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DOVER DISTRICT COUNCIL

APPENDIX TO JOINT REPORT OF THE CHIEF EXECUTIVE (HEAD OF LEGAL SERVICES), THE DIRECTOR OF PLANNING AND TECHNICAL SERVICES AND THE DIRECTOR OF FINANCE AND CENTRAL SUPPORT

LEISURE FACILITIES MANAGEMENT LIAISON GROUP - 27 MARCH 2001
 CABINET - 27 MARCH 2001
 POLICY AND SERVICES COMMITTEE - 27 MARCH 2001

REPORT OF LÉONIE COWEN & ASSOCIATES REGARDING TRANSFER OF LEISURE FACILITIES TO VISTA LEISURE

Purpose of Report

This Report sets out legal advice confirming that a final decision to transfer the Council's leisure facilities to Vista Leisure would be legally sound.

Background

1. The Council has already resolved in principle to transfer its two leisure centres to a non-profit-distributing organisation which would provide recreational facilities at the centres with the assistance of a financial contribution from the Council. Progress has been reported from time to time to the Leisure Facilities Management Liaison Group and there is therefore no need to set out the progress of this matter in detail.
2. A new company, Vista Leisure, which is a non-profit-distributing company limited by guarantee with wide charitable recreational, leisure and other objects was formed by its shadow board of Trustees (as such directors of charities and other non-profit-distributing bodies are often known) on 29 January 2001 with a view to taking a transfer.
3. The Council's officers and ourselves have been having detailed discussions with the Trustees of Vista Leisure and their own solicitors in recent months with a view to agreeing the terms of the documents and ensuring that Vista will be ready to take a transfer on 1 April and run the facilities thereafter. Vista have appointed their own independent solicitors and have had some independent commercial advice to ensure that the discussions have been appropriately at arms length.

Léonie E. Cowen
 Accredited Mediator
 Andrew J. S. Riddell
 Consultant

4. Agreement has now been reached on the principles underpinning the transfer and on the documents. There are some matters which will need to be considered by the Council as the Trustees would like assurances on a number of issues. These are set out below in the section Issues raised by Vista.

Legal Issues & Structure of the Transfer

5. Local authorities functions in relation to recreation are set out in Section 19 of the Local Government (Miscellaneous Provisions) Act 1976. An authority may either provide services and facilities directly under Section 19(1) or can contribute by way of grant or loan to the expenses incurred or to be incurred by a voluntary organisation in the provision of such services as provided in Section 19(3).
6. Vista falls within the definition of a voluntary organisation and it is the latter sub-section which empowers the proposed financial support to Vista.
7. The Council will need to satisfy itself that the proposed transfer and financial support is for a proper purpose (i.e. that their primary objective is to secure the continuation of recreational services, albeit in a more tax-efficient manner).
8. The Council will lease the two leisure centres to Vista for ten years for a peppercorn rent. The terms of the lease are tailored to take ensure VAT-efficiency and to reflect the fact that Vista is a new organisation with no expertise in property management nor independent financial resources. Hence, the Council has retained responsibility for the structure of the buildings and major repairs (both to the structure of the centres and as to plant and equipment), and Vista is not obliged to maintain the centres in a better condition than that in which it took them. In addition, recognising that either party's circumstances might change and to take account of the discretionary nature of recreation provision, there are appropriate mutual break provisions. The user clause allows the centres to be used for accessible and affordable recreation, sport or leisure and there is a limited right to sub-let areas other than any swimming pool, sports hall, squash court, fitness suite or (at Deal only) tennis centre. This latter was at the express request of the trustees who want to be able develop the business whilst recognising that this cannot be done at the expense of the core activities. In addition, Vista will be allowed to contract out catering at the centres (so long as this is not done by way of a lease. The plant and equipment at the centres is included in the leases and is itemised in an inventory.
9. Once the new 'dry side at Tides Leisure Centre has been built, it too will be leased to Vista on similar terms to the other leases. The Council and Vista will enter into an Agreement for Lease in respect of this additional property at the same time as entering into the other documents in order to establish the commitment. The agreement will be conditional on the 'dry side' actually being built (as to which the Council is under no obligation to Vista).
10. It is necessary to enable the break clauses to operate as intended that Vista not have security of tenure under the Landlord and Tenant Act 1954, and this is achieved by obtaining court orders before the leases are entered into. However, these cannot be obtained before 1 April. It is therefore proposed that Vista be granted 5 month leases (which do not confer security of title) on 1 April with the parties co-operating in obtaining

court orders and entering into the 10 year leases as soon as practicable thereafter. The 10 year leases will run from 1 April 2001.

11. Members will remember that it was originally intended to lease or licence the car parks at Tides. After further consideration (in conjunction with the Council's officers) we all agreed that this would not be sensible as this car park is covered by an off-street parking places order and there would be complications enforcing the order if the car park is leased or licenced to a third party.
12. We have considered the provisions of Section 123(1) of the Local Government Act 1972. This provides that an authority can only dispose of property for a period of seven years or more at the best price reasonably obtainable, unless there is either a General or specific consent by the Secretary of State. In this instance, as the leisure centres can only be run with financial support from the Council, we agree with the Council's Valuer that a disposal at a peppercorn rent would meet the Section 123 test of disposal for best consideration. This is consistent with the view taken in other transfers.
13. In addition to the two leases, there will be a funding agreement in accordance with Section 19(3). This is an agreement which provides for Vista to be paid the sum of £130,000 for the 2001/2 Financial Year in equal quarterly instalments. This sum is thought by the Council's officers to be sufficient for Vista meet the provisions set out in Vista's Approved Business Plan (which is to be annexed to the funding agreement) though this is questioned by Vista, who are concerned that the amount may be insufficient (see below). There is provision in the agreement for in-year variations and the document also anticipates that Vista will apply for funding for the next Financial Year with a sensible time table set out for this which is consistent with the Council's own decision-making processes. The purpose of the grant funding is set out namely to deliver recreation and other leisure services at the centres in accordance with the Council's Recreation Strategy Action Plan for 2001/2 in accordance with the principles of best value. Vista and the Council will work together to formulate methods of measuring this and keeping appropriate performance indicators.
14. There is also to be a formal Transfer Agreement which deals with the arrangements for the transfer of staff and a number of other ancillary matters. As, apart from the staff, there is to be no actual business transfer, we have agreed with Vista's solicitors that this should be recited at the beginning of this document.
15. The structure of the transfer and the documents supporting it take account of the Advice given to external auditors by the Audit Commission on these matters. The Audit Commission are concerned to ensure that authorities transfer leisure and recreation services for proper purposes (i.e. primarily operational and not financial) and do not fetter their long-term discretion by the terms of the transfers and Members will appreciate from this report that these matters are reflected in this transfer.

Issues Raised by Vista

16. The Trustees have taken their prospective responsibilities very seriously. They have been very aware that they are new to the leisure and recreation business and are seeking assurance from Council Members on a few, but significant, matters.

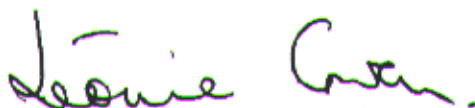
17. There are four of these, reconsideration of the level of funding support in the autumn of 2001, confirmation of financial support in the event of an unexpected employee risk, confirmation of support by way of increased security of tenure if required by a grant-provider and confirmation of likely funding position after the first year.
18. The Trustees consider that the proposed funding support of £130,000 is likely to be insufficient and sought £165,000. The Council's officers recognise that in the context of a total revenue spend of in the order of £1,400,000, a difference of £35,000 is at the budgetary margin, but nevertheless are of the view that £130,000 is likely to be sufficient revenue support in the first year. Taking into account the Council's financial position and the wording of Section 19(3), the Director of Finance is unwilling to recommend a different figure. However, it is accepted by the officers and by ourselves that the true position will not be known until Vista start trading. Hence, we consider it is entirely appropriate for the Council to review the position in the Autumn (should the Trustees consider that the sum of £130,000 is inadequate) with a view to agreeing any requisite additional sum on the basis of a substantiated commercial need. The precise timing of the review should depend upon circumstances. In view of the Trustees' prudent commercial need to ensure that the company trades solvently, we recognise the validity of the Trustees' concerns.
19. With regard to the possibility of staff claims, there is always a potential risk for a new employer in a TUPE transfer and although we do not know of any actual significant claims and we have recommended the Trustees take out legal expenses insurance, nevertheless they originally sought an indemnity against future employee claims. We explained that, in our view, the giving of such an indemnity is outside the Council's powers, but we could recommend that the Council gives a non-binding assurance that they would be likely to give favourable consideration to an additional grant if such a circumstance occurs, subject to the Trustees doing their best to limit the size of their liability. It should be appreciated that if the Council had taken the services back in-house or re-tendered, they would have retained such a risk and in the circumstances, we consider the Trustees' position is reasonable.
20. The third request relates to the possibility of a longer or more secure lease being required if this is necessary to obtain a grant. We and the Council's officers have explained that it is likely any grant-giver would require confirmation of the Council's support and it may well be the Council (as freeholder) who makes the application and/or agrees to abide by grant conditions relating to long-term use of the premises in question, particularly if the application is for a major capital grant. Whilst the Council cannot pre-judge its decision, as this matter would need to be fully considered at the time an application is made, if the Council supports the application then it follows the Council would agree to do anything reasonably necessary to obtain the grant money including extending the lease or changing its terms.
21. The last request relates to future year funding. We have explained that the Council cannot fetter its future discretion on funding, but, taking into account our understanding of the Council's acknowledged commitment to the future provision of leisure, recreation and sport, which we believe you consider very important, there is no current intention or wish to avoid future year commitments. We have re-assured the Trustees that we will seek your express confirmation that this is the position and that the Council would not have gone to

all of the trouble and expense of carrying out this project unless you anticipated wanting to enter into a long term commitment with Vista.

22. We would recommend giving assurances to Vista in the terms set out above and would like to add that both the officers and ourselves have all been impressed by the tremendous dedication shown by the Trustees, whom Members will appreciate are all unpaid volunteers. The Trustees have spent a considerable amount of time and energy in considering the issues and in finalising their own business plan for the coming financial year and their concerns are entirely reasonable within the context of their acknowledged desire to make a success of their venture.

Recommendations

23. That the Council transfer its two Leisure Centres to Vista and enter into the Leases, Funding Agreement and Transfer Agreement and give the assurances as set out in this report.



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21 March 2001



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20 March 2001

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Dear Sirs

**Dover District Council and Vista Leisure – Transfer of Leisure Services
Indemnity in respect of staff claims**

Our clients have asked us to write formally to you following the decision by the Council that they cannot grant our clients an indemnity in respect of TUPE claims.

As you know, there has been virtually no information forthcoming in respect of the staff or staff matters and our clients feel very strongly that they should be indemnified in respect of any claims arising from the Transfer of Undertakings Regulations.

You had recently suggested that insurance may offer a degree of comfort but our clients have investigated this and found that their insurers will not consider providing cover for such claims.

Our clients have asked us to point out to you that they are proceeding with the Transfer of Leisure Services on the understanding that, if any substantial claim is made as a result of the Transfer of Undertakings Regulations applying to them, they will be looking to the Council to cover their costs in respect of such claims.

Yours faithfully

Mowll & Mowll

cc Rodney Stone – Vista Leisure

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