

# CHESHIRE EAST COUNCIL

## Cabinet

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<b>Date of Meeting:</b>	28 <sup>th</sup> May 2013
<b>Report of:</b>	Head of Public Protection and Enforcement
<b>Subject/Title:</b>	Key Decision 10 - Update on the Review of Service Delivery Options – Leisure Services
<b>Portfolio Holder:</b>	Councillor Janet Clowes (Health and Adult Social Care)

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### 1.0 Report Summary

- 1.1 A key decision 12/13-19 Cabinet resolved “That approval is given to the procurement and appointment of a suitable leisure and financial consultant to review the range of potential delivery models available and recommend a preferred option for leisure and related services”;
- 1.2 This report now sets out the work to date on the various potential delivery models to secure the future of leisure services. It seeks Cabinet approval for the creation of a company that will be a charitable Trust and that the delivery of leisure services will be transferred to that company. The project is in line with the Council’s three year plan: Priority six: Redefining the Council’s role in core place-based service. It is also part of the Major Change Programme “6.1: Developing new delivery model for leisure provision”
- 1.3 The Council’s leisure facilities are currently managed ‘in-house’. In line with the need to deliver efficiencies in future service provision; this report outlines the conclusions from the options appraisal work by FMG consulting.
- 1.4 The project has been reviewed by the Technical Enabler Group (TEG) on the 2<sup>nd</sup> May and its comments have been taken into account in the writing of this report. Further work has also been undertaken on the project documentation following the TEG meeting and will be presented for endorsement to the Executive Monitoring Board (EMB) on the 14<sup>th</sup> May.
- 1.5 The current service is an amalgamation of those inherited from the three former district councils including fifteen facilities: a total of nine sites have swimming pools and two have athletic stadiums. Of these, eight are joint-use community leisure facilities shared with high schools. This process also includes the Council leisure, sport and play development team as phase 1. Annual attendance visits for 2011/12 was 2.7 million. The service has 400 plus FTE staff who will transfer to the trust and in the last financial year the council invested £9.040m in the service.

### 2.0 Decision Requested

- 2.1 Cabinet is asked to note the findings of the options appraisal and consultation exercise that have concluded that the most appropriate model to be that of a

charitable trust. The full options appraisal report is attached at appendix A for completeness.

- 2.2 Cabinet is asked to approve the formation of the Trust and the transfer of leisure services into it with an effective target date of 1<sup>st</sup> April 2014 with the trust being established by the end of the year at the latest. In making this decision Cabinet should take into consideration sections 9 and 10 of this report and in particular 9.1. The implementation of the 1<sup>st</sup> of April assumes that they will be no significant delays in relation to critical external dependencies (i.e.- Charity commission registration)
- 2.3 Once 2.2 has been confirmed, that delegated authority be given to the Head of Public Protection and Enforcement (SRO for the project), Borough Solicitor and 151 Officer (or the officers that are devolved those powers) to implement the preferred delivery model in consultation with the Portfolio Holder and Leader of the Council.

### **Reasons for Recommendations**

- 3.1 There is a need to achieve best value for the services that the Council directly provides and reduce net operating cost wherever possible, whilst at the same time maintaining the best possible service for its residents in line with the Council's three year plan.
- 3.2 The review of leisure facilities and the establishment of a charitable trust means that the leisure facilities will not be privatised and a trust will also help to achieve the previous point whilst also maximising opportunity for partner engagement and promoting high quality service delivery..
- 3.3 The purpose of the options report was to deliver an appraisal for leisure services and to determine the future delivery models which also include leisure, sports and play development services,. The analysis covered both the financial and non-financial implications of different management vehicles and has covered a wide range of potential options, including:
  - Continued in-house management;
  - Outsourced management – either through a private company or an existing charitable company (Trust); and
  - Establishing a new company – either charitable or non-charitable, covering the following options:
    - Unincorporated Charitable NPDO;
    - Industrial and Provident Society (IPS);
    - Company Limited by Guarantee (CLG);
    - Charitable Incorporated Organisation (CIO);

- Limited liability partnership (LLP);

- 3.4. The report has concluded that the most viable option is a charitable trust and this should be in the form of new one created by the Council.
- 3.5 In reaching this decision members should also be aware that 4 week consultation exercise has been undertaken and the evaluation of the consultation exercise shows that 62% of the responses were supportive of charitable Trust. A number of responses were also received from Schools and Parish Councils. (The full consultation analysis is attached at appendix B)
- 3.6.1 There is a requirement for the project to go through the Councils project Gateway process for review and endorsement before a recommended way forward can be presented to Cabinet. At the time of writing this report it has been reviewed by TEG and will go for EMB endorsement on the 14<sup>th</sup> May.

#### **4.0 Wards Affected**

- 4.1 All Wards are affected.

#### **5.0 Local Ward Members**

- 5.1 All Local Ward Members.

#### **6.0 Policy Implications**

- 6.1 The Council's three year plan outcome 5 –People live well and for longer- in particular that "local people have healthy lifestyles and access to good cultural, leisure and recreational facilities".
- 6.2 The Council's Business Plan identifies efficiency savings linked to Leisure services (Priority 6. Redefining the Council's role in core place-based services- 6.1: Develop new delivery model for leisure operations).

#### **7.0 Financial Implications**

- 7.1 The financial savings associated with the establishment of trust do not currently include any potential savings due to a revision of staff terms and conditions, this will be explored in more detail and any potential savings will be in addition to those that are mentioned later in this report.

The report assessed the financial implications of the outsourcing options being considered based on the following key income and expenditure areas:

- the current net direct costs of the services;
- the impact of VAT and NNDR on the different models;
- the impact arising from central support costs;

- profit, contingency and overheads;
- the impact on pension costs to the Council and operator;
- set-up costs and timescales;
- operational changes to increase revenue or reduce costs; and
- implications of including other services within the commissioning opportunity.
- The potential to work more closely with partner organisation including Town and Parish council in alternative delivery models.

7.2 The external consultant's report commissioned to review the various delivery vehicle options calculated that the trust model delivers the highest amount of annual savings for the Council with an existing trust providing a greater level of savings than a new trust. This is mainly because an established trust has lower management costs, easier access to capital funds that can be invested to generate additional income, greater economies of scale and new expertise that a new trust could not offer in the short term. This was confirmed in the net present cost modelling of each option over a 25 year period (see table below)

7.3 There is further work required to review the figures provided in the consultant's report and to investigate further costs of implementation. In particular, the additional pension costs, the impact on the Council's support services costs and further savings that could be delivered. However it is clear the NNDR and VAT savings alone present a strong business case for the move to trust status. The report indicates that a saving of 20% of net direct service costs could be saved through NNDR and VAT benefits.

	In-House £ (Base)	Private Sector £	Existing Trust £	New Trust £	New CIC £
Total 25 year cost	£94,940,205	£91,424,170	£77,234,553	£84,664,134	£105,451,700
Net Present Cost (including set-up costs)	£60,473,754	£58,516,256	£49,477,942	£54,180,446	£67,421,434
<b>25 Year Benefit compared to base NPC</b>	<b>£0</b>	<b>£1,957,498</b>	<b>£10,995,812</b>	<b>£6,293,307</b>	<b>-£6,947,681</b>

The recommendation is to establish a new trust charitable trust as this will provide an excellent level of saving and will deliver the greatest non-financial benefits to the Council, particularly in relation to strategic priorities and integration of services. All current sites within Leisure facilities will be included.

- 7.4 The total cost of implementation of the preferred model is the region of £200k and funding is already in place for this, however members should be aware that examples from other authorities have indicated that this could be as high £400k. The costs of implementation will be monitored by the project manager , within the £200k allowance has been made for external legal advice, a dedicated Project Manager and extra capacity to support the assets service. The project being delivered within this budget will depend on whether any unexpected implementation costs are incurred, the capacity of the other corporate enablers (HR, Finance, Procurement) to deliver and if a shorter time frame is required then that recommended at 2.2 then the cost will be considerably more, further work will be required to establish a clear budget for the establishment of the charitable trust.

## **8.0 Legal Implications**

- 8.1 Unless the Council is outsourcing the service delivery to a company that is wholly controlled by Cheshire East Council it will be necessary to undertake a procurement exercise. Contracts for the provision of leisure services are “Part B” Services for the purposes of the EU procurement rules. Part B Services contracts should ordinarily be competed under EC Treaty principles where there is a realistic prospect of cross-border interest for the award. If this arises then a proportionate level of European wide advertisement and competition should be carried out in order to open up the opportunity to fair and transparent competition in the European provider market. The form of advertisement need not be by Contract Notice in the OJEU (although this is often used as an effective way of discharging this obligation).
- 8.2 As the value of the service contract exceeds £173,934, the contract is also further subject to limited application of the Public Contracts Regulations 2006 (as amended) and in particular in relation to non-discriminatory technical specifications; requirements to treat bidders equally and in a non-discriminatory way; and also to act transparently. The level of representation on the trust board cannot exceed 20% otherwise the trust cannot be seen to be independent for charitable purposes. In order to achieve the full tax benefits a charitable trust cannot be wholly controlled. This is pertinent because the only exemption from the procurement requirements is in a situation where the services are being transferred to a company that is wholly owned and controlled company (this is called the *Teckal* exemption). External legal advice has confirmed that transferring the service to a wholly owned company (the *Teckal* company) and then subsequently transferring the company into the ownership of the leisure trust would not provide a more viable route since in disposing of the *Teckal* company, the new ownership arrangements introducing private interests would invalidate the *Teckal* status of that company and therefore it would not be able to retain the arrangement

to provide services back to the Council. Indeed, the establishment of a *Teckal* body for the purposes of an imminent onward sale could in itself be considered a single linked transaction in breach of the procurement rules.

- 8.3 In the event that Council, following due diligence, concludes that there is not sufficient cross-border interest in the leisure service, it can make a direct award to a trust however this is open to challenge. If successfully challenged then the contract could be set aside as ineffective and the staff and service will revert back to the council. If a procurement challenge is brought under the Public Contracts Regulations 2006 for the award (or prospective award) then the complainant would normally only have 30 days to bring proceedings from when they first knew, or ought to have known, the grounds of starting proceedings arising. The courts have discretion to extend this to 3 months in exceptional circumstances. Therefore, market notification (in terms of a press release or award notice in the OJEU) may be sufficient to commence time running for this purpose. This may not be attractive as it would mean drawing attention to the issue but would serve as a means to flush out possible industry objection. A challenge on the basis of a judicial review of the Council's decision on the basis of compliance with the EC Treaty principles would have to commence within 3 months from when the grounds for challenge first arose.

A complainant could raise a complaint with the European Commission which would then investigate the issue with the UK government. If it is unsatisfied with the justification in response, it could ultimately refer the issue to the European Courts. Such actions would lie against the UK government (rather than directly against the Council) which could ultimately result in the member state being fined (though this is rare). There is no time-limit for such a complaint being brought to the Commission. Expert legal advice will be required in the event that the award is challenged and this will be in addition to the external legal resource already figured into the project cost. No consideration has been made as to the length of the service delivery agreement with the trust or the lengths of leases to the trust.

- 8.4 The Council will also need to consider the risk of any funding to the Trust being deemed unlawful state aid. State Aid may arise where the Council provides aid to select undertakings (any entity which puts goods or services on the given market), which has the potential to distort competition and affect trade between member states of the European Union. The outsourcing of Glasgow's leisure and cultural services to a leisure trust was for example formally challenged on state aid grounds; the challenge was however turned down by the European Commission. It will be important therefore to ensure that state aid is properly considered as part of the decision making over the structure of the arrangements.
- 8.5 If service delivery is transferred to a trust the Council will not maintain influence over decision making and it will not be able to depend on transferring further services should it decide to do so in the future. At school

sites the council has joint use agreements in place with the schools and these will need to be honoured by the trust.

- 8.6 As the trust will be completely separate entity to the council it will have its own governance and approval process, the only representation the council is permitted is an allocation on the board of less than 20 percent a balanced trust board including elected members and senior officers would allow the Council to retain a good degree of strategic control, ensuring service delivery is aligned with the priorities of the Council.
- 8.7 A detailed outcome specification and performance management system will ensure services are focused on the priorities of the Council and local residents, with any management fee linked to the delivery of agreed outcomes.
- 8.8 Transferring the service delivery to an arm's length company such as a Trust will trigger a TUPE transfer of employees who are working in or for the leisure service immediately before the transfer.
- 8.9 The council will have to undertake the necessary due diligence to identify which employees have the right to transfer to the Trust and to be able to provide the necessary employee liability information in accordance with the TUPE regulations. The Council and the Trust will also have to comply with the Regulations consultation requirement which stipulates that consultation on changes to terms and conditions (measures) needs to be conducted in good time before the transfer. In "good time" is not defined in the regulations but a comparison is usually drawn with the timescale for redundancy consultation which is 45 days.
- 8.10 As part of the project the review of employment terms and conditions will be undertaken to ensure the future success of the trust in the leisure market.
- 8.11 Specialist pension/actuary advice will be required on pension issues and confirmation of the potential bond costs will need to be established which could be considerable in relation to the transferring staff. The Trust may well also see an increase in the employer contributions of the employees post transfer. If the Trust chooses not to offer access to the LGPS pension for any new starters it will also have to seek expert pension advice in relation to what pension fund to offer new starters and the required implementation and associated costs.
- 8.12 As part of the implementation plan, the board of trustees will be appointed and this board will become responsible for forming and recruiting to the management structure of the Trust.

## **9.0 Risk Management**

There are number of risk associated with the project, these are captured in detail along with mitigating actions as a part of the Project governance, the

below represents the pertinent ones that it is felt necessary to bring to the attention of members.

- 9.1 Early and continued engagement with trade unions and the existing workforce even at this early stage will be key to successfully delivering the outcomes of the review and also in transitioning to a new delivery model.
- 9.2 Early and continued engagement will also be required with the Cheshire Pension fund in relation to the actuary reports required in relation to the transferring employees, bond requirements and pension changes and the completion of a Pension Admission Agreement Cheshire pension fund are already aware of the request and once a decision is made then they will be formally instructed to commence the work
- 9.3 The creation of the Trust well in advance of the anticipated transfer of Service date to ensure that the Trust is able to undertake all the necessary preparatory steps prior to the transfer and to engage in the necessary consultation both with the employees and the Council.
- 9.4 Considerable Input from Legal and Assets Services will be needed to ensure the Council's ownership is protected in order to secure the future use of the assets for leisure and recreational purposes, members of staff from legal service form part of the project and allowance has been made within the implementation costs for the required assets work to be carried out.
- 9.5 There will be a number of Procurement issues that will need to be considered further as part of the in-depth review of the preferred delivery model, these will include current regulations that address asset and service transfer;
- 9.6 Guidance suggests that there are different routes depending upon whether the asset is to be transferred or a service is to be transferred.
- 9.7 The ongoing issues with the Council's physical asset stock mean that major investment will be required in the near future to deliver the Lifestyle Hubs. This level of major asset work can be incorporated into any future delivery model, but it is more complex if a private outsourcing model is selected due to the contractual nature of the relationship with a third party provider and this is compounded if the likely outcome of the asset strategy is unknown when the contract is entered into. This will be further explored as part of the review.
- 9.8 In order to achieve the fiscal benefits of a trust model, it is also likely that the existing and any future leisure facilities will be leased to the company, with appropriate safeguards around facility maintenance and service delivery.
- 9.9 Whilst a different delivery model could realise revenue budget savings in relation to changes in VAT status, care will need to be taken in respect of arrangements for future capital investment (i.e. to avoid incidence of significant irrecoverable VAT on developments).



- 9.10 Should a procurement challenge be successful and therefore the Charitable Trust is not an option the fall back position, would be the creation of an organisation under the Teckal exemption (or other option)
- 9.11 Currently the shared services SLE is being established and once this has been implemented, there may be an obligation on the Council / Trust to continue using the shared services arrangements on interim basis, and therefore savings from this element may take longer to realise- the final decision on the provider of these services will be made by the Trust.
- 9.12 Similarly the impact on the councils other support services associated with this service will need to be managed effectively as part of the project. This will ensure the trust retains the necessary expenditure and staff resources to deliver the core business whilst reducing the likelihood of any residual overhead remaining with the council.

## **10.0 Background and Options**

- 10.1 The establishment of a trust to deliver leisure operations was considered in the early life of CEC and was deemed to be the preferred delivery model at that time. The report has concluded that this is still the most appropriate option.
- 10.2 Further consideration will be given to the range of services that will constitute the makeup of the potential trust but the first phase will be the whole of the Leisure facilities services including the leisure, play and sports development service
- 10.3 Initial advice has indicated in financial terms, that a transfer of leisure facilities either via a new trust or existing trust model is likely to provide the greatest potential for savings. In non-financial terms the service and community benefits associated with a trust model provide a clear driver for setting up a new trust that can become a strong delivery vehicle across leisure and other services in the future.

### **Action Plan for implementation**

- 10.6 In order to implement a delivery model, there is a large amount of documentation to be prepared and legal requirements to be met. This will require a specialist dedicated Project Manager with in-depth knowledge of the area and a dedicated internal project team will be needed, with this in place the preferred model should be achieved in time for the next financial year.
- 10.7 The key elements of the implementation of the trust and in order to achieve this ambitious timeframe being:
- Appointment of Board Members by the- 1<sup>st</sup> September 2013
  - Appointment of CEO and Management Team- 1<sup>st</sup> November 2013
  - Asset Surveys & Leases completed – 31<sup>st</sup> January 2014
  - Drawing up of SLA and Performance specification – 1<sup>st</sup> February 2014

- Registration with Charities Commission confirmed 28<sup>th</sup> February 2014
- Completion of Trust Business Plan- 28<sup>th</sup> February 2014
- Trust becomes fully operational- 1<sup>st</sup> April 2014

## **11.0 Access to Information**

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