

APPENDIX 2
APPENDIX TO REPORT TO CABINET OF 28TH SEPTEMBER 2016 ON IMPROVED
SWIMMING PROVISION IN SHREWSBURY

CONFIDENTIAL AND PRIVILEGED LEGAL ADVICE FOR SHROPSHIRE COUNCIL

PART 1

General introduction and advice set out

1. I have been asked to provide advice which will be an appendix to the Report to Cabinet of 28th September on the above. In preparing this advice I have taken into account the decisions taken by the Cabinet on 13th July, officer recommendations in the 28th September report and the terms of reference in Appendix 1 of this report.

2. As the Council remains committed to being open I have been asked to allow this advice to be public. I have agreed to this as the matters set out are part of the relevant considerations for the Cabinet and will be relevant to the Council and any third parties who are preparing a business case for new pool provision. However, as before, 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 either for inclusion as part of their business case (if they consider it appropriate to include this) or otherwise. This advice should be read in conjunction with the advice included as an appendix to the 13th July Report as issues identified in that report have only been referred to and expanded upon to a limited extent.

3. This advice is intended to support the recommendations in this report and address the legal implications of the following matters in particular the:-
 - 3.1 decision of 13th July and recommendations in this report;

 - 3.2 options which are capable of being compliant with the requirements of paragraphs A, B and C of 1.3 of Appendix 1; and

3.3 business case process.

4. I have also attached a brief résumé of the relevant provisions of the Contract (as amended in 2015) as Part 2 of this advice.

The legal implications of the decision of 13th July and recommendations in this report

5. An explanation of the legal implications of the decision of 13th July are set out in the body of the report and take into account this legal advice so there is no need to repeat these.
6. I have given careful consideration to the recommended next steps as set out in this report and to whether there are any prudent alternative approaches to those as recommended in the report. I have concluded that in view of the careful and detailed options appraisal and evaluation which has been carried out by officers (supported by external advisors and reported to Cabinet on 13th July) the Council ought to decide on its indicative preferred option now for the reasons set out in the Report and in paragraph 7 of this legal advice. The recommended decision on the Council's indicative preferred option is not inconsistent with giving third parties an opportunity of submitting a business case for an alternative option for pool provision in Shrewsbury. In addition to the rationale for taking such a decision set out in paragraph 7 of this advice, stating an indicative preference will allow Interested Organisations to respond in their business cases to the identified benefits of the Shrewsbury Sports Village and seek to negate these.
7. Providing swimming provision by building at the Shrewsbury Sports Village is the only option which officers and advisors consider is likely to be able to meet the Council's four criteria and other requirements set out at Table 1 of Part 1 of the Terms of Reference (Appendix 1 to this report) and expanded on within Appendix 1. The recommendation that the Shrewsbury Sports Village should be agreed in principle as the preferred option takes into account the agreed criteria and all of the factors considered as part of the evaluation requirements. In particular the Council's current and likely future financial position has been taken into account. None of the other options are considered by

officers and advisors to be affordable or able to meet the criteria and requirements as effectively as the Shrewsbury Sports Village (or necessarily at all in some instances).

8. As identified, since the consultation closed, the Council's financial position has significantly worsened. The rationale behind the decision to give third parties an opportunity lasting 12 months to put forward alternative business plan proposals is understood, in view of the outcome of the public consultation, but from the information which I have seen there is a need to ensure that a provisional decision to support the Shrewsbury Sports Village is taken as early as possible so that a business case can be prepared for the Shrewsbury Sports Village in parallel with the work being carried out by external Interested Organisations to reduce the further delay in implementing the preferred solution. If this recommendation is not accepted, Cabinet ought to detail the reasons that it is rejecting the officer recommendation.

Options which it is recommended are capable of being compliant with the requirements of paragraphs A, B or C of 1.3 of Appendix 1

Introduction and general

9. At its meeting on 13th July, the Cabinet did not approve any preferred approach to the submission of business cases nor did it seek to limit the type of options which are submitted. The current report clarifies the recommendations made in July and as part of this recommends that the Cabinet should limit the number of business case options which will be considered compliant. There are a number of specific reasons for this as set out in the following paragraphs.

An option which is capable of being delivered in accordance with the legal framework of the current Council contract with the Shropshire Community Leisure Trust

10. The Council carried out a detailed, robust and transparent open market procurement process in 2011/12 which accepted the recommendations in a detailed appraisal of the alternative delivery options for the Council's leisure centres. This recommended that the future management of the Council's five leisure centres should be procured as a single portfolio via a competitive, robust process.

11. The outcome of this process was that Shropshire Community Leisure Trust were appointed as the Council's leisure contractor for the portfolio. Shropshire Community Leisure Trust is supported in its delivery by its agent Serco Leisure Limited. This is the outcome which it is considered delivered best value in 2012.
12. The current Contract and Leases (as varied by Variation 2) includes sufficiently wide Variation provisions to enable the Council to implement the option of the development and delivery of swimming provision at the Shrewsbury Sports Village, or the redevelopment or rebuilding of the Quarry. This is on the basis that the outcome of this will be the continuation of service delivery thereafter of the enhanced pool provision in Shrewsbury by the current Contractor. Further brief details of the current legal documents as varied are set out in Part 2 of this advice.
13. If an alternative Town Centre site is proposed or other option to the options currently envisaged, the contractual and procurement implications will need detailed consideration as any such option will probably not be capable of delivery by the Council, if this is the proposal, without a further open market procurement. The Council's procurement in 2011/12 and the later Variation took place on the basis of the current portfolio of properties. The current public procurement regime would not allow a new additional property to be added to the current Contract. I consider that the Council would be required to carry out a further open market procurement.
14. No justification has been put forward in the responses to the consultation or otherwise which would support carrying out a further procurement to deliver an alternative procured option. It is technically possible for the Council to terminate the part of the current contract which includes the Quarry and let a separate contract for the building works and/or delivery of leisure services from the Quarry or elsewhere. Any such option would require commercial discussions with the current contractor and a further detailed, robust and transparent open market options appraisal followed by a procurement process for this one site pursuant to the Concession Contract Regulations 2016. This legislation was not in force in 2011/12 and it adds additional complexity and therefore potential cost to the process. The outcome of any such approach is commercially and operationally uncertain, it would be a costly and risky process for many reasons. Any

procurement is intrinsically uncertain and costly to deliver, there is a risk that the procurement of a single leisure centre which primarily consists of pool provision and which does not have extensive additional fitness facilities will not attract significant market interest and the outcome of the procurement, if it is successful, could well result in a higher and therefore unaffordable net contract price. The terms of and portfolio for the 2011/12 procurement were based on a report and recommendations from specialist external consultants. There is no information suggesting that a single site procurement so soon after a robust procurement would provide value for money. It cannot be recommended.

15. It follows from the above legal analysis that if the Council decides either to develop new provision at the Shrewsbury Sports Village, or approve a procured solution at the Quarry or other Town Centre site, it is recommended that this ought to be within the legal framework of the existing contract with Shropshire Community Leisure Trust.

A land transaction whereby the Interested Organisation delivers leisure services having acquired an interest in the land

16. This option would require the Interested Organisation submitting a business case to put forward an option whereby a third party would acquire the Quarry (or other land from which the Town Centre leisure services would be delivered) and manage the leisure services because they have an interest in the land (a lease or freehold). As identified in paragraph 14, the Council would have to terminate the part of Contract which relates to the Quarry and this will have commercial implications. The option of selling the Quarry was identified in general terms in the legal appendix to the July report. This option would mean that the current contractual arrangements between the Council and the Shropshire Community Trust Limited would be terminated and the Interested Organisation would either take responsibility for delivering the leisure services from the Quarry in a manner which complies with the criteria set out in paragraph 1.3 of Appendix 1 to the Report or would put forward an alternative governance model.
17. There are a number of aspects to this option. There are numerous leisure centres and other community facilities in England and Wales which are run by third party organisations and are either independently funded or supported by capital and revenue

grants. Some of these flourish and some do not.

18. Community organisations delivering former public sector services or delivering, for example public houses and village shops, by taking over these properties to avoid their closure has been encouraged and recognised as a legitimate model by the Localism Act 2011. As identified in the legal appendix to the July report, the Quarry has been registered as an asset of community value which means it cannot be sold unless there is a delay (as required by the Act) except to an organisation which meets the definitions in the Act.
19. This second option which is considered to be a potentially a compliant option is therefore an option utilising the principles set out in the Localism Act and allowing a Localism Act compliant organisation to put forward an option that they will take a lease or have the freehold transferred to them so that they can rebuild or redevelop the Quarry and thereafter deliver leisure services from it.
20. This option has a number of complexities for the Council and also for the Interested Organisation putting it forward. A number of the key legal issues have already been identified in the legal appendix to the report to Cabinet of 13th July (see paragraphs 16 - 23 in particular). The option would have to be structured to ensure that the exclusion of property transactions from the requirements of public procurement regime is triggered. This means that there would be no contract in existence between the Council because as also identified in paragraph 13 a local authority is unable directly to let a contract of this size without an open market procurement.
21. This is a very complex aspect of the law based on European case law. To put it simply the Council would have to lease or transfer the freehold to the relevant organisation but could not attach a specification or other detailed conditions relating to use of the Quarry because a specification or the type of conditions typically found in a contract have been interpreted as bringing the arrangement within the public procurement regime. The only terms which could be included would be those which would be interpreted as property or planning terms and conditions. Whilst leasing the land would enable the Council to recover the Quarry if the premises are not developed and/or used as required (e.g. because the lessee cannot afford to repair and it is only partly used or even derelict), a freehold disposal would not even enable this. A freehold disposal cannot therefore be

recommended.

22. There are a number of matters which it is recommended that an Interested Organisation putting forward a land transaction should give particular thought to in their business cases. The criteria and information sought in the table forming part of 1.3 of Appendix 1 are generic, they apply to all three models. There are specific aspects of a property model which an Interested Organisation will need to consider and address in its business case, if this is the preferred model. These are as follows:-
 - 22.1 (As identified) how they will satisfy the Council that their legal model will provide the Council with the confidence that future leisure provision (as set out in the Council's strategy) will be secured and continuous for up to 25 years. Without such a guarantee of continuity provision this option cannot be recommended.
 - 22.2 The terms on which they are offering to buy or lease the Quarry, taking into account that the Council will need to consider whether any offer is consistent with its fiduciary duties, the Council's duties under section 123 Local Government Act 1972 and the rules relating to State Aid (see paragraphs 4, 18, 19 and 23 of the Legal Advice to the report to Cabinet of 13th July).
23. It will be up to an Interested Organisation which puts forward such an option to demonstrate how it will meet the criteria, is defined in law as a property transaction and to provide the information required for a compliant business case in paragraph 1.3 of Part 1 of Appendix 1 to the Cabinet Report. It is therefore recommended that within these constraints that Interested Organisations should have flexibility to set out their offer.

Management by Shrewsbury Town Council

24. This option can either be delivered by the Town Council on its own or potentially in partnership with a third party if it decides to carry out an open market procurement.
25. The most straight forward version of this option would be that the Council enters into an agency agreement with the Town Council pursuant to the relevant Local Government

legislation whereby the Town Council delivers the services in-house either at the Quarry or from an alternative Town Centre site on behalf of the Council. As it is recommended that each business case should be evaluated on an equal basis the Town Council would need to put forward its business case and address all of the issues identified in paragraph 3.1 and elsewhere within Appendix 1 to the report. These include identifying how they would achieve all of the Council's minimum pool requirements and to satisfy the Council that this is a legally sound option (see below for more details).

26. This option would require the Council to terminate the part of the Contract with the Shropshire Community Leisure Trust Ltd with the implications identified in paragraph 14 and it is recommended that the Council would enter into a formal agency agreement with the Town Council. The Town Council and not the Council would have to satisfy itself that entering into this course of action is affordable and fulfils its fiduciary duties. The staff employed in the delivery of the services would transfer to the Town Council pursuant to TUPE and the Town Council would be responsible for pension and other liabilities.
27. I considered a more complex variant on this, for the Town Council to enter into a consortium arrangement with a third party. It would be up to the Town Council to consider and establish the terms and legality of any such option.
28. As with all of the options, there are a number of complexities which the Town Council would need to address in its business case. In particular, they would need to satisfy the Council that what they are proposing is legally sound. Contracts between two public sector bodies are subject to the public procurement regime. As identified, this is a concession contract and the law relating to concession contracts was codified and amended from April 2016 when the Concession Contracts Regulations 2016 came into force. To be compliant, the business case offer will need to comply with the requirements set out in paragraph 1.3 of Appendix 1 but will also need to demonstrate that this will be a co-operative arrangement in the public interest rather than an arrangement similar to a conventional contract. Taking into account the Council requirements as set out in paragraph 1.3 it is considered that this will be difficult to demonstrate. The regulations have also added an additional test for inter authority contracts, that the open market value of the activities of the Council and Town Council

must form less than 20% of the turnover of the Quarry (or other facility which is put forward).

The Business Case Process

29. The recommended business case process for the Council and any external Interested Organisations is set out in the report and I have assisted in its drafting. The comments in this section of my advice are intended to provide additional background about the reasons for the approach set out in the report.
30. Careful thought has been given to the recommended process and in particular the complexity of the process especially for external Interested Organisations who do not have necessarily have access to similar information or resources as those available to the Council.
31. I identified in my advice to the Cabinet of 13th July the requirement for the Council to treat each individual external Interested Organisation fairly and transparently. Having given the matter further thought in conjunction with Council officers, I would go further in this advice. I support the recommendations in the report that the Council should set up a fair and transparent process which provides equal information to all who wish to put in a business case, including the Council officers and advisors who are preparing a business case for the Shrewsbury Sports Village. This approach will ensure that the process is able to be a genuine and fair process allowing external Interested Organisations to have a similar starting baseline. The Council will be able to evaluate any externally submitted business cases in parallel with and in a similar manner to the business case for the Shrewsbury Sports Village confident in the knowledge that all external Interested Organisations have been treated equally.
32. I also consider that whilst it is recommended that the Council approves the Shrewsbury Sports Village in principle as its preferred option (for the reasons set out in the report of 13th July and in this report) having agreed to give external Interested Organisations a 12 month opportunity to put forward alternatives it follows from the July decision that the Council ought to be open minded about the possibility that external Interested Organisations may well be able provide a better and different alternative approach.

33. In my advice to the Cabinet report of 13th July, I referred in outline to the legal and procurement issues which will have to be considered and addressed by each Interested Organisation which submits a business case before it can be considered compliant. In view of the freedom provided to external Interested Organisations to structure their option, it is important to stress again that each business case must address the legal issues identified, to the extent that these are relevant to the relevant option, and any other legal issues which arise. These may or may not be complex, depending on the suggested option. Demonstrating compliance is up to the Interested Organisation submitting the business case as the Council will only be able to evaluate what is submitted. Whilst it is possible that the law may change and the constraints on the Council's ability to be flexible in the current public procurement regime will be abolished because of Brexit, the law will not change by September 2017 when the business cases must be submitted.
34. The process being put forward in the report and Appendix 1 includes an interim process for a strategic outline business case ("SOBC") to be submitted and evaluated in parallel with any SOBC put forward by the Council. The rationale behind this is that there is a Treasury guidance ("the Green Book") which provides a practical 5 step by step to the development of business cases and whilst this is too complex to be adopted in whole for this project and is not wholly appropriate as it is meant for much larger procured projects, the philosophy and general approach is useful. Stage 1 of this process corresponds directly to Gate 1 in the Office of Government Commerce (now Cabinet Office) process. Gateway reviews are peer review for major projects whereby independent practitioners from outside the project use their experience to examine the progress and likelihood of the project being successfully delivered.
35. Having considered the stage the Council has reached in this project, I consider that the Council currently has an incomplete Stage 1 (using the language of the Green Book). Stage 1 is scoping the proposal and preparing the SOBC. The case for change should be made, the way forward explored and the business justification completed. I recommend that this should be completed by the provision of SOBCs by the Council and other Interested Organisations because without this stage being completed it is not easy to progress the next stage and for the Council or third parties putting forward business

cases to agree their delivery strategy. I therefore support the recommended approach whereby there is a stage of consideration of the SOBCs, i.e. the client evaluation team which is outside the project, carries out an evaluation of the Gate 1, business justification and gives feedback on the outcome of its evaluation.

36. I am very mindful of the cost and other resources which external Interested Organisations will need to expend to produce a business case and in my view this interim stage is fair to any such organisation and the Council team preparing the Shrewsbury Sports Village business case as it provides an opportunity for an interim critique. If an Interested Organisation is informed that in the view of officers and advisors there is insufficient business justification for their proposals to pass Gate 1, they have the opportunity of addressing any deficits or withdrawing and not spending any more time and cost on seeking to complete the full business case (FBC). To let Interested Organisations spend up to 12 months and significant funds on what could be an approach which is very unlikely to meet the Council's criteria and without any interim stage would not seem fair.

Conclusion

37. It will be appreciated from the above and from the advice attached to the 13th July report and the current report that the business case process and subsequent consideration and approval of the preferred approach by the Council in 2017 raise complex legal and procurement issues.
38. This advice is provided on the basis of current information. Each option to be evaluated with care and the legal and procurement implications identified and confirmed as part of the evaluation of the SOBC and FBC to establish that such an option is legally and governance sound.
39. The Council's evaluation will be on the basis of the information which has been supplied by the Interested Organisations and it is recommended that the terms of reference for a compliant business case should include legal and procurement compliance.
40. I have sought to set out the currently identified legal issues in my two legal appendices

(to this report and to that of the report to Cabinet of 13th July 2016) but it will be essential for Interested Organisations to consider whether they ought to take their own legal advice and how far they ought to include a consideration of legal and procurement issues because if an option is not legally compliant with the terms set out it will be recommended for rejection.

PART 2

RÉSUMÉ OF RELEVANT PROVISIONS CONTRACT (AS AMENDED BY A VARIATION DATED 24 APRIL 2015) AND LEASES

The Contract

41. The Council entered into a contract (with supporting specification) and leases with Shropshire Community Leisure Trust Ltd to deliver its leisure centres at the Quarry, Shrewsbury Sports Village and at three other centres. The contract is from 1 August 2012 for 10 years until 31 July 2022 with the opportunity for an extension for a further 5 years thereafter. With the Council's approval, Shropshire Community Leisure Trust Ltd has appointed Serco leisure to deliver the leisure services on its behalf. On 24 March 2015, the parties entered into a formal Variation of the Contract and lease of Shrewsbury Sports Village.
42. This résumé sets out those terms of the varied contract and leases which are relevant to the report.
43. The terms of the varied contract and leases of the Quarry and Shrewsbury Sports Village allow the Council to terminate the parts of the contract and leases which relate to each of these properties on 6 months' notice and vary the terms of the services to allow for the:-
 - 43.1 Closure of the Quarry for it to be redeveloped or refurbished (if this cannot be carried out in parallel with some service delivery) and grant of a new lease on completion to the Shropshire Community Leisure Trust Ltd;

- 43.2 Closure of the Quarry if it is to be replaced with pool provision on the site of the Shrewsbury Sports Village and termination of the lease of the Shrewsbury Sports Village to enable the construction to take place and a grant of a new lease to Shropshire Community Leisure Trust Ltd thereafter; or
- 43.3 termination of Council contracted provision at the Quarry.
44. The contract provides that if it is partly or wholly terminated or varied and there are financial consequences, for example if the approved project means that part only of the Quarry were to be open to the public during a refurbishment or rebuilding process, the contractor is entitled to receive capped compensation for loss and in certain circumstances, redundancy payments for staff may be payable. It is not considered appropriate to include the detail of these payments within an open report and if any Interested Organisation provides evidence that it needs this information to prepare its business case and is prepared to enter into a confidentiality agreement the Council can consider whether it is able provide required information.
45. Whilst the terms of the Variation are flexible, as identified in the legal appendix to the report to the Cabinet on 13th July, the Council is bound by the public procurement regime and other legal principles so any solution which is put forward must take into account these restrictions.
46. Whatever the approved solution it is envisaged that there will be a requirement for a further Variation before it can be implemented.
47. It is envisaged that the Council will need to agree a protocol with Shropshire Community Leisure Trust Ltd regarding the provision of information during the process for third parties to submit a business case. A protocol is required to ensure that all parties are given similar information and because the contract provides that Shropshire Community Leisure Trust Ltd should not disclose the terms of the current Contract without Council consent so they would not be able to provide individual parties with any information regarding the contractual terms without this consent.

Further Provisions of the Leases

48. The lease of each of the facilities is for 15 years on the basis that if the contract is not extended the leases would end at the same time as the contract and if the contract is extended there is no need for further leases to be entered into.

49. The leases have a split of landlord and tenant responsibilities. The Council retains responsibility for the majority of the repairs and maintenance at each of the facilities. This is particularly material in the case of the Quarry because it is an old facility. The ongoing cost of maintenance at the Quarry and current and any future risk of plant or building failure is a significant factor and concern for the Council and, as identified, is material to consideration and evaluation of the preferred option.

50. The leases all include a provision allowing the Council to terminate the lease on 6 months' notice if the Council considers in its sole discretion that it is not economic to repair or maintain a facility.

Léonie Cowen

Léonie Cowen & Associates

13 September 2016