

CABINET	AGENDA ITEM No. 5.1
12th October 2009	PUBLIC REPORT

Cabinet Member(s) responsible:	Councillor Matthew Lee (Cabinet Member for Environment Capital and Culture)	
Contact Officer(s):	Kevin Tighe, Head of Culture	Tel. 863784

CULTURE TRUST

R E C O M M E N D A T I O N S	
FROM : Councillor Matthew Lee, Cabinet Member for Environment Capital and Culture)	Deadline date : N/A
<p>1. To give authority to the Director of Operations to commence the process of establishing a not-for-profit distributing organisation (a 'trust') subject to appropriate consultation with staff and the agreement of a detailed business plan.</p> <p>2. To approve the inclusion of the following services within the scope of this work: Arts (including the Key Theatre and Gallery), Heritage (including the Museum), Library (all existing services) and Sports Services (all existing services).</p> <p>3. To approve a detailed full options appraisal of bereavement services (including the crematorium), to identify the optimum way of delivering this service.</p> <p>4. To agree to the formation of a shadow board as part of the process of establishing a not-for-profit distributing organisation (a 'trust').</p>	

1. ORIGIN OF REPORT

- 1.1 This report has been requested by the Cabinet Member for Environment Capital and Culture.

2. PURPOSE AND REASON FOR REPORT

- 2.1 To update Cabinet on the work undertaken to date to explore the formation of a trust for the delivery of cultural services and to seek agreement to proceed with further work to create such a trust, including formal consultation with staff and the development of a business plan.

This report is for Cabinet to consider under its Terms of Reference No. 3.2.4 To promote the Council's corporate and key strategies and Peterborough's Community Strategy and approve strategies and cross-cutting programmes not included within the Council's major policy and budget framework.

3. TIMESCALE

Is this a Major Policy Item/Statutory Plan?	NO
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4. A CULTURE TRUST

- 4.1 There are a number of different ways the Council could deliver and develop cultural services. The optimum delivery method for Peterborough has been the subject of consideration since the Council's Best Value review in 2004. Key to this review was a study by KPMG (2005) which was enhanced by a report produced by Deloitte in October 2006. This work has recently been refreshed by leading leisure trust solicitors Lawrence Graham.
- 4.2 These reviews considered, amongst other options: in-house delivery, tendering for a commercial operator, a mixed approach to delivery of services and the formation of a trust. The first two reports focused on key evaluation criteria including: enhancing quality of service, promoting Peterborough, improving levels of participation and value for money. Their conclusion was that a trust would provide the best delivery option to meet the Council's aspirations. The work of Lawrence Graham has re-confirmed the suitability and deliverability of this option. The executive summary of Lawrence Grahams review is attached as appendix 1.
- 4.3 The Audit Commission in its report 'Public Sport and Recreation Services' notes that trusts are performing at the same level as local authority in-house teams; but at a significant reduced cost. The same report notes the worst performing authorities are those which have adopted the 'mixed economy model' with both in-house and private sector management; Peterborough City Council currently has this approach. The broad message is that it is possible that if Peterborough City Council were to move away from its current model, participation rates could improve and costs reduce.
- 4.4 As with all management options there are advantages and disadvantages in delivering services through trust status. Advantages might include:
- Speed of decision-making compared with local government requirements may mean that facilities and services can be operated with greater financial and management autonomy, enabling them to respond to market changes and remain competitive;
 - There is an opportunity to harness public and private expertise on the board of the trust. Whilst democratic control of the activity through the local authority may be lost, community involvement in strategic decision-making can be a significant advantage;
 - A management team that is able to operate more commercially;
 - There is an undisputed fiscal advantage presented by trusts. Most trusts seek charitable status and charities are entitled to mandatory rate relief of 80% from national non-domestic rates (NNDR) and can apply for discretionary relief for the remaining 20%. Trusts operating sports facilities are exempt from VAT on entrance fees for sporting activities and there are a number of 'VAT breaks' for voluntary bodies generally. The savings calculated for the services propose are set out in paragraph 11 and is £396,703 for NNDR. Lawrence Graham estimate additional savings in excess of £75,000 from having a more favourable VAT position. In moving forward with a trust there is a net savings from these two elements calculated as approximately £471,000.
- 4.5 The disadvantages linked to strategic management of trusts are:
- Loss of integration with other Council services and the local authority can become 'divorced' from the leisure/culture service;
 - The Council will have less direct control than at present; charitable trusts must be independent and the trustees must be able to act at their discretion;

- Ongoing commitment and obligation of the Council to support the trust through grants and other financial assistance, less flexibility to amend financial investment in cultural activities than if they remained within the Council
- If, as is usual, the trust is set up as a charity, then it can only act within its objectives which cannot be altered without the Charity Commission's consent;
- The administration of the charity in itself may prove burdensome; bearing in mind the obligations imposed by legislation such as the 1985 Act and the 1993 Act.

5. CONSULTATION

- 5.1 On the 11 February 2009, the Community Development Scrutiny Panel explored the principle of all of the Council's cultural services being delivered through a trust. The delivery of bereavement services through a trust was given specific scrutiny by Members of the Panel. In addition, the Strong and Supportive Communities Scrutiny Committee received an update on the 10 September 2009 on the work undertaken to explore the formation of a trust.
- 5.2 On the 10 June 2009 the Business Transformation Savings Board approved the content of a business case to create a trust should Members wish to proceed with the recommendation of this report.
- 5.3 Further consultation is envisaged including formal staff consultation over the potential transfer to a trust under The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

6. ANTICIPATED OUTCOMES

- 6.1 It is anticipated that a further report will be presented to Cabinet in February 2010. This report will include the outcome of formal staff consultation on the principles of transferring staff to the trust, and a proposed business plan for the culture trust. It will also include detailed information on the impact on the Council of a transfer to a trust, including the expected cost of ongoing financial support, and also the impact on other Council support services.
- 6.2 The business plan will cover all of the key issues relevant to forming and delivering a culture trust including:
- objectives of the trust
 - portfolio of activities to meet objectives
 - enhancement of current performance initiatives
 - new development opportunities
 - organisational structure
 - financial forecasts for the new organisation
 - risk management
 - a business transition plan.
- 6.2 In order to develop a business plan for the culture trust, it is essential that the principles within the plan are tested not only by the Council but also by the people who would become part of any trust that may be formed. In order to do this, it is proposed to form a shadow trust. The shadow trust will initially have no legal identity or assets. It will, however, play a vital role as a "touch-stone" to key issues as the business plan emerges.
- 6.3 There are six officer task and finish groups working on the delivery of this business plan and other related activities; a high level time-table of their work is set out in Appendix 2.

7. REASONS FOR RECOMMENDATIONS

- 7.1 The reason for this recommendation is to improve service delivery and efficiency of cultural services in Peterborough.

8. ALTERNATIVE OPTIONS CONSIDERED

- 8.1 In July 2005 KPMG concluded a study which explored a range of options for the then Culture and Recreation Services section of the Council. This review covered in-house delivery, tendering for a commercial operator, a mixed approach to delivery of services and the formation of a trust. This study was followed up in October 2006 by a review by Deloitte which considered the same options. The studies concluded that the optimum way of delivering the kind of cultural services desired by Members was through a trust. Both the KPMG study and the Deloitte study was reviewed by leading leisure trust solicitors Lawrence Graham; their conclusion, following a review of the services, was that the delivery of services through a trust remained the optimum way of delivering those services.

- 8.2 One option considered and discounted at this stage is the inclusion of bereavement services within the trust. The primary reasons for this are as follows:

- while there are clear synergies between art, heritage, library and sport (each of these having a link to people's leisure interests and lifestyles) there is not a natural fit with bereavement services
- there are some limited financial advantages to be obtained by moving bereavement services into a trust, however it is questionable on whether business rates would be recoverable as crematorium services are not considered as charitable.

It is proposed that a separate piece of work is undertaken to fully explore all future options for bereavement services and this work will influence the final decision on whether or not this should be included in any trust.

9. IMPLICATIONS

- 9.1 The implications for the Council are wide spread. The Council's legal, financial, property, human resources, information technology and communications teams are key players in the project team that has been exploring and will be perusing the formation of the trust. The following issues are pertinent to each of these disciplines.

10. LEGAL

- 10.1 The Council has both general powers (Section 2 of the Local Government Act 2000) and specific powers (Section 19(3) of the Local Government (Miscellaneous Provisions) Act 1976) to support the proposed initiative. Section 19(3) of the 1976 Act specifically permits the Council to provide indoor and outdoor leisure facilities and to contribute by way of a grant towards the costs incurred by a voluntary organisation providing such facilities (and so can be relied on to enable the Council to enter into a grant funding arrangement to a trust), it does not provide a sufficient legal basis for other aspects of the initiative - most particularly the promotion of the trust and the provision of any support services to a new trust.
- 10.2 It will, therefore, be necessary to rely on Section 2 of the 2000 Act in addition to Section 19 of the 1976 Act. The recent case of Risk Management Partners Ltd v. Brent London Borough Council and Others (2008) (the "Brent Case") considered the extent and use of Section 2 powers.

- 10.3 Section 2 provides that a local authority has the power to do anything which it considers is likely to achieve any one or more of the following objects:
- the promotion or improvement of the economic well-being of their area;
 - the promotion or improvement of the social well-being of their area; and
 - the promotion or improvement of the environmental well-being of their area.
- 10.4 While Section 2 provides a robust statutory basis for the current proposals, it is essential that:
- the Council can demonstrate that its use of Section 2 powers in relation to this initiative is consistent with the objectives of the Sustainable Community Strategy;
 - the Council is satisfied that the initiative is likely to promote the well-being of its area or its inhabitants and specifically that it will promote one or more of the three objects in the 2000 Act; and
 - the primary purpose of the initiative is not to raise money and that the action is not explicitly prohibited on the face of other legislation.
- 10.5 When Cabinet is asked to make a final determination on whether or not a trust should be formed, expected to be in February 2010, there will be full consideration of whether it is appropriate to use Section 2 “well-being” powers.
- 10.6 It is proposed to create a ‘shadow’ board with eleven members prior to the creation of a trust as a board will be required to make decisions relating to the establishment of the trust and to the contractual arrangements between the Council and the trust before the trust itself is created. It is proposed that two councillors will be members of the shadow board and local advertisements will then be placed for the remaining members of the shadow board. All suitable applicants will then be interviewed by a panel, including the two councillors, then a selection made. The principle of drawing in shadow board members through nomination also remains an option. The shadow board members will be appointed and complete an induction before becoming involved in the formation of the trust.
- 10.7 It is proposed that membership of the Board will be voluntary and that Board members will not, therefore, receive payment for acting in their capacity as trustees. A trustee will not be allowed to make any profit as a result of his position as a trustee nor will a trustee be allowed to enter into any contract with the trust to provide services to the trust for profit.
- 10.8 The Council’s Legal Services team will form a key part of the project team that establishes the trust in addition to the specialist legal advice provided by Lawrence Graham solicitors bought in to support this process.

11. FINANCIAL

- 11.1 Detailed financial implications of forming a trust have been included in the report produced by Consultants Lawrence Graham and this includes an analysis of the benefits and costs associated with forming a Non-Profit Distributing Organisation (NPDO). The main issues relating to this are the extent of the services transferring into a new organisation, in terms of their financial make up, the costs of setting up and supporting a NPDO and the benefits arising from the Business Rate (NNDR) relief available and the complicated arrangements around VAT that could be used to the NPDO’s advantage. However, there are issues for the Council in relation to the extent of the NNDR relief that can be given and the arrangements that need to be put in place to enable VAT implications to be favourable to the NPDO overall.
- 11.2 A detailed financial breakdown of all of the services identified as potentially transferring into a NPDO was provided to the Lawrence Graham which identified the total expenditure and income budgets of all of the services and an analysis of the Corporate recharges that are borne by these services currently. Total expenditure of £8.711m is offset with income and grants totalling £2.781m leaving a net operating budget of £5.93m. In addition there are costs of Corporate services such as Legal, HR, Finance etc amounting to an additional

£1.468m of expenditure relating to these services. The question of whether or not the NPDO 'buys back' all or some of the Corporate services and the financial implications of those decisions will need to be considered as part of the Business Planning process. It is likely however that any decision not to continue with in house support services will have detrimental financial implications on the Council both in terms of 'lost' revenue and in potential redundancy costs etc.

- 11.3 An analysis of the NNDR costs indicates that there is a total NNDR liability currently of £466,710 on the premises occupied by the services identified as potentially transferring into a NPDO. Current legislation within Section 43 and 44 of the Local Government and Finance Act 1988 for eligible charitable organisations allows for 80% of these costs to be Mandatory relieved. Therefore there would be a minimum reduction in current costs of the services amounting to £373,368. However, Section 47 of the above Act gives a Local Authority discretionary powers to grant additional relief up to the full 100% of the NNDR charge. However of this additional 20% relief 75% is funded by the Local Authority and only 25% picked up from the NNDR pool. Therefore if 100% relief was granted the total saving that would accrue to the Council and the NPDO combined would be 85% of the total NNDR liability – i.e. the full 80% plus a quarter of the remaining 20%. This would then amount to a total reduction in NNDR liability of £396,703. This will become an annual saving. The issue of whether the Council or the NPDO benefit from this reduction will need to be considered in the light of the Council's financial position and the funding required by the NPDO to fulfil its objectives contained within its Business Plan.
- 11.4 Far more complex is the subject of VAT and the benefit the Council enjoys of its Partial Exemption status in relation to the full recovery of all Input Tax. There is a complicated calculation involved in ensuring that the Council continues to enjoy these benefits due to the amount of exempt activity it undertakes. In moving services both in and out of the Council a movement of tax liability has the ability to amend this calculation to such an extent that the Council may lose its Partial Exemption Status. Should that happen then the Council would be unable to recover any input tax in relation to exempt activity and the financial implications would be extremely serious. It should be noted that transferring services into a trust would improve the Council's Partial Exemption position with regard to VAT. The Council is currently running at between 3.5% and 4%. Breaching the Partial Exemption limit would cost the Authority around £1 million, moving services into a trust would help reduce the likelihood of such a cost being incurred.
- 11.5 This issue will need to be revisited during the completion of a business plan which will need to consider how the Trust and the Council operate in partnership in order to ensure that the VAT benefits are maximised.
- 11.6 As mentioned within the HR section of this report there will be a financial implication in respect of the need to ensure that employees are provided with the same or broadly comparable pension rights prior to any TUPE transfer. This will require an actuarial assessment of the Pension Fund liability for future pension costs of the transferring employees. The actuarial assessment will indicate the percentage rate to be applied for the employer's contribution which will need to be met by the NPDO. This will be different to the rate currently paid by the Council due to the fact that there are fewer employees in the total calculation and the likelihood that the age profile will be different to that of the total numbers of Council employees. In addition there is likely to be a requirement by the Cambridgeshire Pensions Authority for a guarantors bond in respect of the risk that the new organisation may fail to meet its obligations. The value of both the employer's rate and the bond are still unknown and will need to be taken into account during the completion of the business plan.
- 11.7 In addition, there is the issue of set up costs and the issues surrounding accommodation and facilities. Both of these will require both revenue and capital expenditure and a plan of action over the next few weeks and months will need to identify the totality of these and the availability of funding. The cost of these items has not been finalised. However, it is unlikely that any additional revenue or capital requirement for the formation of the trust will be significant. Once again, the Business Planning process will need to identify these and decisions will need to be made on how this is moved forward.

- 11.8 Finally Members will wish to note that creating a trust will bring advantages and disadvantages in relation to longer term financial planning. If a medium term business plan is agreed, then the Council will lose a degree of 'manoeuvrability' on how its budgets are utilised. However, this will be balanced by enhanced clarity on the cost of a specific service over that period.

12. HUMAN RESOURCES

- 12.1 The establishment of a trust as proposed will involve employees transferring under TUPE, thereby legally protecting their current contractual terms and conditions (pensions are dealt with below) and continuous service. To ensure a successful transfer under the relevant legislation, effective consultation with both Trade Union Representatives and staff will be required; it is proposed that this should be for a period of approximately three months. Employee representatives and staff have already been made aware of the feasibility study currently being undertaken.
- 12.2 The Council are currently working with Cambridgeshire County Council Pension Service to enable transferred staff to remain in the Local Government Pension Scheme; via an 'Admitted Body Status' pension scheme. This will ensure all employees retain existing pension benefits. The work with Cambridgeshire County Council remains on-going and employees will be kept informed of progress.

13. PROPERTY

- 13.1 It will be necessary to transfer assets to the cultural trust to enable it to deliver the services proposed. It is proposed that, in the majority of cases, the asset transfer will take the form of a lease. However, where the Council already leases in a property to support areas that will be transferred to the cultural trust, it may be necessary to consider some form of management agreement. This is because the assignment of the lease may be prohibited by the original agreement.
- 13.2 Key to the successful transfer of assets will be the assignment of liability. As the Landlord, the Council will retain certain liabilities which will be defined by the lease. It will then be the Council's legal duty to undertake these works as and when they are necessary. The Council will lose the flexibility of managing the programme for repair and maintenance obligations as currently enjoyed with operational property. The Council and the trust will need to work in partnership to ensure this does not become an issue.
- 13.3 A series of condition inspections are being undertaken at the present. The outcome of these will be used to inform the business case set out at paragraph 6 above and will clearly identify the future financial obligations both parties will have with regard to the assets. As part of this, a future work programme will identify works that need to be undertaken. This obligation can be built into the Council's Medium Term Financial Strategy.

14. INFORMATION TECHNOLOGY (ICT)

- 14.1 There are no immediate ICT implications emerging from this report. Members will wish to note that early consideration has already been given to the principle of the trust purchasing its ICT services through the Council via its Managed ICT Service Contract.

15. BACKGROUND DOCUMENTS

- 15.1 Lawrence Graham report into the formation of a culture trust for Peterborough.
15.2 KPMG study 2005

15.3 Deloitte study 2006