

Key Decision (Officer)

Date: 22 May 2020

Exempt or confidential report

The following paragraph of Part 4b Section 10 of the constitution applies in respect of information given in **Appendices 1, 2 and 3** of this report and they are therefore exempt from publication. Members and officers are advised not to disclose the contents of this report:

Information relating to the financial or business affairs of any particular person (including the Authority holding that information).

Wards: All Wards

Subject: Leisure Centres Contract – Covid 19

Lead officer: Christine Parsloe, Leisure & Culture Development Manager

Lead member: Councillor Cooper-Marbiah, Cabinet Member for Commerce, Leisure and Culture

Contact officer: Christine Parsloe, Leisure & Culture Development Manager

Recommendations:

- A. To award Greenwich Leisure Limited an interest free grant of £305,555 operational costs (excluding salaries). This is in accordance with the specific Covid 19 - Deed of Variation to the contract, in order to support the organisation through this extraordinary time and retain their services in readiness for re-opening the Leisure Centres in the fullness of time.
 - B. Give authority to the Director of Environment and Regeneration, in consultation with the Cabinet Member for Commerce, Leisure and Culture, to agree the final detail of the Covid 19 – Deed of Variation and to use his delegated authority to enter into the Covid 19 – Deed of Variation.
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1 PURPOSE OF REPORT AND EXECUTIVE SUMMARY

- 1.1. The Leisure Centres have had to close under central Government instruction due to the Covid 19 pandemic. This has placed the operators in a difficult financial position. This report seeks approval to support the operator with financial support so that they are in a position to reopen the facilities once the emergency situation is over.

2 DETAILS

- 2.1. Central Government required providers of leisure facilities to close as part of their response to the Covid 19 pandemic. This requirement is set out in secondary legislation, in force 26 March 2020, 1pm, The Health Protection (Conovirus, Restrictions) (England) Regulation 2020 (Regulations), which provides that indoor fitness studios, gyms, swimming pools, or other indoor leisure centres “must cease to carry on that business” from 2pm on 21 March 2020. The regulations make it an offence to contravene the Regulations “without reasonable excuse” and the Regulations currently expire in 6 months’ time.

- 2.2. Merton's operator immediately complied with this secondary legislation and closed the 3 leisure centres in the borough and then alerted the council to the need for financial assistance on 24 March 2020. Since this request, officers have been working with GLL to consider how best to support them, whilst still ensuring that they maximise the Government benefits; minimise costs whilst keeping their previous customer base supported through such measures as 'free' online exercise classes, etc. The result of these discussions is an understanding by all that GLL will need financial support from the council if they are going to survive as a social enterprise and specifically in relation to the Merton contract.

3 ALTERNATIVE OPTIONS

- 3.1. Various options have been considered from retaining GLL as an operator to GLL no longer being able to survive as a social enterprise and the council having no operator for the centres once the Covid 19 pandemic is over. Other options for consideration is what the council should or should not fund in relation to the request from GLL and the Merton's contractual agreements, set in the context of the secondary legislation and associated Public Policy Note (PPN 02/20 attached at Appendix 4). Finally, options giving consideration as to whether the finance should be a loan or grant; recoverable or non-recoverable and whether the finance should require interest to be paid or not.
- 3.2. It is clear that should the Council (and other councils) not provide this financial support in line with Government advice and guidance then GLL would be unable to continue as a viable entity and Merton would need to consider how to operate the centres post Lockdown.
- 3.3. GLL has taken advantage of all routes available to it from government funding including:
- Govt Job Protection Scheme
 - Business Rates Holidays
 - Deferral of VAT payments
- 3.4. Other Government loan schemes are generally aimed at SMEs and are too small for an organisation of GLL's size.
- 3.5. GLL does have business interruption insurance in place however insurance companies are generally not paying out on Covid-19 business interruption.
- 3.6. GLL has also investigated loans but, because of existing borrowing, it states that there is little opportunity to raise more loan finance. In addition, commercial loans will not resolve the financial problems faced by GLL as it will just delay the problem for a later date as they are unlikely to generate sufficient income of the scale required in order to repay commercial loans.
- 3.7. GLL is currently drawing heavily on its reserves due to the Covid-19 impact to the value of circa £1.5m per week with no income to offset this. This cannot continue for GLL as reserves will be exhausted without support from local authority partners.

4 CONSULTATION UNDERTAKEN OR PROPOSED

- 4.1. Specialist financial and legal advice has been sought from FMG Consulting Ltd and Blake Morgan LLP respectively.

- 4.2. The Director of Environment & Regeneration coordinated discussions and deliberations with all London borough directors with GLL as their contracted leisure operator so that all could share understanding and knowledge, whilst seeking to agree a set of principles by which all could then finalise their individual agreements in line with the secondary legislation; the Public Policy Note (PPN 02/20) and the individual contractual agreements within each authority.
- 4.3. These discussions included the Chief Executive and key Directors of GLL, during the final stages, so that GLL could clearly explain and discuss the challenges they are facing, whilst also gaining an insight into some of the wider pressures on public funds.
- 4.4. Consultation was also undertaken across public sector procurement officer forums and leisure client officers.
- 4.5. All of the information from all sources have been considered in determining the approach proposed in this report.

5 TIMETABLE

5.1. **Table 1 Key Dates**

Date	Activity
20 March	Leisure Centres last day of trading
21 March	Secondary legislation effected
24 March	GLL alert Merton to financial shortfall
May	Key Decision Report Agreed
May	Deed of Variation – Signed and Sealed
June	Grant payment to GLL
TBD	Government announcements on reopening Leisure Centres
July	First review of use of grant via Open Book with GLL (end of first quarter). All reviews will be done quarterly thereafter until the repayment is complete.

6 FINANCIAL, RESOURCE AND PROPERTY IMPLICATIONS

- 6.1. The detail of GLL’s ‘financial ask’ is included as Appendix 1 (Exempt).
- 6.2. The interest free grant to GLL is expected to be repaid over the next 10 years of the contract by changes to the profit share arrangements, through a Deed of Variation.
- 6.3. The repayment terms mean that the Council will receive 100% of the GLL’s “Operating Surplus above Contractor Profit” each financial year until either the grant is repaid, or until the end of the contract in 2030.
- 6.4. There is also an opportunity cost to this grant, which has been calculated as being in the region of £12,600.

- 6.5. FMG Consulting Ltd (Leisure Consultants) have provided advice and guidance on this Deed of Variation and their report is attached at Appendix 2.
- 6.6. The cost of the legal and financial advice for this Deed of Variation is c£30,000.
- 6.7. The cost of the grant and associated legal and consultancy costs will be charged against the Government's Covid-19 grant, but this may not cover all of the Council's Covid-19 costs.
- 6.8. As part of this agreement, the Council will also forego guaranteed income from the GLL contract until the end of June 2020 of c£232k. This could increase should the restrictions on leisure centres remain in place.
- 6.9. However, it should also be noted that as the Council is liable for the leisure centres' electricity and gas costs, there will be an element of cost reduction in this area until they fully reopen.

7 LEGAL AND STATUTORY IMPLICATIONS

- 7.1. Blake Morgan LLP have provided legal advice and guidance as well as the drafting for the Deed of Variation. Their reports are included at Appendix 3.
- 7.2. At the moment the Government requirement to close leisure centres is set out in secondary legislation, in force 26th March 2020 1pm, The Health Protection (Coronavirus, Restrictions) (England) Regulation 2020 (**Regulations**), which provides that indoor fitness studios, gyms, swimming pools or other indoor leisure centres "must cease to carry on that business" from 2pm on 21 March 2020. The Regulations make it an offence to contravene the Regulations "without reasonable excuse" and the Regulations currently expire in 6 months' time.
- 7.3. As the Prime Minister's direction may be seen as "Guidance" and the Regulations as "Legislation" in the GLL leisure contract (**LMA**), it is likely that there has been a Change in Law with which GLL must comply. Pursuant to the LMA, and unlike many other leisure operator contracts based upon Sport England Standard Form, GLL and not the Council are responsible, pursuant to the LMA, for Change in Law, unless there is a Capital Expenditure impact, which is not considered to be the case by the parties.
- 7.4. GLL are, however, entitled to relief under their contract, if the forced closures are treated as an embargo and a Relief Event. This relief is sought to be granted pursuant to and in accordance with the LMA. During such period, GLL would be relieved from their obligation to provide the full services and to pay the Management Fee and any under-performance payment adjustments to the Council, but would need to continue to provide essential services connected with Legislation, health and safety, essential caretaking, testing and maintenance.
- 7.5. The Cabinet Office has issued a Procurement Policy Note (PPN) on Supplier relief due to COVID-19 (PPN 02/20) and some Model Interim Payment Terms (Model Terms) which Blake Morgan LLP believe can be considered somewhere between best practice and law. In their experience authorities do tend to follow them.
- 7.6. The PPN suggests maximising commercial flexibilities within the contract, to include waiving or delaying the Council's rights and remedies such as service credits or termination rights. However, the note also states the Council should take account of its own contract, contractor performance, and the procurement

regulations that permit variations and state aid rules. The Council's own contract has been considered in reports provided by Blake Morgan, set out in full at Appendix 3, a summary of which is provided above.

- 7.7. In response to the PPN and in consultation with other London borough directors contracting with GLL, the Council is looking to agree to provide additional relief to GLL by way of an interest free repayable grant. Such grant would be repaid through the existing profit share payments that are already permitted under the LMA (whereby profit above a certain threshold is shared between the Council and GLL), but will require a variation of the LMA to increase the possibility of recovering the grant through a greater profit share whilst the grant is due and unpaid. The variation to the LMA therefore seeks to recover the grant from the Contractor over the remaining duration of the contract, and if the amount is not repaid during the remaining duration of the contract, i.e. because GLL never recovers to that extent after this unprecedented event, then the Council would not seek to pursue GLL for any unpaid balance. The contract variation is to allow for this mechanism during the period for which the grant is repayable and not repaid.
- 7.8. The Local Government Association (LGA) in conjunction with UK Active and Community Leisure UK issued guidance on 29th April 2020 "Options for councils in supporting leisure providers through COVID-19", attached to this report at Appendix 5. This report, the consultation undertaken, the advice received to date, the relief being offered to GLL and the Deed of Variation are in line with this guidance, which encourages councils to support their operators through a number of means, to include funding costs, protecting cash-flow, waiving sums owed by the operator, offering interest free loans or grants, deferring rental costs, paying for necessary costs to support the essential maintenance and reopening of centres and utilising open book reconciliation on a quarterly basis.
- 7.9. Blake Morgan LLP and FMG Consulting Ltd are in the process of drafting a deed (**Covid 19 – Deed of Variation or Deed**) recording the relief event being given pursuant to the LMA and the variation required to the LMA, effective from the end of the Covid relief period. This is currently the 30th of June 2020, but the Deed seeks to allow an extension of that period by email should further extensions be warranted, for example due to additional PPNs or the need for a phased opening of some but not all leisure centres and resumption of some but not all services.
- 7.10. Please be advised that this Deed is in advanced stages of being finalised, but has yet to be shared with GLL, which is expected to happen during the course of this week, and hence there may be some adjustments made to the relief and variation described in this report, as a result of their input. For this reason, authority is sought to be given to the Director of Environment and Regeneration, in consultation with the Cabinet Member for Commerce, Leisure and Culture, to finalise the Covid 19 – Deed of variation with GLL and to use his delegated authority to enter into this Deed.
- 7.11. Blake Morgan LLP have provided procurement and state aid advice on the variation to the LMA. In terms of procurement, on the basis of the information we have, there appear to be strong arguments that at least two of the safe harbours under Regulation 72 PCR will be met such that the proposed variation can be said to be permitted by PCR and will not therefore amount to a substantial

change and require re-procurement. In terms of state aid, provided that this is considered to be an interest-free repayable grant and not an interest free loan, it is considered that Section 3.1 of the Temporary Framework can be said to apply to the proposed support. Blake Morgan LLP's more detailed advice on these points is included at Appendix 3.

8 HUMAN RIGHTS, EQUALITIES AND COMMUNITY COHESION IMPLICATIONS

- 8.1. Leisure Centres are important community resources in which communities can take part in community sport and social activities. These venues offer activities and events which engage with all people of all backgrounds and they do so to generate positive community cohesion experiences.

9 CRIME AND DISORDER IMPLICATIONS

- 9.1. Leisure Centres, on the whole, are venues where activities and events take place to bring people and communities together. They are places that provide positive activities and role models and they discourage crime and disorder by offering positive alternatives.

10 RISK MANAGEMENT AND HEALTH AND SAFETY IMPLICATIONS

- 10.1. The greatest risk for the council is that the leisure centre operator does not survive the economic impact of the Covid 19 pandemic, leaving the council without an operator and needing to source a new operator in a difficult economic climate or having to take the service back in-house. This would cause increased risks from a Health and Safety perspective, since at the current time GLL are doing daily visits to check on all facilities to ensure that all plant and machinery are continuing to tick over and are in good working order as well as the buildings being safe.

11 APPENDICES – THE FOLLOWING DOCUMENTS ARE TO BE PUBLISHED WITH THIS REPORT AND FORM PART OF THE REPORT

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- Appendix 1 – GLL's 'Financial Ask' (Exempt)
- Appendix 2 – FMG – Financial Advice (Exempt)
- Appendix 3 – Blake Morgan LLP – Legal Advice (Exempt)
- Appendix 4 – Public Policy Note (PPN 02/20)
- Appendix 5 – LGA Guidance Note - Options for councils in supporting leisure providers through COVID-19

12 BACKGROUND PAPERS

- 12.1. Files on the Leisure Contract relating to the Covid 19 pandemic