

**APPENDIX 4**  
**APPENDIX TO REPORT TO CABINET OF 13<sup>TH</sup> JULY 2016 ON THE FUTURE OF**  
**POOL PROVISION IN SHREWSBURY**

**CONFIDENTIAL AND PRIVILEGED LEGAL ADVICE FOR SHROPSHIRE**  
**COUNCIL**

**General introduction and advice sought**

1. I have been asked to provide brief and initial advice to the Council, which can be appended to the Report to Cabinet of 13<sup>th</sup> July on the future options for pool provision in Shrewsbury. At this stage, I have given initial consideration only to the issues so this advice is preliminary advice only.
2. The Council is committed to being open and I have therefore been asked to allow my advice to be public. I have agreed to this as the matters set out are part of the relevant considerations which the Cabinet will consider. There is an important caveat, the advice is given solely to the Council and not to any third party and should not be relied upon by any third party. Third parties should obtain their own legal and any other advice which they need.

**Legal background to the delivery of leisure facilities and services and other relevant law**

3. The Council provides and currently procures the delivery of its leisure centres pursuant to section 19 Local Government (Miscellaneous Provisions) Act 1976 supported by other later and general legislation. Provision of leisure services is discretionary. This means that unlike its core statutory services a local authority is not obliged to provide or support the provision of leisure services via a contract or otherwise.

**The Council's Fiduciary Duties**

4. At a time when local government is under increasing financial pressure, before entering into any new commitments for discretionary spend a local authority ought therefore to consider whether any such spend is prudent. Whether it is capital and revenue affordable are key relevant considerations.

5. The Council's financial position is materially worse than it was when the consultation regarding the future of swimming and associated leisure services in Shrewsbury was commenced in 2015 and I consider that is essential for Cabinet to recognise and take into account the financial realities at the time any decision is taken.
6. As part of its deliberations, the respective revenue and capital cost of each option together with its sustainability, in each instance evaluated over a similar period of time are critical factors.
7. The Council's current and likely further worsening of its financial position are strong arguments in favour of making an early decision to avoid the impact of inflation on the cost of implementing any decision.
8. Any option which the Council delivers will secure the continuation of swimming provision in Shrewsbury will incur significant spend. Any in principle and final decision ought to take account of and be consistent with the Council's strategies and policies supported by an analysis of the responses to the questions and supporting information identified in the consultation documents (as updated) and, of course, taking into account its financial position.

### **The Outcome of the Consultation and Alternative Approaches**

9. The response to the consultation is that each of the three Quarry options have overwhelming public support. However, the analysis carried out by Council officers and technical advisors recommend that the Shrewsbury Sports Village ("SV") is the preferred option. This is based on the options appraisals set out in the Report and its appendices.
10. Since the consultation closed, the Council has received a request or offers from two groups who each support the continuation of pool provision at the Quarry and who want to present further options which will support keeping swimming in the town centre.
11. These offers are set out at Section 8 of the Report so there is no need for them to be detailed any further in this advice. Neither offer is fully articulated at present and there is limited detail. It is to be assumed that if the Council indicates it is willing to consider these offers that further work will be carried out thereafter. I also understand

that Shrewsbury Town Council will continue to support an option which enables swimming to continue at the Quarry.

12. It is unclear why these offers have been made so long after the public consultation closed and why they were not made at an earlier stage in the process. It is also unclear how far these groups have developed these options, for example, by raising funds to further explore the options, support the development of a business case(s), business plan(s) or otherwise.
13. I have considered relevant recently reported decisions on the extent to which a local authority ought to consider third party proposals which, for example, would preclude the need to close libraries, when considering the outcome of a consultation process. The circumstances in the present instance are materially different to the libraries cases for a number of material reasons, one of which is that the services are already delivered by a third party contractor pursuant to an open market procurement, not in-house.
14. Nevertheless, although there are several material differences from the recent cases on consultation it does seem that the Council is being given the opportunity of considering alternative suggestions which could allow affordable and sustainable pool provision to continue at the Quarry if the groups are given the time and opportunity to develop their options and dependent on the outcome of this. The approaches put forward are in my view, consistent with the philosophy underpinning and the provisions of the Localism Act 2011 and the Council may consider that it is appropriate to allow these groups time to develop their offer(s), particularly as there is such strong community feeling about the retention of pool provision within the town Centre. The information and analysis set out in the Report together with the supporting documents provide the Council with sufficient information to take a decision in principle regarding the preferred location for the replacement of existing swimming provision in Shrewsbury but as the detailed further feasibility work has not been carried out, the Council is not in a position to make a final decision on the preferred option at the Cabinet in July.
15. There are a number of complex legal implications for the Council and these groups to consider and which will have to be further developed and considered thereafter if the

Cabinet approves the recommendation to allow the groups further time to develop their offers. Initial consideration suggests that the issues set out are relevant but further detailed advice is likely to be required in the future.

### **Implication of registration of Quarry as an asset of community value and section 123 Local Government Act 1972**

16. The Quarry has been registered as an asset of community value under the Localism Act 2011. Registration of an asset as an asset of community value is not directly relevant to the current consideration by the Cabinet of future provision of a pool in Shrewsbury. If the Quarry is not the preferred site and the Council wishes to sell the Quarry thereafter, there is an initial 6 week moratorium on any sale to allow a community group to ask to be treated as a potential bidder and if such a group expresses such an interest they have 6 months from then to put forward a formal bid.
17. There is no obligation to sell to such a group and at the end of the period a sale can continue in the usual way and the community group's bid would be considered as part of any such process.
18. There is further relevant legislation, section 123 Local Government Act 1972. This requires the Council to obtain the best consideration reasonably obtainable for the sale of a freehold or a long lease with some limited exceptions whereby an authority may agree to sell at an undervalue. The Council may sell at an undervalue of not more than £2,000,000 pursuant to a general consent from the Secretary of State provided that it considers the disposal will contribute to the promotion or improvement of the economic, social or environmental well-being of the Council's area. Alternatively, the Council may seek a specific consent if any disposal would be outside the terms of the general consent. However, the Council may take the view that any disposal for less than the best consideration is inappropriate in view of its financial position. A disposal at an undervalue is an exception to the general requirement to obtain best consideration.
19. In addition, state aid principles may well need consideration. With very limited exceptions and subject to financial trigger levels, these principles preclude the state (whether or not local or central government) from giving an advantage to one organisation which could distort competition. They are very wide and include giving

non-financial assistance.

20. Hence, if the Council does not wish to continue with commissioning leisure provision at the Quarry I envisage it may wish to consider whether or not to sell the site, for example, if it is considered surplus to requirements. If the Council does intend to sell the site it can consider whether to sell to a local community group and the terms of any sale. This is a future issue and is included for information at this stage.

### **Procurement and other legal implications of the offers in Section 8 of the report**

21. The law relating to public procurement has recently changed by virtue of the Public Contract Regulations 2015 and the Concession Contract Regulations 2016. The changes in the law are relevant to a consideration of what is being offered by the BID/Quarry group supported by Shrewsbury Town Council. At this stage as the offers identified in section 8 of the report are not specific I have simply set out some general principles.
22. If one of the options being put forward is an offer to contract with the Council and run the facility pursuant to a contract, it should be appreciated that the delivery of these leisure services is a concession contract and is governed by the 2016 regulations. This is because a significant amount of the contractor's income comes from the public and the contractor depends on this as a material part of the overall income. Concession contracts with a value to the concessionaire of (currently) just over £4,000,000 in total value during the contract period cannot be let without an open market procurement. The impact of the 2016 regulations would need to be considered and so would the impact of the Council's procedures for letting contracts. In view of the income generated each year at the Quarry, I have assumed that such an offer would be within this regulatory regime.
23. The Council procured its existing contract to provide its leisure centres including the Quarry after a rigorous, open market and transparent process. The contractual and procurement implications of any change of contractor or variation to allow a new contractor to contract with the current contractor would be complex and would preclude the Council from favouring one group over any other operator. The Council must treat each potential bidder equally and must take into account the principles of equal treatment, non-discrimination and transparency. Therefore, it would be

improper for the Council to give any group an advantage over another potential bidder. If financial support is offered by another contracting authority, such as the Town Council, this other contracting authority would be required to consider whether any such benefit breaches the rules precluding state aid.

### **The Requirement for the Council to Act Fairly**

24. This is a complex matter and there are a number of separate matters which the Council should take into account before taking a final decision on the preferred option. One of the issues is the proposed approach to the Council's proposed detailed work on the SV option. A second issue is how to ensure that any groups are given an appropriate level of information and support whilst at the same time ensuring that no individual group is given preferential treatment.
25. I consider that the Council ought not to give preferential support to any particular group or groups to avoid fettering its ability to take decisions in the future. This principle should be taken into account by the Council in future decision-making.
26. In order to do this and if the Cabinet resolutions on 13<sup>th</sup> July and at future meeting are in accordance with the recommendations to the meeting on 13<sup>th</sup> July, the groups identified in section 8 and any other groups who wish to put forward an option which will support future swimming in Shrewsbury should be given access to the information referred to in recommendation and to be further developed.
27. Whilst I do not consider it is appropriate for the Council to support and assist any individual group, I recognise that the Council may wish to explain the proposed process to the groups identified in section 8 and any other groups in further detail in due course. The detailed arrangements for informing the public can be agreed as part of the proposed future decision set out in recommendation C.

### **Léonie Cowen**

Léonie Cowen & Associates

6<sup>th</sup> July 2016