

Bath & North East Somerset Council

DECISION MAKER:	Cabinet	
MEETING:	04/12/2013	EXECUTIVE FORWARD PLAN REFERENCE:
		E 2604
TITLE:	Bath Spa – Proposed Change of Control	
WARD:	All	
AN OPEN PUBLIC ITEM		
List of attachments to this report: Letter of application for consent.		

1 THE ISSUE

- 1.1 To consider whether to grant consent, under the terms of the relevant legal agreements, to a change of control (in other words, of ownership) of Thermae Development Company Limited (**TDC**), the contractor appointed by the Council in 2001 to operate the Bath Spa facility (the **Spa**).

2 RECOMMENDATION

- 2.1 That Cabinet approve the proposed change of control; and
- 2.2 The Chief Financial Officer, in consultation with the Chief Executive and Monitoring Officer, be authorised to enter into any necessary arrangements or take any other action to give effect to the decision, including finalising the terms of a formal deed of consent.

3 RESOURCE IMPLICATIONS (FINANCE, PROPERTY, PEOPLE)

- 3.1 Paragraph 5.5 of the report sets out the current financial arrangements between the Council and TDC. It is not proposed that they will be changed.
- 3.2 The Council have incurred legal and other professional costs to assist it in the consideration of the request. TDC has agreed to pay up to £20,000 towards these costs. The additional cost to the Council will be met from one-off funding.

4 STATUTORY CONSIDERATIONS AND BASIS FOR PROPOSAL

- 4.1 The Council's powers to hold and manage land are contained in a number of statutes, primarily the Local Government Act 1972.

- 4.2 The Council has particular responsibility under the County of Avon Act 1982 in respect of certain hot springs, including those which supply the Spa. It is not considered that the proposed change of control will have any adverse impact to the water supply to the Spa.

5 THE REPORT

5.1 Background

- 5.1.1 The Council and TDC are parties to a Lease, a Water Supply Agreement and a Content Agreement each dated 12 July 2006 (the **Lease, WSA and Content Agreement** respectively). These documents entitle TDC to occupy and operate the Spa.
- 5.1.2 Under the terms of the Lease and the WSA, the Council's consent is required for a change in control, being a change in the ownership of the controlling share of TDC. Currently, 100% of the shares in TDC are owned by its parent company, Thermae OntwikkelingsMaatschappij (T.O.M.) N.V. (**TOM**).
- 5.1.3 TOM has entered into a conditional agreement for the sale of the shares to YTL Hotels and Properties Sdn (**YTL Hotels**). TOM wrote to the Council on 29 July 2013 requesting consent to the sale in accordance with the terms of the Lease and the WSA. The sale agreement is conditional upon the Council granting consent.
- 5.1.4 YTL Hotels is a wholly owned subsidiary of YTL Corporation Berhad, a company listed on the Tokyo stock exchange, and YTL Hotels, itself, owns and/or operates a number of hotels. These are principally in Malaysia, but it also owns and/or operates three hotels in Australia, one in France and will from Spring 2014 operate the new Gainsborough Hotel in Bath.
- 5.1.5 Since receiving the request for consent, the Council has been engaged in a due diligence process of investigating YTL Hotel's financial standing, its track record as a spa operator, its management structure and its business plan for the Spa. The Council is currently taking up YTL Hotel's references.

5.2 Consent

- 5.2.1 The grounds for the granting of consent by the Council to a change of control of TDC are slightly different under the terms of the Lease and the WSA. However, neither agreement can be transferred without the other, which means the two different tests work in tandem and must both be satisfied by the proposed new owner, YTL Hotels.

Water Supply Agreement

- 5.2.2 Under clause 4.2 of the WSA, the Council cannot unreasonably refuse consent. However, it can decide under clause 4.3 not to consent if it decides the "*person, firm or body corporate concerned*" (in this case, YTL Hotels) is not a "*reasonable and prudent operator*".

5.2.3 A “reasonable and prudent operator” is defined in clause 1 of the WSA as set out below. The key words are highlighted in bold.

*“... a person firm or body corporate seeking in **good faith** to perform its **contractual obligations** in accordance with the terms of this [WSA] insofar as such performance is possible and not beyond reasonable control and in so doing and in the general conduct of its whole undertaking (insofar as aforesaid) exercising that **degree of skill diligence prudence and foresight which would reasonably and ordinarily be expected from a skilled and experienced operator engaged in the same or a similar type of undertaking** under the same or similar circumstances especially having regard to ensuring **the safe handling storage and use of Spa Facilities Water** and any reference to the standard of a reasonable and prudent operator shall include such degree of diligence prudence and foresight.”*

5.2.4 Under clause 4.3 of the WSA, it would be reasonable for the Council to be supplied with any information which would demonstrate YTL Hotels' capacity to meet these criteria.

The Lease

5.2.5 Under clause 4.15.9 of the Lease, a change of control requires the Council's consent in writing, such consent not to be unreasonably withheld.

5.2.6 The Council can withhold consent under clause 4.15.10 for various reasons including:

5.2.6.1 if TDC cannot demonstrate “to the satisfaction of the (Council) (acting reasonably) that the proposed assignee or Controller ... is ... **responsible and respectable**”;

5.2.6.2 if “**it is otherwise reasonable to do so**”.

5.3 Due Diligence

5.3.1 Since August 2013, the Council's due diligence exercise has been focussed in two directions. Firstly, towards YTL Hotels and the extent to which it is able to satisfy the criteria mentioned above and secondly, toward TDC and its operation of the Spa to ensure that if ownership is transferred there are no existing breaches of either the Lease, the WSA or the Content Agreement.

5.3.2 If any breaches of the WSA or the Lease are found, YTL has confirmed that it will be prepared to deal with the rectification of these after any decision to grant consent has been given and that it is prepared to give assurances in that regard.

5.4 Decision Making

5.4.1 The Council therefore has a rights under clause 4.15.10 of the Lease and clause 4.3 of the WSA to withhold consent, but in making a decision it is important that Council acts reasonably and only considers evidence that is within the criteria set out above.

5.4.2 The Council would be acting reasonably in considering the information below in making its decision whether or not to grant consent. It has contractual authority under the Lease and the WSA to receive such information from TDC (being the party requesting consent under these agreements):

5.4.2.1 statutory and management accounts of YTL Hotels;

5.4.2.2 a business plan and all related due diligence information for YTL Hotels' acquisition of TDC;

5.4.2.3 references for YTL Hotels;

5.4.2.4 evidence of the operation by YTL Hotels of a spa similar in size, profile and importance to the Spa;

5.4.2.5 any specific evidence of experience of the "... *safe handling storage and use of ...*" water of an equivalent importance to that which is the subject of the WSA.

5.5 Financial Implications

5.5.1 Under the Lease, the Council receives rent which comprises five parts:

5.5.1.1 First part: £25,000 rent for the demised premises between year 1 and year 10 (inclusive) of the Lease. This increases from year 11 to £80,000 or 10% of net profit whichever is the greater (by way of explanation, 8 May 2006 being the beginning of year 1 and 8 May 2016 being the beginning of year 11).

5.5.1.2 Second part: An additional rent of 25% of net profit if the net profit exceeds £2.4m in year 6 to year 10 (inclusive) and from year 11 if net profit exceeds 30% of capital employed one quarter of the sum by which net profit exceeds 30% of capital employed (capital employed is agreed and defined at £3,416,000).

5.5.1.3 Third part: 12 ½% of net profit in accordance with Schedule 4 of the WSA (this is a payment for water).

5.5.1.4 Fourth part: Insurance rent.

5.5.1.5 Fifth part: VAT.

5.5.2 The WSA and the Lease provide guidance upon accounting procedures and a definition of net profit.

5.6 Big Lottery Fund

5.6.1 As part of the funding for the development of the Spa, the Council received a grant from the Millennium Commission. The Millennium Commission assumed the rights and obligations of the Big Lottery Fund (BLF) from 2007. The grant funding agreements impose various obligations on the Council, and in some circumstances require consent to be obtained from BLF before a specific course of action is taken. The Council has been given legal advice that

consent from BLF is not formally required before it can itself give consent to the proposed change of control. However, in keeping with the spirit of the grant, the Council has kept BLF informed of the proposed change in ownership and the timescale within which the decision is being made.

6 RATIONALE

6.1 Council officers and their appointed external legal and financial advisers in this matter have reviewed the information obtained under the due diligence exercise referred to in section 5.4.2 above. It is reasonable to conclude that the new parent company of TDC, YTL Hotels, meets the criteria set out in section 5.2.3 and 5.2.6. It is therefore considered that the Council's interests will be protected by agreeing to the proposal and that it should agree to consent to the change of control.

7 OTHER OPTIONS CONSIDERED

7.1 The only other option would be to refuse consent. It is considered this would not be defensible.

8 CONSULTATION

8.1 Consultation has taken place with the Chief Executive, Monitoring Officer and the Council's external financial and legal advisers.

9 RISK MANAGEMENT

9.1 A risk assessment related to the issue and recommendations has been undertaken, in compliance with the Council's decision-making risk management guidance.

Contact person	<i>Tim Richens, Chief Financial Officer and Divisional Director – Business Support – (01225) 477468</i>
Background papers	<i>List here any background papers not included with this report because they are already in the public domain, and where/how they are available for inspection.</i>
Please contact the report author if you need to access this report in an alternative format	