

Report to: Cabinet

Date: 8 February 2023

Title: Congress and Devonshire Park Theatres – Future Governance Arrangements

Report of: Robert Cottrill, Chief Executive

Cabinet member(s): Councillor David Tutt, Leader of the Council

Ward(s): All

Purpose of report: To update Cabinet on the progress of the work of the cross-party Devonshire Park Governance Board and to propose changes to the governance arrangements for the Congress and Devonshire Park Theatres in pursuit of cultural and financial benefits.

Decision type: Key Decision

Officer recommendation(s):

1. To note the update on work to date and to authorise the Chief Executive, in consultation with the Leader and the Cabinet Member for Tourism and Culture Services, to take all necessary actions in relation to the project to create the Local Authority Controlled Company including determining the terms of and authorising execution of all documentation.
2. To develop further the plans for the creation of the charitable entity for a future decision by Cabinet.
3. To agree provision of £50,000 to be made available to support the initial steps towards delivery of the new governance arrangement.

Reasons for recommendations: The recommendations build on investment made to date which has enhanced the offer of the Congress and Devonshire Park Theatres, and promote the future of the facilities and the cultural offer for Eastbourne. The proposed, new governance offer would introduce financial safeguards for the council while increasing opportunities for the theatres to raise funds and access funding streams unavailable to local authority-owned and operated facilities.

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1 Introduction and Background

1.1 Eastbourne Borough Council (EBC) owns and operates the Devonshire Park Quarter (DPQ) complex – one of the most vibrant, multi-purpose leisure and culture hubs in the south-east of England.

1.2 Major investment in the DPQ over recent years has significantly improved the quality and range of its facilities, positioning Eastbourne as one of the country's most attractive and high-profile leisure and business visitor destinations.

1.3 A thriving cultural and leisure offer plays a vital role in successful place shaping, honours the investment made over recent years, and safeguards Eastbourne's reputation and status as a great place to live, work, study and visit.

Additionally, the benefits of the DPQ on the local economy – in terms of employment, spend (both within the DPQ and in other parts of the local dining, leisure, hospitality and hotel sectors), attracting visitors, students and residents, and retaining and circulating cultural spend within the local economy – are well documented.

It is, therefore, imperative that EBC considers the most appropriate way for the DPQ to be managed and to strengthen further its contribution to the local economy and identity.

1.4 As a way of building upon the current offer and delivering safeguards to EBC, a cross-party Devonshire Park Governance Board has been exploring alternative legal, constitutional and governance models for the future operation and management of the DPQ. The considerations include, amongst others (see paragraph 5.1), a potential transfer of the assets and undertaking.

1.5 Consideration of alternative governance arrangements is in the spirit of the council's commitment and ambitions to develop the cultural offer, to continue growing the regional and national reputation and audience base, and to lever in additional financial investment.

An alternative governance model would enable and facilitate a range of benefits:

- a sustainable future for the cultural and leisure offer for the benefit of the town and local economy.
- de-risk a range of costs, liabilities and responsibilities for the council.
- protection of the council's VAT recovery position.
- increased opportunities to raise funds and access funding streams.
- Support opportunities to diversify the town's business offer to reduce the scale of reliance on tourism and leisure income.
- ability to deliver a greater impact (social value and cultural participation) than a council-owned and operated service.

1.6 Womble Bond Dickinson (WBD) – specialists in charity law with considerable experience in the charity sector – have provided EBC with initial high-level legal advice on the, in principle, direction of travel of the governance options and the various legal considerations that would be involved in a transfer of DPQ. WBD advised of the need to develop a sound and sustainable business case for the

operation of the site as a going concern by a newly formed charitable independent body, and that operation through a new charitable vehicle is financially sustainable in the short, medium and longer-term.

WBD also confirmed that as a complex and multi-functional site, there are significant activities across DPQ that are not and cannot be charitable (e.g. conference events held by commercial entities). The advice set out that if the newly formed independent body were to operate as a charity, a range of current DPQ activities would need to sit outside of the new governance arrangements.

As such, further consideration of the future governance arrangements for the site has focused on the Congress and Devonshire Park Theatres (the Theatres) only. The Theatres' activities align with a move to a charitable body.

1.7 Detailed, financial modelling is required to enable the council to decide the next steps in relation to the future of the Theatres. The modelling would set out the financial consequences – including best, worst and reasonable case scenarios – of the Theatres being operated by a new, charitable operator, both in relation to EBC and any new charity. To be a viable proposal, EBC must ensure that the independent body would have the resources available to operate as a going concern. The financial modelling will contribute to and support the development of a full business case and plan for the future of the Theatres.

1.8 In addition to legal advice, EBC also commissioned Value Added Consultancy to provide specialist taxation advice in relation to the Theatres and the opportunity of making use of the VAT cultural exemption.

The findings of the consultant are based on the most recent information. These include estimates of the input tax attributable to the council's exempt activities ('exempt input tax') across all cost centres for 2022-23 and 2023-24.

It is important to stress that the conclusions the consultant has reached are dependent on the estimates and could be altered if the actual expenditure differs. Any decisions based on these conclusions should, therefore, allow for a margin of error.

A brief summary of the key points of the consultant's findings are as follow:

- EBC is forecast to exceed the annual partial exemption de minimis threshold for 2022-23 even whilst the Congress Theatre remains taxable. However, it will remain under the threshold when measured over seven years.
- The council will continue to remain below the 5% threshold in 2023-24, measured on the seven-year average, even allowing for the introduction of exempt input tax in the Congress Theatre cost centre, but there is little margin for error.
- EBC is forecast to exceed the 5% threshold under both the annual and seven-year measures in 2024-25, even with the removal of the Congress Theatre. This problem is resolved if the Devonshire Park Theatre is also transferred out.

The latest advice from the consultant confirms that based on the council's projected levels of exempt input tax within each cost centre, it can absorb the

additional level of exempt input tax generated if the Congress Theatre becomes culturally exempt for one year.

A significant change compared to earlier advice is the level of exempt input tax generated by the Devonshire Park Theatre. This significantly reduces the margin of error for the de minimis threshold.

A series of recommendations has been made including EBC making plans to remove the Theatres from council control.

- 1.9 Subject to Cabinet's approval, it is expected that Value Added Consultancy will liaise with the appointed accountancy firm in carrying out the financial modelling work to ensure a joined-up approach between the advice on the VAT cultural exemption and on the broader, financial modelling.
- 1.10 Further advice will be required on the legal considerations of implementing a new governance arrangement, including:
- The potential legal models for the charitable entity and the steps to its creation.
 - The impact of any governance changes on any agreements currently in place for the Theatres and, more broadly, the DPQ.
 - The legal and practical issues arising in the event of a transfer of assets and the undertaking (the staff employment and pension considerations will be covered by the provisions of the Transfer of Undertaking [Protection of Employment] Regulations Act 2006 – commonly referred to as TUPE) from EBC to a new charity.
 - The establishment of the Local Authority Controlled Company (LACC - see paragraph 2.1).

The additional legal advice will be pursued subject to Cabinet's approval of the proposals.

- 1.11 Any changes to the ownership responsibilities at the Devonshire Park complex would require consideration and resolution of a number of complexities from a practical and operational perspective, including:
- Access arrangements for the Congress Theatre – as part of the extensive redevelopment at Devonshire Park, including the construction of the Welcome Building, access arrangements to the Congress Theatre were changed. The only access to the Congress Theatre that is compliant with the Equality Act 2010 is through the Welcome Building.
 - Utilities within the Welcome Building and the Congress Theatre – the buildings share a heating system that cannot be separated.
 - Co-ordination of assets for mutual benefit – there will be occasions when it will be desirable to open the various access points between the Congress Theatre and the Welcome Building (e.g. if there is a show in the Congress Theatre, it would be mutually advantageous to open the café in the Welcome Building and, if there is a large event in the Welcome Building, it may be advantageous for the attendees to be able to use the foyer of the Congress Theatre).

- 1.12 The work to explore alternative governance arrangements for the Theatres sits alongside, is informed by and will need to take into consideration the following external review processes that EBC is engaged with/has undertaken:
- The assurance review with government to explore opportunities to support the council with the financial challenges experienced as a result of the Covid-19 pandemic. An overarching recommendation from the assurance review is that the council should reduce its reliance on tourism income.
 - The Local Government Association peer challenge process which took place in September 2022 and, for which, there will be a follow up review in 2023 (an exact date is still to be confirmed).

Any steps to implement alternative governance arrangements for the Theatres will need to be taken in line with the parameters of the assurance review and peer challenge processes.

Further, any steps to implement alternative governance arrangements for the Theatres will be reviewed every six months in relation to progress.

2 Latest Position and Next Steps

- 2.1 The Devonshire Park Governance Board has considered the best routes, if approved by Cabinet, to implement a new charitable entity to operate the Theatres. The Board recommends Cabinet approve a staged approach to forming the charitable entity, with the creation of a Local Authority Controlled Company (LACC) as an interim step from April 2023.
- 2.2 A LACC is a company which is a subsidiary of the local authority, or the local authority controls the majority of the votes at its general meetings, or the local authority has the power to appoint or remove a majority of the directors/trustees.
- EBC has experience in recent years of setting up a LACC with the establishment of South East Environmental Services Ltd (SEESL).
- 2.3 Local authorities may consider establishing a LACC for certain projects/ activities. The reasons for doing so may include:
- a desire to establish an organisation's independence from the local authority.
 - for the purposes of trading.
 - to attract funding which is not otherwise available to the local authority.
 - the need to ring-fence funding.
- 2.4 The Board proposes the creation of a LACC for the following reasons:
- The LACC would afford EBC the time to develop the sound and sustainable business case for the operation of the Theatres as a going concern by a newly formed charitable independent body.
 - The interim step of using a LACC will allow for the development of a sound operational and financial structure and the basis for the lease terms and service level agreements will be put in place to support the finalisation of agreed financial terms for the charitable entity model.
 - Transfer of the Theatres' operations to a LACC would enable EBC to avail of the VAT cultural exemption.

- Whilst the Theatres are run by a LACC, the rules regarding charities being independent can be fully explored including what this means in terms of governance, and how EBC can secure strategic engagement with a new charitable operator.
- The interim LACC would allow the parties to put in place lease arrangements and a Memorandum of Understanding to govern the practical issues relating to use of the site (e.g. access to the Congress Theatre that is compliant with the Equality Act 2010). The use of the LACC would enable EBC to put in place effective arrangements that are workable in the future.

2.5 If Cabinet approves the Devonshire Park Governance Board’s proposal to explore the creation of a charitable entity to operate the Theatres, with the interim step of forming a LACC from April 2023, the rigour and discipline of a project management approach (using the council’s project management toolkit) would be applied to the next phase of consideration and actions. Regular updates would be provided to Cabinet, along with decision points, at key milestones within the project. Agreement is sought for provision of £50,000 to be made available to support the initial steps towards delivery of the new governance arrangement. Any additional funding requirements for this work will be submitted to Cabinet for approval once the project is fully scoped and costed.

2.6 The Project Board will produce and oversee a plan to deliver the detailed proposals for Cabinet’s approval for the move to a new governance arrangement for the Theatres. The plan will include a number of key milestones and delivery dates for the project, including:

- development of an operational model – early 2023
- aim to deliver tax efficiencies – from 1 April 2023
- define high-level arrangements between the council and the LACC – by the 1 April 2023
- explore the options for and timing of the move to the charitable entity – ongoing.

2.7 An effective communications and engagement strategy with key stakeholders – members, local and national partners, cultural organisations, groups and funding bodies, and staff and trade unions – will be essential throughout this process. This will be mapped and implemented in parallel to, and as part of, the project activities.

3 Conclusions

3.1 EBC is well-positioned to build on improvements implemented over recent years across DPQ by exploring a new governance model for the Theatres. A new, charitable entity, supported in the interim by a LACC would enable and support the next phase of the cultural offer for the benefit of residents, communities and the local economy.

4 Corporate plan and council policies

4.1 The approach and proposals set out in this paper align with and/or further the aims of the following plans, strategies or policies:

- Corporate Plan 2022-2026
- The council's response to the assurance review process

5 Business case and alternative option(s) considered

5.1 The Devonshire Park Governance Board members considered a range of options relating to the future governance of the Devonshire Park and, specifically, the Congress Theatre and the Devonshire Park Theatre, including:

- Do nothing – leave the current arrangements “as is” and manage the activities and assets as part of EBC.
- Charitable entity – transfer the activity and/or assets to a newly-created charity to ensure the future provision of a cultural programme to the benefit of the residents, communities and the local community.
- Privatised the assets/offer – transfer the Theatres (buildings and activities) to a 3rd party to operate as a commercial concern.
- Management company – operate the Theatres through a wholly owned EBC company (a Local Authority Controlled Company – LACC), tasked with managing the buildings and services.

The Board considers the proposal to transfer the Theatres to a charitable entity, via a LACC, best aligns with the council's commitment and ambitions to develop the cultural offer, to continue growing the regional and national reputation and audience base, and to lever in additional financial investment.

6 Financial appraisal

6.1 The Finance implications are dealt with in the body of the report. Comprehensive financial advice (both internal and external) has been, and will continue to be, taken as the proposals are progressed.

7 Legal implications

7.1 The legal implications are dealt with in the body of the report. Comprehensive legal advice (both internal and external) has been, and will continue to be, taken as the proposals are progressed.

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8 Risk management implications

8.1 Subject to approval by Cabinet, a full assessment and management of any risks will be undertaken, as part of the project management approach.

9 Equality analysis

9.1 Subject to approval by Cabinet, an equality analysis will be undertaken, as part of the project management approach.

10 Environmental sustainability implications

10.1 Subject to approval by Cabinet, the environmental implications and opportunities will be assessed, as part of the project management approach.

11 Appendices

None

12 Background papers

None