

DATED

2013

- (1) TONBRIDGE & MALLING BOROUGH COUNCIL
- (2) TONBRIDGE & MALLING LEISURE TRUST

MANAGEMENT AGREEMENT
relating to the provision of
Leisure Services

VERSION 6: 4 SEPTEMBER 2013

Minerva House
5 Montague Close
London
SE1 9BB
DX: 156810 London Bridge 6

T 020 7593 5000
F 020 7593 5099
www.wslaw.co.uk

Winckworth
Sherwood

Solicitors and
Parliamentary Agents

CONTENTS

Clause	Page
PART 1 – PRELIMINARY	2
1. DEFINITIONS AND INTERPRETATION	2
PART 2 – INDEPENDENCE OF THE TRUST	13
2. INDEPENDENCE OF THE TRUST	13
3. PARTNERSHIP ARRANGEMENTS	14
PART 4 – THE SERVICES	15
4. SERVICES TO BE PROVIDED BY THE TRUST	15
5. PRICING	15
6. PROGRAMMING	16
7. ANNUAL SERVICE PLANNING PROCESS	17
PART 5 – CHANGES IN SERVICES/TRANSFER OF ADDITIONAL SERVICES	18
8. COUNCIL REQUEST FOR A CHANGE IN SERVICE	18
9. TRUST REQUEST FOR A CHANGE IN SERVICE	19
10. TRANSFER OF ADDITIONAL SERVICES TO THE TRUST	20
11. TRUST BORROWINGS	22
PART 6 – PROPERTY, MAINTENANCE AND EQUIPMENT ISSUES	23
12. COUNCIL REQUIREMENTS IN RELATION TO THE FACILITIES	23
13. THE TRUST'S USE OF THE FACILITIES	23
14. COUNCIL'S USE OF THE FACILITIES	24
15. MAINTENANCE OF THE FACILITIES	24
16. CAR PARKING ARRANGEMENTS	25
17. REDEVELOPMENT OF ALL OR PART OF THE PROPERTY PORTFOLIO	25
18. PROVISIONS RELATING TO THE ANGEL CENTRE	26
19. THIRD PARTY LEASES	28
20. UTILITIES	28
21. EQUIPMENT	28
PART 7 – STAFFING, PENSIONS AND MANAGEMENT ISSUES	31
22. STAFFING ISSUES	31
PART 8 – RISK MANAGEMENT ISSUES	34
23. HEALTH AND SAFETY	34
24. INSURANCES	34
25. COMPLAINTS PROCEDURE AND QUALITY CONTROL	35
26. CUSTOMER SATISFACTION AND MONITORING	36
27. BEST VALUE	36
28. INFORMATION, AUDIT AND INSPECTION	37

29.	JOINT PROCUREMENT	38
30.	COOPERATION	38
	PART 9 – SERVICE FEE AND PAYMENT ARRANGEMENTS	39
31.	SERVICE FEE	39
32.	INTEREST ON LATE PAYMENT	39
33.	ADJUSTMENT TO THE SERVICE FEE	39
34.	GAIN SHARE	40
35.	SERVICE FEE REVIEW FOLLOWING THE REDEVELOPMENT OF THE ANGEL CENTRE	40
	PART 10 – MONITORING REGIME	42
36.	REPORTING AND MONITORING	42
37.	MANAGING POOR PERFORMANCE	42
38.	COUNCIL STEP-IN	43
	PART 11 – TERMINATION AND CONSEQUENCES OF TERMINATION	45
39.	VOLUNTARY TERMINATION BY THE COUNCIL	45
40.	PARTIAL TERMINATION BY THE COUNCIL	45
41.	TERMINATION ON TRUST DEFAULT	45
42.	TERMINATION ON COUNCIL DEFAULT	46
43.	TERMINATION ON FORCE MAJEURE	46
44.	AUTOMATIC TERMINATION	47
45.	CONSEQUENCES OF TERMINATION	47
46.	EXIT AND HANDOVER ON TERMINATION	48
	PART 12 – GENERAL	52
47.	COUNCIL OFFICER	52
48.	TRUST REPRESENTATIVE	52
49.	LIABILITY OF THE TRUST	53
50.	LIABILITY OF THE COUNCIL	53
51.	USE OF THE COUNCIL'S LOGO	54
52.	PUBLIC RELATIONS, PUBLICITY AND ADVERTISING	54
53.	COMPETITION	54
54.	COPYRIGHT	54
55.	DATA PROTECTION [NB: TO BE FURTHER REVIEWED PLUS A NEW IPR CLAUSE]	54
56.	CORRUPT GIFTS PAYMENTS OF COMMISSION AND GRATUITIES	55
57.	CHANGE OF LAW	55
58.	AMENDMENTS	56
59.	SET-OFF	56
60.	ANNOUNCEMENTS	56
61.	WAIVER	56

62.	SEVERABILITY	56
63.	ENTIRE AGREEMENT	56
64.	ASSIGNMENT AND SUBCONTRACTING	57
65.	CONFIDENTIALITY	57
66.	FREEDOM OF INFORMATION	58
67.	CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999	59
68.	COUNTERPARTS	59
69.	NOTICES	59
70.	COSTS	60
71.	NO PARTNERSHIP OR AGENCY	60
72.	DISPUTE RESOLUTION	60
73.	GOVERNING LAW	60
	SCHEDULE 1 SERVICE OUTPUTS	62
	SCHEDULE 2 MINIMUM OPENING HOURS	63
	SCHEDULE 3 CORE PRICES	64
	SCHEDULE 4 ANNUAL SERVICE PLAN CONTENTS	65
	SCHEDULE 5 ANNUAL SERVICE PLAN 2013 - 2015	66
	SCHEDULE 6 BUSINESS PLAN 2013 - 2018	67
	SCHEDULE 7 REPAIR AND MAINTENANCE MATRIX	68
	SCHEDULE 8 PPM PROGRAMME	69
	SCHEDULE 10 CAPITAL RENEWALS SCHEDULE	71
	SCHEDULE 11 SERVICE FEE	72
	SCHEDULE 12 GAIN SHARE	73
	SCHEDULE 13 FORMAT FOR REPORTS	
	SCHEDULE 14 PROCEDURE FOR DISPUTE RESOLUTION	74
	SCHEDULE 14 PROCEDURE FOR DISPUTE RESOLUTION	75
	SCHEDULE 15	77
	PART 1 CONFIDENTIAL INFORMATION	77
	PART 2 COMMERCIALY SENSITIVE INFORMATION	77
	SCHEDULE 16 UTILITIES COST SHARING	78

BETWEEN:

- (1) **TONBRIDGE & MALLING BOROUGH COUNCIL** whose principal office is at Gibson Buildings, Gibson Drive, Kings Hill, West Malling, Kent ME19 4LZ (the "**Council**")
- (2) **TONBRIDGE & MALLING LEISURE TRUST** a charitable company limited by guarantee registered on 15 March 2013 whose registered company number is 08447331 and whose registered office is at 1-5 Martin Square, Larkfield, Aylesford, Kent ME20 6QL (the "**Trust**")

WHEREAS:

- (A) The Council provides or procures the provision of a range of services for the residents of and visitors to the administrative area of Tonbridge & Malling including leisure services.
- (B) The Trust's primary purpose is to provide or assist in the provision of facilities and/or services for recreational and leisure time activities and to promote healthy active lifestyles.
- (C) The Council and the Trust have identified a number of joint objectives to increase participation in recreational and leisure time activities and to promote healthy active lifestyles.
- (D) The Council and the Trust have entered into an arrangement to achieve these common objectives.
- (E) As part of these arrangements, the Trust will manage the Council's leisure facilities and bookings for sports pitches in Tonbridge.
- (F) The Council and the Trust, acting at arm's length and with the Trust taking appropriate independent advice, have agreed certain outputs for the leisure services.
- (G) The Council, having duly considered the Business Plan presented to it by the Trust, has agreed pursuant to its powers set out in Section 19 of the Local Government (Miscellaneous Provisions) Act 1976, Section 1 of the Localism Act 2011 and all other enabling powers and regulations thereto to enter in to this Agreement with the Trust.
- (H) In consideration of the Trust delivering the agreed outputs for leisure services, the Council has agreed to provide ongoing financial support for the time being.
- (I) This Agreement describes the leisure services to be provided by the Trust and the Council's minimum requirements regarding the delivery of those services.

PART 1 – PRELIMINARY

1. DEFINITIONS AND INTERPRETATION

1.1 In this Agreement hereto unless the context otherwise requires the following expressions (set out in alphabetical order) shall have the meanings respectively attributed to them:

- “1999 Act”** means the Local Government Act 1999;
- “Action Plan”** means an Action Plan prepared by the Trust pursuant to **Clause 35** of this Agreement;
- “Additional Services”** means the Additional Services which subject to the provisions of **Clause 10** could be transferred to the Trust.
- “Admission Agreement”** means an admission agreement as defined in the Business Transfer Agreement;
- “Agreement”** means this agreement;
- “Angel Centre Lease”** means the lease to be entered into by the parties in relation to the Angel Centre;
- “Annual Service Planning Process”** means the process for the review of the Annual Service Delivery Plan submitted by the Trust to the Council in accordance with **Clause 7** of this Agreement;
- “Annual Service Delivery Plan”** means the annual service delivery plan submitted by the Trust in accordance with **Clause 7** of this Agreement detailing the manner in which the Services will be provided by the Trust during the forthcoming Service Year and as approved by the Council in accordance with such **Clause 7**. A copy of the Trust's Annual Service Delivery Plan for the period 1 November 2013 to 31 March 2015 set out in Schedule 5;
- “Assets”** means all assets and rights to enable the Council or a Successor Organisation to operate and maintain the Facilities in accordance with this Agreement including:
- (a) any Equipment loaned to the Trust by the Council for the Service Period pursuant to this Agreement;
 - (b) any books and records including operating and maintenance manuals, health and safety manuals prepared and/or developed by the Trust to promote the Services at the Facilities;
 - (c) any spare parts, tools and other assets together with warranties in respect of assets being transferred;
 - (d) any contractual rights accruing after termination of this Agreement;

- (e) any intellectual property rights; and
- (f) any unexpired portions of any membership fee or direct debit payments or deposits for bookings for the use of the Facilities either as part of a membership arrangement relating exclusively to the use of the Facility or use of the Facility as part of a wider membership arrangement relating to the period after the termination of this Agreement or otherwise;

“Best Value Duty”

means the duty of local authorities to make arrangements to secure continuous improvement in the delivery of services as required by the 1999 Act;

“Breakage Costs”

Losses that have been or will be reasonably, properly and directly incurred by the Trust in relation to the Services as a direct result of early termination of this Agreement (in whole or part) in the event of Council Default, Voluntary Termination or Partial Termination by the Council in relation to any of the Leases but only to the extent that:

- (a) the Losses are incurred in connection with the provision of the Services including but not limited to:
 - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
 - (ii) any expenditure reasonably and properly incurred in anticipation of the provision of the Services in the future pursuant to the terms of this Agreement;
 - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the Services;
 - (iv) redundancy payments;
 - (v) any breakage costs arising in relation to any third party finance in relation to the Services provided that such finance has been approved in advance by the Council pursuant to the terms of this Agreement;
 - (vi) any undepreciated capital expenditure approved in advance by the Council pursuant to the terms of this Agreement;
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms; and
- (c) the Trust has used its reasonable endeavours to

	mitigate the Losses;
“Business Day”	means a day (excluding Saturday and Sunday) on which banks in London are open for business generally;
“Business Information”	means the materials, books, data, financial and other costing documents of the Trust relating to the Services, including without prejudice to the foregoing, details of users, direct debit payers, standing orders and third party suppliers of goods, services and materials;
“Business Plan”	means the Trust's Business Plan (from time to time) as agreed between the parties in accordance with this Agreement. A copy of the Trust's Business Plan for the period 1 November 2013 to 31 March 2018 is attached at Schedule 6 ;
“Business Transfer Agreement”	means the agreement between the Council and the Trust relating to the transfer of certain assets entered into on even date hereto;
“Capital Renewals Schedule”	means the ten year Capital Renewals Schedule starting from 1 April 2013 which will be reviewed annually in accordance with this Agreement. A copy of the Capital Renewals Schedule is attached at Schedule 10;
“Change Assessment”	means an assessment of any financial or operational impact of a proposed change pursuant to Clauses 8 and 9 ;
“Change in Law”	means the coming into effect after the date of this Agreement of any legislation, guidance or any applicable judgment of a relevant court of law which changes a binding precedent;
“Change in Service”	means a material and significant change in any aspect of the Services or a change which has a long term impact on the Services provided by the Trust pursuant to the terms of this Agreement which has not otherwise been agreed between the parties pursuant to the Annual Service Plan Review Process;
“Commencement Date”	means 1 November 2013;
“Commercially Sensitive Information”	means commercial information not in the public domain pertaining to the business of the Trust that if made available to competitors of the Trust would harm the ability of the Trust to compete fairly with its competitors in the provision of leisure and recreational services including without limitation trade secrets and any discounts or preferential rates with third party suppliers;
“Core Pricing Schedule”	means the Council's list of prices (including, for the avoidance of doubt, the Concessionary Prices) for certain leisure activities from time to time. The Core Pricing Schedule for the period 1 November 2013 to 31 March 2014 is set out at Schedule 3;

“Council Equipment”	means the items of loose equipment (being items of equipment which are moveable and not treated as a fixture and fitting) owned or leased by the Council, and used in the Facilities and loaned to the Trust pursuant to the terms of this Agreement. The Council’s Equipment as at the Commencement Date is set out in the Capital Renewals Schedule;
“Council Notice Change”	of means a notice of change issued by the Council pursuant to Clause 8 ;
“Council Officer”	means the person notified to the Trust by the Council to be the authorised representative of the Council for all purposes connected with this Agreement;
“Council Policies”	means the standards, policies, strategies and instructions issued by the Council and as notified to the Trust as part of the Annual Service Planning Process;
“Council’s Key Priorities”	means the Council’s objectives for the Services as notified to the Trust by the Council as part of the Annual Service Planning Process;
“Dispute Procedure”	means the procedure for the resolution of disputes set out in Schedule 14 ;
“DPA”	means the Data Protection Act 1998;
“Employees”	means the employees engaged in the provision of the Services who will transfer to the employment of the Trust under the terms of the Business Transfer Agreement. The TUPE list is set out at Schedule 3 to the Business Transfer Agreement;
“Employment Law”	means all and any laws, common law, statutes, directives, recommendations, regulations, notices, codes of practice, guidance notes, judgments, decrees or orders, whether of the European Community or the United Kingdom or any other relevant jurisdiction, relating to or connected with the employment of employees and workers and/or their health and safety at work;
“Expenditure”	means the aggregate of expenditure incurred in any Service Year during the Service Period by the Trust in relation to the proper performance of this Agreement which, for the avoidance of doubt, shall exclude any Income and shall not for the purposes of calculation be offset by any Income and shall not include any transfer or internal recharge expenditure between the Trust and its subsidiary;
“Expiry Date”	means 31 October 2033 ;
“Facilities”	means the following facilities: <ul style="list-style-type: none"> • Larkfield Leisure Centre

- Tonbridge Swimming Pool
- Angel Centre
- Poulton Wood Golf Centre
- Games Hut
- Bookings for sports pitches in Tonbridge

and as more particularly described in each of the Leases;

- “Force Majeure”** shall have the meaning set out in **Clause 43** (Force Majeure);
- “Good Industry Practice”** means the exercise of that degree of skill, diligence and prudence which would reasonably be expected from an experienced operator providing services similar to the Services provided by the Trust pursuant to this Agreement and/or managing a similar portfolio of Facilities and under the same or similar circumstances and conditions as that in which the relevant matters arise;
- “Income”** means the aggregate of sums received in any year during the Service Period by or on behalf of the Trust from members of the public and other sources in the proper performance of this Agreement which, for the avoidance of doubt, shall exclude any Expenditure;
- “Index or Indexation”** means the amount which in relation to any figure represents as a percentage of that figure the same percentage by which the consumer prices index (CPI) as published by the Office for national statistics on 1/11 prior to the start of the financial period to which the CPI amount will be applied has changed over the figure of the CPI on the 1/11 12 months earlier than 1/11 prior to the start of the financial period to which the CPI amount will be applied;
- “Intellectual Property”** means any and all patents, trademarks, service marks, copyright, database rights, moral rights, rights in a design, know-how, confidential information and all or any other intellectual or industrial property rights whether or not registered or capable of registration and whether subsisting in the United Kingdom or any other part of the world, together with all or any goodwill relating or attached thereto which is created, brought into existence, acquired, used or intended to be used by the Trust for the purposes of providing the Services and/or otherwise for the purposes of this Agreement;
- “Law”** means any Act of Parliament or subordinate legislation within Section 21(1) of the Interpretation Act 1978, any exercise of Royal Prerogative and any enforceable right within Section 2 of the European Communities Act 1972;

“Leases”	means the Leases for those Facilities set out in Part 1 of Schedule 1 entered into by the parties on even date hereto or such later date as specified in Schedule 1 together with such additional facilities as may be included in the portfolio for management by the Trust pursuant to the terms of this Agreement;
“Long Stop Date”	means the period of twenty four months from 1 March 2017 or 1 March in each five year cycle from the Commencement Date and from the date of the last five year cycle respectively or such later date as the parties acting reasonably shall agree;
“Losses”	means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or at common law or in connection with judgments, proceedings, internal costs or demands;
“Minimum Opening Hours”	means the minimum opening hours for the Facilities as specified in Schedule 2;
“New Employees”	means employees of the Trust or a relevant Subcontractor (who are not Transferring Employees or Transferring Future Employees) who are assigned to the performance of the Services or any material part thereof;
“Operational and Financial Records”	means the operational and financial records which the Council requires the Trust to maintain as notified to the Trust by the Council from time to time ;
“Personal Data”	means personal data as referred to in the DPA which is supplied to the Trust by the Council or obtained by the Trust in the course of performing its obligations under this Agreement;
“PPM Programme”	means the Planned Preventative Maintenance Programme for each Facility referred to as BRREP (Building Repairs Reserve Expenditure Plan) which shall be reviewed annually in accordance with this Agreement. The PPM Programme for the period 1 November 2013 to 31 March 2018 is attached at Schedule 8;
“Prescribed Rate”	means an interest rate of three per cent above the base lending rate of Bank of England from time to time;
“Prohibited Act”	means; <ul style="list-style-type: none"> (a) offering giving or agreeing to give to any member, servant or employee 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 having done or not having done) any act in relation to the obtaining or performance of this Agreement or any other

agreement with the Council; or

- (ii) for showing or not showing favour or disfavour to any member, servant or employee or any other person in relation to this Agreement or any other agreement with the Council;
- (b) entering into this Agreement or any other agreement with the Council in connection with which commission has been paid or has been agreed to be paid by the Trust or on its behalf or to its knowledge unless before the relevant agreement is entered into particulars of any such commission and of the terms and conditions of any such agreement for the payment thereof have been disclosed in writing to the Council;
- (c) committing any offence:
 - (i) under the Bribery Act 2010;
 - (ii) under law creating offences in respect of fraudulent acts; or
 - (iii) at common law in respect of fraudulent acts in relation to this Agreement or any other agreement with the Council; or
- (d) defrauding or attempting to defraud or conspiring to defraud the Council;

“Project Documentation” means this Agreement together with:

- (a) the Business Transfer Agreement;
- (b) the Support Services Agreement;
- (c) the Leases;
- (d) [the Licence;]
- (e) the Admission Agreement;

“Regulations” means the Transfer of Undertakings (Protection of Employment) Regulations 2006 and/or any other regulations enacted for the purpose of implementing the EC Acquired Rights Directive 77/187 as amended into English Law;

“Repair and Maintenance Matrix” means the schedule identifying each Parties’ repair and maintenance responsibilities in relation to the Facilities as set out at Schedule 7;

“Review Meetings” means the regular review meetings between the parties in accordance with **Clause 36**;

“Service Fee” means the Service Fee payable by the Council to the Trust

(if any) or the Council to the Trust (if any);

“Service Fee Adjustment Date”	means 1 April every five years throughout the Service Period from 1 April 2018;
“Service Outputs”	means the Council’s required outputs for the Services. The Council’s Service Outputs for the period 1 November 2013 to 31 March 2015 are set out in Schedule 1;
“Service Period”	means (subject to the provisions for early Termination set out in this Agreement) the period commencing on the Commencement Date and ending on the Expiry Date;
“Service Year”	means each 12 month period from 1 April to 31 March in each year of the Service Period save that in the first year following the Commencement Date the Service Year shall be from 1 November 2013 to 31 March 2014 and in the final year of the Service Period, the Service Year shall be from 1 April 2033 to 31 October 2033;
“Services”	means the community leisure services to be provided by the Trust in accordance with this Agreement;
“Subcontractor”	means any subcontractor of the Trust appointed to carry out any part of the Services during the Service Period as approved by the Council pursuant to Clause 64 (Assignment and Subcontracting);
“Successor Organisation”	means any person appointed to carry out part or all of the Services on the expiry, termination or partial termination of this Agreement;
“Support Services Agreement”	means the agreement of even date hereto between the Council and the Trust relating to the provision of support services by the Council to the Trust;
“SJL”	means Sainsburys [] Limited;
“Third Party Leases”	means: <ul style="list-style-type: none"> (a) []; (b) []; (c) [];
“Trust Notice of Change”	means a notice served by the Trust requesting a change pursuant to Clause 9 ;
“Trust Representative”	means the principal contact of the Trust appointed pursuant to the provisions of Clause 48 of this Agreement;
“Trust’s Equipment”	means any items of equipment owned, leased or otherwise procured by the Trust and installed or otherwise used in delivering the Services at the Facilities which is in addition

to and other than the Council's Equipment;

“Trust's IPR”

means any Intellectual Property Rights created by or on behalf of the Trust in respect the Trust's:

- (a) brand names, trademarks, trade names, designs, logos, domain names and name;
- (b) know-how and business systems;
- (c) quality management procedures and customer care programme;
- (d) sales and customer retention products and processes;
- (e) corporate policies and training documentation;
- (f) intranet, integrated management system and supporting documentation; and
- (g) Annual Service Delivery Plans and Business Plans;

but excluding:

- (a) operational instructions;
- (b) any User or member data base relevant to the Facilities;
- (c) any booking system used at and in respect of the Facilities;
- (d) any Intellectual Property Rights in any other item (whether tangible or non-tangible) necessary for the operation and/or maintenance of the Facilities by the Council and/or any Successor Organisation;

“TUPE Regulations”

means the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI No. 246) as amended;

“Users”

means customers (whether members or “pay and play” users) who use the Facilities and/or Services;

“Utilities”

means gas, electricity, water and sewerage;

“VAT”

means value added tax as provided for in the Value Added Tax Act 1994 of the United Kingdom and legislation (whether delegated or otherwise) supplemental thereto or in any primary or subordinate legislation promulgated by the European Union or anybody or agency thereof and any tax similar or equivalent to such taxes imposed by any country other than the United Kingdom; and

“Voluntary Termination”

means the Council's right to terminate this Agreement pursuant to **Clause 39** of this Agreement.

- 1.2 Within this Agreement, unless the contrary intention appears:
- 1.2.1 words denoting the singular shall include the plural number and vice versa;
- 1.2.2 the masculine includes the feminine and the neuter and vice versa and words importing individuals shall be treated as importing corporations and vice versa;
- 1.2.3 references in this Agreement to **Clauses**, recitals, Appendices or **Schedules** are references to **Clauses** of and recitals or **Schedules** to this Agreement unless otherwise specified. References to sub-**Clauses** are, unless otherwise stated, to sub-**Clauses** of the **Clause** in which the reference appears;
- 1.2.4 this Agreement includes the **Schedules**;
- 1.2.5 references to statutes shall include any statutory modification, re-enactment, extension, consolidation or replacement thereof, any corresponding provision in repealed enactments and any other regulation instrument or other subordinate legislation made under the relevant statute or statutory instrument;
- 1.2.6 reference to time shall be construed during the period of summer time to be British Summer Time and otherwise to Greenwich Mean Time.
- 1.2.7 any phrase introduced by the terms “including” “include” “in particular” or any similar expression shall be construed as illustrative and shall not limit the sense of the words preceding those terms.
- 1.2.8 any reference to a document being in the “agreed form” means a document in a form agreed by the parties and initialled by or on behalf of each of them for the purposes of identification.
- 1.2.9 the table of contents and headings in this Agreement are for convenience only and shall not affect its construction;
- 1.2.10 references to a “person” shall be construed so as to include any individual, firm, trust, government, state or agency of a state, local or municipal authority or government body or any joint venture, association or partnership (whether or not having separate legal personality);
- 1.2.11 a “party” shall mean a party to this Agreement and “parties” shall mean both of them;
- 1.2.12 an agreement or other document is a reference to that agreement or document as from time to time supplemented or amended;
- 1.2.1 “writing” shall be construed so as to include any communications effected by, facsimile transmission or any comparable means ordinarily legible and non-transitory but excluding writing appearing only on the screen of a visual display unit or other similar device;
- 1.2.2 “month” shall mean the period of a calendar month and where there is no corresponding day in a following or preceding month the period shall end on the last day of that following or preceding month;
- 1.2.3 any references to a “day” shall mean a period of 24 hours running from midnight to midnight;

- 1.3 In the event of any inconsistency between the provisions of the body of this Agreement and the **Schedules** or between any of the **Schedules**, the conflict shall be resolved according to the following order of priority:
 - 1.3.1 the body of this Agreement;
 - 1.3.2 the Schedules;
- 1.4 In the event of any inconsistency between any documents forming the Project Documents, except as otherwise expressly provided, the provisions of this Agreement shall prevail.

PART 2 – INDEPENDENCE OF THE TRUST

2. INDEPENDENCE OF THE TRUST

- 2.1 The Trust has been established as a company limited by guarantee with exclusively charitable purposes.
- 2.2 The Council fully acknowledges the independence of the Trust and the need for the Trust to retain that independence.
- 2.3 The Council and the Trust have identified common objectives and have agreed to work in partnership to achieve those common objectives and for the Trust to deliver the agreed Service Outputs.
- 2.4 For the avoidance of doubt, this Agreement between the Council and the Trust relates solely to the delivery of the Services at the Facilities or otherwise in accordance with the terms of this Agreement and does not in any way preclude, restrict, limit or fetter the right of the Trust to enter into any other arrangement with any other organisation, entity or body to assist the Trust achieve its charitable objects provided that any such arrangement does not have a material and adverse impact on the Trust's ability to deliver the Services pursuant to the terms of this Agreement or the Gain Share arrangements between the Council and the Trust.
- 2.5 The Trust shall consult with the Council before entering into any other arrangement with any other organisation pursuant to Clause 2.4 above.

PART 3 – PARTNERSHIP ARRANGEMENTS

3. PARTNERSHIP ARRANGEMENTS

- 3.1 The Parties acknowledge that this is an important strategic partnership as between the parties to assist the Council in achieving its corporate and strategic objectives for the health and wellbeing of the residents and visitors to the Tonbridge & Malling area and to assist the Trust fulfil its charitable objects.
- 3.2 The Parties agree to act in good faith in relation to this partnership arrangement and to co-operate with one another to deliver the agreed common objectives.
- 3.3 The Parties shall review this Agreement and the arrangements between the parties generally from time to time to ensure these are operating as the parties had intended at the Commencement Date and, as appropriate, discuss and agree any changes to the arrangements.

PART 4 – THE SERVICES

4. SERVICES TO BE PROVIDED BY THE TRUST

- 4.1 With effect from the Commencement Date and in consideration of the Council appointing the Trust to provide the Services and the agreed Service Outputs in fulfilment of the Trust's charitable objects, the Trust agrees that it will provide the Services throughout the twenty year Service Period in accordance with the terms of this Agreement.
- 4.2 Throughout the Service Period, the Trust agrees to:
- 4.2.1 enter into the Project Documents and comply with the terms thereof;
 - 4.2.2 manage and operate the Facilities;
 - 4.2.3 delivery the Services during the Minimum Opening Hours;
 - 4.2.4 perform the Services in accordance with the terms of this Agreement and as more particularly described in the approved Business Plan and Annual Service Delivery Plan (incorporated into the Business Plan);
 - 4.2.5 develop the range of Services and activities available at the Facilities to encourage all sections of the community to participate in healthy recreational activities;
 - 4.2.6 develop marketing strategies to promote the Facilities and encourage the maximum participation in healthy recreational activities;
 - 4.2.7 continually develop the programming at the Facilities to retain existing users and to encourage new users;
 - 4.2.8 develop activities and programmes accessible to all sections of the local community regardless of age, earnings or ability;
 - 4.2.9 perform the Services in accordance with Good Industry Practice; and
 - 4.2.10 perform the Services to achieve the Service Outputs.
- 4.3 For the avoidance of doubt, as a minimum the Trust shall be required to deliver the full range of leisure and community services provided by the Council immediately prior to the Commencement Date.
- 4.4 For the avoidance of doubt, all of the Trust's obligations under this Agreement shall apply at all times that the Services are provided notwithstanding if the Services are provided outside the Minimum Opening Hours;

5. PRICING

- 5.1 The Trust shall have full discretion to establish fees and charges for the Facilities and/or Services save that the Trust shall be required to comply with the prices set out in the Core Pricing Schedule .
- 5.2 The Core Pricing Schedule shall be reviewed by the parties each year as part of the Annual Service Planning Process.
- 5.3 The Trust shall be entitled to reduce Core Prices at any time. The Trust shall be entitled to increase the Core Prices provided that the average increase is not greater than CPI.

For the avoidance of doubt, the Trust shall require the Council's prior written consent to any increases in Core Prices which are in excess of CPI.

- 5.4 CPI shall be calculated by reference to CPI as at the previous 1 November in each Service Year.
- 5.5 In determining the fees and charges to be charged to Users of the Facilities and Services the Trust shall have regards to:
- 5.5.1 the Trust's charitable objectives;
 - 5.5.2 the needs of the local community;
 - 5.5.3 developing a balanced programme;
 - 5.5.4 the Council's Key Priorities;
 - 5.5.5 the Core Pricing Schedule;
 - 5.5.6 the Council's policy for pitch hire charges;
 - 5.5.7 the viability of the Trust;
 - 5.5.8 the prevailing market conditions;
 - 5.5.9 pricing of other leisure facilities in the area.
- 5.6 Any changes to Core Prices or Concessionary Prices or other fees and charges shall be effective from 1 April in each year of the Service Period save unless otherwise agreed with the Council. For the avoidance of doubt, the first date for any changes to the fees and charges shall be 1 April 2014.

6. PROGRAMMING

- 6.1 The Trust's programme for the Services for the period 1 November 2013 to 31 March 2015 is set out in the Trust's Annual Service Delivery Plan.
- 6.2 The Trust shall submit to the Council its proposed programme for the Services for each Service Year in the Service Period as part of the Annual Service Planning Process procedure set out in **Clause 7**.
- 6.3 The Trust will highlight any material changes to the previous year's programme for approval by the Council as part of the Annual Service Planning Process.
- 6.4 In developing its programme, the Trust shall ensure that it is a balanced programme with a wide range of recreation and leisure time activities which shall appeal to all sections of the local community regardless of age, earnings or ability.
- 6.5 The Trust shall continuously review and refresh the programme to ensure it is up to date and responsive to the changing needs and expectations of the local community as well as the wider leisure market.
- 6.6 The Trust shall take all reasonable steps to introduce innovative ways through programming, pricing and marketing to encourage all sections to participate in healthy recreational activities.

6.7 The Trust shall honour the Access for National Sports People Scheme and any protected bookings agreed between the parties from time to time.

7. ANNUAL SERVICE PLANNING PROCESS

7.1 From 1 April 2014 the parties shall agree each Annual Service Delivery Plan in accordance with the following procedure:

7.1.1 at the earliest opportunity, and in any event by no later than [1 July] in each Service Year of the Service Period, the Council will notify the Trust of the Council's objectives for the Services and, in particular, any key priorities and/or initiatives for the forthcoming twelve months;

7.1.2 the Trust shall submit a draft Annual Service Delivery Plan for the period 1 April to 31 March of every Service Year by [1 December] of each Service Year;

7.1.3 the Annual Service Delivery Plan shall, as a minimum, contain the information set out in Schedule 4;

7.1.4 the Council shall give due consideration to the draft Annual Service Delivery Plan and will alert the Trust at the earliest opportunity if the same is not acceptable and/or whether any changes are required by no later than [1 February] of each Service Year. The Trust shall promptly deal with the Council's comments (if any) and where relevant, amend and re-submit a revised draft Annual Service Delivery Plan;

7.1.5 the parties shall meet as regularly as required to discuss and agree the Annual Service Delivery Plan with a view to agreeing the same for every relevant Service Year no later than [1 March] in each Service Year for implementation from the following [1 April] in each Service Year.

7.2 If the parties have not been able to agree the Annual Service Delivery Plan by the target dates referred to in **Clause** 7.1 then either party may refer the matter to be resolved by the Dispute Procedure until the Annual Service Delivery Plan is agreed or otherwise determined by the start of the next Service Year, the Annual Service Delivery Plan for the preceding Service Year shall apply save that the Trust shall be permitted to adjust any fees and charges provided that the average increase is no greater than Indexation.

PART 5 – CHANGES IN SERVICES/TRANSFER OF ADDITIONAL SERVICES

8. COUNCIL REQUEST FOR A CHANGE IN SERVICE

- 8.1 The parties shall adopt a flexible approach to the delivery of the Services having regards to the changing needs of the local community and the prevailing economic and social conditions.
- 8.2 The parties shall meet and discuss in good faith any proposed changes to the Services and whether any such change would require the service of a Notice of Change pursuant to **Clauses 8 or 9**.
- 8.3 The Council shall not propose any Change where the change would require the Services to be performed in a way that infringes any Law or is inconsistent with Good Industry Practice or would otherwise be unlawful.
- 8.4 Without prejudice to **Clause 8.1**, if the Council requires a Change in the Services provided by the Trust pursuant to the terms of this Agreement and as more particularly described in the Trust's Business Plan from time to time, it must serve a Council Notice of Change on the Trust.
- 8.5 The Council Notice of Change shall set out the required Change to the Council's Policies/Council's Objectives and/or Service Outputs in sufficient detail to enable the Trust to assess any financial or operational impact of the proposed Change.
- 8.6 The Trust shall use all reasonable endeavours to accommodate any Changes requested by the Council within the existing operational budgets for the Services, subject to that, as soon as practicable and in any event within forty (40) Business Days after having received the Council Notice of Change, the Trust shall deliver to the Council a Change Assessment including an assessment of:
- 8.6.1 any impact on the provision of the Services;
 - 8.6.2 any amendments required to this Agreement and/or any Project Document as a result of the Change;
 - 8.6.3 any estimated cost implications of the Change;
 - 8.6.4 any revenue implications (increase or decrease) that results from the Change;
 - 8.6.5 any impact on the Service Fee (if any) payable by the Council to the Trust or the Trust to the Council (if applicable).
- 8.7 As soon as practicable after the Council receives the Change Assessment, the parties shall meet and discuss the issues set out in the Change Assessment including:
- 8.7.1 providing evidence that the Trust has used reasonable endeavours to minimise any increase in costs and maximise any reduction in costs; and
 - 8.7.2 if the Trust does not intend to use its own resources to implement any Change to the Services, evidence that it has complied with or will comply with Best Value principles when procuring any work, services, supplies, materials or equipment required in relation to the Change.
- 8.8 In such discussions the Council may modify the Council Notice of Change. In each case the Trust shall, as soon as practicable, and in any event not more than twenty (20)

Business Days after receipt of such modification, notify the Council of any consequential change to the Change Assessment.

- 8.9 If the parties cannot agree on the contents of the Change Assessment then the dispute will be determined in accordance with the Dispute Procedure.
- 8.10 As soon as practicable after the contents of the Change Assessment has been agreed or otherwise determined pursuant to **Clause** 8.9, the Council shall either:
- 8.10.1 confirm in writing the Change Assessment (as modified); or
- 8.10.2 withdraw the Council Notice of Change.
- 8.11 If the Council does not confirm the Change Assessment (as modified) within twenty (20) Business Days of the contents of the Change Assessment having been agreed or determined then the Council Notice of Change shall be deemed to have been withdrawn.
- 8.12 Once the Change has been agreed, the agreed change shall, unless the parties otherwise agree, acting reasonably, be implemented within forty (40) Business Days of the parties' agreement. Within this period, the parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Change.

9. TRUST REQUEST FOR A CHANGE IN SERVICE

- 9.1 Without prejudice to **Clause** 8.1 and having met with the Council pursuant to 8.2 to determine if a Notice of Change is required, if the Trust wishes to introduce a Change in the Services provided by the Trust pursuant to the terms of this Agreement and as more particularly described in the Trust's Business Plan from time to time, it shall serve a Trust Notice of Change on the Council Officer.
- 9.2 The Trust Notice of Change must:
- 9.2.1 set out the proposed Change in sufficient detail to enable the Council to evaluate it in full;
- 9.2.2 specify the Trust's reasons for proposing the Change;
- 9.2.3 request the Council to consult with the Trust with a view to deciding whether to agree to the Change and, if so, what consequential changes the Council requires as a result;
- 9.2.4 indicate any financial or operational implications of the Change;
- 9.2.5 any impact on the Service Fee; and
- 9.2.6 indicate if there are any dates by which a decision by the Council is critical.
- 9.3 The Council shall evaluate the Trust's proposed Change in good faith, taking into account all relevant issues, including whether:
- 9.3.1 the Change affects the quality of the Services or the likelihood of successful delivery of the Services;
- 9.3.2 the Change will adversely interfere with the relationship of the Council and/or the Trust with third parties;

- 9.3.3 the financial strength of the Trust is sufficient to perform the Change;
- 9.3.4 the Change materially and adversely affects the risk or costs to which the Council is exposed.
- 9.4 As soon as practicable after receiving the Trust Notice of Change, the parties shall meet and discuss the matters referred to in it. During their discussions the Council may propose reasonable modifications. The Trust shall respond promptly to any suggested modifications. Within ten (10) Business Days of receipt of the Notice of Change (or modified Notice of Change) the Council shall notify the Trust in writing that it accepts or rejects the Trust Notice of Change.
- 9.5 If the Council accepts the Trust Notice of Change (with or without modification) the relevant change shall, unless the parties otherwise agree, acting reasonably, be implemented within twenty (20) Business Days of the Council's acceptance. Within this period, the parties shall consult and agree the remaining details as soon as practicable and shall enter into any documents to amend this Agreement or any relevant Project Document which are necessary to give effect to the Change.
- 9.6 If the Council rejects the Trust Notice of Change, it shall be obliged to give its reasons for such a rejection.
- 9.7 The Council acting reasonably taking into account the financial impact on both the Trust and the Council cannot reject a Change which is required in order to conform to a Change in Law, the costs of which shall be borne by the Trust; or where the change, if implemented, would not have a materially adverse effect on the nature, extent and quality of the Services.

10. TRANSFER OF ADDITIONAL SERVICES TO THE TRUST

- 10.1 The parties acknowledge the importance of delivering a range of high quality affordable services for the benefit of the local community. The Council in its role as an enabler and facilitator of community services wishes to explore options for local, voluntary and charitable organisations to deliver services in partnership with the Council. The Council may wish to explore with the Trust from time to time the option of transferring to the Trust Additional Services. In determining which if any of these Additional Services the Council would wish the Trust to deliver in partnership with the Council, the Council shall act reasonably and in good faith and have due regards to, inter alia, the capacity, resources and expertise of the Trust and the "business fit" of the Additional Service with the existing Services provided by the Trust. The procedure for transferring Additional Services to the Trust is set out in **Clause** 10.2 below.
- 10.2 In the event that the Council wishes to transfer Additional Services to the Trust it shall issue to the Trust a Notice to Transfer Additional Services and the procedure set out in this **Clause** 10 shall apply.
- 10.3 The Notice to Transfer Additional Services shall contain the following information:
- 10.3.1 details of the Additional Service (or Services) to be transferred (the "Proposed Additional Service");
- 10.3.2 details of the number and roles of the employees that are in scope of the proposed TUPE transfer and associated assets of the Proposed Additional Service;
- 10.3.3 details of any specific service requirements/ outputs for the Proposed Additional Service;

- 10.3.4 details of any proposed financial arrangements to be provided by one party to the other party (capital and/or revenue and including Council Funding (if any)) and the scheduling of any such payments for the Proposed Additional Service;
- 10.3.5 details of any specific maintenance requirements for any property to be transferred to the Trust under lease or licence for the Proposed Additional Service; and
- 10.3.6 details of the strategic plans for any service improvements for the Proposed Additional Service.
- 10.4 At the earliest opportunity and in any event within thirty (30) Business Days or such longer period as the Council acting reasonably agrees of receipt of the Council Notice to Transfer Additional Services, the Trust, acting reasonably, shall provide to the Council either:-
- 10.4.1 a rejection of the Council's Notice to Transfer Additional Services with a written explanation;
- 10.4.2 the Trust's estimate of the likely effects of the transfer of the Proposed Additional Service (the "Estimate") containing the items referred to in **Clause** 10.3 on the Trust and the Services; or
- 10.4.3 confirmation as to when the estimate is to be provided to the Council (provided that the Trust shall use all reasonable endeavours to obtain such information as is required expeditiously).
- 10.5 The Estimate shall include the opinion of the Trust acting reasonably and properly on:
- 10.5.1 whether relief from compliance with any obligations in this Agreement is required,
- 10.5.2 any amendment required to this Agreement and/or associated documents;
- 10.5.3 any impact on the provision of the existing Services provided by Trust;
- 10.5.4 any resulting impact on the revenues of the Trust;
- 10.5.5 any adjustment to the Service Fee payable by the Council to the Trust if any) or the Trust to the Council (if applicable);
- 10.5.6 any capital requirements;
- 10.5.7 any legal, financial or other professional and/or specialist advice required and an estimate of any costs for such advice;
- 10.5.8 any impact generally on the financial viability of the Trust; and
- 10.5.9 any regulatory approvals which are required including but not limited to the Charity Commission.
- 10.6 As soon as practicable after the Council receives the Estimate, the parties acting reasonably and properly shall discuss and use reasonable endeavours to agree the Estimate.
- 10.7 In such discussions the Council may modify the Council Notice to Transfer Additional Services in which case the Trust shall, as soon as practicable, and in any event not more than twenty (20) Business Days after receipt of such modification, notify the Council of any consequential changes to the Estimate.

- 10.8 As soon as practicable after the contents of the Estimate have been agreed, the Council must:
- 10.8.1 confirm in writing to the Trust the Estimate (as modified); or
- 10.8.2 withdraw the Council Notice to Transfer Additional Services.
- 10.9 The Trust shall be entitled to refer the matter to Dispute Resolution if the Council withdraws the Notice to Transfer Additional Services where the Trust considers the Council has not acted reasonably in giving due consideration to the Estimate.
- 10.10 Where the Council Notice to Transfer Additional Services is confirmed then if the Estimate (as modified) involves capital expenditure (unless the Council has elected to fund such costs) then the Trust shall use its reasonable endeavours to obtain funding for the whole of the estimated capital expenditure, on terms reasonably satisfactory to it.
- 10.11 In the event that the Council Notice to Transfer Additional Services and the Estimate have been confirmed by the Council, then any adjustment to the Service Fee shall have immediate effect upon the transfer of the Proposed Additional Service.
- 10.12 In the event that the parties agree to the transfer of an Additional Service, then the parties shall meet at the earliest opportunity to agree an implementation plan for the smooth transfer of the Additional Service to the Trust. This plan shall include (inter alia):
- 10.12.1 identification of all assets associated with the Additional Service;
- 10.12.2 identification of all transferring employees associated with the Transferring Service;
- 10.12.3 union consultation and employee communication plan;
- 10.12.4 impact on existing pension arrangements and/or proposals for new pension arrangements;
- 10.12.5 procurement of any legal, financial or other professional or specialist advice and the liability for the costs thereof; and
- 10.12.6 timetable to complete the transfer and such transfer documentation as required.
- 10.13 If the parties cannot agree the contents of the Estimate, then the matter shall not be referred to the Dispute Resolution Procedure but rather the parties acting reasonably shall use reasonable endeavours to agree a way forward having particular regard to the viability of the Trust and value for money to both parties in transferring the Additional Service or Services.
- 11. TRUST BORROWINGS**
- 11.1 The Trust shall not be entitled to use any of the Facilities or Equipment or any of the other assets of the Council as security for any borrowings. Further, the Trust cannot bind the Council in any way as acting as guarantor in relation to any third party borrowings.
- 11.2 The Council shall not be liable for any Breakage Costs associated with third party finance arising from the Council exercising its right to terminate this Agreement early pursuant to **Clause 37** (Voluntary Termination) unless third party finance has previously been notified, discussed and expressly agreed in writing with the Council.

PART 6 – PROPERTY, MAINTENANCE AND EQUIPMENT ISSUES

12. COUNCIL REQUIREMENTS IN RELATION TO THE FACILITIES

- 12.1 On the Commencement Date, the Council shall grant to the Trust and the Trust shall accept the Leases.
- 12.2 From the Commencement Date, for the avoidance of doubt, the Trust shall be fully liable for the business rates at each of the Facilities whether occupied by the Trust as lessor or licensee.
- 12.3 The Trust shall observe and perform all the obligations as lessee or licensee under the Leases (respectively). Any breach by the Trust of any provision of the Leases shall in addition be deemed to be a breach of this Agreement.
- 12.4 Where this Agreement is terminated for any reason prior to the Expiry Date or on the Expiry Date, the Leases shall automatically cease and determine with effect from the date of the termination of this Agreement. The Trust shall take all steps as may be proper and reasonable to cancel or assist in the cancellation of all entries at the Land Registry as appropriate.
- 12.5 The Trust shall at all times permit the Council and its professional advisors and contractors as appropriate upon reasonable notice during usual opening times to enter any of the Facilities:
- 12.5.1 to carry out its repair and maintenance obligations in accordance with the PPM Programme;
- 12.5.2 to inspect the Facilities as Landlord;
- 12.5.3 to establish if the provisions of this Agreement have been observed by the Trust, and
- 12.5.4 to access those of the Trust's financial and/or operational records that the Council is permitted to inspect pursuant to the terms of this Agreement and/or are otherwise exclusively relevant to the delivery of the Services;
- 12.5.5 reasonable steps not to have an adverse impact on the Trust's operation;
- 12.5.6 provided always that the Council shall not be required to give prior notice of such entry or inspection in cases of emergency and right to carry out repairs or where acting reasonably the Council believes the Trust is in material breach of its obligations under this Agreement or the Leases.
- 12.6 The Council shall be entitled to exercise its redevelopment break **Clause** in relation to the Angel Centre in accordance with the terms of the Angel Centre Lease.

13. THE TRUST'S USE OF THE FACILITIES

- 13.1 The Trust shall not use the Facilities or any part of the Facilities for any purpose other than for the purpose of delivering the Services.
- 13.2 Without limiting the provisions of any of the Leases, the Trust shall keep the Facilities properly secured at all times and shall be responsible for the safekeeping of all keys, passes and other means of access made available to it by the Council and shall notify the Council immediately of the loss of any such keys passes or other means of access and shall where the losses have been occasioned by the act or default of the Trust its

Employees, Subcontractors or agents and shall meet the cost of replacements and/or any other reasonable alternative security measures implemented as a result of such loss.

- 13.3 the Trust will keep the Facilities open during the Minimum Opening Hours (or such other hours as agreed in writing between the Council and the Trust).

14. COUNCIL'S USE OF THE FACILITIES

- 14.1 The Council shall be entitled to use the Facilities for the purposes of fulfilling its obligations under this Agreement generally and specifically for the following purposes:

14.1.1 business continuity;

14.1.2 emergencies;

14.1.3 election count; and

14.1.4 Council meetings.

- 14.2 In relation to business continuity, the Trust shall, upon request by the Council, permit the Facilities to be used for such purposes as reasonable required by the Council in the circumstances to maintain the critical services of the Council whilst all or any of the Council's buildings are not available.

- 14.3 In relation to emergencies, the Trust shall, upon request by the Council, permit the Facilities to be used by the Council as an emergency rest centre in the event of an emergency pursuant to the Council's emergency planning arrangements.

- 14.4 The Council shall meet any costs reasonably and properly incurred by the Trust in relation to Clause 14.2 and 14.3, in excess of its normal operating costs subject to the Trust taking all reasonable steps to mitigate its losses/costs.

- 14.5 The Council shall be permitted to use the Facilities for the counting of votes, voting, administration, postal voting or other activities in relation to local, national or European elections and national, regional or local referenda or polls where such use is required by the Council under relevant electoral legislation. Notwithstanding the restrictions set out in electoral law, the Council shall pay for the use of the Facilities at an appropriate rate to be agreed in advance by the parties.

- 14.6 The Council shall be permitted to use the Facilities for Council meetings and/or meetings with the public and/or special events. The Council shall pay for such use which shall be by reference to the prevailing rate for hire of the Facilities by community groups.

15. MAINTENANCE OF THE FACILITIES

- 15.1 The repair and maintenance of the Facilities shall be shared between the parties. Each party's repair and maintenance obligations is set out in the Repair and Maintenance Matrix.

- 15.2 The parties shall ensure on a continuing basis that at all times during the Service Period that:

- 15.2.1 the Facilities are maintained in accordance with the agreed PPM Programme for each Facility each year;

- 15.2.2 the Trust can deliver the Services in accordance with the agreed Annual Service Delivery Plan;
- 15.2.3 the Facilities are handed back on the Expiry Date (or in the event of early termination) in a state of repair which is no worse than as at the outset (save for fair wear and tear).
- 15.3 Each party shall undertake programmed maintenance of each Facility in accordance with the relevant agreed PPM Programme.
- 15.4 The PPM Programme shall be reviewed as part of the Annual Service Planning Process (or as more regularly as required).
- 15.5 Each party shall notify the other party should there be repairs and/or maintenance required and/or outstanding which is the responsibility of the other party..
- 15.6 Wherever possible, the Council shall carry out unprogrammed works outside the Minimum Opening Hours.
- 15.7 Subject to Clauses 15.8 and 15.9 and subject to the Trust in the first instance claiming on the Trust's business interruption insurance, the Trust shall be entitled to claim for loss of income for the following events:
- 15.7.1 unprogrammed works by the Council;
- 15.7.2 programmed works by the Council which result in an unforeseen closure of all or part of a Facility.
- 15.8 The Trust shall not be entitled to make a loss of income claim for a closure of all or part of a Facility of up to seven days over the Christmas period or any closure of less than 24 hours.
- 15.9 The Trust shall be under an obligation to mitigate the impact of any loss of income claim and provide such information as the Council may reasonably request to substantiate any claim.

16. CAR PARKING ARRANGEMENTS

- 16.1 The current arrangements for car parking at the Facilities is set out at Schedule 9.
- 16.2 The Council shall consult with the Trust before implementing any changes to the existing car parking arrangements.
- 16.3 The Council will have full regard to the impact of any changes to car parking arrangements on the Trust's Annual Service Delivery Plan and/or Business Plan.
- 16.4 Any changes to the current car parking arrangements shall be treated as a Council Request for Change.

17. REDEVELOPMENT OF ALL OR PART OF THE PROPERTY PORTFOLIO

- 17.1 The Council shall be entitled to undertake improvements to the Facilities during the Service Period ("Improvement Works").
- 17.2 The Council shall serve not less than [six (6) months] notice on the Trust to notify the Trust of its intention to undertake certain works ("Improvements Notice").

- 17.3 Upon receipt of the Improvements Notice, the parties shall meet to discuss and agree the following:
- 17.3.1 timetable for the Improvement Works;
 - 17.3.2 changes to Facilities;
 - 17.3.3 impact on the Trust's Business Plan or Annual Service Delivery Plan;
 - 17.3.4 any changes to Service Fee ("Impact Notice")
- 17.4 In the event of any dispute in relation to the Impact Notice, either party shall be entitled to refer the matter to Dispute Resolution Procedure.
- 17.5 Once agreed or determined, the parties shall comply with the Impact Notice and accordingly adjust the Services, Business Plan and/or Service fee.
- 17.6 The parties shall co-operate during any works programmes.
- 17.7 The Council shall be under an obligation to mitigate the impact of the improvement works on the Services.
- 17.8 The Trust shall provide such assistance as reasonably required during any improvement works programme.

18. PROVISIONS RELATING TO THE ANGEL CENTRE

[NB: TO BE REVIEWED / FURTHER AMENDED]

18.1 Lease One : Pre-Option Lease

- 18.1.1 The Trust shall be granted a short term temporary lease of the Angel Centre by the Council from 1 November 2013 for a term of approximately 5 years [it will be 5 years in length if it is granted after the option agreement has been signed with X which is the expected position] (" the Pre-Option Lease"). This Lease will be contracted out of the security of tenure provisions contained in the Landlord and Tenant Act 1954 Part II and will prohibit any sub-letting under letting or sharing possession of the demised premises with any other body or person save where this has been approved in advance by the Council and X and is on a sub-lease/under lease which has been contracted out of the security of tenure provisions referred to above. The Council may terminate the Pre-Option Lease, on the date when the third party developer ("X") exercises an option for a long lease of the land including the Angel Centre for re-development ("the Option"), by the Council giving prior notice to the Trust pursuant to clause 18.1.3 below.
- 18.1.2 The option period granted to X by the Council will be for a maximum of 5 years from the date that X and the Council enter into the agreement relating to the development of the land including the Angel Centre ("the Option Agreement"). The Option Agreement is subject to a number of conditions precedent which must be satisfied within this option period before it can be exercised by X in their absolute discretion.
- 18.1.3 The Council shall give the Trust nine Business Days notice that X intends to exercise the Option or, if less, as much notice as possible following X notifying the Council of its intention. On the exercise of the Option by X the Pre-Option Lease will terminate, X will be granted a long lease of the land including the Angel Centre by the Council, the Council will be granted an under lease by X of the Angel Centre and the Council will grant a new short term contracted out under lease of the Angel Centre to the Trust for

the expected length of the building programme for a new community and leisure centre at Bradford Street with a period added to cover force majeure 19 months and 2 weeks.

- 18.1.4 The order of the transactions on exercise of the Option by X is expected to be:
- 18.1.4.1 termination of the Pre-Option Lease by the Council;
 - 18.1.4.2 grant of a long lease by the Council of land including the Angel Centre to X;
 - 18.1.4.3 grant of an under lease by X to the Council of the Angel Centre;
 - 18.1.4.4 Grant of a contracted out sub-lease of the Angel Centre by the Council to the Trust ("the Post-Option Angel Centre sub-lease").
- 18.2 **Lease Two: Post option Angel Centre sub-lease**
- 18.2.1 The Council shall grant an agreement for lease in respect of the Post option Angel Centre sub-lease which is dependent on X exercising the Option and such sub-lease being contracted out of the security of tenure provisions in the Landlord and Tenant Act 1954 part II. This sub-lease will prohibit any sub-letting under letting or sharing possession of the premises with any other body or person save where this has been approved in advance by the Council and X and the sub-lease/under lease is contracted out of the security of tenure provisions referred to above.
 - 18.2.2 The Post option Angel Centre sub-lease shall include a landlords rolling break clause giving as much notice as possible [and not less than 3 *] months notice to determine it in the event that the construction of the new leisure and community facility at Bradford Street will be completed earlier than the end of the term of this lease. [*period suggested by MG as minimum necessary for decant]
- 18.3 **Lease Three: Bradford Street Lease**
- 18.3.1 The Council shall grant an agreement for lease in respect of the proposed new leisure and community facility at Bradford Street which is conditional on the Option being exercised by X, planning permission being granted in respect of the proposed new building, construction of the new building being completed and this lease being contracted out of the security of tenure provisions contained in Part II of the Landlord and Tenant Act 1954.
 - 18.3.2 This Bradford Street Lease shall be for a term commensurate with the remainder of the 20 year Service Period (which commenced on 1 November 2013) unexpired at the date of the Trusts occupation of the Bradford Street facility.
- 18.4 **Lease Four: Angel Centre Lease -no redevelopment**
- 18.4.1 In the event that X does not exercise the Option within the Option Period, the Trust shall be granted a contracted out lease of the Angel Centre for a term commensurate with the remainder of the 20 year Service Period unexpired at the date when Lease One above expires.
 - 18.4.2 The Council will grant the Trust an agreement for Lease in respect of this Lease which is conditional on X not exercising the Option within the Option

Period, and this lease being contracted out of the security of tenure provisions contained in part II of the Landlord and Tenant Act 1954.

18.5 Age Concern Lease

- 18.5.1 The area demised to the Trust under leases One Two and Three above will exclude the area which has been agreed that the Council may demise to Age Concern."

19. THIRD PARTY LEASES

- 19.1 The parties acknowledge existing Third Party Leases at the Facilities.
- 19.2 The Council shall use all reasonable endeavours to assign the Third Party Leases to the Trust.
- 19.3 The Trust shall become the Landlord for the purposes of the Third Party Leases.
- 19.4 The Trust shall comply with its obligations under the Third Party Leases.
- 19.5 The Trust shall be under no obligation to renew or extend the Third Party Leases at their expiry or early determination.

20. UTILITIES

- 20.1 The Trust will be under an obligation to use all reasonable endeavours to minimise its consumption of energy generally and mitigate the environmental impact of the Services.
- 20.2 Without prejudice to the generality of the above, the Council and the Trust shall collaborate to explore and, as appropriate, implement energy management systems.
- 20.3 The Trust shall be responsible for the consumption costs of all Utilities at the Facilities.
- 20.4 Subject to Clause 19.6, the Trust shall be responsible for the procurement of the Utilities at the Facilities.
- 20.5 The Council shall be responsible for the tariff costs of such Utilities if and to the extent that tariff costs exceed CPI in accordance with Schedule 17 and provided that the Trust procures the Utilities from a provider approved by the Council.
- 20.6 The Council shall not be responsible for the tariff costs of the Utilities if and to the extent that the Trust meets its revenue reserves target and its approved business plan surplus threshold.

21. EQUIPMENT

- 21.1 With effect from the Commencement Date, the Council shall loan to the Trust the Council's Equipment for use in delivering the Services pursuant to the terms of this Agreement. For the avoidance of doubt, the Council shall not transfer legal title to the Capital Renewals Schedule and shall retain legal title throughout the Service Period in relation to the Council Equipment and any replacements thereof.
- 21.2 The Trust shall be under an obligation to maintain the Equipment Inventory and update it on an annual basis. The Equipment Inventory shall identify each item of the Council's Equipment and also its life expectancy.

- 21.3 The Trust shall be responsible for servicing the Council's Equipment and shall ensure all the Council's Equipment complies with all applicable health and safety regulations. However, the Council shall continue to be responsible for insuring the Council's Equipment and replacing the Council's Equipment in accordance with the Council's Capital Renewals Schedule set out at Schedule 10.
- 21.4 Without prejudice to Clause 20.2, upon the expiry or early termination of this Agreement the parties shall undertake a joint audit of the Equipment at that time.
- 21.5 Throughout the Service Period, the Trust shall not:
- 21.5.1 use or allow the Council's Equipment to be used other than at the Facilities or for the purposes of delivering the Services other than with the Council's prior written consent;
- 21.5.2 use or permit the Council's Equipment to be used or operated in a manner contrary to any statutory provision or regulation or for any illegal purposes whatsoever;
- 21.5.3 use or allow the Council's Equipment to be used for any purpose not permitted by the terms and conditions of any policy or policies of insurance affecting the Council's Equipment or do or allow to be done any act or thing which may invalidate such insurance;
- 21.5.4 do or permit or cause to be done any matter or thing whereby the rights of the Council in respect of the Council's Equipment are or may be prejudicially affected;
- 21.5.5 sell offer to sell assign mortgage pledge or otherwise dispose of or part with possession of any item of the Council's Equipment or part thereof nor allow the creation of any encumbrance over the Council's Equipment;
- 21.5.6 modify any items of the Council's Equipment other than in the normal course of routine maintenance.
- 21.6 The parties shall agree appropriate arrangements to identify the Council's Equipment (including any replacements) as belonging to the Council and shall use all reasonable endeavours to ensure that the Council's Equipment can be identified by reference to an inventory register or database as appropriate.
- 21.7 The Council shall at all reasonable times have access to the Council's Equipment for the purpose of inspection and/or for use provided that such use does not have a material and adverse impact on the Trust's Annual Service Delivery Plan, (at no cost to the Council) as it may in its discretion consider necessary and/or access to the Equipment Inventory to ensure it is up to date and clearly identifies the Council's Equipment.
- 21.8 The Trust shall:
- 21.8.1 at its own cost maintain the Council's Equipment in good and serviceable condition throughout the Term save for fair wear and tear in respect of serviceable items only (provided that the Trust shall not be required to put the Council's Equipment in a better state of repair than at the outset of the Commencement Date);
- 21.8.2 notify the Council of any items of the Council's Equipment in need of repair;
- 21.8.3 complete a Capital Renewals Proforma in relation to any replacement of any items of the Council's Equipment;
- 21.8.4 as soon as reasonably practicable and in any event within 48 hours of the Trust becoming aware of such inform the Council of any legal claims or actions (or threats of

claims or actions) in respect of the Council's Equipment brought against the Trust or any formal notices complaints or similar documents received from any government or regulatory body;

- 21.8.5 keep the Council's Equipment in its sole and exclusive possession and use all reasonable endeavours to protect the Council's Equipment against distress execution or seizure.
- 21.9 The Council shall be responsible for the replacement of the Council's Equipment in accordance with the Capital Renewals Schedule.
- 21.10 The Capital Renewals Schedule shall be reviewed annually as part of the Annual Services Planning Process.
- 21.11 The residual value of any items of the Council's Equipment which is sold during the Service Period shall accrue to the Council.
- 21.12 The provisions of this **Clause** shall not in any way restrict or prevent the Trust from acquiring, leasing or otherwise procuring its own equipment for use in delivering the Services.

PART 7 – STAFFING, PENSIONS AND MANAGEMENT ISSUES

22. STAFFING ISSUES

- 22.1 The Trust shall at all times during the Service Period using its own skill and judgement commensurate with Good Industry Practice employ sufficient persons of sufficient abilities and skills for the proper performance of the Services in accordance with this Agreement, the agreed Annual Service Delivery Plan and prevailing health and safety guidance.
- 22.2 The Trust shall ensure that every person employed by the Trust in and about the provision of Services is at all times properly and sufficiently trained and instructed with regard to:
- 22.2.1 the task(s) that that person has to perform;
 - 22.2.2 all relevant rules, procedures and statutory requirements;
 - 22.2.3 health and safety at work;
 - 22.2.4 fire risk and fire precautions; and
 - 22.2.5 courtesy to and consideration for the public.
- 22.3 The Trust shall ensure that a suitably qualified employee shall be present at each Facility during the Opening Hours. When the Facilities are closed to the public the Trust shall arrange for a suitably qualified manager to be on call and available to deal with emergencies.
- 22.4 The Trust shall provide sufficient complement of supervisory staff in addition to the duty manager to ensure the Trust's Employees, agents or Subcontractors engaged in and about the provision of the Services are at all times adequately supervised and properly perform their duties.
- 22.5 The Trust exercising its own discretion skill and judgement shall take reasonable steps to ensure that at all times throughout the Service Period the Employees are suitable to be employed to perform the Services. For the purposes of this **Clause**, reasonable steps shall mean that prior to their engagement by the Trust, the Trust shall make such checks and reasonable enquiries that a prudent and responsible employer should reasonably undertake including assessing their suitability to work with, inter alia, children and vulnerable adults whether at interview or otherwise and taking references from suitable persons about the person's character, background or convictions (including obtaining relevant criminal conviction certificates or criminal record certificates pursuant to the Police Act 1977 (as amended) and relevant checks with the Disclosure and Barring Service and including any required in connection with working with children where appropriate.
- 22.6 The Trust shall adopt good recruitment practices which for the avoidance of doubt, shall be of a standard equal to or better than the practises immediately prior to the Commencement Date.
- 22.7 The Trust shall recognise any trade unions recognised by the Council immediately prior to the Commencement Date and shall undertake to comply fully with TUPE requirements and employment law generally regarding recognition of and consultation with trade unions and other staff representatives.
- 22.8 The Trust shall undertake biannual staff surveys and share the results with the Council as part of the Annual Service Planning Process as required.

- 22.9 The Trust shall at all times be fully responsible for the payment of all income or other taxes, national insurance contributions, or levies of any kind relating to the employment of the Employees and shall be responsible for the payment of pension contributions in relation to the Employees as provided by the Business Transfer Agreement
- 22.10 The Trust shall require its Employees at all times while engaged in the provision of the Services to be properly and presentably dressed and where appropriate in suitable uniforms or work wear.
- 22.11 The Trust shall provide and shall use all reasonable endeavours to ensure that its Employees wear at all times when engaged in the provision of the Services appropriate identification.
- 22.12 Where the nature of the place where any duties upon which the Trust's employees shall be engaged in the provision of the Services makes the wearing of any special or protective clothing or footwear necessary or appropriate, the Trust shall provide and shall require its employees to wear such clothing or footwear.
- 22.13 Where the Council Officer becomes concerned at the behaviour or performance of an individual employed in or about the execution of the Services he will inform the Trust Representative in writing of his concern in order that, where appropriate, action may be taken under the relevant disciplinary policy of the Trust. Should an improvement not be forthcoming or should a single incident be considered by the Council Officer to be so serious as to necessitate immediate removal the Council Officer shall request the Trust to remove the person from the Services. The Trust shall take such action in relation to the Council's request in accordance with the individual's terms and conditions of employment, the Trust's own employment policies and/or employment law generally.
- 22.14 The Council shall not be liable to the Trust or any employee of the Trust for any claims against the Trust for the Trust taking any action pursuant to this clause. The Trust shall indemnify and keep indemnified the Council against any losses, claims, actions or proceedings brought against the Council by an employee pursuant to this Clause.
- 22.15 The Trust shall inform the Council Representative as soon as reasonably practicable if a member of staff has been subject to a disciplinary procedure or has been dismissed as a result of a complaint made by a member of the public or another member of the Trust's staff or the Council.
- 22.16 The Trust shall develop a whistle blowing policy having due regard to the Council's own whistle blowing policy as notified to the Trust from time to time and shall ensure that all members of staff are aware of the policy.
- 22.17 The Trust shall establish a customer charter to deal with, inter alia, customer complaints which aligns with the Council's Customer Complaints Policy and Procedure as notified to the Trust from time to time.
- 22.18 The Trust and any subcontractor of the Trust shall not victimise, harass or unlawfully discriminate against any employee of the Trust or any other person engaged by the Trust in the provision of the Services, or any employee of or other person engaged by the Council, or any applicant for employment or engagement, due to their gender, race, colour, ethnic or national origin, disability, age, religion, belief, sexual orientation or part time or fixed term status.
- 22.19 The Trust and any subcontractor of the Trust undertakes that it will not breach any applicable discrimination legislation and further shall take all reasonable steps to promote access to the Facilities and Services to all sectors of the community regardless

of religion, race, marital status. The Trust shall comply with the Equality Act and have due regard to the Council's Equality and Discrimination Policy.

PART 8 – RISK MANAGEMENT ISSUES

23. HEALTH AND SAFETY

- 23.1 The Trust shall ensure that it and its Employees shall in the course of this Agreement comply with the Health and Safety at Work etc Act 1974.
- 23.2 The Trust and any of its subcontractors shall adopt safe methods of work and shall take all such precautions as are necessary to protect the health and safety of its own Employees, the employees of the Council and of all other persons including members of the public.
- 23.3 The Trust shall properly maintain (and upon request shall provide copies to the Council) records of all accidents and incidents at the Facilities. The Trust shall notify the Council at the earliest opportunity and in any event of any RIDDOR reportable accident or incident not more than 24 hours after the event.
- 23.4 The Trust shall throughout the Service Period maintain and implement a written health and safety policy (and provide the Council with a copy of such) and shall ensure that the Council and the Trust's Employees are notified of any changes to the policy including risk assessments and health and safety method statements for all of the activities comprised in the Services.
- 23.5 The Trust shall ensure that all Facilities and machinery and equipment at the Facilities are in safe working order at all times and used in a safe manner including the provision of instruction and training to operators and maintenance staff who will use or maintain such Facilities, machinery and equipment necessary for compliance with the requirements of health and safety legislation.
- 23.6 The Council's Officer may acting reasonably and promptly suspend the delivery of any part or parts of the Services by the Trust in accordance with this Agreement in the event of the Council becoming aware of any material non compliance by the Trust with Health and Safety regulations or procedures including matters affecting public safety, the Council or the Trust's Employees where such non compliance means that the Services cannot safely continue to be provided by the Trust. The Trust shall not resume the provision of the affected part or parts of the Services until the Council's authorised Health and Safety Advisor acting promptly and reasonably has certified that he is satisfied that the Trust has complied with Health and Safety regulations and procedures. All additional costs, fees, expenses and lost revenue occasioned by such supervision shall be borne by the Trust save and in so far as the non-compliance arose from an act or default of the Council.
- 23.7 For the avoidance of doubt, these obligations in relation to health and safety shall apply equally to any subcontractor of the Trust in the delivery of the Services and/or maintenance of the Facilities.
- 23.8 The Trust shall be responsible to comply with the recommendations of the Health and Safety executive and the Council's safety advisors. The Trust shall notify the Council of any significant risks identified as part of the Services and shall monitor its staff against its risk assessments, health and safety method statement and working procedures and when there are any significant failures it shall notify these to the Council. The Council shall monitor the Trust in respect of any significant risks identified to it by the Trust and shall notify the Trust where there are any significant issues arising for their action.

24. INSURANCES

- 24.1 Without prejudice to the Council's rights under this Agreement, the Trust shall with effect from the Commencement Date and throughout the Service Period take out such policy or

policies of insurance approved by the Council as may be necessary to insure the Trust against all risks which a prudent service provider engaged in providing the Services would insure against and any insurances as may be required by law for the Service Period including (without limitation) in respect of the following risks and, where stated, in the following minimum amounts:

- 24.1.1 business interruption insurance;
 - 24.1.2 trustee indemnity insurance;
 - 24.1.3 public liability, such insurance cover being in an amount not less than £20,000,000 (twenty million pounds) in respect of each and every claim, the number of claims in any period of insurance to be unlimited or such higher figure as the Council may from time to time specify (in which case the provisions of **Clause 8** shall apply);
 - 24.1.4 employer's liability including (without limitation) in respect of personal injury or death of any person arising under a contract of Services with the Trust and/or arising out of an incident occurring during the course of such person's employment in compliance with the Employer's Liability (Compulsory Insurance) Act 1969; such insurance cover shall not be less than £10,000,000 (ten million pounds) in respect of any one incident, the number of claims in any one period of insurance to be unlimited or such higher figure as the Council may from time to time specify (in which case the provisions of **Clause 8** shall apply); and
 - 24.1.5 the Trust's insurance obligations generally as required by the terms of the Leases.
- 24.2 The Trust shall within ten (10) Business Days of a written request by the Council Officer submit to the Council documentary evidence that all policies of insurance effected under this **Clause** are being maintained in accordance herewith, including without limitation providing copies of all insurance policies, cover notes and renewal certificates together with evidence that the premiums payable under the insurance policies have been paid in full and are in full force and effect provided that except where there is a claim under any such insurances the information shall not be requested more often than twice in any 12 month period.
- 24.3 The Trust shall cause the Council's interest to be noted on each such policy of insurance.
- 24.4 If the Trust appoints any Subcontractor in connection with the Services, the Trust shall ensure that such Subcontractor takes out such insurance policies as may be necessary for the purpose of delivering the subcontracted Services.
- 24.5 To the extent that the Trust fails to put in place the insurance policies required hereunder or any part of them within ten (10) Business Days of the Commencement Date of this Agreement the Council may, but shall not be obliged, to take out the relevant insurance policies itself and the Trust shall within ten (10) Business Days on the Council's first demand pay to the Council any cost or expense incurred by the Council in doing so.
25. **COMPLAINTS PROCEDURE AND QUALITY CONTROL**
- 25.1 The Trust shall establish a customer satisfaction and complaints procedure which at least matches the Council's equivalent policies.
- 25.2 The Trust shall deal with any complaints received (whether orally or in writing whether from Users or others) in a prompt, courteous and efficient manner.
- 25.3 Material complaints unresolved within thirty (30) Business Days and received or referred to the Council may be investigated by the Council Officer.

25.4 The Trust shall attain and retain QUEST accreditation (or such other applicable quality mark as shall be relevant to each of the elements of the Services as notified to the Trust by the Council from time to time) in relation to each of the Facilities throughout the Service Period.

25.5 The Trust shall throughout the Service Period institute and maintain a properly documented system of quality control to assist with continuous improvement and designed to ensure that the Services are provided at all times and in all respects in accordance with this Agreement.

26. CUSTOMER SATISFACTION AND MONITORING

26.1 The Trust shall regularly monitor customer satisfaction (in addition to any research undertaken or commissioned by the Council). The scope, methodology and sampling of any research shall be agreed with the Council. The results shall be presented at the Review Meetings.

26.2 The Trust shall also take in to account the results of any customer satisfaction monitoring undertaken or commissioned by the Council as notified to the Trust when reviewing the matters referred to in **Clause 27.1**.

27. BEST VALUE

27.1 The Trust acknowledges that:

27.1.1 the Council is subject to the Best Value Duty; and

27.1.2 the provisions of this **Clause 27** are intended to assist the Council in discharging its Best Value Duty and achieving its objectives for leisure and recreational services.

27.2 The Trust shall, throughout the Service Period, make arrangements to secure continuous improvement in the way in which the Services are provided, having regard to a combination of economy, efficiency and effectiveness.

27.3 The Trust shall undertake or refrain from undertaking such actions as the Council shall reasonably request where applicable to enable the Council to comply with the 1999 Act, including:

27.3.1 complying with requests for information, data or other assistance made by the Council in pursuance of its duty of its Best Value Duty;

27.3.2 facilitate any review, inspection or audit undertaken by the Council's external auditor;

27.3.3 complying with all reasonable requests by the Council to procure the attendance of specific officers or Employees of the Trust at any meetings of the Council upon reasonable notice at which the Services are to be discussed; and

27.3.4 permitting any relevant inspector, in connection with the exercise of his statutory powers and duties, at all reasonable times and upon reasonable notice, access to:

27.3.4.1 the Facilities;

27.3.4.2 any document or data relating to the Services;

27.3.4.3 any Subcontractor, agent or employee of the Trust.

27.4 The Trust shall work closely with the Council to assist the Council acting reasonably, to demonstrate to the Council's external auditors how the arrangements between the parties pursuant to the terms of this Agreement are improving the services available to the public at large and contributing to the well-being of the Tonbridge & Malling district area.

28. INFORMATION, AUDIT AND INSPECTION

28.1 The Trust shall maintain and provide current complete accurate operational and financial records in relation to the delivery of the Services including details of all Income and Expenditure which the Council may reasonably and properly require.

28.2 The Council has the right to inspect any relevant and reasonably necessary financial and operational records of the Trust as they relate to the Services, *inter alia*, for the following purposes (including but not limited to):

28.2.1 to review the Trust's Business Plan and Annual Service Delivery Plan;

28.2.2 to verify any aspect of the monthly financial and operational reports;

28.2.3 to verify any cost estimate for any variation of the Services requested by the Council or the Trust.

28.3 The Trust shall comply with statutory accounting requirements and any statements of recommended accounting practice which apply to the Trust.

28.4 The Trust shall provide the Council with a copy of its audited accounts as soon as they are available and in any event within 9 months from the end of the Trust's financial year.

28.5 The Trust shall co-operate with the Council's auditors with regard to any audit requirements in connection with the Trust's delivery of Services under this Agreement.

28.6 In the event that the Trust fails to comply with the requirements of **Clauses 28.1 to 28.5** (inclusive) above then, without prejudice to any other rights or remedies available to the Council, the Council Officer or such other person nominated by the Council Officer shall be given access to all and any accounts, documents and information (and the assets, stocks, stores or other evidence which supports such documentation) relevant to the delivery of the Service in the possession, custody or control of the Trust to enable the Council to carry out its own audit of the Trust. In such circumstances, the Trust shall:

28.6.1 provide (or procure that the same are provided) such facilities as the Council Officer (or his nominee) may reasonably require to visit any place where the accounts are held and examine any such accounts;

28.6.2 permit (or procure permission) the Council Officer (or his nominee) to take copies of the accounts and other relevant documents;

28.6.3 provide such information and/or explanation as the Council Officer (or his nominee) may consider appropriate or necessary to carry out the audit; and

28.6.4 procure that any person acting on behalf of the Trust (and use reasonable endeavours to procure any Subcontractor) who has relevant account information provides access to such to the Council Officer (or his nominee).

28.7 The Trust shall co-operate in a timely manner with any reasonable requests by the Council to assist with the provision of any performance information required by the

Council's auditor or any central government department or agency including in relation to but not limited to any investigations or statutory returns provided that such information is not disclosed to or made available to a competitor of the Trusts and further provided that the Council notifies the Trust in advance or at the earliest opportunity following the provision of the information, the nature of the information provided and to which person, organisation or agency.

29. JOINT PROCUREMENT

29.1 The Parties are under an express obligation to maximise value for money with regards to the purchase of goods and services.

29.2 The Parties shall cooperate with regards to purchasing arrangements and, where appropriate, share information with regards to potential discounts for bulk purchasing.

30. COOPERATION

30.1 The parties acknowledge that the Services provided by the Council have significant impact on the economic, social and environmental wellbeing of the area.

30.2 The parties agree to act in good faith and cooperate with one another to assist each party to deliver the agreed common objectives for Tonbridge & Malling.

30.3 The parties shall cooperate regarding the development of strategies, plans and initiatives to develop and/or promote the Services for the benefit the local community and visitors to Tonbridge & Malling and/or the development or promotion of leisure and recreational services generally in Tonbridge & Malling.

PART 9 – SERVICE FEE AND PAYMENT ARRANGEMENTS

31. SERVICE FEE

- 31.1 In consideration of the Trust providing the Services the Council shall (unless otherwise agreed between the parties) pay to the Trust the Service Fee.
- 31.2 The Service Fee payable by the Council to the Trust for the period 1 November 2013 to 31 March 2018 is set out in **Schedule 11**.
- 31.3 The Service Fee payable by the Council to the Trust for the period from 1 April 2018 for the remainder of the Service Period shall be reviewed and, if appropriate, adjusted in accordance with **Clause 33** below.
- 31.4 Save for as provided for in Clause 30.5 below, the Service Fee shall be paid in equal instalments quarterly in advance on the first Business Day of each quarter month starting on 1 April 2015.
- 31.5 The Service Fee for the period 1 November 2013 to [31 March 2015] shall be payable by the Council to the Trust in one payment.
- 31.6 The Trust shall submit a VAT invoice requesting payment. The Service Fee shall be due and payable on the due date whether demanded or not.
- 31.7 All amounts due under this Agreement and set out in Schedule 11 are expressed exclusive of VAT.
- 31.8 The Service Fee shall be adjusted each year in line with CPI as at 1 November prior to the start of each Service Year from 1 November 2014.
- 31.9 The provisions in this Clause do not in any way preclude the Trust from seeking additional funding from the Council to assist with any new projects, initiatives or Service developments or otherwise to mitigate the impact of an unforeseen circumstance which has a material and adverse impact on the Trust's Business Plan.
- 31.10 In the event that during the Service Period, the parties, acting reasonable and in good faith, agree that the Trust shall pay the Council a Service Fee, then the parties, acting reasonably, shall agree any variations required to this Agreement. Any such variation shall be in writing and signed by both parties as required by Clause 55.

32. INTEREST ON LATE PAYMENT

- 32.1 If either party fails to pay any sum due under this Agreement on the due date for payment, that party shall pay interest on that sum from the due date up to the date of actual payment (as well after as before judgment) at the Prescribed Rate as at the final date for payment.

33. ADJUSTMENT TO THE SERVICE FEE

- 33.1 The Service Fee for the period from 1 April 2018 and for the remainder of the Service Period shall be reviewed and, if agreed, adjusted at the commencement of each five year period on the Service Fee Adjustment Date (1 April 2018, 1 April 2023, 1 April 2028 and so forth, every five years throughout the Service Period starting from 1 April 2016) in accordance with **Clause 33.2** below:

- 33.2 The Service Fee payable in each of the five years following each Service Fee Adjustment Date shall be reviewed and determined as follows:
- 33.2.1 by no later than 1 July 2016 the Council shall notify the Trust of the Council's Objectives for the Services for the period 1 April 2018 to 31 March 2023 and its indicative budget for the Services;
- 33.2.2 by no later than 1 December 2016 the Trust shall prepare and deliver its Business Plan for the period 1 April 2018 to 31 March 2023 and its indicative Service Fee request;
- 33.2.3 the parties shall, acting reasonably and in good faith, meet to discuss and agree the Business Plan and the required Service Fee by no later than 1 March 2017.
- 33.3 In the event of any dispute relating to the range and/or level of Services that can be delivered for the required Service Fee, the matter can be referred by either party to be resolved by Dispute Resolution Procedure provided that for the avoidance of doubt the Council shall not be required (but may at its discretion) to increase its level of Service Fee;
- 33.4 Subject to Clause 32.5, in the event for whatever reason the Business Plan cannot be agreed by that date, the Business Plan, Annual Service Delivery Plan and Service Fee for the previous period shall continue and be payable until the Long Stop Date subject to any agreed adjustments to fees and charges.
- 33.5 If, acting reasonably and in good faith, the parties cannot agree the level of funding by the Long Stop Date, then the Council has the option to terminate this Agreement upon not less than 12 months written notice. Termination shall be treated as Voluntary Termination and Breakage Costs shall be payable.
- 33.6 Once agreed, the Service Fee shall be adjusted to take into account any short fall or over payment being the difference between the Service Fee agreed between the parties and the Service Fee paid by the Council during the period up until the Service Fee is agreed.
- 33.7 The adjustment formula set out in **Clause 32.2** shall apply throughout the term of the Agreement unless the parties agree otherwise.
- 34. GAIN SHARE**
- 34.1 Any surpluses generated by the Trust calculated by reference to Schedule 12 shall be shared between the parties once the agreed revenue reserve thresholds and annual surplus have been met as set out in Schedule 12.
- 35. SERVICE FEE REVIEW FOLLOWING THE REDEVELOPMENT OF THE ANGEL CENTRE**
- 35.1 The parties acknowledge that the opening of the new Angel Centre shall have a material impact on the Trust's Business Plan.
- 35.2 By no later than three months before the target date for Practical Completion of the new Angel Centre, the Trust shall prepare a revised Business Plan for consideration by the Council, taking into account the estimated costs for operating the new Angel Centre ("Estimated Costs").
- 35.3 Following receipt of the revised Business Plan, including the Estimated Costs, the parties shall meet and discuss the revised Business Plan and acting reasonably and in

good faith shall agree an adjustment to the Service Fee to take effect from the commencement of operation of the new Angel Centre.

- 35.4 The parties, acting reasonably and in good faith, shall co-operate in full to establish the new operating costs of the new Angel Centre at the earliest opportunity following the first twelve months that the Angel Centre is fully operational.
- 35.5 Without prejudice to the generality of the above, within three months following the first twelve months of operation of the new Angel Centre, the Trust shall prepare a revised Business Plan based on the actual cost of operating the new Angel Centre ("Actual Costs").
- 35.6 The parties, acting reasonably and in good faith, shall compare the Estimated Costs to the Actual Costs of operating the Angel Centre and shall agree a commensurate adjustment to the Service Fee to reconcile any cost differences (whether up or down). The adjustment shall take immediate effect from the start of the next quarter payment of the Service Fee payable by the Council to the Trust.
- 35.7 The Actual Costs for operating the new Angel Centre shall be used by the Trust as the base costs when preparing the Trust's Business Plan for the next financial year.

PART 10 – MONITORING REGIME

36. REPORTING AND MONITORING

- 36.1 The Trust agrees that throughout the Service Period it shall:
- 36.1.1 attend monthly Review Meetings with the Council Officer;
 - 36.1.2 attend quarterly Review Meetings with the relevant strategic directors from the Council;
 - 36.1.3 attend six weekly maintenance liaison meetings;
 - 36.1.4 attend agreed Tonbridge Sports Association liaison meetings;
 - 36.1.5 attend meetings with elected members to review the performance of the Trust and present service development plans;
 - 36.1.6 attend regular meetings with relevant Council officers to review the services being provided by the Council to the Trust pursuant to the Support Services Agreement;
 - 36.1.7 provide monthly and quarterly financial and operational reports in the form set out at Schedule 13 prior to the relevant Review Meetings.

37. MANAGING POOR PERFORMANCE

- 37.1 Without prejudice to the Council's other rights and remedies under this Agreement, if, at any time the Council acting reasonably determines that the Trust has materially failed to perform any of its obligations under this Agreement, the Council shall give written notice of such breach to the Trust.
- 37.2 Within ten (10) Business Days of the receipt of a notice given under **Clause 37.1** above, the Trust shall prepare and submit to the Council for its approval an action plan to remedy the breaches specified in the notice ("**Action Plan**").
- 37.3 An Action Plan shall specify a timetable for remedying each of the breaches complained of;
- 37.4 Within twenty (20) Business Days of its receipt of an Action Plan the Council may approve all or part of the plan. The Council shall notify the Trust of any part of the Action Plan which it does not approve. Within ten (10) Business Days of such notification, the Trust shall revise the Action Plan and re-submit to the Action Plan for approval by the Council. The Council shall approve the revised Action Plan within ten (10) Business Days of receipt or, in default of such approval of all or any part, the Dispute Resolution Procedure shall apply.
- 37.5 Following the approval or determination of an Action Plan under **Clause 37.4** if, at the next Quarterly Review Meeting, the breaches specified in the notice issued under **Clause 37.1** have not been remedied by the Trust to the Council's satisfaction acting reasonably in the time period permitted by the Action Plan such that the Services in accordance with this Agreement, the Council may:
- 37.5.1 agree to an extended period for the Action Plan and/or to any other amendments to the same;
 - 37.5.2 exercise its rights to step in pursuant to **Clause 35**; or

- 37.5.3 terminate all or part of this Agreement in accordance with **Clause 37**.
- 37.6 If the breaches specified in the notice issued under **Clause 37.1** have been remedied by the Trust to the Council's satisfaction acting in accordance with the Action Plan, the Council shall notify the Trust that all material breaches have been remedied and withdraw the notice.
- 37.7 PROVIDED THAT for the avoidance of doubt if the Trust is at all times materially complying with either the Annual Service Delivery Plan and/or an Action Plan, or is unable to do so through circumstances beyond its reasonable control then the Trust shall not be deemed to be in breach of this Agreement.
- 38. COUNCIL STEP-IN**
- 38.1 If the Council reasonably and properly believes having full regard to all of the circumstances that it is essential to take action in connection with the Services:-
- 38.1.1 because a serious risk exists to the health or safety of persons or property or to the environment that the Trust is unable or is expressly unwilling itself to remedy;
- 38.1.2 to discharge a statutory duty that the Trust is unable or is expressly unwilling to comply with or itself undertake;
- 38.1.3 because an Emergency has arisen; and/or
- 38.1.4 because of a material breach of this Agreement;
- then the Council shall be entitled to take action in accordance with this Clause.
- 38.2 If the circumstances set out in **Clause 38.1** arise and the Council wishes to take action, the Council shall notify the Trust in writing of the following:-
- 38.2.1 the action it wishes to take;
- 38.2.2 the reason for such action;
- 38.2.3 the date it wishes to commence such action;
- 38.2.4 the time period which it believes will be necessary for such action; and
- 38.2.5 to the extent practicable, the effect on the Trust and its obligation to provide the Services during the period such action is being taken.
- 38.3 Following service of such notice, the Council shall take such action as notified under **Clause 38.2** (Notice to the Trust) and any consequential additional action as it reasonably believes is necessary (together, the "Required Action") and the Trust shall give all reasonable assistance to the Council while it is taking the Required Action. The Council shall provide the Trust with notice of completion of the Required Action and shall use reasonable endeavours to provide such advance notice as is reasonably practicable of its anticipated completion.
- 38.4 Where the Required Action has been taken otherwise than as a result of a breach by the Trust or its Subcontractors, the Council shall undertake the Required Action in accordance with Good Industry Practice and shall undertake to meet costs reasonably and properly incurred by the Trust subject always to an obligation of the Trust to mitigate any such costs.

- 38.5 In taking any Required Action, the Council shall at all times and shall so far as is reasonably practicable in the circumstances, act so as to minimise any adverse effect on the provision of the Services and the availability of the relevant Facilities and/or Services to the Users following completion of the Required Action.
- 38.6 If the Trust is not in breach of its obligations under this Agreement, then for so long as and to the extent that the Required Action is taken, and this prevents the Trust from providing any part of the Services:-
- 38.6.1 the Trust shall be relieved from its obligations to provide such part of the Services; and
- 38.6.2 in respect of the period in which the Council is taking the Required Action and provided that the Trust provides the Council with reasonable assistance (such assistance to be at the expense of the Council to the extent that incremental costs are incurred) the Service Fee due from the Council to the Trust (if any) shall equal the amount the Trust would receive if it were satisfying all its obligations and providing the Services affected by the Required Action in full.
- 38.7 If the Required Action is taken as a result of a serious and persistent breach of the obligations of the Trust under this Agreement but not otherwise, then for so long as and to the extent that the Required Action is taken, and this prevents the Trust from providing any part of the Services:-
- 38.7.1 the Trust shall be relieved of its obligations to provide such part of the Services; and
- 38.7.2 in respect of the period in which the Council is taking the Required Action, the Service Fee due from the Council to the Trust (if any) (or the Trust to the Council, if applicable) shall be adjusted to take account of the Council's costs of operation in taking the Required Action. In the event that no Service Fee is due from the Council to the Trust, the Trust shall pay all reasonable costs (including payment of officer time) incurred by the Council in taking the Required Action.

PART 11 – TERMINATION AND CONSEQUENCES OF TERMINATION

39. VOLUNTARY TERMINATION BY THE COUNCIL

- 39.1 The Council may terminate all or part of this Agreement at any time on or before the Expiry Date by **complying** with its obligations under **Clause 39.2** below.
- 39.2 If the Council wishes to terminate this Agreement under this **Clause 39**, it must give a Termination Notice to the Trust stating:-
- 39.2.1 that the Council is terminating this Agreement under this **Clause 39.1**;
- 39.2.2 that this Agreement will terminate on the date falling twelve (12) months after the date of receipt of the notice; and
- 39.2.3 whether the Council has chosen to exercise its option under **Clause 39.4** below.
- 39.3 On termination (including any Partial Termination), the Council shall have the option to require the Trust to transfer to the Council all of its rights, title and interest in the Trust's Equipment.
- 39.4 This Agreement will terminate on the date falling twelve (12) months after the date of receipt of the Termination Notice referred to in **Clause 39.2** (Voluntary Termination by the Council) above.
- 39.5 This right shall not be exercisable by the Council until after 1 April 2017.

40. PARTIAL TERMINATION BY THE COUNCIL

- 40.1 The Council may terminate this Agreement in relation to any of the Services and/or Facilities at any time on or before the Expiry Date by serving a Termination Notice in accordance with **Clause 39.2** in relation to that part of the Services and/or Facilities.
- 40.2 For the avoidance of doubt, following Partial Termination of this Agreement in relation to any Facilities in accordance with this **Clause 40**, all other provisions of this Agreement shall remain in full force and effect

41. TERMINATION ON TRUST DEFAULT

- 41.1 The Council may, without prejudice to any of its other rights arising hereunder, or in relation to the Leases, terminate this Agreement forthwith upon giving written notice in any of the circumstances set out below:
- 41.1.1 if the Trust commits a material breach of this Agreement or the Leases which if capable of remedy has not been remedied in accordance with **Clause 36**;
- 41.1.2 if the Trust fails to comply with an Action Plan and the Council exercises its rights detailed in **Clause 37**;
- 41.1.3 if the Trust fails to vacate the Angel Centre on notice being given to the Trust in accordance with the Angel Centre Lease provided that notice is not less than [3] months written notice;
- 41.1.4 if an order is made or a resolution is passed for the winding-up of the Trust except in the case of a voluntary winding-up for the purposes of a scheme of reconstruction or

amalgamation the terms of which shall previously have been approved in writing by the Council (such approval not to be unreasonably withheld or delayed);

- 41.1.5 if an administration order is made in respect of the Trust;
- 41.1.6 if a receiver (which expression shall include an administrative receiver) is appointed in respect of the Trust or all or any of its assets;
- 41.1.7 if the Trust is unable to pay its debts within the meaning of Section 123 of the Insolvency Act 1986;
- 41.1.8 if any voluntary arrangement is proposed under Section 1 of the Insolvency Act 1986 in respect of the Trust;
- 41.1.9 if the Trust ceases or itself expressly in writing threatens to cease to carry on business;
- 41.1.10 if the Trust commits a persistent breach of any of its obligations under this Agreement, the Business Transfer Agreement, the Leases. For the purposes of this **Clause**, a persistent breach shall mean a breach that is repeated three times or more within six months of the first breach having been drawn to the attention of the Trust by the Council. The Trust shall not be regarded as being in persistent breach of this Agreement if the Trust is otherwise in compliance with an approved Action Plan to remedy the breach;
- 41.1.11 the Trust or any director or trustee or member of the executive management team of the Trust shall commit a Prohibited Act; or
- 41.1.12 if any of the Leases terminate, other than by Voluntary Termination by the Council.

42. TERMINATION ON COUNCIL DEFAULT

- 42.1 The Trust may terminate this Agreement upon giving notice within thirty (30) Business Days of becoming aware of any of the following defaults ("Council Default"):
- 42.2 a failure by the Council to make payment of the Service Fee (if any) for a continuous period of six (6) months and having failed to make good the outstanding payment with thirty (30) Business Days of a formal final written demand by the Trust and to the extent that non payment substantially frustrates or renders it impossible for the Trust to perform the Services under this Agreement; or
- 42.3 a material breach by the Council of its obligations under this Agreement which substantially frustrates or renders it impossible for the Trust to perform the Services under this Agreement for a continuous period of six (6) months.
- 42.4 The Trust's Termination Notice must specify the type of Council Default which has occurred entitling the Trust to terminate.
- 42.5 This Agreement will terminate on the day falling ninety (90) Business Days after the date the Council receives the Trust Termination Notice, unless the Council rectifies the Council Default within thirty (30) Business Days of receipt of the Trust Termination Notice or such longer period as the Trust acting reasonably agrees.

43. TERMINATION ON FORCE MAJEURE

- 43.1 No failure or omission by any party to carry out or observe any of the stipulations or conditions of this Agreement shall, except in relation to obligations to make payments

hereunder and except as herein expressly provided to the contrary, give rise to any claim against the party in question or be deemed a breach of this Agreement if such failure or omission arises from any cause reasonably beyond the control of that party including, but not limited to, national emergency, war, prohibitive governmental regulations or any other cause beyond the reasonable control of the parties renders performance of this Agreement impossible (a "Force Majeure Event").

- 43.2 Each party agrees to notify the other as soon as reasonably practicable upon becoming aware of a Force Majeure Event and the parties shall then work together in such a manner as is reasonable in the circumstances to deal with the Force Majeure Event and shall use all reasonable endeavours to mitigate any adverse effects on the provision of the Services and any losses arising from the Force Majeure Event and continue to perform their obligations under this Agreement notwithstanding the Force Majeure Event.
- 43.3 In the event that a party is unable to fulfil its obligations in a Force Majeure Event the obligations hereunder of such party shall be suspended including payments relating to that Force Majeure Event. The party whose obligations have been suspended as aforesaid shall give notice of such suspension as soon as reasonably possible to the other party stating the date and extent of such suspension and cause thereof. Any party whose obligations have been suspended as aforesaid shall resume the performance of such obligations as soon as reasonably possible after the removal of the cause and shall so notify the other party.
- 43.4 Each party shall bear its own costs in rectifying a Force Majeure Event and neither party shall be entitled to bring a claim for a breach of this Agreement or incur any liability to the other party for any losses or damages arising from a Force Majeure Event.
- 43.5 Where a Force Majeure Event has a material effect on the provision of all or any significant part of the Services for more than six months, then either party shall be entitled to Terminate this Agreement in relation to the part of the Services and/or Facilities affected by giving not less than three months prior written notice to the other.

44. AUTOMATIC TERMINATION

- 44.1 This Agreement shall terminate automatically at the expiry of the Service Period unless the parties agree otherwise in writing.

45. CONSEQUENCES OF TERMINATION

- 45.1 In the event that this Agreement terminates or expires then:
- 45.1.1 the Leases shall automatically terminate;
- 45.1.2 the Council shall be entitled to re-enter and take back control of the Facilities and the Council's Equipment including all replacement items of Equipment;
- 45.1.3 the Trust shall deliver the Business Information and such other information which may be reasonably necessary to enable the Council or a Successor Organisation to carry on the Services;
- 45.1.4 the Council shall be entitled to acquire any of the Trust's Equipment upon the following terms:
- 45.1.4.1 in the case of the Trust's Equipment not subject to any hire or hire purchase or operating or finance Lease or other credit arrangements, at the written

down value of the Trust's Equipment as it appears in the Trust's accounts (written down on a straight line basis); and

45.1.4.2 the Council shall not be obliged to purchase any Trust's Equipment subject to hire or hire purchase or operating or finance or other credit arrangements unless and upon such terms as the parties.

45.2 In the event of this Agreement terminating in the event of Voluntary Termination or Partial Termination by the Council or Council Default, the Council shall pay to the Trust the Breakage Costs incurred and in the case of this Agreement terminating in the event of Termination for Contractor Breach the Council shall pay to the Trust the Breakage Costs incurred in relation to limb (vi) only of the definition of Breakage Costs.

46. EXIT AND HANDOVER ON TERMINATION

46.1 In the event of this Agreement terminating howsoever caused:

46.1.1 within twenty (20) Business Days of notice of termination of this Agreement being served, or if termination is to take effect immediately, within ten (10) Business Days of notice of the same being given, the parties shall meet to discuss a timetable for drawing up and will draw up an exit plan covering the performance of the obligations of both parties during the exit and handover period. In any event, the Trust shall, at no cost to the Council, provide such cooperation, information and assistance to the Council and/or as may be reasonably required by the Council to a Successor Organisation to transfer and to enable a smooth migration of the Services being supplied by the Trust including enabling the Council and/or its Successor Organisation to perform all of the Trust's obligations under this Agreement;

46.1.2 the Trust and the Council shall use all reasonable endeavours to ensure all appropriate arrangements are put in place to give effect to the said termination and the Trust shall consult with the Council on all aspects and will comply with any reasonable requirements of the Council in relation to the same;

46.2 the Trust agrees that if it is requested by the Council and at the Council's cost it shall use all reasonable endeavours to assign or novate any then existing contracts which the Trust has entered into with third parties in connection with the operation and management of the Facilities including the leasing of any Trust's Equipment to the Council or to any Successor Organisation.

46.3 the Trust shall not, other than in the ordinary course of trading, in the six month period leading to the expiry of this Agreement or in any other period remaining between the Council giving notice and such notice expiring, (the twelve month period or other period to be referred to in this **Clause** as the "Applicable Period") in relation to any Services or Facilities except with the prior written consent of the Council, such consent not to be unreasonably withheld or delayed:

46.3.1 dispose of or agree to dispose of or grant any option in respect of any part of its assets other than stock in the ordinary course of trading;

46.3.2 vary the terms of any contracts with any provider of goods and/or services already entered into;

46.3.3 enter into any long-term (being 12 months or longer), unusual or abnormal contract or commitment;

- 46.3.4 enter into any leasing, hire purchase, contract hire or other agreements or arrangements for payment on deferred terms;
- 46.3.5 grant or issue or agree to grant or issue any mortgages, charges, debentures or other securities for money or redeem or agree to redeem any such securities or give or agree to give any guarantees or indemnities or, without prejudice to the foregoing generality, create or permit to subsist any other encumbrance over all or any of its present or future revenues or assets;
- 46.3.6 permit any of its insurances to lapse or do anything which would make any policy of insurance void or voidable;
- 46.3.7 in any way depart from the ordinary course of its day to day business either as regards the nature or scope or the manner of conducting the same;
- 46.3.8 pay any fees or commissions to any persons other than fees payable on arm's length terms to third parties who have rendered bona fide service or advice required in the ordinary course of business;
- 46.3.9 release, waive or modify any warranty or guarantee given by any supplier of goods or services;
- 46.3.10 cause or permit any item comprised in the records relating to the Services including the Business Information to be removed or destroyed or any programs or data held on the computer systems of the Trust and relating to the Services to be removed or deleted except for the deletion of Personal Data where required to ensure compliance with the DPA or for the efficient running of the computer system in question after satisfactory back-up copies have been made and securely stored off-site;
- 46.3.11 take any action if the reasonably foreseeable consequence would be to materially and adversely affect the value of the Facilities;
- 46.3.12 terminate the employment of any of the Employees for any reason whatsoever without first obtaining the consent of the Council to such Termination save where, in the reasonable opinion of the Trust, Termination is justified for cause due to the actions of any such of the Employees;
- 46.3.13 alter or change in any way any of the terms and conditions of employment of any of the Employees whether with or without the consent of the Employees other than for wage or salary awards which are in line with those offered generally for similar individuals within the Trust's workforce or as is required by law (for the avoidance of doubt, the Trust will provide upon request by the Council evidence that any such wage or salary award is in line with those offered generally for similar individuals);
- 46.3.14 relocate or assign to new duties any of the Employees, or assign to the provision of the Services any employee not so assigned at the commencement of the Applicable Period, or increase to any significant degree the proportion of working time spent on the Services by any such employee, without the prior written consent of the Council, such consent not to be unreasonably withheld or delayed; or
- 46.3.15 make any other alterations to the structure or composition of the Employees which are intended to or which may preclude the application of the Regulations upon the resumption of service by the Council or another service provider.
- 46.4 Where reasonably and properly required for the purposes of the Regulations, upon cessation of service by the Trust and at any time during the Applicable Period, the Trust

shall, on request by the Council, and subject to the DPA, Human Rights Right Act 1998 and all legislation relating to the confidentiality of personal information and subject to **Clause 55** provide the Council with the following:

- 46.4.1 full details of all the Employees assigned to the provision of the Services, including, but not limited to, details of terms and conditions of employment (including but not limited to full details of the remuneration of the Employees in whatever form and detail the Council may reasonably require) and benefits (including but not limited to any bonus, incentive, employee share scheme and life, accident, long term disability and any other health insurance), working arrangements, outstanding obligations to increase remuneration, recognition agreements, redundancy schemes, disciplinary records and attendance records (including all those Employees temporarily absent from work for any reason, for example, maternity leave, sick leave or holiday) and list of agency workers and any Contractors that may be deemed to be providing Services that may be in scope of any proposed transfer of undertaking.
- 46.4.2 all existing, anticipated or threatened claims and disputes so far as it is aware (including but not limited to industrial injury claim or claims in an employment tribunal); and
- 46.4.3 details of the Users of the Facilities, suppliers of goods and services and any third party arrangements;
- 46.4.4 any other information reasonably and properly required by the Council to enable the Council or a Successor Organisation to provide the Service in the same or substantially similar form save that the Council shall not disclose Commercially Sensitive Information where the Council is retendering all or part of the Services and the Trust has been invited to tender for the provision of those Services.
- 46.4.5 The Trust shall authorise the Council to use any and all the information it may consider necessary for the purposes of its business or for informing any Successor Organisation for any services which are substantially the same as the Services (or any part thereof).
- 46.5 The parties shall jointly undertake a Stock take and Equipment Inventory Audit on or before Termination of this Agreement.
- 46.6 The parties acknowledge that on the expiry of this Agreement, or the Termination or partial Termination of the Services or of this Agreement, it is likely that the Regulations will apply. The parties accordingly agree that the contracts of employment of the Employees, or in the case of a partial Termination, those Employees assigned to the Services being Terminated, will have effect from the expiry, Termination or partial Termination, as the case may be (the "Applicable Termination Date"), as if originally made between the Council or any Successor Organisation.
- 46.7 The Trust undertakes to the Council that it will:
 - 46.7.1 pay all emoluments and outgoings relating to the Employees, or in the case of a partial Termination, those Employees assigned to the Services being Terminated (including, without limitation, all wages and salaries, sick pay, maternity pay, pension contributions, accrued holiday entitlement, bonuses, commission, any liability to taxation (including income tax and national insurance contributions deducted or deductible from such amounts under the PAYE system) and any other amounts) arising or in respect of any period on or before the Applicable Termination Date;
 - 46.7.2 perform all obligations under or in connection with the contracts of employment of the Employees, or in the case of a partial Termination, those Employees assigned to the

Services being Terminated, arising or in respect of any period on or before the Applicable Termination Date;

- 46.7.3 inform and consult appropriate representatives of the Employees, or in the case of a partial Termination, appropriate representatives of those Employees assigned to the Services being Terminated, and otherwise comply in all respects with Regulations 10 and 10A of the Regulations (the Trust shall not be liable under or with respect to this provision to the extent that it or any Subcontractor is unable to fulfil their obligations under this provision due to a failure by the Council or any Successor Operator to provide all information required by the Transfer Regulations).

PART 12 – GENERAL**47. COUNCIL OFFICER**

- 47.1 The Council Officer shall be the Director of Street Scene and Leisure or such other person appointed pursuant to this **Clause**. The Council Officer shall exercise the functions and powers of the Council for all purposes in relation to this Agreement in accordance with the scheme of delegation as notified to the Trust upon the Commencement Date and as may be amended by the Council from time to time and as notified to the Trust.
- 47.2 The Council Officer shall be entitled at any time, by notice to the Trust, to authorise any other person to exercise the functions and powers of the Council delegated to him pursuant to this **Clause**, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Council Officer and all references to the “Council Officer” in this Agreement (apart from this **Clause**) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 47.3 The Council may by notice to the Trust change the Council Officer. The Council shall (as far as practicable) consult with the Trust prior to the appointment of any replacement for the Council Officer, taking account of the need for liaison and continuity in respect of the Services. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Trust in the execution of its obligations under this Agreement).
- 47.4 During any period when no Council Officer has been appointed (or when the Council Officer is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Council shall notify the Trust of an alternative appointed to perform the function of the Council Officer.
- 47.5 Subject to the scheme of delegation or where otherwise expressly notified in writing by the Council before such act or instruction, the Trust and Trust's Representative shall be entitled to treat any act or instruction of the Council Officer which is authorised by this Agreement as being expressly authorised by the Council and the Trust and the Trust's Representative shall not be required to determine whether authority has in fact been given.
- 47.6 Save where notified in writing by the Council before such act or instruction, the Trust and Trust's Representative shall not be entitled to treat any act or instruction of the Council Officer or any other officer, employee or other person engaged by the Council which is not authorised by this Agreement as being authorised by the Council and shall be required to determine by notice to the Council whether an express authority has in fact been given.

48. TRUST REPRESENTATIVE

- 48.1 The Trust's Representative shall be the Chief Executive of the Trust from time to time or such other person appointed pursuant to this **Clause**. The Trust's Representative shall exercise the functions and powers of the Trust for all purposes in relation to this Agreement as functions or powers to be carried out by the Trust's Representative. The Trust's Representative shall also exercise such other functions and powers of the Trust under this Agreement as may be notified to the Trust from time to time.

- 48.2 The Trust's Representative shall be entitled at any time, by notice to the Council, to authorise any other person to exercise the functions and powers of the Trust delegated to him pursuant to this **Clause**, either generally or specifically. Any act of any such person shall, for the purposes of this Agreement, constitute an act of the Trust's Representative and all references to the "Trust's Representative" in this Agreement (apart from this **Clause**) shall be taken as references to such person so far as they concern matters within the scope of such person's authority.
- 48.3 The Trust may by notice to the Council change the Trust's Representative. The Trust shall (as far as practicable) consult with the Council prior to the appointment of any replacement for the Trust's Representative, taking account of the need for liaison and continuity in respect of the Services. Such change shall have effect on the date specified in the written notice (which date shall, other than in the case of emergency, be such date as will not cause material inconvenience to the Council in the execution of its obligations under this Agreement).
- 48.4 During any period when no Trust's Representative has been appointed (or when the Trust's Representative is unable through illness, incapacity or any other reason whatsoever to carry out or exercise his functions under this Agreement) the Trust shall notify the Council of an alternative appointed to perform the function of the Trust's Representative.
- 48.5 Save where notified in writing by the Trust before such act or instruction, the Council and Council Officer shall be entitled to treat any act or instruction of the Trust's Representative which is authorised by this Agreement as being expressly authorised by the Trust and the Council and the Council Officer shall not be required to determine whether authority has in fact been given.
- 48.6 Save where notified in writing by the Trust before such act or instruction, the Council and Council Officer shall not be entitled to treat any act or instruction of the Trust's Representative or any other officer, employee or other person engaged by the Trust which is not authorised by this Agreement as being authorised by the Trust and shall be required to determine by notice to the Trust whether an express authority has in fact been given.

49. LIABILITY OF THE TRUST

- 49.1 The Council shall not be liable to indemnify the Trust, its officers, servants, employees or agents against any demands, liability, damages, losses, costs, claims or proceedings whatsoever suffered or incurred by the Trust, its officers, servants, employees or agents howsoever arising except for any loss directly arising from proven negligence on the part of the Council, its servants or agents. Damages arising from such proven negligence shall be limited to direct and unavoidable losses and the Trust shall take all reasonable steps to mitigate such losses.

50. LIABILITY OF THE COUNCIL

- 50.1 The Trust shall not be liable to indemnify the Council, its officers, servants, employees or agents against any demands, liability, damages, losses, costs, claims or proceedings whatsoever suffered or incurred by the Council, its officers, servants, employees or agents howsoever arising except for any loss directly arising from proven negligence on the part of the Trust, its servants or agents. Damages arising from such proven negligence shall be limited to direct and unavoidable losses and the Council shall take all reasonable steps to mitigate such losses.

51. USE OF THE COUNCIL'S LOGO

- 51.1 The Trust shall be required to acknowledge the partnership between the Council and the Trust in relation to all marketing material used in promoting the Services or the Facilities.
- 51.2 The parties shall cooperate with regards to any joint promotion and/or marketing campaigns in relation to the Services and Facilities.
- 51.3 The Trust shall comply with such protocol in relation to the use of the Council's logo and branding in relation to the Facilities and Services as agreed between the Parties from time to time.

52. PUBLIC RELATIONS, PUBLICITY AND ADVERTISING

- 52.1 The Trust shall liaise with the Council in relation to press and media relations.
- 52.2 The Trust shall provide the Council with copies of all press releases.
- 52.3 The Parties shall co-operate to maximise positive press coverage in relation to the Services and Facilities and mitigate the impact of any negative press coverage
- 52.4 The above clauses shall not in any way restrict the Trust from undertaking any genuine marketing initiatives to advertise the Services or Facilities and/or activities offered by the Trust.
- 52.5 Subject to any agreed protocol and the Leases, the Trust shall be entitled to display and/or attach to any Facility any sign, notice or advertisement relating to the Services and/or any events at the Facilities subject to planning permission.
- 52.6 The Trust shall seek the Council's approval to any sponsorship arrangements relating to the Services and/or Facilities, such consent not to be unreasonably withheld or delayed.

53. COMPETITION

- 53.1 The Council shall not itself undertake promote or procure any new activities that would directly compete with the Trust without prior consultation with the Trust and having due regard to any concerns raised by the Trust. Nothing shall prevent the Council from entering into arrangements with third parties to provide leisure eservices if the Trust has refused to provide such.

54. COPYRIGHT

- 54.1 Copyright in the documents comprising this Agreement shall vest in the Council but the Trust may obtain or make at his own expense any further copies for use by it in performing the Services.

55. DATA PROTECTION [NB: TO BE FURTHER REVIEWED PLUS A NEW IPR CLAUSE]

- 55.1 Each party shall comply with all appropriate data protection legislation and principles including but not limited to the Data Protection Act 1998 ("DPA" as amended) in relation to Personal Data (as defined in the DPA 1998) controlled or processed by it or transferred to it or obtained under this Agreement or in relation to the Services.
- 55.2 Except to the extent required or permitted by law any Personal Data provided to the parties in relation to this Agreement shall only be used for the purposes of the

Agreement or in relation to the Services unless the Trust takes such steps as are required under the DPA to enable the Personal Data to be used for a different purpose.

- 55.3 The Council shall continue to act as Data Controller in relation to any databases relating to the Users and/or Members of the Facilities and/or Services.
- 55.4 The Trust shall act as data processor in relation to such databases.
- 55.5 The Trust shall be required to maintain the databases on behalf of the Council and shall only be permitted to process the data for the purposes of providing the Services pursuant to the Management Agreement.
- 55.6 The Trust shall be required to deliver up to the Council the databases at the expiry of the Management Agreement (howsoever caused).
- 55.7 The Trust shall indemnify the Council against any claims Losses costs expenses liabilities demands actions proceedings and damages which the Council may suffer as a result of or arising out of any breach of the DPA by the Trust.

56. CORRUPT GIFTS PAYMENTS OF COMMISSION AND GRATUITIES

- 56.1 The Trust shall not whether itself, or by any partner or director engaged in the provision of the Services, or by any person employed by it to provide the Services, solicit or accept any gratuity, tip or any other form of money taking or reward, collection, or charge for any part of the Services other than charges properly approved by the Council in accordance with the provisions of this Agreement.
- 56.2 The Trust shall not, and confirms that in entering this Agreement it has not committed any Prohibited Act.

57. CHANGE OF LAW

- 57.1 The Trust shall, in the provision of the Services, comply with all applicable law and legislation whether made by statute, enactment, order, regulation or other similar instrument notwithstanding any change of law whether through legislation or jurisprudence after the Commencement Date which, for the avoidance of doubt, shall include without limitation, any change in law affecting the Trust's eligibility for mandatory and/or discretionary rate relief and/or any other tax relief and/or VAT exemptions and including failure by the Trust to achieve charity registration for whatever reason.
- 57.2 In the event that the Council changes is discretionary rate relief policy so that the Council determines not to grant discretionary rate relief to charities or reduces the level of discretionary rate relief to charities, then there shall be a commensurate adjustment to the Service Fee to offset the Trust's liability to business rates for a period of up to [three years].
- 57.3 The Trust shall keep itself and the Council informed of any forthcoming legislation that may affect the Services, the Facilities or the leisure industry or generally.
- 57.4 The Trust shall adapt and/or change the Services to take into account any operational requirements brought about by changes in relevant legislation provided always that such adaptation and/or change must be approved in advance by the Council and such changes and/or adaptation shall not adversely affect the standard of the Services to be provided under this Agreement.

57.5 The parties acting reasonably and in good faith shall meet to discuss the impact of a change in law on the Trust's ability to deliver the Annual Service Delivery Plan or any aspect of it. This shall be without prejudice to the Trust's right to request a change to the Services pursuant to **Clause 9** hereto.

58. AMENDMENTS

58.1 Subject to **Clause 55.2**, no amendments to this Agreement shall be binding unless agreed to by the parties and evidenced in writing and signed by both parties.

58.2 The parties acknowledge that matters will arise during the Service Period which will require consequential amendments to this Agreement. The parties shall act reasonably and in good faith towards one another in discussing and agreeing any amendments required to this Agreement following the Commencement Date.

59. SET-OFF

59.1 The parties acting reasonably shall be permitted to set off any amounts owed to each other pursuant to the terms of this Agreement.

60. ANNOUNCEMENTS

60.1 The Council and the Trust shall on completion of this Agreement make such announcements as may be agreed in writing between the parties.

61. WAIVER

61.1 No delay, omission or forbearance by either party hereunder to exercise or enforce any right, power or remedy arising under or in connection with this Agreement shall operate as a waiver of that or any other right, power or remedy, and any single or partial exercise or enforcement thereof shall not preclude any other or further exercise or enforcement thereof or the exercise or enforcement of any right, power or other remedy.

61.2 Waiver of a breach of or default under any of the terms of this Agreement does not constitute a waiver of any other breach or default and shall not affect any other terms of this Agreement.

62. SEVERABILITY

62.1 If any of the provisions of this Agreement is found by a competent authority to be void or unenforceable it shall be deemed to be deleted from this Agreement and the remaining provisions shall continue to apply. The Council and the Trust shall negotiate in good faith in order to agree the terms of a mutually satisfactory provision which most nearly achieves the object of the objectionable, allegedly void or unenforceable provision to be substituted for the provision found to be void or unenforceable.

63. ENTIRE AGREEMENT

63.1 This Agreement and all agreements entered into or to be entered into pursuant to the terms of this Agreement together with its schedules, together constitute the entire agreement between the parties with respect to its subject matter and supersede all previous agreements and understandings between the parties. Each party acknowledges that, in entering into this agreement and other documents forming the entire agreement as to the subject of this Agreement, it does not do so on the basis of or in reliance upon any representations, promises, undertakings, warranties or other statements (whether written or oral) of any nature whatsoever except as expressly

provided in this Agreement and save to the extent that they arise out of the fraud or fraudulent misrepresentation of any party and accordingly all conditions, warranties or other terms implied by statute or common law are hereby excluded to the fullest extent permitted by law.

64. ASSIGNMENT AND SUBCONTRACTING

- 64.1 Subject to **Clause 64.3** neither party shall assign or transfer or purport to assign or transfer any of its rights or obligations under this Agreement save as contemplated by this Agreement.
- 64.2 Subject to **Clause 64.3** the Trust shall not be entitled to subcontract any aspect of the Service (not otherwise subcontracted as at the Commencement Date) without the Council's prior written consent such consent not to be unreasonably withheld or withdrawn.
- 64.3 The Trust shall be entitled to sub-contract to its trading subsidiary (if established) any of the Services falling within the scope of the Services which are non charitable, non primary purpose trading or otherwise considered by the Trustees of the Trust to be high risk. The Trust shall notify the Council of which Services have been sub-contracted to be carried out by the trading subsidiary as part of the Annual Service Planning Process.
- 64.4 For the avoidance of doubt, the Trust shall remain fully liable to the Council for delivering the Services notwithstanding any sub-contracting arrangements.
- 64.5 As appropriate, any subcontractor shall be required to enter into a lease which is contracted out of the 1954 Act. Any such lease shall be for a period of less than the remainder of the Service Period.
- 64.6 Any subleases in relation to the Angel Leisure Centre shall require the prior written consent of SSL.

65. CONFIDENTIALITY

- 65.1 Subject to Clause 63, each party undertakes to the other to keep secret and confidential all information (whether written, pictorial, in machine readable form or oral) and in whatever form received during the continuance of this Agreement or obtained as a result of entering into or performing this Agreement which is confidential in nature concerning the business or affairs of the other party including without limitation:
- 65.1.1 those sections of this Agreement identified in Part 1 Schedule 15;
- 65.1.2 information concerning the trade secrets, customers, suppliers or business associations of the other party;
- 65.1.3 information concerning the financial, operational, technical or commercial affairs of the other party;
- 65.1.4 all of which shall be the "**Confidential Information**".
- 65.2 Subject to Clause 63, each party undertakes to the other not to use the Confidential Information of the other party except for the purposes of this Agreement and shall not disclose the same to any person other than the Agent (to the extent that disclosure is necessary to the Agent for the performance of its duties under the Agency Agreement) and except to the extent that such information:

- 65.2.1 is required to be disclosed by the law of any relevant jurisdiction;
- 65.2.2 is trivial or obvious;
- 65.2.3 is already in the public domain at the time of disclosure or thereafter shall fall into the public domain other than as a result of breach of this **Clause**;
- 65.2.4 is in the disclosing party's possession (as evidenced by written records) otherwise than as a result of a breach of this **Clause**;
- 65.2.5 becomes known to the disclosing party from a source other than another party to this Agreement otherwise than as a result of a breach of this **Clause**; or
- 65.2.6 was disclosed after the express prior written approval of the party to whom such information belongs.
- 65.3 The Trust shall assist the Council and shall procure that its Agent shall assist the Council at no additional charge in meeting any reasonable requests for information in relation to this Agreement and/or the Services provided by the Trust pursuant to the terms of this Agreement which are made to the Council in connection with the Freedom of Information Act 2000 (the "FOI Act") or any statutory modification or re-enactment thereof or any related guidelines or codes of practice. The Council may, from time to time, serve on the Trust an information notice requiring the Trust within seven days or such shorter time as is specified in the information notice, to furnish to the Council such information and in such form as the Council may reasonably require relating to such requests for information.
- 65.4 At its sole discretion and notwithstanding any other condition of this Agreement, the Council shall be entitled to disclose to third parties any and all terms and conditions of the Agreement and the contents of any documents and information relating to this Agreement pursuant to the Freedom of Information Act 2000 ("FIOA") or Environmental Information Regulations 2004 ("EIR").
- 65.5 Notwithstanding anything contained elsewhere in this Agreement, the provisions of this Clause 65 shall survive the termination or expiry of this Agreement

66. FREEDOM OF INFORMATION

- 66.1 The Trust acknowledges that the Council is subject to the requirements of the FOIA and the EIR and shall assist and cooperate with the Council to enable the Council to comply with their Information disclosure obligations.
- 66.2 The Trust shall:
- 66.2.1 inform anyone who lodges an Request for Information direct with the Trust that the Trust is not subject to the FOIA and the request should be made direct to the Council;
- 66.2.2 notwithstanding clause 66.2.1, transfer to the Council all Requests for Information that it receives as soon as practicable and in any event within two (2) Working Days of receiving a Request for Information; and
- 66.2.3 where the Information requested is held by the Trust on behalf of the Council, provide the Council with a copy of all Information in its possession or power in the form that the Council, acting reasonably, requires within five (5) Working Days (or such other period as the parties may agree) of the Council's request.

- 66.3 The Council shall be responsible for determining in its absolute discretion and notwithstanding any other provision in this Agreement or any other agreement whether the Commercially Sensitive Information and/or any other Information is exempt from disclosure in accordance with the provisions of the FOIA or the EIR.
- 66.4 In no event shall the Trust respond directly to a Request for Information unless expressly authorised to do so by the Council.
- 66.5 The Trust acknowledges that (notwithstanding the provisions of Clause 66.2) the Council may, acting in accordance with the Department of Constitutional Affairs' Code of Practice on the Discharge of Functions of Public Authorities under Part 1 of the Freedom of Information Act 2000 (the "FOIA Code"), be obliged under the FOIA, or the EIR to disclose information concerning the Trust:
- 66.5.1 in certain circumstances without consulting the Trust; or
- 66.5.2 following consultation with the Trust and having taken their views into account;
- provided always that where Clause 66.2 applies the Council shall, in accordance with any recommendations of the FOIA Code, take reasonable steps, where appropriate, to give the Trust advanced notice, or failing that, to draw the disclosure to the Trust's attention after any such disclosure.
- 66.6 The Trust shall ensure that all Information is retained for disclosure and shall permit the Council to inspect such records as requested from time to time.
- 66.7 The Trust acknowledges that the Commercially Sensitive Information listed in Part 2 of Schedule 15 is of indicative value only and that the Council may be obliged to disclose it in accordance with Clause 66.5.

67. CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

- 67.1 No person who is not a party to this Agreement shall have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.
- 67.2 Nothing contained in **Clause** 67.1 shall affect any right or remedy of any third party which exists or is available other than under the Contracts (Rights of Third Parties) Act 1999.

68. COUNTERPARTS

- 68.1 This Agreement may be executed in any number of counterparts, and by the different parties in different counterparts, each of which when executed and delivered is an original but all such counterparts shall be deemed to constitute one and the same instrument.

69. NOTICES

- 69.1 Any notice or other communication given under this Agreement shall be in writing and signed by or on behalf of the party giving it and shall be served by delivering it by hand or sending it by pre-paid recorded delivery or registered post to the party due to receive it, at its address set out in this Agreement or to such other address as is last notified in writing to the party for such purpose.

- 69.2 In the absence of evidence of earlier receipt any notice given pursuant to this **Clause** shall be deemed to have been received:
- 69.2.1 if delivered by hand, at the time of actual delivery to the address referred to in Recitals 1 and 2 of this Agreement ;
- 69.2.2 in the case of pre-paid recorded delivery or registered post, two Business Days after the date of posting; and
- 69.2.3 in the case of registered airmail, five Business Days after the date of posting.
- 69.3 If deemed receipt under **Clause** 69.1 occurs before 9:00 am on a Business Day, the notice shall be deemed to have been received at 9:00 am on that day. If deemed receipt occurs after 5:00 pm on a Business Day or on any day which is not a Business Day, the notice shall be deemed to have been received at 9:00 am on the next Business Day.
- 69.4 For the avoidance of doubt, notice given under this Agreement shall not be validly served if sent by e-mail.

70. COSTS

Except where this Agreement or the Novation Agreement provides otherwise each party shall pay its own costs relating to or in connection with the negotiations, preparation, execution and implementation by it of this Agreement.

71. NO PARTNERSHIP OR AGENCY

None of the provisions of this Agreement and no action taken by the parties under this Agreement shall constitute or be deemed to constitute a partnership or a relationship of principal and agent or any other fiduciary relationship and neither party has authority to bind the other in any way.

72. DISPUTE RESOLUTION

If any dispute or difference arises out of or in connection with this Agreement the procedure for dispute resolution set out in **Schedule** 14 hereto shall take effect.

73. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with English law and the parties hereto hereby submit to the non-exclusive jurisdiction of the English Courts, in respect of any dispute arising from this Agreement or its subject matter.

AS WITNESS whereof the duly authorised representatives of the parties hereto have signed and delivered this Agreement as a Deed the day and year first before written.

THE COMMON SEAL of
**TONBRIDGE & MALLING BOROUGH
COUNCIL**

was duly affixed to this Agreement in the
presence of :

.....
Authorised signatory

.....
Print name

EXECUTED AS A DEED by
TONBRIDGE & MALLING LEISURE TRUST
Acting by two directors or one director and the
company secretary

.....
Director

Print
name.....

.....
Director/Secretary

.....
Print name

SCHEDULE 1
SERVICE OUTPUTS

**SCHEDULE 2
MINIMUM OPENING HOURS**

Facility	Weekday	Saturday	Sunday	Bank Holiday

**SCHEDULE 3
CORE PRICES**

SCHEDULE 4
ANNUAL SERVICE PLAN CONTENTS

SCHEDULE 5
ANNUAL SERVICE PLAN 2013 - 2015

SCHEDULE 6
BUSINESS PLAN 2013 - 2018

SCHEDULE 7
REPAIR AND MAINTENANCE MATRIX

SCHEDULE 8
PPM PROGRAMME

**SCHEDULE 9
CAR PARKING ARRANGEMENTS**

SCHEDULE 10
CAPITAL RENEWALS SCHEDULE

SCHEDULE 11
SERVICE FEE

SCHEDULE 12
GAIN SHARE

SCHEDULE 13
FORMAT FOR REPORTS

SCHEDULE 14
PROCEDURE FOR DISPUTE RESOLUTION

Escalation Process

- 1.1 Nothing in this Dispute Resolution Procedure shall prevent the parties from seeking from any court of the competent jurisdiction an interim order restraining the other party from doing any act or compelling the other party to do any act.
- 1.2 The Trust Officer and the Council shall attempt in good faith to negotiate a settlement to any Dispute between them arising out of or in connection with the Agreement within fifteen (15) Business Days of either party notifying the other of the Dispute such efforts shall involve the escalation of the Dispute as follows:
- The Trust's Contract Manager and the Council's Authorised Officer
 - The Trust's Chief Executive and the Council's Corporate Director

Structured Dispute Resolution

- 1.3 If the Dispute cannot be resolved by the parties pursuant to paragraph 1.2 the Dispute shall be referred to mediation pursuant to the procedure set out in paragraph 1.5 unless either party acting reasonably considers that the Dispute is not suitable for resolution by mediation.
- 1.4 The performance of the Agreement shall not be suspended, cease or be delayed by the reference of a Dispute to mediation and each party shall comply fully with the requirements of the Agreement at all times.
- 1.5 The procedure for mediation and consequential provisions relating to mediation are as follows:
- 1.5.1 a neutral adviser or mediator ("**Mediator**") shall be chosen by agreement between the parties or, if they are unable to agree upon a Mediator within ten (10) Business Days after a request by one party to the other or if the Mediator agreed upon is unable or unwilling to act, either party shall within ten (10) Business Days from the date of the proposal to appoint a Mediator or within ten (10) Business Days of notice to either party that he is unable or unwilling to act, apply to the Centre for Effective Dispute Resolution ("**CEDR**") to appoint a Mediator.
- 1.5.2 The parties shall within ten (10) Business Days of the appointment of the Mediator meet with him in order to agree a programme for the exchange of all relevant information and the structure to be adopted for negotiations to be held. If considered appropriate, the parties may at any stage seek assistance from CEDR to provide guidance on a suitable procedure.
- 1.5.3 Unless otherwise agreed, all negotiations connected with the Dispute and any settlement agreement relating to it shall be conducted in confidence and without prejudice to the rights of the parties in any future proceedings.
- 1.5.4 If the parties reach agreement on the resolution of the Dispute, the agreement shall be reduced to writing and shall be binding on the parties once it is signed by their duly authorised representatives.

- 1.5.5 Failing agreement, either of the parties may invite the Mediator to provide a non-binding but informative opinion in writing. Such an opinion shall be provided on a without prejudice basis and shall not be used in evidence in any proceedings relating to the Agreement without the prior written consent of both parties.
- 1.5.6 If the parties fail to reach agreement in the structured negotiations within ten (10) Business Days of the Mediator being appointed, or such longer period as may be agreed by the Parties, then any Dispute may be referred to the Courts or appropriate external body.

SCHEDULE 15

**PART 1
CONFIDENTIAL INFORMATION**

**PART 2
COMMERCIALLY SENSITIVE INFORMATION**

SCHEDULE 16
UTILITIES COST SHARING