that Mr Morrison would be paid for acting as a director of Silent Valley. However, as the Silent Valley Board had determined that its directors would be paid £9,360 per annum, approval by the Full Council of the proposal that Mr Morrison be paid "the remuneration determined by and received from [Silent Valley]" resulted in Mr Morrison being paid £9,360 per annum for undertaking the role of a Silent Valley director.
- 52 In accordance with Silent Valley's Articles of Association, the Council had the power to determine the remuneration of Silent Valley directors. However, in practice it was the Silent Valley Board that determined the level of remuneration to be paid to Silent Valley directors .
- 53 In my view it was inappropriate for the Council to rely on the Silent Valley Board's determination of the remuneration for a Council-appointed Silent Valley director without knowing the level of remuneration involved. If Mr Morrison was carrying out the Silent Valley director role as part of his duties as the Council's Chief Executive, it meant that the Silent Valley Board, of which Mr Morrison was a member, was determining an element of Mr Morrison's pay as a Council officer. This represents a serious governance flaw and gives rise to a significant potential conflict of interest. It is not clear to me how or if this potential conflict of interest was addressed.
- 54 Mr Morrison told my auditors that "the remuneration policy attached to the position had been agreed by my predecessor Mr James as Controlling Director when he was the Director of Finance/Deputy [Chief Executive] for the Council. My remuneration and terms of condition had been set by custom and practise [sic] in the Council and reflected that the Council wanted to remunerate me rather than Silent Valley directly and did consider the role as part of my Chief Executive duties"
- 55 I do not fully agree with Mr Morrison's position on this matter for the following reasons:
- Mr Morrison was not remunerated for undertaking the Silent Valley director role in the same way as his predecessor in the role, Mr James. As set out in **paragraph 31**, Mr James received an increase of £2,148 to his Council salary to reflect the additional responsibilities arising from his Silent Valley appointment. The recommended increase in pay was significantly below the director fee that Silent Valley had determined to pay its directors. The amount of remuneration to be paid to Mr James was approved by the

Council. In Mr Morrison's case, at the meeting of Full Council held on 20 February 2003, it was decided that "the remuneration determined by and received from Silent Valley Waste Services Limited be added to the salary of the Chief Executive". The Council did not approve the amount of remuneration to be paid to Mr Morrison.

- Mr Morrison maintains that the terms and conditions of the Silent Valley director role had "been set by custom and practice". However, this is not reflected in the report of the Council's Chief Legal Officer to the Council meeting of 9 January 2003 which states that "Board members are remunerated by the Board, but the Board remuneration in respect of the Chief Executive will be paid to the Council. There will be a need to consider the extent to which the additional duties and responsibilities arising from the appointment should result in a change of salary". The Chief Legal Officer correctly identified that it was necessary to determine what additional duties and responsibilities Mr Morrison would be required to undertake arising from his Silent Valley role, and to ensure that the amount to be paid to Mr Morrison was commensurate to these additional duties and responsibilities. However, I have seen no evidence that this was acted upon.
- Mr Morrison maintains that he was undertaking the Silent Valley director appointment as part of his Chief Executive role. I accept that this may have been the Council's intention. However, for the reasons set out in **paragraph 61**, I have been unable to satisfy myself that Mr Morrison's appointment as a Silent Valley director formed part of Mr Morrison's employment as the Council's Chief Executive.

56 The Council's constitution required the amount of remuneration to be paid to Council Chief Officers, and any changes to that amount, be determined by the Full Council. The amount to be paid to Mr Morrison for acting as a Silent Valley director therefore required Full Council approval. As members were not informed of the amount to be paid, I consider the Council did not comply with the requirements of its own constitution, and the remuneration paid to Mr Morrison for acting in the capacity of a Silent Valley director was not properly approved.

The Council's failure to establish effective governance arrangements resulted in a lack of clarity over whether pension regulations were complied with in respect of Mr Morrison's Silent Valley appointment

- 57 The Council treated the amount paid to Mr Morrison in respect of his Silent Valley appointment as a pensionable payment within the Local Government Pension Scheme (LGPS), as though it was part of his employment as Chief Executive of the Council. The amount paid to Mr Morrison by the Council for undertaking the Silent Valley role was recovered from Silent Valley through an invoicing arrangement. During the period that Mr Morrison served as a Council appointed director of Silent Valley (2003 to 2011), the Council incurred other costs related to the appointment which were not recovered from Silent Valley. These were as follows:
- employer pension contributions of £18,364.16 paid to the LGPS)¹
 - pension strain costs amounting to £12,454.04 when Mr Morrison's Council employment ended in 2011²
 - employer national insurance Contributions paid to HMRC totalling £11,098.56³
- 58 I have significant doubt as to whether the Council had the lawful authority to treat the amount paid to Mr Morrison in respect of his Silent Valley appointment as a pensionable payment within the LGPS, as though this remuneration related to his employment as the Council Chief Executive.
- 59 In my view, the Council was only entitled to adopt the approach set out in **paragraph 57** if Mr Morrison was undertaking the role as a Silent Valley director as part of his appointment as the Council's Chief Executive. The Local Government Pension Scheme Regulations 1997 (the 1997 Regulations) set out that "a person who is an active member in more than one employment must make contributions for each of those employments". Therefore, if Mr Morrison's Chief Executive and Silent Valley appointments were separate employments, the Council could not legitimately treat the remuneration for the Silent Valley appointment as pensionable as part of Mr Morrison's Chief Executive role. The effect of merging two separate

¹ Throughout this report where reference is made to the Council making employer pension contributions to the LGPS in respect of Council officers acting as appointed directors of Silent Valley, the officers concerned paid employee pension contributions to the LGPS in respect of their Silent Valley remuneration.

² Pension strain costs (often also called capital costs) occur when there is a clear shortfall in the assumed level of funding needed to provide a particular pension benefit. Strain costs occur when a member draws their benefits earlier than expected.

³ Throughout this report where reference is made to the Council making employer national insurance contributions in respect of Council officers acting as appointed directors of Silent Valley, the officers concerned paid employee national insurance contributions in respect of their Silent Valley remuneration.

pensionable employments can result in the pension scheme member receiving higher pension scheme benefits than they are entitled to.

60 I have been unable to satisfy myself that Mr Morrison's appointment as a Silent Valley director formed part of Mr Morrison's employment as the Council's Chief Executive.

61 The Council's decision that "the remuneration determined by and received from Silent Valley Waste Service Limited be added to the salary of the Chief Executive", made at its meeting of 20 February 2003, suggests that it might have been the Council's intention that Mr Morrison undertake the Silent Valley appointment as part of his employment as Chief Executive. However, the Council's arrangements put in place in respect of the appointment create significant uncertainty as to whether this was in fact the case. I note that:

- as set out in **paragraphs 48 to 56**, the Full Council was not informed, nor did it approve the amount of remuneration to be paid to Mr Morrison for undertaking the Silent Valley role. While the Council could have determined the amount to be paid, in practise it was the Silent Valley Board that made the determination. As set out in **paragraph 53**, if Mr Morrison was undertaking the Silent Valley director role as part of his duties as the Council's Chief Executive, this represented a serious governance flaw giving rise to a significant potential conflict of interest. Alternatively, as the Silent Valley Board had determined the remuneration for the Silent Valley role, it could be construed that Mr Morrison was not undertaking the role as part of his employment as the Council's Chief Executive.
- the Silent Valley director fee paid by the Council to Mr Morrison was recharged to Silent Valley. If Mr Morrison was undertaking the role as part of his functions as the Council's Chief Executive, I would have expected these costs to be borne by the Council. However, I also note that the Council's treatment of costs in respect of the Silent Valley appointment was not consistent, in that employer pension and national insurance costs were not recharged to Silent Valley.
- Mr Morrison's employee file contains a documentary instruction, signed on behalf of the Head of Personnel, to adjust Mr Morrison's pay. The instruction states "Please pay Director's Emoluments - Silent Valley Waste Services Ltd of £9,360 [per annum] as from 5/2/03. Pay increase to be set at board meeting to be effective from 1 July, each year". While the report of the Council's Chief Legal Officer considered by a meeting of the Full Council on 20 February 2013 recommended that "the remuneration determined by and received from Silent Valley Waste Services Limited be added to the salary of the Chief Executive", the salary of the Chief Executive and uplifts to that salary continued to be determined by the Council. The Silent Valley director fee, and uplifts to that fee were determined by Silent Valley's Board. Therefore, from February 2003 onward the amount payable to Mr Morrison

in respect of his Silent Valley directorship was distinguishable from his base salary as the Council's Chief Executive, suggesting that Mr Morrison was being remunerated for two separate roles.

- if Mr Morrison was undertaking the Silent Valley director role as part of his Chief Executive employment, I would have expected the Council to have determined the precise nature of the additional duties and responsibilities required of him as the Council's Chief Executive in respect of Silent Valley. I have seen no evidence that this was done. This may be indicative that Mr Morrison was not undertaking the Silent Valley role as part of his Chief Executive employment or may simply represent the failure of the Council to establish proper governance arrangements in respect of the appointment.

62 On 2 December 2019 the Council wrote to Silent Valley requesting reimbursement of the employer pension and national insurance contributions' costs it had incurred in respect of Council employees who had served as Silent Valley directors. This included costs relating to Mr Morrison's Silent Valley directorship from 2003 to 2011. The letter was based on external legal advice obtained by the Council. The Council's legal advice concluded that the appointment of Council officers, including Mr Morrison, to the Board of Silent Valley, should have been treated as separate employments, and that it would have been more appropriate for Silent Valley to have provided its own pension arrangements relating to these roles via its own admission to the LGPS. The Council has therefore concluded that the officers concerned were not undertaking their Silent Valley roles as part of their primary Council employments. However, I note that while this is the Council's current position, this does not necessarily offer an insight to the Council's intention and approach at the time.

63 If Mr Morrison's Silent Valley appointment was not part of his Council Chief Executive role, the Council was in breach of the 1997 Regulations which state that "a person who is an active member in more than one employment must make contributions for each of those employments". This could potentially have resulted in Mr Morrison accruing higher pension benefits than he was legitimately entitled to. However, the failure of the Council to establish proper governance around the appointment means that there is significant uncertainty as to whether the Silent Valley appointment was part of, or separate from, his employment as the Council's Chief Executive.

64 I acknowledge that the position is unclear and only a Court could determine definitively whether the 1997 Regulations were breached, but in my view, I consider it more likely than not that the Regulations were breached.

65 I consider that the lack of certainty regarding this matter resulted from the Council's failure to establish proper governance arrangements for managing its relationship with Silent Valley, determining the detail and precise nature of the duties and responsibilities of its appointed Silent Valley director, approving remuneration, and managing conflicts of interest.

The Council breached EU procurement regulations when it extended its 15-year contract with Silent Valley in 2008 and again in 2010

- 66 In 1994 the Council awarded a 15-year contract to Silent Valley for the disposal of waste collected in the Council's area, and for the management and operation of civic amenity sites. The contract was due to terminate on 8 August 2009.
- 67 On 5 March 2008, the Council's Executive Committee considered a report from its then Corporate Director of Environment that recommended that the contract should be extended for a minimum of two years from 8 August 2009. The Executive Committee accepted this recommendation, and the contract was extended to 8 August 2011.
- 68 Between September 2009 and August 2010, following the extension of the contract, the Council received enquiries from several potential tenderers and consultants asking when the Silent Valley contract would expire and when the services being provided by Silent Valley would be subject to competition. In late 2010, the Council (and another Welsh local authority) sought external legal advice as to whether it was permissible under the Public Contracts Regulations 2006 and "the wider principles of EU Law (the Procurement Rules)" to extend its existing waste disposal contracts to 31 March 2012 without advertising them in the Official Journal of the European Union (OJEU) and carrying out a public tendering exercise. The legal advice obtained by the Council concluded:
- "On the information provided to us we cannot identify a lawful basis on which the original contracts entered into between Blaenau Gwent County Borough Council ("BGCBC") and Silent Valley Waste Services Limited ("Silent Valley") were extended. Therefore, it would follow that the current contract arrangements were entered in breach of the Procurement Rules".
 - "It is clear that any further extension of the existing contracts would expose the Councils to the risk of a procurement challenge unless [they] takes the arrangements back "in house" (and there are a number of options for achieving this)."
 - "In the case of the contract between BGCBC and Silent Valley this would involve either amending the relevant company constitutional documents in order to demonstrate that BGCBC exercises control over the day to day management of the company's affairs similar to that which it exercises over its own internal departments, setting up a new wholly controlled company or bringing the whole operation back in house at BGCBC".
- 69 The advice further states that "in circumstances where a council is contemplating taking action which appears to be in breach of legal provisions (here the Procurement Rules) the relevant Monitoring Officer will need to be involved and consider whether he or she needs to take any action. Monitoring Officers have a

statutory responsibility to report to the council where they consider that the council has or is intending to come to a decision which constitutes a contravention of any enactment or rule of law. On our current information, any extension to the existing contracts would fall into this category".

- 70 A meeting of the Council's Executive Committee held on 16 December 2010 considered a report by the Council's Director of Environment and Regeneration, Mr Parsons. The report set out a proposal to further extend the Silent Valley contract until 31 March 2012 to provide time for the Council and a neighbouring local authority to develop a joint procurement strategy for waste services. The Council's legal advice referred to in **paragraphs 68 to 69** was appended to the report. The minutes of the Council's Executive Committee state that the Committee agreed that the report and the recommendations within it "be accepted". The report had recommended that the Executive Committee:
- "approve the decision to extend the contractual arrangements with Silent Valley Waste Services Ltd until March 2012"; and
 - "approve the decision to end contractual arrangements with Silent Valley when the contract expired on that date.
- 71 The Director of Environment and Regeneration's report to the Executive Committee meeting of 16 December 2010 does not record that the Council's Chief Legal and Monitoring Officer, Mr John, was consulted on the proposals provided to the Council's Executive Committee, despite the advice of the Council's legal advisors that "he will need to be involved". The minutes of the Executive Committee meeting of 16 December 2010 do not record that Mr John exercised his statutory duty to report to the Council that the decision to extend the contract would be unlawful. This was despite the Council having received legal advice to that effect (**paragraph 68**).
- 72 Mr John told my auditors that he was not provided with a copy of that advice and was not aware that any of the Council's legal officers had seen it either. He told my auditors that his assumption is that the advice was sought by Council procurement officers. However, as set out in **paragraph 70**, the legal advice was appended to the report presented to the Council's Executive Committee on 16 December 2010 and the minutes of that meeting show that Mr John was in attendance at the meeting. Furthermore, the former Director of Environment and Regeneration told my auditors that "it was routine practice for reports to be circulated to appropriate departments and corporate management team before going forward to executive. These procedures would have included the document being copied to the monitoring officer as standard practice".
- 73 I have considered the contract extensions agreed by the Council and, in my view, there was no legal basis for them. I therefore consider that, in awarding work between 9 August 2009 and 31 March 2012 to Silent Valley without seeking competition, the Council was in breach of the Public Contract Regulations 2006. Furthermore, I am satisfied that the Council's Chief Legal and Monitoring Officer,

Mr John, had sight of the report and the appended legal advice which included reference to his own statutory responsibility as the Council's Monitoring Officer to report to the Council where he considered it was intending to come to a decision which constituted a contravention of any enactment or rule of law (**see paragraph 69**). I consider that, in failing to report on this matter to the Council, Mr John may have been in breach of his statutory duties.

The process that resulted in the Council appointing its former Chief Executive, Mr Waggett, as a director of Silent Valley in 2011 was flawed, and the pension arrangements for the appointment were potentially in breach of pension regulations

The process that resulted in the Council appointing its former Chief Executive, Mr Waggett, as a director of Silent Valley in 2011 was flawed

- 74 On 31 March 2011, the Council's Chief Executive, Mr Morrison, left the Council's employment and his appointment as the Council's nominated director of Silent Valley ceased on the same date.
- 75 On 15 April 2011, a meeting of the Full Council considered a report from its Chief Legal Officer, Mr John, that proposed that the Council's newly appointed Chief Executive, Mr Waggett, replace Mr Morrison as the Council's appointed director on Silent Valley's Board (Silent Valley's Board subsequently appointed Mr Morrison as a director of Silent Valley on 19 May 2011 and he served in that role until 15 May 2012).
- 76 I note that the report submitted to the Council:
- does not set out the amount Mr Waggett would be paid for undertaking the role, and members were not asked to approve remuneration arrangements (as required under the Council's constitution if Mr Waggett was undertaking the Silent Valley role as part of his Chief Executive duties).
 - does not set out the detail and precise nature of the duties and responsibilities of the Silent Valley role to be performed by Mr Waggett, despite setting out the general Companies Act duties applicable to all company directors.
 - does not set out how potential conflicts arising from Mr Waggett acting as both the Council's Chief Executive and a Silent Valley director were to be managed.

- states that "there are no financial implications for the Council as [Silent Valley] will be responsible for any fee payable as a Board Member to the Council's appointed Director". However, the way in which the Council administered the fee resulted in the Council incurring additional financial costs for the following reasons:
 - the Council treated the fee paid to Mr Waggett in respect of his Silent Valley appointment as a pensionable payment within the LGPS as though it was part of Mr Waggett's employment as Chief Executive of the Council. The Council paid employer pension contributions of £12,169.74 to the LGPS in respect of Mr Waggett's Silent Valley appointment for the period 19 May 2011 to 29 February 2016. The Council also incurred pension strain costs amounting to £20,279.23 when Mr Waggett's Council employment ended in 2016. The Council did not seek to recover the pension costs from Silent Valley during the period in which they were incurred.
 - the Council paid employer national insurance Contributions to HMRC totalling £7,774.15 in respect of Mr Waggett's Silent Valley appointment for the period 19 May 2011 to 29 February 2016 (**paragraph 155 and Exhibit 3**). The Council did not seek to recover the pension and national insurance costs from Silent Valley during the period in which they were incurred.

77 Mr John told my auditors that "reports relating to the appointment of officers of the Authority to the Silent Valley Board were always drafted and prepared by an officer of the Council's Resources Department and issued in [his] name ... in normal circumstances, the appointment of the Authority's representatives on outside bodies was a matter for Democratic Services, a function for which I had no responsibility". While I note Mr John's comment, I consider that, where a report is made to Council members in the name of an officer, it is incumbent upon that officer to confirm that the content of that report is accurate and provides members with sufficient information to make an informed decision, regardless of who has drafted the report.

78 At its meeting of 15 April 2011, the Council resolved to appoint Mr Waggett "as the Authority's nominated Director on the Board of Silent Valley Waste Services Limited with immediate effect". The minutes of the meeting record that, at the Council meeting of 15 April 2011, the Chief People and Performance Officer informed members that "the appointment now being considered was for the Council's nominated Director for as long as Silent Valley remained a going concern". However, under Silent Valley's Articles, Council appointed directors were to hold office for a fixed term period of two years but could be re-appointed at the end of this period for further 2-year terms.

79 The process that led to the appointment of Mr Waggett as a Silent Valley director was flawed because members of the Council did not approve the amount of

remuneration Mr Waggett would receive for acting as a director of Silent Valley, contrary to the requirements of the Council's constitution, and did not take into account that the Council would be liable for an element of this remuneration, such as employer pension and national insurance costs.

- 80 Furthermore, it was not made clear whether Mr Waggett's Silent Valley appointment was to be part of his appointment as the Council's Chief Executive, or whether Mr Waggett was undertaking the role as a separate Silent Valley appointment, ie the Council was acting as an agent for Silent Valley in making payments to Mr Waggett. The fact that the Council was informed at its meeting of 15 April 2011 that the appointment had no financial implications for the Council gives support to the idea that Mr Waggett was undertaking the Silent Valley role as a separate Silent Valley employment.
- 81 Mr Waggett has told my auditors that he was not involved in his appointment or in preparing the report of the Council's Chief Legal Officer which recommended his appointment. I note that the minutes of the Council meeting of 15 April 2011 record that at that meeting Mr Waggett declared his interest in the agenda item "Appointment of Director to Silent Valley Waste Services Ltd".
- 82 In my view, for the reasons set out above, the process that resulted in the Council appointing its former Chief Executive, Mr Waggett as a director of Silent Valley in 2011 was flawed.

The pension arrangements made by the Council in respect of Mr Waggett's Silent Valley employment were potentially in breach of pension regulations

- 83 For pension purposes, the Council treated the remuneration paid to the Council's then Chief Executive, Mr Waggett, in respect of his appointment as a Silent Valley director as though the appointment was part of his role as the Council's Chief Executive. The Council paid employer pension contributions into the LGPS on the consolidated remuneration from both appointments. This increased Mr Waggett's future pension benefits arising from his employment as the Council's Chief Executive.
- 84 I have significant doubt as to whether the pension arrangements made by the Council in respect of Mr Waggett's appointment as a Silent Valley appointment were appropriate or in accordance with pension regulations. The Council was only entitled to adopt the approach set out in **paragraph 83** if:
- Mr Waggett's appointment as a Silent Valley director represented a Council employment. In my view, if the appointment was not a Council employment, but rather a Silent Valley employment, the Council had no lawful authority to pay employer pension contributions to the LGPS on behalf of Silent Valley.
 - Mr Waggett was undertaking the role as a Silent Valley director as part of his appointment as the Council's Chief Executive. The provisions of the Local

Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (the 2007 Regulations) set out that, where a person is an active member in more than one employment, they must make contributions for each of those employments. If Mr Waggett's Chief Executive and Silent Valley appointments were separate employments, the Council could not legitimately treat the remuneration for the Silent Valley appointment as pensionable as part of Mr Waggett's Chief Executive role. While I acknowledge that Mr Waggett paid pension contributions on the combined remuneration he received in respect of his Chief Executive and Silent Valley roles, the effect of merging two separate pensionable employments can result in a pension scheme member receiving higher pension scheme benefits than they are entitled to.

- 85 I have been unable to satisfy myself that Mr Waggett's appointment as a Silent Valley director was a Council employment and, if it was, that it was not separate from his employment as the Council's Chief Executive.
- 86 The Council's constitution required Council appointments to the Board of Silent Valley to be approved by a meeting of the Full Council and, as set out in **paragraph 78**, the Council did resolve to appoint Mr Waggett "as the Authority's nominated Director on the Board of Silent Valley Waste Services Limited with immediate effect". However, the Council's approval of the appointment is not in itself the determining factor as to whether Mr Waggett's appointment as a Silent Valley director was a Council or Silent Valley employment.
- 87 There is evidence to suggest that Mr Waggett's Silent Valley directorship may have been a Silent Valley employment. This includes:
- while Silent Valley's Articles of Association provided the Council with the power to determine the remuneration to be paid to Silent Valley directors, in practice this did not happen. The minutes of meetings of the Silent Valley Board show that the Silent Valley Board rather than the Council determined the remuneration of its directors. At its meeting on 15 April 2011, the Council did not approve, nor was it asked to approve, remuneration to be paid to Mr Waggett for undertaking his Silent Valley role. The Chief Legal Officer's report that was presented to the meeting set out that "there are no financial implications for the Council as Silent Valley Waste Services Limited will be responsible for any fee payable as a Board Member to the Council's appointed Director". The amount to be paid to Mr Waggett was not therefore determined by the Council. The party that determines the remuneration for a role is a significant indicator, but not the only indicator, of where the employment relationship lies. The remuneration arrangements agreed by the Council for Mr Waggett's Silent Valley appointment differ from those agreed in respect of Mr Morrison's appointment in 2003. When Mr Morrison was appointed, the Council was informed that there would be an adjustment to his salary as the Council's Chief Executive to reflect the additional duties and responsibilities of the Silent Valley appointment. When Mr Waggett was

appointed to the Silent Valley role in 2011, the Council was explicitly, but incorrectly, informed that there would be no financial implications for the Council. As the Council was informed that the appointment would not result in it incurring any costs, there is significantly more doubt about whether Mr Waggett's Silent Valley appointment was a Council employment.

- the Council paid Mr Waggett the director fee determined by Silent Valley, but put in place an invoicing arrangement to recover the cost of the fee from Silent Valley. The party responsible for meeting the employment costs of an appointment is an important indicator of where the employment relationship lies. I accept that it could also be argued that, as employer pension and national insurance costs were not recharged to Silent Valley, the Council viewed the Silent Valley appointment as a Council employment. This serves to demonstrate the failure of the Council to properly define the nature of Mr Waggett's Silent Valley role.
- if Mr Waggett's Silent Valley appointment was a Council employment, the Council failed to define the requirements of the role, including duties and accountability arrangements, and how much he should be remunerated for undertaking the role. If this was indeed a Council employment, the lack of clarity is indicative of poor governance on the part of the Council.

88 On 2 December 2019, the Council wrote to Silent Valley, requesting reimbursement of the employer pension and national insurance contributions costs it had incurred in respect of Council employees who had served as Silent Valley directors. This included costs relating to Mr Waggett's Silent Valley directorship between 2011 and 2016. The letter was based on external legal advice obtained by the Council.

89 The Council's legal advice concluded that the appointment of Council officers to the Board of Silent Valley, including Mr Waggett's appointment, should have been treated as separate employments, and that it would have been more appropriate for Silent Valley to have provided its own pension arrangements relating to these roles via its own admission to the LGPS.

90 The Council's decision to seek the recovery of employer pension and national insurance contributions from Silent Valley, which related to Council officers who had previously served as Silent Valley directors (**see paragraph 62**), indicates that the Council accepts that the Silent Valley roles were in fact Silent Valley employments. I acknowledge that the Council's current position does not necessarily offer an insight into the Council's position when Mr Waggett was appointed to the Board of Silent Valley in 2011. It could be argued that, as the Council did not seek to recover the employer pension and national insurance costs at the time, its position was that the Silent Valley appointment was a Council employment. In my view, I consider it unlikely that the Council even considered the status of the Silent Valley appointment in 2011.

- 91 Council officers have told my auditors that, while they accept that there were procedural deficiencies in the way the pension arrangements were administered, they do not consider that the Council acted unlawfully in making employer pension contributions into the LGPS on the remuneration paid to council officers in respect of their Silent Valley director roles. My understanding is that this view is based on the fact that Silent Valley is an admitted body to the LGPS within the Greater Gwent Pension Fund, and therefore, because Silent Valley could itself have made employer pension contributions into the LGPS in respect of its directors, the Council had the power to administer the payments on their behalf.
- 92 I do not agree with this view, for the following reasons:
- although it is my view that Silent Valley was a company under the control of a County Borough Council in Wales (as a wholly owned subsidiary), the employees of which could be eligible for membership of LGPS, Silent Valley did not designate its directors as a class of employees eligible for membership of the LGPS as required under the relevant pension regulations. Therefore, in my view, the Council could not lawfully make payments to the LGPS on behalf of Silent Valley.
 - I have seen no evidence to suggest that Silent Valley requested that the Council administer payments to the LGPS on its behalf.
- 93 I have also considered whether the Council acted lawfully in treating Mr Waggett's appointment as the Council's Chief Executive and his appointment as a Silent Valley director as a single appointment for pension purposes. As set out in **paragraph 84**, bullet point 2, the 2007 Regulations require that, where a person is an active member in more than one employment, they must make contributions for each of those employments.
- 94 In my view, there is evidence to indicate that Mr Waggett's Silent Valley appointment may have been separate from his employment as the Council's Chief Executive. This includes:
- the remuneration paid to Mr Waggett in respect of his Silent Valley directorship was separately specified in the Council's accounts and within Mr Waggett's employee file, suggesting that the pay for Silent Valley was not consolidated into his pay as Chief Executive. However, I accept that the Council could have decided to separate the payments for record-keeping and administrative purposes even if they could correctly be consolidated for employment and pension purposes.
 - Silent Valley's Articles of Association stipulated that the appointment of Council nominated directors was for a two-year fixed term period, which contrasts with Mr Waggett's permanent appointment as the Council's Chief Executive.
 - as set out in **paragraphs 88 to 90**, the Council has itself concluded that Mr Waggett's Silent Valley directorship should "have been treated as a separate employment".

- 95 While I accept that it may have been the Council's intention that Mr Waggett undertake the Silent Valley director role as part of his Chief Executive duties, the Council failed to put in place proper governance arrangements to ensure that this occurred. In my view there is now fundamental uncertainty as to whether the Silent Valley and Chief Executive appointments were one or two appointments
- 96 Mr Waggett told my auditors that "he understood at the time, as did the Council, that his appointment was a Council appointment and therefore there was no breach of the Pension Regulations; it was a single appointment, albeit with two roles". However, for the reasons set out in **paragraphs 87 to 94**, I consider it likely that Mr Waggett's appointment as a director of Silent Valley was separate from his appointment as the Council's Chief Executive, and I have significant doubt that the Council could lawfully pay employer pension contributions into the LGPS on behalf of Silent Valley, given that Silent Valley had not designated its directors as a class of employees eligible for membership of the LGPS. The Council did not recharge Silent Valley for the cost of the employer pension contributions it paid into the LGPS.
- 97 Regardless of whether the Council had the power to make pension contributions into the LGPS on behalf of Silent Valley, it is not clear that the Council complied with the 2007 Regulations which required that, where a person is an active member in more than one employment, they must make contributions for each of those employments. The Council treated the two appointments as a single employment for pension purposes. This may have resulted in Mr Waggett accruing higher pension benefits than he is legitimately entitled to.
- 98 I recognise that the position is unclear and only a court could definitively determine whether the 2007 Regulations were breached. But in my view I consider it more likely than not that the 2007 Regulations were breached.
- 99 I consider that the lack of certainty around pension arrangements for Council officers appointed as Silent Valley directors was caused by the Council's failure to establish proper governance arrangements for managing its relationship with Silent Valley, including establishing appropriate arrangements for:
- determining the roles and responsibilities of Council nominated directors
 - approval of appointments
 - determining remuneration
 - managing conflicts of interest

It is unclear how the Council's then Chief Executive, Chief Finance Officer and Director of Environment and Regeneration were nominated as paid directors of Silent Valley in 2012, and their appointments were not approved in accordance with the Council's constitution

In 2011, the Council started a project to examine options for its future relationship with Silent Valley

- 100 On 8 February 2011, Mr James, the General Manager of Silent Valley (and former Director of Finance and Deputy Chief Executive of the Council) wrote to the Council's Corporate Director of Environment, Mr Parsons, notifying him that the Company had been served with a Landfill Closure Notice by the Environment Agency (now Natural Resources Wales) on 17 November 2010. The Closure Notice was issued to address long-term risk of pollution caused by contamination leaking into groundwater from waste at the Silent Valley Landfill Site situated at Beechwood House, Cwm. The Landfill Closure Notice required Silent Valley to initiate the closure of the site, meaning that the Company would not be able to accept waste for disposal at Cwm after 31 March 2011.
- 101 Mr James further set out that the impact of the Landfill Closure Notice would affect Silent Valley's entire business because the management of the site represented a major part of Silent Valley's operations. The letter stated that closure of the landfill site would have a significant impact on Silent Valley's finances and potential job losses. The Company was therefore considering closure of a number of other sites "which are engaged in waste management services (including civic amenity/recycling sites and/or waste transfer stations.)" and that this could result in the cessation of services contracted with the Council for the operation of some civic amenity/recycling sites. Mr James set out that he had arranged to meet Council officers on 14 February 2011 to discuss how the Council intended to proceed in view of the Landfill Closure Notice.
- 102 I have not seen any records of the meeting held on 14 February 2011. However, following the meeting, Silent Valley continued to carry out operations on behalf of the Council including the operation and management of the Council's Household Waste Recycling Centres.
- 103 In view of the legal advice the Council had received regarding the lawfulness of extending the Council's contract with Silent Valley (**paragraphs 68 to 69**), and the business impact on Silent Valley arising from Landfill Closure Notice served on it, in Autumn 2011 the Council began a project to consider what options were available when the contract with Silent Valley expired on 31 March 2012. A project

manager was appointed from within the Department of Environment and Waste to lead the project. The Council also obtained external financial and legal advice to support the development of a proposal to present to members of the Council.

- 104 While the project was taken forward within the Department of Environment and Waste, the Council's Director of Environment and Regeneration, Mr Parsons, told my auditors that his personal involvement was limited because he was absent from work for a large part of 2011 due to sickness, and only returned to work in the autumn of 2011. He maintains that, on his return to work, he was seconded to work full-time on a regeneration project until he left his Council employment in 2013. He told my auditors that any comments he made regarding the Silent Valley project would have been in an "advisory capacity" because, "from early 2011 until I finished work in 2013 I held the title of Director of Environment and Regeneration, I had no operational, strategic or corporate control of the department and had limited, if any substantive interaction with the department".
- 105 While I note Mr Parsons' comments, the Council's documentary records indicate that from October 2011 to April 2012, Mr Parsons had significant involvement in the Silent Valley project including commenting and making suggested amendments to draft reports, attending meetings regarding the project, regular liaison with the project manager, and receiving external professional advice regarding the project.
- 106 On 14 October 2011, the Council's legal advisors emailed Mr Parsons and the project manager setting out the requirements that must be met for a contracting organisation, such as the Council, being able to contract with a contractor like Silent Valley without having to seek competition under the Public Contracts Regulations 2006. The Council's legal advisors set out that the Council could potentially claim 'Teckal exemption'⁴ because the services provided by Silent Valley would not have to be subjected to competition in the following circumstances:
- the Council was able to exercise control over Silent Valley similar to that which it was able to exercise over an internal department. That would mean that the Council must have the power of decisive influence over both the strategic objectives and the significant decisions of Silent Valley.
 - Silent Valley would carry out the essential part of its activities with the Council, and the business undertaken by Silent Valley for any other organisation could only be of marginal significance.

⁴ Teckal Srl v Comune di Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia (Case C-107/98) [1999] ECR I-8121 (Teckal) was a leading court judgment on public to public contracts and their exemption from the procurement rules. The Teckal principles set out in the case were subsequently codified in Article 12 of the Public Contracts Directive 2014 and regulation 12 of the Public Contracts Regulations 2015 (SI 2015/102) (PCR 2015).

- 107 On 4 November 2011 the Council's legal advisors emailed Mr Parsons and the project manager a first incomplete draft of a report for Council members. The report set out four potential options for the future of the services being provided by Silent Valley:
- continue with the existing structure, ownership and operation of Silent Valley.
 - restructure Silent Valley to give the Council control of the Board and make Silent Valley 'Teckal compliant' with limited external trading.
 - restructure Silent Valley to give the Council control of the Board but allow broader commercial trading.
 - transfer assets, operations and liabilities from Silent Valley to the Council and provide services through an in-house team with Silent Valley being wound-up.
- 108 Under 'Optimum Solution', the draft report states, "I shall make the working assumption that the Optimum Solution involves the continuation of the company, at least in the short term, but the issue remains open as to whether it is a Teckal compliant company or not". The report sets out that the composition of the Board of Silent Valley needed "to be completed, setting out numbers of council directors and to discuss the issue of non-executive directors bringing additional skills to the Board".

It is unclear how the Council's then Chief Executive, Chief Finance Officer and Director of Environment and Regeneration were nominated in 2012 as paid directors of Silent Valley

- 109 Between 4 November 2011 and 28 March 2012 the draft report to be considered by members of the Council went through several iterations. A version circulated on 27 January 2012 did not include a conclusion or recommendation on the 'Optimum Solution' or include details of the proposed Board composition.
- 110 By 20 February 2012, the draft report had been amended to advise members that the 'Optimum Solution' was to "restructure [Silent Valley] to give [the Council] control of the Board and make [Silent Valley] Teckal compliant with limited external trading".
- 111 The draft report included a section drafted by the Council's legal advisors which highlighted the need for the Council to address potential conflicts of interest between the Council, Silent Valley and Silent Valley's directors. It also set out a section on governance arrangements. However, the section on governance failed to include specific measures to address the potential conflicts of interests and, as set out in **paragraphs 123 to 149**, proper governance arrangements were not

established and measures to address potential conflicts of interests were not implemented.

112 The draft report further set out that "in order to restructure the constitution of [Silent Valley] and bring it within Authority control in terms of the Board, certain steps will need to be taken which will involve the Authority, as 100% shareholder, changing the constitution and the membership of the board also being changed". The report set out the names of those who it was proposed would become directors of Silent Valley. These were:

- Mr James (who had been General Manager of Silent Valley since 2003 and was the former Director of Finance and Deputy Chief Executive of the Council)
- Mr Waggett (who was the serving Chief Executive of the Council and who had since 15 April 2011 been a Council appointed director of Silent Valley)
- Mr Parsons (the Council's Director for Environment and Regeneration)
- Mr McAuliffe (the Council's Chief Finance Officer)

113 I have not been able to determine who and how it was decided that the report be amended to name the above individuals as proposed new directors of Silent Valley, and I have seen no documented rationale why these Council officers were proposed. Unfortunately, the Council did not keep a comprehensive audit trail of how the proposals were developed. Minutes of project group meetings were not kept and there is no documentary record of who decided the contents of the report to be provided to members of the Council.

114 Each of the Council officers who were appointed as Silent Valley directors appear to have been involved in the process that led to their Silent Valley appointments. In particular I note:

- the records that the Council holds shows that its then Director of Environment and Regeneration, Mr Parsons, was integrally involved with the development of the Silent Valley proposals from the commencement of the project up until the proposals were approved by the Council's Executive Committee on 28 March 2012. This involvement included editing versions of the draft report and meeting with the Council's external advisors.
- email correspondence indicates that Council officers, including Mr Waggett and Mr Parsons, were sent a copy of the draft report dated 20 February 2012 as referred to in **paragraphs 110 to 112**.
- on 26 February 2012, the project manager emailed Mr Parson's Executive Assistant attaching a draft version of the report for consideration by the Executive Committee requesting that "following the comments from [Mr Parsons] please find attached a revised report and appendices, could you please circulate these to the attendees for the meeting on the 1st of March? I have left sections highlighted as these will need to be discussed on Thursday and then final amendments can be made after the meeting". The

sections highlighted included the names of those proposed as directors of Silent Valley. No minutes have been retained of the meeting held on 1 March 2012. I note that on 16 February 2012 Mr Parson's Executive Assistant sent out an email to a number of Council officers inviting them to attend the meeting of 1 March 2012. Mr Waggett, Mr McAuliffe and Mr Parsons were amongst those invited. The project manager informed my auditors that each of these officers attended the meeting of 1 March 2012.

- on 1 March 2012, the project manager emailed a revised version of the report to the Director of Environment and Regeneration, Mr Parsons, the Acting Chief Officer Environment, and two other departmental officers. The covering email stated "please find attached a revised version of the report following our meeting today. If you are happy with the report can it please be put onto the agenda for the [Departmental Management Team and Corporate Management Team] next week and subsequently Executive". The attached report still contained the names of the proposed directors. However, the names were no longer highlighted, indicating in my view that agreement had been reached that these names should be included in the final report. It seems probable that these changes were agreed at the meeting of 1 March 2012. Mr Parsons responded to the email on 2 March stating "Looks fine to me and picks up all the points raised yesterday".
- the final version of the report considered by the Council's Executive Committee records that the contents of the report had been checked by the Council's Monitoring Officer, Head of Human Resources and Chief Finance and s151 Officer, Mr McAuliffe. Mr McAuliffe has told my auditors that he would not personally have undertaken this check, and it would have been undertaken by another officer within his department. However, the report does not make this clear.

115 I accept that the officers named above were not necessarily precluded from involvement in preparing proposals for members to approve. However, as these officers had pecuniary interests in the outcome of the process, in that the Silent Valley appointments could be remunerated, the Council needed to ensure that robust governance arrangements were put in place to ensure that bias on the part of officers could not affect the outcome of the process. I would have expected the Council to ensure that the process was properly documented, the reasons for decisions clearly set out, and the process subjected to scrutiny. I have seen no evidence that such arrangements were put in place.

116 In my view, the Council failed to put in place adequate governance arrangements around the process and, as a consequence, I have not been able to satisfy myself that the proposals put to the Council's Executive Committee meeting were free from officer bias.

The Council's Executive Committee approved officer proposals for restructuring Silent Valley, despite not having the constitutional authority to do so, but important elements of the proposals were not subsequently implemented

- 117 A briefing note dated 27 March 2012 for staff within the Environment and Regeneration Department records that the draft report to the Council's Executive was approved at a meeting of the Departmental Management Team held on 6 March 2012 to go forward to the Corporate Management Team. It also records that the Corporate Management Team approved the report on 13 March 2012.
- 118 On 28 March 2012, a meeting of the Council's Executive Committee considered the officer report on the future of Silent Valley. The report was unchanged (other than formatting) from the version dated 1 March 2012 and was agreed by the Director of Environment and Regeneration, Mr Parsons, on 2 March 2012 (**paragraph 114, bullet 4**). The report recommendations are set out in **Exhibit 1**.

Exhibit 1: recommendations for the restructuring of Silent Valley made to a meeting of the Council's Executive Committee held on 28 March 2012

Recommendations of an officer report provided to members of the Council's Executive Committee for consideration

1. Restructure SVWS Ltd to give the Authority control of the Board and make SVWS Ltd "Teckal compliant" with limited external trading.
2. Revise the constitutional documents of the company to enable such Teckal compliance.
3. Develop contractual documentation between the Authority and SVWS Ltd in order to regularise the services provided by the company. The contractual documentation to include but not be limited to details of the respective obligations, rights and liabilities by both parties.
4. Review this revised arrangement in approximately 2 – 3 years when the capping of the landfill site will be completed and aftercare provisions are fully understood.
5. Appoint Mr James, Mr Parsons, Mr Waggett and Mr McAuliffe to the board of directors of the Company and formally agree this appointment, any remuneration and any indemnity provisions with the officers identified.

Source: Council agenda papers

- 119 The minutes of the meeting of 28 March 2012 record that Mr Waggett and Mr McAuliffe "left the meeting whilst the item, [Silent Valley] was under discussion"

having declared an interest in the matter. Mr Parsons is not recorded as having being present at the meeting.

120 The minutes of the meeting record that the Executive Committee resolved to accept the report recommendations.

121 I note the following:

- the report recommended that the Executive Committee appoint Mr James, Mr Parsons, Mr Waggett and Mr McAuliffe "to the board of directors of the Company and formally agree this appointment, any remuneration and any indemnity provisions with the officers identified". As the report did not set out any detail regarding the level of remuneration to be paid, I do not consider that this was an adequate approval. Furthermore, the Council's constitution set out that the Full Council was to determine the level and any change in the level of the remuneration to be paid to Chief Officers. The Council's Executive Committee was therefore not able to agree remuneration for the officers appointed as Silent Valley directors. The Council's constitution also set out that the function of appointing representatives to outside bodies was to be carried out by Full Council unless Full Council delegated the function. I therefore consider that it was necessary for a meeting of the Full Council to confirm the appointments to Silent Valley and any remuneration to be paid for undertaking these roles. The Full Council was not asked to confirm the appointments or to determine the amount of remuneration relating to the Silent Valley director roles. Mr Waggett, Mr McAuliffe and Mr Parsons were Chief Officers and, given that Mr Waggett was the Council's Head of Paid Service, and Mr McAuliffe the Council's s151 officer, I would have expected them to have been aware of these constitutional requirements. I would also have expected the Council's Monitoring Officer to have advised that remuneration to be paid for undertaking the Silent Valley roles would need to be determined
- the report to the Executive Committee set out that "any remuneration which is paid to the directors and any indemnity which is given by the Authority to cover their actions in their capacity as director of the company is to be formally agreed between the officers and the Authority". As set out above, the Council constitution required Full Council to determine the level and any change in the level of the remuneration to be paid to Chief Officers. However, Full Council was not asked to confirm the appointments or to determine the amount of remuneration relating to the Silent Valley Director roles, and I therefore consider that the change in remuneration was not adequately approved. Furthermore, I have seen no evidence that the Council took any steps to determine what would be an appropriate rate of remuneration for undertaking the role, commensurate with any additional duties and responsibilities involved in undertaking the role. It appears that the additional remuneration paid to the officers concerned was in effect determined by the Board of Silent Valley and not the Council. This appears

to have occurred by default because Silent Valley determined the annual director fee to be paid to its directors, and the Council did not consider or determine whether this represented appropriate remuneration for the roles to be performed by the officers concerned.

- neither the Executive Committee nor Full Council approved that remuneration paid to the Council officers appointed as Silent Valley directors should be treated as pensionable pay within the LGPS. Nevertheless, the Council paid employer pension contributions into the LGPS on this remuneration as though the remuneration related to their primary roles as Council officers. I have significant doubt whether the Council had the necessary authority to treat the remuneration as pensionable in this way (**paragraphs 154 to 164**) and, in any event, the remuneration paid to these officers should not have been treated as pensionable pay because the remuneration itself had not been approved by the Council.
- the report identified that the Council officers serving on the Silent Valley Board would have potential conflicts of interest between their role of Council officers and their role as company directors. However, the Council did not put in place adequate arrangements to manage the potential conflicts of interest (**paragraphs 123 to 131**). This was a significant oversight.
- the report states that, to help address the potential conflict of interest, "their position will need to be regularised to ensure that the Authority formally agrees their roles as part of their Authority duties, any remuneration which is paid and any indemnity which is given by the Authority to cover their actions in their actions as director of the company". The Council did not take steps to agree the role of the appointed directors as part of their Authority duties, or to regularise the remuneration for the role (**paragraphs 127 to 131**).

122 In my view, for the reasons set out above, I consider the process that led to the appointment and remuneration of the Council's Chief Executive, Chief Finance Officer and Director of Environment and Regeneration was fundamentally flawed, and the resolution approved by the Council's Executive Committee was beyond the constitutional power of the Executive Committee to approve and therefore the decision was potentially unlawful.

The Council failed to establish or operate adequate or effective governance arrangements to manage its relationship with Silent Valley from 2012 onwards

The Council failed to put in place proper arrangements to manage and mitigate potential conflicts of interest

- 123 As set out in **Exhibit 1**, on 28 March 2012 the Council's Executive Committee approved a recommendation to give the Authority "control of the Board and make SVWS Ltd 'Teckal compliant' with limited external trading". This recommendation was designed to enable the Council to demonstrate that it was able to exercise control over the day-to-day management of the company's affairs similar to that which it exercised over its own internal departments, and in doing so enable the Council to award work directly to Silent Valley without seeking competition.
- 124 To ensure that the Council had control of the Silent Valley Board, the Council's Executive Committee agreed that the majority of Silent Valley's directors would be appointed by the Council. The Executive Committee further agreed that the Council's Chief Executive, Chief Finance Officer and Director for Environment and Regeneration be appointed as Silent Valley Directors. The fourth director, Silent Valley's Managing Director, was appointed by the Company.
- 125 In resolving to exercise control over the Silent Valley Board, I consider that the Council had a duty to ensure that adequate and effective governance arrangements were put in place to ensure that:
- potential conflicts arising from officers of the Council sitting on Silent Valley's Board were managed and mitigated;
 - the relationship between the Council and Silent Valley was formalised and documented so that there was a common understanding of the obligations of both parties; and
 - the operational and financial performance of Silent Valley could be monitored and scrutinised by the Council.
- 126 The Council's decision to appoint three of its chief officers to the Silent Valley Board gave rise to potential conflicts of interest as they would have dual roles as Council officers and Silent Valley directors. In these circumstances, the Council needed to establish robust arrangements to ensure these officers understood their responsibilities when acting as Silent Valley directors. This was crucial to managing and mitigating the potential conflicts and to ensuring that these officers were aware of their responsibilities both to the Council and to Silent Valley when exercising their Silent Valley roles.

- 127 The report considered by the Council's Executive Committee on 28 March 2012 recognised the need to address potential conflicts of interest and set out that "officers appointed as directors will still need to be aware of the potential conflict and their position will need to be regularised to ensure that the Authority formally agrees their role as part of their Authority duties, any remuneration which is paid and any indemnity which is given by the Authority to cover their actions in their capacity as director of the company".
- 128 The importance of the Council regularising the positions of Council officers appointed to serve on company boards cannot be overstated. This is because, while a director's overriding duty is to the company, a Council officer appointed by the Council to serve as director on a company board is only serving in that role because of, and in fulfilment of, their employment as a Council officer. Their position on the company should therefore be an inherent part of their job as a Council officer, and their duties and remuneration in respect of their company roles should therefore be clearly articulated under their contracts of employment. I recognise that serving as a company director will include distinct and potentially onerous additional responsibilities. It is therefore incumbent on the Council recognise the value of those responsibilities by undertaking a review of an officer's remuneration. This would usually be through a job evaluation process. It should not be for the Company to determine the remuneration for undertaking the role as this gives rise to an inherent conflict of interest.
- 129 Even though the need to ensure that the roles of the Council-appointed Silent Valley directors were agreed by the Council as part of their Authority duties, no action was taken to address this matter. The Council did not agree the amount of remuneration to be paid for these roles, did not seek to assess the value of the responsibilities involved in performing the Silent Valley roles, or to consider the potential conflicts of interest arising.
- 130 I am unclear why the Council did not address this matter. In my view, the Council should have:
- determined what additional Council duties and responsibilities were required of the officers concerned in respect of their Silent Valley roles;
 - agreed these duties and responsibilities with the officers concerned and formalised these requirements within their terms and conditions of employment; and
 - assessed whether the additional duties justified an increase in remuneration and, if an increase was justified, determined the level of that increase, commensurate with the additional demands of the role.
- 131 The failure of the Council to establish proper arrangements around the duties and remuneration of the local authority directors has created significant uncertainty as to whether the Council appointed directors were acting in the interests of the Council or Silent Valley when undertaking their Silent Valley roles, and potential conflicts of interests were neither managed nor mitigated. The Council's failure to

establish proper governance arrangements around the roles and the remuneration of Council officers serving as Silent Valley directors has resulted in significant doubt over the whether the pension arrangements put in place by the Council in respect of the Council officers as Silent Valley directors were compliant with pension regulations (**paragraphs 154 to 164**).

The Council failed to put in place a clear governance framework in respect of its relationship with Silent Valley

- 132 The report presented to the Council's Executive Committee meeting of 28 March 2012 further stated that, "If the company is reconstituted and operates as a teckal compliant company, it will be possible for the Authority to contract directly with SVWS Ltd for the continued provision of these services. However, the opportunity should be taken to regularise the relationship and set out clearly in contractual documentation the respective obligations, rights, liabilities etc of the parties ... The Authority is the sole shareholder of the company and it needs to ensure that there is clarity within the decision making structure of the Authority as to who is in a position to make decisions in this capacity. In this respect the board members named [as local authority directors] cannot operate in a dual capacity".
- 133 The report correctly identified that those officers appointed as Silent Valley directors, and responsible in that capacity for Silent Valley decision-making could not be responsible for taking decisions relating to Silent Valley within the decision-making structure of the Council. The officers appointed to act as local authority appointed directors of Silent Valley were the Council's Chief Executive and Head of Paid Service, Chief Finance Officer and s151 Officer. In normal circumstances each of these officers would have had a significant role in the Council's decision-making in respect of Silent Valley.
- 134 The report recognised the importance of regularising the relationship with Silent Valley by putting in place contractual documentation "setting out the respective obligations, rights, liabilities etc of the parties" and making sure that there was clarity on who was able to make decisions in respect of the shareholder; the shareholder being the Council in respect of Silent Valley.
- I have seen no evidence that the Council took action to address these matters. I would have expected the Council to have sought to address this matter by drawing up and agreeing a governance framework to include:
 - a shareholder's or management agreement setting out the rights of the Council as the sole shareholder and how it can exercise those rights;
 - financial agreements setting out what assistance was to be provided to the Company, and on what terms; and
 - a business plan setting out the objectives of the business, how they are to be achieved and standards met.

- 135 Mr Crook was appointed on 5 August 2013 to succeed Mr Parsons as the Council's Director of Environment and Regeneration⁵. He also served as a director on the Board of Silent Valley from 1 March 2016 to 19 March 2018. Mr Crook told my auditors that in 2017 he was made aware that there was not an extant contract between the Council and Silent Valley, so he started a review aimed at putting in place a Service Level Agreement (SLA). The intention was that the SLA would regularise the relationship between the Council and Silent Valley. However, for various reasons, the review was put on hold. Mr Crook told my auditors that, as he "had a conflict of interest [he had been appointed as a director of Silent Valley] [he] was unable to comment on the lack of progress". While I recognise that a review was commenced, this occurred some five years after the Council took control of the Silent Valley Board and was not completed.
- 136 The failure to establish a robust documented governance framework to regulate the relationship between the Council and Silent Valley was, in my view, a very significant and serious oversight.

The Council failed to establish clear arrangements on how, as Silent Valley's sole shareholder, it would make decisions in respect of the Company

- 137 The need for clarity in decision-making is a key principle of good governance.
- 138 The report presented to the Executive Committee meeting of 28 March 2012 recognised the importance of this principle and stated: "the Authority is the sole shareholder of the company and it needs to ensure that there is clarity within the decision making structure of the Authority as to who is in a position to make decisions in this capacity. This should, ideally, not be one of the [Silent Valley] directors as they have a different role and set of responsibilities ... When the Authority is making decisions in its capacity as shareholder, it is able to make those in the best interests of the Authority. This could be, for example, radically to change the constitution of the company or indeed to wind it up."
- 139 It is good practice for local authorities to grant delegated authority to an officer of the Council (usually a director) to make decisions on behalf of the Council, as the shareholder of a Council owned and controlled company. The individual concerned would normally be supported by a shareholder board/group to provide the necessary oversight from the shareholder's perspective that the policies and boundaries that the Council as the shareholder has established for the company are being adhered to.
- 140 Early drafts of the report considered by a meeting of the Council's Executive Committee on 28 March 2012 included a proposal for the Council to establish a

⁵ The Council's Director of Environment and Regeneration, Mr Parsons who was appointed as a Silent Valley Director on 15 May 2012 left his Council employment on 31 August 2013 and his Silent Valley directorship terminated on the same date.

Shareholder Board/Group. The draft report set out proposed names for membership of the Shareholder Board/Group. In the event, for reasons I have not been able to ascertain, the proposal to establish a Shareholder Board/Group was not included in the final report submitted to the Council's Executive Committee meeting of 28 March 2012. No alternative arrangements were subsequently established. While the Council had appointed directors to Silent Valley's Board, their presence on the Board could not provide the necessary representation or oversight because the directors acting in that capacity were required under the Companies Act 2006 "to act in the way [they consider], in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole". Despite that, as Silent Valley is a wholly owned Council company, there is a significant confluence of interests between those of the Council and Silent Valley. In the absence of adequate arrangements for shareholder decision-making, it is unclear to me how the interests of the Council, as the sole shareholder of Silent Valley, were represented from 2012 onwards, or whether the Council was sighted on matters relating to Silent Valley that it may have wished to decide for itself.

The Council failed to establish appropriate mechanisms to review and scrutinise the operational and financial performance of Silent Valley

- 141 As the Council wholly owns and controls Silent Valley, the Council had a duty to put in place arrangements to review and scrutinise the operational and financial performance of Silent Valley and to ensure that public money was well-spent.
- 142 In my view, performance review and scrutiny could have been undertaken at various levels including:
- a Council Shareholder Board/Group (**see paragraph 139 to 140**)
 - operational assessments undertaken by staff within Blaenau Gwent's Environment and Regeneration Department
 - reports to members on the overall performance of Silent Valley
 - reviews undertaken by the Council's Overview and Scrutiny Committee
- 143 The Council has not been able to provide me with any evidence that the performance of Silent Valley was systematically monitored or reviewed by the Council between 2012 and 2017.
- 144 Officers within the Council's Environment and Regeneration, and Finance Departments, and Council appointed directors of Silent Valley, have told my auditors that while some technical operational discussions took place between Council and Silent Valley officers, they are not aware of any reports being presented to members of the Council relating to the performance of Silent Valley.
- 145 I find this particularly concerning because since the Council formally took control of the Company in 2012, Silent Valley reported significant year-on-year losses as shown in **Exhibit 2**.

Exhibit 2: reported financial performance of Silent Valley 2012-13 to 2018-19

Financial Year	Operating Income	Operating Costs	Loss
2012-13	£3,725,147	£3,878,601	£153,454
2013-14	£1,079,385	£1,414,099	£334,714
2014-15	£772,967	£1,065,665	£292,698
2015-16	£800,902	£1,129,197	£328,295
2016-17	£1,123,252	£1,438,730	£315,478
2017-18	£1,018,457	£1,268,648	£250,191
2018-19 ⁶	£1,032,239	£1,365,533	£333,294
Total	£9,552,349	£11,560,473	£2,008,124

Source: Companies House, Silent Valley accounts 2012-13 to 2018-19

- 146 In the financial years 2012-13 to 2018-19, Silent Valley made a cumulative operating loss of over £2 million. This is over 21% of its operating income for the same period. If an internal department of the Council operating a trading activity had reported losses of this scale, I would have expected Council officers to bring the matter to the attention of members, considered contract amendments or contract termination, and developed a recovery plan to ensure that statutory services could be delivered in a sustainable way.
- 147 I have seen no evidence that the Council took any of these steps in respect of Silent Valley. The Council officers who, under normal circumstances, would have led on such matters in regard to waste disposal services (the Council's Chief Executive, the Chief Finance and Section 151 Officer, and the Director of Environment and Regeneration), had been appointed as directors of Silent Valley in 2012⁷.
- 148 Mr Crook, the Council's Director of Environment and Regeneration from 5 August 2013 told my auditors that he "was unaware that any recommendations made in 2012 had not been implemented".

⁶ As set out in **paragraphs 260 to 264**, on 19 March 2018, the Council terminated officer appointments to the Silent Valley Board. Therefore, in the 2018-19 financial year there were no Council officers on the Silent Valley Board

⁷ Mr McAuliffe ceased to be the Council's Chief Finance Officer and s151 Officer on 29 July 2018

149 However, as set out above, recommendations made in the report presented to the Executive Committee meeting of 28 March 2012 were not implemented and, in my view, the Council failed to establish appropriate mechanisms to review and scrutinise the operational and financial performance of Silent Valley.

Council officers appointed to the Silent Valley Board as directors in 2012 were remunerated through the Council's payroll for these appointments at a rate determined by the Silent Valley Board, but the Council did not recover the full cost of the appointments from Silent Valley, and the pensionable treatment of the remuneration was potentially in breach of pension regulations

Council officers appointed to the Silent Valley Board as directors in 2012 were remunerated through the Council's payroll for these appointments at a rate determined by the Board, but the Council did not recover the full costs of these appointments from Silent Valley

150 On 15 May 2012, the outgoing Silent Valley Board met for a final time. The minutes of the meeting record that the Board considered and approved:

- proposed new Company Articles of Association to be recommended to the Council for approval;
- the appointment of Mr McAuliffe and Mr Parsons as new directors of the Company; and
- the termination of the appointments of Silent Valley appointed directors, Mr Morrison, Mr Axford and one other director (now deceased).

151 The meeting was adjourned, the directors whose appointments had terminated left the meeting, and the reconstituted Board met for the first time after the adjournment. The newly formed Board comprised:

- Mr James (General Manager and director of Silent Valley)
- Mr Waggett (Council appointed director of Silent Valley and the Council's Chief Executive)

- Mr Parsons (Council appointed director of Silent Valley and the Council's Director of Environment and Regeneration)
 - Mr McAuliffe (Council appointed director of Silent Valley and the Council's Chief Finance and s151 Officer)
- 152 Mr James was the General Manager of Silent Valley and was directly remunerated by the Company (**see paragraphs 193 to 194**).
- 153 The other three directors were paid £11,568.96 per annum by the Council for acting as directors of Silent Valley. The rate of remuneration was determined by the Silent Valley Board and was subject to annual review each May. Mr Waggett completed and signed payroll amendment forms in respect of Mr McAuliffe and Mr Parsons and the forms were countersigned by the Council's Human Resource Manager. The forms, which were dated 2 July 2012, were then sent to the Council's Director of Resources for processing. The forms set out that "in line with agreement and email please pay Director's fee of £11,568.96 per annum wef from 15 May 2012 costs to be invoiced to Silent Valley". The forms refer to the relevant authority for this action as being the minutes of a Silent Valley Board. In my view, while the forms refer to the payments being made "in line with agreement" this could not be referring to the agreement of members of the Council because, as set out in **paragraph 121**, members of the Council had not agreed that the officers concerned should be remunerated £11,568,96 per annum for undertaking the Silent Valley roles.
- 154 Following the restructuring of the Silent Valley Board in 2012, the Council continued, as it had done since 2003, to treat the director fees paid to Council appointed Silent Valley directors as pensionable payments and made employer pension contributions into the LGPS, as though the Silent Valley directorships and local authority employments of the individuals concerned were single employments. The Council also paid employer national insurance contributions to HMRC in respect of the Silent Valley remuneration.
- 155 The Council invoiced Silent Valley for the cost of the director fees paid to Mr Waggett, Mr McAuliffe and Mr Parsons. However, it did not invoice Silent Valley for the cost of employer national insurance and pension contributions the Council incurred in respect of all Council appointed directors from 5 February 2003 to 19 March 2018. **Exhibit 3** sets out details of these costs.

Exhibit 3: employer pension and national insurance (NI) contributions incurred by the Council in respect of Council appointed Silent Valley directors from 5 February 2003 to 19 March 2018

Director	Period	NI	Pension annual contributions	Pension Strain costs	Total
Mr Morrison	05/02/2003-31/03/2011	£11,098.56	£18,364.16	£12,454.04	£41,916.76
Mr Waggett	19/05/2011-29/02/2016	£7,774.15	£12,169.74	£20,279.23	£40,223.12
Mr Parsons	15/05/2012-31/08/2013	£2,068.60	£3,246.93	£8,513.03	£13,828.156
Mr McAuliffe	15/05/2012-19/03/2018	£9,334.47	£14,600.68	£7,741.89	£31,677.04
Mr Crook	01/04/2016-19/03/2018	£3,274.58	£5,101.69		£8,376.27
Total		£33,550.36	£53,483.21	£48,988.19	£136,021.76

Source: Council financial records

156 On 2 December 2019, the Council wrote to Silent Valley requesting reimbursement of the costs set out in **Exhibit 3**. Silent Valley declined to meet these costs.

The Council treatment of payments made from 2012 onwards to the Local Government Pension Scheme in respect of Council officers appointed as Silent Valley directors was potentially in breach of pension regulations

157 The Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 (the 2007 Regulations), in conjunction with the Local Government Pension Scheme (Administration) Regulations 2008 (the 2008 Regulations) governed the operation of the LGPS at the time that Mr McAuliffe and Mr Parsons were appointed directors of Silent Valley, and when Mr Waggett's appointment was re-affirmed in 2012. The 2008 Regulations specify who was entitled to be an active member of the LGPS. This included:

- a person employed by a County Borough Council in Wales
- a person employed by a company under the control of a County Borough Council in Wales, where the Company had made a resolution that an employee or a class of employees may be a member(s) of the LGPS. While, in my view, Silent Valley was such a company, it did not make a resolution enabling directors of Silent Valley to be members of the LGPS

- 158 The 2007 Regulations defined pay on which pension contributions could be made as "the total of all the salary, wages, fees and other payments paid to him for his own use in respect of his employment; and any other payment or benefit specified in his contract of employment as being a pensionable emolument"
- 159 The Regulations also state that "a person who is an active member in more than one employment must make contributions for each of those employments". Employments could not be consolidated and regarded as a single employment for pension purposes.
- 160 In my view, Mr Waggett's, Mr McAuliffe's and Mr Parsons' appointments as directors of Silent Valley were separate appointments/employments for pension purposes. The reasons I have come to this view are:
- the Council did not specify any additional duties or responsibilities that they would be required to undertake on behalf of the Council as part of their core Council roles
 - the Council did not approve remuneration paid to the directors of Silent Valley. Silent Valley determined the pay for its directors. It is difficult to see how the Silent Valley remuneration could be considered part of the Council pay of these officers when the Council neither determined their responsibilities in respect of Silent Valley nor decided the pay for that work
 - as the Council did not approve an amount of remuneration to be paid to Mr Waggett, Mr McAuliffe and Mr Parsons for undertaking their Silent Valley roles, as required by the Council's constitution, even if these persons were undertaking the Silent Valley roles as part of their Council duties, any remuneration paid to them should not have been treated as pensionable, because the remuneration itself had not been approved by the Council
 - the cost of the annual director fee paid by the Council to the relevant officers was recharged to Silent Valley. The Council was therefore not liable for the fee, and the initial payment of the fee by the Council appears to be solely an arrangement of administrative convenience
 - the payments made to the officers in respect of Silent Valley was separately specified in the Council's accounts and within their employee files, indicating that the pay for Silent Valley was not consolidated
 - at no point did the Council determine by resolution that the remuneration to be received by the relevant officers in respect of their Silent Valley directorships should be treated as pensionable
 - on 16 August 2017, the Council's then Lead Corporate Director/Head of Paid Service wrote to Mr McAuliffe, (and Mr Crook, the Council's Director of Environment and Regeneration who was appointed to the Silent Valley Board on 1 March 2016) stating "the role with the Company is at the Council's request (and is a separate engagement which the Council is remunerating and does not constitute additional remuneration for your core duties as a Council officer) The role you perform is approved and clearly

recorded by the Council in its AGM, and/or separate reports ... and that the payment is clearly recorded by the Council in its pay policy statement."⁸ Mr McAuliffe and Mr Crook responded accepting the position as stated.

- 161 In my view, the remuneration paid to Mr Waggett, Mr McAuliffe, Mr Parsons and Mr Crook in respect of their Silent Valley appointments should not have been treated as pensionable pay by the Council, and the Council should not have paid pension contributions to the LGPS on the basis of a salary that had been increased by the Silent Valley remuneration. I can see no legitimate reason why the Council paid pension contributions to the LGPS in respect of Silent Valley remuneration when it was not liable to pay.
- 162 In treating Mr Waggett's, Mr McAuliffe's and Mr Parsons' Silent Valley and Council appointments as single appointments for pension purposes, it is not clear that the Council complied with the 2007 Regulations (**see paragraph 97**). The Council and Silent Valley appointments of these officers were not concurrent. In combining the two appointments for pension purposes, those appointments were treated as though they were concurrent, and pension benefits were calculated as though they had been Silent Valley directors for the same period they had served as local government officers. In each case, the Silent Valley appointments were of a far shorter duration.
- 163 As a consequence, it is probable that these officers have accrued higher pension benefits than they were legitimately entitled to.
- 164 I recognise that only a court could determine definitively whether the Regulations have been breached, but I consider it more likely than not that the Regulations were breached.

⁸ Mr McAuliffe's and Mr Crook's appointments as Silent Valley directors, and the remuneration they received for these roles were reported to members within the Council's annual pay policy statements which are approved by the full Council. The remuneration paid in respect of these roles was also recorded in the Council's annual accounts. Neither the annual pay policy nor the annual accounts set out that the remuneration was being treated as pensionable under the LGPS. Furthermore, as set out in paragraph 121, the Council did not approve the remuneration for these roles as required by the Council's constitution.

On 3 April 2012 members of the outgoing Silent Valley Board voted to make gratuity payments of £11,569 to each retiring Board member, contrary to Silent Valley's governing document, even though all but one of those present stood to benefit financially from the decision

- 165 On 3 April 2012, the outgoing Silent Valley Board met. Those present were:
- Mr James (the Silent Valley General Manager and former Director of Finance and Deputy Chief Executive of the Council)
 - Mr Morrison (the former Chief Executive of the Council and a Silent Valley appointment to the Board from 19 May 2011)
 - Mr Waggett (the Council's serving Chief Executive and a Council appointed director of Silent Valley from 19 May 2011)
 - Mr Axford (the Council's former Chief Internal Auditor and a Silent Valley appointment to the Board from 19 May 2011)
 - One other non-executive director (now deceased) appointed by Silent Valley
- 166 Mr Morrison has told my auditors that at the meeting the Board was informed by Mr Waggett that the Council had decided to terminate the appointments of all the directors other than his own (Mr Waggett's) and Mr James'.
- 167 The minutes of the meeting of the Silent Valley Board on 3 April 2012 set out, in brief, the changes the Council had decided to make in respect of the Company, which included the termination of Mr Morrison's, Mr Axford's and the now deceased director's appointments.
- 168 The minutes of the Board record that Mr Waggett "suggested that terminating directors be awarded an ex-gratia [payment] equivalent to one year's director's fee" The annual director fee at that time was £11,568.96. The minutes record that the Board "approved [Mr Waggett's] suggested ex-gratia payment to terminating directors. [Mr Morrison] asked if the same consideration would be afforded to [Mr James] when he terminated and [Mr Waggett] confirmed that it would". Mr Morrison has told my auditors that he made this suggestion because he wanted to make sure that all the directors were being treated equally.
- 169 Mr Waggett maintains that the minutes of the Silent Valley Board meeting of 3 April 2012 are incorrect in several respects. He maintains:
- the payments made to the outgoing directors were not ex-gratia payments as stated in the minutes but were payments to settle potential legal claims that the outgoing directors could have brought for early termination of office. He maintains that one of the outgoing directors threatened legal action

because their appointment was being terminated before the end of their 2-year appointment period.

- only he, Mr Waggett, and Mr James approved the payments. He maintains that the outgoing Silent Valley directors declared their interests and did not vote on the proposed payments.
- while the minutes record that Mr Morrison asked, "if the same consideration would be afforded to [Mr James] when he terminated and [Mr Waggett] confirmed that it would", Mr Waggett maintains that he did not agree that a future payment would be made to Mr James over and above the amount he would be entitled to under his contract of employment.

170 I do not accept Mr Waggett's recollection of the meeting for the following reasons:

- the minutes of the Silent Valley Board meeting of 3 April 2012 represent the official record of proceedings at that meeting. If the minutes of that meeting in respect of the payments to outgoing directors were fundamentally inaccurate as Mr Waggett maintains, I would have expected the minutes to have been corrected before approval to ensure their factual accuracy. Mr Waggett's recollection of events differ from others present at the meeting who have not sought to maintain that the payments were to settle potential legal claims. Furthermore, both Mr James' and Mr Morrison's accounts support the minute record that the Board agreed that Mr James would be entitled to a future payment.
- no documentary evidence has been provided to my auditors which indicates that the payments were to settle potential legal claims, and the minutes of the Silent Valley Board meeting of 3 April 2011 do not refer to the settlement of potential claims. Mr Waggett maintains that he recalls being advised by Mr James prior to the Board meeting "that a precedent had been set and having sought legal advice previously in 2011 in respect of a director". However, the minutes of the Silent Valley Board meeting of 6 June 2011 refer to legal advice Silent Valley had requested on making ex-gratia payments and not advice on settlement of potential legal claims (**see paragraph 174**).
- Mr Waggett maintains that only he and Mr James approved the payments, and the outgoing directors declared their interests. However, the minutes of the meeting do not record that interests were declared, or that only two directors voted on the proposal. Mr James has also told my auditors that only he and Mr Waggett voted on the proposal. However, Mr James' account differs from Mr Waggett's in that Mr James maintains that it was agreed that he should receive a future payment. The accounts given by Mr Waggett and Mr James are problematic. If the Board approval included agreement that Mr James receive a future payment, as is recorded in the minutes, then Mr James, because of his interest in the matter, was precluded by Silent Valley's Memorandum and Articles of Association from voting on the matter

(see paragraph 173, bullet point 2). The quorum for a Silent Valley Board meeting was two members, and therefore if four of the five members present were unable to vote on the decision, the decision could not be taken under the Company Articles. It is difficult to see how the payments could have been to settle potential legal claims relating to the early termination of director appointments given that the Silent Valley Board agreed that Mr James would receive a future payment despite the fact that his appointment was continuing.

- 171 Mr James told my auditors that: "he remembers that the three outgoing directors took no part in the discussion or the decision relating to the approval of their own ex-gratia payments (which were a method to secure their termination as Board Directors)". However, the minutes of the Board meeting of 3 April 2012 record that the outgoing directors were present and involved in the discussion regarding the payments and the minutes do not record that interests were declared or that those present did not vote on the matter. I also note that it was not necessary for payments to be made to the outgoing directors to "secure their termination as Board directors". Silent Valley's Articles of Association set out that the Council, as the Controlling Authority, "may remove any Director before the expiration of his/her period of office notwithstanding anything in these Articles or in any agreement between the Company and such Director".
- 172 None of the Silent Valley directors, except for Mr James, had a contractual entitlement to receive a payment from Silent Valley on the termination of their directorships. Mr James' situation was different from the other directors because, as the Company's General Manager, he had a written contract of employment that included provisions in respect of the termination of his employment (**paragraphs 208 to 210**). Furthermore, as I have seen no contemporaneous evidence to indicate that the payments made to the outgoing directors were to settle potential legal claims, (or that Silent Valley and/or the Council had sought advice on whether there was a basis for the outgoing directors to make such claims), I consider the payments were as stated in the minutes of the Silent Valley Board meeting of 3 April 2012, 'ex-gratia' or gratuity payments.
- 173 I consider that the decision made by the Board to pay the terminating directors £11,568.96 each, and to commit to make a future payment to Mr James when he ceased to be a director of Silent Valley, was in my view, in breach of Silent Valley's Articles and the Companies Act, and reflects poorly on the Council's oversight arrangements in respect of the Company. My reasons for reaching this view are as follows:
- Silent Valley's Memorandum and Articles of Association, the document governing the operation of the Company, sets out that the Company may make gratuity payments to directors. However, the document also sets out that the directors of Silent Valley shall not make any such payment "save with the prior written approval in writing of the Company's Controlling

Authority" ie the Council. Silent Valley neither requested nor obtained prior written approval from the Council.

- Silent Valley's Memorandum and Articles of Association sets out that "directors shall not vote at a meeting of directors or a committee of directors on any resolution concerning a matter in which he has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the Company". The document provides several exceptions to this, none of which are relevant to the resolution passed at the meeting of 3 April 2012. I consider that four of the five directors present had a material disqualifying personal and pecuniary interest in the resolution. I also consider that the resolution conflicted or may have conflicted with the interests of the Company, in that it resulted in payments totalling £34,706.88 being paid in a situation where the Company had no obligation to make a payment. In accordance with Silent Valley's Articles, the Council could have approved these conflicts by ordinary resolution, but there is no suggestion it did so. Furthermore, in passing the resolution, the Board also agreed to make a future payment to Mr James on the termination of his employment (**see paragraphs 212 to 224**). The minutes of the Board meeting of 3 April 2012 do not record that the directors concerned declared their interest in the proposed payments.
- under Section 175 of the Companies Act 2006, a company director "must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company", and Section 177 of that Act states: "If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors". I consider that the directors who had interests in the proposal regarding ex-gratia payments (which they would personally benefit from) did not take steps to avoid the conflict of interest, and did not declare their interest in respect of the proposed transactions.

174 Mr James told my auditors that he understood that Silent Valley had the authority to make ex-gratia payments to outgoing directors and this had been confirmed when he sought external legal advice on whether a payment could be made to an outgoing director in 2011. My auditors have not seen this advice and therefore are unsighted of the detail of it. However, a summary of the advice was presented to a Silent Valley Board meeting on 6 June 2011, and the Board was informed that:

- the Board had discretion to make ex-gratia payments.
- leaving directors "should be asked to confirm that they are not entitled to any compensation for loss of office and acknowledge they have no further claims whatsoever" and that "It was very rare for a payment to be made in such circumstances".

- 175 I note that, in accordance with the legal advice Silent Valley received in 2011, the Silent Valley directors whose appointments terminated in 2011 signed documents confirming that they had "no claim or right of action of any kind outstanding for compensation or otherwise against the Company or any of its officers or employees in respect of the termination of my office or otherwise".
- 176 As set out above, Silent Valley's Articles of Association empower Silent Valley to make gratuity payments to directors. However, they also set out that the directors of Silent Valley shall not make any such payment without the prior written approval of the Council. Silent Valley has not retained a copy of the 2011 legal advice, and therefore I am unclear whether the requirement to obtain approval from the Council for such payments was referred to within it. Mr Waggett told my auditors that, while approval was not sought from the Council for the payment, he informed "the Council Leadership in the days following the decision that payments had to be made to avoid legal claims".
- 177 I note that Mr Morrison and Mr Axford, whose directorships terminated on 15 May 2012, had only been appointed by Silent Valley to its Board on 19 May 2011 and yet received ex-gratia payments equivalent to a year's director fee.
- 178 Mr Morrison told my auditors that he was assured by Mr Waggett and Mr James that the proposed payments were "quite legal under companies act legislation" and he assumed that the Council had agreed to the payments.
- 179 In my view, the way in which ex-gratia payments were made to outgoing directors of Silent Valley in 2012 indicates that the Council's arrangements to secure value for money in respect of its use of public resources through Silent Valley were not operating effectively. Silent Valley was and is wholly owned by the Council and the assets held and managed by Silent Valley are therefore public assets. The Council, then, had a duty to ensure that it had established proper arrangements to secure value for money in respect of the use of its resources through Silent Valley. While Silent Valley was not controlled by the Council in April 2012, in that the Council did not appoint a majority of the directors to the Silent Valley Board, the Council was still able to establish proper arrangements to secure value for money through mechanisms such as its service contract with Silent Valley, by appointing a director to the Board of Silent Valley to represent the interests of the Council, and through compliance with the Company's Articles. The Articles specified decisions relating to Silent Valley which required approval by the Council, such as approval of ex-gratia payments to Silent Valley directors. However, as set out above, the payments were not approved by the Council.
- 180 Furthermore, it appears to me that Mr Waggett, as the Council's appointed director on the Board of Silent Valley, did not effectively represent the Council's interests in respect of this matter. Mr Waggett proposed a resolution that led to three former Council colleagues receiving substantial payments which, in my view, were in breach of the Company's Articles and the Companies Act. I am unclear whether, in making this proposal, Mr Waggett believed he was acting in his role of Chief

Executive of the Council or as a Silent Valley director. In either case, it does not appear that the proposal was in the Council's or the Company's best interests. I have seen no evidence that Mr Waggett sought external advice on the proposal or made the Council aware of the payments.

- 181 Mr Waggett told my auditors that "there was no deliberate attempt on [his part] to cause a breach of the Company Articles, but there appears to have been an oversight in not obtaining Council approval in written form". He also maintains that "I believed I was acting in the best interests of the Company and was acting in my role as a Silent Valley Director. My view is clear; I was not approving a future payment to Mr James as he was continuing to work and did so for a further 4 years".
- 182 Mr Waggett told my auditors that, since the incorporation of Silent Valley, written Council approval had not been sought for certain matters which required the Council's approval in written form. He therefore maintains that "I believe custom and practice from Day 1 was that this particular article [relating to matters requiring written approval from the Council] was overlooked and therefore a variation to the Articles was in place". I accept that the failure to obtain written Council approval for the ex-gratia payments made to outgoing directors in 2012 may not have been an isolated example Silent Valley, in making representations on this report, maintain that from 1992 onwards Silent Valley never sought Council's approval for any payments to Silent Valley directors, and that it has no correspondence from the Council approving such payments. However, in my view following "custom and practice" is not justification for non-compliance with the requirements of the Company's Articles.

Between 2013 and 2016, changes were made to the membership of Silent Valley's Board, but the treatment of Silent Valley remuneration as pensionable under the Local Government Pension Scheme continued

- 183 On 31 August 2013 Mr Parsons left his employment as the Council's Director of Environment and Regeneration and his directorship of Silent Valley was terminated on the same day. Mr Parsons had served as a Council appointed director of Silent Valley for 19½ months. The Council did not appoint another director to replace Mr Parsons on the Board of Silent Valley.
- 184 On 19 November 2015, as part of a corporate restructuring proposal, the Council agreed that the post of Chief Executive be deleted and Mr Waggett, as the post-holder, be made redundant on 29 February 2016. On 29 February 2016, Mr Waggett, the Council's Chief Executive left his Council employment and his directorship of Silent Valley terminated. Mr Waggett had served as a Council

appointed director of Silent Valley for 4 years and 9 months. On 5 July 2016, Silent Valley appointed Mr Waggett as its General Manager, a director and company secretary (**paragraphs 228 to 252**).

- 185 On 25 February 2016, shortly before Mr Waggett left the Council's employment, a meeting of the Council considered a report from its then newly appointed Lead Corporate Director/Head of Paid Service. The report set out arrangements for the distribution of duties and responsibilities because of the restructuring. The report stated that "the [Chief Executive's] role as a Council nominated Director on the Silent Valley Board will transfer to the Corporate Director Environment and Regeneration [Mr Crook] (from 1 March 2016). As a Company Director the appointed representative will be subject to the various provisions and personal liabilities as contained in legislation and provided always that the appointed representative acts reasonably, lawfully and in good faith, having sought and had regard to all relevant and professional advice". The report does not refer to remuneration in respect of the Silent Valley director role. The minutes of the meeting of 25 February 2016 record that the Council approved the nomination of Mr Crook as a Council appointed Silent Valley director.
- 186 The director fee payable to Silent Valley directors at the time of Mr Crook's appointment was £11,568.96 per annum. On 29 March 2016, the Council's Lead Corporate Director/Head of Paid Service wrote to Mr Crook confirming his appointment as director of Silent Valley and the remuneration for the role. The letter did not state that the remuneration for the role was pensionable within the LGPS. However, as was the case with other Council appointed directors, the Council treated the Silent Valley remuneration as pensionable and paid employer pension contributions into the LGPS as though Mr Crook's Council and Silent Valley appointments were a single appointment. The Council invoiced Silent Valley for the cost of the director fees paid to Mr Crook. During the time Mr Crook served as a director of Silent Valley, the Council did not invoice Silent Valley for the cost of the employer pension contributions (and employer national insurance contributions) paid by the Council in respect of his Silent Valley appointment. Details of these costs are set out in **Exhibit 3**.
- 187 The Local Government Pension Scheme Regulations 2013 (the 2013 Regulations) governed the operation of the LGPS at the time that Mr Crook was appointed as a director of Silent Valley. Regulation 22 states that "a separate pension account must be opened in relation to each employment where a member is or was employed in two or more scheme employments".
- 188 For the same reasons as set out in **paragraphs 154 to 164**, I consider it likely that Mr Crook's appointment as a director of Silent Valley was separate to his employment as the Council's Corporate Director Environment and Regeneration. I have significant doubt that the Council could lawfully pay employer pension contributions into the LGPS on behalf of Silent Valley given that Silent Valley had not designated its directors as a class of employees eligible for membership of the

LGPS. The Council did not recharge Silent Valley for the cost of employer pension contribution it paid into the LGPS.

- 189 Notwithstanding whether the Council had the power to make pension contributions into the LGPS on behalf of Silent Valley, it is not clear that the Council complied with Regulation 22 of the 2013 Regulations which required separate pension accounts to be opened in respect of each scheme employment. The Council treated the two appointments as a single employment for pension purposes. This may have resulted in Mr Crook accruing higher pension benefits than he was entitled to.
- 190 Mr Crook told my auditors that "no training, guidance, support or advice at any stage regarding the role of a company director was provided to [him] by either the Council or [Silent Valley], nor in the management of any potential conflicts of interest of which I was unaware". This comment illustrates the failure of the Council to establish and operate adequate or effective governance arrangements to manage its relationship with Silent Valley from 2012 onwards as set out in **paragraphs 123 to 149**.
- 191 The Council terminated Mr Crook's appointment as a director of Silent Valley on 19 March 2018.

The Council's then Chief Finance Officer and its Director of Environment and Regeneration, acting in their roles as Silent Valley Board members, approved a payment of £38,737 to Silent Valley's General Manager, Mr James, when his employment terminated on 31 August 2016, however, Mr James did not have a contractual entitlement to this payment and it is unclear how the decision to approve the payment was in the interests of the Council

The process that resulted in Silent Valley making a payment of £38,737 to Silent Valley's General Manager at the termination of his employment on 31 August 2016 was fundamentally flawed, and Mr James participated in this process even though he had a pecuniary interest in its outcome

- 192 From 29 August 2003 Mr James was employed as Silent Valley's General Manager. The General Manager was the Company's most senior executive, effectively the Chief Executive Officer. Mr James had previously been employed as the Council's Director of Finance and Deputy Chief Executive.
- 193 Mr James' contract of employment set out that he was engaged on a part-time basis, would be required to work 6-8 days a month and would be entitled to 12 days of paid leave per annum. In addition to acting as the Company's General Manager, Mr James also acted as the Company Secretary and a Company Director. During the financial year 2015-16, Mr James was paid separately for each of these roles as follows:
- Company Director: £11,569
 - Company Secretary: £4,937
 - General Manager: £33,103 (based on 7 days' work per month at £394 per day)
- 194 During 2015-16 Mr James was paid in total £49,609. This equated to a whole time equivalent (WTE) salary of c£103,000.
- 195 On 29 February 2016 Mr Waggett left his employment as Chief Executive of the Council, necessitating the termination of his appointment as a Council appointed director of Silent Valley. As set out in **paragraphs 184 to 186**, the Council agreed that Mr Crook, the Council's Director of Waste and Environment, would replace Mr Waggett as a Council appointed director of Silent Valley from 1 March 2016. From 1 March 2016 to 6 July 2016 the membership of Silent Valley's Board comprised Mr James, Mr McAuliffe and Mr Crook.
- 196 The minutes of a meeting of Silent Valley's Board held on 29 April 2016 state that "the Board commenced a discussion on the potential changes to the senior management post and asked [Mr James] to prepare some further information for circulation". Although the minutes do not record the detail of these "potential changes", Mr McAuliffe has told my auditors that Mr James indicated to the Board that he wished to retire as Silent Valley's General Manager.
- 197 Mr James maintains that his position as Silent Valley's General Manager had become untenable. He had been asked by the Council to engage in discussions with representatives of one of the Council's partner organisations aimed at delivering changes in waste management practice. These meetings had included discussing measures that Silent Valley was being asked to undertake. Mr James told my auditors that the discussions were robust, and he became aware that the partner organisation was seeking his removal from his Silent Valley role. Mr James maintains that, as a consequence, working relationships were affected and he was frustrated in his ability to fulfil all his duties. He also maintains that his poor relationship with the partner organisation was affecting the ability of the Council to attract grant funding for works at the Silent Valley site while he remained in post.
- 198 I have been unable to reach a conclusion on the basis on which Mr James left his Silent Valley employment because Silent Valley has been unable to locate any

correspondence from Mr James giving written notice of his resignation or that Silent Valley gave Mr James notice of the termination of his employment. Silent Valley does not hold any records indicating that there was an employment dispute between Mr James and Silent Valley or that Silent Valley took action to terminate Mr James's employment. Mr James maintains that the exit was negotiated in that, on 21 June 2016, the Board resolved that "the Company terminates the appointment of DC James as Manager, Company Secretary and Director on 31st August 2016 with payment in lieu of notice (as per the contract of employment, which is calculated as 6 months of total remuneration based on 8 days as manager per month) and makes a severance payment equal to the annual director's fee of £11,586 as agreed in Minute 1403 April 2012" (see **Exhibit 7**). However, I note that Mr James himself drafted this resolution. As set out in **paragraph 196**, it appears that a decision that Mr James' employment would terminate was taken some months earlier. The basis on which Mr James left Silent Valley is important because it has a bearing on his entitlement to receive a payment in lieu of notice under his employment contract (**paragraphs 207 to 211**).

- 199 Mr James's contract specified that he would be required to work 6-8 days a month and prior to May 2016, Mr James was being paid for working seven days each month. From 1 May 2016, four months before Mr James left Silent Valley's employment, Mr James' working days changed from seven days a month to eight days a month, increasing his salary as General Manager from £2,748 to £3,152 per month. As a result of working an extra day per month from 1 May 2016 Mr James received an additional £1,576 in salary for the period 1 May 2016 and 31 August 2016 and an additional £2,364 payment in lieu of notice when his contract terminated 31 August 2016. I am unclear how it was agreed and who agreed that Mr James increase his working days from seven to eight days a month.
- 200 On 17 June 2016 Mr James emailed a draft job advertisement for a new General Manager to his fellow Board members, Mr McAuliffe and Mr Crook. In response, Mr McAuliffe asked Mr James to draw up resolutions for the Board to consider and sign "in the order of details of departure followed by advert." Later the same day Mr James sent Mr McAuliffe an email with a draft Board resolution attached. The resolution authorised Mr James to receive a payment on the termination of his employment. The covering email states that "of course I will not sign because of my interest". The draft resolution is set out in **Exhibit 4**.

Exhibit 4: Silent Valley draft Board resolution dated 17 June 2016 prepared by Mr James for the termination of his own employment with Silent Valley

Draft Silent Valley Board resolution

It is hereby RESOLVED THAT:

The Company terminates the appointment of DC James as Manager and Director on 31st August 2016 with payment in lieu of notice and makes a severance payment equal to the annual director's fee of £11,586 as agreed in Minute 1403 April 2012.

The Company advertise for the post of General Manager excluding Director/Company Secretary in the Job Centre for a fixed term, initially for a period of twelve months.

Exhibit source: Silent Valley emails between Board directors

- 201 The draft resolution prepared by Mr James did not specify:
- his contractual entitlement to receive the specified payments
 - the length of the notice period for which he would receive a payment in lieu of notice
 - why the minutes of a meeting in April 2012 entitled him to receive a year's director fee amounting to £11,586 as a severance payment when, in fact, this payment does not appear to relate to the settlement of any legitimate claim on Silent Valley
 - the total amount of the payment he would receive
- 202 Mr McAuliffe responded to Mr James stating, "as we have not seen your contract of employment, for absolute clarity, should we include some elements in relation to [payment in lieu of notice]". Mr McAuliffe told my auditors that he discussed Mr James' email with Mr Crook and his response was sent on behalf of them both. The response sent by Mr McAuliffe recommended the resolution be amended and sent back to Mr James, as per the wording set out in **Exhibit 5**. Mr McAuliffe's amendments shown in orange.

Exhibit 5: Silent Valley draft Board resolution dated 17 June 2016 for the termination of Mr James' employment with Silent Valley. Resolution prepared by Mr James and amendments suggested by Mr McAuliffe shown in orange.

Draft Silent Valley Board resolution

It is hereby RESOLVED THAT:

The Company terminates the appointment of DC James as Manager, **Company Secretary** and Director on 31st August 2016 with payment in lieu of notice **with payment in lieu of notice (as per the contract of employment, which is calculated as ... 6(?) months of the company secretary remuneration and 6 months of the 6/7/8? monthly general manager remuneration duties?)** and makes a severance payment equal to the annual director's fee of £11,586 as agreed in Minute 1403 April 2012.

Source: Silent Valley emails between Board directors

- 203 Mr McAuliffe told my auditors that neither he nor Mr Crook had sight of Mr James' contract of employment and had no reason to doubt the accuracy of what Mr James maintained he was entitled to by way of a termination payment. It therefore appears to me that no checks were made to ensure that the payment to Mr James was his contractual entitlement.
- 204 On 21 June 2016, Mr McAuliffe and Mr Crook signed the final version of the Board resolution prepared by Mr James. The final version included clarification of points raised in Mr McAuliffe's amended version. The resolution was amended to state that:
- Mr James would receive six months' payment in lieu of notice, "as per the contract of employment"
 - Mr James payment in lieu of notice was based on working eight days per month
- 205 The resolution approved by the Board included one further change to the draft recommended by Mr McAuliffe. Mr McAuliffe's draft stated that Mr James would receive payment in lieu of notice for his roles as General Manager and Company Secretary, but not for his role as director. The approved resolution stated that Mr James would receive six months payment in lieu of notice for all three roles, even though the resolution also included a payment "equal to the annual director's fee of £11,568". This change increased the total amount payable by £5,784.
- 206 The approved resolution, (**Exhibit 7**) therefore comprised four elements totalling £38,737:
- 12 months of the director fee as a severance payment - £11,568

- 6 months of the director fee as a payment in lieu of notice - £5,784
- 6 months of General Manager pay as a payment in lieu of notice (based on 8 days per month) - £18,916
- 6 months of Company Secretary pay as a payment in lieu of notice - £2,469

The amount paid to the General Manager of Silent Valley at the termination of his employment on 31 August 2016 was significantly in excess of his contractual entitlement

Mr James had a contractual entitlement to receive a payment in lieu of notice if not required to work his notice period

- 207 Mr James told my auditors that he was appointed as Silent Valley's 'director with special responsibilities' in 2004 and that in 2006 his terms and conditions of employment were varied by agreement to include additional responsibilities and he became Silent Valley's General Manager. Silent Valley has provided us with a written "Service Agreement" (contract of employment) dated 11 April 2004 which refers to Mr James as holding the roles of Silent Valley's 'Executive, Company Secretary and a Company director with a contract commencement date of 29 August 2003. Silent Valley holds no subsequent employment contract in respect of Mr James.
- 208 Mr James' contract sets out his terms and conditions of employment. These include provisions relating to termination of employment and notice periods as set out in **Exhibit 6**.

Exhibit 6: employment termination and notices provisions within Mr James' contract of employment dated 11 April 2004

Contractual termination and notice provisions

3.2 The said appointment will be deemed to have commenced on the Commencement Date and will continue subject as follows unless and until the employment is terminated by the Company giving to the Executive not less than six calendar months' written notice or by you giving to the Company not less than three calendar months' written notice to expire at any time. No employment with a previous employer counts for the purpose of the 1996 Act as part of the Executive's period of continuous employment.

3.3 If notice is given by either party to terminate the Executive's employment the Company reserves to make a payment in lieu of the notice period referred to in clause 3.2, or remainder of the notice period if at the Company's request the Executive has worked during part of the notice period. For the avoidance of doubt the Executive's employment will terminate on the date specified in the notice given by the Company pursuant to this clause.

3.4 Notwithstanding the provisions of clause 3.2, the Executive's employment under this Agreement will automatically terminate on his 65th birthday.

Source: Silent Valley employment records

- 209 Clause 3.2 of the contract sets out the requirement for Mr James to give at least three months' written notice of his resignation, and for Silent Valley to give at least six months' notice to Mr James if it decided to terminate Mr James' employment. In the absence of written evidence setting out the basis of Mr James's departure, see **paragraphs 197 to 198**, I have not been able to conclude whether he was entitled to receive payment of three months or six months pay in lieu of notice in the event that he was not required to work his notice. I am also unclear, due to the absence of any written record of notice being given, when the relevant notice period should have commenced.
- 210 Clause 3.3 sets out that if Silent Valley determined that Mr James was not required to work his notice period, he would be entitled to receive payment in lieu of notice in respect of the period of notice he was not required to work.
- 211 I consider it highly probable that a decision that Mr James would leave Silent Valley's employment was made by April 2016 (by either Silent Valley or Mr James). However, it is certain that by 15 June 2016 a decision had been made that Mr James' employment would end on 31 August 2016 because, on that date, Mr McAuliffe, Mr Crook and Mr James discussed the arrangements for recruiting a

new General Manager (**paragraph 230**). I consider that the latest Mr James' notice period could have started was 15 June 2016, ending on 15 December 2016, and therefore the maximum entitlement that Mr James had to a payment in lieu of notice under his written contract of employment amounted to £15,737, which would represent pay for the period 1 September 2016 to 15 December 2016. This is based on the assumption that Silent Valley terminated Mr James' employment. If Mr James left his employment on a voluntary basis his maximum entitlement under his contract of employment amounted to a payment of £2,265 in lieu of notice for the period 1 September 2016 to 15 September 2016.

Mr James did not have an entitlement to receive a payment equivalent to a year's director fee of £11,568 in addition to a contractual payment in lieu of notice

- 212 When drawing up the Board resolution for his own termination payment, Mr James set out that it had been agreed at the Silent Valley Board meeting held on 3 April 2012, that on the termination of his employment he would receive a severance payment equal to the annual director's fee of £11,568.
- 213 On 28 March 2012 the Council's Executive Committee agreed to change the composition of the Board to ensure that the majority of Silent Valley's directors were appointed by the Council. The Executive Committee resolved that all the Company appointed directors (except Mr James) be required to stand down, and the Council would appoint two more of its own employees as directors of Silent Valley (Mr Waggett, the Council's Chief Executive was already a Council appointed director of Silent Valley).
- 214 On 3 April 2012, the outgoing Board of Silent Valley met. The meeting was chaired by Mr Morrison, a former Chief Executive of the Council. Also present were Mr James, the General Manager of Silent Valley, Mr Waggett, the Council appointed director and serving Chief Executive of the Council, and two other Silent Valley directors. The Board was told that due to the changes to the structure of the Company, the directorships of the Company appointed directors, except for Mr James, would terminate.
- 215 The Silent Valley directors had no entitlement to receive a payment on the termination of their director appointments. However, the minutes of the Board meeting record that Mr Waggett proposed that the three directors removed from office should "be awarded an ex-gratia equivalent to one year's Director's fee".
- 216 The minutes record that the Board "approved ex-gratia payment to terminating Directors". For the reasons set out in **paragraph 168**, my view is that these payments were in breach of Silent Valley's Articles, and the Companies Act.
- 217 The minutes of the Silent Valley Board meeting of 3 April 2012 also record that Mr Morrison "asked if the same consideration would be afforded to [Mr James] when he terminated and [Mr Waggett] confirmed that it would".

- 218 In addressing the question of whether the 'ex-gratia' payments made to those directors whose directorships were terminated by the Council in 2012 were compliant with Silent Valley's Articles and the Companies Act, I consider that the circumstances surrounding Mr James' departure from the Company were not comparable to those directors for the following reasons:
- Mr James had a contract of employment dated 11 April 2004 that included provisions for the termination of his engagement as General Manager, Company Secretary and Director of Silent Valley. The contract stipulated his entitlement to written notice, and provision for him to be paid in lieu of notice. The Silent Valley directors whose directorships terminated in 2012 had no contractual entitlement to receive a termination payment and received no notice that their directorships would terminate.
 - as set out in **paragraph 198**, Silent Valley has been unable to provide me with any documentary evidence that Silent Valley terminated Mr James' appointments as General Manager, Company Secretary and Director. This contrasts with the directors who left Silent Valley in 2012. Those directors were removed from office by a decision of the Council's Executive Committee. In any event, as set out above, Mr James was paid six months in lieu of notice (which included his director role), while also being paid for working part of his notice period. This was in effect a duplicate payment.
- 219 As set out in **paragraph 174**, I note that, in 2011, Mr James sought legal advice, on behalf of the Board of Silent Valley, on making an 'ex-gratia' payment to a director leaving the Board. My auditors have not seen this advice, but the content of the advice was presented to a Silent Valley Board meeting on 6 June 2011. The Board was informed that:
- the Board had discretion to make ex-gratia payments.
 - leaving directors "should be asked to confirm that they are not entitled to any compensation for loss of office and acknowledge they have no further claims whatsoever" and that "It was very rare for a payment to be made in such circumstances".
- 220 The ex-gratia payment made to Mr James amounting to the equivalent of the annual director fee (£11,568) in August 2016 was contrary to the advice Mr James had presented to the Silent Valley Board on 6 June 2011. Mr James already had contractual rights in respect of the termination of his employment and, in addition to the 'ex-gratia' payment of £11,568, received a further £27,169, which Mr James claimed he was contractually entitled to.
- 221 As set out in **paragraphs 165 to 182**, my view is that the resolution made by the Silent Valley Board at its meeting of 3 April 2012 to make ex-gratia payments to leaving directors was in breach of Silent Valley's Articles and the Companies Act in that:

- the payments were not permitted by the Company Articles without written consent from the Council. I have not been provided with any evidence that such consent was sought by Silent Valley or provided by the Council.
- the Companies Act 2006 sets out that directors of a company must act in accordance with the company's constitution and may only exercise powers for the purposes for which they are conferred. The payment of £11,568 made to Mr James in August 2016 was based on a resolution made by the Silent Valley Board on 3 April 2012 that the Board had no power to make without the Council's written consent. I therefore consider that Mr James had no entitlement to this payment.

222 The minutes of the Silent Valley Board meeting held on 3 April 2012 records that the Board approved that Mr James would receive a severance payment equal to the annual director's fee on the termination of his employment. It is not clear that any thought was given to whether this would be on top of any other payments agreed later. Mr James received payment in lieu of notice for a period he was also paid to work, as well as 18 months' worth of director fees. It is not immediately obvious that this was the Board's intention back in 2012. I also note that Mr Waggett, the Council's appointed Silent Valley director who had proposed that the outgoing directors receive ex-gratia payments equal to the annual director fee in the meeting of 3 April 2012, maintains that the Board did not agree that Mr James would receive a future payment over and above that specified in his contract of employment (**see paragraphs 208 to 210**).

223 Mr Crook maintains that he was advised by Mr James and Mr McAuliffe that Mr James "was entitled to payments based on previous Board decisions/custom and practice and advice the company had previously received".

224 For the reasons set out above, I do not consider that Mr James was entitled to receive a payment equivalent to one year's director fee (£11,568) on the termination of his employment

The Council's then Chief Finance Officer and its Director of Environment and Regeneration, acting in their roles as Silent Valley Board members, approved that a payment of £38,737 be made to Silent Valley's General Manager on the termination of his employment, but in my view they did not take sufficient action to ensure that Mr James had an entitlement to the payment, and it is not clear how the decision to approve the payment was in the interests of the Council

225 When appointing its then Chief Finance Officer, Mr McAuliffe and its Director of Environment and Regeneration, Mr Crook to serve as Council nominated Silent Valley directors, the Council had a reasonable expectation that in fulfilling those roles they would seek to represent the Council's interests on the Silent Valley Board. Furthermore, when Mr McAuliffe and Mr Crook approved in June 2016 that Mr James receive a termination payment of £38,737, Silent Valley was a Teckal controlled company meaning that the Council controlled the Silent Valley's Board, enabling it to exercise control over the day-to-day management of the company's affairs, similar to that which it exercised over its own internal departments. As the two Silent Valley directors responsible for approving the payment to Mr James, Silent Valley's most senior executive officer, I consider that Mr McAuliffe should have taken steps to ensure that Mr James was entitled to the proposed payment, and that the payment was in the interests of both the Council and the Company.

226 I consider that appropriate action was not taken to ensure that Mr James had an entitlement to the payment for the following reasons:

- Mr James should not have been permitted to draft the Board resolution setting out details of a payment to himself.
- the payment should not have been approved by Mr McAuliffe and Mr Crook until such time as they had confirmed that Mr James has a contractual entitlement to that payment. As set out in paragraphs 201 to 203, Mr McAuliffe acknowledged that he had not had sight of Mr James' contract of employment.
- Mr McAuliffe and Mr Crook should have sought advice as to whether Mr James had a legitimate claim to a payment of £11,568 over and above his contractual entitlement, based upon the Board resolution of 3 April 2012.
- Mr McAuliffe and Mr Crook should have questioned why Mr James was entitled to receive payment of six months in lieu of notice when he was paid for working for part of that period.

227 In my view, Mr McAuliffe and Mr Crook did not take sufficient action to ensure that Mr James was contractually entitled to receive a payment of £38,737 on the termination of his employment, and therefore did not properly represent the Council's interests on the Silent Valley Board in respect of this matter.

Furthermore, given that Mr James was not contractually entitled to receive a termination payment of £38,737, I am unclear how the decision to approve the payment was in the interests of the Council as the sole shareholder of Silent Valley, or in Silent Valley's interests.

The process that led to the Council's former Chief Executive being appointed as Silent Valley's new General Manager in June 2016 was uncompetitive and deficient in several material respects

- 228 As set out in **paragraphs 123 to 124**, in 2012 the Council put in place arrangements to make Silent Valley Teckal compliant, thereby enabling the Council to award work to Silent Valley without seeking competition. The Council gained control of Silent Valley's Board enabling it to exercise control over the day-to-day management of the company's affairs, similar to that which it exercised over its own internal departments. The Council had a duty to ensure that Silent Valley had robust governance arrangements in place, including that key strategic decisions were made in the interests of the Council. In June 2016 Silent Valley appointed a new General Manager, the most senior Company officer. The way in which this appointment was handled is indicative of poor governance.
- 229 At some point between April 2016 and June 2016, Silent Valley took steps to recruit a new General Manager to replace its outgoing General Manager, Mr James.
- 230 On 17 June 2016, Mr James emailed Mr McAuliffe and Mr Crook setting out that "further to the discussion on Wednesday [15 June 2016]" he:
- had found out what information was needed to advertise the General Manager post with the job centre;
 - was attaching the draft advertisement for approval or amendment;
 - would finalise a job description based on a Council template the following week, "in time for the appointment";
 - was suggesting that the post should be advertised on an interim basis for five to 12 months "in view of the discussion on the precarious nature of the Company's future"; and
 - could send the advert out by email with a closing date of "7 to 8 days later which should lead to an appointment a few days afterwards".
- 231 Mr McAuliffe responded to Mr James the same day, raising one query about whether the successful applicant needed to have a degree. Mr McAuliffe also asked Mr James to draw up Board resolutions to approve the details for the

termination of Mr James' employment as the Company's General Manager, and to approve the advertisement for a new General Manager.

- 232 Later that day, 17 June 2016, Mr James confirmed that he had changed the advert to make it clear that applicants were required to be educated to "degree level" and had written and attached draft Board resolutions which included that "the Company advertise for the post of General Manager excluding Director/Company Secretary in the Job Centre for a fixed term, initially for a period of twelve months".
- 233 On 21 June 2016, Mr McAuliffe and Mr Crook signed the amended Board resolution as shown in **Exhibit 7**.

Exhibit 7: Silent Valley Board resolution dated 21 June 2016 for the termination of the employment of the company's general manager and recruitment of a new general manager

Written Board Resolution

It is hereby RESOLVED THAT:

The Company terminates the appointment of DC James as Manager, Company Secretary and Director on 31st August 2016 with payment in lieu of notice (as per the contract of employment, which is calculated as 6 months of total remuneration based on 8 days as manager per month) and makes a severance payment equal to the annual director's fee of £11,586 as agreed in Minute 1403 April 2012.

The Company advertise for the post of General Manager excluding Director/Company Secretary in the Job Centre for a fixed term, initially for a period of twelve months.

Source: Silent Valley Board minutes and resolutions

- 234 On 22 June 2016, the vacancy of General Manager was advertised online via the DWP's Universal Jobmatch service and in the national Job Centre Network. The closing date for applications was set for 1 July 2016. The application process was therefore open for seven working days.
- 235 A copy of the job advertisement is set out in **Appendix 1**. The advertisement lacks detail and does not set out:
- the job title
 - nature of the role
 - salary

- level of seniority of the role (the WTE equivalent salary on appointment was c£120,000)
- 236 Five applications were received in response to the advertisement. Four of these applications were submitted online by:
- a production operative in metalworking
 - a landscape assistant
 - a retail assistant
 - an unemployed bar assistant
- 237 The fifth application was submitted as a hard-copy application form. The applicant was Mr Waggett, the former Chief Executive of the Council who had left his employment with the Council on 29 February 2016. Mr Waggett also served as a paid Council appointed director of Silent Valley from 15 April 2011 to 29 February 2016.
- 238 Mr Waggett's application is dated 28 June 2016. The application sets out Mr Waggett's career history with the Council and his experience as a director of Silent Valley. The application also sets out Mr Waggett's educational background. While Mr Waggett was a fully qualified accountant, he did not possess a degree qualification. Mr Waggett named as his referees Mr James, the General Manager of Silent Valley, and the Council's Temporary Lead Corporate Director/Head of Paid Service, who was appointed to this role after Mr Waggett left his employment as the Council's Chief Executive.
- 239 On 5 July 2016, the Board of Silent Valley met to discuss the appointment of a new General Manager. Only two directors of the Silent Valley Board were present at this meeting, Mr Crook and Mr James. Mr Crook had, until 29 February 2016, been reporting to Mr Waggett within their respective Council employments, and Mr Waggett had formerly reported to Mr James within the Council. Mr McAuliffe also reported to Mr Waggett until 29 February 2016, but he was not present at the Board meeting of 5 July 2016.
- 240 The Board minutes record that Mr James informed the Board that:
- the vacancy for the General Manager post had been advertised in Job Centres "via the DWP Universal Jobmatch vacancies board" from 22 June 2016 to 1 July 2016.
 - one completed application form had been received, but that a further four individuals had indicated to Universal Jobmatch that they had applied but had not returned application forms. (I note that while these four individuals did not submit the template application form, they submitted online applications which included the same information required by the application form.)
 - the four individuals who had not completed the application form did not have any relevant qualifications or experience.

- he had invited the remaining applicant, Mr Waggett to attend the Board meeting so that "the Board could proceed to interview if so desired".
- 241 The minutes of the Board record that Mr Waggett was invited to join the meeting and that "the Board considered the application form, job description and person specification and then proceeded to interview Mr David Waggett. At the conclusion of the interview the Board offered him the post which was accepted."
- 242 The Silent Valley recruitment file for the appointment contains an assessment sheet completed and signed by Mr James and Mr Crook. The assessment sheet takes the form of a person specification. Against each of the person specification requirements, the assessors were able to tick boxes to show whether that requirement would be assessed via application form, interview, other, or probationary period/performance coaching.
- 243 In most instances, the person specification requirements have been ticked to show they were assessed by application, interview, and 'other'. As the recruitment process only involved an application form and interview, the basis on which the 'other' box was ticked is not apparent. While the assessment sheet includes a small number of annotations such as "Companies Act", "External Bodies", and "Income on the Companies behalf", it is not clear whether these annotations were used to ask questions, or were responses given by Mr Waggett. The Silent Valley recruitment file does not contain any specific detail of the assessment process undertaken, such as questions asked, nor does it contain any record to show how the Board satisfied itself that Mr Waggett met the requirements of the person specification.
- 244 The Board minutes of 5 July 2016 set out that Mr James "reminded the Board that no replacement Director (& Secretary) had been identified nor appointed and that the interview had shown that Mr Waggett could also fulfil these roles". The Board resolved that Mr Waggett be appointed as General Manager, Director and Secretary with his appointment starting the following day, 6 July 2016. The remuneration for the roles was set as follows:
- £11,569 per annum as a Director of Silent Valley;
 - £4,937 per annum as Company Secretary; and
 - £394 per day as General Manager of Silent Valley (6-8 days a month).
- 245 The above remuneration equates to a whole-time equivalent salary of approximately £120,000 per annum.
- 246 My auditors found no evidence that references were taken up by the Company. However, I also note that one of Mr Waggett's referees was Mr James, who had been one of the two Silent Valley directors who interviewed him.
- 247 I am unclear why Mr Waggett was appointed Company Secretary with immediate effect. Mr Waggett and Mr James were paid £822 each for acting as the Silent Valley Company Secretary from 1 July 2016 to 31 August 2016.

- 248 The Board minutes of 5 July 2016 make no reference to Mr Waggett's appointment being a temporary appointment, even though the Board resolution dated 21 June 2016 had set out that the appointment would initially be for a period of twelve months (see **Exhibit 7**) and was advertised on that basis.
- 249 On 3 October 2016, Silent Valley entered into a 'Service Agreement' (essentially a contract of employment) with Mr Waggett. This document did not set out that the appointment was of a temporary nature, and Mr Waggett remains in post as the General Manager, Director and Company Secretary of Silent Valley. While Mr Waggett's contract states that he will work 6-8 days a month as the Company's General Manager, Mr Waggett has consistently been paid for working eight days a month.
- 250 Mr James told my auditors that "in relation to the recruitment of [his successor], the company had made previous requests to the Council for Human Resources support which had not been provided and resulted in the company administering the recruitment". Mr Crook informed my auditors that "the recruitment process was discussed and agreed with the Council Lead Corporate Director and Head of Organisational Development". The Council's former Lead Corporate Director told my auditors that he did discuss the recruitment in general terms with Mr Crook and told him that "it was very important from the council's perspective that the SV General Manager recruitment process was, and was seen to be, open and transparent. I did emphasise it was my expectation that it should be openly advertised, and by implication follow normal recruitment practices of shortlisting and selection interview etc. However I did not see, agree or sign off the arrangements for the recruitment process, including for example where and how it would be advertised." The former Lead Corporate Director also told my auditors that he had not seen the advertisement until shown it by my auditors after my audit had commenced.
- 251 The Council's Head of Organisational Development told my auditors that:
- she had never been approached or requested to provide a HR Service to Silent Valley and was unaware of any such approach being made prior to her appointment.
 - the Council did not have any agreement or arrangement in place to provide a HR service.
 - she did not advise, have involvement in or have sight of any recruitment process for any posts at Silent Valley.
 - she had not seen the advertisement for the Silent Valley General Manager post until shown it by my auditors.
- 252 I consider the process set out above that led to Mr Waggett being appointed as Silent Valley's General Manager was uncompetitive and deficient in several material respects.

Since my audit commenced the Council has taken steps to address the issues identified in this report

- 253 In 2011, Welsh Government published its 'Collections Blueprint' as part of the Municipal Sector Plan. The Blueprint described the Welsh Government's recommended service profile for the collection of household waste with the aim of supporting Waste Services Teams across Wales to meet the challenge of the Statutory Recovery Targets.
- 254 The Council worked with Welsh Government to consider the 'Collections Blueprint' and how services could be delivered in Blaenau Gwent in the future, ensuring that it was best placed to work towards meeting the Statutory Recovery Targets.
- 255 On 24 September 2014, the Executive Committee of the Council approved a decision to make significant changes to the way in which waste and recycling services were to be delivered by the Council. These included application of the Welsh Government's 'Collections Blueprint', and the introduction of:
- weekly source segregated kerbside collections
 - three-weekly residual waste collections
 - weekly hygiene collection
 - weekly on-request green waste (seasonal) collections
- 256 The agreed service changes resulted in the need for changes to the way Silent Valley operated the Waste Transfer Station, and so revised service requirements needed to be developed. These service changes came into effect in October 2015.
- 257 Definitive closure of the Cwm landfill site was achieved on 4th March 2016 enabling the Council to make progress in developing revised contractual arrangements with Silent Valley.
- 258 Discussions around future contractual arrangements with the representatives of the Company recommenced in early 2016, and work was mapped out to seek approval for the Direct Award of a new 10-year contract in 2017.
- 259 As part of this process, the Council needed to review its service requirements and the governance arrangements for Silent Valley, including Teckal compliance. In considering these matters, the Council's then Temporary Lead Corporate Director, in conjunction with the then Council Leader, determined that decisions should be delayed until later in 2017. This would give time for the Council to consider what further options may be available other than awarding a new long-term contract to Silent Valley, and to seek external legal and financial advice on these options.
- 260 On 7 December 2017, the Council's Temporary Lead Corporate Director presented a report to a meeting of Full Council setting out four options for the Council's future waste services provision. These options were:

- continuing with Silent Valley as a 'Teckal Compliant' company and the awarding of a new long-term contract.
 - transferring the assets and liabilities of Silent Valley into the Council, with Council providing the services in-house.
 - termination of the Silent Valley arrangements and carrying out a competitive procurement process.
 - any combination of the above.
- 261 The report set out an evaluation of each of the options and recognised that, in the event the Council determined to provide the services in-house and transfer the assets and liabilities of Silent Valley back to the Council, there would be a need to carry out commercial, legal and financial due diligence. It was intended that this due diligence would be completed by March/April 2018.
- 262 The report also recognised that, until a final decision was taken, there was a need to review the composition of Silent Valley due to concerns over conflicts of interest. The Council's legal advisors had indicated that "appointing statutory officers, eg Section 151 Officer / Monitoring Officer can cause further risks of potential conflicts of interest. Their view being that on balance it is advisable that such officers are kept free from director roles wherever possible in order to avoid such potential conflicts. It has also become apparent that while the Council needs to ensure those nominated to the board are able to bring relevant knowledge and added value, the overlap between service provision could lead to the potential for day to day conflicts to occur. In relation to the preferred option in this report that could become an increasing risk of conflict associated with the Corporate Director of Environment and Regeneration fulfilling a company director role". At that time the Council's Chief Finance and s151 Officer, Mr McAuliffe, and its Director of Environment and Regeneration, Mr Crook, were members of the Silent Valley Board.
- 263 The report asked the Council to:
- approve in principle a 'preferred option', involving transferring Silent Valley's assets and liabilities back to the Council and Silent Valley being wound up, subject to the completion of due diligence and a report on this being made to the Council's Executive Committee.
 - nominate two elected Council members to act as directors of Silent Valley to replace the Council's Chief Finance Officer and Director of Environment and Regeneration on the Silent Valley Board.
- 264 The Council approved the recommendations. On 19 March 2018 the Silent Valley appointments of Mr McAuliffe and Mr Crook were terminated, and they were replaced on the Silent Valley Board by two elected members of the Council who did not have portfolio responsibilities within the service area or statutory functions, thereby mitigating the potential for conflicts of interest.

- 265 A working group of officers from across the Council was formed to take forward the due diligence process, and due diligence activities have been carried out in the following areas:
- legal and Contractual
 - property
 - employment and Pensions
 - financial
 - technical
- 266 The Council has established monthly operational meetings with Silent Valley to direct the operations of the Company and to monitor the Company's performance. This mechanism has been put in place to enable the Council to better exercise controls over the affairs of the Company. Review of these monitoring activities has been included within the forward work-programme of the Council's Scrutiny Committee. Members of the Scrutiny Committee considered the first Company monitoring report at its meeting of 5 December 2019.
- 267 At a meeting of Full Council held on 12 December 2019, members considered a report setting out the findings of the due diligence process prepared by its Managing Director. The report concluded that, should the activities of Silent Valley, including its assets and liabilities, be brought back in-house, this could result in a significant cost pressure being placed upon the annual revenue budget of the Council. The working group considered this could be unaffordable to the Council and believed it prudent to reconsider the options put to the Council meeting of 27 December 2017, and to explore any further possibilities.
- 268 The report set out the working group's evaluation of a long-list of options that had been considered. These options were:
- collaboration with the Public Sector. This option involved seeking a public sector partner with similar services or aspiration to deliver the services currently delivered by Silent Valley on behalf of the Council.
 - transfer Services in-house .
 - retain the current Teckal model ie, continue with the status quo.
 - local authority trading company.
 - outsourced procurement.
- 269 The report identified the public sector collaboration model as being the highest scoring option, recommended that "Option 1 - Collaboration with the Public Sector (Shared Services) be endorsed", and that:
- officers be given approval to seek a public sector partner with similar services or aspiration to deliver the services being delivered by Silent Valley on behalf of the Council.

- if there was not sufficient interest from public sector partners to take forward the preferred option, officers should develop a contingency plan for the delivery of the services.
- to mitigate the risks of depleting the general reserves needed to cover the costs associated with the aftercare liabilities of the landfill site, the Council should explore options for securing sufficient reserves to meet the assessed costs and liabilities up to 2076.

270 The minutes of the Council meeting held on 12 December 2019 record that the members approved the recommendations above.

271 The Council carried out its soft market testing in the Autumn of 2020. It received one Expression of Interest, and a business plan was submitted by Silent Valley setting out how it would continue to support service delivery. Due diligence has been undertaken on the business plan, and Council officers are now seeking to conclude the review, and to take appropriate recommendations to a meeting of Members for consideration.

272 My auditors have not made an assessment of the Council's planned arrangements for the future. However, I am satisfied that that the Council has recognised that the previous arrangements were unsatisfactory, have taken steps to address the deficiencies identified in this report.

Appendix 1

Silent Valley advertisement in the Job Centre Network for a new General Manager

Exhibit 8: Silent Valley Job Centre advert

Job Centre Advert

Company : Silent Valley Waste Services Ltd

Location: Cwm, Ebbw Vale, Wales

Industry: Waste Management

Status; Temporary Part Time

Career Level : n/a

Education Level: Degree level / Relevant Professional Qualification

Salary: Competitive negotiable upon appointment

Hours of work: 6-8 days per month for 12 months

Contact Information Phone
Email

Application Form available for download.

Closing Date 29th June



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