East Lothian Council

REPORT TO: East Lothian Council

MEETING DATE: 15 December 2015

BY: Depute Chief Executive (Partnerships and Community Services)

SUBJECT: Roads Collaboration Proposal for Edinburgh City, East Lothian, Midlothian, West Lothian, Scottish Borders and Fife Councils

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1 PURPOSE

1.1 To inform Council that Edinburgh, East Lothian, Midlothian, West Lothian, Scottish Borders and Fife Councils have been working in partnership to explore opportunities for increased collaboration in roads services.

1.2 This report outlines the process taken to explore opportunities for collaboration with other local roads authorities (within the Edinburgh, East Lothian, Midlothian, West Lothian, Borders and Fife (ELBF) area), and seeks approval from the Council for the creation of a shadow joint committee.

2 RECOMMENDATIONS

2.1 It is recommended that the Council:

- approves the creation of a Shadow Joint Committee for collaborative road services
- appoints the East Lothian Council representatives on the shadow joint committee

3 BACKGROUND

3.1 The National Roads Maintenance Review (NRMR) final report was published in July 2012, following a recommendation from Audit Scotland to:

“Consider a national review on how the road network is managed and maintained, with a view to stimulating service re-design and increasing the pace of examining the potential for shared services.”

3.2 The NRMR explored the optimum delivery of roads maintenance services, concluding that sharing of services should be explored by all roads authorities, with the onus on authorities to demonstrate that change could be delivered effectively and driven forward at a local level.

3.3 The NRMR has lead to the establishment of the Roads Collaboration Programme to support the recommendations of the review and to explore the opportunities to share services amongst Scotland's 32 local roads authorities and Transport Scotland.

3.4 Prior to the report being published, a group of senior officers from Edinburgh, East Lothian, Midlothian, West Lothian, Borders and Fife (ELBF) Councils formed to explore the benefits of sharing road maintenance resources.

Benefits of Sharing

3.5 Improving performance and efficiency through collaboration may lead to direct financial savings through reduced overhead costs and greater buying power. However, the main benefits of sharing are associated with resilience and sustainability. These include:

- Sharing of expertise and staff pools to achieve greater output with the same resource, avoiding the risks associated with single point of failure
- Standardisation of processes and specifications, leading to a consistent standard and quality of service
- Increased capacity through the elimination of duplication and access to joint resources
- Improved business intelligence through shared best practice and management information and expertise
- More opportunity to develop future workforce planning strategies
- More effective use of specialist assets together with the benefits of improved joint investment planning for staff, plant and equipment
- More effective procurement and better value for money

3.6 ELBF has recognised the substantial benefits associated with formal collaboration for some time, and joined the Governance First Project in April 2014 to explore more formal governance options that will allow the participating authorities to benefit from collaboration.

3.7 Substantial sharing is already underway within ELBF, with a variety of agreements in place to ensure the successful delivery of these initiatives on a collaborative basis. Initiatives include:

- Maintenance of traffic signals
- Collaboration in Road Safety Audits
- CLARENCE Customer Care Call Centre
- Collaboration in roads repairs
- Provision of rock salt and winter gritting equipment
- Professional services and advice in relation to Flood Risk Management
- Single Development Control Guidelines document
- Street lighting installation and maintenance procurement framework
- ISO9001 Quality Assurance System
- Winter weather forecasting
- Proprietary road surfacing projects (eg bond-coat)

3.8 There are different degrees of participation from the six authorities in the above initiatives but they form a strong basis for future activity.

3.9 The extent of future collaboration will be considered and agreed by the governing body, with the individual participating authorities taking the decision on whether or not each proposal should be taken forward. This can include either the establishment of a fully integrated shared service or sharing in specific service areas only. Any collaboration will require appropriate legal documentation.

3.10 It is anticipated that the approach to sharing will initially be one of 'small demonstration projects' to identify baselines, increase performance levels and to begin to identify areas of potential savings. Eleven areas of roads services have been identified where the greatest benefits from new or increased collaboration are anticipated. These can be taken forward on a project-by-project basis:

- Asset Management
- Joint Procurement
- Flood Risk Management
- New Roads & Streetworks Act – co-ordination of road works
- Weather Forecasting
- Traffic Signal Maintenance
- Road Safety

- Structures
- Street Lighting
- Training
- Packaging of Roads Maintenance Contracts

Governance First

3.11 The concept of 'Governance First' refers to the creation of a formalised governing body as the fundamental first step to developing shared services, undertaken prior to the design of the shared service in terms of operational delivery.

3.12 By setting up a governance arrangement first, prior to looking at specific areas of service collaboration, partner authorities benefit from working under a formal governance ‘umbrella’ where a common vision for the service can be agreed and options for working collaboratively can be explored and implemented.

3.13 Creating a governing body inclusive of Elected Members at the early stage has the added benefit of ensuring that they are involved in setting the direction of the service from the outset.

Proposed Governance model

3.14 ELBF officers carried out an options appraisal of the models available, with support from the Roads Collaboration Programme and advice from Burness Paull LLP.

3.15 The options considered included:

- Joint Committee
- Joint Board
- Company Limited by Guarantee
- Company Limited by Shares
- Limited Liability Partnership

3.16 The options appraisal concluded that a joint committee was the preferred governance model to allow effective collaboration, with a formal body established under the Local Government (Scotland) Act 1973 to enable the partner authorities to carry out their functions jointly. A summary of the options appraisal is outlined in Appendix 1.

3.17 In the absence of a definitive range of services to be included in the collaboration, a remit for the committee cannot be outlined at this time. Therefore, it is recommended that, in the first instance, a shadow joint committee be established, which can be formalised into a joint committee within the next 12 months.

3.18 A shadow joint committee is not a formal body in the same way as a joint committee and it does not have to operate in line with the rules stipulated by the Local Government (Scotland) Act 1973. It does, however, provide greater flexibility in the interim period and allows the Elected Members from the partner authorities to form a group, set the direction of collaboration and define the remit of the joint committee.

3.19 During the options appraisal, a limited liability partnership was also identified as an appropriate governance model for future consideration and this can be explored further as the scope of the collaboration is defined in the interim period.

3.20 The different timescales for each council to consider participating in the proposed shadow joint committee may mean that the shadow joint committee will not have the involvement of all six local ELBF authorities from the start, but an initial involvement of at least four councils will allow the new governance arrangements to proceed.

3.21 A proposed term of reference for the shadow joint committee is outlined in Appendix 2.

3.22 Managing collaborative activity/shared service under a formal governance arrangement increases the likelihood of achieving the benefits (highlighted in Item 3.1) by ensuring local authorities are working to an agreed common vision for the future.

3.23 Creating a formal governing body to act as an ‘umbrella’ under which to deliver improvements promotes transparency and simplifies the processes associated with sharing.

3.24 Burness Paull LLP provided advice to the Improvement Service (as above) on:

- the means by which local authorities can share services;
- the establishment of a formal governance arrangement, such as a joint committee; and
- compliance with procurement legislation.

3.25 The Sevice Manager, Legal and Procurement will provide the necessary legal support in relation to the Council’s involvement in establishing the new governance body.

4 POLICY IMPLICATIONS

4.1 There are no Policy implications at this time.

5 EQUALITIES IMPACT ASSESSMENT

5.1 An Equality Impact Assessment has been carried out and no negative impacts have been found.

6 RESOURCE IMPLICATIONS

6.1 Financial - As the shadow joint committee is not a legal entity, a Lead Authority will be identified on a case by case basis to provide business and administrative support, with agreement reached between the participating councils on how any associated Lead Authority costs will be shared.

6.2 Personnel - None

6.3 Other - None

7 BACKGROUND PAPERS

7.1 None

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Appendix 1

Governance Model Options Appraisal

To determine the most appropriate governance model, ELBF officers carried out an options appraisal of the models available, taking into account perceived benefits and risks associated with each. The group was fully supported in their appraisal by the Roads Collaboration Programme team, inclusive of an external senior solicitor from Burness Paull who provided essential legal guidance to allow the group to make informed decisions when selecting the most beneficial model.
Two potential models were identified by the programme team for consideration by ELBF:

Model 1 – Co-operation **-** this model is based on the strand of European law which permits public authorities to enter into arrangements for collaboration and co-operation without those arrangements having to be the subject of a procurement process.

Based on procurement law principles, the key features of Model 1 – in the context of roads authorities – would be as follows:

- there would require to be a joint governance structure – most likely a joint committee;
- each of the authorities would require to commit to some element of sharing of resources;
- the financial contributions would require to be based on the sharing of costs – with no margin/profit element for any of the participating authorities;
- it would be viable for assets currently owned by each authority to continue to be held by them, i.e. it would not be a pre-requisite that assets had to be transferred out of the ownership of any of the existing authorities;
- the staff teams of each authority would be deployed in accordance with decisions of the joint committee;
- the joint committee would serve as a framework, providing overall governance and accountability

Model 2 – Joint Body **-** based on the principles of EU procurement law, a model involving the use of a jointly controlled corporate body would represent a viable model for collaboration and joint service delivery in the context of roads authorities.

The key features of Model 2 would be as follows:

- a legal entity would be formed, such as a company limited by guarantee or a limited liability partnership (LLP); or alternatively (involving additional formalities and a longer timescale) a joint board established;
- all participating authorities would require to share control of the legal entity – but voting rights need to be equal;

- all participating authorities would require to access some level of service from the joint legal entity – but the volumes of work need not be equal;
- the “essential part” of the corporate body’s activities must be with the participating authorities – the current threshold is 90% but will change to 80% when the relevant Directive in introduced into Scots law;
- the corporate body would hold its own assets and/or directly employ its own staff;
- the joint body could act as a central purchasing authority for the participating authorities – procuring materials or services, or a private sector strategic partner;
- the corporate body must not have any private sector shareholding, but could access loan finance from any source (bonds);
- a subsidiary legal entity could potentially operate on the market, winning work from other authorities and potentially:

  - preserving/expanding the workforce;
  - maximising community benefits (e.g. apprenticeships);
  - delivering additional income to support core services.

It was agreed that both model 1 and model 2 were viable options and should both be explored in greater detail taking into account the various options that could be developed within each model.

Out with the status quo option (‘do nothing’), there were five possible options considered within the two models outlined:

- Joint committee
- Joint board
- Company limited by guarantee
- Company limited by shares
- Limited liability partnership

When considering the advantages and disadvantages of each in an initial high-level appraisal, officers discussed the key features of each model with advice from Burness Paull.

Following a SWOT analysis, it was concluded that the greatest opportunities were present in the Joint Committee or LLP options. The key reasons for this decision were:

- The status quo model can no longer be seen as a long-term viable option for delivering roads services as the current economic climate will continue to put substantial pressures on services. In order to collaborate on a more substantial basis, authorities will be required to establish a formal legal framework for collaboration, to comply with procurement law.

- The Joint Committee model is very familiar and well established in local government and is particularly beneficial in terms of the speed in which it can be established.
- While a Joint Board offers additional benefits to that of a Joint Committee, the time involved in the parliamentary procedures needed to establish the body would outweigh any benefits.
- An LLP offers all the benefits of a joint committee plus additional benefits offered by the establishment of a legal entity (model 2).
- An LLP is particularly attractive over a Company Limited by Guarantee and a Company Limited by Shares, as the profits of an LLP – where membership is made up of local authorities – is exempt from tax. Any profits can be reinvested in the LLP or drawn off by the participating authorities – in each case with no tax being payable.

A further comparative analysis was then undertaken to assess and compare the Joint Committee and LLP options.

Edinburgh, Lothians, Borders and Fife Forum
Comparison of Joint Committee and Limited Liability Partnership

1. Key Features of Each Model

	Legal Entity?	Governed by...	Set up by.....	Ongoing admin. tasks	Legal duties on board members	Other features
Joint Committee	No	Local Government (Scotland) Act 1973	Participating local authorities themselves	Servicing meetings (agendas, reports, minutes), accounting, financial reporting to participating authorities	Those applying under local government law plus (possibly) duties applying under general case law to those serving in a position of trust	Only local authorities can participate (not other public bodies); also, at least two thirds of the committee members must be elected members
Limited Liability Partnership	Yes	Limited Liability Partnerships Act 2000	Companies House	As for Joint Committee, plus annual return to Companies House, annual accounts complying with statutory requirements (with formal audit if above thresholds)	Those applying under local government law; plus (possibly) duties applying under general case law to those serving in a position of trust; plus any duties specifically set out in the LLP Agreement	No restrictions regarding the types of bodies who can participate; and no restrictions on who can serve on the board

2. Main Advantages and Disadvantages

There are a number of key issues to be considered when considering the main advantages/disadvantages of a Joint Committee against an LLP:

	Issue	Comparison of both models against this issue
Legal entity or not	If the joint structure is not a legal entity, it cannot enter into contracts, employ people, or have other formal legal relationships in its own name. That then means that one of the authorities has to take the role of lead/host authority in contracting with third parties, employing/managing any joint staff team, holding funds etc. This can (a) distort the overall dynamic of decision-making; (b) make it more difficult to hold all participating authorities to account on an equal basis; and (c) cause difficulties in sharing risk (since the lead authority is the immediate target for third-party claims). It would be possible to split roles so that one authority was lead authority for third party contracts, another took the role of employer, another as fund holder.	A Joint Committee is not a legal entity. The LLP is a legal entity, and can thus enter into legal relationships in its own name. That gives a direct connection between decisions of the joint board, and implementation of those decisions – rather than this having to be routed through one of the participating authorities. Where contracts are entered into directly by a joint body, no one authority is exposed to third-party claims - so that creates better balance in decision-making. Also, the existence of a joint body (with a joint staff team directly managed by that joint body) can help to create a more level playing-field in holding all participating authorities to account.
Governing legislation	The formation of a structure governed by local government legislation, rather than LLP legislation, could be seen as "home ground", and thus less of a significant step for a local authority to take. Having said that, there is an increasing trend for local authorities to set up companies or LLPs as offshoots (e.g. leisure/culture trusts), so this is not unfamiliar territory in the way that it used to be.	An LLP is governed by the Limited Liability Partnerships Act 2000 (which in turn refers to various provisions of the Companies Act 2006, adapted to fit the LLP model).

Set-up process	While the setting-up of an LLP involves Companies House, this is largely a form-filling exercise – typically adding only a few days to the much more significant task of tailoring a constitution for the joint body. The tailoring of a constitution - whether a minute of agreement (joint committee) or LLP agreement (LLP) – would need to be carried out and neither requires a more complex constitution than the other (though in practice, local authorities tend to favour a lighter-touch minute of agreement in the context of Joint Committees).	The Joint Committee is a little simpler to set up, as there is no need to involve any regulator. The administrative set-up costs for a Joint Committee is likely to be less than an LLP, but in either case this will not be a significant cost. However, with no lead authority associated with an LLP, dedicated senior management and some support resource would be required for an LLP, the costs of which would be shared amongst partners. In the case of ELBFF it is likely that this cost could be in the order of £60,000 per year at least initially.
Ongoing admin. tasks	The prospect of having to deal with additional administrative tasks is often off-putting to those considering the creation of a joint body. In reality, the additional administration is likely to be minimal (over and above the tasks that are inevitably associated with servicing *any* form of joint decision-making group) – except that the implications of having to carry out a formal audit should be borne in mind.	A Joint Committee involves the minimum by way of additional ongoing administration, as compared with the LLP. For a Joint Committee, the lead authority would normally be expected to provide this.
Legal duties on board members	The idea of board members having to take on duties over and above those that attach to them already under local government legislation may be seen as challenging.	A Joint Committee would not impose any special legal duties on committee members – over and above the duties that members already have under local government legislation. As regards the LLP model, the LLP legislation does not impose any duties on LLP board members; there are legal duties on the LLP <u>*members*</u> – in this case, that would be the participating authorities, as corporate bodies – relating to for example filing of accounts and other formal matters.

Involving others	It may be felt appropriate to bring other public authorities (e.g. Transport Scotland or the relevant Regional Transport Partnership) into the governance model on an equal footing to the local roads authorities. That would be inconsistent with the rules relating to Joint Committees. However, the legislation would allow co-option of people drawn from Transport Scotland or an RTP onto the joint committee, so long as the “minimum two-thirds elected members” requirement was still met.	If it is felt essential that bodies other than local authorities should participate directly in the governance model, then a Joint Committee should be considered carefully. The same point applies if it is felt that having a minimum of two-thirds elected members on the board is not appropriate.
Tax	The issue of tax is an important factor, particularly if there is a risk that surpluses generated by the joint body might be substantial in future years (and taking account of any aspirations round developing income from the provision of services to a wider range of bodies).	Tax on surpluses does not come into play in relation to a joint committee as these fall within the general tax exemptions applying to local authorities. If there is a risk that tax liabilities might arise in the future, tax considerations would point to the use of an LLP model. An LLP does not pay tax; it is the members of an LLP who pay tax, based on the profits of the LLP that are allocated to them. Where – as in this case – the members are local authorities, the general tax exemption for local authorities comes into play and thus no tax is payable on the profits of the LLP. That applies irrespective of whether the profits are left within the LLP to fund working capital requirements or future investments or are drawn off by the local authorities – so there is full flexibility.

3. Strengths, Weaknesses, Opportunities & Threats

Joint Committee Model

STRENGTHS	WEAKNESSES
❖ Provides a strong governance framework ❖ Familiar model within the local government field, so unlikely to cause concerns to elected members ❖ Can provide an overarching framework, compatible with procurement principles round collaboration in the performance of a public task, under which individual projects can be taken forward	❖ As compared with an LLP, a Joint Committee is not a legal entity, so contracts etc. need to be dealt with through a lead authority ❖ Selection of lead authority may be difficult (there is the possibility of different authorities taking responsibility for staff, finance, contracts etc. – but that adds complications) ❖ Lead authority is directly exposed to third party claims – so that may distort the dynamic of decision-making as the lead authority may refuse to take steps agreed on by the Joint Committee if they would expose it to liability/risk
OPPORTUNITIES	**THREATS**
❖ A Joint Committee would provide a platform for more rapid progress with shared services ❖ Over time, the participating authorities may become more familiar/confident about sharing of resources etc., and that in turn may facilitate moving to a Limited Liability Partnership model	❖ The lead authority arrangement could potentially represent a source of friction, if there is a sense among the other participating authorities that the dynamic of decision-making is not working as it should ❖ The fact that the lead authority takes the primary risk as regards third party claims may inhibit progress with more ambitious projects (the other authorities can agree to reimburse a proportion of the lead authority's liability from third party claims, but that is not a perfect solution) ❖ As compared with an LLP, a Joint Committee tends to be more

	exposed to changes in the political agendas

Limited Liability Partnership Model

STRENGTHS	WEAKNESSES
❖ As compared with a Joint Committee, an LLP provides a jointly-controlled legal entity, which can itself enter into contracts, take on staff, hold its own funds, etc. ❖ The commitments of the participating authorities can be pinned down in a more robust way through legally-binding agreements between each of them and the joint legal entity ❖ Those serving on the board have a legal duty to take decisions in a way that will best promote the success of the company in achieving its purposes ❖ A Limited Liability Partnership has a major advantage of being tax-transparent	❖ As compared with a Joint Committee, there may be a perception among elected members that the formation of a LLP displaces their role and/or represents a first step towards privatisation ❖ The principle of profit distribution – even if that not envisaged to happen in practice in the short to medium term – may distort the fundamental principles of what the shared services arrangements are intended to achieve
OPPORTUNITIES	**THREATS**
❖ As compared with a Joint Committee, an LLP can act as a flexible model – not just dealing with initial feasibility but (once approved by the participating authorities) directly taking forward joint projects	❖ If the participating authorities are concerned about issues of control, they may impose tight restrictions on what the LLP can do without the consent of all participating authorities – with the effect that the LLP is unable to achieve its

❖ An LLP could serve as the vehicle for a wide range of shared services projects and initiatives	potential

Appendix 2

Shadow Joint Committee – Roads Services

1. **Membership:**

   Each local authority will provide one elected member.

2. **Chair:**

   The Chair will rotate between the local authorities on an annual basis.

3. **Substitutes:**

   Each local authority will also name an elected member who will be able to act as a substitute for their substantive member.

4. **Officers**

   Officers will normally attend to support meetings.

5. **Remit**

   a) To explore options for the member local authorities sharing roads services and associated assets.
   b) To evaluate proposals for shared services and joint working, and make recommendations to the relevant member local authorities on the preferred collaboration model.
   c) To discuss and develop draft governance arrangements for a formal decision making joint body.

6. **Code of Conduct**

   The Councillors' Code of Conduct (paragraphs 3.14 – 3.15) specifies members' responsibilities regarding private information.

7. **Meeting (and papers):**

   The Shadow Joint Committee will meet a minimum of four times per year, with papers circulated fourteen days in advance of meetings.