

**Tonbridge and Malling Borough Council**

**Leisure NPDO – Heads of Terms**

**Final Draft (1 May 2013)**

This document sets out the heads of terms for the proposed establishment of a NPDO for Tonbridge and Malling, in relation to the key documents. The memorandum and articles of association for the new organisation are dealt with separately. The four principle agreements are:

- Management Agreement – sets out the basis of how the Council will fund the Trust and the key outcomes the Trust will deliver in return.
- Leases – sets out the buildings and property which are to be leased and the principle terms
- Transfer Agreement – what other assets and transfer provisions there are, which only apply at point of transfer
- Support Services Agreement – the basis on which the Council will continue to supply services to the Trust

The tables below set out these key agreements.

**1. Management Agreement**

Issue	Agreed Position
Scope of Services	<ul style="list-style-type: none"> <li>• Operation of:               <ul style="list-style-type: none"> <li>○ Larkfield Leisure Centre</li> <li>○ Tonbridge Swimming Pool</li> <li>○ Angel Centre</li> <li>○ Poulton Wood Golf Centre</li> <li>○ Games Hut</li> <li>○ Bookings for sports pitches in Tonbridge</li> </ul> </li> <li>• Angel Centre is due to be demolished in Autumn 2015.</li> <li>• A new Leisure &amp; Community Centre is to be developed in Bradford Street Car Park, opening in Autumn 2015 and it is the intention of both parties that TMLT will operate the new leisure and community centre. The management fee will be reviewed at this point in addition to the review mechanism below, to reflect the new operating costs and any transfer costs from the existing Angel to the new Leisure and Community Centre. The Council will exercise its right to break the Angel Centre lease early (Angel Centre Redevelopment Break Clause) which will be excisable by giving TMLT not less than six months written notice.</li> </ul>
Duty to Co-operate	<ul style="list-style-type: none"> <li>• There is an overarching duty for both parties to work in partnership with each other and to collaborate in delivering the services and the public health responsibilities.</li> </ul>
Services	<ul style="list-style-type: none"> <li>• Leisure management of the facilities, including operation, programming, events, catering, retail, sports and leisure activities, grounds maintenance, bookings.</li> <li>• Delivery of the key corporate outcomes – set out in corporate strategy and Leisure &amp; Arts Strategy</li> <li>• Operate in accordance with Good Industry Practice and Legislation</li> </ul>

Issue	Agreed Position
	<ul style="list-style-type: none"> <li>Requirement to continuously improve and deliver Best Value, to be demonstrated in the TMLT's business plan</li> </ul>
Length of Term	<ul style="list-style-type: none"> <li>Management Agreement to be 20 years, with a review of the funding every 5 years (or at other times if required by the Council), as set out below</li> <li>Both lease and management agreement to be terminated if the other one is terminated</li> </ul>
Funding & Review of Funding/ Review of Services	<ul style="list-style-type: none"> <li>To be fixed for each 5 year period of the funding agreement prior to review, which would reflect any efficiencies delivered in the business plan and indexation costs (based on CPI index)</li> <li>Funding would be provided quarterly in advance (except Year 1, which is to be agreed subject to business plan)</li> <li>The funding will be renegotiated in accordance with the following process (during every 5 year process) <ul style="list-style-type: none"> <li>In Year 4 [April] – the Council confirms the funding, priorities and areas they wish to deliver for the subsequent 5 year period</li> <li>Trust prepares a draft 5 year business plan in response to priorities by [September] in Year 4</li> <li>Business Plan and funding discussed between parties</li> <li>Seek to agree by [December] in Year 4 (15 months prior to end of existing funding period)</li> </ul> </li> <li>If, acting reasonably and in good faith, no agreement to future funding then the funding for the previous period shall continue until such time as the parties are able to agree the level of funding and services, subject to a Long Stop Date. If agreement cannot be reached by the Long Stop Date, then the Council has the option to terminate the agreement. This will be treated as Voluntary Termination.</li> <li>There would be VAT applied to the management fee</li> <li>NOTE: It is possible that in the future, the Council 's subsidy for leisure services will reduce to zero. The Management Agreement will continue to apply to the day to day management and operation of the facilities/ delivery of the services.</li> <li>Notwithstanding that the funding is fixed for 5 years, there will be an annual review of the services to ensure these continue to meet the Council's priorities for the next 12 month period. The Management Agreement will set out the timetable for this annual review.</li> </ul>
Surplus Share	<ul style="list-style-type: none"> <li>TMLT will prepare their business plan which allows for reserves to be developed over time, which can be used for reinvestment in the service.</li> <li>Surpluses over and above an agreed level will be shared between TMBC and TMLT in the proportion of [50:50], annually</li> <li>The agreed level to be set to incentivise TMLT once the business plan has been developed, and would be at a level which is above the business plan projections</li> </ul>
Insurance	<ul style="list-style-type: none"> <li>TMBC responsible for organising and paying for Building Insurance</li> <li>TMLT responsible for organising and paying for Employers Liability, Public Liability, contents, business interruption</li> </ul>
Opening Hours	<ul style="list-style-type: none"> <li>Minimum opening hours will be specified in the agreement, broadly based upon the existing opening hours</li> </ul>

Issue	Agreed Position
	<ul style="list-style-type: none"> <li>Changes to minimum opening hours can only be made with the agreement of TMBC, such consent not to be unreasonably withheld or delayed.</li> </ul>
Programming and Bookings	<ul style="list-style-type: none"> <li>Protected bookings to be identified, which could include protection of casual use at certain facilities and other groups rather than purely clubs. Schedule to be developed</li> <li>Programmes of use to be reviewed and agreed annually by TMBC with any significant variations to this to be agreed by TMBC</li> </ul>
Pricing	<ul style="list-style-type: none"> <li>A list of core prices to be agreed by TMBC on an annual basis.</li> </ul>
Council Use of Facilities	<ul style="list-style-type: none"> <li>Larkfield Leisure Centre and Angel Centre to be emergency rest centres and TMBC to be able to use</li> <li>Centres also to be available for use in line with TMBC's business continuity plan, with compensation being paid for loss of income. TMLT will be under an obligation to use all reasonable endeavours to mitigate any loss.</li> <li>Angel and Larkfield required for use at elections and for other meetings (including Area One Planning Committee and Tonbridge Forum) with the use to be paid for at the community rate.</li> <li>Other use will be paid for at prevailing rate</li> </ul>
Utilities	<ul style="list-style-type: none"> <li>TMBC to take tariff risk, over and above inflation (using CPI) or above an agreed level subject to TMBC approving the utilities supplier(s).</li> <li>Payments for increased tariff will only be paid if TMLT have not met their target financial levels in the business plan</li> <li>TMLT to take consumption risk</li> <li>TMLT will be under an obligation to use all reasonable endeavours to reduce Consumption levels.</li> </ul>
Service Development	<ul style="list-style-type: none"> <li>TMLT responsible for delivery of strategic plan in response to TMBC outcomes and corporate plan</li> <li>Plan produced for 5 year period, reviewed annually</li> <li>Performance monitored and reported quarterly</li> <li>Annual outcomes report to be prepared setting out how TMLT has delivered against the outcomes</li> </ul>
Quality of Service	<ul style="list-style-type: none"> <li>TMLT will be required to achieve and maintain Quest Plus at excellent level (or other similar quality standard) and maintain appropriate quality standards</li> <li>Exception to this will be Poult Wood which would be required to achieve and maintain Quest Entry level</li> </ul>
Customer Service	<ul style="list-style-type: none"> <li>TMLT will be required to meet TMBC customer care standards in terms of response times and values</li> </ul>
Health & Safety	<ul style="list-style-type: none"> <li>TMLT to be responsible for Health and Safety and will provide H&amp;S policy and operating plans, which will be reviewed by TMBC</li> </ul>
Staffing and Management Issues	<ul style="list-style-type: none"> <li>TMLT will be under an obligation to employ sufficient numbers of appropriately trained staff to deliver the services.</li> <li>TMLT will be required to comply with all relevant employment legislation and good employment practice generally.</li> <li>TMLT will undertake all appropriate checks to comply with safeguarding requirements.</li> <li>TMLT will provide LGPS pension scheme for TUPE staff.</li> </ul>

Asset Management Issues	<ul style="list-style-type: none"> <li>• TMLT will repair and maintain the facilities in accordance with the agreed repair and maintenance schedule.</li> <li>• TMLT will prepare an annual repair and maintenance programme for review by the Council.</li> <li>• TMLT will repair and maintain all existing equipment.</li> <li>• TMLT will replace any equipment which is beyond repair on a like for like basis or equivalent value basis or such other basis as the parties may agree.</li> <li>• TMLT will liaise with the Council regarding any significant equipment replacement programmes.</li> </ul>
Marketing and Use of Council	<ul style="list-style-type: none"> <li>• TMBC logo required on literature and 'TM Active working in partnership with TMBC' wording required</li> </ul>
Change in Law	<ul style="list-style-type: none"> <li>• General change in Law – TMLT responsibility</li> <li>• Specific change in Law – TMBC responsibility</li> </ul>
Change Procedure	<ul style="list-style-type: none"> <li>• TMBC can request change – TMLT must respond with costs and if agreed then implemented with cost implications. If not agreed then dispute resolution or third party</li> <li>• TMLT can request change – TMBC absolute discretion whether agreed or not</li> </ul>
Monitoring & Performance	<ul style="list-style-type: none"> <li>• TMLT to report on the business plan and TMBC to be able to monitor performance. Reports to be presented in a quarterly report, the format of which is to be agreed. The format will be attached as a schedule but will be based on the current reporting the LSBU prepares.</li> <li>• Annual review of performance and delivery against outcomes – preparation of business plan and service development</li> <li>• Deductions from funding possible if Trust fails to perform – through performance monitoring system. This would be linked to delivery of outcomes and allow TMLT the opportunity to rectify performance failures</li> <li>• If requested, TMLT will be required to attend Members Presentation and Meetings</li> </ul>
Contracting Outside of TMBC boundaries	<ul style="list-style-type: none"> <li>• TMLT to only change its objects or undertake any opportunities outside Tonbridge and Malling following consultation with TMBC</li> </ul>
Dispute Resolution	<ul style="list-style-type: none"> <li>• Procedure as follows <ul style="list-style-type: none"> <li>○ TMLT Contract Manager and TMBC Authorised Officer seek to agree</li> <li>○ Chief Executive of TMLT and Corporate Director of TMBC seek to agree</li> <li>○ Third Party determines through mediation</li> <li>○ Going to court can only be implemented if mediation fails</li> </ul> </li> </ul>
Termination	<ul style="list-style-type: none"> <li>• Can be terminated by either party based on default by the other party which would include the following <ul style="list-style-type: none"> <li>○ TMLT default – material breach, insolvency, breach of deduction thresholds within the deduction regime</li> <li>○ TMBC default – material breach, non payment of funding</li> <li>○ Also Voluntary Termination by the Council – upon not less than twelve months notice</li> </ul> </li> <li>• Consequences of termination <ul style="list-style-type: none"> <li>○ To follow the requirements under exit and handover (see below)</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ Compensation <ul style="list-style-type: none"> <li>§ TMLT default – no compensation payable, except outstanding capital sums which TMLT have invested</li> </ul> </li> <li>• TMBC default (and Voluntary Termination) – compensation for costs of TMLT</li> </ul>
Partial Termination	<ul style="list-style-type: none"> <li>• TMBC able to partially terminate the services which would link to partial termination of one of the leases</li> <li>• Any compensation would be as set out for termination</li> <li>• TMLT unable to partially terminate</li> </ul>
Exit and Handover	<ul style="list-style-type: none"> <li>• TMLT will be required to <ul style="list-style-type: none"> <li>○ Deliver the assets associated with the service back to the Council (in the agreed state of repair)</li> <li>○ Provide TUPE information</li> <li>○ Apportion the costs/income</li> <li>○ Cooperate with the Council</li> </ul> </li> </ul>

## 2. Leases

Issue	Agreed Position
Scope of Services	<ul style="list-style-type: none"> <li>• Leases for the following buildings: <ul style="list-style-type: none"> <li>○ Larkfield Leisure Centre (note – will need to be a sub lease of existing lease with East Malling and Larkfield Parish Council)</li> <li>○ Tonbridge Swimming Pool</li> <li>○ Angel Centre</li> <li>○ Poulton Wood Golf Centre</li> <li>○ Games hut requires a lease</li> </ul> </li> <li>• Angel Centre is due to be demolished in the Autumn 2015. The Council will be entitled to terminate the lease early by exercising its redevelopment break clause– which would be excisable upon giving not less than 6 months notice.</li> <li>• A new Leisure &amp; Community Centre is to be developed in Bradford Street Car Park in Autumn 2015 and it is the intention of TMBC and TMLT that the TMLT will operate the new leisure and community centre</li> <li>• Red line drawings being prepared to include car parks where relevant, although maintenance of car parks may be retained by TMBC</li> </ul>
Length of Term	<ul style="list-style-type: none"> <li>• Leases to be for 20 years</li> <li>• All leases will terminate early in the event of termination of the Management Agreement or the relevant lease will terminate in the event of partial termination</li> </ul>
Rent	<ul style="list-style-type: none"> <li>• Peppercorn rent</li> </ul>
Use of Buildings	<ul style="list-style-type: none"> <li>• Can only be used for its existing use or similar (sport, leisure and cultural activities)</li> <li>• Prohibited uses to be included are any use for political purposes, gambling, any use which would bring TMBC into disrepute</li> <li>• Change of use would require TMBC agreement</li> <li>• Sub letting of buildings is only allowed with agreement of TMBC (and would be contracted out of the 1954 act), excluding the current contracts and uses. Should not stop TMLT from entering into hire</li> </ul>

Issue	Agreed Position
	<p>arrangements with clubs, etc</p> <ul style="list-style-type: none"> <li>• Consideration as to whether TMBC consent required in all cases or in certain circumstances TMLT can do without consent (eg bar and catering)</li> </ul>
Maintenance	<ul style="list-style-type: none"> <li>• TMBC responsible for building and structural maintenance, including plant replacement</li> <li>• TMLT responsible for day to day maintenance</li> <li>• Responsibility matrix to be developed based on current responsibilities under BRREP – will be attached as a schedule to the management agreement</li> </ul>
Equipment	<ul style="list-style-type: none"> <li>• All equipment would be under licence to TMLT and that responsibilities for the repair and replacement of the equipment would be split in accordance with the Capital Renewals schedule. Any equipment not in the Capital Renewals schedule is the responsibility of TMLT</li> </ul>
Change in Ownership or Control of TMLT	<ul style="list-style-type: none"> <li>• Requires TMBC agreement</li> </ul>
Assignment of Lease	<ul style="list-style-type: none"> <li>• Not allowed without agreement of TMBC</li> </ul>
Charges over Lease	<ul style="list-style-type: none"> <li>• Not allowed without agreement of TMBC</li> </ul>
Landlord & Tenant Act 1954	<ul style="list-style-type: none"> <li>• Contracted Out</li> </ul>

### 3. Transfer Agreement

Issue	Agreed Position
Assets	<ul style="list-style-type: none"> <li>• The assets to be transferred (legal title) will be: <ul style="list-style-type: none"> <li>○ Staff (TUPE)</li> <li>○ Stock (cash payment)</li> <li>○ Contracts (novated)</li> </ul> </li> <li>• The assets to be loaned/leased: <ul style="list-style-type: none"> <li>○ Facilities</li> <li>○ Equipment</li> <li>○ Membership database</li> <li>○ IPR</li> </ul> </li> <li>• The assets to be excluded: <ul style="list-style-type: none"> <li>○ Retained contracts</li> <li>○ Cash at bank</li> <li>○ Existing debts/liabilities</li> </ul> </li> <li>• Apportionment of income and expenditure allocations at the transfer date to be agreed with a long stop date of [2] months after date of transfer.</li> <li>• Joint stock take to be undertaken the day before transfer to agree valuation of stock.</li> <li>• Any payments for stock and apportionments to be made within 3 months of transfer.</li> </ul>
Pensions	<ul style="list-style-type: none"> <li>• TMLT to obtain admitted body status</li> <li>• TMBC to act as guarantor</li> <li>• The Pension scheme contribution rate will be transferred as a fully</li> </ul>

Issue	Agreed Position
	funded scheme <ul style="list-style-type: none"> <li>• Consideration as to whether it is to be an open or closed scheme . A cost benefit analysis will be undertaken once the contribution rates are known.</li> <li>• Risk on contribution rates will sit with the party who is in control of the risk, thus any changes in benefits would sit with TMLT</li> <li>• Scheme to be returned on a fully funded basis, for the areas which TMLT can control</li> </ul>
Existing Service Contracts	<ul style="list-style-type: none"> <li>• Will be novated to Trust</li> <li>• Consider if there are any contracts to be retained by TMBC</li> </ul>
Utilities	<ul style="list-style-type: none"> <li>• Transfer of existing contracts for Utilities, with TMBC acting as guarantor</li> </ul>
Staff	<ul style="list-style-type: none"> <li>• Transferred under TUPE</li> <li>• The Contract will set out in detail both parties' obligations in relation to the TUPE Regulations, including consultation.</li> <li>• Indemnity from the Council to TMLT to mitigate any liabilities incurred by TMLT in relation to staff claims but arising from an act or omission of the Council prior to the Transfer Date</li> <li>• Indemnity from TMLT to the Council to mitigate any liabilities incurred by the Council in relation to staff claims but arising from an act or omission of TMLT after the Transfer Date</li> <li>• Council will meet all remuneration costs up to the point of transfer</li> </ul>
Liabilities	<ul style="list-style-type: none"> <li>• Existing debts and liabilities will be excluded from the Transfer</li> </ul>
Dispute Resolution	<ul style="list-style-type: none"> <li>• Procedure as follows               <ul style="list-style-type: none"> <li>○ TMLT Contract Manager and TMBC Authorised Officer seek to agree</li> <li>○ Chief Executive of TMLT and Corporate Director of TMBC seek to agree</li> <li>○ Third Party determines through mediation</li> <li>○ Going to court can only be implemented if mediation fails</li> </ul> </li> </ul>

#### 4. Support Services Agreement

Issue	Agreed Position
Services	<p>The following services to be provided</p> <ul style="list-style-type: none"> <li>• Financial Services (including accountancy, payroll, purchase and sales ledgers)</li> <li>• HR</li> <li>• Legal Services</li> <li>• IT Management</li> <li>• Health and Safety (to be determined)</li> <li>• Printing and Courier Services</li> </ul> <p>Services to be provided by TMBC to be set out in specification with appropriate KPIs</p> <p>Services can only be provided where there is no conflict of interest.</p>

Issue	Agreed Position
Length of Agreement	<ul style="list-style-type: none"> <li>• 2 years – initial term</li> <li>• Potential to extend on agreement of both parties, with the need for 6 months notice if agreement is terminated</li> </ul>
Termination	<ul style="list-style-type: none"> <li>• During the initial term the agreement can only be terminated by either party through default on performance</li> <li>• TMLT can terminate if KPIs not delivered</li> <li>• TMBC can terminate for non payment of fees</li> </ul>
Charges & Payment	<ul style="list-style-type: none"> <li>• The charges will be as specified in the pricing schedule – will reflect the amounts in Budget for 13/14, subject to review and subject to indexation (CPI)</li> <li>• Payment will include VAT</li> <li>• Timing of payment to be agreed</li> </ul>
Dispute Resolution	<ul style="list-style-type: none"> <li>• Procedure as follows <ul style="list-style-type: none"> <li>○ TMLT Contract Manager and TMBC Authorised Officer seek to agree</li> <li>○ Chief Executive of TMLT and Corporate Director of TMBC seek to agree</li> <li>○ Third Party determines through mediation</li> <li>○ Going to court can only be implemented if mediation fails</li> </ul> </li> </ul>
Review	<ul style="list-style-type: none"> <li>• To be reviewed as part of annual review process</li> </ul>

Notes:

TMBC – Tonbridge and Malling Borough Council

TMLT – Tonbridge and Malling Leisure Trust