

Cheltenham Borough Council
Cabinet – 16 September 2014
The Cheltenham Trust – Contract Award

Accountable member	Cabinet Member for Healthy Lifestyles, Councillor Rowena Hay
Accountable officer	Pat Pratley, Deputy Chief Executive
Ward(s) affected	All
Key Decision	Yes
Executive summary	<p>In December 2012, Cabinet agreed that it would create a charitable trust to sustain and develop the good work of the council's in-house leisure and culture services. As well as leading to significant financial benefits to the Council and the town, a trust will be in a strong position to promote healthier lives, to create inspirational experiences and to promote the town as a great place to be.</p> <p>Cabinet received an update report in June recommending it note the intention to award a contract to The Cheltenham Trust (the Trust) from 1 October 2014. Since then a great deal of work has been done by the Programme Board, the Cheltenham Trust Board of Trustees and the Leisure and Culture Executive Team.</p> <p>The purpose of this report is principally to obtain the agreement of Cabinet to the award of a contract to the Trust for the leisure and culture services from 1 October 2014 and for the Council to enter into the various legal agreements and conclude the necessary documentation.</p> <p>The trust has applied to the Charity Commission to register The Cheltenham Trust as a charitable body. The Charity Commission is currently processing the application and it is hoped that registration will be achieved before the Cabinet meeting. If however that is not the case, or another critical issue arises preventing transfer of services to the Trust by 1 October, a recommendation as to next steps is included for Members consideration.</p>
Recommendations	<p>1. Subject to The Cheltenham Trust being registered as a charity by the Charities Commission before 1 October 2014, I recommend that:</p> <p>1.1 Cabinet agrees that the following services will be undertaken by The Cheltenham Trust, or where relevant its trading subsidiary, Cheltenham Leisure and Culture Limited:</p> <p style="text-align:center">Leisure@ Cheltenham Prince of Wales Stadium Town Hall Pittville Pump Room The Wilson (Cheltenham Art Gallery and Museum) Tourism Services and Tourist Information Centre Sport, Play and Healthy Lifestyles</p>

1.2 Cabinet approves the proposed management fee, and the arrangements for varying it, as set out in sections 8.1 and 8.2 of this report.

1.3 Cabinet delegates authority to the Deputy Chief Executive, in consultation with the Cabinet Member for Healthy Lifestyles, S151 Officer and Borough Solicitor to finalise and complete the contract, leases, licences and all other relevant contracts and legal documentation as necessary to enable the Trust to commence business from 1 October 2014.

1.4 Cabinet delegates authority to the Deputy Chief Executive, in consultation with the Cabinet Member for Healthy Lifestyles, S151 Officer and Borough Solicitor for the Council to enter into a service level contract with The Cheltenham Trust for the provision of property services as outlined in section 5.4.3 of this report.

2. I recommend that, in the event of The Cheltenham Trust not being registered as a charity before 1 October 2014, or another critical issue preventing the transfer of services by that date that

2.1 Cabinet delegates authority to the Deputy Chief Executive, in consultation with the Cabinet Member for Healthy Lifestyles, the Cabinet Member for Finance, S151 Officer and Borough Solicitor for the Council to complete the transfer, if all impediments are removed, at any date up to and including 1 November 2014.

2.2 In the event that services are not transferred in accordance with recommendation 2.1 that a further report be brought to the Cabinet meeting on 11 November 2014.

3 Cabinet notes that The Cheltenham Trust has been granted Admitted Body status to the Local Government Pension Scheme and that, as previously advised to Cabinet in the June report, this Council will be liable for any pension deficit on former employees of the Council who transfer to the Trust.

Financial implications

The original 'Bridging the Gap' savings target for the Trust was £700k by 2017/18.

The creation of the Trust will deliver annual savings in its management fee of £1.025m by 2018/19 as a result of activity which will generate both savings and additional income, including external fundraising, as outlined in the business plan put forward by the Trustees. The projections and assumptions have been subject to a due diligence process and, assuming charitable status is obtained, are considered to be prudent and deliverable.

There will be some additional costs to the council as a result of the creation of the Trust including additional client management and pension costs. The net savings to the council are £125k in 2014/15 rising to £833k by 2018/19.

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<p>Legal implications</p>	<p>The report indicates the position the Council is currently at with the project and that there is one issue that may hold matters up, the granting of charitable bodies status. This is a matter that is in the hands of the Charity Commission and it is hoped this will be granted before the Cabinet meeting.</p> <p>The current position has been reached following consideration, by way of a PQQ process, whether there was a currently developed market for the services. It was clear that there was not following that process and thus there was no requirement to go through any tendering procedure. This is not an 'EU' tendering process, therefore the Public Contracts rules are not applicable. This has not been challenged and the Cabinet noted the intention to award the contract in its June meeting.</p> <p>The services are being contracted to the current 'in house team' following the formation of a Limited Company, and detailed discussions on the contractual relationship with that company and the Council are taking place. That Company should be registered shortly as a Charitable body</p> <p>The contract will be with a separate legal entity which is independent of the Council. The relationship will be dependent on the Contractual documentation as would any other independent company. The Contract has been subject to long and detailed consideration and generally follows normal contractual principles.</p> <p>The Contract contains the Specification on what the Council wants, and the Trust Proposal on how they will provide them. It also contains details of how the Council will monitor and enforce the contract, as well as provisions for varying the contract and what will be done if there is a default.</p> <p>The Contract is for 10 years which can be extended for an extra five and this links, as is mentioned in the report, to the Leases which are for 15 years with a break clause at 10 years.</p> <p>The documentation for the TUPE transfer and the pension arrangements will be standard.</p> <p>Contact officer: Gary Spencer Gary.Spencer@tewkesbury.gov.uk, 01684 272691</p>
<p>HR implications (including learning and organisational development)</p>	<p>GOSS HR has been secured by the Trust to provide HR, Payroll, Learning and Organisational Development and Corporate Health and Safety Services. This will ensure that any HR implications outlined in sections 11 and 12 of the report are monitored closely before and after the transfer of services. For the employees who will transfer this will also mean that they are already familiar with the HR team and who to contact for support and advice should they need it in the future.</p> <p>Contact officer: Julie McCarthy Julie.McCarthy@cheltenham.gov.uk, 01242 264355</p>

<p>Key risks</p>	<p>A full analysis of risks has been undertaken by the Council's Programme Board and is shown in Appendix 3.</p> <p>The key risk is that if the Trust fails to deliver on the contract then the council's desired outcomes (financial and non-financial) may not be achieved. The risk is mitigated by the agreement of</p> <ol style="list-style-type: none"> 1. A robust contract based on an agreed specification with performance measures and a framework of contract governance 2. A partnership approach based on agreed principles <p>as set out in the relevant sections of this report.</p>
<p>Corporate and community plan Implications</p>	<p>The creation of The Cheltenham Trust supports the following strategic objectives:</p> <ul style="list-style-type: none"> • Enhancing the provision of arts and culture; and • People are able to lead healthy lifestyles <p>The outcomes specified for the Trust will also help the council deliver other strategic outcomes:</p> <ul style="list-style-type: none"> • Cheltenham has a strong and sustainable economy • We will meet our 'Bridging the Gap' targets for cashable savings and increased income
<p>Environmental and climate change implications</p>	<p>The report does not have direct environmental and climate change implications. However the contract 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> <p>The Council will initially support the Trust to develop the strategy and an action plan. The Trust will then be responsible for its implementation and will formally report on progress against the action plan as part of the Trust's Annual Performance Report.</p>
<p>Property/Asset Implications</p>	<p>The property implications are as outlined in the body of the report and the Heads of Terms as set out in Appendix 1.</p> <p>Contact officer: David Roberts David.Roberts@Cheltenham.gov.uk; 01242 264151</p>

1. Background

- 1.1 Following an appraisal of the needs and priorities of the Council and the communities of Cheltenham for leisure and culture, Cabinet agreed in December 2012 that a charitable trust should be created to operate its services in this sector.
- 1.2 By transferring services to The Cheltenham Trust (the Trust), the Council seeks:
- A sustainable future for the services based on a tried, tested and trusted delivery model
 - Increased capability to deliver the outcomes of importance to the Council and others
 - A reduced Council subsidy for services and a substantial contribution to the Council's achievement of a balanced budget
 - Retention of the synergies between leisure and culture, i.e. their common link to healthy lifestyles, their overlapping customer base, their shared strategic partners, and the economies of scale achievable by streamlining common functions.
 - Delivery of its priority outcomes (listed in section 4.1.2 below)
- 1.3 Cabinet received a report in June recommending that it note the intention to award a contract to the Trust from 1 October 2014.
- 1.4 Since then a great deal of work has been done by the Council's Programme Board, the Cheltenham Trust Board of Trustees and Leisure and Culture Executive Team.
- 1.5 The purpose of this report is principally to obtain the agreement of Cabinet to the award of a contract to the Trust for the leisure and culture services from 1 October 2014. In order to assist Cabinet in its decision making the following information/updates are provided:
- 1.5.1 An update on progress with the creation of the Trust including the position with regard to charitable registration (**Section 2**)
- 1.5.2 Confirmation of the services to be transferred to the Trust and the buildings to be leased or licensed by the Trust (**Section 3**)
- 1.5.3 A brief explanation of the outcomes based specification and the response to it termed the "Trust proposal" (**Section 4**)
- 1.5.4 Principle information relating to the contract and leases being entered into between this Council and the Trust (**Section 5**)
- 1.5.5 A brief summary of the performance management arrangements for the contract (**Section 6**)
- 1.5.6 Details regarding support services arrangements (**Section 7**)
- 1.5.7 An explanation of the management fee to be payable to the Trust by the Council and noting the position with regard to variations and dealing with revenue surpluses (**Section 8**)
- 1.5.8 An explanation of arrangements to be put in place to support any short-term cash flow problem the Trust may encounter, as a new business with no working capital, together with an explanation of how the Council might support the Trust in the case of any deficits in funding arising during the contract term (**Section 9**)
- 1.5.9 An update on arrangements with regard to the TUPE provisions (**Section 10**) and the Trust's admittance to the Local Government Pension Scheme (**Section 11**)
- 1.5.10 An explanation of the Council's due diligence process and the outcome, together with any specific matters highlighted but which do not impede contract award (**Section 12**)

1.5.11 A summary of the outcome of the Community Impact Assessment (**Section 13**)

2. The Cheltenham Trust - Update

- 2.1 Cabinet will recall that in March it received a report on the Trust's Memorandum and Articles of Association. As recommended by Cabinet the wording was finalised, in consultation with the Cabinet Member for Healthy Lifestyles, in preparation for company registration. The Cheltenham Trust was incorporated as a company limited by guarantee on 1 May 2014. The Trust has recruited for a Chief Executive.
- 2.2 Successful delivery of the Council's contract will require the Trust to carry out non-charitable activities, that is, activities which do not fall within the 13 charitable 'purposes' listed in the Charities Act 2011. The Trust has therefore set up a trading company named 'Cheltenham Leisure and Culture Limited (CLCT Ltd) which was incorporated as a private limited company on 16 July 2014. CLCT Ltd has a Board of Directors consisting of three Trustees including the Chair and Vice Chair and it is proposed that additional commercial expertise be brought in to join the Board at some future date to further develop the company.
- 2.3 It is well established that charities may create non-charitable trading companies to undertake non-charitable activities for the purposes of generating profits that can be used by the charity. This is reflected in Charity Commission and Her Majesty's Revenue and Customs (HMRC) guidance. The trading company will carry out activities such as weddings at the Town Hall and Pump Room, Tourism and catering activities.
- 2.4 The Trustees and the executive team have also been working on developing the Trust's brand and marketing strategy in response to the Council's outcomes specification but also in recognition of the role of the Trust as an independent charitable body delivering leisure and arts provision in Cheltenham. In particular the Trust is seeking to develop its brand in accordance with its vision which is about enhancing and enriching people's lives in Cheltenham through the provision of leisure and cultural services.
- 2.5 The Trust has expressed a willingness to take a contract for the provision of services outlined in **Section 3.2**, and to enter into the various leases and licences for the associated buildings and properties. A contract has been drafted under which the Trust will provide the services and the Trust board has concluded its own due diligence.
- 2.6 The trust Board met on 5 September and:
- Approved the trust's business plan;
 - Delegated authority to nominated trustees to finalise all contractual matters
 - Approved its trustee code of conduct, its audit committee terms of reference and the trust's policies and procedures
 - Reviewed the progress made on the development of the trust's brand
- 2.7 The trust Board also received an update on Charity Commission registration. The Commission has asked some questions of clarification which are being responded to by the trust. The view is that there should be no impediment to the Trust being registered as a charitable body and, it is hoped that, by the time Cabinet meets that charitable status will have been granted. However, as the matter is outstanding at the point of issuing this report, Recommendation 1 is subject to the trust being awarded charitable status before 1 October 2014.
- 2.8 In the event that charitable registration not being confirmed by 1 October, or another currently unforeseen critical issue arises which prevents transfer of services by 1 October, the Council and the Trust will then seek to work together to deal with the impediment. It should be noted that a significant delay to the transfer may have implications for set-up costs, the Trust's business plan, the realisation of benefits and the deployment of Council and partner resources.

2.9 Therefore this report contains recommendations as to next steps which would enable officers, in consultation with relevant Cabinet Members, to continue to progress the award of a contract to the Trust, within the timescales stipulated, so long as all impediments to such a contract award had been removed. If, however, a contract has not been entered into, and the services have not been transferred to the Trust by 1 November, a further report will be brought back to Cabinet at its November meeting.

2.10 **CABINET IS THEREFORE RECOMMENDED that in the event of The Cheltenham Trust not being registered as a charity before 1 October 2014, or another critical issue preventing the transfer of services by that date to**

2.10.1 **Delegate authority to the Deputy Chief Executive, in consultation with the Cabinet Member for Healthy Lifestyles, the Cabinet Member for Finance, S151 Officer and Borough Solicitor for the Council to complete the transfer, if all impediments are removed, at any date up to and including 1 November 2014 (Recommendation 2.1); and**

2.10.2 **In the event that services are not transferred by 1 November 2014 that a further report be brought to the Cabinet meeting on 11 November 2014 (Recommendation 2.2)**

3. **Services to be Transferred to The Cheltenham Trust**

3.1 As per the original business case, the Trust, by entering into a contract with the Council, will take over the management of the services currently operated by the Council. The Trust will also enter into individual leases or licences with the Council for the relevant buildings.

3.2 The services and buildings in question are as follows:

Leisure@ Cheltenham
Prince of Wales Stadium
Town Hall
Pittville Pump Room
The Wilson (Cheltenham Art Gallery and Museum)
Tourism Services and Tourist Information Centre
Sport, Play and Healthy Lifestyles

3.3 **CABINET IS THEREFORE RECOMMENDED subject to The Cheltenham Trust being registered as a charity to agree that the services identified above will be undertaken by The Cheltenham Trust, or where relevant its trading subsidiary, Cheltenham Leisure and Culture Limited (Recommendation 1.1)**

4. **Specification and Trust Proposal**

4.1 **Specification**

4.1.1 The specification sets out the partnership principles which will underpin the Council's relationship with the Trust. These are:

1. **Strategic focus:** concentration on maximising the contribution of leisure, culture and tourism to the future success of Cheltenham.
2. **Supportive relationships:** work to encourage and foster positive working relationships with the council as well as local, regional and national partners.
3. **Creativity:** encouragement of new ideas for improving Cheltenham's creative offer and quality of life and for projecting its vibrancy.

4. **Accountability:** the Council must be assured that its partner's services are safe, protect the town's heritage and provide value-for-money.

4.1.2 The Council has prepared its specification based on 3 high level target outcomes agreed by Cabinet:

1. People in Cheltenham lead healthier, fulfilling and active lives.
2. People in Cheltenham are inspired to take part and gain valuable skills and experiences.
3. Cheltenham is seen as a world class place to live, work, study and visit.

4.1.3 Whilst the specification provides further detail on these outcomes, it is not intended that the Council dictates precisely what the Trust is to provide. Rather, the focus is on allowing the experts (the Trust) to design and deliver services, activities and events and produce measures which enable the Council and the Trust to track progress towards meeting the outcomes.

4.1.4 The specification sets out how contract governance will be organised, it specifies the minimum operating standards expected of the Trust, for example. Regarding the availability of facilities, it outlines the communication protocol between the Trust and the Council as well as placing requirements on the Trust regarding environmental management, business continuity planning and quality assurance process.

4.1.5 The specification also sets out a number of Protected Activities which are concessions and activities that the Council believes are crucial to the delivery of the outcomes. If the Trust wishes to vary the Protected Activities in any way it would need to obtain prior agreement of the Council.

4.2 The Cheltenham Trust's Proposal

4.2.1 The Trust has prepared a proposal document in response to the specification. The proposal confirms the Trust's commitment to work in partnership with the Council to deliver the outcomes specified, sets out the services it expects to provide and the measures it will use to monitor performance. The proposal also contains the baseline data and targets for where it aspires to be at the conclusion of the initial management fee period.

4.2.2 Assuming a contract commencement date of 1 October 2014 the initial management fee period, contractually termed the funding period, will be 4.5 years, i.e. 1 October 2014 to 31 March 2019. This has been necessary in order to align the Trust's financial and operating year with that of the Council, i.e., both run from April to March. This also means that the Trust's Annual Performance Report and Annual Development Plan process will align to the Council's budget and performance reporting cycles.

4.3 Contractual obligations

4.3.1 Both the specification and the proposal are schedules to the contract and so the Trust will be contractually obliged to deliver against them.

4.3.2 Further information on the contract and leases is contained in the next section.

5. Contract, Leases and Licences

5.1 **Appendices 1 and 2** contain the current draft key commercial principles and heads of terms with regard to the contract, leases and licences.

5.2 The key principles for note are as outlined in the following sections.

5.3 The Contract

- 5.3.1 The contract will be for 10 years. As per the pre-qualification questionnaire process (PQQ) there is the potential for the Council to extend the contract by 5 years.
- 5.3.2 The management fee (**Section 8.1**) will be fixed for a 4.5 year period after which the funding period and management fee will be renegotiated. However, it is anticipated that the management fee will either be maintained at the reduced level (i.e. 2018/19) or reduced further as a result of further savings or additional income opportunities identified by the Trust. The Trust's financial plan will allow for reserves to be built up over time which can be used for reinvestment in the service. The contract will provide for dealing with surpluses based on the audited accounts.
- 5.3.3 The Trust has freedom to set prices at a level determined by it, except for those Protected Activities, as outlined in the specification (**Section 4.1.3**). The Trust can only set prices for Protected Activities above the rate of inflation (CPI – Consumer Price Index) in agreement with the Council.
- 5.3.4 Contract monitoring provisions exist within the contract and are outlined in **Section 6** of this report.

5.4 Leases and Licences

- 5.4.1 The Council will lease to the Trust the following buildings: Leisure@ Cheltenham, Prince of Wales Stadium, Town Hall, Pittville Pump Room, The Wilson (Cheltenham Art Gallery and Museum).
- 5.4.2 Leases will be for 15 years with a break clause after 10 years and charged at a peppercorn rent. The lease terms are longer than the contract term so that in the event of a contract extension the lease terms do not need to be renegotiated and new leases entered into. However the Council is protected by the break clause in case the contract is not extended for any reason.
- 5.4.3 The Trust will act as agents for the Council with regard to the day to day reactive property maintenance matters. The council will be responsible for all building and structural repair and maintenance including plant replacement and there will be a service level contract between the Trust and this Council with regard to Property Services.
- 5.4.4 Licences will be granted on storage unit 3 at The Swindon Road Depot together with the Telephone Kiosks on the Promenade.

5.5 CABINET IS THEREFORE RECOMMENDED to

- 5.5.1 **Delegate authority to the Deputy Chief Executive in consultation with the Cabinet Member for Healthy Lifestyles, S151 Officer and Borough Solicitor, to finalise and complete the contract, leases, licences and all other relevant contracts and legal documentation as necessary to enable the Trust to commence business from 1 October 2014 (Recommendation 1.3); and**
- 5.5.2 **Delegate authority to the Deputy Chief Executive, in consultation with the Cabinet Member for Healthy Lifestyles, S151 Officer and Borough Solicitor for the Council to enter into a service level contract with The Cheltenham Trust for the provision of Property Services. (Recommendation 1.4)**

6. Contract Management

- 6.1 The contract between the Council and the Trust makes provisions for managing the contract and contract governance and these are explained in summary below.
 - 6.1.1 The contract requires the Council to nominate an Authorised Officer and this will be the Deputy Chief Executive. The Trust will appoint its own Trust Representative. The Commissioning Division will perform the client role on behalf of the Council.

- 6.1.2** The Trust's proposal, as outlined in **Section 4.2**, describes how the Trust will deliver against the specification and the performance measures that will be used to monitor performance. The Trust will produce monthly and quarterly monitoring reports and submit these to the Council.
- 6.1.3** A Partnership Board will be created which will include representation from the Council and the Trust. Membership of the Partnership Board will include the Cabinet Member for Healthy Lifestyles, the Authorised Officer, the Chair of the Board of Trustees and the Trust Representative. The Partnership Board will undertake high level oversight of the performance of the contract between the Trust and the Council and importantly will provide a forum for strategic discussion regarding the Trust's plans for service development.
- 6.1.4** Following the end of each financial year the Trust will produce an Annual Performance Report setting out the overall performance of the Trust in the previous financial year in delivering the against the contract and its proposal. The Trust will also agree with the Council an Annual Development Plan setting out how it will deliver the specification outcomes in each forthcoming year. In addition to the ongoing contract monitoring throughout the year the Council will conduct an annual review of the Trust's performance by reference to the Annual Performance Report.
- 6.1.5** The contract also places obligations on the Trust to co-operate with the Council with regard to such matters as:
- Alerting the Council to serious and persistent complaints so these can be investigated appropriately
 - Co-operating with the Council where complaints are made to the Local Government Ombudsman
 - On request providing copies of health and safety risk assessments and allowing the Council to investigate the Trust's management of health and safety incidents.
- 6.1.6** Where either through ongoing contract monitoring, the annual review process or matters of a serious nature being identified to the Council, it is found that the Trust is failing materially, then the contract requires the Trust to prepare a Service Improvement Plan for agreement with the Council. If this cannot be agreed between the Authorised Officer and the Trust's Representative then it will be referred to the Partnership Board.
- 6.1.7** Where the performance of the Trust falls materially below the standards expected then the contract contains provisions for the serving of default notices and, where the matter is so serious and it cannot be resolved, contract termination provisions exist.

7. Support Services for the Trust

- 7.1** **Appendix 2** contains the draft heads of terms for support services. The Trust has taken time to consider its support service requirements and at its meeting on 6 August 2014 concluded that it would enter into the following service level contracts:
- 7.1.1** Financial services including procurement, human resources including payroll, learning and organisational development and health & safety support supplied by GO Shared Services (GOSS) – contracting authority Cotswold District Council
- 7.1.2** Legal services provided by One Legal – contracting authority Tewkesbury Borough Council

- 7.1.3** Internal audit services provided by Audit Cotswolds – contracting authority Cotswold District Council.
- 7.1.4** ICT services provided by the ICT shared service – contracting authority Forest of Dean District Council.
- 7.2** Whilst there is a risk should the Trust decide to source its support services from other providers, in the medium term this risk has been mitigated as much as possible through intensive engagement between the Trust and the support service providers to ensure that the service specification and standards will meet the needs of the Trust. Were the Trust to decide to source its support services from elsewhere then this would be dealt with under a variation to the contract including negotiation over the budget for procuring external support services. This will need to be subject to a business case which demonstrates advantages to both the Trust and the council of taking such a decision.
- 7.3** Regarding health and safety, GOSS will provide competent advice to support the development of the Trust's health and safety management system. Members should be aware that this contract places legal obligations on both parties with regard to health and safety compliance. The council will seek to ensure that the Trust is meeting its legal obligations by way of contract monitoring. Should the Trust wish to break away after 12 months it will need to provide assurances to the council that it has access to competent advice and that it is meeting its statutory requirements.
- 7.4** It should also be remembered that the Trustees are also company directors. Among their obligations as directors, Trustees have a duty to ensure the risks in their organisation are properly managed. Failure to comply with the Health and Safety at Work etc, Act 1974, is a criminal offence and can have serious consequences for both organisations and individuals. Sanctions include fines, imprisonment and disqualification.

8. Management Fee and Process for Variation

8.1 Management Fee

- 8.1.1** The December 2012 Cabinet report stated that not only was the aim of creating a new Trust to secure a viable and sustainable future for the services but there was also a financial imperative to reduce the cost to the public of the leisure and culture services by at least £700Kpa by 2017-18.
- 8.1.2** Since being appointed, the Board of Trustees, together with the Leisure and Culture Executive Team, has developed and refined its business plan and supporting 5 year financial plan. The Trust's financial year will run from April to March. The financial plan has been developed by analysing the existing performance of the services and translating this into future projections, based on identified growth and changes to the operation as a result of the services being operated by a charitable Trust.
- 8.1.3** The Trust has also carried out due diligence on the historical performance of the services in order to give it assurance that the proposed management fee payable will be sufficient to support its business objectives. Currently, the

services are delivering broadly on target with The Wilson projecting an over-spend of approximately £50k. Officers are working to mitigate this shortfall.

- 8.1.4** The Board of Trustees has developed its financial plan based on two scenarios; a sustainable base plan and a growth plan. Both plan projections allow for the Trust to develop a reserve which will be necessary for the Trust as it moves forward.
- 8.1.5** The financial plans have been shared with the Council as part of the Trust's Proposal and the Council's finance team has conducted its own due diligence. The review has concluded that the assumptions with the sustainable financial plan have been developed on relatively conservative projections.
- 8.1.6** Based on the period 1 April 2014 to 31 March 2019 and the sustainable base plan scenario the management fee payable by the Council under the contract with the Trust is:
- | | |
|--------------------------|---|
| April 2014 to March 2015 | £1.666M (full year) (part year fee will be residual budget for 2014/15) |
| April 2015 to March 2016 | £968K |
| April 2016 to March 2017 | £764K |
| April 2017 to March 2018 | £648K |
| April 2018 to March 2019 | £641K |
- 8.1.7** Therefore, based on the sustainable base plan the management fee reduces by £1.025M over the period 2014-15 to 2018-19.
- 8.1.8** It should be noted that with a start date of 1 October there will only be 6 months of operation through the Trust. Therefore at the end of September it is proposed that the Trust will take on the balance of the budget available and manage the overall budget for the remainder of 2014-15.
- 8.1.9** The Bridging the Gap (BtG) target for savings from the Trust was £181,700 for 2014-15. The latest version of the Trust's business plan identifies additional salary costs to the Trust in the first 2 years which are compensated for in later years through the growth plan. Taking these projections into account, there is a shortfall against the BtG target for 2014-15 of £55,800. However, the shortfall in 2014-15 may be offset by savings or additional income elsewhere in the council's budget and will be considered at the revised budget stage in the autumn of 2014.

8.2 Surpluses

- 8.2.1** The sustainable base plan allows for the creation of revenue surpluses which will be necessary for the Trust as a new business. The Trust will also wish to build reserves to support future business revenue fluctuations, cash flow and for investment in the facilities and this will be used to lever in additional external funding to deliver on its and the Council's key outcomes.
- 8.2.2** Surpluses will be based on the Trust's audited accounts. The trust will retain the first £100k of any surplus annually, above which, surpluses will be shared

equally i.e. 50:50 between the Council and the Trust until the Trust's reserves reach £500k. When this target is reached surpluses will be shared 50:50.

- 8.2.3** The contract will allow for the Trust to present a business case to the Council for the use of the Council's share of surplus.

8.3 Variation of the Management Fee

- 8.3.1** Requests to vary the contract can be made by either party and are not restricted to variations to the management fee. The variation process requires both parties to act reasonably in response to variations and in the case of variations which result in a reduction in the management fee payable these cannot be enacted until they have been agreed between the parties and sufficient notice is given to enable changes to take place. This provision is so that the Trust has time to make any necessary operational adjustments.

- 8.3.2** The Council needs also to acknowledge that in a scenario where the Council decides to reduce its management fee this may result in negotiation with the Trust as to the extent of service provision.

- 8.3** **CABINET IS THEREFORE RECOMMENDED to approve the proposed management fee and the arrangements for varying it (Recommendation 1.2).**

9. Cash Flow Provision, Overdraft Facility and Ear-Marked Reserve

9.1 Cash Flow Provision

- 9.1.1** In the December 2012 Cabinet report reference was made to the fact that the Trust, as a new business, may require a facility to allow it to overcome cash flow issues (relating to matters of timing). It is intended that an advance of the management fee of £200k is to be repaid within 2 years from the start of the contract to support cash-flow.

- 9.1.2** In addition, an overdraft facility of £100,000 per annum will be available to the Trust, which was approved as part of the outturn report on the 2013-14 budget in July 2014. This will be reviewed annually in line with the Council's Treasury Management Policy.

9.2 Ear-Marked Reserve

- 9.2.1** As part of the 2014-15 budget an ear-marked reserve of £200K was created to be held in the Council's accounts to cover any operating deficit position that the Trust may face. Were the Trust to require the use of the deficit provision it would need to apply to the Council to access it and would also need to provide the Council with a financial plan as to how the business would be brought back into surplus within a timescale to be agreed between the Trust and the Council.

10. TUPE

- 10.1** There will be a requirement to transfer under TUPE (Transfer of Undertakings Protection of Employment) Regulations 2006 123 of Cheltenham Borough Council employees to The Cheltenham Trust. TUPE will apply in the creation of the Trust as it will constitute a separate undertaking, and the Council's business or undertaking will transfer as a going concern to the Trust.
- 10.2** Under TUPE all the employees who spend more than (as a guide) over 50% of their work time on work transferring to the Trust will, unless they object, automatically transfer to the employment of the Trust under their existing terms and conditions of employment, along with continuity of service.
- 10.3** If any employees object to the transfer then they do not transfer, but equally they do not stay - instead the transfer itself terminates their employment and they usually have no rights against anyone in consequence. A refusal to transfer will usually mean that the employee has in effect resigned, i.e. no entitlement to redundancy.
- 10.4** Work has commenced to comply with TUPE regulations. Key steps in the process are as follows:
- 10.4.1** Identify which employees will be affected by the transfer.
- 10.4.2** There is a statutory requirement for full and proper consultation with employees and representatives from the two recognised trade unions, Unison and GMB. The TUPE regulations state that the transferor (Cheltenham Borough Council) must conduct a full and meaningful consultation with employees at the earliest practicable time. Failure to consult properly can result in payment of compensation of up to 13 weeks' pay. The transferor and The Cheltenham Trust (the transferee) are both liable for this award of compensation.
- 10.4.3** Consultation with TU representatives and employees impacted directly and indirectly has commenced regarding the TUPE transfer and will continue through to the proposed transfer date of 1 October 2014.
- 10.4.4** The transferor is obliged to give the transferee written information about the employees who are to transfer and all the associated rights and obligations towards them. This information includes, for example, the identity and age of the employees who will transfer, information contained in the employees' written particulars of employment under section 1 of the Employment Rights Act 1996 and details of any claims that the transferor reasonably believes might be brought. Wherever practicable information handed over to the new employer (the Trust) will be anonymised. The law states if the transferor does not provide this information, the transferee may apply to an employment tribunal for such amount as it considers just and equitable. Compensation starts at a minimum of £500 for each employee in respect of whom the information was not provided or was defective.
- 10.4.5** It is worth noting that if any employee is dismissed for reasons connected to the transfer, this dismissal may be automatically unfair. The new employer (the Trust) may, however, dismiss them post transfer from some other reason not connected with the transfer (e.g. for economic, technical or organisational

reasons entailing a change in the workforce).

10.4.6 All relevant employees will transfer to the Trust with effect from 1 October 2014, the date that it is envisaged that the TUPE transfer will take effect, and will commence with the Trust at one minute past midnight on the 1 October 2014. No immediate staffing changes are envisaged before this date, nor on transfer. Any variations to operational arrangements post 1 October 2014 will be subject to separate discussions and consultation and be the responsibility of the Trust.

11. Pension Provision

11.1 As reported to Cabinet in June the Gloucestershire County Council Pension Committee met on 16 May, and agreed the admission of The Cheltenham Trust as a transferee Admission Body into the Gloucestershire Local Government Pension Scheme (LGPS) Fund on the following basis:

11.1.1 The LGPS members transferring from the Council will do so on a fully funded basis and the Council will act as guarantor for all their pension liabilities. It was noted that the contract start date will be 1 October 2014 and the Admission Agreement would need to be agreed and sealed by the contract start date. For those employees transferring to the Trust, a new employer contribution rate will be calculated and this will be subject to triennial review

11.1.2 The Pension Committee made reference to the requirement for a bond to be put in place to cover early retirement costs were the Trust to go into liquidation. The Head of the Pension Fund at Gloucestershire County Council has subsequently advised that the requirement for a bond is optional. It is likely that the sourcing for a bond for a new entity could be difficult and the decision as to whether a bond is necessary needs to be made in the context of the services being commissioned. The services and buildings that the Trust will run and operate under contract with the Council are pivotal to the leisure and culture offer in Cheltenham. In the event that the Trust did cease trading then the services, buildings and employees would revert back to the Council and therefore no early retirement costs would materialise.

11.2 The Trust will also operate a stakeholder pension scheme for new employees recruited to the Trust. The contribution rates for the stakeholder scheme are 3% for the employer and 3% for the employee. It is anticipated that savings in pension contributions will accrue therefore when transferred employees leave the Trust and new employees join.

11.3 Savings from pension contributions through turnover of staff achieved by the LGPS pension contribution element will be treated outside of the management fee through a mechanism designed to reimburse the Trust for continued LGPS costs and to allow the council to deliver the savings to the LGPS arising from staff turnover.

11.4 **CABINET IS THEREFORE RECOMMENDED to note that The Cheltenham Trust has been granted Admitted Body status to the Local Government Pension Scheme and that, as previously advised to Cabinet in the June report, this Council will be liable for any pension deficit on former**

employees of the Council who transfer to the Trust.

12. Due Diligence

- 12.1** The Council's due diligence process was based on its standard approach to contract award with advice from the GOSS procurement team. Audit Cotswolds have provided independent support to the development and design of the due diligence process and the Head of Audit Cotswolds chaired the due diligence gateway review meetings.
- 12.2** The purpose of due diligence is to ensure that all material matters had been/will be considered and dealt with prior to the Council entering into any contractual arrangement with the Trust. The due diligence review concluded with a gateway review on 27 August 2014. The timing of the review was so that Cabinet could be advised of any other matters of significant impediment to contract award, other than charity registration.
- 12.3** Operational leads were identified and selected to undertake various element of the due diligence review and were chosen because of either;
- 12.3.1** Their professional role, for example, the S151 Officer led on the due diligence review of the Trust's financial plan, GOSS Health and Safety Manager led on the Trust's health and safety proposals, or
- 12.3.2** Their role within the project team, for example, the Client Officer led on the due diligence of non-financial elements of the Trust's proposal, the Director of Commissioning led on the review of support service arrangements as the project lead for that area.
- 12.4** Due diligence covered the following areas: Trust Proposal (including the Trust's financial plan), HR (including TUPE and Pensions), Property, Legal, Insurance, Health and Safety, Support Services (GOSS, ICT, Internal Audit, Legal), Contract and Client Management, Governance and Project Management.
- 12.5** The due diligence review of the Trust's financial plan was passed with the following two caveats. Firstly, there is no approved Trust management structure as the Chief Executive has yet to be appointed and therefore it is not possible for the Trust to provide this at this stage. However, the Section 151 Officer is confident that the Board understand the target for savings and the need to deliver the services within the proposed management fee / cost envelope. Secondly, the fund raising strategy has yet to be developed but is due in the autumn of 2014.
- 12.6** All other due diligence reviews were passed without any significant matters for note or report. However, as the review was conducted early, in order to provide assurance to Elected Members for the purposes of this report, there are a number of issues which need to be concluded and resolved. These issues have been collated and will be monitored to ensure their satisfactory conclusion prior to contract award.

13. Community Impact Assessment

13.1 The Council's Equality and Diversity Policy, commits the Council to using community impact assessments in order to:

- Take into account the needs, experiences and circumstances of those groups of people who use (or don't / can't use) our services.
- Identify any inequalities people may experience.
- Think about the other ways in which we can deliver our services which will not lead to inequalities.
- Develop better policy-making, procedures and services.

13.2 A community impact assessment template was undertaken for the transfer of the leisure and culture services into the new Trust by the Business Transformation Manager, the Strategy and Engagement Manager and the Trust Executive Team.

13.3 The assessment found that current leisure and culture provision is well regarded and is open and accessible to all groups and highlighted the positive work undertaken by the services to increase participation across all groups.

13.4 In terms of the key actions to be carried out, the assessment welcomed the fact that the council has sought to protect the tradition of open and accessible provision by identifying key groups where participation and engagement can be lower. So alongside the mainstream programme, the council will be expecting the Trust to address the needs of the priority groups identified below for all activities.

- Older people
- Children and young people
- Disabled people – both children and adults
- Black and minority ethnic groups
- People from lower socio-economic groups

13.5 Moving into the Trust, the assessment also noted that officers and Trustees will need to strike a balance between focussing on commercial activities that will help to deliver the business growth required to reduce the annual subsidy from the Council, whilst maintaining and hopefully expanding the targeted community outreach activities we provide to engage target groups. Each of the facilities have targeted programmes, projects and activities that engage schools, families, young people's groups, VCS groups, and older people, and the Council will expect the Trust to continue to develop new and innovative approaches that appeal to this broad spectrum of users and broaden the base of participation across their services.

13.6 In addition, the contract with the Trust will require it to make provision for equalities and diversity and to have its own policy or use the Council's policy where it does not have its own.

14. Reasons for recommendations

14.1 As detailed within the body of the report.

15. Alternative options considered

15.1 The option to create a new charitable Trust to deliver the services within the scope of this report was the output from an option appraisal and business case process previously reported to Cabinet.

16. Consultation and feedback

16.1 GO Shared Services HR team has continued to maintain ongoing and positive dialogue with the employee representatives of the Council as the project has progressed, this remains the case as the TUPE process draws to a conclusion. Elected Members have received briefings on the project as it has progressed, as have the Budget Scrutiny Working Group and the Audit Committee.

16.2 A Member Seminar will take place on 8 September 2014. Feedback from that seminar will be reported to Cabinet at the meeting.

17. Performance management – monitoring and review

17.1 **Section 6** describes the formal contract governance framework. Contract management provisions will form part of the contract and place expectations on the Trust to provide information with regard to meeting its contractual obligations.

17.2 Outside of the formal contract management framework Operational Programme Board, comprising the Council's Senior Leadership Team, will receive quarterly updates on the performance of the contract.

17.3 In addition there will be informal strategic meetings of the Leader of the Council, Cabinet Member for Healthy Lifestyles, CBC Chief Executive and the Chair of the Board of Trustees. These have already commenced during the run up to the formal contract award. It is anticipated that the Trust's Chief Executive will join these informal meetings once in post. Similar informal strategic discussions take place with other Council partners, for example, Cheltenham Festivals, and have proved very useful in bringing about effective informal engagement and information sharing.

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Appendices	<ol style="list-style-type: none"> 1. Draft Heads of Terms – The Cheltenham Trust – Leases and Licences 2. Draft Heads of Terms – The Cheltenham Trust – Contract and Support Services 3. Risk Assessment
Background information	<ol style="list-style-type: none"> 1. Due diligence report 2. Community Impact Assessment