

CABINET MEETING: 13 July 2023

ST DAVID'S HALL

CULTURE, PARKS & EVENTS (COUNCILLOR JEN BURKE)

AGENDA ITEM:

PORTFOLIO: INVESTMENT & DEVELOPMENT

Appendices 1-3 of this report are not for publication as they contain exempt information of the description contained in paragraphs 14 and 16 of Part 4 of Schedule 12A of the Local Government Act 1972. In all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Reason for this Report

1. To present the outcome of the various processes undertaken by the Council in relation to the proposed transaction with Academy Music Group (AMG) for St David's Hall.
2. To seek approval to transfer the business of St David's Hall via a business sale agreement and enter into a full repairing and insuring 45-year lease with AMG for St David's Hall to protect the venue and to develop and maintain the music and cultural/community offer including the classical programme.

Background

3. In December 2022, Cabinet agreed in principle to enter into a business sale agreement and lease with AMG for St David's Hall and delegated authority to progress negotiations subject to (i) the findings of a budgetary consultation, (ii) the undertaking and findings of a consultation with affected staff in relation to a potential transfer under the Transfer of Undertaking (Protection of Employment Regulations 2006 (TUPE) as amended by the "Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) regulations 2014; and (iii) an assessment of best value. Following the above, the proposal was to return to Cabinet for a final decision on whether to proceed with the offer from AMG.

4. St David's Hall opened in September 1982 as the National Concert Hall and Convention Centre for Wales. The building is located in the Hayes in Cardiff city centre and can accommodate 2,000 people in the main auditorium, making it the city's second biggest venue outside of sporting stadia, and the largest venue dedicated to the arts. The venue was established to deliver a wide range of events and performances, including symphonic orchestral performances in a purposely designed setting, rock and pop, comedy, dance and conferences.
5. The building is currently owned, operated and funded by Cardiff Council and was developed by Seymour Harris Partnership with contractors John Laing & Son to provide a superlative performing arts and conference venue befitting the capital city of Wales. To that end, significant effort was undertaken to ensure that the building was appropriate for international classical music performances, working with renowned acousticians Sandy Brown to create the perfect conditions for audiences to enjoy a full symphony orchestra. As a result of this work St David's Hall has become world renowned for the acoustic quality of the hall, recognised as being amongst the top ten of the world's best sounding concert halls and one the UK's highest-ranking classical music venues.

Issues

6. Whilst St David's Hall remains a renowned classical music venue, it is slowly falling into a state of disrepair which threatens to undermine its reputation and on-going operation. The lack of national funding to support the venue has meant the burden of responsibility for maintaining the building and delivering the classical programme has fallen on the Council. The Arts Council of Wales withdrew the venue's *Revenue Funded Organization* status in 2014 which provided c£65k per annum over approved 5-year periods. Although the scale of this contribution was relatively modest, it did nonetheless represent a gesture of support for a facility of 'national' significance. The Arts Council for Wales does still provide ad-hoc funding towards the classical series of £99k per annum, through Arts Active, however this funding is required to be applied for each year.
7. Despite the Council's sustained and significant financial contribution towards the venue (over an extended period of 40 years) the operational budget has not been sufficient to both protect the delivery of the classical/community programme and to release investment to maintain and modernize the building. The Council has only been able to afford to implement a basic maintenance programme to cover general wear and tear amounting to circa £2m of capital and circa £600k of revenue over the last 10 years. This has become increasingly insufficient as the building has grown older.
8. The scale of capital investment required to address both the short-term repairs, the longer-term maintenance backlog, and general modernisation to ensure a good quality provision consistent with industry standards, is not available from within existing Council resources and any borrowing to fund the works would have a significant additional revenue implication on the Council at a time when many services are facing significant financial pressures.

9. The allocated revenue subsidy from the Council for St David's Hall is £688,700 in the current year. However, the venue regularly achieves lower box office revenue than forecast and as such the actual level of Council financial support regularly exceeds £1m per annum. The unallocated budget spend is required to be absorbed within wider directorate budgets and each year this is becoming increasingly difficult to achieve due to the growing pressure on Council budgets.
10. For nearly a decade, since the onset of public sector austerity, the Council has been keen to identify ways to reduce the burden of St David's Hall on the public purse. In 2016, the Council undertook a full OJEU Competitive Dialogue public procurement process to identify an external operator for both St David's Hall and the New Theatre, which at the time were managed as one combined entity. Although the process generated interest from the market, it was clear that the interest was contingent on the Council retaining full responsibility for the maintenance of St David's Hall. There was strong interest in the New Theatre as a separate going concern and in 2019 the Council separated the operation of the two venues and proceeded with a strategy which secured an external operator for the New Theatre only, through a property lease.
11. The level of subsidy of the classical/community programme has had a consequential knock-on effect on the level of investment the Council has been able to make towards the maintenance and modernisation of the building. As the building has grown older, the maintenance backlog has grown more significant, with the Council only able to support general day to day repairs. In December 2021, following the update to Cabinet on the condition of the building, Cabinet requested the development of an Outline Business Case for St David's Hall that would consider the options for dealing with the implications of the condition survey and seek to remove or at least reduce the operational subsidy.

The AMG Offer

12. The lease and business sale agreement with AMG is set out in detail at **Confidential Appendix 1**. The key elements of the documents include:
 - Allowing AMG, as tenant, to operate the venue as an independent commercial enterprise.
 - A commitment to take on full responsibility for the building, taking the liability away from the Council and removing the need for the Council to provide any financial contribution towards the up-keep and operation of the building.
 - A commitment to retain and provide a long-term future to the National Concert Hall of Wales, including the on-going use of the name St David's Hall in English and Welsh, whilst optimising the overall event calendar.
 - A commitment to allocate a minimum of 60 days within the peak event calendar to accommodate key classical events and a minimum of 20 further

days outside peak dates. The off-peak commitment extends to 30 days every other year to accommodate the BBC Cardiff Singer of the World event. These dates would be secured annually in the event calendar over the full term of the lease. The offer is not intended to limit the number of days, but rather to guarantee a set minimum to the classical/community programme.

- A commitment to maintain the venue's key musical instruments including the Steinway pianos and the St David's Hall organ.
- AMG will also enter into a Memorandum of Understanding Agreement (MOU) with the key classical stakeholders to develop an optimum classical and community programme. The Draft MOU is attached at **Confidential Appendix 5** and whilst not legally binding, it reflects a clear intention of the parties to work together in a collaborative manner. Dialogue is progressing well with all stakeholders and it is intended that the MOU will be entered into at the same time as the lease.
- A commitment to employ existing Council employees currently working at St David's Hall on existing terms via the application of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

Completing the Process

13. Following Cabinet's 'in-principle' approval of the proposed transaction with AMG provided in December 2022, a number of further investigations were required to be undertaken before a further report could be presented to Cabinet for a final decision to proceed. These are set out below:

Public Consultation

14. A consultation on the proposal was undertaken with the public through the 2023/24 budget consultation process. The response from residents indicated that they were not opposed to the proposal to enter into a long-term lease with AMG.

Staff Consultation

15. There are currently 37 FTE at St David's Hall for which TUPE will apply. This is made up of 48 posts and involves 47 individuals. There are also a number of casual workers (non-guaranteed hours) for which TUPE will also apply.
16. The Council is committed to ensuring that staff transferring to AMG will not be in detriment. Initial engagement has taken place with staff and this will be followed by formal consultation as part of the TUPE process if the proposed transfer is approved by Cabinet. Further details are provided in the HR Implications section below.

Nature of the transaction

17. The Council has received King's Counsel advice that the proposal relates to a property transaction and therefore does not involve an activity governed by the procurement rules. Further advice on this is set out at **Confidential Appendix 1**.
18. A Voluntary Ex Ante Transparency Notice (VEAT) was published by the Council on 5 June 2023. The notice aims to provides transparency to the market on the arrangements to be entered into with AMG and set out the Council's justification as to why those arrangements do not fall within the scope of the procurement rules. In response to the VEAT Notice, one organisation sent a letter to the Council on 29 June 2023 requesting further information in relation to the proposed transaction with AMG. The letter is attached as part of **Confidential Appendix 1**, alongside the Council's detailed response.

Best Value

19. In May 2023, the Council undertook a market exercise facilitated by independent advisors which invited interested parties to submit offers for the opportunity to acquire St David's Hall. The Council received no formal offers as a result of this market exercise. An overview of the process is set out at **Confidential Appendix 2**.
20. Following analysis of the wider market and advice from the Council's independent advisors set out at **Confidential Appendix 3** it is concluded that the essential terms of the proposed transaction with AMG represent best value. Since the critical element of the consideration likely to be received by the Council is the carrying out of the essential works required for St David's Hall to continue to operate, the lease requires the works to be undertaken within an appropriate timescale.

Welsh Language

21. The Council has emphasised from the start of this process and in all negotiations, that the Council would wish for the new operator to offer the same opportunities for the use of the Welsh Language at the venue, to follow Welsh Language Standards applicable to the Council and other public bodies in Wales, and to agree a policy to support this work.
22. AMG has agreed to meet the same standards for the Welsh Language as would be expected of the Council.

Next Steps

23. The Council is required to undertake full TUPE engagement with all employees prior to entering the lease and business sales agreement with AMG.
24. The Council is required to complete the MOU with classical stakeholders.

25. At the appropriate time, the Council will enter into the lease and business sale agreement with AMG.
26. Conclude work-streams to determine Tax implications and structure for transaction.

Reasons for Recommendation

27. To establish a sustainable long-term future for St David's Hall, the National Concert Hall of Wales and to protect the delivery of the classical music/community programme.

Financial Implications

28. The report seeks approval for the Council to enter into a business sale agreement and a full repairing and insuring 45-year property lease with AMG as tenant for the operation of St David's Hall as an independent commercial enterprise. Confidential Appendix 1 sets out the draft detailed terms for the lease and an associated business sale agreement.
29. It should be noted that the proposal is still subject to completion and agreement of the lease Heads of Terms to include final detail of the transfer of building liabilities and the transfer of relevant staff under TUPE regulations.
30. Confidential Appendix 5 also details a draft Memorandum of Understanding (MOU) under which AMG would also commit to develop a classical and community programme. It is intended that the MOU once finalised will be entered into at the same time as the property lease.
31. Subject to this final detail, the proposal is aimed at the removal of the ongoing operating subsidy to the Council with a current annual revenue budget set at £688,700. It is proposed that the Arts Active Programme will continue to be provided by the Council and therefore the revenue saving achievable in line with the current draft heads of terms and business sale agreement is likely to be in the region of £500,000 per annum.
32. The earlier report to Cabinet in December 2022 highlighted that a detailed condition survey carried out in 2021 is noted to have identified several significant issues relating to the fabric of the building with the value of these works exceeding available capital budgets. The report additionally noted that temporary building management and health and safety strategies in place are only suitable for the short term and in advance of permanent remediation.
33. Additional borrowing to the extent of funding required to carry out essential works would have a very significant impact on the existing revenue budgets of the Directorate and would necessitate the identification of additional alternative revenue savings proposals.

34. The property lease as it is currently drafted would require no Council capital investment, no future buildings liability, and no committed annual revenue payments or subsidy to the new tenant. The draft offer also provides for the continuation of the classical programme requiring no on-going contribution from the Council.
35. It may be necessary for the Council to undertake refurbishment of some assets (particularly instruments) prior to any transfer. The extent of any such obligations on the Council should be clearly identified and agreed as part of the final contract. This would also need to be agreed and form part of future budget setting processes for both capital and revenue budgets. The Council will also need to be satisfied that, taking account of any such obligations and the value of any assets transferred under the business sale agreement, the proposal to effect such transfer for nominal consideration remains consistent with the overall best value rationale.
36. The recommendation provides for the transfer of all staff associated with St David's Hall under TUPE regulations. This and any Pension Fund implications in relation to any transfer of responsibilities will need to be fully set out as part of the completion of the proposed business sale agreement.
37. The timing of the transfer, staff consultation and exact detail of the legal agreements may also have an impact on the achievability of budget savings for 2023/24 and any ongoing liabilities for the Council and will need to be reviewed accordingly as part of the finalisation of the contractual terms.
38. Initial VAT advice received by the Council on the status of the lease suggests that any potential future Council contribution may be subject to VAT. Therefore, in such an arrangement and in order for the Council to recover this VAT, the Council will need to exercise an option to tax over the whole site prior to any completion of the lease, in order that any interests in land granted are taxable rather than exempt supplies. In principle, this would allow for VAT recovery on any costs directly associated with these interests. Similarly, the Council has included a clause that the operator cannot dis-apply the option to tax in relation to the Land and will not do, or cause to be done, or omit to do anything which could lead to the option to tax being revoked or dis-applied by operation of law or otherwise.
39. It is proposed prior to the finalisation of the contract that a workstream is established to consider and determine the optimum tax structure for the transaction in order to protect the Council's interests in this regard.
40. Legal advice with regard to the draft Heads of Terms are set out in Confidential Appendix 1.
41. Prior to agreeing the recommendations within this report and prior to the finalisation of any lease agreement, decision makers should ensure that they are satisfied with the findings in this regard.

42. Further consideration will be given to the legal, procurement and tax implications of the report proposals as the documentation is finalised and in order to ensure that the structure of any final contract sufficiently protects the Council's interests.

Legal Implications

43. Legal advice in relation to the proposed transaction is set out at **Confidential Appendix 1**. This advice is confidential and privileged.
44. Prior to agreeing the recommendation sought within this report, decision-makers should ensure that they are satisfied with the findings in relation to the legal advice.
45. Section 123 of the Local Government Act 1972 enables the Council to dispose of land "in any manner they wish", provided that best consideration is obtained, for any interest for a term exceeding 7 years (or an assignment which still has more than 7 years to run). Disposals of land for more than 7 years for less than best consideration require the consent of the Welsh Parliament, unless the disposal falls within the NAFWC 41/2003 Local Government Act 1972: General Disposal Consent (Wales) Order 2003. This general consent permits a disposal for less than the best consideration that can reasonably be obtained where the following conditions are met:
- a) the Council considers that the purpose for which the interest in the land is to be disposed is likely to contribute to the achievement of any one or more of the following objects in respect of the whole or any part of its area, or of all or any persons resident or present in its area:
 - i. the promotion or improvement of economic well-being;
 - ii. the promotion or improvement of social well-being;
 - iii. the promotion or improvement of environmental well-being;and
 - b) the difference between the unrestricted value of the interest to be disposed of and the consideration accepted does not exceed £2,000,000 (two million pounds).
46. The Council intends to grant a lease for a term in excess of 7 years and accordingly, an independent surveyor has assessed whether the offer the Council has been presented with for the leasehold transaction represents the best consideration reasonably obtainable.
47. The legal advice at **Confidential Appendix 1** includes two opinions from Counsel addressing issues of procurement law and the Council's obligations under s123 LGA, as well as any issues concerning subsidy control. Following receipt of Counsel's most recent opinion the issues have been discussed

further with him, leading to various recommendations within this report as to points to be addressed before the transaction is finalised.

48. In coming to its decision, the Cabinet needs to take account of the Council's fiduciary duties to local residents and taxpayers.
49. The Cabinet must also make its decision having due regard to the Council's public sector equality duties pursuant to the Equality Act 2010 (including specific Welsh public sector duties). This requires the Council, in the exercise of its functions, to have due regard to the need to (1) eliminate unlawful discrimination, (2) advance equality of opportunity and (3) foster good relations on the basis of protected characteristics. The protected characteristics are: age, gender reassignment, sex, race - including ethnic or national origin, colour or nationality, disability, pregnancy and maternity, marriage and civil partnership, sexual orientation, religion or belief — including lack of belief.
50. An Equalities Impact Assessment has been undertaken. The findings are outlined within the Single Impact Assessment, see **Appendix 5**.
51. The Well-Being of Future Generations (Wales) Act 2015 ("the Act") places a 'well-being duty' on public bodies aimed at achieving 7 national well-being goals for Wales — a Wales that is prosperous, resilient, healthier, more equal, has cohesive communities, a vibrant culture and thriving Welsh language, and is globally responsible.
52. In discharging its duties under the Act, the Council has set and published wellbeing objectives designed to maximise its contribution to achieving the national well-being goals. The well-being objectives are set out in Cardiff's Corporate Plan 2022-25.
53. The well-being duty also requires the Council to act in accordance with the 'sustainable development principle'. This principle requires the Council to act in a way which seeks to ensure that the needs of the present are met without comprising the ability of future generations to meet their own needs. Put simply, this means that Council decision makers must take account of the impact of their decisions on people living their lives in Wales in the future. In doing so, the Council must:
 - Look to the long term;
 - Focus on prevention by understanding the root causes of problems;
 - Deliver an integrates approach to achieving the 7 national well-being goals;
 - Work in collaboration with others to find shared sustainable solutions; and
 - Involve people from all sections of the community in the decisions which affect them.

54. The Cabinet must be satisfied that the proposed decision accords with the principles above; and due regard must be given to the Statutory Guidance issued by the Welsh Ministers, which is accessible here:

<http://gov.wales/topics/people-and-communities/people/future-generations-act/statutory-guidance/?lang=en>

55. The Council has to be mindful of the Welsh Language (Wales) Measure 2011 and the Welsh Language Standards when making any policy decisions and consider the impact upon the Welsh language.

Procurement Law

56. Detailed procurement advice in relation to the proposed transaction is set out in **Confidential Appendix 1**.

Employment Law

57. The Council currently employs 47 employees to deliver the Music and Arts programme at St David's Hall.
58. There is the potential for some or all of those employees to transfer from the Council to AMG under the Transfer of Undertakings (Protection of Employment Regulations 2006) (TUPE) and, in any event, the lease and business sale agreement provide for the Council and AMG to treat all employees currently employed by the Council at the venue as transferring under TUPE. The expectation under the business sale agreement AMG is therefore that, whilst AMG would be responsible for those employees after the transfer, the Council would provide certain warranties and indemnities to AMG including for: all employee costs arising pre transfer; claims from transferring staff arising from pre transfer acts and omissions of the Council when the Council was their employer; and the risk of staff who have not been identified as being in scope to transfer alleging they should also transfer. The Council would also have obligations under TUPE to inform, and potentially consult, with the affected staff' representatives in relation to the transfer.

Property Implications

59. All property implications are contained within the body of the report.

HR Implications

60. The legal implications set out in this report explain the TUPE requirements and pension implications. In addition to the requirements under the (Transfer of Undertakings (Protection of Employment Regulations) (TUPE), the requirements of the Welsh Government's Code of Practice on Workforce Matters the Code) must be met.

61. The Code is designed to ensure that where public services are outsourced to a third party (including the private or third sector) and staff transfer: (a) TUPE will apply, and if TUPE does not strictly apply, the principles of TUPE will be followed unless there are exceptional reasons for not doing so; and (b) staff of the service provider (whether newly recruited or existing staff) undertaking work on that contract will be employed on terms and conditions which are no less favourable than those of transferred staff, with the exception of pension arrangements where reasonable pension provision must be made as indicated in the Code. The Code requires the contracting authority, in this case the Council, to monitor the implementation of the Code by service providers wherever it applies, and to provide an annual report to the Welsh Government.
62. Agency workers at St David's Hall that have been continuously engaged in the same role for a fixed number of hours per week for the last 4 years, and those that have been doing the same for a period of 2 years, will be offered contracts of employment in accordance with the Fair Worker Policy (either permanent contract or temporary). This will mean that they will be covered by the TUPE legislation. AMG would need to determine for themselves the future use of Agency workers.
63. Cleaning employees within the Resources Directorate that are allocated duties in St. David's Hall are likely to be in scope to transfer to the incoming employer. Consultation will need to take place with managers within the Resources Directorate to ascertain if TUPE will apply. If this group are wholly engaged in the provision of cleaning services to St. David's Hall and are considered to be "in scope", they will need to be engaged in the formal consultation process.
64. The Local Government Pension Scheme Regulations allows for the incoming employer to join the scheme by virtue of entering into a tripartite Admission Agreement with the outgoing employer and the Administering Authority, in this case, Cardiff and Vale of Glamorgan Pension Fund. The Council as the outgoing and scheme employer has the responsibility of ensuring that the whole process is undertaken in a timeframe that allows for continued scheme membership of the transferred employees, ensuring that no employee is placed at risk of suffering a break in pensionable membership.
65. Many of the clauses contained within the Admission Agreement will be statutory provisions prescribed by the Local Government Pension Scheme Regulations; others will be additions requested by the Council as the scheme employer or the outgoing employer as the Transferee Admission Body and agreed by all parties. It is important that sufficient time is allocated prior to a TUPE transfer to allow for completion of the Admission Agreement.
66. Employees who transfer from the outgoing employer (the Council) to the incoming employer (AMG) are not regarded as dismissed under TUPE, therefore, a transfer does not trigger an entitlement to redundancy pay unless there is an actual dismissal.
67. The incoming employer will be required to take over any collective agreements made by or on behalf of the outgoing employer in respect of the transferring

employees which are in force at the point of transfer. These will include terms and conditions of employment negotiated through collective bargaining as well as wider employment relations agreements; examples include, collective disputes procedure, negotiated redundancy procedures, flexible working arrangements etc. The incoming employer are not however bound by post-transfer collectively agreed terms which they have not negotiated.

68. The Council as the outgoing employer, may, should they choose, offer alternative vacancies to any employee who is (objecting or otherwise) and who is assigned to the group but does not wish to transfer to the incoming employer. In such circumstances, the Council's normal recruitment and selection procedures would apply.
69. The trade unions, employees and agency workers have been briefed on the recommendations set out in this report. Should Cabinet agree to the recommendations, a formal consultation period will commence with employees who are in scope to transfer to AMG under the Transfer of Undertaking (Protection of Employment) Regulations (TUPE). Trade union colleagues will be invited to attend employee consultation meetings and will be fully briefed throughout the transfer process.

RECOMMENDATION

Cabinet is recommended to:

- 1) Delegate authority to the Director of Economic Development in consultation with the Cabinet Member for Culture, Parks and Events, the Section 151 Officer and the Legal Officer to conclude negotiations with AMG and other relevant stakeholders to:
 - a. complete the MOU with stakeholders based on the principles set out in the draft MOU attached at **Confidential Appendix 1**;
 - b. complete the lease and associated documents as set out at **Confidential Appendix 1**;
 - c. complete the business sales agreement with AMG for St David's Hall based on the principles set out in the draft business sales agreement as set out at **Confidential Appendix 1**;
- 2) Authorise the transfer of [all] employees to AMG under the Transfer of Undertaking (Protection of Employment Regulations 2006) (TUPE).

SENIOR RESPONSIBLE OFFICER	Neil Hanratty Director of Economic Development
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The following appendices are attached:

Appendices

Confidential Appendix 1 - Legal Advice & Agreements

Confidential Appendix 2 - Market Exercise Summary

Confidential Appendix 3 - Surveyors Letter

Appendix 4 - Single Impact Assessment

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