

**Legal Agreements Between the Council and the Trust
Extract Summary Report Prepared by Biggart Baillie**

**WEST DUNBARTONSHIRE COUNCIL (the “Council”)
TRANSFER OF LEISURE SERVICES TO NEW LEISURE TRUST:
EXTRACT REPORT ON LEGAL ISSUES FOR INCLUSION IN THE
REPORT TO THE HOUSING, ENVIRONMENT AND ECONOMIC
DEVELOPMENT COMMITTEE: 19 DECEMBER 2011 (the HEED REPORT)**

1, Background

- 1.1. The Council wishes to establish a separate legal entity for delivery of its leisure services (the “Trust”). The Trust will be formed as a new legal entity with charitable status. The charitable status of the Trust will secure various fiscal benefits for both the Trust and ultimately the Council which are reported on more fully at Section 5 of the HEED Report. The target date for implementation of the Trust for delivery of leisure services is 1 April 2012. Biggart Baillie LLP have been appointed as external legal advisors to advise on the formation of the Trust and the transfer of leisure services to it.
- 1.2. Biggart Baillie LLP prepared a report for the Leisure Trust Project Board assessing the merits of the various legal forms which the Trust may take. Having considered such report and other relevant factors, the Leisure Trust Project Board decided that the Trust would be formed as a private company limited by guarantee having charitable status. The internal governance of the Trust and its relationship with the Council will be governed by the Trust’s constitution. The process for incorporation of the Trust and obtaining charitable status is reported on more fully at Section 2 (*Incorporation of the Trust*) of this Report.
- 1.3. Following incorporation of the Trust, the Council will transfer to it all business and assets (including employees) which relate to the provision by it of leisure services, for nominal consideration. The Trust and the Council will enter into a Business Transfer Agreement for this purpose.
- 1.4. In order to secure the ongoing provision of leisure services to the West Dunbartonshire area, the Council will engage the Trust as a service provider to maintain and manage major sports and leisure facilities owned by the Council. The parties will enter into a Services Agreement for this purpose.
- 1.5. As part of the Trust’s management of the various sports and leisure facilities pursuant to the Services Agreement, the Council will lease the properties to the Trust. The Council and the Trust will enter into a

separate lease in respect of each property, although the leases will largely follow a standard form.

- 1.6. The Council will continue to provide a number of centralised services to the Trust for a transitional period. The parties will enter into a Transitional Services Agreement for this purpose.
- 1.7. The purpose of this note is to provide an overview of the main legal issues associated with establishment of the Trust and the transfer of leisure services to it, and how these issues are to be addressed by the legal documentation to be entered into between the Trust and the Council.

2. Incorporation of the Trust

- 2.1. The Trust will be incorporated as a private company limited by guarantee by way of an application to the Registrar of Companies. The Council will be the sole member of the Trust with ultimate control over its activities. The Trust will be managed by a Board of Directors, the composition of which is commented on in more detail below.
- 2.2. The Trust will adopt a set of Articles of Association on incorporation, which set out the rules for the internal management and governance of the Trust ("the Constitution"). Biggart Baillie LLP has prepared a draft of the Constitution which is with the Leisure Trust Project Board for review. The Constitution will detail:
 - the Board of Directors, including the process of their decision making, board meetings, appointment and removal and their powers;
 - who is eligible for membership of the Trust (i.e. the Council);
 - the organisation of member meetings and voting at those meetings;
 - any restrictions on the powers of the Trust.
- 2.3. Once in agreed form, the Constitution will be sent to the Office of the Scottish Charity Regulator ("OSCR") for prior approval to ensure that it meets with the requirements of the Charities and Trustee Investment (Scotland) Act 2005 (as amended). Only once the Trust has been incorporated with the Registrar of Companies can a formal application be made to OSCR for registration of the Trust as a charity. OSCR can take up to three months to grant an application therefore it is important that the Constitution is in agreed form and the Trust incorporated in advance of the end of 2011. Registration with HM Revenue and Customs for VAT and Charitable status will be made as soon as possible following registration of the Trust with OSCR.

3. Constitution of the Trust and Internal Governance

- 3.1. The Trust will be a distinct legal entity from the Council with power to contract in its own name. However, the Council will be the sole member of the Trust and will have ultimate control over its activities. The Council will also be entitled to appoint various members of the Board of Directors.
- 3.2. The Trust will be governed by a Board of Directors. The Directors will all be Charity Trustees in terms of the Charities and Trustee Investment (Scotland) Act 2005 (as amended) and will be subject to various duties and obligations set out in that act. In addition, the Directors will be subject to the duties and obligations set out in the Companies Act 2006. Biggart Baillie LLP has been instructed to prepare a briefing paper for the new Directors to advise them on their duties. Broadly, the Directors will be under a duty to act in the best interests of the Trust and maintain their independence from the Council. It will be essential to the Trust's application for charitable status that the Constitution includes detailed procedures to address any conflicts of interest which may arise for Directors in respect of the interests of the Trust and third parties, including the Council. The Trust must prepare a detailed Code of Conduct for Directors to follow.
- 3.3. The Board of Directors will comprise:
- 3 Councillors appointed by the Council ("Partner Directors"); and
 - 6 independent directors appointed following a public recruitment process ("Independent Directors") one of whom would preferably be nominated by the employees of the Trust

The Charities and Trustee Investment (Scotland) Act 2005 (as amended) prohibits these Directors from being remunerated for their position on the Board, other than being reimbursed reasonable travelling expenses. An Independent Director employed by the Trust will continue to be remunerated as an employee of the Trust.

4. Legal Documentation

- 4.1. The key legal documents required to implement the new delivery model for leisure services will be:
- Business Transfer Agreement in terms of which all assets of the Council which relate to its delivery of leisure services will transfer to the Trust;
 - Property Leases in terms of which the twenty one sports and leisure facilities owned by the Council are leased to the Trust;
 - Services Agreement in terms of which the Trust will be appointed to provide leisure services in the West Dunbartonshire area for an initial agreed period of 3 years;

- Transitional Services Agreement in terms of which the Council will provide certain centralised services to the Trust for an agreed transitional period of 3 years.

4.2. Business Transfer Agreement

The Business Transfer Agreement will transfer the Council's leisure services to the trust, together with all related assets including:

- any contracts to which the Council is a party;
- equipment, motor vehicles and stock;
- any distinct intellectual property rights which relate only to leisure services; and
- a lease of the twenty one sports and leisure facilities owned by the Council.

A due diligence exercise is being led by the Leisure Trust Project Board to identify all assets which must transfer to the Trust. It is particularly important to identify any contracts or commitments which relate to leisure services and must be transferred to the Trust so that the Trust's Business Plan takes into account all outgoings and liabilities which it must meet going forward. In the event that any contract or commitment is identified after the Transfer which should have been issued by the Trust, the contract or commitment will transfer to the Trust and the Trust will be provided with additional funds to meet the commitment by way of an adjustment to the Funding Commitment.

All employees of the Council engaged in leisure services will also transfer to the Trust in terms of the Transfer of Undertaking (protection of Employment) Regulations 2006 ("TUPE") and Guidance issued under Section 52 of the Local Government in Scotland Act 2003 ("section 52 Guidance"). The terms and conditions of employment of staff will not change as a result of the transfer. In terms of TUPE and the Section 52 Guidance, the Trust will assume all liabilities in respect of the employees, even those arising in advance of the Transfer. To ensure that the Trust can meet any unforeseen liabilities which arise, the Council will undertake to meet appropriate liabilities relating to the period prior to the Transfer by increasing the sum which the Council pays to the Trust under the Services Agreement accordingly ("the Funding Commitment").

The Trust will become an Admitted Body to the Strathclyde Pension Fund and all existing and new employees of the Trust will have the opportunity to participate in the Scheme. As the Trust is a newly formed entity, the Strathclyde Pension Scheme will require a guarantee from the Council in respect of the Trust's obligations to the Scheme going forward.

4.3. Services Agreement

- 4.3.1. In order to ensure that the Council continues to meet its obligations to ensure that there is adequate provision of facilities for the inhabitants of its area for recreational, sporting, cultural and social activities in terms of Section 14 of the Local Government and Planning (Scotland) Act 1982 the parties will enter into a Services Agreement. The Council will appoint the Trust as service provider to maintain and manage the twenty one sports and leisure facilities owned by the Council and leased to the Trust.
- 4.3.2. The Services Agreement will set out in detail the services which the Trust is to deliver. This will include management of the twenty one sports facilities and also delivery of the Active Schools and Sports Development programs (“the Services”).
- 4.3.3. The Services Agreement will endure for an initial period of 3 years from the 1 April 2012. The Council has the option to extend the period of the Services Agreement for a further 3 years provided that sufficient notice is given to the Trust in advance of the expiry date. If the Council exercises its option to extend the Services Agreement, the Council shall be required to give notice to terminate the extended agreement no less than 12 months prior to the extended expiry date. If the Council fails to give such adequate notice, the agreement shall then continue on a year-to-year basis until terminated by either party giving no less than 12 months’ notice in writing.
- 4.3.4. The Trust is paid for delivery of the Services by way of an annual Funding Commitment. The Funding Commitment is identified from an annual Business Plan, which the Trust and Council agree, which sets out the resources required by the Trust to deliver the Services. The Services Agreement provides for a review of the Business Plan in the event that any unforeseen costs arise for the Trust, or if the Council’s budget is reduced and it must implement efficiency measures in its services.
- 4.3.5. The Trust’s delivery of the Services will be measured against agreed Service Performance Standards. The Council will have rights to inspect the Trust’s records to ensure compliance with the Services Agreement. The Services Agreement will be terminable on various events of default, including if the Trust fails to perform its material obligations under the Services Agreement or enters into insolvency proceedings. In this event, the Council will take ownership of any assets owned by the Trust, to enable it to resume delivery of leisure services or put an alternative delivery model in place.

Property Leases

- 4.3.6. As part of the Trust's management of the Council's sports and leisure facilities pursuant to the Services Agreement detailed above, the Trust will take a lease of each of the twenty one properties ("the Properties"). As the Properties will vary, the Trust and Council will enter into a separate lease in respect of each, although the leases will largely follow a standard form agreed between the Trust and the Council. Licences to occupy may be used in circumstances where a lease is not available or appropriate.
- 4.3.7. The duration of each lease will be for a period of no more than 20 years and will reflect the duration of the Services Agreement to ensure that the Trust is not in occupation of the Properties following termination of the Services Agreement.
- 4.3.8. The Properties will be leased to the Trust for a nominal rent.

4.4. Transitional Services Agreement

- 4.4.1. In order to assist the Trust initially with the delivery of the leisure facilities, the Council will provide certain transitional services to the Trust, including marketing, waste management, information technology, payroll and human resources, and maintenance and repair of the Properties.
- 4.4.2. The Transitional Services Agreement will set out in detail the transitional services to be provided by the Council to the Trust.
- 4.4.3. The Transitional Services Agreement will endure for an initial period of [three] years from 1 April 2012. Following the initial period, the Transitional Services Agreement will automatically review for successive periods of one year, unless and until it is terminated by one of the parties in accordance its terms.
- 4.4.4. The Trust will pay the Council a service charge for each of the transitional services provided. These charges will be based on the cost of the services provided, and will be set out in the Schedule to the Transitional Services Agreement.
- 4.4.5. A review process will be set up to monitor the provision of the transitional services.