

Taunton Deane Borough Council

Full Council – 12 July 2016

Tone Leisure merger with Greenwich Leisure Limited

This matter is the responsibility of Executive Councillor Cllr Catherine Herbert

Report Author: Alison North

1 Executive Summary

- 1.1 Since July 2014 Tone Leisure have been in discussion with the UK's largest leisure charitable social enterprise, Greenwich Leisure Limited (GLL), to explore the potential for Tone Leisure's responsibility for the provision of leisure services within the Borough being merged with GLL. These discussions were triggered by the shifting market for local authority provision and the recognition at the tender that Tone Leisure was a small local trust and therefore disadvantaged in terms of competing successfully to win contracts.
- 1.2 Members were advised of the general nature of the current proposals in May 2015 in a briefing note, which also updated that Tone Leisure had become a wholly owned subsidiary in GLL's group structure with a view to further integration being progressed over time. A further briefing was carried out as part of the Members induction programme and as part of the regular Scrutiny reports submitted by Tone Leisure. Since that time discussions have continued to the point where the proposal is now a merger between Tone and GLL. GLL and Tone are now formally seeking the support of TDDB for the merger and this report sets out the issues which Councillors will need to consider in approving the assignment of the existing leases and funding arrangement, pre the Council progressing a procurement exercise for new arrangements starting 2019.

2 Recommendations

- 2.1 It is recommended that Full Council approve the merger between Tone Leisure and Greenwich Leisure Limited, and in order to facilitate the transfer of leisure service provision from Tone Leisure to Greenwich Leisure Limited, should agree for the three years remaining of the current arrangements with Tone Leisure:-
 - The assignment of relevant property leases from Tone Leisure to Greenwich Leisure Limited; and
 - The transfer of the funding agreement from Tone Leisure to Greenwich Leisure Limited.

3 Background

- 3.1 In 2002 following a strategic leisure study the Council resolved that a leisure trust should be formed in order to provide leisure services within the Borough. This proposal was put forward in recognition of the challenges the Council was facing at the time in sustaining capital investment and securing ongoing revenue provision for its six leisure assets. The formation of a leisure trust was identified as the best means of addressing these issues, with such an arrangement providing savings through NNDR/VAT which could be earmarked for reinvestment for the purposes of future maintenance leisure assets. A trust was also seen as an appropriate mechanism for imposing a requirement on any operator to provide community benefit projects.
- 3.2 In June 2004 Full Council approved the recommendation that the Council's leisure facilities and development services be transferred to Tone Leisure, set up as a company limited by guarantee. The arrangements for the provision of these services were set out in formal agreements which provided for annual funding, supported by fifteen year leases for each facility. These arrangements are all due to end in June 2019.
- 3.3 It is clear that the changing climate of public expenditure and the future requirements for leisure services are now very different from when Tone Leisure was formed in 2004. Pressures on Councils through declining revenue and increased capital maintenance costs have forced a change in how the leisure operator market functions, with a greatly increased emphasis on more commercial contracts which places more onus on the operator rather than the Council in the future provision of services.
- 3.4 Against this emerging financial and operational background, it was recognised by the Tone Leisure Board Trustees that they needed to identify a strategy which would provide the organisation with the best chance of achieving sustainability and longevity as a service provider in the leisure sector. There is also a need to consider their position as a local employer and those within the community that rely upon this employment. As such they began discussions with the UK's largest leisure charitable social enterprise, Greenwich Leisure Limited (GLL), in order to explore the potential for Tone Leisure to utilise the national expertise of GLL, their financial strength and skills whilst maintaining local networks and employees. By considering a merger rather than remaining as an owned subsidiary has enabled Tone Leisure to become the lead for the South West Region as GLL expand on their regionalisation strategy.
- 3.5 Appendix A sets out Tone Leisure's recommendation from the Board Chair.

4. Who are Greenwich Leisure Limited (GLL)?

- 4.1 GLL was formed in the early 1990's and has grown to be a major provider of leisure services within the charitable social enterprise sector. The company operates over 200 leisure centres nationwide through a growing network of regional hubs operating diverse services across a variety of health, fitness, sport, library, arts and cultural facilities. GLL employ approximately 10,000 members of staff and have a turnover of approximately £250m.

- 4.2 Overall GLL are the largest leisure operator in the UK with continued growth having brought more than £80m direct capital investment in to facilities
- 4.3 Tone Leisure's Board were particularly keen to explore possible engagement with GLL not just because of GLL's significant size and expertise in the industry, but also because of the close alignment between GLL's community-focused corporate values and those of Tone. In seeking a merger with GLL it is felt that Tone have been proactive in safeguarding the service in the manner identified later in the report.

5. The proposals in detail

- 5.1 On the assumption that the Council ultimately supports the proposals for merger, the merger of Tone Leisure into GLL can be achieved in one of two ways.
- 5.2 The first and potentially simplest way is for the assignment of the existing leases from Tone Leisure to GLL.
- 5.3 The second and arguably more complex approach involves Tone Leisure (and its two subsidiary companies) being converted into community benefit societies, following which the engagements of these companies could then be formally transferred to GLL via the statutory transfer process as set out in the Co-operative and Community Benefit Societies Act 2014.
- 5.4 Due to the complications of the second approach and the relatively straight forward mechanism of assigning leases to enable what is required 5.2 is the recommendation of this report. Whichever approach is followed, the merger process will ultimately lead to leisure services within the Borough being provided by GLL as a business entity. In operational terms this means that the Tone Leisure brand will no longer be seen at the Council's facilities and once the merger is complete GLL branding will be seen across the Borough's leisure sites, for the remainder of the current service period up to 2019. In terms of service, GLL would continue to be required to provide the services in the same manner as Tone have to date, in full accordance with the service agreement as currently operated by Tone. Overall customers will see no change to the services which they currently enjoy and they will benefit from the ability to use other GLL sites across the country if they hold a membership. It should be stressed that GLL will only be able to continue with the provision of services on this basis until 2019 (the same date as that on which the current arrangements with Tone are due to terminate), at which point the entire service will need to be subjected to a full formal procurement exercise, this will be for a different offering than is in place now.
- 5.5 Following the transfer to GLL, the annual grant management fee that is currently paid by the Council to Tone Leisure will be payable to GLL, but there will be no change to how this payment is administered which is through quarterly instalments. The Council will continue to control the level of payment set at each budget as now.
- 5.6 GLL recognise and value the importance of local connectivity and Members part in influencing and monitoring services. Following transfer and absorption, it is proposed that GLL will operate via an advisory board which will have the purpose of maintaining the connection of service delivery with the community through Councillor Representation. The requirement within the current funding agreement – which

stipulates that an annual business plan be produced setting out the key area of work for

each forthcoming year – will also remain in force, as will the requirement for a company representative to attend Scrutiny Committee quarterly.

5.7 Overall, the merger will lead to a situation in which Council leisure services will be provided by a major operator with a significant position in the market, which it is argued will make leisure services within the Borough more resilient to economic and financial pressures, while securing significant benefits in terms of access to capital, cash flow support and general risk management.

5.8 Tone Leisure staff will transfer via TUPE to GLL and new employees will have access to GLL's current pension provision.

6. Considerations for the Council

6.1 There are numerous aspects of the proposed merger which Members will need to consider before reaching an informed decision in this matter. These considerations have been confirmed formally by GLL as per Appendix B

6.2 **Service provision** –As stated above, GLL will continue to be bound by the same service arrangements as are currently operated by Tone.

6.3 **Corporate aspects** –If GLL assume responsibility for the provision of leisure services within the Borough, the Council will effectively have no direct representational interest in the new provider. In this situation, Members may need to consider if the replacement with an Advisory Board is sufficient to ensure that local needs for leisure services are met. The view of officers is that the Council's control over GLL will be predominantly exercised via the funding agreement and other supporting documents, and that the current interest in Tone via its board is merely secondary to the Council's already-significant ability as contracting authority to secure appropriate levels of leisure service provisions within the Borough

6.4 **Procurement** – Clearly the transfer of leisure services from Tone to GLL will entail the award of a significant service to a provider without a formal competition process. However, such a transfer is specifically envisaged within Regulation 72(1)(d)(ii) of the Procurement Regulations 2015, which provides that "*Contracts may be modified without a new procurement procedure...where a new contractor replaces the one to which the contracting authority had originally awarded the contract as a consequence of...universal or partial succession into the position of the original contractor, following corporate restructuring including takeover, merger, acquisition...of another operator that fulfils the criteria for qualitative selection originally established...*". Therefore the transfer to GLL is permissible within the 2015 Regulations. The issue for Members is whether they wish to make use of this exemption from the requirement to engage in a full procurement exercise at this stage. The view of officers is that the best approach would be to secure the provision of services by GLL (via transfer) for the period 2016-19, and then to undertake a full procurement of the leisure service in 2019 (as originally intended with Tone) under a very different offering. GLL have confirmed in their letter at Appendix B that they will indemnify TDBC for any costs which are incurred by the Council if the decision to transfer direct to GLL is – for whatever reason

- subject to any legal challenge.

6.5 **Pensions** – The local government Pension Scheme will remain in place for those existing employees who TUPE transfer from Tone Leisure to GLL. Any new employees will have access to the GLL current pension scheme.

6.6 **Practical issues** – Members must necessarily consider the situation which will arise if, contrary to officer recommendation, the proposal to transfer the services to GLL is not supported, following which the services will remain with Tone

7 **Legal implications**

7.1 From the legal perspective, there are two main aspects to this report which need to be specifically borne in mind.

7.2 First, as highlighted above, the current proposals will effectively entail a decision by the Council to defer exposure of its leisure services to a full procurement exercise until 2019, and to use the exception within Reg 72 of the 2015 Regulations in support of the proposed transfer to GLL. This approach is supported by officers, and is also consistent with external legal advice, which concludes specifically that the GLL transfer comes directly within the Reg 72(1)(d)(ii) exception.

7.3 Secondly, the GLL proposal (if approved) will effectively entail a transfer of the leases of the Council's various leisure sites to GLL from Tone. It should be noted this is a transfer of leases not the assets themselves which remain with the Council as per the current arrangements. At the moment, these leases all contain a specific prohibition on assignment or transfer, and so will need to be amended before any transfer to GLL can be formalised. This can be done and in the circumstances is reasonable.

8 **Asset Management Implications**

8.1 These are contained in the main body of this report. Each lease concerned will require a variation to enable assignment and then the subsequent assignment of those amended leases. Other lease terms to remain as existing and therefore the Council could still enforce the lease terms in the same manner as currently. It could be argued for the reasons set out in this report that with GLL'S stronger tenant covenant, that the Council would be in a stronger position.

9 **Financial aspects**

9.1 These are set out throughout this report, but the following points are emphasized in particular.

9.2 **Leases** – Currently a number of leisure property assets are leased to Tone Leisure on individual fifteen year leases which are due to expire in June 2019 when the current leisure contract is due for retendering. It is proposed to transfer the unexpired portion of these leases, approximately three years, to GLL. As stated above, it will be necessary to vary these leases beforehand, as they currently contain a total prohibition

on assignment. There are also a number of leases for gym equipment etc. which would need to be novated.

- 9.3 On completion of Blackbrook Pool it is currently anticipated that this will also be leased to GLL on similar terms and conditions to other leisure land and buildings currently within the Borough's leisure portfolio, pending a full and very different procurement in 2019.
- 9.4 **The Funding Agreement** – As stated above, this would be transferred to GLL. No amendments are expected to the current arrangements for payment of the quarterly management fee.
- 9.5 **Control and influence** – The proposal for Tone Leisure to become a wholly owned subsidiary of GLL has no adverse effect on Taunton Deane Borough Council. There is currently no requirement for the Council to prepare group accounts and this would still be the case were the merger to go ahead.
- 9.6 **Section 151 Officer Statement** – The issues associated with a merger are set out in this report. The key piece of work post this change must be to focus on an affordable long-term solution for our leisure facilities.

10 **Health and Wellbeing Implications**

- 10.1 The merger of Tone Leisure with GLL – and the ultimate takeover of Tone by GLL - will continue and strengthen access to good quality, affordable and accessible services for all ages and abilities in the community. The maintained charitable trust status of our operator will also maintain community benefits.

11 **Links to Corporate Aims / Priorities**

- 11.1 The strengthened provision of the Borough's leisure operations supports Key Theme 2 b "*Further develop the offering of the Deane in terms of social, leisure and culture in order to make the area and even more attractive proposition for investment*".

12 **Community Scrutiny Committee Comments**

- 12.1 This issue was considered by the Community Scrutiny Committee at its meeting on 26 April 2016 when Members supported the proposed merger.

Democratic Path:

- **Scrutiny - Yes**
- **Executive – No**

- Full Council – Yes

Reporting Frequency : Once only Ad-hoc Quarterly
 Twice-yearly Annually

List of Appendices

Appendix A	Tone Leisure Board Letter of recommendation
Appendix B	GLL Letter of confirmation

Contact Officers

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Tone Leisure (Taunton Deane) Ltd.

7th March, 2016

Mrs. A. North,
Community Leisure Manager,
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The Deane House,
Belvedere Road,
TAUNTON.
TA1 1HE

Dear Alison,

TONE LEISURE/GLL MERGER

I am writing on behalf of Tone Leisure Group Limited and Tone Leisure (Taunton Deane) Limited to formally request Taunton Deane Borough Council's consent to approve the merger of Tone Leisure and GLL later this year. As you are already aware, Tone Leisure became an owned subsidiary of GLL in June 2015.

I would like to assure you that the Board's decision to progress to full merger has not been taken lightly and this strategic move has been well debated and discussed. We began informal discussions with GLL in July 2014. This then led to a series of further meetings and negotiations over the following ten months. On 28th April, 2015 Tone Leisure (Taunton Deane) Limited called an EGM and agreed to the future partnership with GLL. On 8th May, 2015 Tone Leisure Group Board met and all the Group Board Trustees supported and signed the required Written Special Resolution.

Whilst I and all the Trustees associated with Tone Leisure feel sad that this will be the end of the journey for Tone as a small independent Leisure Trust, we equally feel excited and inspired by the new opportunities that becoming part of GLL presents. As Trustees we have taken our responsibilities seriously and our primary concern has been to pursue a strategy that gives the organisation the best chance of sustainability and longevity. In particular, we want to ensure that our staff are transferring to another organisation that values its people and the delivery of health, leisure and sport in the local community. Having completed extensive due diligence we are assured that GLL shares similar ethics and values to those of Tone.

I trust that the Council will support and consent to this request, as we very much hope that this move will strengthen our Taunton partnership.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Karen Arnold', written in a cursive style.

Karen Arnold
Chair of Tone Group Limited and
Chair of Tone (Taunton Deane) Limited



INVESTOR IN PEOPLE



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Registered in England : 4983733. Registered Charity No. 1110756

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29th March 2016

Dear Alison,

Tone Leisure and GLL Merger

Further to our recent discussions please see below the responses to questions raised by yourself and Chris which I trust you will find in order.

1. An outline of your request to the Council i.e. that Tone Leisure is fully merged with GLL.

Tone Leisure and GLL have been working together for some time whereby Tone Leisure is now a wholly-owned subsidiary of GLL and part of GLL's group structure. Both organisations now wish to undertake a transfer of Tone's assets, contracts, agreements and employees to GLL to effectively merge the organisations. We see this as the best way to continue to provide the highest level of service to the Taunton and Deane residents through a charitable social enterprise delivery model.

2. Confirmation that there is no material change to the funding agreement as is - current for service or cost

There would be no material change to the funding agreement with the council.

3. Confirmation that GLL are in a position to maintain service provision

GLL can confirm that we are in a position to maintain service provision

4. Confirmation that GLL are in a financially stable position to maintain the transferred assets from Tone Leisure and fulfil the maintenance requirements of the lease agreements

GLL is financially stable and can satisfactorily fulfil the requirements currently placed on Tone in the lease agreements

5. Confirmation that GLL will accept the novation of the leases

GLL will accept novation of the leases

6. Confirmation of the governance arrangement going forward. In particular the Advisory Board

We would wish to discuss this further with officers and Members to assess the best way forward but we will commit to:

- Attending Scrutiny, Cabinet and such other Council meetings as is felt appropriate and desirable
- Establishing an Advisory Board to include Members and working with Members and Officers to agree the heads of terms to enable significant influence
- Regular meetings with the Portfolio Holder

7. Confirmation of arrangements for Tone Leisure staff i.e. they will TUPE transfer

Tone Leisure staff will TUPE transfer to GLL

8. Confirmation that GLL will provide an indemnity covering any costs which TDBC would incur in the event of a legal challenge to procurement

To confirm the legal advice received on this point (specifically Regulation 72 of the new Procurement Rules – the Public Contract Regulations 2015) and as previously shared with Roy Pinney:

Regulation 72 sets out where contracts can be modified during their term without the need for a new procurement, and includes at section 1(d) the following:

"(d) where a **new contractor replaces the one to which the contracting authority had initially awarded the contract** as a consequence of—

(i) an unequivocal review clause or option in conformity with sub-paragraph (a), or

(ii) **universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency**, of another economic operator that fulfils the criteria for qualitative selection initially established, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part"

In our view the above is quite clear. The Council can modify the contract where GLL is replacing Tone as the contractor, without going out to procurement, because the trigger for that change is the merger of Tone into GLL (which clearly falls into the wording of the Regulation above).

In our view and the view of our legal experts, therefore, the likelihood of there being any successful challenge on procurement grounds is low and we are therefore prepared to indemnify TDBC against any reasonable costs that it might incur in the event of legal challenge.

Please contact me with any further questions or issues for clarification.

Best wishes



PP. Jon Argent

National Partnerships Director: GLL