



CABINET REPORT

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| Report Title | Update on the grant of property leases and financial and Management Agreements to Northampton Leisure Trust (Unity Leisure) |
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AGENDA STATUS: PUBLIC

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| Cabinet Meeting Date: | 11 September 2019 |
| Key Decision: | YES |
| Within Policy: | YES |
| Policy Document: | NO |
| Directorate: | Management Board |
| Accountable Cabinet Member: | Cllr T Hadland |
| Ward(s) | N/A |

1 Purpose

- 1.1 To seek agreement of Cabinet to a further and final amendment to the recommendation of the report to Cabinet of 14th March 2018 'Grant of property leases and financial and management agreements to Northampton Leisure Trust (Unity Leisure).

2 Recommendations

2.1 Cabinet approves:

- a) The termination of the existing Management Agreement between the Council and Northampton Leisure (Unity Leisure) dated 31st March 2011 and attached as appendix 1 to facilitate the completion of the proposed lease arrangements with the Trust.

- b) Delegates authority to the Economic Growth and Regeneration Manager, the Borough Secretary and Head of Finance in consultation with the Portfolio Holder for Regeneration and Enterprise to complete the necessary leases.
- c) Authorises officers to negotiate and agree terms and conditions in the said lease arrangements to ensure as far as possible the continuing provision of the requisite leisure services to the public in the three leisure centres now being managed and controlled by the Trust, but which do not fall foul of the Public Contract Regulations 2015.
- d) Notes that by moving to lease arrangements, that will involve the Council losing substantial control over the delivery of leisure facilities in Northampton.
- e) Further reports to future meetings of the Cabinet on any issue arising which the officers concerned consider need further discussion and decision by Cabinet before completion of the new lease arrangements.
- f) To seek any further external legal advice deemed necessary to conclude the transaction.

3 Issues and choices

3.1 Report background

- 3.1.1 Unity Leisure trading as Northampton Leisure Trust (NLT) was established by the Council in April 2011 to operate the three Council owned leisure centres, Lings Forum, Danes Camp and Mounts Baths, and to deliver sports development, health and play services.
- 3.1.2 The cost to the Council of providing Leisure Services was previously in the order of £M, in the form the Leisure Trust no longer receives a Management Fee from the Council, nor does it pay a lease charge. The current relationship limits the Trust's ability to invest and develop the services further.
- 3.1.3 On 14th March 2018 Cabinet agreed, inter alia, to enter into three new Full Repairing and Insuring Leases, one for each of the three leisure centres. Those leases are yet to be completed.
- 3.1.4 The recommendations were amended at Cabinet on 17 October 2018, in respect of insurance provision.
- 3.1.5 This report only seeks to clarify the use or not of a Management Agreement with NLT, it does not seek to amend the previously agreed approach to the Leases and Loan as detailed in prior Cabinet Reports.
- 3.1.6 After further discussion with NLT, it was agreed that the Management Agreement, which was instigated in 2011, is no longer fit for purpose and was constructed at a time the Council directly delivered leisure services and subsequently commissioned them from NLT. The Council no longer exercises control on service delivery in the

said leisure centre or directly provides a leisure strategy related to the delivery of Leisure Services.

- 3.1.7 Legal advice states that the Management Agreement cannot be materially changed without a new procurement exercise, this would not add value as the Council no longer 'procures' leisure services.
- 3.1.8 The alternative option is to recognise that the Council no longer exercises control over the leisure centres, and such services, so does not require a Management Agreement with NLT.
- 3.1.9 For ease of reference a copy of the Management Agreement (Appendix 1), with just the TUPE details redacted, is attached, along with copies of the previous two Cabinet Reports (Appendices 2 & 3).
- 3.1.10 External Legal advice has been sought on the matter and the key legal aspects arise around whether there is or is not a Public Service Contract under the Public Contract Regulations 2015. Under the current extant Management Agreement a Public Service Contract exists, this is a legacy of the original launch of the Northampton Leisure Trust in 2011 when the Council paid a management fee for the provision and management of the Leisure Centres. The next and current iteration of that relationship reflects no management fee is paid, nor any lease payment made.
- 3.1.11 The issue now is that the Council no longer budgets to support Leisure nor has a Leisure Strategy, it does not exercise the controls reflected in the Management Agreement. With the lease arrangements approved in the two previous Cabinet Reports (Appendices 2 & 3) there is recognition that the Trust is a self regulating body, with responsibility for more facilities than just the original three sites that were the Councils. The Council therefore cannot exercise control over the whole Trusts business.
- 3.1.12 If there is no Management Agreement, there is no control and the leases may be processed as simple land transactions. The benefit of this approach is that should the Management Agreement remain, it would need to be materially amended to reflect the true status of the relationship and such a material amendment would then trigger a procurement exercise, which in fact would be to 'not purchase' a service.
- 3.1.13 In taking forward the leases without a Management Agreement the Council would need to acknowledge that it can no longer exercise control over Best Value Principles, send the Council's Internal Auditors into the Trust, dictate the opening hours of each centre or the service to be specifically provided.
- 3.1.14 In progressing the leases alone, there would still need to be due regard to legislation and the requirements of the Local Government Act 1972, S.123 which requires a demonstration of best value. In this instance the external legal advisors have stated that on the current lease values intended the lifetime of the lease undervalue would be under the threshold of £2,000.000 without having to seek a General Consent Order.
- 3.1.15 The leases may make reference to expectation ie The Council expects the Trust to continue a scheme of concessions (such as on page 71 of the current Management Agreement) but would not be able to enforce it.

- 3.1.16 The advice also states that whilst the leases are intended to be at less than full market value (with or without the Management Agreement) in recognition of the community value the Trust delivers, given the local nature of the service delivery the leases as a land transaction are unlikely to be considered an issue for State Aid.
- 3.1.17 Should the Council wish to continue with the Management Agreement the advice is that the Council should seek full market value of the leases and then it could vary the Management Agreement as it wishes. But then pay the Trust the difference between the market value and the agreed value as a Management Fee in recognition of control.

3.2 Issues

There are no issues arising from the recommendation of this report, beyond the risk being highlighted in respect of control that might have been exercised via a Management Agreement.

3.3 Choices (options)

- 3.3.1 Cabinet is asked to approve the cessation of the Management Agreement between the Council and Leisure Trust as per the recommendation, or
- 3.3.2 Cabinet chooses to retain the Management Agreement noting it cannot be amended into a form that is fit for purpose, or
- 3.3.3 Cabinet chooses to retain the principle of control via a Management Agreement, so instructing officers to cease the property leasehold arrangements and conduct a new formal tender exercise (reverse auction) for the provision of Leisure Services to the Council.

4 Implications (including financial)

4.1 Policy

- 4.1.1 The Council no longer operates a formal Leisure Strategy. There are therefore no policy implications relating to this report, beyond the perceived risk of not being able to control the Leisure Trust in the future.

4.2 Resources and risk

- 4.2.1 There are no additional resource implications arising from this report.
- 4.2.2 By removing the Management Agreement the Council will not be able to exercise direct control over the Leisure Trust operations, which it does not now as it no longer pays a Management Fee to the Trust.
- 4.2.3 There is risk that the Council is not able to ensure the outcomes it requires are enforceable through the lease arrangement itself, however it does not currently monitor or enforce the service delivery with the trust.

4.3 Legal

- 4.3.1 The Council has received external legal advice on the matter for procurement/tender obligations in relation to the provision of usage and service requirements in any new lease arrangements. In essence there will still need to be some obligations relating to service usage, but these will not refer to detail such as pricing arrangements and cannot replicate the provisions of the existing Management Agreement. The new leases will seek to impose obligations on the Trust relating to the continuing use of the three leisure centres to deliver leisure services to the public, but the element of control given in the Management Agreement will not be possible.
- 4.3.2 Section 123 of the Local Government Act 1972 requiring Best Value will need to be complied with and will be assessed with and will be assessed through the negotiations.
- 4.3.3 Heads of terms for the proposed leases have not been finalised. However, the leases will be negotiated in a way that enables the Council to have some influence on the provisions of leisure services, or exit from the arrangements, but in a way that does not fall foul of the Public Works Contracts Regulations 2015.

4.4 Equality and health

- 4.4.1 There are no direct equalities and health implications arising from this report. Services to the public will not be directly impacted as a result of the recommendation of this report. There are therefore no direct equality or health implications.

4.5 Consultees (internal and external)

- 4.5.1 Corporate Management Board (CMB) and Northampton Leisure Trust (Unity Leisure) Management Board.

4.6 How the proposals deliver priority outcomes

This report will contribute to the priority corporate outcomes of

- Enhancing leisure activities for local people and encouraging participation and
- Delivering quality modern services

5 Other implications

- 5.1 There are no other implications arising from this report.

6 Background papers

- 6.1 Cabinet Reports 14 March 2018 and 17 October 2018
- 6.2 Operating Agreement between NLT and NBC
- 6.3 General Consent Order (06/03)
- 6.4 Valuation from Underwoods
- 6.5 Advice from Browne Jacobson Solicitors (Confidential & Legally Privileged)
- 6.6 Social Value Study from University of Northampton Institute for Social Innovation and Impact.
- 6.7 Council budget and capital programme reports February 2019.

Kevin Langley
Economic Growth and Regeneration Manager

DATED 31st March 2011

(1) NORTHAMPTON BOROUGH COUNCIL

(2) UNITY LEISURE

**COMMUNITY LEISURE & FACILITIES OPERATING
AGREEMENT**

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(Ref: JDEC)

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DATED

31st March

2011

BETWEEN:

- (1) **NORTHAMPTON BOROUGH COUNCIL** of The Guildhall, St Giles Square, Northampton NN1 1DE ("the Council"); and
- (2) **UNITY LEISURE** (Company number 7555631) whose registered office is at Lings Forum Leisure Centre, Weston Favell Centre, Northampton NN3 8JR ("the Operator").

RECITALS:

- (A) The Council is empowered to provide recreational facilities pursuant to s.19 of the Local Government (Miscellaneous Provisions) Act 1976. In furtherance of that power the Council currently owns and operates premises from which it runs various leisure and sports activities for use by the public. The Council now wishes the management of those leisure and sports facilities to be undertaken by a third party contractor.
- (B) The Operator has been established as a company limited by guarantee for which charitable status will be sought.
- (C) The Operator intends, in conjunction with the Council, to develop and implement strategies to promote leisure and sports facilities in the area governed by the Council by the development of new facilities, the application of new funding sources and otherwise. The Operator shall also be entitled, after obtaining the prior consent of the Council, to develop new facilities outside of the area governed by the Council through the application of new funding sources.
- (D) The Operator has expertise in the management of leisure and sports facilities and has agreed to utilise that expertise for the Council in respect of operating identified leisure and sports facilities upon the terms and subject to the conditions set out in this Agreement.

1 DEFINITIONS

- 1.1 In this Agreement the expressions set out in Schedule 1 shall have the meanings set out therein unless the context requires otherwise.

2 OPERATING PERIOD

- 2.1 The Operating Period shall commence on the Effective Date and shall continue (subject to earlier termination in accordance with the provisions of this Agreement) for an initial period of fifteen (15) years ("the Initial Period").
- 2.2 At the end of the Initial Period, at the Council's option (provided on not less than twelve (12) months notice in writing prior to the expiry of the Initial Period) and with the Operator's written agreement (to be confirmed not less than six (6) months prior to the expiry of the Initial Period), the Operating Period shall (subject to earlier termination in accordance with the provisions of this Agreement) be extended for an additional period of three (3) years ("a Renewal Term"). If the parties cannot agree upon the terms that will apply to any such Renewal Term, this Agreement shall automatically terminate at the end of the Initial Period.
- 2.3 The provisions of clause 2.2 above shall apply (mutatis mutandis) at the end of each Renewal Term up to a maximum total of five (5) such Renewal Terms whereupon this Agreement shall automatically terminate.

3 BUSINESS PLAN

- 3.1 The Operator shall within a period of two (2) Months from the Effective Date, and thereafter one (1) month prior to the beginning of each subsequent Year, deliver to the Council a draft Business Plan to apply in relation to the next following Year. The draft Business Plan shall embody the relevant principles of the Council and the Strategies set out in clause 4.1 below and shall contain the information and be in a format agreed by the parties from time to time.
- 3.2 The Business Plan shall include:
- 3.2.1 a detailed action plan setting out the Operator's suggested measures which could be taken further by the Operator, the Council or other organisations to improve the Services, provided that against any measure which it considers might be taken by the Operator itself, the Operator shall set out, in detail, whether the implementation of such measure would result in any Variation to the Business Plan if the measure were to be considered a Variation for the purposes of clause 50;
 - 3.2.2 recommendations for potential improvements or enhancements in or development of any of the Services at any of the Facilities. The Council shall consider such recommendations but shall be under no obligation to adopt any or all of them; and
 - 3.2.3 methods for monitoring the delivery of the Services and the Key Performance Indicators in relation to the Services which are to be met each Year.
- 3.3 In each Year once the same has been prepared the Operator and the Council shall meet and in good faith seek to agree the content of the Business Plan (including the Key Performance Indicators) as soon as reasonably practicable, and in any event no later than one (1) Month before the commencement of the relevant Year (or, in the case of the draft Business Plan for the first Year, produced within two (2) Months of the Effective Date). In the event that the Operator and the Council cannot agree upon the Business Plan within the timeframe set out in this clause, then the matters in dispute shall be referred initially for resolution under the provisions of clause 60. Pending the determination of such dispute, the then current Business Plan shall continue in full force and effect, as amended to incorporate such changes as have been agreed between the parties. Upon determination of the dispute the Business Plan shall be adopted and the provisions of clause 3.4 shall apply in relation to the same.
- 3.4 In any Year, the Business Plan shall not be deemed to be accepted by the Parties until such time as the Parties have each given its acceptance in writing subject to determination under clause 60, as the case may be. Once such acceptance in writing has been given or determination has been made, as the case may be, such Business Plan shall form an integral part of the Agreement.
- 3.5 From the Effective Date:
- 3.5.1 the Operator shall provide the Services at each of the Facilities upon the terms set out in this Agreement and more particularly in accordance with the provisions of the Business Plan; and
 - 3.5.2 the Business Plan shall become part of this Agreement until such time as the Business Plan is varied or replaced, whereupon such variation or replacement shall become part of this Agreement.

- 3.6 The Operator shall develop NOP's in respect of each element of operation of each Facility at which Services are to be supplied, which shall be constantly reviewed and, where necessary, updated.

4 COMMUNITY COMMITMENT

- 4.1 The Operator acknowledges that the Services to be supplied hereunder are part of an important integral relationship between the Council and the community it represents and the Operator acknowledges and confirms that in performing the Services under this Agreement it has a duty to help the Council in maintaining this relationship. The Operator, through the Business Plan, will ensure that all of its policies, strategies and activities support the objectives of all relevant Council strategies from time to time ("**the Strategies**") including, without limitation, the following:

- 4.1.1 the Council's Corporate Plan; and
- 4.1.2 the Council's Leisure, Sports and Play Development Strategy.

- 4.2 The Operator shall:

- 4.2.1 at all times ensure that all its staff are trained in and understand the Strategies;
- 4.2.2 provide information to help the Council to update and develop the Strategies from time to time; and
- 4.2.3 demonstrate in the Business Plan how resources will be used to meet the Strategies.

5 THE SERVICES

- 5.1 In consideration of the payment of the Management Service Fee the Operator agrees from the Effective Date to supply the Services at each of the Facilities upon the terms and conditions set out in the Agreement which shall require the Operator to perform the Services with all due skill, care and diligence and in accordance and otherwise in compliance with:

- 5.1.1 the Business Plan and in particular but without limitation, the Key Performance Indicators for the provision of the Services set out therein;
- 5.1.2 any current Best Value (or then current equivalent successor) performance indicators issued by the Government or any relevant regulatory body which are relevant to the performance of the Services or any part thereof;
- 5.1.3 the Strategies (as which term is defined in clause 4.1) and any relevant policies (including the Equality Policy);
- 5.1.4 the Council Guidelines and in particular, but without limitation, those relating to customer care;
- 5.1.5 any reasonable instructions issued to the Operator by the Council Representative pursuant to or in connection with this Agreement;
- 5.1.6 all Legislation;
- 5.1.7 a manner which shall preserve, promote and enhance and shall not prejudice the image, reputation and interests of the Council;
- 5.1.8 in good and full co-operation with any other company or consultant engaged by the Council to carry out related or relevant works or services on behalf of the Council; and

- 5.1.9 in a manner which has regard to the interests and welfare of service users and the management and maintenance of the Facilities to a high standard.
- 5.2 The Operator shall comply with the Council's monitoring, remedy and default procedure as specified in clause 5.3 and Schedule 5 Part 1.
- 5.3 The parties will work continually to improve the Services by effective communication, business and project management techniques and the exercise of sound commercial and financial judgement.
- 5.4 The parties acknowledge and agree that there will be day to day minor exigencies and contingencies that occur in relation to the provision of the Services subject always to the provisions of clause 5.3. The Operator shall use all reasonable endeavours to address such exigencies and contingencies provided that the performance of such activities does not fall outside of the scope of or reduce the quality or range of the Services.
- 5.5 The Operator hereby warrants and represents to the Council that:
- 5.5.1 it has the full capacity and authority and all necessary licences, permits and consents to supply the Services under and in the manner contemplated by this Agreement and to enter into any documents to be entered into by it pursuant to this Agreement;
- 5.5.2 this Agreement and any other agreements anticipated to be entered into pursuant to this Agreement shall be executed by duly authorised representatives of the Operator; and
- 5.5.3 this Agreement constitutes valid, binding and enforceable obligations of the Operator in accordance with its terms.
- 5.6 The Council hereby warrants and represents to the Operator that it has the full capacity and authority and all necessary licences, permits and consents to enter into this Agreement and any associated documentation pursuant to this Agreement.
- 5.7 The Operator shall not, in the provision of the Services, enter into any Operator Contracts which:
- 5.7.1 would have a residual term beyond any potential expiry date of this Agreement;
- 5.7.2 could reasonably be described as containing terms which are onerous to the Operator (or which would be onerous to the Council upon assignment to it) or which are unusually favourable to the contractor to whom the contract is let; or
- 5.7.3 are not capable of assignment or novation to the Council (or its nominated third party) in the event of the expiry or termination of this Agreement;
- in each case, without first obtaining the prior written consent of the Council.

6 STANDARD OF THE SERVICES

- 6.1 The Operator shall use all reasonable endeavours to operate and maintain throughout the Operating Period an industry recognised quality assurance scheme in respect of all Facilities operated as part of the Services provided under this Agreement.
- 6.2 In addition to any more specific obligations imposed by the terms of this Agreement, it shall be the duty of the Operator at all times to provide the Services to the Standards of a Reasonable and Prudent Operator.

- 6.3 The Operator shall, subject to clauses 6.4, 6.5 and 6.6 below, be entitled to set opening times, the levels of charges and fees, and the discount and other concessionary entitlements (including the applicable eligibility criteria) in respect of the Facilities as part of its provision of the Services.
- 6.4 The Operator shall, in the provision of the Services, recognise the Facilities' opening times, the levels of charges and fees, and the discount and other concessionary entitlements applied by the Council for the use of the Facilities as at the date of this Agreement, as the same are set out in Schedules 9 and 10 respectively, and (unless otherwise agreed in accordance with the provisions of the Agreement) treat the same as minimum requirements for the operation of the Facilities.
- 6.5 The Operator will consult with the Council and obtain the Council's written consent (not to be unreasonably withheld or delayed) before making any amendment to any fees and charges which would have the effect of imposing an increase above the prevailing rate of increase in the Retail Price Index. In considering any increase to the fees and charges, the Operator will have regard to the wider community impact of any such increase. In considering whether to give its consent in accordance with the provisions of this clause 6.5, the Council will have regard to the aims of the Business Plan.
- 6.6 Either party shall, pursuant to the Change Control Procedure, be entitled to propose to the other a change to the opening times at any of the Facilities or discount and other concessionary entitlements (including the applicable eligibility criteria).
- 6.7 The Operator shall participate in regular benchmarking and any other such companion exercises with other providers of services similar to the Services as shall be reasonably required by the Council at any time during the Operating Period.

7 TRANSFER OF UNDERTAKINGS

- 7.1 The Operator acknowledges that pursuant to the Transfer of Undertakings Protection of Employment) Regulations 2006 ("**the Regulations**") at the Effective Date the Operator will become the employer of the Transferring Employees and the Operator agrees that from the Effective Date it will employ the Transferring Employees with service continuous with that with the Council and on the terms and conditions of employment which applied to them immediately before the Effective Date. For the avoidance of doubt 'terms and conditions of employment' shall include any policies and procedures and trade union recognition arrangements applicable to the Transferring Employees.
- 7.2 The Council shall indemnify the Operator fully and keep the Operator indemnified and hold it harmless at all times from and against all actions, claims, liabilities, expenses, legal remedies, compensation, Court or Tribunal orders, penalties, fines, awards, costs (excluding legal expenses) arising from or relating to any claim against the Operator by or in respect of (including a claim by any trade union in respect of) any of the Transferring Employees or in respect of any employees of the Council who are not Transferring Employees (including employees of a party nominated by the Council to undertake the Services) but whose contracts of employment may be transferred to the Operator as a result of the operation of the Regulations at the Effective Date in relation to the provision of the Services, arising from any act or omission by the Council (or any party nominated by the Council to undertake the Services) or any other event or matter occurring or arising prior to the Effective Date including without limitation any such liability for or arising from:
- 7.2.1 any unfair dismissal basic, compensatory or additional award by an Employment Tribunal;

- 7.2.2 any failure by the Council to comply with its obligations under the Regulations to consult with and provide information to the Transferring Employees in relation to the transfer of their employment to the Operator under this Agreement;
 - 7.2.3 any damages for race, sex and disability discrimination;
 - 7.2.4 any statutory redundancy pay awarded by an Employment Tribunal;
 - 7.2.5 any protective award or liability under Sections 189 and 190 of the Trade Union and Labour Relations (Consolidation) Act 1992;
 - 7.2.6 any award made for unlawful deduction of wages under Part II of the Employment Rights Act 1996;
 - 7.2.7 any contract of employment between the Council and any former employee of the Council (or any employee of a party nominated by the Council to undertake the Services) which contract terminated prior to the Effective Date; and
 - 7.2.8 any personal injury or death occurring prior to the Effective Date.
- 7.3 All salaries, bonuses and other emoluments including holiday pay, tax and national insurance contributions and contributions to retirement benefit schemes relating to the Transferring Employees shall be borne by the Council up to the Effective Date and by the Operator from and including the Effective Date.
- 7.4 If by operation of law the contracts of employment of any employees of the Council (or of any party nominated by the Council to provide the Services prior to the Effective Date) who are not Transferring Employees shall be transferred to the Operator as a result of the operation of the Regulations at the Effective Date in relation to the provision of the Services, the parties shall discuss any appropriate changes to the level of the Management Service Fee which are necessary as a result.
- 7.5 The Operator warrants that:
- 7.5.1 it will comply with its obligations under Regulation 13 of the Regulations;
 - 7.5.2 it has not made any representations or omitted to make any representations or made any misrepresentations or misstatements whether negligent or not to any of the Transferring Employees or any trade union or staff body that could result in a dispute claim liability or demand between any or all of the Council's employees and the Council/the Operator whether such representations, misrepresentations or misstatements are or are not made on or after the Effective Date and whether liability for any such claim arises before or after the Effective Date; and
 - 7.5.3 where applicable it has provided to the Council all relevant information which they are required to provide the Council for the purposes of consultation in accordance with the Regulations and will indemnify the Council against any compensation for which the Council may become liable as a result of any breach thereof by the Operator.
- 7.6 The Operator shall give the Council such assistance as the Council may reasonably require to contest (at the Council's expense) any claim brought by a Transferring Employee or any other employee to which the indemnities in clauses 7.2, 7.3 and 7.4 apply.
- 7.7 The Council shall not be liable for any claim under the indemnities in clauses 7.2, 7.3 and 7.4 above unless:

- 7.7.1 the Council has received written notice from the Operator giving reasonable details of such claim and, if practicable the Operator's estimate of the amount involved, on or before twelve (12) months from the Effective Date; and
- 7.7.2 the aggregate amount of all such claims under these indemnities exceeds £1,000.
- 7.8 The Operator shall indemnify the Council fully and keep the Council indemnified and hold it harmless at all times from and against all actions, claims, liabilities, expenses, legal remedies, compensation, Court or Tribunal orders, penalties, fines, awards, costs (including reasonable legal expenses):
- 7.8.1 arising out of any breach of the warranties set out at clause 7.5;
- 7.8.2 incurred from any change or proposed change by the Operator to the terms and conditions of employment of any Transferring Employee where such change is or is proposed to be effected following the Effective Date;
- 7.8.3 arising out of any claim by any Transferring Employee in respect of unfair dismissal, redundancy pay, sex, race or disability discrimination, equal pay, unlawful deductions, breach of contract of employment or any collective agreement, unlawful deductions, equal pay, any other claim within the jurisdiction of an employment tribunal, loss of earnings, industrial or personal injury, any other claim in tort or at common law or otherwise relating to their employment by the Operator arising out of any act, fault or omission of the Operator which occurred on or after the Effective Date unless and to the extent that such claim arises from any action or inaction of the Council; and
- 7.8.4 arising out of any claim against the Council by or in respect of (including a claim by any trade union in respect of) any of the Transferring Employees arising from any event or matter occurring or arising after the Effective Date.
- 7.9 The Council and the Operator shall at all times take all reasonable steps to minimise any loss for which the relevant party is entitled to bring a claim against the other pursuant to the indemnities given in this clause 7, which shall include any obligation to exhaust any entitlement to reimbursement from any third party in respect of such loss and, any such indemnity shall not extend to losses which could have been reduced or avoided by the beneficiary of such indemnity complying with the provision of this clause.
- 7.10 If, after the Effective Date the Services are subsequently transferred from the Operator to the Council (or a third party nominated by the Council to undertake the Services or any service equivalent to the Services (the "**Future Services Provider**")) the Council acknowledges that all the employees wholly or mainly engaged in connection with the Services immediately prior to the date of the said transfer may become employees of the Council (or the Future Services Provider) by operation of the Regulations on the same terms and conditions of employment as those enjoyed by such individuals immediately prior to the said transfer.
- 7.11 The Operator undertakes that it will use all reasonable endeavours, upon prior written request by the Council, within the period of six (6) months prior to the termination of this Agreement provide full and accurate information in relation to each employee employed by the Operator to carry out the Services to allow the Council to comply with its obligations under the Regulations.
- 7.12 In the event of the application or alleged application (whether correctly or not) of the Regulations in relation to the termination or expiry of this Agreement and the transfer

of the Services (or any part of the Services) from the Operator or any sub contractor of the Operator, then the Operator shall (and shall procure that any sub contractor shall) indemnify and keep indemnified the Council or any Future Services Provider against all losses, damages, costs, actions, awards, penalties, fines, proceedings, claims, demands, liabilities (including without limitation any liability to tax) and expenses (including without limitation reasonable legal and other professional fees and expenses) ("**Liabilities**") which the Council or any Future Services Provider (whether directly or indirectly) incurs by reason of or arising from any act or omission of the Operator or its sub contractor in the period prior to the application or alleged application of the Regulations which shall include, for the avoidance of doubt, but without limitation any Liabilities that have arisen from any act or omission of the Operator or any sub contractor in the period prior to the application or alleged application of the Regulations in respect of the employees or former employees of the Operator or any sub contractor which transfer or are alleged to have transferred to the Council or any Future Services Provider under the Regulations.

7.13 For the purposes of this clause 7.13 "**Returning Employees**" shall mean those employees wholly or mainly engaged in the provision of the Services as the case may be as immediately before the expiry or termination of this Agreement whose employment transfers to the Council or Future Services Provider pursuant to the Regulations. Upon expiry or earlier termination of this Agreement for whatever reason (such date being termed the "**Return Date**"), the provisions of this clause 7 will apply:

7.13.1 the Operator shall or shall procure that all wages, salaries and other benefits of the Returning Employees and other employees or former employees of the Operator (who had been engaged in the provision of the Services) and all PAYE tax deductions and national insurance contributions relating thereto in respect of the employment of the Returning Employees and such other employees or former employees of the Operator up to the Return Date are satisfied;

7.13.2 the Operator shall in respect of those employees who constitute Returning Employees indemnify the Council and any Future Services Provider against all direct losses incurred by them resulting from any claim, act, fault or omission whatsoever by or on behalf of any of the Returning Employees in respect of the period after the Effective Date but on or before the Return Date (whether any such claim, act, fault or omission attributable to the period up to and on the Return Date, arises before, on or after the Return Date) including but not limited to any failure by the Operator to comply with its or their obligations under Regulation 13 of the Regulations save to the extent that any such failure to comply arises as a result of an act or omission of the Council or any replacement provider; and

7.13.3 the Operator shall in respect of those employees who constitute Returning Employees indemnify the Council and any Future Services Provider in relation to all of the redundancy costs (including statutory and contractual costs) of dismissing any Returning Employees on the grounds of redundancy on the termination or expiry of this Agreement.

8 PENSIONS

8.1 Subject to compliance by the Council with clause 8.3 below, the Operator shall obtain admitted body status within the Northamptonshire Pension Fund of the Local Government Pension Scheme (the "**Scheme**") for the benefit of all Transferring Employees who are active members of or eligible to become active members of the

Scheme ("**Pensionable Employees**") and produce a certified copy of the executed admission agreement (the "**Admission Agreement**") which shall be effective on and from the Effective Date, on or as soon as reasonably practicable after the Effective Date.

- 8.2 No later than the first anniversary of the Effective Date (or any earlier date stipulated by the Council and / or by the administering authority of the Scheme (the "**Authority**") pursuant to the Admission Agreement), the Operator shall procure a bond in respect of the Operator's liabilities under the Admission Agreement, such bond to comply with the requirements set out in the Admission Agreement. Thereafter, the Operator shall maintain such bond in force, and shall renew and/or adjust such bond as and when required pursuant to the Admission Agreement.
- 8.3 Where so required by the Authority, the Council shall before the Effective Date execute the Admission Agreement, and (to the extent required by the regulations governing the Scheme) shall meet any liabilities of the Operator arising on termination of under the Admission Agreement which are not met by the Operator or under any bond procured by the Operator pursuant to clause 8.2.
- 8.4 The Operator hereby indemnifies the Council from and against all losses suffered or incurred by the Council which arise from any breach by the Operator of the terms of the Admission Agreement or of the regulations governing the Scheme.
- 8.5 The Council shall have a right to set off against any payments due to the Operator under this Agreement an amount equal to any overdue employer and employee contributions and other payments (including any interest payable thereon) due from the Operator under the Admission Agreement or the regulations governing the Scheme.
- 8.6 The Council agrees that it will procure that:
- 8.6.1 the Scheme's actuary will value the assets and the liabilities of the Scheme relating to pensionable service completed by and service credits awarded to the Pensionable Employees prior to the Effective Date, such valuation to be undertaken as at the Effective Date on a past service reserve basis using the methods and assumptions used to value the Scheme for the 31 March 2010 triennial valuation of the Scheme, updated to reflect current market conditions as at the Effective Date; and
- 8.6.2 the Scheme shall allocate such assets to the notional fund attributable to the Operator as are necessary to ensure that the accrued benefits of the Pensionable Employees in respect of pensionable service prior to the Effective Date and any service credits awarded in respect of any Pensionable Employee prior to such date are fully funded as at the Effective Date on the basis of the valuation carried out under clause 8.6.1;
- but for the avoidance of doubt, and subject only to the Council's responsibilities under clause 8.3, the Operator shall otherwise be solely responsible for meeting any and all liabilities to the Scheme on and from the Effective Date in relation to the Pensionable Employees, however such liabilities may arise and regardless of whether such liabilities relate to pensionable service before or after the Effective Date, to the exclusion of the Council.
- 8.7 The Council hereby indemnifies the Operator against any from and against all losses suffered or incurred by the Operator which arise from any breach by the Council of clause 8.6.
- 8.8 If, whilst the Operator is still the employer of Pensionable Employees, and prior to the Termination Date:

- 8.8.1 the Operator no longer wishes to offer all or some of those Pensionable Employees membership of the Scheme; or
- 8.8.2 the Operator ceases to hold admitted body status within the Scheme (including by termination of the Admission Agreement without replacement); or
- 8.8.3 any Pensionable Employee (though remaining employed by the Operator) ceases to be employed in connection with the Services but does not voluntarily agree to the loss of his Scheme membership as part of the change in his employment duties;

then in respect of those Pensionable Employees who consequently cease to be eligible for membership of the Scheme ("**Affected Employees**"), the provisions of clause 8.9 shall apply in relation to all periods of employment of the Affected Employees on and after the date on which they cease to be eligible for membership of the Scheme (the "**Cessation Date**").

- 8.9 The Operator shall as soon as reasonably practicable and in any event not later than one (1) month after the Cessation Date nominate to the Council in writing the pension scheme or schemes which it proposes shall be the Operator Scheme for the purposes of this clause. Such pension scheme or schemes must be:
 - 8.9.1 registered within the meaning of the Finance Act 2004;
 - 8.9.2 capable of receiving a transfer payment in respect of the Affected Employees in accordance with clause 8.10; and
 - 8.9.3 certified (in accordance with relevant guidance produced by the Government Actuary's Department) by an actuary approved by the Council as providing benefits which are broadly comparable to those provided by the Scheme (based upon the regulations governing the Scheme as in force at the Cessation Date), or (where not so certified) approved by the Council in writing.
- 8.10 The Operator undertakes to the Council (for the benefit of the Council itself and for the Council as agent and trustee for the benefit of the Affected Employees) that it shall procure that:
 - 8.10.1 the Affected Employees shall no later than three (3) months after the Cessation Date be invited to join the Operator Scheme with effect from and including the Cessation Date (but such invitation may be withdrawn if any Affected Employee does not apply to join the Operator Scheme within a reasonable period stipulated by the Operator, being not less than one (1) month from the date on which the invitation is first made to him);
 - 8.10.2 if the Operator Scheme is terminated, a replacement pension scheme shall be provided with immediate effect for those Affected Employees who are still employed by the Operator, which scheme must comply with the relevant provisions of this clause 8 as if it were the Operator Scheme; and
 - 8.10.3 the trustees or managers of the Operator Scheme will agree to accept a transfer payment from the Scheme in respect of those Affected Employees who elect to transfer their accrued benefits within the Scheme to the Operator Scheme in accordance with clause 8.11 below, and will on receipt of such transfer payment provide the relevant Affected Employees with transfer credits in the Operator Scheme which are certified by an actuary appointed by the Council or (where the Council so elects) by the Scheme's actuary as being of actuarially equivalent value to the relevant

Affected Employees' accrued benefits within the Scheme which are the subject of the transfer payment.

- 8.11 The Operator shall offer each Affected Employee who joins the Operator Scheme in response to the invitation referred to in clause 8.10.1 the opportunity to transfer his accrued benefits within the Scheme to the Operator Scheme. Such offer shall be made within the period of one (1) month commencing on the date the Affected Member applies to join the Operator Scheme, and in a form complying with any requirements of the regulations governing the Scheme and with any reasonable additional requirements of the Authority. An Affected Employee wishing to elect such a transfer must give his written consent to the transfer in such form as the Operator may reasonably require within the period of three (3) months commencing on the date the offer is made to him.
- 8.12 Where any Affected Employee elects to transfer his accrued benefits under clause 8.11, the Operator and the Council shall use their respective best endeavours to:
- 8.12.1 agree with the Authority as soon as reasonably practicable the amount of the transfer payment to be made in respect of such Affected Employee's accrued benefits;
- 8.12.2 procure that the amount of the transfer payment shall be not less than:
- 8.12.2.1 an amount representing the relevant Affected Employee's share of the fund under the Scheme, when valued on a past service reserve basis using the methods and assumptions used to value the Scheme for the most recent triennial valuation of the Scheme, updated to reflect current market conditions as at the date the calculation is carried out, including (for the avoidance of doubt) assumptions relating to future pay increases; or
- 8.12.2.2 an amount representing the relevant Affected Employee's cash equivalent (as defined for the purposes of the Pension Schemes Act 1993);
- whichever is the greater; and
- 8.12.3 procure that the Authority makes the transfer payment in the agreed amount as soon as reasonably practicable after such amount has been agreed (subject always to compliance by the trustees or managers of the Operator Scheme with such requirements as the Authority is legally bound to impose or otherwise reasonably requires).
- 8.13 Save on expiry or termination of this Agreement, if the employment of any Pensionable Employee transfers to another employer (by way of a transfer under TUPE) the Operator shall (except in respect of any Pensionable Employee who has, prior to the date of the transfer, ceased to be employed in connection with the Services and who at that time voluntarily agreed to the loss of his Scheme membership as part of the change in his employment duties), procure that the employer to which the Pensionable Employee is transferred (the "New Employer") complies with the provisions of this clause 8 (Pensions), provided that references to the Operator will become references to the New Employer, references to Effective Date will become references to the date of transfer to the New Employer and references to Pensionable Employees will become references to the Pensionable Employees so transferred to the New Employer.
- 8.14 If, on expiry or termination of this Agreement, the Operator is still the employer of any Pensionable Employees, and the Council or a Future Services Provider to whose

employment any Pensionable Employee transfers so requires, the Operator shall procure that:

1.1.1 the accrued benefits (if any) of such Pensionable Employee within the Scheme in respect of pensionable service prior to the Termination Date and any service credits awarded in respect of such Pensionable Employee prior to such date are fully funded as at the Termination Date, when valued as at the Termination Date on a past service reserve basis using the methods and assumptions used to value the Scheme for the most recent triennial valuation of the Scheme undertaken prior to that date, updated to reflect current market conditions as at the Termination Date; and

8.14.1 the trustees or managers of any Operator Scheme in which such Pensionable Employee has accrued benefits shall transfer the accrued benefits of such Pensionable Employee from the Operator Scheme on the same basis as set out in clause 8.12.

9 STAFF

9.1 The Operator acknowledges that the Council has a strong commitment to equality and in providing the Services under this Agreement the Operator shall operate equality policies and procedures in all aspects of its work, including the Equality Policy. By implementing these policies and procedures the Operator shall ensure that it does not in any way discriminate against any person or other organisation on the grounds of race, ethnic origin, disability, nationality, gender, sexuality, age, class, appearance, religion, responsibility for dependants, unrelated criminal activities, being HIV positive or having AIDS, or any other matter which causes a person to be treated with injustice.

9.2 The Operator shall follow the best professional practice in relation to equality and in particular, but without limitation, shall comply with:

9.2.1 all relevant Legislation as well as statutory and other official guidance and codes of practice; and

9.2.2 the Council's own equality policies as the same may be adopted and amended from time to time including the Equality Policy (or such similar policies as the Operator shall develop from time to time).

9.3 The Operator's Equality Policy will comply with the requirements of Schedule 12. The application of this policy must demonstrate how the Operator:

9.3.1 employs and recruits staff;

9.3.2 deals with board membership and other issues arising from its constitution;

9.3.3 handles racial disputes, harassment issues and promotes racial harmony;

9.3.4 commissions contractors, consultants and agents; and

9.3.5 implements the Business Plan.

9.4 The Operator shall provide such information as the Council may reasonably request for the purpose of assessing the Operator's compliance with the provisions of clauses 9.1 to 9.3, inclusive.

9.5 It shall be the duty of the Operator to ensure that it has at all times a sufficient reserve of competent staff available to provide the Services in accordance with the provisions of the Agreement in accordance with the Business Plan and the NOP's.

- 9.6 The Operator shall employ in and about the provision of the Services only such persons as possess suitable qualifications, skills and experience so that the Services can be carried out in a safe and competent manner.
- 9.7 The Operator shall ensure that every person employed by it in and about the provision of the Services are properly and sufficiently instructed and supervised and trained with regard to the provision of the Services and in particular that each person so employed is made aware of:
- 9.7.1 all tasks that that person has to perform;
 - 9.7.2 all relevant policies (including without limitation the Equality Policy), rules, procedures, codes of conduct and standards of the Council as which are agreed with the Operator from time to time;
 - 9.7.3 all relevant Council Guidelines;
 - 9.7.4 all relevant rules and procedures concerning health and safety at work; and
 - 9.7.5 all relevant policies, rules, procedures and standards (including the relevant parts of the Business Plan and the NOP's) of the Operator;
- and the Operator shall ensure that all persons employed by them shall comply with the Council's Employees Code of Conduct applicable from time to time.
- 9.8 The Council Representative may on reasonable grounds and at all times acting reasonably request that the Operator remove from work in or about the provision of the Services any person employed by the Operator where the Council Representative reasonably suspects any breach of the provisions of clause 9.15 or clause 52.
- 9.9 The Operator shall provide such special clothing or footwear for their staff as they deem appropriate where the nature or the place of any duties make the wearing of such items necessary or appropriate for health and safety reasons.
- 9.10 The schedule of NOP's in respect of each Facility shall be available for inspection at any time by the Council Representative and for the Operator's staff at the relevant Facility.
- 9.11 The Operator shall maintain an accidents and incidents record at each Facility in accordance with the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 ("RIDDOR") and shall inform the Council Representative as soon as reasonably practicable where serious injuries to either users of any of the Facilities or staff occur.
- 9.12 The Operator shall provide and shall ensure that its staff wear at all times, when engaged in the provision of the Services, such identification (including photographic identification) as may be specified by the Council and shall ensure that when reasonably requested by do so, any staff of the Operator shall while engaged in the provision of the Services at any Facility, display their identity status as staff of the Operator.
- 9.13 The Operator and their staff shall not solicit any gratuity, tip or monies other than the bona fide charges permitted to be charged under this Agreement and the provisions of clause 52 shall be complied with and the Operator shall make all staff aware of the same at all times during the Operating Period.
- 9.14 Save as aforesaid, the Operator shall be entirely responsible for the employment and conditions of service of the Operator's own staff.
- 9.15 If, owing to the nature of the Services, employees of the Operator are exempt from the provisions of Section 4(2) of the Rehabilitation of Offenders Act 1974, by virtue of

the Rehabilitation of Offenders Act 1974 (Exemptions) Order 1975, or any such updated Act and/or Order then the Operator shall ensure that all staff engaged in the provision of the Services shall provide information to the Operator in accordance with the said Act and Order about convictions which would otherwise be spent under the provision of the said Act. The Operator shall, upon request, disclose to the Council Representative the names and addresses and sufficient information in respect of all relevant staff and the Operator shall use all reasonable endeavours to ensure that all proper checks are made including, without limitation, obtaining clearance (where possible, prior to the commencement of employment or engagement, and otherwise as soon as reasonably practicable thereafter) in respect of all staff of the Operator who will or may come into contact with children in the provision of the Services, by the Criminal Records Bureau and, as appropriate, all convictions of their staff engaged in and about the provision of the Services.

- 9.16 The Council may, following use of the procedure set out in clause 9.15, or otherwise at any time, notify the Operator that it considers any specific member of staff of the Operator (or any officer of the Operator, not being a member of staff) or a Permitted Sub-Contractor to be unsuitable in connection with the provision of the Services at any of the Facilities. The Council shall provide the Operator (or any officer of the Operator, not being an employee) with its reasons for giving such notification to the extent that it is able to do so without breaching any law or any duty of confidence, and the Council will act reasonably and proportionately in giving such notification. Upon receipt of such notification, the Operator (or any officer of the Operator, not being an employee) shall forthwith consider the substance of such notification and shall immediately investigate the background reasons given by the Council (if any).
- 9.17 If as a result of the Operator's investigation pursuant to clause 9.16:
- 9.17.1 the Operator considers it appropriate and necessary, acting reasonably and in the best interests of the provision of the Services hereunder and the users of the Facilities at all times, the Operator shall instigate disciplinary proceedings against the member(s) of staff being the subject of the investigation or take steps to remove the member(s) of staff from the provision of the Services at the relevant Facilities (in each case in accordance with their established procedures); or
- 9.17.2 the Operator considers it inappropriate or otherwise unnecessary, acting reasonably and in the best interests of the provision of the Services hereunder and the users of the Facilities at all times, to instigate disciplinary proceedings or to take steps to remove the member(s) of staff from the provision of the Services at the relevant Facilities, then it shall inform the Council of their findings and their opinion.
- 9.18 If as a result of any disciplinary proceedings the Operator brings against the member(s) of staff being the subject of the proceedings pursuant to clause 9.17.1:
- 9.18.1 the Operator considers it has reasonable grounds, after having taken legal advice, to dismiss the member(s) of staff in question or to remove the member(s) of staff from the provision of the Services at the relevant Facilities, then it shall do all that it is lawful to do to dismiss such member(s) of staff or remove the member(s) of staff from the provision of the Services at the relevant Facilities; or
- 9.18.2 the Operator considers it has no grounds, after taking legal advice, to dismiss the member(s) of staff in question or to remove them from the provision of the Services at the relevant Facilities, then it shall inform the Council of their findings.

9.19 Where, contrary to the findings of the Operator pursuant to the provisions of clauses 9.17.2 and/or 9.18.2, the Council requires that any such member(s) of staff be dismissed summarily then the Operator shall do all that it is lawful for them to do to summarily dismiss the member(s) of staff in question, and the Council shall indemnify and keep the Operator indemnified against all costs (including legal costs and any awards which may be made against the Operator and in favour of the member(s) of staff incurred by the Operator in carrying out the wishes of the Council.

10 CONTROL AND SUPERVISION

- 10.1 The Operator shall appoint a senior person who shall be the Managing Director of the Operator. Such appointment or any further appointment shall be subject to the approval of the Council and in any event shall be subject to the provisions of clauses 9.16 to 9.19 inclusive as if they were for the purposes of these provisions a member of staff. The Managing Director shall not be replaced without the prior written approval of the Council, such approval not to be unreasonably withheld or delayed.
- 10.2 The Operator shall, prior to the Effective Date, designate an appropriately qualified and competent person to be the Contract Manager as whose details are set out in Schedule 2 Part 3. For the avoidance of doubt, such appointment is not required to be an external appointment but the Contract Manager and the Managing Director shall not be the same person.
- 10.3 The Contract Manager or, where appropriate, his deputy (as hereinafter mentioned) shall be the duly authorised representative of the Operator for all purposes connected with this Agreement. Any notice, information, instruction or other communication given or made to the Contract Manager (or where appropriate his deputy) shall be deemed to have been given or made to the Operator.
- 10.4 The Operator shall forthwith give notice in writing to the Council Representative of the identity of the person appointed Contract Manager and of any subsequent appointment, subject to the provisions of clause 10.1. Until notice of a subsequent appointment shall have been given, the Council shall be entitled to treat as Contract Manager the person last notified to the Council Representative as being the Contract Manager.
- 10.5 The Operator shall ensure that the Contract Manager or a competent deputy duly authorised to act on his behalf is available to the Council or the Council Representative, as the case may be, on prior reasonable notice.
- 10.6 The Operator shall inform the Council Representative, in writing, of the identity of any person authorised to act for any period as deputy for the Contract Manager.
- 10.7 If the Operator at any time becomes aware of any act or omission or proposed act or omission by the Council which prevents or hinders or may prevent or hinder the Operator from providing the Services in accordance with the terms of this Agreement, the Contract Manager or his deputy shall inform the Council Representative of that fact.
- 10.8 The Operator shall, notwithstanding the provisions of clause 26, use all reasonable endeavours to provide a sufficient complement of supervisory staff, in addition to the Contract Manager, to ensure that the Operator's staff engaged in and about the provision of the Services at each of the Facilities are adequately supervised and properly perform their duties.
- 10.9 The Operator shall use all reasonable endeavours to ensure that members of its staff give all reasonable assistance to the Council in the investigation of complaints, disciplinary matters involving Council staff, claims for damages and similar matters.

10.10 The Operator shall use all reasonable endeavours to ensure that any agents, contractors or suppliers who may be required to enter the Facilities at the Operator's behest shall be fully aware of the following:

1.1.2 all relevant rules and procedures concerning health and safety at work;

1.1.3 all relevant rules and procedures concerning fire risks and fire precautions; and

1.1.4 all relevant policies (including without limitation the Equality Policy), rules, procedures and standards of the Council as which are agreed with the Operator from time to time.

11 EQUIPMENT AND MATERIALS

11.1 The Council shall make available to the Operator all of the Equipment and Materials which are available at the Facilities on the Effective Date. The Council shall grant the Operator during the Operating Period the right to use the Old Equipment situated at the Facilities from the Effective Date for the purposes of providing the Services for the Operating Period. The Operator acknowledges and confirms that it acquires the right to use all Old Equipment at the Facilities in the state it is in as at the Effective Date and that the Council shall not be under any obligation whatsoever to replace or improve the condition of any such Old Equipment. The Operator further acknowledges and confirms that all Materials made available for its consumption in providing the Services hereunder are provided in an "as is" condition.

11.2 During the Operating Period the Operator shall at all times maintain all Equipment in a safe, serviceable and clean condition and shall at all times maintain all Equipment at least to the standard recommended by the manufacturer in each case.

11.3 The Operator undertakes that all New Equipment and Materials purchased or otherwise procured for use at any of the Facilities after the Effective Date and used at the Facilities shall be kept at all times in a safe, serviceable and clean condition during the Operating Period.

11.4 The Operator shall only keep hazardous Materials or Equipment at the Facilities which are strictly necessary and which are to be used in connection with the provision of the Services. Such Materials or Equipment must be kept at all times under proper control and safekeeping by the Operator and the Operator shall use all reasonable endeavours to ensure that any and all such Materials and Equipment are properly and clearly labelled as such.

11.5 The Operator shall permit the Council Representative, or his deputy to inspect with reasonable prior notice, at any reasonable time, any Equipment or Materials used or proposed to be used by the Operator in or about the provision of the Services at any of the Facilities and the Operator shall co-operate with the Council Representative, or his deputy, so as to facilitate the carrying out of such inspections.

11.6 Where it is found that Equipment or Materials used or proposed to be used by the Operator in the provision of the Services do not meet any provisions of the Business Plan or the NOP's, the Operator shall, at its own cost, either repair or remove such Equipment or Materials from the Facility at which it is then situated as soon as reasonably practicable.

12 USE OF THE COUNCIL'S FACILITIES

12.1 The Council shall grant Leases to the Operator (and the Operator shall take Leases) in respect of each of the Facilities upon or as soon as reasonably practicable after the Effective Date, and in any event within three (3) months of the Effective Date.

- 12.2 Pending the grant of the Leases, with effect from the Effective Date, the Council shall permit the Operator, their staff, agents and subcontractors, as licensee only, to enter the Facilities to the extent reasonably necessary for or in anticipation of the observance and performance of any of the obligations of the Operator under this Agreement. In such intervening period, prior to the grant of the Leases, the Council, as licensors, shall remain solely responsible for the external and structural maintenance of each of the Facilities as if the Leases had been granted.
- 12.3 Without prejudice to the terms of the Leases, the Operator shall use the Facilities only in connection with the provision of the Services or ancillary leisure and recreational services as set out in the Business Plan and shall ensure that the Operator's staff use and permit the use of each of the Facilities only for those purposes. For the avoidance of doubt, the Council will have the right of veto over any proposed change in the use of any of the Facilities to the extent that such change of use does not fall within the scope of this clause 12.3.
- 12.4 Without prejudice to the terms of the Leases, the Operator shall ensure that only users and spectators at the Facilities, their own staff, persons making deliveries, suppliers and contractors at the Facilities in connection with the provision of the Services have access to or the use of any part of the Facilities.
- 12.5 Without prejudice to the terms of the Leases and the provisions of clause 53, the Operator shall at all times permit the Council Representative, upon reasonable prior notice, to inspect any of the Facilities.
- 12.6 The Operator shall permit the Council (without the Council making payment or recompense to the Operator) the right to use any of the Facilities at any time in bona fide emergency situations for the accommodation of members of the public pursuant to its role and powers as a local authority and the Operator shall give all necessary assistance including the provision of staff to the Council in arranging emergency use in accordance with the Council's Emergency Plan.
- 12.7 Without prejudice to the provisions of clause 12.6 the Operator shall, upon the occurrence of a bona fide emergency situation and at the request and cost of the Council use all reasonable endeavours to provide the following services under the control and direction of the Council's Emergency Officer or their designated representative:
- 12.7.1 to make provision for persons made homeless as a result of such an emergency and evacuees and to supervise and co-ordinate the efforts to secure temporary accommodation for the same including the use of any of the Facilities and in addition the Operator shall so far as reasonably possible assist in the equipping of such places for use of temporary accommodation;
 - 12.7.2 to liaise with the Council and such other organisations as the Council shall decide in order to co-ordinate action in dealing with homeless persons and evacuees;
 - 12.7.3 whenever so requested by the Council to arrange for the provision of temporary accommodation for homeless persons and/or evacuees at any of the Facilities; and
 - 12.7.4 to manage the temporary accommodation at any of the Facilities secured pursuant to these provisions for so long as the state of emergency lasts.
- 12.8 At the request of the Council the Operator will attend such training sessions and/or exercises as may be reasonably specified by the Council and the number of the Operator's employees who shall be required so to attend shall be agreed between

the Council and the Operator and in default of agreement the Council shall specify the number of the Operator staff required to attend.

- 12.9 In the event that the Council requires the use of any Facility in connection with any local, general and / or European elections or has any other reasonable requirement in respect of such Facility, the Operator will comply with such requirement (including, without limitation, the provision of any necessary staff to fulfil the Council's requirement). In these circumstances, the Council shall give the Operator notice of its requirements for using any Facility and for additional or alternative services to be provided within good time of the relevant event taking place. Costs reasonably and properly incurred by the Operator in complying with this clause 12.9 shall be reimbursed by the Council on the same basis as has been used prior to the Effective Date (ie only the cost of staff required to operate the Facility during the required event will be re-imbursed).

13 THIRD PARTY CONTRACTS

- 13.1 Subject always to the Council being able to obtain all necessary third party licences, consents and permissions, the Council undertakes to use all reasonable endeavours either:

13.1.1 to procure at its own cost the assignment or novation, as the case may be, to the Operator of the Third Party Contracts with effect from the Effective Date; or

13.1.2 to procure goods and services under the Third Party Contracts on behalf of and at the request of the Operator, subject to the Operator undertaking to pay to the Council the costs incurred by the Council in procuring such goods and services.

- 13.2 The Operator will, if so requested by the Council, provide reasonable assistance to the Council to seek such licences, consents and permissions necessary for the assignment, sub-letting or novation to the Operator of the Third Party Contracts. The Council and the Operator undertake to each other to comply with the terms of all licences, consents and permissions given in respect of the assignment or novation of the Third Party Contracts.

- 13.3 After the Effective Date:

13.3.1 unless and until any Third Party Contracts are novated or assigned the Council will hold the benefit of such Third Party Contracts on trust for the Operator absolutely and will account to the Operator for any sums or any other benefits received by the Council in relation thereto;

13.3.2 the Operator will, as the Council's agent, perform all the obligations of the Council in the Third Party Contracts relating to the period after the Effective Date, including the meeting of ongoing costs in respect thereof strictly in accordance with their respective terms; and

13.3.3 unless and until any Third Party Contracts are novated or assigned, or consent is obtained, the Council will act in accordance with the reasonable directions of the Operator in all matters relating to such Third Party Contracts for so long as the Council is required and authorised so to do by the Operator.

- 13.4 To the extent that the Council is unable to procure the assignment or novation to the Operator of any Third Party Contract, then the parties agree to use all reasonable endeavours to obtain the financing or provision of the goods and/or services, as the case may be, by an alternative means as quickly as is reasonably practicable,

subject always to the alternative financing or supply being suitable for the provision of the Services in accordance with this Agreement.

14 LICENCES

14.1 The Operator will ensure that it has in place and maintains throughout the Operating Period all licences, permissions and such other authorisations as may be necessary for the proper operation of the Facilities and performance of the Services.

14.2 The Operator will procure the transfer of (or, as applicable, arrange for applications to be made for) all licences (including, without limitation, entertainment licences and liquor licences) in respect of the Facilities from the name of the Council to the extent that such transfers / applications are required to enable the Operator to provide the Services in accordance with all relevant legislation and other requirements / standards hereunder at that Facility.

14.3 Until such time as the licences have been transferred / applied for and obtained in the name of the Operator, the Operator shall at all times use all reasonable endeavours to comply with the provisions of such licences.

14.4 The Council will provide to the Operator all reasonable co-operation and assistance to ensure the timely transfer of the licences into the name of the Operator (or, where appropriate, the Operator's designated nominee).

15 MANAGEMENT SERVICE FEE

15.1 The Council shall pay the Operator the Management Service Fee for the provision of the Services during each Year of the Operating Period commencing on the Effective Date, the level of such Management Service Fee for each Year being as set out in Schedule 4 Part 1 (or as calculated using the mechanism set out therein) and, unless otherwise agreed in writing between the parties to the contrary, the Management Service Fee shall be payable quarterly in advance (other than for the first six (6) months following the Effective Date, the Management Service Fee for which shall be paid in one payment in advance) on the following basis: (2)

15.2 For each Year during the Operating Period the Operator shall be entitled to retain the total income (if any) received during that Year at each of the Facilities. Insofar as in any Year there is a surplus (ie trading incomes (together with any other amounts, including the Management Service Fee) exceed all overheads for that Year) in the Operator's audited accounts, the Operator, in accordance with the Operator's constitution, shall reinvest such surplus into the provision of the Services for the following and subsequent Years during the Operating Period in consultation with the Council and in accordance with the Business Plan or the Operator's reserves strategy. Any deficit (ie overheads for that Year exceed all trading incomes (together with any other amounts, including the Management Service Fee) will be for the account of the Operator and the Council will have no liability in respect of such deficit.

15.3 The Council acknowledges that some payments in respect of the usage of the Facilities have been made by service users in advance of the Effective Date. The Council shall, in the operation of this Agreement, account to the Operator (whether by way of a direct payment or offset against initial Operator costs that the Council may agree to cover at the start of this Agreement) for a sum which represents, as at the Effective Date, a pro-rated proportion of all pre-paid memberships or usage or hiring fees in respect of the facilities at the Facilities which relate to any period after the Effective Date.

15.4 The only sums payable by the Council for the provision of the Services and the Facilities shall be the sums specified in clause 15.1 and 15.3 or as otherwise.

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expressly identified and set out in the Agreement. All other costs, charges, fees and expenses of whatever kind for or arising out of or in connection with the provision of the Services (including without limitation all utilities but excluding premiums for the insurance of buildings and plant) shall be paid by the Operator.

- 15.5 If, for any reason, this Agreement comes to an end or is terminated otherwise than at the end of a Year, the sum payable by the Council under clause 15.1 in respect of the partly completed period shall be duly apportioned as at the date the Agreement comes to an end or is terminated and the proper proportion paid to the Operator (or any balance re-paid to the Council where the Management Service Fee has been paid in full in advance) in accordance with the terms hereof.

16 BEST VALUE

Duty of Best Value

- 16.1 The Operator acknowledges that the Council is subject to the Best Value Duty. Consequently, the Operator shall undertake (or refrain from undertaking) such actions as the Council shall reasonably request to enable the Council to comply with the Best Value Duty and shall provide to the Council such assistance and such information as the Council may from time to time request in order to meet its Best Value Duty.

Customer Satisfaction

- 16.2 The Operator shall, in the provision of the Services, perform customer satisfaction surveys, or use other appropriate means (such as holding customer forums) to check on a regular basis that users of the Facilities are satisfied with their operation. The Operator shall use its best endeavours to maintain an accurate and up-to-date record of such customer feedback and will supply to the Council a copy of the same upon request.
- 16.3 If, in the Council's reasonable opinion:
- 16.3.1 the customer feedback obtained by the Operator under clause 16.4 above discloses that the performance of the Services (or any part) may be improved having regard to the Best Value Duty; or
 - 16.3.2 the Operator has not complied with the best value performance indicators and benchmarking requirements of the Council from time to time;
- then the Council may serve a written notice upon the Operator ("**the Service Improvement Notice**") stating the nature of the improvements to the performance of the Services (or the relevant part) which the Council desires.
- 16.4 The Operator shall, within thirty (30) days of the date of receipt of a Service Improvement Notice, provide the Council with the "**Services Improvement Plan**" containing the Operator's proposals to achieve the improvement of the Services (or the relevant part) in accordance with the Service Improvement Notice.
- 16.5 As soon as reasonably practicable after the Council receives the Services Improvement Plan the parties shall discuss and agree the issues set out in it. In such discussions the Council may modify the Service Improvement Notice, in which case the Operator shall, as soon as practicable, notify the Council of any consequential changes to the Services Improvement Plan.
- 16.6 If the parties cannot agree on the contents of the Services Improvement Plan then the dispute will be determined in accordance with clause 60.
- 16.7 As soon as practicable after the content of the Services Improvement Plan has been agreed or otherwise determined pursuant to clause 60 the Council shall:

- 16.7.1 confirm in writing the Services Improvement Plan; or
 - 16.7.2 withdraw the Service Improvement Notice.
- 16.8 If the Council does not confirm the Services Improvement Plan within twenty (20) days of the Services Improvement Plan having been agreed in accordance with clause 16.7 or determined in accordance with clause 16.8 then the Service Improvement Notice shall be deemed to have been withdrawn.

17 SECURITY AND CLEANING

- 17.1 The Operator shall be responsible for the security of all Facilities, Materials and Equipment used by the Operator in or about the provision of the Services or otherwise belonging to the Operator or the Operator's staff at the Facilities in accordance with the Business Plans and any NOP's.
- 17.2 The Operator shall, where necessary, and as instructed, operate the Council's burglar and fire alarms at each of the Facilities. Keys for gaining access to any of the Facilities will be provided as necessary by the Operator and the Operator shall keep a record of the distribution of all keys relating to any part of any of the Facilities.
- 17.3 The Council shall hand the Facilities over to the Operator in a reasonable state of cleanliness and repair and in a state which is consistent with the Operator's requirement to provide the Services at each of the Facilities.
- 17.4 The Operator shall during the Operating Period make arrangements for the cleaning of each of the Facility interiors on a regular timetabled basis.

18 QUALITY CONTROL/AUDIT/REPORTING

Quality Control

- 18.1 The Operator shall, in accordance with the provisions of clause 6, operate a system of quality control, including applying for and maintaining a Quality Standard to ensure that the standards set out in this Agreement are properly maintained in connection with the provision of the Services. The quality control systems maintained by the Operator shall supplement any monitoring that may be instituted by the Council (if any) at any time during the Operating Period.

Audit

- 18.2 The Operator shall keep full and accurate records and books of account relating to the performance of the Services and all their activities and obligations under this Agreement. The Operator shall provide the Council each Year with a set of audited accounts as soon as reasonably practicable after the same have been filed with the relevant authority.
- 18.3 The Operator shall permit the Council and/or its authorised representatives (including its own Audit department and/or such external consultant the Council requires ("the Auditors")) at the Council's cost, on reasonable prior written notice, during normal office hours full and free access to inspect the records and books of account which they are under an obligation to keep pursuant to the provisions of clause 18.2.

Reporting

- 18.4 Without prejudice to clause 16 the Operator shall develop a system of regular meetings with the Council for the purpose of reporting its performance of its obligations under the Agreement, including (without limitation):
 - 18.4.1 its compliance with and actions taken in respect of all matters set out in the Business Plan; and
 - 18.4.2 its compliance with and actions taken in respect of the Strategies.

- 18.5 Without prejudice to the other provisions of this Agreement the Operator shall provide all relevant information which may be required by the Council in order that the Council shall be able to act fairly, properly and in accordance with its statutory obligations in connection with the provision of the Services or the future provision of the same or any similar services and also to deal with investigations or inquiries by the Audit Commission, the Ombudsman and similar persons or bodies. The Council may make a request for any such information at any reasonable time and the Operator shall comply with that request as soon as possible.
- 18.6 Subject to clause 18.5 the Operator shall consult as often as may be reasonably necessary with the Council Representative or with such other member of the Council's retained staff as the Council Representative may specify from time to time to ensure that the Services are provided and continue to be provided in a continuous and efficient manner and in accordance with the provisions of this Agreement.
- 18.7 The Contract Manager and the Council Representative (or their nominated representatives, as appropriate) shall at a mutually convenient time and location attend quarterly meetings to be arranged with effect from the Effective Date in order to discuss the performance of the Services under this Agreement. The Council reserves the right to require the Contract Manager to attend more frequent meetings with the Council Representative should operational issues relating to the Services require this to occur.
- 18.8 The Operator shall observe and comply with any reasonable and appropriate instructions or directions given or made by the Council Representative so as to help ensure the proper performance of the Services in accordance with the Business Plan and all such instructions or directions shall be confirmed in writing by the Council Representative before the end of the working day which follows the issue of such instructions or directions.
- 18.9 The Operator shall inform the Council Representative immediately by telephone or email (and shall confirm in writing as soon as reasonably practicable following such call or email) of any or all of the following matters:
- 18.9.1 any failure by the Council or its employees or agents or other persons providing services to the Council to meet its obligations under this Agreement;
 - 18.9.2 any acts or omissions by the Council or such other persons as are referred to in clause 18.9.1 which prevent or hinder or are likely to prevent or hinder the Operator from complying with its obligations under this Agreement; and/or
 - 18.9.3 any points of contention or other difficulties with any local users or user groups or comparable organisations, which might prevent or hinder the Operator from complying with its obligations under this Agreement.
- 18.10 The Operator shall co-operate with all relevant Council departments to enable them to better perform their functions and duties either by means of the provision of information or by such other appropriate means as do not involve additional expenditure.
- 18.11 The Operator and the Council shall establish such mutual arrangements as may be necessary (whether by mobile telephones, email or otherwise) to ensure that the liaison arrangements stipulated in this Agreement are workable and can be achieved.
- 18.12 The Operator shall, on being given reasonable notice, liaise with Council Members, Members of Parliament and other elected representatives as shall be reasonably required from time to time by the Council Representative.

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19 FACILITIES/TEMPORARY CLOSURES/UPGRADES

- 19.1 During the Operating Period the Council shall be responsible for the external and structural maintenance of all buildings located at the Facilities as more particularly detailed in each of the Leases.
- 19.2 The Council will provide the Operator with as much notice as is reasonably practicable in relation to planned maintenance to enable the Operator to consider ways of minimising the effect of any planned maintenance at any of the Facilities.
- 19.3 The Operator shall be entitled to make suggestions to the Council at any time where the provision of any of the Services or any of the Facilities should be varied (ie incremented or deleted) such matters shall constitute a Variation and shall be dealt with in accordance with the provisions of Schedule 11.
- 19.4 The Council shall give the Contract Manager as much notice as is reasonably practicable before commencing repairs or planned maintenance works.
- 19.5 The Council's notice shall include the following information:
- 19.5.1 the nature of the repairs required and Facilities to be closed;
 - 19.5.2 the estimated time for those repairs and closures;
 - 19.5.3 the estimated loss of Income (calculated as a daily rate based on the average daily Income from the use of the relevant Facilities over the equivalent time period in the previous financial year, and applied per day of closure (or part thereof) of the relevant Facilities); and
 - 19.5.4 the estimated savings resulting from such closure.
- 19.6 Once the repairs are completed the Council shall reimburse the Operator within thirty (30) days thereafter for such estimated loss of Income except to the extent that:
- 19.6.1 there is any compensating increase in Income at any other Facility;
 - 19.6.2 the loss of income is met by the Trust's loss of income insurance;
 - 19.6.3 the closure could have been prevented or reduced (acting reasonably in all the circumstances);
 - 19.6.4 the consequences of the closure could have been lessened or otherwise mitigated by action of the Operator; or
 - 19.6.5 there was any overrun beyond the originally planned date for completion, in which case the Operator shall (save where such overrun has been caused by the acts or defaults of the Operator) in addition to the originally estimated loss of Income be paid a daily rate loss of Income for any days or parts thereof covering the period of such overruns.

20 FORCE MAJEURE

- 20.1 Neither party shall be deemed to be in breach of this Agreement or otherwise liable to the other party in any manner whatsoever for any failure or delay in performing its obligations under this Agreement due to Force Majeure.
- 20.2 If a party's performance of its obligations under this Agreement is affected by Force Majeure, then:
- 20.2.1 It shall give written notice to the other party, specifying the nature and extent of the Force Majeure immediately on becoming aware of the Force Majeure and will use all reasonable endeavours to mitigate the severity of the Force Majeure;

- 20.2.2 subject to the provisions of clause 20.3, the date for performance of such obligations shall be deemed suspended but only for a period equal to the delay caused by such event.
- 20.3 If the event of Force Majeure in question prevails in relation to a specific Facility for a continuous period in excess of six (6) months after the date on which the Force Majeure commenced, the party not affected by the Force Majeure shall then be entitled to give notice in writing to the other to terminate this Agreement in relation solely to that Facility and thereafter for the remainder of the Operating Period:
- 20.3.1 the term "**Facility**" shall be construed accordingly;
- 20.3.2 the Lease in respect of that particular Facility shall terminate (and if no Lease has been granted, the provisions of clause 12.2 shall no longer apply to that Facility); and
- 20.3.3 the Management Service Fee shall be reduced pro rata to take account of such termination;

This notice to terminate must specify the termination date, which must not be less than thirty (30) days after the date on which the notice to terminate is given. Once a notice to terminate has been validly given, this Agreement will terminate in relation solely to that Facility upon the termination date set out in the notice.

- 20.4 Insofar as Force Majeure results in the inability of the Operator to open one or more of the Facilities to the public simultaneously for a continuous period in excess of six (6) months after the date on which the Force Majeure commenced, the party not affected by the Force Majeure shall then be entitled to give notice in writing to the other to terminate this Agreement, as a whole. This notice to terminate must specify the termination date, which must not be less than sixty (60) days after the date on which the notice to terminate is given. Once a notice to terminate has been validly given, the Agreement shall terminate on the termination date set out in the notice.

21 CONFIDENTIALITY AND PUBLICITY

- 21.1 Each party undertakes:
- 21.1.1 to keep confidential all information (written or oral) concerning the business and affairs of the other that it shall have obtained or received as a result of the discussions leading up to or the entering into or performance of this Agreement ("the Information"). The term "**Information**" extends to all knowledge and information relating to the trade, business, activities, operations, organisations, finances, processes, drawings, specifications, methods of and concerning the other party (and any of its customers or suppliers);
- 21.1.2 to not disclose the Information in whole or in part to any other person without the other party's written consent, save to those of its employees, agents and sub-contractors involved in the provision or receipt of the Services and who have a need to know the same; and
- 21.1.3 to use the Information solely in connection with the provision or receipt of the Services and not for its own benefit or the benefit of any third party.
- 21.2 The provisions of clause 21.1 above shall not apply to the whole or any part of the Information to the extent that it is:
- 21.2.1 already in the other party's possession on the date of its disclosure without breach of any obligation of confidentiality;
- 21.2.2 in the public domain other than as a result of a breach of this clause; or

21.2.3 independently developed by the other party without reference to or use of the Information.

21.3 For the purposes of the undertaking in clause 21.1 above, the Information shall be deemed to include all data under the care and control of either party. Each party shall ensure compliance with the requirements of the Data Protection Act 1998 in respect of any relevant Information in its possession.

21.4 Each party undertakes to make all of its relevant employees, agents and sub-contractors aware of the confidentiality of the Information and the provisions of this clause 21 and, without limitation to the foregoing, to take all such steps as shall from time to time be necessary to ensure compliance by its employees, agents and sub-contractors with the provisions of this clause 21.

21.5 No announcement or information concerning this Agreement or any ancillary matter shall be made or released or authorised to be made or released in any advertising, publicity, promotional or other marketing activities by either of the parties (but excluding any disclosure required by legal, accounting or regulatory requirements) without the prior written consent of the other such consent not to be unreasonably withheld or delayed, provided that the prior written of the Council shall not be required in respect of any advertising materials produced by the Operator in the ordinary course of the business provided further that such advertising materials do not refer to the Council.

22 **ASSIGNMENT**

Neither party shall transfer, or assign or novate this Agreement or any part thereof except by the prior written agreement of the other party, such agreement not to be unreasonably withheld or delayed, save that (in the case of the Council) the consent of the Operator shall not be required in respect of any assignment or novation which results from statutory reorganisation of Local Government.

23 **SUB-CONTRACTING**

23.1 The Operator shall not subcontract any part of the provision of the Services except to a Permitted Sub-Contractor or otherwise with the prior written agreement of the Council which, if given, shall not relieve the Operator of any liability or obligation under the Agreement. The Operator shall be responsible for the acts, defaults or omissions of any subcontractor, its employees or agents in all respects as if they were the acts, defaults or neglects of the Operator, its employees, or agents or sub-contractors, as the case may be.

23.2 The Operator shall be entitled to permit third parties access to Facilities to perform activities related or ancillary to the Services in accordance with the provisions of each Lease.

24 **INDEMNITY AND INSURANCE**

24.1 The Operator shall indemnify and keep indemnified the Council against personal injury to or death of any person, loss of or damage to any Old Equipment, or loss of or damage caused to any of the Facilities, or loss or damage to any property of the Council or a third party arising out of any negligent act or omission of the Operator, its employees, agents or sub-contractors and against all actions, claims, demands, proceedings, damages, costs, charges or expenses whatsoever in respect thereof or in relation thereto save where the same arises out of any act or omission of the Council, its employees, agents or sub-contractors (not, for the purposes of this clause, including the Operator or any employee of the Operator).

- 24.2 Without thereby limiting their responsibilities under this clause the Operator shall take out and at all times during the Operating Period maintain insurance with a reputable insurance company against business interruption (including loss of Income at the Facilities), all loss of or damage to any of the Facilities, all loss of or damage to Old Equipment, theft, money and assault (including injury or death of any person arising out of or in consequence of their obligations under this Agreement or otherwise), public liability, loss of licence, deterioration of stock, terrorism, trustee indemnity, fidelity guarantee, Professional Indemnity Insurance, and against all actions, claims, demands, proceedings, damages, costs, charges and expenses in respect thereof.
- 24.3 The insurance in respect of personal injury or death of any person arising under a contract of service with the Operator and arising out of an incident occurring during the course of such persons employment shall comply with the Employer's Liability (Compulsory Insurance) Act 1969 and any amendment or statutory orders made thereunder. For all other claims to which this clause 24 applies the limit of liability shall not be less than £10,000,000 (ten million pounds) except in respect of Professional Indemnity in respect of which cover shall be not less than £2,000,000 (two million pounds) in respect of any one claim or series of linked claims at any of the Facilities.
- 24.4 The Operator shall supply to the Council annually, within thirty (30) days of renewal or commencement of cover, copies of all insurance policies, cover notes, premium receipts and other documents to prove compliance with the provisions of this clause.
- 24.5 The Council shall, subject to the provisions of clause 24.1, during the Operating Period, maintain building insurance cover in respect of all risks for which it is liable under the Agreement relating to any damage to any of the Facilities.
- 24.6 The Council hereby indemnifies and shall continue to indemnify and hold harmless the Operator from and against all third party actions, claims and demands (and all costs and expenses in connection therewith) in respect of any of the Third Party Contracts which have been assigned or novated to the Operator pursuant to the Agreement insofar as and to the extent that the action, claim or demand in question relates to any date or period prior to the date of the relevant assignment or novation to the Operator, or any date or period after the date of any assignment or novation back to the Council (or a third party) pursuant to clause 54 below.
- 24.7 Subject to the Council having obtained all necessary consents from third parties to enable the Third Party Contracts to be novated or assigned to the Operator (the Operator agreeing to provide all reasonable assistance to obtain such consents), the Operator hereby indemnifies, and shall continue to indemnify and hold harmless the Council, from and against all third party actions, claims and demands (and all costs and expenses in connection therewith) in respect of any of the Third Party Contracts which have been novated or assigned to the Operator pursuant to this Agreement insofar as and to the extent that the action, claim or demand in question relates to any date or period after the date of the relevant novation or assignment to the Operator and prior to any further assignment or novation back to the Council (or any third party) pursuant to clause 54 below or to any period after the Effective Date and prior to the assignment or novation in question arising as a result of any act or omission of the Operator.
- 24.8 Save as otherwise expressly provided in this Agreement, neither party shall be liable, whether in contract, negligence, breach of statutory duty, other tort or otherwise, for any indirect or consequential loss suffered by the other party as a result of this Agreement.

25 FRAUD

- 25.1 As soon as the Operator becomes aware of or suspects any fraudulent action or malpractice in the provision of the Services or which otherwise affects the Council, the Contract Manager shall notify the Council Representative of the same.
- 25.2 Subject to clause 25.3, the Operator shall assume and have sole responsibility for investigating or arranging for the investigation of such fraudulent action or malpractice.
- 25.3 To the extent that the fraudulent action or malpractice has an impact upon the Council or its affairs, the Council may request to be involved in the investigation into such fraudulent action or malpractice, and the Operator will allow the Council to be involved in the same.
- 25.4 Where the Council has invoked its rights under clause 25.3 above, the Operator shall afford all possible access and facilities to the Council Representative and his nominees and agents when the Council Representative carries out its activities in relation to an investigation into any such fraudulent action or malpractice.
- 25.5 Regardless of any involvement of the Council in any investigation pursuant to clause 25.3 above, the Operator shall take such action as is necessary in the circumstances in relation into an investigation into any fraudulent action or malpractice. The Council Representative shall have the right (without prejudice to the provisions of clause 25.3) to require that the Operator suspend from any further work on this Agreement any person suspected of fraudulent action or malpractice.
- 25.6 Without prejudice to any other rights the Council may have (including but not limited to termination as permitted by this Agreement or otherwise) the Council Representative shall be entitled, upon reasonable notice, (except in circumstances requiring immediate intervention) to require that the Operator suspend all or any stipulated further work under this Agreement if the Council Representative has reasonable grounds for believing and where such belief has been previously communicated to the Contract Manager or nominee that fraudulent activity or malpractice has taken place.
- 25.7 Any dispute between the Council and the Operator in relation to the operation of this clause 25 shall be resolved in accordance with the provisions of clause 60 below.

26 COMPLAINTS – PROCEDURE

- 26.1 The Operator shall at the request of the Council Representative, in the places and in a form approved by the Council Representative, arrange for notices to be permanently displayed at all Facilities giving information as to how complaints about the provision of the Services at any of the Facilities may be made. The Operator shall deal with any complaints received from whatever source in a prompt, courteous and efficient manner.
- 26.2 The Operator shall keep a written record of all complaints received and of the action taken in relation to such complaints. Such records shall be kept available for inspection by the Council Representative at all reasonable times. The Operator shall notify the Council Representative forthwith in writing of all formal complaints received and of all steps taken in response thereto.
- 26.3 Any costs incurred by the Council in responding to and dealing with any justified official complaints about the Operator's performance of the Services shall be reflected in a variation to the current level of the Management Service Fee provided that no detrimental variation shall occur where there has been no finding of maladministration or breach of any policies or procedures of the Operator or those policies and procedures of the Council directly applicable to the Operator.

- 26.4 The Operator acknowledges and confirms that for the purposes of this clause 26 the term "**complaints**" includes (without limitation) suggestions from a member of the public or an elected representative as to how the Services might or should be performed as well as personal or particular concerns about any particular aspect of any of the Facilities or any member of staff.

27 **LEGAL INVESTIGATIONS**

- 27.1 The Operator immediately upon becoming aware of the same shall notify the Council Representative of any accident, damage or breach of any statutory provision which affects or might reasonably be expected to affect the Operator's ability to comply with the Business Plan or deliver the Services in accordance with this Agreement.
- 27.2 If requested to do so by the Council Representative, the Operator shall provide the Council Representative with any relevant information in connection with any legal inquiry, arbitration or court proceedings in which the Council may become involved or any relevant disciplinary hearing internal to the Council and through the appropriate officers or employees shall give evidence in such inquiries or proceedings or hearings.
- 27.3 Should any part of the Services involve the Operator in performing duties or exercising powers under some other contract it shall upon becoming aware of anything which is likely to give rise to arbitration or litigation forthwith notify the Council Representative of the existence of any such matter together with such particulars as are available.

28 **AGENCY**

- 28.1 Neither the Operator nor any of its staff shall in any circumstances hold itself or themselves out as being the servant or agent of the Council otherwise than in circumstances expressly permitted by the Agreement.
- 28.2 Neither the Operator nor its staff shall, in any circumstances, hold itself or themselves out as being authorised to enter into any contract on behalf of the Council or in any other way to bind the Council to the performance, variation, release or discharge of any obligation otherwise than in circumstances expressly permitted by the Agreement.
- 28.3 Neither the Operator nor any of its staff shall in any circumstances hold itself or themselves out as having the power to make, vary, discharge or waive any byelaw or regulation of any kind.

29 **FAILURE TO PERFORM**

No liability shall be incurred by the Operator if, but only to the extent that, such liability would not have arisen if the Council had properly complied with its obligations under this Agreement.

30 **PROVISION OF INFORMATION - COUNCIL**

Subject always to any legally binding constraints (whether under statute or otherwise) the Council shall use its reasonable endeavours to provide the Operator with such information as the Operator may properly require to enable it to comply with its obligations under this Agreement.

31 **INTELLECTUAL PROPERTY RIGHTS**

- 31.1 At the expiry or earlier termination of the Agreement, the Operator shall transfer to the Council or whomsoever the Council shall direct all documents, material, data and

other information (in whatever form) in its possession relating to the Agreement, together with any relevant computer software processing facilities.

- 31.2 Any and all intellectual property rights in any matter or thing developed under this Agreement or arising from the provision of the Services by the Operator (including, without prejudice to the generality of the foregoing, any software) other than intellectual property rights belonging to a third party shall belong to the Council and the Operator agrees that it shall execute or cause to be executed all deeds, documents and acts required to vest such intellectual property rights in the Council.

32 RIGHT TO USE DOCUMENTS

- 32.1 The ownership of and an unrestricted right to use any document produced by the Operator, its sub-contractors and agents for all purposes envisaged by or arising under this Agreement shall be vested in the Council.
- 32.2 At the expiry or earlier determination of the Agreement the Operator shall transfer all documents, materials and other information (in whatever form) in its possession relating to the Agreement to the Council or whomsoever the Council shall direct.

33 RIGHTS AND DUTIES RESERVED

All rights, duties and powers which the Council has as a local authority or which the Council's officers have as local authority officers are expressly reserved and in particular (but without limitation) the Council reserves the right to exercise its powers as a landlord in respect of any of its properties notwithstanding the provisions of this Agreement.

34 INTEREST ON OVERDUE PAYMENTS

Save where payment is reasonably disputed by the Council and the Operator has been notified of such dispute, if and whenever any payment due by either party in accordance with this Agreement shall at any time remain unpaid for a space of thirty days (30) days next after becoming payable a further and additional sum by way of interest on the same calculated at the rate of three per cent (3%) above the base lending rate in force from time to time of HSBC bank plc (calculated from the date upon which such sum first became payable until the date of actual payment) shall (if demanded) be accounted for (as if paid by) the defaulting party to the other party.

35 VALUE ADDED TAX

- 35.1 Where the Council is to make a payment to the Operator under this Agreement, it shall in addition to such payment pay any VAT that is applicable to such payment subject only to receipt from the Operator of a valid VAT invoice.
- 35.2 Where the Operator is to make a payment to the Council under this Agreement, it shall in addition to such payment pay any VAT that is applicable to such payment subject only to receipt from the Council of a valid VAT invoice.
- 35.3 Each party acknowledges and agrees that it is its own responsibility to account for the payment of any applicable VAT to the relevant tax authorities and each party shall indemnify the other against any losses, costs or expenses arising out of or in connection with its failure to do so.

36 INFORMATION ABOUT EMPLOYEES

The Operator shall within twelve (12) months before the expiry of this Agreement or within such other period as the Council may specify in the event of an earlier termination of this Agreement either in whole or in part and upon a continuing basis provide such information as the Council may require about the terms and conditions

of employment of any employees employed by the Operator in connection with the provision of the Services so as to enable the Council and any third party to assess the implications (if any) of the Regulations.

37 RIGHT TO REPRESENTATION

Without prejudice to its obligations under the Regulations, the Operator shall take all appropriate steps consistent with good employer practice to ensure that its employees have appropriate representation (whether through trade unions or otherwise).

38 PARTNERSHIP

Nothing in this Agreement shall be construed as establishing or implying any partnership or joint venture between the parties hereto and save as expressly provided nothing in this Agreement shall be deemed to make the Operator the agent of the Council or authorise the Operator (a) to incur any expenses on behalf of the Council (b) to enter into any engagement or make any representation or warranty on behalf of the Council or (c) to commit or bind the Council in any way whatsoever without in each case obtaining the Council Representative's prior written consent.

39 SURVIVAL OF THIS AGREEMENT

39.1 Insofar as any of the rights and powers of the Council provided for in this Agreement shall or may be exercised or exercisable after the termination or expiry of this Agreement the provisions of this Agreement conferring such rights and powers shall survive and remain in full force and effect notwithstanding such termination or expiry.

39.2 Insofar as any of the obligations of the Operator provided for in this Agreement remain to be discharged after the termination or expiry of this Agreement the provisions of this Agreement imposing such obligations shall survive and remain in full force and effect notwithstanding such termination or expiry.

40 REPRESENTING THE COUNCIL IN RELATED OR PARTNERSHIP ACTIVITY

The Operator will at the request of the Council Representative or in pursuit of Business Plan objectives work with other agencies, bodies and organisations in partnerships, for as and projects. This might include (but not be limited to) area and other consultative for as, community safety meetings, regeneration partnerships and health improvement.

41 FUNCTIONS DELEGATED

The functions delegated by the Council for the purposes of this Agreement shall be those functions or activities identified in Schedule 2 as the responsibility of the Operator.

42 INSPECTIONS & MONITORING

42.1 The Operator shall at all times during the provision of the Services allow the Council Representative and such persons as may from time to time be nominated by the Council Representative access to:

42.1.1 all offices and work places of the Operator for the purpose of monitoring and inspecting work being performed in order to provide the Services;

42.1.2 all offices and work places of the Operator for the purpose of inspecting any or all records and documents in the possession, custody or control of the Operator in connection with the provision of the Services;

- 42.1.3 any personnel or agents of the Operator for the purpose of interviewing such persons in connection with the provision of the Services;
- 42.1.4 technology, resources, equipment, systems, and procedures used or proposed to be used in connection with the provision of the Services.
- 42.2 The Operator shall adopt its own Standing Orders and Financial Regulations provided it is not contrary to recommended national professional best practice, guidance or statute.
- 42.3 If the Operator is unable or fails to provide the Services or any part thereof in accordance with the requirements of this Agreement, the Council may, subject to the provisions of clause 53 and Schedule 5 Part 1:
 - 42.3.1 engage a consultant, at the joint cost of the parties, to monitor the quality of the delivery of the Services and to report back to the Council on its findings; and or
 - 42.3.2 itself provide or may employ and pay other persons to provide the Services or any part thereof and all costs incurred thereby shall (if and to the extent the Council so determines) be reflected in a variation to the then Business Plan.

The Council's rights under this Agreement shall be without prejudice to any other rights or remedies, which it may possess.

- 42.4 The Operator shall as the Council shall require from time to time co-operate, liaise with, and co-ordinate its activities with those of any other companies or any company or sub-contractor employed directly or indirectly by the Council and shall provide the Services in harmony with and at no detriment to any other services provided by or on behalf of or to the Council. In particular, but without limitation, the Operator shall take all practicable steps to ensure that at the expiry or earlier termination of this Agreement any subsequent company or the Council's own employees can immediately provide services to the Council on the same basis and to the same standard as set out herein.
- 42.5 The Operator shall not permit its interests to interfere or conflict with its duty (which the Operator hereby acknowledges) or the Local Authorities (Model Code of Conduct) (England) Order 2001 adopted by the Elected members of the Council to provide the Services in the utmost good faith.

43 SERVICE LEVEL AGREEMENTS

- 43.1 The Council and the Operator shall enter into the Service Level Agreements in respect of the services specified in Part A of Schedule 14 as soon as reasonably practicable after the Effective Date, and in any event within three (3) months of the Effective Date.
- 43.2 The Council and the Operator may enter into further Service Level Agreements from time to time during the Operating Period subject to the Council and the Operator agreeing the terms of such further Service Level Agreements at the relevant time.

44 DATA

- 44.1 Subject to the provisions of clauses 43 and 45 the Operator shall be entitled to access to such data and information as is held by the Council and which the Operator may reasonably require in order to provide the Services.
- 44.2 In addition to any requirements set out in the Business Plan the Operator will ensure that the Council's data relating to the Services is kept up-to-date.

- 44.3 Without prejudice to clauses 43 and 45 the Operator shall take all practicable steps to safeguard such data and information against unauthorised access, tampering or system failure.
- 44.4 The Operator shall at all times ensure that it has in place adequate recovery arrangements to ensure that the Operator can continue to comply without interruption with its remaining obligations under this Agreement in the event of a partial or complete failure of the Operator's own computer systems or software.

45 **DATA PROTECTION AND FREEDOM OF INFORMATION**

- 45.1 Without prejudice to clause 44 the Operator shall:
- 45.1.1 comply with its obligations under the Data Protection Act 1998 (including where appropriate obtaining registration thereunder) and the Computer Misuse Act 1990 insofar as the performance of the Services and the other requirements of this Agreement give rise to obligations under those Acts;
 - 45.1.2 provide the Council with such information as the Council may require to (i) satisfy itself that the Operator is complying with the obligations referred to in clause 45.1.1 and (ii) enable the Council to comply with its own obligations under the Data Protection Act 1998; and
 - 45.1.3 make such application for a change in its registration and take such other steps as may be necessary to afford the Council access to information which is required by the Council in connection with any of its statutory duties and responsibilities and for any purpose connected with this Agreement.
- 45.2 Neither party shall knowingly do anything which places the other in breach of its obligations under the Data Protection Act 1998 and each party shall provide all reasonable co-operation to the other to enable that other party to comply with its own obligations under the Data Protection Act 1998.
- 45.3 **THE** Operator acknowledges that the Council is subject to the requirements of the Freedom of Information Act 2000 ("**FOIA**") and shall assist and cooperate with the Council to enable the Council to comply with its information disclosure obligations.
- 45.4 The Operator shall and shall procure that any Permitted Sub-contractors shall:
- 45.4.1 transfer to the Council all FOIA requests for information that they receive as soon as practicable and in any event within five (5) Working Days of receiving a FOIA request for information;
 - 45.4.2 provide the Council with a copy of all information in its possession or power in the form held by the Operator within five (5) Working Days (or such other period as the Council may specify) of the Council's request; and
 - 45.4.3 provide all necessary assistance as reasonably requested by the Council to enable the Council to respond to the FOIA request for information within the time for compliance set out in section 10 of FOIA.
- 45.5 The Council shall be responsible for determining in its absolute discretion whether information is exempt from disclosure in accordance with FOIA or the Environmental Information Regulations. Subject to the foregoing and to the Council's statutory obligations (particularly the time limits within FOIA) the Council shall use reasonable endeavours to notify the Operator if it believes it is required to disclose any of the Operator's commercially sensitive information.
- 45.6 In no event shall the Operator respond directly to a FOIA request for information unless expressly authorised to do so by the Council.

- 45.7 The Operator acknowledges that the Council may, pursuant to FOIA, be obliged to disclose information without consulting or obtaining consent from the Operator, or having taken the Operator's views into account.
- 45.8 The Operator shall ensure that all information is retained for disclosure and shall permit the Council to inspect such records as requested from time to time.
- 45.9 For the avoidance of doubt, where a Change in Law occurs such that the Operator is itself brought within the scope of FOIA, it hereby agrees that it will comply with all relevant obligations under that Act.

46 **HEALTH AND SAFETY**

The Operator shall at all times comply with the requirements of the Health and Safety at Work, etc. Act 1974, the Management of Health and Safety at Work Regulations 1992 (including the provision by the Operator of a copy of its risk assessment under such regulations) and of all other Acts, Regulations, Orders or rules of law (including specifically any best practice and / or industry standards) pertaining to health and safety that are applicable to the provision of the Services.

47 **ORDERING**

The Operator shall not at any time unless otherwise expressly permitted to do so by the Council in writing place or cause to be placed any orders with suppliers or otherwise incur liabilities in the name of the Council or any representative of the Council.

48 **SUPPLIES**

- 48.1 Subject to any on-going Third Party Contracts, the Operator shall be responsible for establishing the Operator's own sources of supply for Materials and New Equipment during the Operating Period and shall be responsible for ensuring reasonable and proper conduct by the Operator's suppliers and employees, at all times in accordance with the provisions of this Agreement, whilst at the Facilities.
- 48.2 Where reasonably practicable, and legally able to do so, it is the intention of the parties to permit the Operator to purchase utility products (gas, water, electricity, telephone, sewage etc) using the Council's ability to purchase such items at greater discounts due to the volume being purchased. The Council agrees to use all reasonable endeavours to enable such purchasing arrangements to take place during the Operating Period.

49 **PERMANENT CLOSURE OF FACILITIES**

- 49.1 At any time during the Operating Period and for any reason the Council may, after giving not less than six (6) months' notice in writing to the Operator, close any one or more of the Facilities (or part thereof) whereupon the respective rights and obligations of the parties hereto under the Agreement with regard to the said Facility or Facilities (or part thereof) will cease.
- 49.2 In the event that the Council exercises its rights under clause 49.1 above to close any one or more of the Facilities (or part thereof), the Management Service Fee payable to the Operator shall be reduced by such amount as the parties agree is just and equitable (having regard to the Operator's audited accounts), and in the event of any dispute between the parties such reduction in the level of the Management Service Fee shall be determined in accordance with clause 60.
- 49.3 Upon the closure of any Facility (or part thereof) pursuant to the provisions of clause 49.1 above, the Council may immediately retake possession of the said Facility or Facilities (or part thereof) and the Lease(s) in respect of such Facility or Facilities (or

part thereof) shall terminate forthwith (and if no Leases have been granted, the provisions of clause 12.2 shall cease to apply in respect thereof) together with any Materials or Old Equipment, clothes or other goods hired or otherwise made available to the Operator for use at such Facility or Facilities (or part thereof). In addition, any other consequences of termination as set out in this Agreement will apply in respect of the Facility (or part thereof) closed.

- 49.4 If, as a result of the exercise by the Council of its rights under clause 49.1 above, all of the Facilities are closed, this Agreement will be deemed to have been terminated as at the date on which the last of the said Facilities closes. However, for the avoidance of doubt, closure of any one or more Facility (or part thereof) which does not result in the closure of all of the Facilities shall not affect the validity and existence of this Agreement as a whole.
- 49.5 Upon the closure of any Facility (or part thereof) pursuant to this clause 49 (other than the closure of all of the Facilities which result in the termination of the Agreement as a whole pursuant to the provisions of clause 49.4) the Termination Sum (if any), calculated based on the date of termination in respect of that Facility (or part thereof) shall be payable by the Council to the Operator or upon the termination of the Agreement pursuant to this clause 49 the Operator shall be entitled to receive the Termination Sums (if any).
- 49.6 It is hereby agreed between the parties that save as provided in this clause 49, the Operator will not otherwise be entitled to any compensation for any loss or damage resulting from the early termination of the Agreement as a result of the exercise by the Council of its powers under clause 49.1 above except to the extent provided under clause 49.5 above.

50 CHANGE CONTROL PROCEDURE AND NEW DEVELOPMENTS

Any change to or request to change any of the Services or any other term of this Agreement (including, but not limited to a change required as a result of a Change of Law) shall be made in accordance with the Change Control Procedure set out in Schedule 11 save where such change is required as a condition of any change in legislation or regulations affecting the provision of the Services.

51 COUNCIL REPRESENTATIVE

- 51.1 The person designated in Schedule 2 as the Council Representative for the Agreement, or their successor, shall be the duly authorised representative of the Council for all purposes connected with the Agreement. Any notice, information or communication given or made to the Council Representative shall be deemed to have been given or made to the Council.
- 51.2 The Council shall forthwith give notice in writing to the Operator of any subsequent appointment as Council Representative. Until notice of a subsequent appointment shall have been given the Operator shall be entitled to treat as Council Representative the person last notified to the Operator as being the Council Representative.
- 51.3 From time to time the Council Representative may appoint one or more deputies to act for them generally or for specified periods. Immediately any such appointment is made the Council Representative shall give written notice to the Operator thereof. During the periods they are so authorised, any such deputy shall have the powers and duties of the Council Representative and may be treated in all respects as the Council Representative subject to any express indication from the Council or the Council Representative, as the case may be, to the contrary.

- 51.4 The Council shall ensure that the Council Representative or a competent deputy duly authorised to act on his behalf is available for consultation with the Operator at all reasonable times.
- 51.5 For the purposes of this Agreement, references to the Council Representative shall include a reference to his duly appointed deputy, unless an express indication is given at the time by the Council or the Council Representative to the contrary, as the case may be.

52 INDUCEMENTS/CORRUPT GIFTS

- 52.1 The Operator acknowledges and confirms that it has not nor will it (and will procure that none of its employees, agents, sub-contractors or suppliers shall) at any time during the Operating Period commit any Prohibited Acts.
- 52.2 Insofar as the Operator is in breach of the provisions of clause 52.1 the Council shall be entitled to demand that any affected employee of the Operator is removed from the employment of the Operator forthwith.

53 DEFAULT PROCEDURE - NOTICES

- 53.1 The Operator shall at all times comply with the provisions of this clause 53 and the provisions of Schedule 5 Part 1.
- 53.2 If the Operator shall omit or fail to perform any part of the Services or shall otherwise make default in carrying out their obligations hereunder the Council Representative may serve a remedy notice on the Operator, specifying the omission, failure or default in question (the "**Remedy Notice**") and shall specify a reasonable time (taking into account all of the circumstances) in which the Operator should remedy the default (the "**Remedy Period**").
- 53.3 If the omission, failure or default in respect of which a Remedy Notice is issued pursuant to clause 53.2 is not remedied within the Remedy Period then the Council may serve a default notice on the Operator, specifying the unremedied omission, failure or default (the "**Default Notice**").

54 TERMINATION

- 54.1 Notwithstanding the provisions of clause 53 and without prejudice to any other rights or remedies which either party may possess, a party may, subject to the provisions of clause 60, give to the other a notice by registered post or recorded delivery specifying a matter referred to in this clause, if the other shall be in breach or default of any of the material provisions of this Agreement.
- 54.2 Where the defaulting party is the Council and the default is a failure to make any payment due hereunder and such default is not remedied within thirty (30) days after being notified under clause 54.1 then the Operator shall be entitled (subject always to the provisions of clauses 7 and 8 above) by immediate notice to the Council by special delivery to terminate this Agreement.
- 54.3 Where the defaulting party is the Council and the default is anything other than a failure to make any payment due hereunder and such default is not remedied within sixty (60) days after being notified under clause 54.1 then the Operator shall be entitled (subject always to the provisions of clauses 7 and 8 above) by immediate notice to the Council by special delivery to terminate this Agreement.
- 54.4 Where the Operator is the defaulting party, and the Operator has been served with a Default Notice under clause 53 of this Agreement or has committed a Significant Breach, then the Operator shall have a period of thirty (30) days after notification under clause 54.1 to rectify the breach (if such breach is reasonably capable of

rectification). If the breach is not rectified (if reasonably capable of rectification) within such period of thirty (30) days the Council shall be entitled by immediate notice to the Operator by special delivery to terminate this Agreement.

54.5 If the Operator:

- 54.5.1 becomes bankrupt, or makes a composition or arrangement with its creditors, or has a proposal in respect of its company for a voluntary arrangement for a composition of debts, or scheme or arrangement approved in accordance with the Insolvency Act, 1986;
- 54.5.2 had an application made under the Insolvency Act, 1986 to the Court for the appointment of an Administrative Receiver;
- 54.5.3 has a winding up order made, or (except for the purposes of amalgamation or reconstruction) a resolution for voluntary winding up passed;
- 54.5.4 has a provisional liquidator, receiver or manager of its business or undertaking duly appointed;
- 54.5.5 has had an Administrative Receiver, as defined in the Insolvency Act, 1986 appointed;
- 54.5.6 has possession taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in, or subject to, the floating charge;
- 54.5.7 is in circumstances which entitle the Court or a creditor to appoint, or have appointed, a receiver, a manager or Administrative Receiver or which entitle the Court to make a winding up order;

then in any such circumstances the engagement of the Operator under this Agreement shall forthwith be automatically determined (but the said engagement may be reinstated and continued if the Council and the Operator, its Trustee in Bankruptcy, Liquidator, provisional Liquidator, receiver or manager, as the case may be, shall so agree).

- 54.6 The Council shall be entitled (but not obliged) to terminate this Agreement forthwith by notice in writing if the Operator has committed a breach of any of the Leases or Service Level Agreements such that the Council would be entitled to terminate the Lease or Service Level Agreement in question. However, for the avoidance of doubt, termination of any one or more Leases or Service Level Agreements which does not result in the termination of all of the Leases or Service Level Agreements shall not affect the validity and existence of this Agreement as a whole.

54.7 In the event of the expiry or earlier termination of the Agreement:

- 54.7.1 the Council shall pay any outstanding instalments of the Management Service Fee due to the Operator under the Agreement up to the date of termination;
- 54.7.2 the Council shall be entitled to repossess any of its Facilities, Materials, clothing, Equipment and any other goods made available to the Operator at the Effective Date and each of the Leases shall terminate with immediate effect (and if no Leases have been granted, the provisions of clause 12.2 shall cease to apply in their entirety in respect of all of the Facilities) and the Operator shall vacate all of the Facilities forthwith, subject to the provisions of clause 54.7.6;
- 54.7.3 the Operator shall procure the assignment or novation to the Council (or to such third party as the Council shall nominate) of such of the Operator

Contracts as the Council may notify in writing to the Operator at the relevant time (including, without limitation, the cinema operator's licence for the Facility at Lings Forum). The Council will indemnify and keep indemnified the Operator from and against all liabilities relating to such Operator Contracts from the date of termination until such contracts are assigned or novated save in respect of any acts or omissions of the Operator during that period;

- 54.7.4 the Operator shall, at the Council's expense, take all such steps as shall be reasonably necessary to agree with the Council a plan for the orderly hand-over of the Services to the Council (or its nominee), such that the Services can be carried on with the minimum of interruption and inconvenience to the Council and to users of the Facilities and to then effect such hand-over;
- 54.7.5 with effect from the date of termination and until such time as the plan for the hand-over of the Services pursuant to clause 54.7.4 has been fully implemented, the Operator shall, unless indicated to the contrary by the Council, continue the provision of the Services at the Facilities (or such of the Facilities as the Council so wishes) to the Council in accordance with this Agreement, save to the extent that the Operator shall be entitled to be paid pro rata to the level of Management Service Fee which would otherwise have been payable had the termination not arisen (which shall be agreed in advance with the Council) for the provision of such Services and all other actions necessary to implement this clause 54;
- 54.7.6 immediately following the expiry or termination date both parties shall promptly deliver up to the other all property supplied by the other and all materials incorporating any Information of the other, and will destroy any Information contained in any materials prepared by the other. Within fourteen (14) days after the termination date both parties shall certify in writing to the other that they have fully complied with their obligations under this clause 54.7.6. For the avoidance of doubt, this clause shall apply (without limitation) to any direct debit information and any other information databases provided to the Operator by or on behalf of the Council (or otherwise obtained / compiled by the Operator) as a result of this Agreement;
- 54.7.7 in circumstances only where the Agreement has been terminated through the Council's breach the Council will indemnify and keep indemnified the Operator against all costs, claims, liabilities and expenses (subject to application of the Transfer of Employment (Protection of Employment) Regulations 2006), including but not limited to any redundancy payments (and any payments due to the Scheme in respect of the early payment of benefits to any Transferring Employee) which are necessarily incurred by the Operator arising out of or in connection with the termination of the contracts of employment of the Transferring Employees by the Operator; without prejudice to the provisions of this clause 54.7.7, both parties agree to seek to reduce the number of employees made redundant in any termination of this Agreement by using all reasonable endeavours to identify opportunities to employ or redeploy such employees, whether within the parties themselves or elsewhere within their respective groups; and
- 54.7.8 subject to the provisions of clause 54.7.2, the Council shall be entitled to have transferred to it (or to a third party nominated by it) from the Operator such of the New Equipment and Materials owned by the

Operator (free from lien, charge or encumbrance) as may reasonably be required to operate the Facilities following the expiry or termination of the Agreement at the written down value then applicable to such New Equipment or Materials.

54.8 The rights of the parties under clause 54 are in addition to and are without prejudice to any other right or remedy either party may have against the other as at the termination date.

55 **TERMINATION – COUNCIL'S DEFAULT**

55.1 Where any termination pursuant to clause 54 occurs as a result of the Council's default:

55.1.1 in addition to any sums due and owing under clause 54 the Council shall pay to the Operator the Termination Sums (if any) detailed in Schedule 4 Part 2; and

55.1.2 each of the Leases granted in respect of each of the Facilities pursuant to clause 12 shall forthwith cease.

56 **TERMINATION – OPERATOR'S DEFAULT**

56.1 Where any termination is caused as a result of the Operator's default then:

56.1.1 each of the Leases granted in respect of each of the Facilities pursuant to clause 12 shall forthwith cease; and

56.1.2 the Operator shall be responsible for paying back to the Council such proportion of the Management Service Fee already paid as shall represent the period in respect of which the Services will not be provided at the Facilities hereunder.

57 **LIMITATION OF LIABILITY**

57.1 Subject as otherwise provided at clause 24, the following provisions set out the parties entire liability (including any liability for the acts or omissions of their respective employees, agents or sub-contractors) to each other in respect of:

57.1.1 any breach of their respective contractual obligations under this Agreement; and

57.1.2 any representation, statement or tortious act or omission, including negligence, arising under or in connection with this Agreement.

57.2 Any act or omission on the part of either party or its employees, agents or sub-contractors falling within clause 57.1 shall, for the purposes of this clause 57, be known as an "**Event of Default**". Neither party shall be deemed to have breached its obligations under this Agreement to the extent that any act or omission on its part is due to any delay or failure by the other party to give instructions, authority or information where the same has been properly sought or where the act or omission on the part of one party arises due to any act or omission on the part of the other party.

57.3 Each party accepts unlimited liability for:

57.3.1 death or personal injury caused by the negligence of themselves, their employees, agents or sub-contractors; or

57.3.2 fraudulent misrepresentation.

57.4 Except in the case of any liability on the part of either party referred to in clause 57.3 the Operator's liability for any uninsured Event of Default per claim at any of the Facilities shall not exceed an amount equalling ten million pounds (£10,000,000).

57.5 The parties each confirm that all the exclusions and limitations of liability set out in this clause 57 are fair and reasonable having regard to all of the circumstances.

58 WAIVER

58.1 Any failure or delay by either party in exercising any right, power or remedy under this Agreement shall not in any circumstances impair such right, power or remedy nor operate as a waiver of it. A single or partial exercise by either party of any other right, power or remedy under this Agreement shall not in any circumstances preclude any other or further exercise of it or the exercise of any other right, power or remedy.

58.2 Save as otherwise expressly provided in this Agreement the rights, powers and remedies provided in this Agreement are cumulative and are not exclusive of any rights, powers and remedies provided by law.

58.3 Any waiver of a breach of, or default under, any of the terms of this Agreement shall not be deemed to be a waiver of any subsequent breach of default and shall in no way affect the other terms of this Agreement.

59 SEVERANCE

59.1 If any provision of this Agreement is held by any court or other competent authority to be void or unenforceable in whole or part:

59.1.1 this shall not affect or impair the legality, validity or enforceability of any other provision of this Agreement;

59.1.2 the parties shall in good faith amend and, if necessary, novate this Agreement to reflect as near as possible the spirit and intention behind an illegal, invalid or unenforceable provision, to the extent that such spirit and intention is consistent with the laws of England and so that the amended clause complies with the laws of England; and

59.1.3 if the parties cannot agree upon the terms of any amendment or novation within six (6) months of the date which a clause was determined to be wholly or partly illegal, invalid or unenforceable by any court, tribunal or administrative body then the parties agree to refer the terms of the amendment or novation back to the court, tribunal or administrative body that originally found the provision to be illegal, invalid or unenforceable. The parties agree that the courts, tribunals or administrative bodies decision in this respect shall be final and binding.

60 DISPUTE RESOLUTION

60.1 Any dispute, difference or question which shall at any time arise between the parties in respect of the construction or effect of this Agreement or the rights, duties and liabilities of the parties hereunder or any matter or event connected with or arising out of this Agreement (a "**Relevant Event**") shall initially be referred to the Council Representative and the Contract Manager to each use their reasonable endeavours to resolve within seven (7) days of the Relevant Event being referred.

60.2 In the event that a meeting between the Council Representative and the Contract Manager fails within the timeframe specified in clause 60.1 to resolve such dispute to the reasonable satisfaction of the parties then the matter shall be referred to a nominated senior executive of each of the Council and the Operator to resolve within a further seven (7) days of such referral.

- 60.3 In the event that a meeting before the respective senior executives of the parties fails within the time frame specified in clause 60.2 to resolve such dispute to the reasonable satisfaction of the parties then the matter shall be referred to a neutral third party ("**Neutral Adviser**") to attempt to resolve the matter, as agreed between the parties before resorting to litigation.
- 60.4 If the parties are unable to agree on a Neutral Adviser or if the agreed Neutral Adviser is unable or unwilling to act, either party may, within seven (7) days from the date of the proposal to appoint a Neutral Adviser or within seven (7) days of the notice that he is unable or unwilling to act, apply to the Centre for Dispute Resolution ("**CEDR**") in London to appoint a Neutral Adviser.
- 60.5 The parties shall, within seven (7) days of the appointment of the Neutral Adviser, meet with him to agree a programme for the exchange of relevant information and the structure for the negotiation. The negotiation shall be held at a mutually agreeable location. If considered appropriate, the parties may at any stage seek assistance from CEDR to provide guidance on a suitable procedure.
- 60.6 All negotiations connected with the dispute shall be conducted in confidence and the parties shall not divulge details of the negotiations except to their professional advisers. Professional advisers shall also be subject to confidentiality. Negotiations shall be without prejudice to the rights of the parties in future proceedings.
- 60.7 If the parties accept the Neutral Adviser's recommendations or are able to resolve the dispute, their agreement shall be recorded in writing and, once signed by their authorised representatives, shall be final and binding.
- 60.8 Failing agreement, the parties may invite the Neutral Adviser to provide a non-binding but informative written opinion on the merits of the dispute and the rights and obligations of the parties. The opinion shall be given on a without prejudice basis and shall be private and confidential to the parties. The opinion may not be used in evidence in proceedings commenced under this Agreement without the prior written consent of both parties.
- 60.9 If the parties fail to reach agreement in the structured negotiations within thirty (30) days of the Neutral Adviser being appointed, the failure shall be without prejudice to the right of either party to refer a dispute or difference to litigation. The parties agree that, before resorting to litigation, they shall first have held structured negotiations under this clause.
- 60.10 Nothing contained in this clause shall restrict either party's freedom to commence legal proceedings to preserve any legal right or remedy or protect any proprietary or trade secret right.

61 **ENTIRE AGREEMENT**

This Agreement (including all of the Schedules) contains all the terms which the parties have agreed in relation to the transactions provided for by this Agreement and neither of the parties have been induced to enter into this Agreement by a statement or promise which it does not contain. This shall not exclude any liability which a party would otherwise have to the other party in respect of any statement made fraudulently by that party prior to the date of this Agreement.

62 **CHOICE OF LAW**

This Agreement shall be governed by and construed according to the law of England and Wales and the parties hereby submit to the non-exclusive jurisdiction of the English courts.

63 HUMAN RIGHTS ACT

63.1 Insofar as the Operator carries out activities which may be deemed to be a function of a public nature for the purposes of the Human Rights Act 1998 under this Agreement, the Operator shall comply with the provisions of the Human Rights Act 1998.

63.2 When the Operator is carrying on an activity as a public function the Operator shall, subject to clause 63.3, be responsible for, and shall release the Council, its employees' agents and contractors from and against, all liability for actions, claims, demands, costs, charges and expenses (including legal expenses on an indemnity basis), which may rise out of or in connection with the Operator's breach of clause 63.1.

63.3 The Operator shall not be responsible to the Council for:

63.3.1 any breach of this clause 63 which rises as a direct result of the Operator acting on the instructions of the Council;

63.3.2 any loss, damage, cost and expense caused by the negligence or wilful misconduct of the Council, its employees' agents or contractors or by the breach by the Council of its obligations under this Agreement.

64 INDEMNITY – CONDUCT OF CLAIMS

64.1 In respect of any claim arising under any indemnity contained in the Agreement, the party indemnified shall:

64.1.1 as soon as possible give to the other party written notice of the claim, circumstance or matter against which that party is claiming to be indemnified, and all details of the claim from time to time in the knowledge or possession of that party;

64.1.2 where the claim relates to a claim by any third party against that party, not without the prior written consent of the other party (which shall not be unreasonably withheld or delayed) admit liability or make any offer, promise, compromise, settlement or communication with the third party in respect of the claim; and

64.1.3 where the claim relates to a claim by any third party against that party, at the request of the other party, and against the other party providing to the reasonable satisfaction of the indemnified party security for all costs, charges and expenses, surrender to the indemnifier or its insurers, on request, the conduct in the indemnified parties name, of the defence, settlement and/or counterclaim of the third parties claim (provided that the indemnified party shall be kept fully informed as to the conduct of such defence, settlement and/or counterclaim.

65 NOTICES

65.1 Any notices required to be given to either party under this Agreement shall be in writing and may be served:

65.1.1 personally or by leaving the notice at that party's usual office in which case the notice shall be deemed to have been duly served at the time it is so given or left;

65.1.2 by delivering the notice to or leaving the notice for that party at their last known place of abode or business or, if a company, at its registered office, in which case the notice shall be deemed to have been duly served at the time it is so delivered or left; or

- 65.1.3 by posting the notice in a prepaid envelope addressed to that party at its last known place of abode or business or, if a company, at the registered office of the company, in which case the notice shall be deemed to have been duly served at the time of delivery in ordinary course of post.

66 **AUDIT**

The Council's internal auditor, the district auditor or any similar organisation, or any auditor acting on behalf of any person, body or organisation which has provided funding to the Council or to the Operator in respect of any of the Facilities may examine such documents as they may reasonably require which are owned, held or otherwise within the control of the Operator (who shall procure that any person acting on their behalf who controls such documents and/or other information shall also provide access) and may require the Operator to provide such oral or written explanation as he considers necessary.

67 **EUROPEAN MONETARY UNION**

- 67.1 The parties agree that the occurrence or non-occurrence of monetary union in the European Union will not of itself result in the discharge (whether by frustration or otherwise), cancellation, rescission or termination, in whole or in part, or give a party the unilateral right to cancel, rescind, terminate or vary, in whole or in part, this Agreement.
- 67.2 An event associated with economic and monetary union in the European Union includes without limitation each (and any combination) of the following:
- 67.2.1 the introduction of, changeover to, or operation of a single or unified European currency (whether known as the Euro or otherwise);
 - 67.2.2 the fixing of conversion rates between a Member State of the European Union's currency and the new currency or between the currencies of Member States;
 - 67.2.3 the substitution of that new currency for the Euro (€) as the unit of account of the European Union;
 - 67.2.4 the introduction of that new currency as lawful currency in a Member State (whether at the earliest possible date or subsequently and whether in parallel with, or as a replacement for, the currency which, before the introduction of the new currency, was lawful currency in that Member State);
 - 67.2.5 the withdrawal from legal tender of any currency that, before the introduction of the new currency, was lawful currency in one of the Member States;
 - 67.2.6 the disappearance or replacement of a relevant price source for the Euro (€) or the national currency of any Member State, or the failure of the agreed sponsor (or a successor sponsor) to publish or display a relevant rate, index, price, page or screen; or
 - 67.2.7 any event in furtherance of the foregoing.
 - 67.2.8 the Operator shall use all reasonable endeavours to ensure that any software or other systems which it uses or acquires in connection with the provision of the Services at any of the Facilities over the Operating Period shall be EMU compliant.

68 **THIRD PARTY RIGHTS**

- 68.1 Save in respect of clauses 8.1, 8.10 and 8.13, or as otherwise specifically set out to the contrary in this Agreement, a person who is not a Party to this Agreement shall have no rights pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement. Any right or remedy of a third party which exists or is available apart from that Act is not affected.

IN WITNESS whereof the parties hereto have executed this Agreement the day and year first before written.

SCHEDULES

**SCHEDULE 1
DEFINITIONS AND INTERPRETATION**

1.1 In this Agreement the terms set out below shall have the following meanings unless the context requires otherwise:

- "Agreement"** shall mean this Agreement and the attached Schedules;
- "Best Value Duty"** the duty imposed on the Council by Part 1 of the 1999 Act (interpreted in accordance with, and including the requirements of, any circulars issued from time to time by the Office of the Deputy Prime Minister in connection with that duty) and under which the Council is under a statutory duty to continuously improve the way its functions are exercised, having regard to a combination of economy, efficiency and effectiveness and to the guidance issued from time to time by the Secretary of State, the Audit Commission and the Chartered Institute of Public Finance and Accountancy pursuant to, or in connection with, Part 1 of the 1999 Act, and such term shall be construed so as to apply equally to any successor duty as may be imposed from time to time on the Council;
- "Change of Law"** the coming into effect after the date of this Agreement of:
- (a) Legislation, other than any Legislation which on the date of this Agreement has been published:
 - (i) in a draft Bill as part of a Government Departmental Consultation Paper;
 - (ii) in a Bill;
 - (iii) in a draft statutory instrument; or
 - (iv) published as a proposal in the Official Journal of the European Communities;
 - (b) any guidance; or
 - (c) any applicable judgment of a relevant court of law which changes a binding precedent;
- "Change Control Procedure"** the change control procedure set out in Schedule 11;

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| "Contract Manager" | shall have the meaning given to it in clause 10.2 and Schedule 2 Part 3; |
| "Council's Emergency Officer" | means the person appointed from time to time by the Council with responsibility for overseeing and putting into operation the Council's Emergency Plan; |
| "Council's Emergency Plan" | the Council's emergency plan from time to time which deals with the management of emergencies within its own geographical jurisdiction and (if applicable) those in neighbouring jurisdictions; |
| "Council Guidelines" | means relevant rules, procedures, guidelines, policies, codes of practice, Standing Orders and Financial Regulations and standards of the Council currently applying or as notified to the Operator by the Council or the Council Representative from time to time, as any of the same may from time to time be amended by the Council and notified to the Operator; |
| "Council Representative" | shall have the meaning given to it in clause 51; |
| "Default Notice" | shall have the meaning attributed to it in clause 53; |
| "Business Plan" | <p>the detailed plan to be produced annually pursuant to the provisions of clause 3 which will identify the Services in detail and which will set out a detailed plan for the implementation of the Services and which shall:</p> <ul style="list-style-type: none"> - set out all the outputs of the Operator, the Key Performance Indicators and performance standards of the Services; - include the overall strategy of the Operator and how the Operator will deliver the key strategic goals of the Council and the community the Council represents; - detail the financial and staffing resources required to enable the Operator to deliver the Services with all due skill and care; and - illustrate how the Operator will implement the Strategies, and the policies and other strategies of the Council as set out in clause 4.1; |
| "Effective Date" | 1 April 2011; |
| "Emergency Plan" | shall mean the Council's emergency plan from time to time; |

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| "Equality Policy" | shall mean the equality policy adopted by the Operator and / or the Council from time to time during the Operating Period; |
| "Equipment" | at the relevant time, all Old Equipment and New Equipment located at the Facilities; |
| "Event of Default" | has the meaning given to it in clause 57.2; |
| "Facility" | the facilities listed in Schedule 2 (as such list may be amended from time to time pursuant to clause 50), in each case, being premises in respect of which the Services are to be provided pursuant to this Agreement including all land, buildings, erections, structures, fixtures from time to time and contents within the areas edged red on the plans attached hereto at Schedule 2 together with all alterations and improvements carried out during the Operating Period; |
| "Force Majeure" | any event beyond the reasonable control of either party including acts of God, acts of governmental or supra-national authority, outbreak of hostilities, national emergency, riots, civil commotion, fire, explosion, flood, epidemic, strike and other industrial disputes, restraints or delays affecting supplies; |
| "Income" | all sums paid by members of the public or private user groups for use of the facilities and/or the Facilities including any and all admission fees, hire charges, tuition fees, membership fees, usage fees, booking fees and any ancillary or supplemental revenues generated at any of the Facilities by any means whatsoever; |
| "Information" | shall have the meaning set out in clause 21.1; |
| "Key Performance Indicators" | the key performance indicators to be set out each Year in the Business Plan which will be used to measure the Operator's delivery of the Services each Year; |
| "Law" | any Legislation, guidance or applicable judgement of a relevant court of law which creates a binding precedent; |
| "Lease" | a lease in the relevant form set out in Schedule 13 granted by the Council in respect of each of the Facilities pursuant to clause 12; |
| "Legislation" | all statutes, regulations, orders made under statutes or European Directives or Regulations having the force of law in the United Kingdom; |

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| "Management Service Fee" | the sums to be paid to the Operator by the Council pursuant to clause 15 and as further set out in Schedule 4; |
| "Materials" | all consumable items located at the Facilities from time to time; |
| "Month" | a calendar month and "monthly" shall be construed accordingly; |
| "New Equipment" | all additional or replacement equipment provided by the Operator at the Facilities during the Operating Period; |
| "NOP's" | the normal operating procedures relating to the Services as developed by the Operator from time to time and agreed with the Council in accordance with clause 3.6; |
| "Old Equipment" | all items of equipment owned or used exclusively by the Council at the Facilities at the Effective Date. For the avoidance of doubt, Old Equipment shall also include any new equipment that may be provided by the Council from time to time during the Operating Period; |
| "Operating Period" | a period commencing at 00:00 hours on the Effective Date and ending on the expiry or termination of this Agreement pursuant to its terms; |
| "Permitted Sub-contractor" | means any sub-contractor who the Council has authorised to act as a sub-contractor of the Operator for the purposes of the provision of the Services at any of the Facilities, as which are set out in Schedule 6; |
| "Prohibited Act" | shall mean: <ul style="list-style-type: none"> (a) offering, giving or agreeing to give to any servants of the Council any gift or consideration of any kind as an inducement or reward: <ul style="list-style-type: none"> (i) for doing or not doing (or for not having done) any act in relation to the obtaining or performance of this Agreement or any other contract with the Council; or (ii) for showing or not showing favour or disfavour to any person in relation to this Agreement or any other contract with the Council; |

- (b) entering into the Agreement or any other contract with the Council in connection with which commission has been paid or has been agreed to be paid by the Operator or on their behalf, or their knowledge, unless before the relevant contract is entered into particulars of any such commission and of the terms and conditions of any such contract for the payment thereof have been disclosed in writing to the Council;
- (c) committing any offence:
 - (i) under the Prevention of Corruption Acts 1889-1916;
 - (ii) under the Local Government Act 1972;
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other contract with the Council; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Council;

"Quality Standard"

such quality standard as the Operator shall obtain and maintain from time to time;

"Regulations"

shall have the meaning attributed to it in clause 7;

"Remedy Period"

shall have the meaning attributed to it in clause 53;

"Retail Price Index"

means the general index of retail prices published monthly by the United Kingdom Office for National Statistics, or if this ceases to be published, such other index as most closely resembles that index;

"Service Level Agreement"

a service level agreement in the relevant form set out in Schedule 14 entered into pursuant to clause 43 in respect of the services also set out also in Schedule 14, and together with such other service level agreements as the parties may agree to enter into from time to time throughout the Operating Period;

"Services"

the management and other functions and strategic planning services relating to the recreational, social, sport and leisure facilities at the Facilities to be provided by the Operator under this Agreement which are or will be more clearly set out in the Business Plan, the NOP's and as the same may be modified, added to or replaced during the Operating Period pursuant to this Agreement;

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| “Services Improvement Plan” | has the meaning given in clause 16.4; |
| “Significant Breach” | a breach of this Agreement by the Operator as further detailed in Schedule 5 Part 2; |
| "Standards of a Reasonable and Prudent Operator" | the exercise of that degree of skill, diligence foresight, experience and prudence which would be expected from a skilled and experienced operator engaged in the same line of business in the United Kingdom under the same or similar circumstances and conditions as the Operator; |
| “the Operator Contracts” | any contracts entered into between the Operator and third parties in the ordinary course of business in connection with the provision of the Services at any of the Facilities during the Operating Period; |
| "Termination Sum" | the sums payable by the Council to the Operator, (if any), pursuant to clauses 49 and 55 and as more particularly detailed in Schedule 4 (which shall be calculated taking into account all mitigation of losses to be reasonably undertaken by the Operator); |
| "Third Party Contracts" | all contracts with third parties entered into by the Council in relation to the provision of services at any of the Facilities, a non-exhaustive list of which is set out in Schedule 8; |
| "Transferring Employees" | those employees of the Council who are listed in Schedule 7 and whose contracts of employment it is intended will be transferred to the Operator pursuant to clause 7 above or, in the alternative, to whom the Operator will make offers of employment pursuant to clause 7 above; |
| "Variation" | a variation in the provisions of this Agreement or the Services to be provided under the same made pursuant to clause 50 and Schedule 11; |
| "VAT" | shall mean Value Added Tax at the relevant rate from time to time, being twenty per cent (20%) as at the Effective Date; |
| “Year” | shall mean the period of twelve (12) Months from the Effective Date, each subsequent consecutive period of twelve (12) Months during the period of this Agreement or the part of such period of twelve (12) Months during which this Agreement remains in subsistence prior to its termination. |

- 1.2 In this Agreement, unless the contrary intention appears:
- 1.2.1 words importing one gender shall include all genders;
 - 1.2.2 words in the singular include the plural and vice versa;
 - 1.2.3 references to clauses and Schedules are references to the clauses and Schedules of this Agreement and the Schedules shall form part of and be deemed to be included into this Agreement;
 - 1.2.4 references to time shall be construed, during the period of summer time to be British Summer Time or its authorised replacement and otherwise to be Greenwich Mean Time;
 - 1.2.5 references to any building, whether by name, description, address or otherwise, shall be construed as including the curtilage of that building;
 - 1.2.6 references to "staff" shall be construed as including all employees (including volunteers);
 - 1.2.7 references to the Council's supervisory staff shall be construed as including only the staff named in Schedule 2 or the staff or posts added to those listed in Schedule 2 from time to time by notice in writing to the Operator by the Council; and
 - 1.2.8 references to the words "include and including" shall be construed without limitation.
- 1.3 In the event of any inconsistency between this Agreement, the Schedules, and any document referred to in this Agreement, the following order of precedence shall apply to determine which document shall prevail:
- 1.3.1 the Business Plan
 - 1.3.2 the Strategies;
 - 1.3.3 the NOP's;
 - 1.3.4 this Agreement;
 - 1.3.5 the Schedules.

SCHEDULE 2

PART 1

SPECIFIC FACILITIES AT WHICH THE SERVICES ARE TO BE PROVIDED

Mounts Baths

The Mounts
Upper Mounts
Northampton
NN1 3DN

Telephone: 01604 837400

Ling Forum

Lings Forum Leisure Centre
Billing Brook Road
Weston Favell
Northampton NN3 8JR

Telephone: 01604 837 300

Danes Camp Leisure Centre

Clannell Road,
Hunsbury,
Northampton,
NN4 0RX

Telephone: 01604 837200

Head Office

78 Robert Street
Northampton
NN1 3BJ

PART 2
COUNCIL REPRESENTATIVE

Jo Guilford

Client Monitoring Officer

Westbridge Depot

01604 838 667

**PART 3
CONTRACT MANAGER**

Claire McNab

78 Robert Street

07889 641 829

**SCHEDULE 3
SERVICES**

**PART 1
BUSINESS PLAN**

For the avoidance of doubt, the Business Plan attached below is indicative only at this stage and has not yet formally been agreed between the parties. The final version of the Business Plan for the first Year of this Agreement will be agreed between the parties in accordance with the provisions of clause 3.1 above and the other applicable provisions of this Agreement.

| | 2011 / 12 | 2012 / 13 | 2013 / 14 |
|--|----------------|----------------|----------------|
| Council Budget | 1,300,717 | 1,365,705 | 1,462,317 |
| Pension Contribution Adjustment | (330,000) | (350,000) | (375,000) |
| Pay and Grading Re-evaluation Costs | 20,000 | 20,000 | 20,000 |
| Expected Savings | (299,841) | (361,158) | (435,765) |
| Base management Fee - As Per Appendix 1 | 690,876 | 674,547 | 671,552 |
| <i>Additional On Going Items</i> | | | |
| Audit Fees | 20,000 | 20,640 | 20,640 |
| Bank Charges | 14,220 | 14,675 | 15,145 |
| Merchant Services Costs | 7,450 | 7,688 | 7,934 |
| Insurance | 39,664 | 40,933 | 42,243 |
| Asset Management - budget trnf to Trust | 193,500 | 199,692 | 206,082 |
| Total Payable | 965,710 | 958,175 | 963,596 |

**Part 2
NOP's**

SCHEDULE 4

PART 1 MANAGEMENT SERVICE FEE

The level of the Management Service Fee for the first Year of this Agreement shall be as set out in the Business Plan and shall be fixed for that Year.

Not less than six (6) months prior to the first anniversary of the Effective Date, the parties shall meet to discuss and agree in good faith the level of the Management Service Fee for the subsequent Year.

In conducting such discussions, the parties will have regard to the expectation of efficiency savings generated through the provision of the Services and the consequent anticipated reduction in Council funding over the life of the Agreement.

If agreement is reached as to the level of the Management Service Fee that is to apply for the subsequent Year, then the new Management Service Fee shall apply and be adopted into this Agreement and the Business Plan(s) applicable to that Year.

If the parties are unable to agree on the level of the Management Service Fee that is to apply for the subsequent Year, then the Management Service Fee from the previous Year shall continue to apply but with the application of such reduction as reflects the level of cost saving or reduced budget as is applied to the funding received by the Council for the relevant period.

For the avoidance of doubt, the above process shall apply in respect of each Year during the term of this Agreement.

PART 2 TERMINATION SUM

In the event that the Operator considers that a Termination Sum should be due and payable to it by the Council under and in accordance with the terms of this Agreement, the parties shall meet to discuss and agree in good faith the level of any such Termination Sum.

In conducting such discussions, the parties will have regard to the prevailing circumstances and conduct of the parties as regards the termination of the Agreement (or part thereof, as applicable). The parties will also have regard to whether or not the Operator is to continue providing services and whether, during the course of the Agreement any significant efficiency savings have been generated by the Operator.

If agreement is reached as to the level of any Termination Sum that is to apply then the Council will pay the same to the Operator within thirty (30) days of receiving an invoice from the Operator for the same.

If the parties are unable to agree on the level of any Termination Sum that is to apply then the parties will initiate and submit themselves to the dispute resolution process set out in clause 60 above.

SCHEDULE 5

PART 1 MONITORING, REMEDY AND DEFAULT PROCEDURES

The Council Representative may inspect any of the Facilities in accordance with the provisions of the Agreement upon giving prior written notice of its intent to do so. However, in keeping with the spirit of partnership the Council Representative or his/ her representative shall keep such inspections to a reasonable level in any Year.

Where, as a result of any such inspection a default is indicated the Council Representative shall issue to the Operator a Remedy Notice (in accordance with the provisions of clause 53) which shall set out the nature of the default, the required action to remedy the default and a stipulated period of time in which the Operator must make the required improvements.

PART 2
SIGNIFICANT BREACHES

A significant breach shall be deemed to include (but not exclusively) the following:

1. A failure of any public area of any of the Facilities to be available for use for a period of twenty four (24) or more hours during which they should be open for the public use.
2. Failure of any area within any of the Facilities to meet the requirements of health and safety or other relevant legislation leading to actual or threatened enforcement proceedings.
3. Failure to meet any of the requirements of a "**Services Improvement Plan**" as referred to in clause 16.
4. Mis-informing the Council in any matter material to the carrying out of the Services.
5. Operating the Services in a way which is likely to injure or offend members of the public or a significant proportion thereof.
6. Operating the Services in a way which is likely to cause a significant detriment to the image, reputation or interests of the Council.
7. Material failure to comply with any of the NOP's.
8. Failure to comply with any material aspect of any of the Business Plan.
9. Failure to comply with any material aspect of any of the Strategies.

**SCHEDULE 6
PERMITTED SUB-CONTRACTORS**

None as at the Effective Date

Pages 62 - 64 removed for
Data Protection

**SCHEDULE 8
THIRD PARTY CONTRACTS**

NBC Leisure Services, Sport & Play Development & The Forum Cinema

Contracts & Leases, which will be in existence after April 2010

| <u>Area</u> | <u>Type of Agreement</u> | <u>Organisation agreement with</u> | <u>Length of Agreement</u> | <u>Finance</u> | <u>Notes</u> |
|--------------------------|---|--|---|---|---|
| Sport & Play Development | <u>Service Level Agreement</u> | <u>Northamptonshire Sport (CSP)</u> John Dryden House 8-10 The Lakes Bedford Road Northampton NN4 7DD | 3 years. End date 31 st March 2013. | Expenditure for 2010/11 £7500.00 (Code 13800) | Northamptonshire Sport and NBC (or Trust) will meet annually to agree Annual Schedule. Fee may rise to £11,500 in 2011/12 |
| Sport & Play Development | <u>Hireof Bondfield Avenue Storage Facility</u> | <u>NBC Asset Management</u> | Annual Agreement (financial year) | £466 NNDR £1000 rent (Code 13802) | Used for storage of sports equipment. Additional equipment if stored FOC at a store rented by the NBC Events Team |
| Sport & Play Development | Northampton Places for Play Programme | <u>Big Lottery Grants Officer Children's Play Programme</u> Apex House, 3 Embassy Drive, Edgbaston, B15 1TR | 3 years. End date Sept 2011 | Last claim to be made in May 2011 External funding Code 13809 | We estimate that the project will continue for an additional 3 months after September 2011 due to an under spend |
| Sport & Play Development | Inclusive Play project - SLA | <u>Greenfields School & Sports College</u> <u>Prentice Court</u> <u>Northampton NN3 8XS</u> | 3 years. End date Sept 2011 | Final year payment to be made to GSSC in Sept 2010 for £20,000 (Sept 2010 – Sept 2011) External funding Code | This expenditure is from the Big Lottery grant income |

| | | | | | |
|--------------------------|--|---|---|---|---|
| | | | | 13809 | |
| Sport & Play Development | Long Term Lease – van hire | <u>NBC Transport Dept. & Northgate Vehicle Hire</u> | Leased until 31st August 2011 | Expenditure £257 per month External funding Code 13809 | This expenditure is from the Big Lottery grant income Expenditure based on NBC discount prices / Insurance not included |
| Sport & Play Development | Eastfield and Spencer Sport and Physical Activity Project | <u>Sport England Finance Sport England 3rd Floor Victoria House Bloomsbury Square London WC1B 4SE</u> | 3 years. End date Sept 2011 | Finance agreement £37,153 left to claim (consists of 2 claims to be made before April 2011) External funding Code 13810 | Several informal financial agreements contribute to the match funding agreement with Sport England |
| Sport & Play Development | Eastfield and Spencer Sport and Physical Activity Project – match funding contribution | Northampton Borough Council | 3 years. End date Sept 2011 | £15,000 per year Code 13810 | |
| Sport & Play Development | 903 - Spencer 905 - Rillwood Court MUGA projects | <u>Barclays Spaces for Sport</u> The Football Foundation Whittington House 19-30 Alfred Place London WC1E 7EA | 3 years. End date June 2011 | Grant Income External funding Code 13810 and 13806 | The grant may be spent before April 2010 |
| Forum Cinema | Service Level Agreement | <u>Independent Cinema Office</u> 3 rd Floor, Kenilworth House, 79/80 Margaret Street, W1W 8TA | Annual Agreement April to March | £1344 plus VAT | Payable to ICO six monthly in arrears for Provision of Cultural Cinema Programming Service |
| Forum Cinema | Screen Advertising Contract | <u>Pearl & Dean Cinemas Ltd</u> 3 Waterehouse Square, 138-142 Holborn, London EC1N 4JR | Ongoing – does not appear to have been renewed annually | 55% of net advertising receipts payable to us | Sole and exclusive screen advertising rights at Forum Cinema |

| | | | | | |
|----------------------------|--------------------------------------|--|---|--|--|
| Leisure Centres | Lease Agreement – Gym Equipment | <u>TBC – New Lease Agreement currently being procured</u> | TBC normally 5 years | £500k approx. | Plan is to have change of company on agreement so straight forward transition |
| Leisure Centres | Lease Agreement – Air Conditioning | <u>TBC – New Lease Agreement currently being procured</u> | | £50k approx. | As above |
| Leisure Centres (all) | Contract – supply resale items | <u>Swimrite (SRS)</u> Unit 15 Chancel Way, Halesowen Industrial Park B62 8SE | 21 September 2009 to 21 September 2012 | 7.5% discount | 7.5% discount on purchase of resale items. Additional 2.5% discount for spend over £15k |
| Lings Forum & Mounts Baths | Lease Agreement – hot drinks machine | <u>Siemens</u> Sefton Park, Bells Hill, Stoke Poges, Bucks SL2 4JS | January 2010 to January 2015 | £493.50 per quarter per site | |
| Mounts Baths | Lease Contract | <u>Stanley Security</u> | 5 year contract to 31.12.11 | £3,045 per year | Rental and Maintenance of PA system |
| Leisure Centres | Lease Agreement | <u>Pitney Bowes</u> PO Box 6570, Harlow, CM20 2GZ | 2 | £1,014.60 | Franking Machines – Lease and Licence Fee |
| Lings Forum | Profit Share Hire Agreement | <u>Ultranova,</u> | One months notice required on either side to terminate agreement | 60% centre, 40% Ultranova | Profit share agreement on sunbeds – currently considering cancelling this prior to moving to Trust |
| Leisure Centres | Service Level Agreement | <u>NHS Northamptonshire</u> Frances Crick House Summerhouse Road Moulton Park Northampton | 1.4.09 – 31.3.11 but would expect new SLA at this point | £20 per referral, £5.00 per session attended up to 35 max. £20.00 per completed exit interview | Activity on Referral Scheme |
| Leisure Centres | Service Level Agreement | <u>NHS Northamptonshire Provider Services</u> | SLA prior to each 10 week programme Current programme started Sept 10 | Funding of £3,273 per each 10 week MEND Programme | MEND Programme Delivery 3 x 10 week programmes delivered per calendar year – generally |

| | | | | | |
|------------|-------|---|--|------------------------------------|---|
| | | | | | between September and July |
| Danes Camp | Lease | Autobar Ronac House, Selinas Lane, Romford, Essex RM8 1QH | 63 month fixed rental, commenced 22.8.08 | £668 per quarter for both machines | Provision of hot drinks machines in diner and foyer |

| Supplier | Description | Location |
|-----------------------------------|--------------------------|--------------------|
| A F D Software Ltd | Software Licences | Lings General |
| A F D Software Ltd | Software Licences | Danes General |
| A F D Software Ltd | Software Licences | Mounts General |
| Abel Alarms | Fire & Burglar Alarms | Mounts General |
| C H G Meridian | Equipment Leasing | Danes General |
| Chelsea Hire | Equipment Hire | Lings General |
| Chelsea Hire | Equipment Hire | Play Development |
| Chubb Electronic Security Ltd | Fire & Burglar Alarms | Lings General |
| CIVICA Services Ltd | Software Licences | Mounts General |
| Coca-Cola & Schweppes | Equipment Hire | Mounts General |
| Coca-Cola & Schweppes | Equipment Hire | Lings General |
| Coca-Cola & Schweppes | Equipment Hire | Danes General |
| Dell Products | Hardware Purchase & Rent | Mounts General |
| Dell Products | Hardware Purchase & Rent | Danes General |
| Dell Products | Hardware Purchase & Rent | Lings General |
| Delta Computer Services | Software Licences | Lings General |
| Delta Computer Services | Software Licences | Mounts General |
| Delta Computer Services | Software Licences | Danes General |
| E.ON Energy | Electricity | Mounts General |
| E.ON Energy | Electricity | Danes General |
| E.ON Energy | Electricity | Lings General |
| Eden Springs UK Limited | Hospitality | Sports-Development |
| Enterprise Rent A Car | Hired Transport & Plant | Danes General |
| Enterprise Rent A Car | Hired Transport & Plant | Lings General |
| Enterprise Rent A Car | Hired Transport & Plant | Mounts General |
| G E Capital Equipment Finance Ltd | Equipment Hire | Lings General |
| G E Capital Equipment Finance Ltd | Equipment Hire | Mounts General |
| G N Grosvenor Ltd | Gas | Lings General |
| Hays Specialist Recruitment | Agency & Temp | Lings General |
| Hays Specialist Recruitment | Agency & Temp | Mounts General |
| ING Lease (UK) Ltd | Equipment Hire | Danes General |
| Insight Direct (Uk) Ltd | Hardware Purchase & Rent | Danes General |
| Insight Direct (Uk) Ltd | Hardware Purchase & Rent | Lings General |
| Insight Direct (Uk) Ltd | Hardware Purchase & Rent | Mounts General |
| Jackson Lift Group | Lift Maintenance | Danes General |
| K & J Hird Ltd | Building Cleaning | Lings General |
| K & J Hird Ltd | Building Cleaning | Danes General |
| K & J Hird Ltd | Building Cleaning | Mounts General |
| Lyreco UK Ltd | Printing & Stationery | Lings General |
| Lyreco UK Ltd | Printing & Stationery | Mounts General |
| Lyreco UK Ltd | Printing & Stationery | Sports-Development |
| Lyreco UK Ltd | Printing & Stationery | Danes General |
| Lyreco UK Ltd | Printing & Stationery | Forum Cinema |

| | | |
|-------------------------------------|------------------------------|---------------------------|
| N Power Limited | Electricity | Mounts General |
| N Power Limited | Electricity | Lings General |
| N Power Limited | Electricity | Danes General |
| Northants Fire Ltd | Fire & Burglar Alarms | Lings General |
| Northants Fire Ltd | Fire & Burglar Alarms | Danes General |
| Northants Fire Ltd | Fire & Burglar Alarms | Mounts General |
| Novar Systems Ltd | Fire & Burglar Alarms | Mounts General |
| Ofcom | Licences | Danes General |
| P H S Group plc | Equipment Hire | Mounts General |
| P H S Group plc | Equipment Hire | Danes General |
| Panasonic Business Systems UK | Photocopying | Lings General |
| Panasonic UK Limited | Photocopying | Danes General |
| Panasonic UK Limited | Photocopying | Lings General |
| Panasonic UK Limited | Photocopying | Mounts General |
| Phonographic Performance Ltd | Licences | Danes General |
| Protec Fire Detection plc | Fire & Burglar Alarms | Danes General |
| Redfern Travel Limited | Rail Travel | Danes General |
| Redfern Travel Limited | Rail Travel | Mounts General |
| Redfern Travel Limited | Rail Travel | Forum Cinema |
| Ricoh UK Limited | Hardware Purchase & Rent | Lings General |
| Ricoh UK Limited | Photocopying | Mounts General |
| Ricoh UK Limited | Photocopying | Danes General |
| Security Wise Ltd | Fire & Burglar Alarms | Danes General |
| The Artificial Eye Film Co Ltd | Equipment Hire | Forum Cinema |
| The Retention People | Software Licences | Mounts General |
| Trade UK - B & Q Financial Services | Furniture Equipment & Tools | Danes General |
| Trade UK - B & Q Financial Services | Furniture Equipment & Tools | Mounts General |
| Trade UK - B & Q Financial Services | Furniture Equipment & Tools | Lings General |
| Trade UK - B & Q Financial Services | Furniture Equipment & Tools | Forum Cinema |
| Trade UK - B & Q Financial Services | Repair & Maint'Nce Buildings | Lings General |
| Trade UK - B & Q Financial Services | Repair & Maint'Nce Buildings | Danes General |
| Trade UK - B & Q Financial Services | Repair & Maint'Nce Buildings | Mounts General |
| Vodafone Corporate Ltd | Mobile Phones | Head of Leisure & Culture |
| Vodafone Corporate Ltd | Mobile Phones | Leisure Manager & Support |
| Vodafone Corporate Ltd | Mobile Phones | Danes General |
| Vodafone Corporate Ltd | Mobile Phones | Mounts Support Services |

**SCHEDULE 9
FACILITIES - FEES AND CHARGES AND CONCESSIONARY ARRANGEMENTS**

**PART 1
FEES AND CHARGES**

**PART 2
CONCESSIONARY ARRANGEMENTS AND ELIGIBILITY CRITERIA**

CONCESSION CATEGORIES

As of 4/08/2010:

All proof of eligibility for benefits will be the same-there will be a letter from the DWP or jobcentre plus. Please check the date of letter.

Students must produce a valid student card or letter regarding EMA or from their school if between 16 and 18 years of age confirming they are still in full time education.

If someone mentions a benefit that is on this list please take their details and pass onto Customer Services Officer/Centre manager to check eligibility. Many benefits are changing names.

Those Entitled:

Leisure card Junior –**Under 16's**

Leisure Card Senior Citizens – **Over 60's**
- **War Disablement Pensioner**

Leisure Card Student:

Full time student over 18
Student Nurse
Youth Training Scheme
Employment Training Trainee

Leisure Card Disabled:

Employment and Support Allowance
Incapacity Benefit
Severe Disablement Allowance
Disability Allowance
Disabled Persons Tax credit
Registered Blind
Invalid care Allowance
Attendance Allowance
Disabled blue/orange badge holder

Leisure Card Benefit:

Council tax Benefit – not single person subsidy
Housing Benefit
Industrial Injuries Benefit
Income Support
Job Seekers Allowance
Working Tax Credit

**SCHEDULE 10
FACILITIES - OPENING TIMES**

The following general opening times currently apply to the service. These have been based on the two key business areas of fitness and swimming at each site. It should also be noted that the service also facilitates earlier access to Mounts Baths and Lings Forum for the use by the local swimming club:

Mounts Baths

| Fitness | Day | Opening times | Swimming | Day | Opening times |
|----------------|------------|----------------------|-----------------|------------|----------------------|
| | Mon - Fri | 7.30am – 10pm | | Mon - Fri | 7.30am – 10pm |
| | Saturday | 8am – 6pm | | Saturday | 8am – 7pm |
| | Sunday | 8am – 5pm | | Sunday | 8am – 5pm |

Lings Forum

| Fitness | Day | Opening times | Swimming | Day | Opening times |
|----------------|------------|----------------------|-----------------|------------|----------------------|
| | Mon - Fri | 7.15am – 10pm | | Mon - Fri | 7.15am – 10pm |
| | Saturday | 8am – 6pm | | Saturday | 7.45am – 10pm |
| | Sunday | 8am – 8pm | | Sunday | 10am – 8.30pm |

Danes Camp

| Fitness | Day | Opening times | Swimming | Day | Opening times |
|----------------|------------|----------------------|-----------------|------------|----------------------|
| | Mon - Fri | 7.15am – 10pm | | Mon - Fri | 7.15am – 10pm |
| | Saturday | 8am – 6pm | | Saturday | 9am – 7pm |
| | Sunday | 8am – 7pm | | Sunday | 8am – 7pm |

SCHEDULE 11
CHANGE CONTROL PROCEDURE

1. In the event that either party ('the Amending Party') wishes to alter, add to or otherwise change any part or parts of the Services or processes by any alteration, addition or omission ('the Variation') then the Amending Party shall submit to the other a written specification of the Variation.
2. In the event that the Council is the Amending Party:
 - 2.1 the Operator shall (without extra charge to the Council) notify the Council in writing within twenty (20) working days of receipt of such written specification from the Council of any additional fees, expenses and/or time required to investigate the effect on all relevant terms of this Agreement of implementing the Variation whereupon the Council shall promptly inform the Operator whether or not to proceed with such investigation.
 - 2.2 In the event of the Operator being requested to proceed with such investigation in accordance with the provisions of paragraph 2.1 hereof then:
 - 2.2.1 the Operator shall as soon as reasonably practicable (and in no event later than twenty (20) working days after the Council's request) give written notice to the Council stating the effect of the Variation in respect of the required adjustment to the level of the Management Service Fee, the ability of the Operator, in providing the Services, to meet the provisions of the Business Plan and all other relevant matters; and
 - 2.2.2 the Council shall reimburse to the Operator the additional fees and expenses incurred by the Operator as a result of the said investigation which fees and costs shall not in any event exceed the amount notified to the Council in respect thereof in paragraph 2.1 above.
 - 2.3 The Council shall consider the Operator's notice in detail and shall at all times consider the appropriateness of such Variation in light of the then current Business Plan, and should the Council wish to proceed with the Variation it shall notify the Operator in writing within five (5) working days of receipt of the notice referred to in paragraph 2.2 above of its requirement that the Operator proceeds with the Variation whereupon the Operator shall have an opportunity to refuse to proceed if it reasonably believes that the Variation does not comply with the then current Business Plan. Unless the Operator is entitled and elects not to proceed with the Variation:
 - 2.3.1 the Operator shall proceed with the Variation;
 - 2.3.2 this Agreement, the Services, and/or Business Plan, and any other relevant terms and/or documents shall be amended to the extent necessary to take into account the matters notified to the Council by the Operator in accordance with the provisions of paragraph 2.2.1 above and the Management Service Fee shall be adjusted by the amount referred to in paragraph 2.2.1 above.
 - 2.4 In the event of the Operator being the Amending Party the Council shall notify the Operator in writing within five (5) working days of the written specification referred to in paragraph 1 above whether it approves the Variation (such approval not to be unreasonably withheld or delayed). In the event of the Council agreeing the Variation

then the Operator shall proceed with the Variation provided that the Business Plan shall in no circumstances be reduced by reason of the Variation without the prior written consent of the Council. Any additional costs incurred as a result of the Variation shall unless otherwise agreed by the Council be borne by the Operator.

3. No alteration, addition or omission to or of the Services shall be made otherwise than in accordance with the provisions of this Schedule 11 and until it is agreed that the Operator proceed with such addition, omission or variation in accordance with the provisions of this Schedule, the parties (subject to the provisions of paragraphs 2.2.2 and 2.3.2 above) shall perform their obligations in accordance with this Agreement as if the Variation had not been required.
4. Each of the Contract Manager and the Council Representative shall have authority to agree a Variation pursuant hereto unless agreed to the contrary from time to time and in relation to specific matters.

SCHEDULE 12 EQUALITY POLICY

The Operator's equality policy shall contain and observe requirements no less stringent than those that the Council adheres to in its equality dealings.

Detail of the documents which the Council applies in its equality dealings can be found by following the link below.

<http://www.northampton.gov.uk/equality>

**SCHEDULE 13
FORM OF LEASE**

SCHEDULE 14
SERVICE LEVEL AGREEMENTS

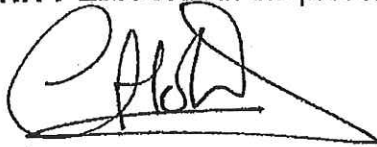
Part A – the SLA Services

The Council and the Operator have agreed as at the Effective Date to enter into Service Level Agreements in respect of the provision by the Council to the Operator of the following services. Such Service Level Agreements will be in the form of the template set out in Part B of this Schedule below.

HR
Finance
ICT (including telephones)
Asset Management
Print & Design
Landscaping
CCTV
Post

Part B – the template form of SLA

EXECUTED as a Deed by
UNITY LEISURE in the presence of

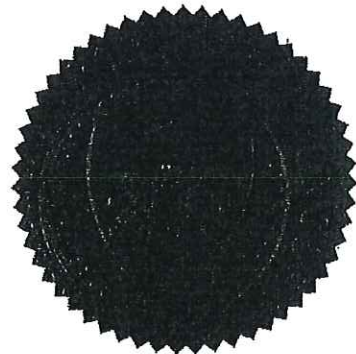


Director CHRIS HOLMES

THE COMMON SEAL of
NORTHAMPTON BOROUGH COUNCIL
was hereuntofor affixed
in the presence of:



Authorised Officer



4890



CABINET REPORT

| | |
|---------------------|--|
| Report Title | Grant of property leases and financial and management agreements to Northampton Leisure Trust (Unity Leisure) |
|---------------------|--|

AGENDA STATUS: Public

| | |
|------------------------------------|---|
| Cabinet Meeting Date: | 14 th March 2018 |
| Key Decision: | Yes |
| Within Policy: | Yes |
| Policy Document: | No |
| Directorates: | Regeneration, Enterprise & Planning, and Customers & Communities |
| Accountable Cabinet Member: | Councillor Tim Hadland |
| Ward(s) | All |

1. Purpose

To seek agreement of Cabinet:

- 1.1 To grant new leases for a term of 30 years to Unity Leisure (trading as Northampton Leisure Trust) on three leisure centres owned by Northampton Borough Council (Lings Forum, Danes Camp, Mounts Baths), in accordance with the terms and conditions set out in this report.
- 1.2 For the Council to either lend up to £3m for a period to be agreed to Unity Leisure, or act as guarantor for a similar amount, for the purpose of improving the aforementioned three leisure centres.

2. Recommendations

That Cabinet agrees that:

- 2.1 Three new Full Repairing and Insuring leases be granted under the Landlord and Tenant Act 1954 to Unity Leisure for the three leisure centres owned by Northampton Borough Council (Lings Forum, Danes Camp, Mounts Baths), for a period of 30 years. The combined rent will be £51,000 per year plus any addition for building insurances and VAT where applicable, and will be in accordance with the terms and conditions set out in this report, which reflects a discount from market rent of £22,500 per annum.
- 2.2 The Head of Regeneration, Economic Development & Assets be authorised to complete the above leases in consultation with the Borough Secretary & Monitoring Officer and the Cabinet Member for Regeneration, Enterprise and Planning.
- 2.3 It approves in principle either the lending of up to £3m to Unity Leisure or acts as guarantor for commercial lending in a similar amount, for the purpose of carrying out capital improvement works on the aforementioned three Leisure Centres.
- 2.4 The Operating Agreement between the Council and Unity Leisure be amended to remove the Council's option to close any one or more of the leisure centres on providing not less than six months' notice.
- 2.5 The Operating Agreement between the Council and Unity Leisure be amended to remove any requirement for a management fee to be paid by the Council to Unity Leisure, this amendment to apply retrospectively back to 2014/15.
- 2.6 The Council's Capital Programme be increased by the amount of the agreed loans in any given year, to be funded entirely by repayments from Unity Leisure.
- 2.7 Authority be delegated to the Chief Finance Officer acting in consultation with the Borough Secretary & Monitoring Officer and the Cabinet Member for Finance to approve the terms of the necessary loan or guarantee agreements following completion of necessary due diligence checks, ensuring that the Council is not exposed to unacceptable financial loss or liability.
- 2.8 The Chief Finance Officer be instructed to amend the appropriate revenue budgets to reflect the agreed level of rental income and savings on repairs and maintenance and insurance.
- 2.9 Authority be delegated to the Borough Secretary & Monitoring Officer in consultation with the Chief Finance Officer and the Head of Regeneration, Economic Development & Assets the power to complete all the relevant documentation, including the loan agreements, leases and Guarantee, as relevant.

3. Issues and Choices

3.1 Report Background

- 3.1.1 Unity Leisure trading as Northampton Leisure Trust (NLT) was established by the Council in April 2011 to operate the three Council owned leisure centres, Lings Forum, Danes camp, Mounts Baths, and to deliver sports development, health and play services.
- 3.1.2 A fifteen year Operating Agreement (with the provision to extend the agreement for further periods up to a further fifteen years) was put in place between the Council and NLT which entailed the Council paying a fee to NLT in return for agreed outcomes. A thirty year lease for the three leisure centres was also entered into at a peppercorn rent.
- 3.1.3 The lease permitted termination by the Council upon determination of the Operating Agreement for any reason, and the Operating Agreement provided the Council with the option to close any one or more of the leisure centres on the provision of not less than six months' notice.
- 3.1.4 It is generally accepted that NLT has thrived since its inception in 2011, not only delivering its original portfolio of services but also expanding its remit and taking on new business.
- 3.1.5 The success of NLT enabled the management fee payable by the Council to NLT to be reduced year on year down to zero by 2014/15. It is proposed that the Operating Agreement between the Council and NLT be amended to reflect the position reached in 2014/15, and the intention of the parties going forward is that no management fee will be payable in the future.
- 3.1.6 For NLT to continue to grow and expand as a leisure provider, it is timely to review the arrangements that were originally put in place in relation to the Operating Agreement and the leases.
- 3.1.7 It is now proposed that three new leases are entered into, one for each of the three leisure centres.
- 3.1.8 It is further proposed, in order to enable NLT to benefit more fully from the new lease arrangements, that the Operating Agreement is extended so as to be concurrent and co-terminus with the new leases, and the Council's right to close any one or more of the leisure centres with six months' notice is removed.
- 3.1.9 The proposed new leases and the proposed changes to the Operating Agreement will give NLT much greater security of tenure enabling it to borrow and access funding more readily, thus improving the services it is able to deliver to the people of Northampton.
- 3.1.10 The proposed new leases will also transfer additional liability for repairs and maintenance of the buildings and plant from the Council to NLT.

3.2 Issues

3.2.1 The development of the proposals set out in this report have required the careful balancing of the requirements of both the Council and NLT against financial, legal and other risk factors so as to find the best way forward for NLT service users and the wider population of Northampton.

3.3 Choices (Options)

3.3.1 The recommendations of this report are interdependent and represent a single package that has been provisionally agreed in its entirety with NLT. Cabinet can therefore only choose to accept or decline all the recommendations.

3.3.2 If Cabinet choose to decline the recommendations of this report it may request that alternative proposals are developed, and for negotiations to be re-opened with NLT so that alternative recommendations can be brought forward to Cabinet in the future.

3.3.3 In developing the recommendations of this report, consideration was given to the duration and terms of the three leases. The options considered for the duration of each lease were a 99 year lease outside the provisions and protections of the 1954 Landlord and Tenants Act, with a rolling development break from year 15 onwards and no liability for external repairs and maintenance, or a 30 year lease granted within the terms of the 1954 Landlord and Tenant Act.

3.3.4 It was determined that the latter form of lease would give NLT the security of tenure necessary for it to secure long term development funding, and protect the long term strategic interests of the Council as owner of the properties.

3.3.5 The options considered for the terms of the lease were to make it Internal Repairing only, or a Full Repairing and Insuring lease (FRI). The FRI lease is preferred on the basis that this makes all building maintenance and repairs the responsibility of NLT, which is both beneficial to the Council, and allows NLT to better manage its own finances and operational requirements.

4. Implications (including financial implications)

4.1 Policy

4.1.1 The recommendations of this report are within policy and have no policy implications.

4.2 Resources and Risk

Leases

4.2.1 It is proposed to grant NLT a Full Repairing and Insuring lease (FRI) for a 30 year term on each property. Independent valuers were engaged to recommend appropriate market rents for the 3 properties on an FRI basis, taking into account the likely future external maintenance and repairs that may be required.

- 4.2.2 The total rent recommended for the three properties was assessed at £73,500 over a 30 year term. However, in negotiation with NLT, it was argued by NLT that a move from a peppercorn rent to circa £70,000 a year could not be sustained, and it was therefore agreed by the Council that a lower level of rent would be acceptable in order that all parties could be confident in the long term delivery of services at the current level.
- 4.2.3 A reduction of £22,500 was therefore agreed, leaving an annual rental of £51,000. This will be subject to upwards-only rent reviews every 5 years, with increases based on the Consumer Price Index (CPI).
- 4.2.4 Section 123 of the Local Government Act 1972 provides that a Council 'may dispose of land held by them in any manner they wish', and that such disposal should not be for less than the best consideration that can reasonably be obtained between willing parties. The granting of a long lease is classed as a disposal for the purposes of Sect.123, so the Council would normally be required to seek the best consideration from NLT. However, in certain circumstances this requirement can be waived.
- 4.2.5 The General Consent Order allows a Council to dispose of land for less than the best consideration where it considers that the disposal will contribute to the social, economic or environmental well-being of the area, and the total undervalue does not exceed £2,000,000. In this instance it is recommended that the 3 leases be granted to NLT at an under value of £22,500 per annum, i.e. £675,000 over the 30 year term of the leases. It is considered that this figure still represents value for money and that the requirements of Sect.123 are satisfied for the following reasons:
- The future repair and maintenance costs of the 3 buildings are potentially significant, and if we do not conclude the leases these costs will fall to the Council to fund. There is also likely to be a requirement for capital expenditure on building improvements. It is therefore economically advantageous for the Council to conclude the leases.
 - Approx. 875,000 people use the 3 centres every year, many from less affluent groups within the community. The facilities therefore make a significant contribution to assisting residents, particularly those who may not be able to afford to use private health clubs, to lead a healthy lifestyle.
 - NLT are in partnership with the Northampton General Practise Alliance and deliver the NHS Health Check programme through the centres, thus helping in identifying health issues at an early stage, and where appropriate delivering interventions. 600 health checks will be delivered through the 3 Centres in the coming year.

NLT have also provided a report prepared by the University of Northampton's Institute for Social Innovation and Impact, which analyses the social value of the work carried out by the Trust. This quantifies the annual value to the wider public sector of NLT's activities as being £3.5m. While this clearly cannot all be attributed to the activities carried out at the 3 premises in question, it does give a clear indication of the social and economic benefits which NLT's operations contribute to the borough.

- 4.2.6 The terms of an FRI lease are such that the tenant is responsible for all building insurances. It is usual for this insurance to be arranged by the landlord and recharged to the tenant as an addition to the rent, but tenants can choose to arrange the insurance themselves.
- 4.2.7 Consideration is being given to whether or not it will be of benefit to NLT for the Council to continue to insure the properties under the Council's block insurance, or for NLT to arrange their own insurance. If it is more cost effective for NLT to insure through the Council's policy, and on the basis that there will be no financial impact on the Council should a claim be made, the full apportioned cost of the insurance will be added to the rent instead of NLT making their own arrangements.

Loan or guarantee

- 4.2.8 The proposed new leases will transfer significant additional liability for repairs, maintenance and improvements of both the buildings and the plant from the Council to NLT. To meet these liabilities NLT has a funding requirement of up to £3m over the coming years. To fund this they will either borrow from the council at commercial interest rates, or they will borrow from a third party with the Council acting as guarantor for the loan.

Financial Risks

- 4.2.9 The Chief Finance Officer will undertake all required due diligence and ensure compliance with the Council's Loans Checklist before any loans are made or guarantees provided.
- 4.2.10 NLT have shared their five year financial forecasts with LGSS Finance – these forecasts demonstrate healthy surpluses. Much of the proposed investment in the centres will improve energy efficiency and make savings in utility costs through the installation of Combined Heat and Power (CHP) units and energy efficient lighting.
- 4.2.11 Any loan would be secured on the leases, (although this may not provide full 'security' value) therefore if the Trust were to default on loan repayments the Council could take back direct control of the leisure centres and would realise the ongoing benefits of the investments made. The risk of not providing this loan facility or acting as guarantor, would reduce 'risk' as perceived by loans, but through absolute crystallisation of £M costs that NBC would have to incur to maintain and replace the Plant, Equipment and Facilities that the Leisure Trust propose to use these fund for.
- 4.2.12 Any loan will be made by the Council at commercial interest rates in line with State Aid rules and taking into account the level of risk. This is currently expected to be in the region of 4.5% to 5%. The loans may be funded by borrowing from PWLB, at a rate of between 2% and 2.5%. If these rates remain the Council will generate surplus interest of up to £0.050m per annum over the period of the loans. The interest earned will exceed our current 'deposit rates' of c0.45%

- 4.2.13 The 2018/19 General Fund revenue budget, as approved by Council on 26th February, includes rental income of £50k per annum from NLT.
- 4.2.14 The Council will also make savings on ongoing repairs and maintenance and insurance costs, responsibility for which will pass to NLT. The average expenditure on repairs and maintenance over the last 3 years has been £0.019m.
- 4.2.15 The Council's capital programme does not include any provision for major repairs or enhancements to the Leisure Centres. The proposals within this report will remove the risk of the Council having to identify funding for such works over the next 30 years. Over the 30 years this could exceed the £675,000 undervalue/discount.

4.3 Legal

- 4.3.1 The Council have sought external legal advice to consider whether there are any procurement law, Section 123 (Local Government Act 1972) or State Aid implications arising from the implementation of the proposed arrangements for the future provision of leisure services (noting the external legal advice excludes the proposed loan and guarantee facility), the key points for the Council to consider are as follows:
- 4.3.2 The Council is under a general duty to achieve best value from the disposal of its land and property arising under Section 123 of the Local Government Act 1972. Circular 06/03 provides a specific consent as set out in paragraph 4.2.5 of this report. The legal advice has stated the grant of a lease at an undervalue may create a State Aid risk i.e. confers an advantage to NTL. The question for the Council is whether this "distorts or threatens to distort competition" and "affects or is capable of affecting trade between the member states". On the basis NLT operates in a very localised area and the services are of a local nature for the people of Northampton it is unlikely trade between member states is affected and therefore State Aid is unlikely to apply; and
- 4.3.3 The Operating Agreement provided by NLT in the view of the legal advice operates as a concessions contract pre the 2016 concessions regulations. On the basis that there is unlikely to be cross boundary interest there is no regulatory requirement to follow any particular process in varying the operating agreement, however any variations should not be significant and should not give the appearance of an entirely new arrangement. In relation to the proposed amendments referred to in paragraphs, 2.4, 2.5 and 2.6 of this report they do not have a significant impact on the operation and variation of the operating agreement.
- 4.3.4 The Localism Act 2011 provides local authorities with wide and facilitative powers to act in the same way as any other legal person, save where those powers are specifically limited by statute (referred to as the General Powers of Competence). The making of a loan or provision of a guarantee would be permissible, subject to any relevant statutory regulations being met. The arrangements must be robust in respect of repayment of any loan to ensure the Council meets its fiduciary duties and has security in place to cover the position of default. The interest rate of any loan will require that the European reference rate methodology be applied to ensure the loan is at a commercial

rate. The Council will need to appoint external legal advisors to draft the loan agreements and/or guarantees as appropriate.

4.3.5 In summary, the external legal advice for implementing the recommendations of this report are low risk but an element of risk will always remain and Cabinet should be aware of this.

4.4 Equality and Health

4.4.1 Services to the public will be unchanged as a result of the recommendations of this report. There are therefore no direct equality or health implications.

4.5 Consultees (Internal and External)

4.5.1 Extensive consultation has taken place with NLT in developing the recommendations of this report. Independent valuers' advice has been taken in determining the appropriate level of rent to charge NLT.

4.6 How the Proposals deliver Priority Outcomes

4.6.1 This report will contribute to the priority corporate outcomes of

- Enhancing leisure activities for local people and encouraging participation and
- Delivering quality modern services

5. Background Papers

Operating Agreement between NLT and NBC

General Consent Order (06/03)

Valuation from Underwoods

Advice from Browne Jacobson Solicitors (Confidential & Legally Privileged)

Social Value Study from University of Northampton Institute for Social innovation and Impact

Contact: Rick O'Farrell, Senior Regeneration Consultant
rofarrell@northampton.gov.uk



CABINET REPORT

| | |
|---------------------|--|
| Report Title | Update on the grant of property leases and financial and management agreements to Northampton Leisure Trust (Unity Leisure) |
|---------------------|--|

AGENDA STATUS: **Public**

| | |
|------------------------------------|-------------------------------|
| Cabinet Meeting Date: | 15 th October 2018 |
| Key Decision: | Yes |
| Within Policy: | Yes |
| Policy Document: | No |
| Directorates: | Economy, Assets and Culture |
| Accountable Cabinet Member: | Councillor Tim Hadland |
| Ward(s) | All |

1. Purpose

To seek agreement of Cabinet:

- 1.1 To approve an amendment to a recommendation of the report to Cabinet of 14th March 2018, 'Grant of property leases and financial and management agreements to Northampton Leisure Trust (Unity Leisure)', so that the leases that are the subject of that report do not include responsibility for insurance, but instead initial responsibility for insurance remains with the council.

2. Recommendations

- 2.1 Cabinet agrees to replace recommendation 2.1 and 2.2 of the report considered and agreed by Cabinet at its meeting on 14th March 2018 (Appendix 1) with the following new recommendations:

- 2.2 Cabinet agrees three new Full Repairing leases be granted under the Landlord and Tenant Act 1954 to Unity Leisure for the three leisure centres owned by Northampton Borough Council (Lings Forum, Danes Camp, Mounts Baths), for a period of 30 years. The combined rent will be £51,000 per year , and will be in accordance with the terms and conditions set out in this report and the Cabinet report dated 14 March 2018 (appendix 1), which reflects a discount from market rent of £22,500 per annum.
- 2.3 Authority be delegated to the Head of Economy, Assets and Culture to complete the above leases in consultation with the Chief Finance Officer and the Cabinet Member for Regeneration and Enterprise, subject to the completion of necessary due diligence checks, ensuring that the Council is not exposed to unacceptable legal or financial risk.
- 2.4 Cabinet agrees that for the first 5 years of the leases, the responsibility for insuring the properties will remain with the Council
- 2.5 Cabinet agrees that a review be carried out in Year 4 of the leases to determine whether or not the Council will continue to carry the cost of insuring the properties after year 5.

3. Issues and Choices

3.1 Report Background

- 3.1.1 Unity Leisure trading as Northampton Leisure Trust (NLT) was established by the Council in April 2011 to operate the three Council owned leisure centres, Lings Forum, Danes Camp and Mounts Baths, and to deliver sports development, health and play services.
- 3.1.2 On 14th March 2018 Cabinet agreed, inter alia, to enter into three new Full Repairing and Insuring Leases, one for each of the three leisure centres. Those leases are yet to be completed. After further discussion with NLT, it is now proposed that the Council retains responsibility for the insurance of the three leisure centres, initially for the first 5 years, as NLT have raised strong concerns about value for money and affordability. A review of affordability will be carried out at the end of year 4. It is proposed that the new recommendations 2.1 replaces recommendation 2.1 of the report considered and approved by Cabinet on 14 March 2018.
- 3.1.3 Apart from proposed changes to recommendations 2.1 and 2.2 of the recommendations approved by Cabinet on 14 March 2018, all other recommendations approved by Cabinet on that date remain extant.
- 3.1.4 The detail is explained more fully below in paragraph 4.2

3.2 Issues

3.2.1 There are no issues arising from the recommendation of this report.

3.3 Choices (Options)

3.3.1 If Cabinet choose not to agree to the recommendation of this report it will be necessary to resume negotiations with NLT, or to continue with the arrangements that are currently in place.

4. Implications (including financial implications)

4.1 Policy

4.1.1 The recommendations of this report are within policy and have no policy implications.

4.2 Resources and Risk

4.2.1 The Cabinet report of 14th March 2018 proposed to grant NLT a Full Repairing and Insuring lease (FRI) for a 30 year term on each property at a combined rent of £51,000, which represented an undervalue of £22,500 which was agreed in recognition of the social impact of NLT on the communities of Northampton, it being determined that a rent of £51,000 still represented value for money for the Council.

4.2.2 However, after further discussion it is now proposed that the leases are granted as Full Repairing, but for the first 5 years do not include responsibility for insurance, responsibility for all building insurance to be retained by the Council at a cost to the Council of £14,000 per year. £14,000 for the purpose of building insurance for the three leisure centres remains in the Council's current budget.

4.2.3 Assuming the recommendation of this report is agreed, the £14,000 saving that would have been achieved, will now not be made.

4.3 Legal

4.3.1 External legal advice was sought as to whether there were any Procurement Law, Section 123 (Local Government Act 1972) or State Aid implications arising from recommendations of 14th March report. Lawyers advised that the report's recommendations were not without risk for the Council, but that the risk was low.

4.4 Equality and Health

4.4.1 Services to the public will not be directly impacted as a result of the recommendation of this report. There are therefore no direct equality or health implications.

4.5 Consultees (Internal and External)

4.5.1 Consultation has taken place with NLT in developing the recommendation of this report.

4.6 How the Proposals deliver Priority Outcomes

4.6.1 This report will contribute to the priority corporate outcomes of

- Enhancing leisure activities for local people and encouraging participation and
- Delivering quality modern services

5. Background Papers

Operating Agreement between NLT and NBC

General Consent Order (06/03)

Valuation from Underwoods

Advice from Browne Jacobson Solicitors (Confidential & Legally Privileged)

Social Value Study from University of Northampton Institute for Social innovation and Impact

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