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REPORT TO: Members' Library Service

BY: Depute Chief Executive (Resources and People)

SUBJECT: Musselburgh Racecourse

1 PURPOSE

- 1.1 To report the recommendation of the preferred operating model of the Musselburgh Racecourse as determined by the Working Group.

2 RECOMMENDATIONS

That the Council:

- 2.1 Notes that the Working Group recommends that the preferred long term operation of Musselburgh Racecourse is carried out by a third party operator and that the Chief Executive shall commence the procurement process to appoint a third party to operate the racecourse.

3 BACKGROUND

- 3.1 At a meeting of the Council on 24 April 2018 approval was granted for the setting up of a Working Group consisting of Councillors O'Donnell, Small and Currie, members of the LRS and Council Officers supported by Pinsent Masons LLP.
- 3.2 The scope of the Working Group was to analyse the different proposed operating models and determine which would be the preferred route to operate Musselburgh Racecourse in the long term. A more detailed analysis worked through by the working group is attached at Appendix 1 of this report. The Appendix includes analysis on an Arms-Length External Organisation (ALEO) and Third Party Operator and also included for completeness is a brief analysis of adopting the Associated Committee as a long term operating model.
- 3.3 The first consideration was in determining whether the Council could put in place an ALEO or Third Party Operator to operate the racecourse while remaining compliant with the common law and statute that govern the

Musselburgh Links and the reclaimed lands. On analysis both options were capable of being progressed without detriment.

- 3.4 It was determined by the Working Group that the current interim operational model, of an associated committee, while remaining competent had on balance more long term potential disadvantages than a third party operator. The key disadvantages from this arrangement would be demonstrating sufficient governance with horseracing expertise within the committee, there would be potential concerns about the racecourse employees employment status and there would be a requirement for the Council to operate in a commercial environment while complying with sporting governance principles as requested by the British Horseracing Authority, public procurement procedures, and the Council's Standing Orders for all contracts that are required for the operation of the racecourse.
- 3.5 The Working Group then considered the operation of the racecourse by a third party operator acknowledging that there were several types of third party operators. These were categorised as ALEOs and external third party operators. For the purpose of the working group the definition of an ALEO was an organisation which is fully owned or controlled by the Council.
- 3.6 One of the benefits of an ALEO would be that it was possible for the Council to directly award the contract to the ALEO without requiring a procurement process. This is because it could be demonstrated that the ALEO would be carrying out the service purely for the Council. This operational model would further provide greater control to ensure that the Council remained compliant with the legislative framework that the Council requires to operate, or ensure the operation, of the racecourse. In addition, an ALEO could be created and be operating the racecourse in a relatively short period of time.
- 3.7 The ALEO may require to consider the employee's pay structure as there may be a requirement to ensure that these are on the same or similar levels to the Council's. In addition the ALEO would be required to comply with public procurement. This presented some concern from certain members of the Working Group who were of the view that this may limit the ability for Musselburgh Racecourse to compete with other racecourses and leisure/sporting entities when wishing to employ staff. It was also noted that the industry has certain expectations in the structure of employment terms and conditions and this would mean that Musselburgh Racecourse could be considerably different from the industry standard. Further it was also noted that the requirement to comply with public procurement for the daily operation of the racecourse may create some complications when dealing with some matters in which the racing industry would see collaboration in procuring goods and services for the racecourse. This would reduce the ability to collaborate and may result in poorer value from these contracts.
- 3.8 It was noted that there is the possibility of a commercial facing ALEO which would avoid the concerns raised in 3.7 above. This ALEO would not require to use public procurement to enter into the operational contracts

nor would there be an issue with employee pay structures. The working group considered this as a viable option however for this commercial facing ALEO to be able to operate it would require to be successful in a procurement process. This would require setting up a company to bid for the work and in the circumstances seemed difficult to justify.

- 3.9 Consideration was then had on a third party operator and the benefits were similar to that of a commercial facing ALEO. However, the main risk around the third party operator was in relation to control. It was discussed and viewed that an appropriately drafted operating contract would provide the Council with sufficient protection.
- 3.10 The next consideration was in reviewing the aspirations of the Council in relation to the racecourse and reviewing which model would best deliver these. This included considering potential capital expenditure at the racecourse and reviewing potential terms for operating and how that would link to capital investment from the Council or other operator, which may be influenced by the duration of the contract and will be determined following market testing. It also included the Council's desire to continue to ensure the racecourse was able to maintain and develop its place as a leading provider of horseracing as well as the wider benefit through the Common Good.
- 3.11 It was noted that the Third Party Operator route would allow the Racecourse to continue to be operated with suitable racecourse knowledge and enhanced expertise. Further this would provide an opportunity for the racecourse to continue to develop as a leading horseracing venue. This was a concern in terms of the ALEO as there would be a requirement to locate financing for the ALEO and a question as to whether the ALEO would be able to generate sufficient finance in its own right and without recourse to the Council to permit sufficient investment to allow the racecourse to remain or improve on its current position.
- 3.12 On consideration of all of the options available to Working Group have unanimously agreed that the most economically advantageous and preferred route for the operation of Musselburgh Racecourse should be by procuring a third party operator.

4 POLICY IMPLICATIONS

- 4.1 The Council will continue to operate the racecourse by means of the Musselburgh Racing Associated Committee until appointment of a third party operator.
- 4.2 Any appointed third party operator will be required to operate the Racecourse within the parameters of the Statute

5 INTEGRATED IMPACT ASSESSMENT

- 5.1 The subject of this report does not affect the wellbeing of the community or have a significant impact on equality, the environment or economy

6 RESOURCE IMPLICATIONS

- 6.1 Financial – the procurement process is expected to deliver an operator that will place the Council at least in as good a position as it is now and hopefully better. To ensure that the procurement is adequately supported and delivered there will be a requirement to obtain external legal and other advisors who have knowledge of the racecourse industry. Due to the timescales involved and dependant on: (i) the extent of the advice required: and (ii) the procurement process followed, it is anticipated the costs will be between £75,000 and £100,000. As the procurement process will directly impact the operation of the racecourse it is proposed that these costs are insofar as possible funded through the racecourse accounts.
- 6.2 Personnel –following the procurement process the racecourse staff would transfer to the new operator. In addition there will be a requirement to ensure that the racecourse General Manager and the Legal and Procurement Services of the Council are adequately resourced to ensure that the procurement is progressed as expediently as possible. .
- 6.3 Other – none at present

7 BACKGROUND PAPERS

- 7.1 Minute of Council on 19 December 2017 (Private Report)
- 7.2 Minute of Council on 27 February 2018 (Private Report)
- 7.3 Members' Library Report, Governance Review – Musselburgh Racecourse. Members' Library Service Ref: 37/18. March 2018 Bulletin.
- 7.4 Minute of Council on 24 April 2018

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Appendix 1

Musselburgh Racecourse – Options Appraisal

Definitions

The terms below shall have the following meaning:

ELC: East Lothian Council

LRS: Lothians Racing Syndicate limited

1985 Act: East Lothian District Council (Musselburgh Links, etc.) Order Confirmation Act 1985

General Comments

All parties and the BHA have agreed that the status quo is not an option.

The Council has set up a new associated committee of the Council (Musselburgh Racing Associated Committee) which complies with both legislative requirements and the BHA's requirements for licence purposes. This is an interim solution pending implementation of an agreed long term approach.

As part of the deliberations the working group in consideration an ALEO, were aware that there would need to be a trade off between control and commercial freedom on the one hand and the ability of ELC to make a direct award of the operating contract to the ALEO on the other.

The working group in considering the 3rd party operator route were of the view that this would satisfy ELC's requirement to have oversight over strategic matters, set parameters and enable the racecourse to operate at arms length. It also provides encouragement to the employees that they can continue to develop a market leading racecourse. Any move towards a 3rd party operator would require a tendering exercise which requires to be carefully prepared/drawn with every consideration for the key factors important to ELC and LRS in terms of the outcome(s) sought. It is by no means certain that a successful bidder could be found hence the importance of having a workable interim solution that is in place pending any transfer to a 3rd party operator or failure of that process.

A procurement for a third party operator will allow contract management of the operator through the associated committee structure. This would also ensure that ELC are meeting best value considerations and complying with their statutory obligations.

Irrespective of which option is chosen be it an ALEO or Third Party Operator, the operator is likely to want full indemnification in respect of any employee issues and this would be expected to be given ELC.

Road Map

<p>Irrespective of which option is chosen, there will need to be further consideration of the future governance structure of the racecourse, with clear demarcation between the supervisory and operational functions. This will be dealt with in the case of the associated committee through the standing orders of ELC; or through the memorandum and articles of association of the ALEO; or through the contract opportunity and the contract management function if a 3rd party operator is procured</p> <p>If the ALEO route is preferred, ELC should ensure that the structure and memorandum and articles of the company reflect (a) the supervisory oversight of ELC and (b) the obligations incumbent upon ELC flowing from the 1985 Act.</p> <p>If ELC chose to procure a 3rd party operator, they should specify the contract requirements in as detailed manner as possible. This will remove dubiety during the operational phase. Robust contract management should also be in place to ensure that the contract outputs are met.</p> <p>There is a general requirement in procurements that all procurement and contract documentation is available at the time the contract notice is published. This task should be completed in advance of publication of the contract notice and will follow ELC's standard procurement processes.</p> <p>If there is a TUPE transfer there is an obligation to inform and consult with appropriate representatives of the employees. The obligation is to inform and consult in "good time" before the transfer. The process normally takes about a month but this can vary depending on the timetable for the wider process.</p>

Option	Advantages	Disadvantages
<p>1. Associated Committee and Sub-committee of ELC</p>	<p>This regularises and delivers a compliant structure</p> <p>The racecourse would be directly controlled by the Council through its Associated Committee and Sub-Committee.</p> <p>The Scheme of Administration's terms of reference will be compliant with the 1985 Act and ELC's own powers.</p> <p>Ensures that there is compliance with the procurement regulations and/or ELC standing orders.</p> <p>This option ensures that ELC is not in breach of any legislation and in particular the 1985 Act.</p>	<p>Any committee of ELC remains a part of the council structure and will not have a distinct legal personality separate from ELC.</p> <p>It will not be able enter into any contracts for works, goods or services in its own accord – these must be in the name of ELC and will require to procure works, goods and services in line with the procurement regulations or ELC standing orders</p> <p>There will be a loss of commercial flexibility.</p>

	<p>It would be possible to achieve a reasonably quick transfer of employees to ELC under TUPE and would clear up any doubt as to employees status and standing</p>	<p>The inconsistency of the current employees' terms and conditions compared to ELC terms and conditions could put ELC in breach of its Single Status Agreement. ELC could be exposed to potential equal pay claims.</p> <p>At the very least, new hires would need to be engaged on ELC terms and conditions.</p>
<p>2. Arms Length External Organisation</p>	<p>ELC would be able to make a direct award of the contract to operate the racecourse to the ALEO provided that the ALEO is set up in a manner compliant with procurement regulations (if these requirements are met this would be commonly referred to as being Teckal compliant).</p> <p>ELC could still enjoy oversight through appointment of ALEO directors holding office alongside LRS or other independent members.</p> <p>The ALEO's memorandum and articles of association could reflect ELC's obligations under the 1985 Act.</p> <p>Good governance could be factored in to the relationship between ELC and the ALEO with a proper demarcation of functions and oversight between the two.</p> <p>It would be possible to achieve a reasonably quick transfer of employees to ALEO under TUPE. ELC would retain control over the ALEO</p>	<p>Tax implications of any ALEO structure would need to be explored further (this would depend on the type of ALEO set up (ie Company Limited by Share, Limited Liability Partnership or otherwise and is beyond the remit of this paper).</p> <p><u>Teckal Compliant</u></p> <p>Relying on the Teckal exemption would mean that ELC would be required to exercise a level of control over the ALEO similar to that it exercises over its own council services.</p> <p>The ALEO would be limited to providing at least 80% of its functions for ELC. This may stifle commerciality. It is a question whether this would be a limiter on the activities of the ALEO as the ALEO would be discharging ELC's obligations under the 1985 Act.</p> <p>The inconsistency of the employee's terms and conditions compared to ELC terms and conditions could expose ELC to potential equal pay claims.</p> <p>New hires may need to be engaged on terms and conditions comparable with ELC terms and conditions.</p> <p><u>Non- Teckal Compliant</u></p> <p>ELC could not make a direct award to the ALEO to operate the racecourse without being in breach of procurement regulations.</p>

<p>3. Third Party Operator</p>	<p>ELC can comply with the relevant procurement regulations to appoint the operator. Thereafter any contracts required for an operation of the Racecourse would be entered into by the Third Party Operator and no further procurement would be required.</p> <p>ELC would achieve best value through opening the contract opportunity to the market and testing this.</p> <p>ELC would still retain strategic oversight of the operations through its committee structure and through proper and robust contract management arrangements.</p> <p>The contract management function will be undertaken through ELC committee structure with a major role for LRS bringing their experienced and knowledgeable in the racing industry.</p> <p>The racecourse employees would transfer to the new operator by way of a TUPE transfer.</p> <p>A Third Party Operator would have more freedom than ELC or ALEO to set terms and conditions for new hires at an appropriate level.</p>	<p>There is a requirement to invest resources up front to ensure the success of the procurement.</p> <p>The procurement process may take some time dependant on the procedure chosen.</p> <p>LRS would have to chose between bidding to be operator (either on their own or in partnership), or agreeing to provide contract management oversight. They would be conflicted from undertaking both aspects.</p> <p>LRS would not be able to help specify the contract opportunity and bid in the process. This would likely be a breach of the overarching procurement principle of equal treatment of all bidders.</p> <p>NOTE: <i>The LRS have confirmed that they are not interested in bidding to operate the racecourse.</i></p> <p>The procurement process will take some time which mayl mean that the permanent employment position will not be quickly resolved</p>
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