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Date: 25 April 2019



Members of the Policy and Strategy Committee

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Dear Member

I refer to the Notice calling a Special Meeting of the Policy and Strategy Committee to be held in the Civic Centre, Motherwell, on Monday, 29 April 2019 at 2 pm and enclose a copy of the report "Update on the Integration of Cultural and Leisure Services" which was marked 'to follow' and should be taken as item 2 on the agenda.

Members are requested to bring this paper with them to the meeting.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Archie Aitken".

**Head of Legal and Democratic Solutions**

Encl.



# North Lanarkshire Council Report

## Policy and Strategy Committee

approval  noting

Ref DM/KH

Date 29/04/2019

## Update – Integration of Cultural and Leisure Services

**From** Des Murray, Chief Executive

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### Executive Summary

The former Policy and Resources Committee (27 September 2018) considered the service review findings regarding CultureNL Ltd (CNL) and North Lanarkshire Leisure Ltd (NLL), and approved that a single delivery vehicle be created to provide sport, culture and leisure related services effective from April 2019.

CultureNL Ltd was identified, following consideration of an amendment, as the entity to be retained to deliver those integrated services.

A Programme Board comprising representatives of both Boards of Directors was tasked with creating the legally merged entity. A summary of the Integration Plan and associated Communication and Engagement Plan produced by the Programme Board was considered by the former Policy and Resources Committee on 6 December 2018 and indicated the target date of April 2019 remained feasible. This report illustrated a need for both Boards of Directors to complete Due Diligence as part of the merger process.

On 20 December 2018, Council noted decisions taken in respect of CNL and NLL and authorised the Head of Legal and Democratic Solutions to prepare and execute, as required, all resolutions necessary to achieve the merger on behalf of the Council.

The Policy and Strategy Committee of 28 February 2019 considered a further progress report regarding the integration and approved the proposal to change the name CultureNL Ltd to Culture and Leisure NL Limited. Committee also approved amendments to CNL's existing Articles of Association and noted the effective date for integration was now 1 June 2019. CNL subsequently submitted these amended Articles to the Office of the Scottish Charities Regulator (OSCR) for consideration.

The CNL Board of Directors met on 15 April 2019 to consider the Legal Due Diligence report in respect of NLL. The Chief Executive of CNL subsequently advised the Chief Executive of North Lanarkshire Council that the CNL Board of Directors had formally rejected the proposed merger previously approved by Council.

In recognising Council had determined integrated delivery was the mechanism to be used to support The Plan for North Lanarkshire, this report presents a range of options for consideration.

## Recommendations

In considering the content of this report, alongside the [more detailed report](#) previously approved by the former Policy and Resources Committee on 27 September 2018, Members are asked to:

1. Reaffirm, or otherwise, that future sport, culture and leisure services be provided through an integrated delivery vehicle;
  2. Reaffirm, or otherwise, that CultureNL Ltd, be retained as the entity to deliver integrated services going forward;
  3. Note the options, summarised in paragraph 2.17 (a) to (f), which are legally available to the Council to achieve integrated service delivery, agreeing a preferred option;
  4. Agree to suspend, through written resolution, the operation of Articles 59.1, 63, 64, 98 and 118 to 121 to enable CNL to continue to transact urgent business, if required;
  5. Instruct officers on the preferred option and course of action; and;
  6. Agree the treatment of one-off merger costs incurred to date by CultureNL Ltd.
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## Supporting Documents

**The Plan for North Lanarkshire**      Delivery of an integrated solution increases the Council's ability too deliver on the key priorities outlined within The Plan.

### 1. Background

- 1.1 CultureNL Ltd (CNL) and NL Leisure Ltd (NLL) deliver a range of cultural and leisure services – at arms-length – on behalf of North Lanarkshire Council. Following ALEO service reviews of both organisations between September 2016 and September 2018, the former Policy and Resources Committee considered a report which outlined that integrated service delivery could positively impact the Council's longer-term cost effectiveness and business planning arrangements.
- 1.2 In contemplating the recommendations contained within the 27 September 2018 report, committee was also asked to consider an amendment proposed by Councillor Linden, seconded by Councillor T. Johnston, "*to identify CultureNL as the entity which shall be retained in the integrated delivery model for sport, culture and leisure services for North Lanarkshire.*" On a vote being taken, 11 members voted for the amendment and 6 members voted for the motion. The amendment was accordingly declared carried, with CNL identified as the legal entity to be retained for future service delivery, and both organisations instructed to jointly produce the integration plan which would create a single delivery vehicle effective from April 2019.
- 1.3 Progress reports regarding the integration were considered by Council committees on 6 December 2018, 20 December 2018 and 28 February 2019. These reports illustrated all parties were working well together to legally merge the organisations by the amended effective date of 1 June 2019.
- 1.4 To facilitate the transfer of NL Leisure Ltd's business and assets to CultureNL Ltd, the Boards of Directors of both organisations are required to consider legal Due Diligence reports containing commercially sensitive and confidential information in respect of the

other organisation. CNL met on 15 April 2019 and NLL on 17 April 2019 to fulfil their Due Diligence obligations.

- 1.5 On 16 April 2019, the Chief Executive of CNL informed North Lanarkshire Council that the Board of Directors had decided not to proceed with the merger previously approved by the Council, despite advice provided to the Board of Directors at their meeting from senior Council officers, including the Council's Section 95 Officer.
- 1.6 The NL Leisure Ltd Board of Directors agreed on 17 April 2019 to accept the Council's request to merge their business with CNL. Furthermore, the Board of Directors confirmed a willingness to complete the merger through NLL, were such to be proposed by the Council.
- 1.7 This report presents a range of options available to the Council to achieve the previously approved single delivery vehicle in respect of future sport, culture and leisure services.

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## **2. Report**

- 2.1. In concluding the initial ALEO service reviews and recommending potential delivery models for committee consideration, elected members were advised the merger option would require the approval of both Boards of Directors. Elected members were also advised, through the September 2018 report to the former Policy and Resources Committee, there was no over-riding benefit to be gained from retaining one entity over another. Committee were presented with the option to identify the entity to be retained or to alternatively delegate that decision to the Programme (Shadow) Board.
- 2.2. As outlined in paragraph 1.2 above, following a vote, committee approved the amendment to retain CNL as the future legal entity and delivery vehicle. Given CNL have now formally rejected the Council's merger request, scope exists for committee to reconsider the previous decision, and to now agree, if such is considered appropriate, to finalise the merger through the NL Leisure Ltd company and charity.
- 2.3. CNL determined at their Board Meeting of 15 April that they would not support the merger process at this time. The first option therefore available to the Council is to determine whether scope exists for CNL to reconsider their position and agree to progress the merger as previously requested by Council. In the event of CNL confirming their current decision stands, or the organisation requiring unreasonable measures to assure them the merger is in the best interests of the charity, the Council will need to reference the company's Articles of Association and Services Agreement to ensure future actions taken to progress the merger are legally available for consideration
- 2.4. Although the Articles of Association set out the rules, governance and decision making powers of CNL, they also clearly demonstrate that membership of the company is restricted to North Lanarkshire Council.
- 2.5. As the sole member of the private company CNL, the council has the power under section 292 of the Companies Act 2006 to require circulation of a written resolution. In exercising this power, the Council could request in writing that CNL approve the merger with NLL, and then require CNL, under section 293 of the Act, to circulate such within 21 days of receiving the request, to the sole member for approval. In taking forward this action, the council can specify whether CNL or NLL will remain as the entity to deliver future integrated services.

- 2.6. CNL Directors are aware of the responsibilities the Companies Act 2006 places on them, so should understand that failure to circulate a written resolution after a request has been received is an offence per section 293(5) of the Act. This course of action does of course carry risk. Independent Directors could for example, choose not to comply with the terms of the Act and would knowingly or otherwise commit an offence, leading to the Council having to pursue further action.
- 2.7. Alternatively, Directors may opt to resign from the CNL Board rather than implement the Council's resolution to merge. Were this to result in a greater number of partner Directors remaining, and/or less than two Independent Directors remaining, the company would struggle to satisfy Articles 98 and 119. Article 98 specifies the quorum necessary for CNL to transact future business, and Article 119 requires at least two Independent Directors to sit on the nominations committee required to guide the Council in appointing replacement Independent Directors.
- 2.8. The Council can alternatively exercise its power under article 59.2 of the current CNL articles to remove the existing Independent Directors from office. This however creates temporary practical issues regarding Articles 98 (quorum), 63, 64 and 118 to 121, which require Independent Directors to form a majority on the Nominations Committee required to guide the Council in selecting appropriate Independent Directors.
- 2.9. To minimise the risk of practical issues arising going forward, and enable the Council to appoint new Independent Directors without reference to the Nominations Committee, members are requested to agree to suspend the operation of CNL Articles 59.1, 63, 64, 98 and 118 to 121 by passing a special resolution. This enables the CNL Board of Directors to continue to convene and transact the merger and any other urgent business.
- 2.10. Turning now to the Services Agreement between the Council and CNL, clauses 1.1, 13, 16 and 23 are particularly relevant to the current situation, and offer an alternative means of achieving integrated delivery through NLL as the retained entity:
- Clause 1.1 Definitions of: Cessation of Service, PSO Services and Prescribed Period;
  - Clause 13 TUPE on Termination;
  - Clause 16 Consequences of Termination;
  - Clause 23 Duration
- 2.11. Paragraph 2.5 above illustrates the Council can exercise powers available through the Companies Act 2006 to conclude the merger, either via CNL or NLL. Ever mindful however of OSCR "*Who's in Charge*" Guidance (2011) and the requirement for a charity's governance and decision-making to be visibly independent from its funders or shareholders, there is an alternative mechanism available to the Council to retain NLL as the future delivery vehicle, should such be the preferred way forward.
- 2.12. The Council can choose to invoke clause 23 of the CNL Services Agreement, and formally notify CNL of an effective end date for the Prescribed Period. This would automatically give rise to various other clauses, including 13 and 16, coming into effect, with CNL thereafter obliged to for example:
- Transfer employment to NLL in accordance with the provisions of TUPE;
  - End all Service Level Agreements (SLA's) with Council services;
  - Transfer and/or assign all assets, Intellectual Properties Rights (IPR) etc. to the Council.

- 2.13. Were committee minded to implement this option, the Council will be obliged to provide CNL with a formal undertaking that the Authority will continue to use the assets and IPR transferred to it solely for charitable purposes.
- 2.14. The final option available to the Council to ensure delivery of sport, culture and leisure services through a single arms-length entity is to create a new charitable organisation. This option was previously rejected (March 2018) as being high risk and unaffordable following the Scottish Government advising that measures were being put in place to discourage the creation of new charitable ALEOs.
- 2.15. With the revised arrangements regarding charitable rates relief now operational, recent dialogue with COSLA and the Scottish Government illustrates that scope may exist for North Lanarkshire Council to create an entirely new leisure and culture trust capable of benefiting from charitable rates relief. Whilst the Scottish Government have advised requests such as this will be formally considered on a case by case basis, the initial soundings with them are positive and illustrate that merging two existing ALEOs into a single new ALEO, effectively delivering the same services in a more administratively efficient way, should not negatively impact the existing baseline relief allocation.
- 2.16. This option still carries a higher level of risk, and is also dependent upon OSCR granting charitable status to the new ALEO. As previously advised, the Council would have to find a further £4.5m per annum to cover the existing charitable rates relief were such to be lost from either creating a new ALEO, or returning services in-house. Based upon previous experience of creating arms-length delivery vehicles, this option could take between twelve and eighteen months to finalise.
- 2.17. To summarise the preceding paragraphs, the following options are presently available to the Council to achieve integrated service delivery:
- (a) Provide CNL an opportunity to reconsider their position and agree to accept the merger request approved by the Council;
  - (b) Exercise powers available under the Companies Act 2006 to request that CNL approve the merger with NLL, by passing a written resolution, with CNL retained as the delivery vehicle going forward;
  - (c) Exercise powers available under the Companies Act 2006 to request that CNL approve the merger with NLL, by passing a written resolution, with NLL retained as the delivery vehicle going forward;
  - (d) Invoke Article 59.2 of the current CNL articles, removing the existing Independent Directors from office, and through suspending Articles 63, 64, 98, 118, 119, 120 and 121 by special resolution, appoint replacement Independent Directors without reference to the Nominations Committee;
  - (e) Retain NLL as the future delivery vehicle and invoke clause 23 of the CNL Services Agreement, formally notifying CNL of an effective end date for them to deliver services on behalf of the Authority;
  - (f) Create a new ALEO to deliver integrated services on behalf of the Council.
- 2.18. Committee are requested to consider the options available and to thereafter instruct officers to deliver their preferred option and course of action.
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### **3. Equality and Diversity**

#### **3.1 Fairer Scotland**

3.1.1 CultureNL Ltd and NL Leisure Ltd contribute to the Fairer Scotland Duty by delivering services which aim to reduce inequalities of outcome and socio-economic disadvantage. Existing purposes include for example “promoting opportunities accessible to all”. The common mission identified for the merged entity - *to seek to help the people of North Lanarkshire to flourish* – reflects the spirit and intention of the Fairer Scotland Duty, and can be delivered regardless of the option implemented.

### **3.2 Equality Impact Assessment**

3.2.1 Equality Impact Assessments will be carried out in line with Council Policy and The Fairer Scotland Duty assessment process noted above.

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## **4. Implications**

### **4.1 Financial Impact**

4.1.1 The budget approved by the Council for 2019-20 envisages integrated delivery being capable of delivering the approved £0.5m by the end of financial year 2020-2021. Any delay regarding the merger of these organisations will reduce their ability to satisfy the Council’s planned savings requirement.

4.1.2 The Council previously agreed to support the initial one-off costs associated with the merger from its’ Change Management Fund. Joint working to date to deliver the merged entity by 1 June 2019 will therefore have resulted in all organisations incurring legal costs. With CNL rejecting the Council’s request to merge with NLL, it now seems appropriate for them to fund any costs incurred in support of that decision from CNL resources.

4.1.3 Creating a new ALEO to deliver integrated services, or returning to in-house provision, remains high-risk and could result in the Council having to fund approx. £4.5m of charitable rates relief currently received annually by the existing charities.

### **4.2 HR/Policy/Legislative Impact**

4.2.1 As previously reported, the transfer of NL Leisure Ltd business to CultureNL Ltd will constitute a relevant transfer in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (‘the TUPE Regulations’). This impacts approx. 800 NLL employees and is currently provided for within the integration plan, with Trade Union and employee engagement already underway. CNL’s decision to formally reject the Council’s request to merge is likely to create additional uncertainty and anxiety for circa. 1,600 employees within the scope of the merger.

4.2.2 Work to legally transfer NLL business to CNL is well underway. OSCR have consented to the name change and are currently considering the amended Articles of Association which were approved at the Policy and Strategy Committee in February 2019.

4.2.3 The legal Due Diligence process has concluded for both organisations, and NLL have drafted the Business Transfer Agreement between themselves and CNL. With the exception of option (f) above, a merger of both organisations can still be achieved within a few months, although the target date of 1 June 2019 does now appear to be unrealistic. Option (f) will take considerably longer to achieve and will require consent from OSCR, and from the charitable rates relief viewpoint, the Scottish Government.

### **4.3 Environmental Impact**

4.3.1 There are no environmental impacts requiring member consideration at this time.

#### 4.4 **Risk Impact**

4.4.1 The risks previously reflected within the joint Risk Management Plan prepared by the Programme Board remain valid, and have been regularly monitored by the existing Boards of Directors and management teams throughout the transition period to date.

4.4.2 Each of the options identified in paragraph 2.17 bring new risks. All give rise to reputational risk for the Council and its service delivery vehicles. Over and above this, options (b), (c) and (d) carry a risk of challenge from OSCR, and option (f) increases the Council's exposure to financial risk. Options (a) and (e) carry the least additional risk, and are therefore likely to represent those most likely to be considered by committee.

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#### 5. **Measures of success**

5.1 The Council can legally deliver the integrated service delivery model approved by the former Policy and Resources Committee on 27 September 2018 to support delivery of The Plan for North Lanarkshire and its associated Programme of Work.

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**Des Murray**  
**Chief Executive**