

Cheltenham Borough Council

Cabinet – 18 March 2014

Leisure and Culture Trust – Memorandum and Articles of Association and Company Registration

Accountable member	Councillor Rowena Hay, Cabinet Member for Sport and Culture
Accountable officer	Pat Pratley, Deputy Chief Executive
Ward(s) affected	All
Key Decision	No
Executive summary	<p>In December 2012 Cabinet received a report on the progress being made with the commissioning options for the future delivery of the leisure and culture services currently provided by the Council. Cabinet endorsed the recommendations contained within the report, ie, to create a charitable trust. Cabinet also recommended that the trust should have broad objects to advance health, arts, sports and education.</p> <p>Since the last report the commissioning project has progressed such that shadow trustees were appointed in December 2013. The shadow trust board has now commenced its formal meeting schedule and is preparing to undertake work to progress all matters necessary to create the new charitable trust.</p> <p>One of the early actions that the shadow board of trustees will need to take is to register the company. The reason for this is that a number of matters which need to be progressed require the company to be registered, eg, application for charity registration, setting up of bank accounts and, ultimately, agreement of contracts and leases. In order to register the company the shadow trustees need to have agreed the company Memorandum and Articles of Association (M&A). The shadow trust will be supported during the set up period by its own legal advisers who will support the shadow trustees with advice to ensure their constitution is relevant and any liabilities arising from decisions taken are covered.</p> <p>The shadow trust board has now met to consider the M&A. The document attached at Appendix 2 is the format now agreed by the shadow board. It contains a number of amendments from an earlier draft which was considered by group leaders and therefore the recommendation made here is that the Cabinet Member for Sport and Culture finalise the M&A to be used for company incorporation in consultation with the group leaders. It is hoped however that that such consultation may have been concluded in time for this meeting.</p> <p>A final matter for Cabinet to be aware of at this time is that Gloucestershire County Council Pensions Committee will be meeting in May and will be asked to grant admitted body status to the new charitable trust. The county</p>

council, as the administering authority, will require Cheltenham Borough Council to act as the guarantor to the LGPS scheme that the trust will provide for staff who TUPE (Transfer of Undertakings (Protection of Employment)) to the new trust.

Recommendations

- 1. Cabinet recommends that the Cabinet Member for Sport and Culture, in consultation with the Group Leaders, finalise the wording of the Memorandum and Articles of Association;**
- 2. Cabinet notes the Shadow trust's intention to register the company using the company name Cheltenham Leisure and Culture Trust**

Financial implications

Employees pay contributions to the LGPS, with the employer making contributions to pay the balance of the cost of providing employee benefits after taking into account investment returns. Every three years, an independent actuary calculates how much the employer should contribute to the scheme. The amount will vary and the proposal to address the funding of future 'potential' liabilities will be set out in the contract between the Trust and the Council.

At the point of TUPE transfer, an actuarial assessment will be made to ensure that the proposed contribution rates are enough to pay for benefits accrued which should mitigate, as far as is practicable, future liabilities.

The administering authority (Gloucestershire County Council) will require the Council to act as guarantor for any pension fund deficit which might accrue over the contract period. It should be noted that this is also the case for any deficits that are held by Cheltenham Borough Council as an employer within the LGPS.

**Contact officer: Paul Jones,
Paul.jones@cheltenham.gov.uk, 01242 775154**

<p>Legal implications</p>	<p>The Articles and Memorandum of Association are drafted in a standard format, identifying a widely drawn set of objects and powers of the Company, all in line with the charitable purposes of it. The widely drawn powers do not mean that the Company will exercise them only that they can if so needed without the need to change the Article and Memorandum of Association later.</p> <p>The suggestions put forward by the Shadow Board allow some flexibility for them to appoint a Chair who is coming near the end of their normal six year maximum tenure and allow another three years (up to a maximum in total of nine years) for them to act so as not to lose their skills. Articles 3.8 and 3.9 deal with this.</p> <p>The other changes do not detrimentally affect the Trust or the Council and do emphasise, in some instances, the independence of the Trust from the Council (Article 4.5)</p> <p>The issues regarding the LGPS are explained in this report in particular that Gloucestershire County Council is very likely to require a guarantee from this Council on any deficits that may accrue. This is an integral part of the Admissions Agreement.</p> <p>Contact officer: Gary Spencer Gary.spencer@teWKesbury.gov.uk, 01684 272691</p>
<p>HR implications (including learning and organisational development)</p>	<p>The HR implications are set out in the body of this report.</p> <p>Contact officer: Julie McCarthy julie.McCarthy@cheltenham.gov.uk, 01242 264355</p>
<p>Key risks</p>	<ol style="list-style-type: none"> 1. If the M&A are not agreed upon then the company registration cannot take place 2. If the company registration does not take place early enough then key administrative matters, eg, setting up of bank accounts may not be achieved for the go live date 3. If the Council does not act as pension guarantor then the trust will not be granted admitted body status to the LGPS
<p>Corporate and community plan Implications</p>	<p>The creation of a new trust for leisure and culture services supports the following Council's strategic objectives:</p> <p>Enhancing the provision of arts and culture – building on the strengths of the current services by reaching out to communities and encouraging participation in the arts</p> <p>People are able to lead healthy lifestyles – providing services which not only help people keep physically and mentally active but also maintain and strengthen already good working partnerships with the health and education sector.</p>

Environmental and climate change implications	<p>The M&A do not, in themselves, have environmental or climate change implications, but the way in which the Trust delivers its charitable objectives will have. Consequently, the contract that the Council will enter into with the Trust will require the Trust to develop and deliver an environmental management strategy to ensure environmental and climate change impacts are considered in service delivery and in business planning.</p>
Property/Asset Implications	<p>This report does not have any property implications but the subsequent transfer and management of the properties will be subject to formal leases.</p> <p>Contact officer: David Roberts David.Roberts@cheltenham.gov.uk 01242 264151</p>

1. Background

- 1.1 Cabinet will recall that in December 2012 they received a report, and endorsed a proposal, to create a new charitable trust for the provision of leisure and culture services. The commissioning review is being managed through the Cheltenham Leisure and Culture Trust Programme (Cheltenham LCT) which has responsibility for co-ordinating and managing the various projects that are necessary to create the new trust by the autumn. The Cabinet Member for Sport and Culture is a member of the programme board.
- 1.2 A significant milestone was achieved in December 2013 when, following an extensive recruitment campaign, and a selection process involving both senior members and officers of the Council, the shadow board of trustees was selected.
- 1.3 The shadow board has now commenced its formal meeting schedule and is preparing to undertake matters necessary to create the new charitable trust. The registration of the charitable company together with the agreement of the company M&As are matters which require early completion for reasons explained in this report.
- 1.4 In addition, the Council is required under TUPE (Transfer Undertaking (Protection of Employment)) to transfer staff on the terms and conditions of employment they enjoy prior to the transfer. Section 5 explains in more detail the requirement for the new trust to be granted Admitted Body status to the Local Government Pension Scheme (LGPS) and the requirement for the Council to act as guarantor.

2. Legal Form – Charitable Company Limited by Guarantee (CCLG)

- 2.1 In accordance with the December 2012 Cabinet report, the new trust will be created as a charitable company limited by guarantee (CCLG). This is a legal model recommended for initiatives of this nature and the one most commonly used. It is up to date and fit for purpose.
- 2.2 As previously reported, the creation of a company creates a separate legal entity. A charitable company is regulated by both Companies House and the Charity Commission. The directors of a charitable company are both directors and trustees and hence have duties and responsibilities under both the Companies Acts and Charities Acts.
- 2.3 Furthermore, a company structure is extremely flexible allowing for the creation of subsidiary companies. It is apparent that the new trust will require at least one trading subsidiary and this can therefore be accommodated within the company structure.
- 2.4 One of the early actions that the shadow board of trustees will need to take is to register the company. The reason for this is that there are certain administrative matters, for example, the setting up of bank accounts etc, which have long lead-in periods making early registration crucial in order to achieve the implementation timetable. In order to register the company the shadow trustees need to have agreed the company M&A and in particular the charitable objects contained in them. Section 4 of this report provides more detail.
- 2.5 One of the other requirements of company registration is that the company name must be registered. The shadow board have considered this matter and intend to register the company name as Cheltenham Leisure and Culture Trust.
- 2.6 **Cabinet is recommended to note the shadow trust's intention to register the company using the company name Cheltenham Leisure and Culture Trust. (Recommendation 2)**

3. Memorandum and Articles of Association

- 3.1 The December 2012 Cabinet report identified a number of other matters for future reporting, the M&A of the new company was one of those matters. The later approval was necessary so that the shadow board of trustees could be actively engaged in the process of creating the new trust. Other matters for future reporting were also identified and these will be the subject of a further report to Cabinet.
- 3.2 In corporate governance, a company's articles of association is a document which, along with the memorandum of association form the company's constitution and define the responsibilities of the directors, the kind of business to be undertaken, and the means by which the shareholders, where appropriate, exert control over the board of directors. The M&A are required in order for the company registration to be commenced.
- 3.3 One of the most important parts of the constitution is the type of charity and its objects. The objects are the list of aims and objectives and set out among other things what the charity is setting out to do, who or what will be the beneficiaries of its work and how the charity is going to achieve what it wants to do.
- 3.4 The objects of the charity are outlined in section 1 of the M&A (**Appendix 2**) and in broad terms advance education, culture arts, heritage, recreation and leisure pursuits, community and public participation.
- 3.5 The Council has worked closely with the shadow board to create the M&A. The Cabinet Member has been involved in discussions relating to amendments to the articles as the matter has progressed. The shadow board considered the M&A at its board meeting on 7 March 2014. At that meeting a further number of more important amendments were proposed with regard to the duration of trustee term and chairing of trustee board meetings.
- 3.6 In addition, and subsequent to the shadow board meeting, a suggestion has been made regarding a minor change to object 1.1.3 where the deletion of the words "*healthy recreation and*" is being suggested. The legal adviser to the shadow board has advised the shadow trust that this matter needs to be consulted on with trustees as it was outside what the shadow board specifically agreed. However, the shadow trust would like the flexibility, if the shadow trustees agree, to remove the words above, in italic, from the M&A prior to incorporation.
- 3.7 Whilst on the face of it this may seem a very minor request, however, as it relates to the charitable objects, the Cabinet Member has considered the matter very carefully. The removal of the suggested words does not in essence change the object which is "*the promotion and preservation of good health and wellbeing*". Furthermore the delivery of the objects will be tested when the shadow trust submits its proposal for delivery of the leisure and culture services and therefore before any contract is entered into with the shadow trust.
- 3.8 The Cabinet Member has kept group leaders closely advised of the development of the M&A and amendments to it as matters have progressed. Group leaders have received verbal and written updates explaining the changes made so far. Group leaders have now been provided with a further written update appraising them of the changes outlined in para 3.5 to 3.7 above. It was hoped that final consultation with Group Leaders could have been concluded prior to this report being considered by Cabinet, however, this has not been possible. Therefore, the recommendation is that the Cabinet Member consult with the group leaders in order to finalise the M&A so that shadow trust may seek company registration by 1 April 2014. Failure to register the company by that date will impact on the programme timeline and the achievability of the go-live date of 1 October 2014.
- 3.9 **Cabinet recommends that the Cabinet Member for Sport and Culture, in consultation with the Group Leaders, finalise the wording of the Memorandum and Articles of Association (Recommendation 1)**

4. Local Government Pension Scheme (LGPS)

- 4.1** Staff who transfer under TUPE to the new trust will do so on the terms and conditions of employment that they enjoyed at the point of transfer. This includes all pension rights and, therefore, transferring employees will be entitled to remain in the Local Government Pension Scheme (LGPS) or be given access to a pension scheme which is broadly comparable.
- 4.2** In order to enable staff to remain in the LGPS post transfer, the trust will need to apply to become an “Admitted Body”, ie, a participating employer in the LGPS. The trust will do this by entering into an Admission Agreement with the administering authority, ie, Gloucestershire County Council. The Admission Agreement sets out the terms on which the trust may participate in the LGPS and which employees may become members of it.
- 4.3** The administering authority will require the Council to act as guarantor for any pension fund deficit which might accrue over the contract period. The approach to funding pension liabilities over the course of the contract will be set out in the contract between the trust and the Council. The contract will require the trust to comply with the provisions of the admission agreement.
- 4.4** Gloucestershire County Council pension committee will, following an actuarial review, consider a report at their May 2014 meeting to consider admitting the new trust to the LGPS. Cabinet is, therefore, not being asked to formally note the pension guarantor issue at this time as this will be the subject of a further report and recommendation to Cabinet.
- 4.5** The trust will also be setting up a pension scheme for new employees outside the LGPS, so new employees will join that scheme. It should also be noted however that, under the new rules of pension auto-enrolment, staff who at the time of transfer, but who are not in the LGPS, will also retain the right to join the LGPS at some time in the future providing they meet the criteria for auto-enrolment.

5. Reasons for recommendations

- 5.1** As per the body of the main report.

6. Alternative options considered

- 6.1** As per the body of the main report.

7. Consultation and feedback

- 7.1** The shadow board have received reports and received advice from their own legal advisers on the creation and content of the M&A. Group leaders have been briefed on the content of the M&A as per para 3.8 above.

8. Performance management –monitoring and review

- 8.1** With specific regard to the pension matters, the trust will be required to operate within the terms of its contract with the Council in particular with regard to matters relating to the LGPS and any admitted body status granted. The trust, as a charitable company will be regulated by both Companies House and the Charity Commission.

Report author	Contact officer: Pat.Pratley@Cheltenham.gov.uk; Deputy Chief Executive 01242 775175
Appendices	<ol style="list-style-type: none">1. Risk Assessment2. Memorandum and Articles of Association
Background information	<ol style="list-style-type: none">1. Cabinet Report 11 December 2012

The risk				Original risk score (impact x likelihood)			Managing risk				
Risk ref.	Risk description	Risk Owner	Date raised	Impact 1-5	Likelihood 1-6	Score	Control	Action	Deadline	Responsible officer	Transferred to risk register
1.	If the M&A are not agreed upon then the company registration cannot take place	Pat Pratley	18.3.14	3	3	9	Reduce	Cabinet recommend that the Cabinet Member for Sport and Culture consult with the Group Leaders to finalise the M&A	18.3.14	Pat Pratley	
2.	If the company registration does not take place early enough then key actions cannot be progressed, eg, charity registration, administrative matters, eg, setting up of bank accounts, concluding contract arrangements	Pat Pratley	18.3.14	3	3	9	Reduce	Following cabinet agreeing to note the intention to register the company this action is progressed by the shadow board	30.4.14	Ken Dale	
3.	If the Council does not act as pension guarantor then the trust will not be granted admitted body status to the LGPS	Pat Pratley	18.3.14	3	4	12	Reduce	1. Clarity on respective liabilities, ie, trust and Council is necessary 2. Contractual terms need to be agreed between both parties so that liabilities are known and understood 3. Further report to Cabinet on pension guarantor issue	1.10.14	Pat Pratley	
Explanatory notes											
Impact – an assessment of the impact if the risk occurs on a scale of 1-5 (1 being least impact and 5 being major or critical)											

Likelihood – how likely is it that the risk will occur on a scale of 1-6

(1 being almost impossible, 2 is very low, 3 is low, 4 significant, 5 high and 6 a very high probability)

Control - Either: Reduce / Accept / Transfer to 3rd party / Close