

Dated

2020

**SOUTH KESTEVEN DISTRICT COUNCIL
LEISURESK LIMITED**

**MEMBER'S AGREEMENT
in relation to LeisureSK Limited**

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PARTIES

- (1) **SOUTH KESTIVEN DISTRICT COUNCIL** of Council Offices, St. Peter's Hill, Grantham NG31 6PZ (the **Owner**).
- (2) **LEISURESK LIMITED** (company no 12888724) whose registered office is at Council Offices, St. Peter's Hill, Grantham NG31 6PZ (the **Company**).

INTRODUCTION

- (A) The Company was incorporated on 18 September 2020 and, at the date of this Agreement, the Owner is the sole member of the Company.
- (B) The Company has been established for the purpose of, amongst other things, providing leisure, sports and cultural facilities and services.
- (C) This Agreement sets out the terms upon which the Owner will participate in the Company as its sole member and the terms upon which the Council will retain decisive influence over both the strategic objectives and the significant decisions of the Company.

AGREED TERMS

1 DEFINITIONS AND INTERPRETATION

1.1 In this Agreement:

Articles means the articles of association of the Company

Business means the business of the Company as set out in clause 2

Business Day means a day (other than a Saturday or Sunday) on which the banks in the City of London are open for business

CA2006 means the Companies Act 2006

Data Protection Legislation means all legislation and regulatory requirements in force from time to time relating to the protection and handling of personal data and the privacy of electronic communications, including, without limitation (i) any data protection legislation from time to time in force in the UK including the Data Protection Act 2018 or any successor legislation, as well as (ii) the General Data Protection Regulation ((EU) 2016/679) and any other directly applicable European Union regulation relating to data protection and privacy (for so long as and to the extent that the law of the European Union has legal effect in the UK)

Director means a director of the Company

Environmental Information Regulations means the Environmental Regulations 2004

FOIA means the Freedom of Information Act 2000

Information has the meaning given to it under section 84 of the FOIA

Owner Consent means the prior written consent of the Owner

Owner Consent Matters means those matters listed in Schedule 1

Owner Representative means the person nominated by the Owner from time to time to act as its authorised representative which shall be determined by the Owner in accordance with its constitution from time to time and notified to the Company in writing

Remuneration Policy means a policy adopted by the Company (following receipt of Owner Consent) in relation to the provision of remuneration (including salary, bonus, the provision of benefits-in-kind or otherwise) for employees, officers and consultants

Request for Information has the meaning set out in the FOIA or any apparent request for information made under the FOIA

Subsidiary has the meaning given in the CA2006

Teckal means the codified rule of EU procurement law as set out within Directive 2014/24/EU and Regulation 12 of the Public Contracts Regulations 2015, deriving from the Teckal case (*Teckal Srl v Comune de Viano and Azienda Gas-Acqua Consorziale (AGAC) di Reggio Emilia* (C-107/98) [1999] ECR I-8121) pursuant to which the requirement for open advertisement and tendering for public contracts in accordance with the Public Contracts Regulations 2015 does not apply

United Kingdom means the geographical area of the United Kingdom of Great Britain and Northern Ireland as at the date of this Agreement

- 1.2 A reference to a statutory provision includes a reference to:
- 1.2.1 a statutory amendment, consolidation or re-enactment (whether before or after the date of this Agreement);
 - 1.2.2 statutory instruments or subordinate legislation (as defined in section 21(1) of the Interpretation Act 1978) or orders made under the statutory provision (whether made before or after the date of this Agreement); and
 - 1.2.3 statutory provisions of which the statutory provision is an amendment, consolidation or re-enactment.
- 1.3 Reference to:
- 1.3.1 a person includes a legal or natural person, partnership, trust, company, government or local authority department or other body (whether corporate or unincorporate);
 - 1.3.2 a statutory or regulatory body shall include its successors and any substituted body;
 - 1.3.3 an individual includes, where appropriate, his personal representatives;
 - 1.3.4 the singular includes the plural and vice versa; and
 - 1.3.5 one gender includes all genders.
- 1.4 Unless otherwise stated, a reference to a clause or Schedule is a reference to a clause of or schedule to this Agreement and a reference to this Agreement includes its Schedules.
- 1.5 Clause headings in this Agreement are for ease of reference only and do not affect its construction.
- 1.6 In construing this Agreement the so-called ejusdem generis rule does not apply and accordingly the interpretation of general words shall not be restricted by words indicating a particular class or particular examples.
- 1.7 For the purposes of this Agreement **Party** means a party to this Agreement and reference to **Parties** shall be to all or more than one of them as applicable.

- 1.8 A reference to **writing** or **written** includes email but not fax.
- 1.9 A reference to any agreement or document (or any provision of it) referred to in the Articles is a reference to that agreement or document (or the relevant provision of it) as varied, amended or supplemented (in each case, other than in breach of the provisions of that agreement or document) from time to time.
- 1.10 Any words following the terms **including**, **include**, **in particular**, **for example** or any similar expression shall be construed as illustrative and shall not limit the sense of the words, description, definition, phrase or term preceding those terms.
- 1.11 A reference to an **amendment** includes a novation, re-enactment, supplement or variation (and amended shall be construed accordingly).
- 1.12 A reference to **determines** or **determined** means, unless the contrary is indicated, a determination made at the absolute discretion of the person making it.

2 BUSINESS AND BUSINESS PLAN

- 2.1 The Business of the Company shall be:
- 2.1.1 to provide leisure, sports and cultural facilities and services;
 - 2.1.2 to liaise and co-operate with all interested groups within the community to develop and deliver this service;
 - 2.1.3 to promote and enter into partnerships or arrangements of all kinds to improve or extend the facilities and services offered;
 - 2.1.4 to explore all avenues of funding and finance for such services;
 - 2.1.5 to improve health and well-being through a range of outcomes, including reduced obesity, reduced anti-social behaviour and narrowing the health inequality gap;
 - 2.1.6 to increase jobs, strengthening the local economy and enable children, young people and adults to learn and be ready for work;
 - 2.1.7 to carry on any other trade or business which in the opinion of the Directors is in the best interest of the Company; and
 - 2.1.8 without prejudice to the activities listed above, to carry on any trade or business of a general commercial company,
- together with any activities reasonably incidental to the above or activities from time to time.
- 2.2 The Parties intend that the Company shall at all times be a Teckal-compliant company.
- 2.3 The Company shall deliver to the Owner by no later than 31st January (or such other date as may be agreed between the Parties) its draft business plan and budget for the following financial year in a form approved by the Owner.
- 2.4 The Owner will use reasonable endeavours to respond no later than 1 month after (or such later date as may be agreed between the Parties) with any issues of concern with the draft business plan and budget, and the Company shall make such amendments to its draft business plan and budget as the Owner may reasonably require.
- 2.5 The Owner shall notify the Company of the reasons for raising issues of concern with its draft business plan and budget and the Owner and the Company will endeavour to work together to agree a revised business plan and budget for approval by the Owner as soon as possible. Until such issues are

resolved the business plan and budget shall not become the Company's business plan and budget for the purposes of this Agreement and the preceding year's business plan and budget shall continue to have effect unless the Parties agree otherwise.

- 2.6 The Company covenants to carry on the Business in accordance with and only to enter into commitments as envisaged by the business plan and budget then in force or where any matter is outside the business plan and budget with Owner Consent.
- 2.7 The Company shall not introduce a new or amend an existing Remuneration Policy to allow for the payment of a Director or Directors without Owner Consent.

3 OWNER'S ROLE

- 3.1 The Owner will monitor and control the Business and affairs of the Company through the Owner Consent Matters, through receiving periodic reports, through its Directors and through ad hoc information requests.
- 3.2 The Owner:
 - 3.2.1 shall have unlimited, unrestricted and prompt access to any Company information and documents requested pursuant to this Agreement;
 - 3.2.2 will not usurp the functions of the Directors but will monitor the activities of the Company to ensure that they are acceptable and accountable to the Owner as ultimate owner of the Company; and
 - 3.2.3 may, in addition to those matters requiring Owner Consent:
 - (a) make recommendations from time to time to the Directors; and/or
 - (b) give directions by notice in writing from time to time to the Directors.
- 3.3 Any notice to or from the Owner shall be sent to or from the Owner Representative. Where a consent or approval is expressed in this Agreement to be required of the Owner (including Owner Consent), it shall be given by the Owner Representative. Such consent or approval shall be given in writing in advance of the decision or matter requiring consent or approval and the Owner shall use its reasonable endeavours to communicate any such decision, consent or approval (including any decision not to give consent or approval) to the Company within a period of 20 Business Days from receipt of the request provided that the Owner shall not be deemed to have made a decision or given its consent or approval by virtue of the fact that it has not communicated the same within that time limit. Where the Company requires the Owner to make any decision or provide any consent or approval, the Company shall provide such material information as the Owner may require to enable it to consider the decision, consent or approval in question.
- 3.4 Once a consent or approval is given in accordance with clause 3.3 then, to the extent a special or an ordinary resolution is required pursuant to the CA2006 or otherwise, and the form of consent or approval doesn't already take the form of such a special or ordinary resolution, the Company shall prepare and circulate to the Owner a draft resolution for consideration and, if thought fit, approval by the Owner. The Owner shall approve any resolution which is in line with a consent or approval previously given.
- 3.5 The Company shall ensure that the Directors and and/or any employees of the Company as requested by the Owner shall attend such meetings or parts of meeting(s) of the Owner as the Owner may require and shall answer questions put by the Owner and provide information regarding the activities of the Company as reasonably requested.

4 CONDUCT OF THE COMPANY'S AFFAIRS

- 4.1 Meetings of the Directors shall be held no less than four times in every year and at not more than three monthly intervals.

- 4.2 With the exception of the Owner Consent Matters, the management of the Company shall be vested in the Directors. The Company shall ensure that no Owner Consent Matters shall be carried out without Owner Consent.
- 4.3 The Directors may, with Owner Consent, appoint a chief executive/managing director on such terms as they may think fit who shall be responsible for the day to day management of the Business within the terms of the business plan and budget then in force and this Agreement, and perform such duties as may be delegated to him by the Directors. The Directors may also remove such managing director, and appoint a replacement, in each case on such terms as they may think fit, providing that no appointment or removal shall be made without Owner Consent.
- 4.4 The Directors will determine the general policies of the Company and the manner in which the Business is to be carried out, subject to:
- 4.4.1 the business plan and the budget then in force;
 - 4.4.2 those matters requiring Owner Consent; and
 - 4.4.3 any other express provisions of this Agreement.
- 4.5 In particular, but without limitation, the Directors shall exercise all voting rights and other powers of control available to them in relation to the Company so as to procure (in so far as they are able in the exercise of such rights and power) that, at all times during the term of this Agreement, the Company shall:
- 4.5.1 carry on and conduct the Business and affairs in a proper and efficient manner, for its own benefit and in accordance with the business plan and budget and good business practices; and
 - 4.5.2 transact all its business on arm's length terms.
- 4.6 The Company shall not carry out any activity which would render the Owner's membership of the Company unlawful provided that where a proposed change of law would render such membership unlawful the Owner will use its reasonable endeavours to take such steps as are necessary to allow it to continue lawfully to be a member of the Company.
- 4.7 The Company will, if it requires any approval, consent or licence for the carrying on of its Business in the manner in which it is from time to time carried on or proposed to be carried on, obtain and maintain the same in full force and effect.
- 4.8 The Company shall permit any Director to discuss the affairs, finances and accounts of the Company and its Subsidiaries with the Owner's designated officers and executives at any time. All books, records, accounts and documents relating to the Business and the affairs of the Company shall be open to the inspection of any such person, who shall be entitled to make any copies thereof as he or she deems appropriate to keep the Owner properly informed about the Business and affairs of the Company or to protect its interests as Owner. Any information secured as a consequence of such discussions and inspections shall be kept confidential by the Owner and its designated officers and executives in accordance with the terms of clause 6.
- 4.9 The Company agrees with the Owner that it will maintain effective and appropriate control systems in relation to the financial, accounting and record-keeping functions of the Company and will generally keep the Owner informed of the progress of the Business and affairs and in particular will procure that the Owner is given such information and such access to the officers, employees and premises of the Company as it may reasonably require for the purposes of enabling it to monitor its investment and interest in the Company.
- 4.10 The Company shall not breach nor cause the Owner to be in breach of the Local Authorities (Companies) Order 1995.

5 TERMINATION

5.1 This Agreement shall terminate upon:

- 5.1.1 the written agreement of the Parties in accordance with the terms agreed; or
- 5.1.2 when a resolution is passed by the Owner or creditors of the Company, or any order made by a court or other competent body or person instituting a process that shall lead to the Company being wound up and its assets being distributed among the creditors, Owner or other contributors; or
- 5.1.3 the Company ceasing to carry on its Business; or
- 5.1.4 the Company being convicted of a criminal offence; or
- 5.1.5 upon the Owner giving not less than 3 months' written notice of the date on which this Agreement will terminate.

6 CONFIDENTIALITY, FREEDOM OF INFORMATION AND DATA PROTECTION

6.1 Each Party undertakes that it shall not at any time disclose to any person any confidential information concerning the business, affairs, customers, clients or suppliers of the other Party except as permitted by clause 6.2.

6.2 Each Party may disclose the other Party's confidential information:

- 6.2.1 to its employees, officers, representatives or advisers who need to have such information for the purposes of carrying out the Party's obligations under this Agreement. Each Party shall ensure that its employees, officers, representatives or advisers to whom it discloses the other Party's confidential information comply with this clause 6; or
- 6.2.2 as may be required by law, court order or any governmental or regulatory authority.

6.3 Each Party acknowledges that the other Party is subject to the requirements of the FOIA and the Environmental Information Regulations, and shall facilitate the other Party's compliance with its Information disclosure requirements pursuant to and in the manner provided for in clauses 6.4-6.7.

6.4 If either Party (the **Recipient**) receives a Request for Information in relation to Information that the other Party is holding and which the Recipient does not hold itself, the Recipient shall within 6 Business Days of receiving a Request for Information:

- 6.4.1 respond to the Request for Information explaining that that the other Party shall be responding within the required timeframe; and
- 6.4.2 refer the Request for Information to the other Party explaining that the other Party is holding the relevant Information and that the Request for Information must be met by the other Party within the required timeframe.

6.5 The Recipient shall provide all necessary assistance as reasonably requested by the other Party to enable the other Party to respond to the Request for Information within the time for compliance set out in Section 10 of the FOIA or Regulation 5 of the Environmental Information Regulations.

6.6 The Parties acknowledge that (notwithstanding the provisions of clause 6.1) a Recipient may, acting in accordance with the Freedom of Information Code of Practice 2018 and the Regulation 16 Code of Practice on the discharge of the obligations of public authorities under the EIR (as appropriate) disclose Information concerning the other Party:

- 6.6.1 in certain circumstances without consulting with the other Party; or

6.6.2 following consultation with the other Party and having taken their views into account. The Recipient shall have absolute discretion as to whether Information is exempt from disclosure under the FOIA and the Environmental Information Regulations and whether Information is to be disclosed in response to a Request for Information.

6.7 Each Party shall transfer to the other Party any Request for Information which it receives but is addressed to the other Party as soon as practicable and in any event within 6 Business Days of receiving it.

6.8 The Parties acknowledge that any lists provided which itemise or outline confidential information are of indicative value only and that a Recipient may nevertheless be obliged to disclose confidential information in accordance with this clause 6.

6.9 The Parties shall comply with all Data Protection Legislation at all times when carrying out their respective obligations pursuant to this Agreement and any other agreement to which it is a party.

7 NO PARTNERSHIP

7.1 Nothing in this Agreement gives rise to a partnership between the Parties or constitutes one Party acting as the agent of the other.

8 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

8.1 Unless the right of enforcement is expressly granted, it is not intended that a third party, other than a lawful successor in title or a lawful assignee, should have the right to enforce a provision of this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999. The Parties may rescind or vary this Agreement without the consent of a third party to whom an express right to enforce any of its terms has been provided.

9 COSTS OF THIS AGREEMENT

9.1 Each Party shall pay its own costs in connection with the negotiation, preparation, execution and performance of this Agreement.

10 WAIVER

10.1 The rights of each of the Parties in respect of a breach of this Agreement shall not be affected by completing, rescinding, or failing to rescind, this Agreement, or failing to exercise, or delaying to exercise, a right or remedy, or by anything else, except a specifically authorised written waiver or release. A single or partial exercise of a right or remedy provided by this Agreement or by law does not prevent its further exercise or the exercise of another right or remedy.

10.2 Waiver of a breach of a term of this Agreement, or of a default under it, does not constitute a waiver of another breach or default nor affect the other terms of this Agreement.

10.3 The rights and remedies provided in this Agreement are cumulative and not exclusive of any other rights or remedies.

11 VARIATION

11.1 A purported variation of this Agreement is not effective unless in writing and signed by or on behalf of each of the Parties.

12 INVALIDITY

12.1 If a provision of this Agreement is held to be illegal or unenforceable, in whole or in part, under an enactment or rule of law, it shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected. The Parties agree to negotiate

in good faith to agree the terms of a mutually satisfactory provision to be substituted for the provision found to be illegal or unenforceable.

13 ENTIRE AGREEMENT

- 13.1 This Agreement (together with any documents entered into under it or at the same time as it) supersedes all prior understandings and agreements between the Parties (whether written or oral) relating to its subject-matter and contains the entire agreement between the Parties relating to its subject-matter.
- 13.2 Each Party acknowledges that it does not enter into this Agreement on the basis of, and does not rely on, warranties or representations made, or agreed to, by any person (whether a party to this Agreement or not).
- 13.3 Each Party waives its rights against the other in respect of warranties and representations (whether written or oral) not expressly set out or referred to in this Agreement.
- 13.4 Nothing in this clause 13 limits or excludes liability for fraud.

14 STATUS OF THIS AGREEMENT

- 14.1 In the event of any ambiguity or discrepancy between the provisions of this Agreement and the Articles, then it is the intention of the Owner that the provisions of this Agreement shall prevail. Accordingly, the Owner shall take all such steps and do all such acts and things as may be necessary or desirable, including, without limitation, exercising all voting and other rights and powers of control available to it in relation to the Company, so as to give effect to the provisions of this Agreement and shall further if necessary procure (insofar as it is able to do so by the exercise of those rights and powers) any required amendment to the Articles.

15 CONSENTS

- 15.1 Consents, notices, approvals or agreements to be given by the Owner under this Agreement (including Owner Consent) shall be given in writing.
- 15.2 Where this Agreement provides that a matter is subject to the consent, approval or agreement of either Party then (except as expressly provided otherwise), it shall be in the absolute discretion of that Party as to whether (and if so, on what terms and conditions) the consent, approval or agreement is made.

16 COMMUNICATIONS

- 16.1 Any notice or other communication under or in connection with this Agreement shall be in writing and shall be delivered personally or sent by first-class post or by email as follows:
 - 16.1.1 if to the Owner, to:
 - Address: [Insert]
 - Email: [Insert]marked for the attention of [Insert]; and
 - 16.1.2 if to the Company, to:
 - Address: [Insert]
 - Email: [Insert]marked for the attention of [Insert],

or to such other person, address, or email as any Party may specify by notice in writing to the other.

16.2 In the absence of evidence of earlier receipt, any notice or other communication shall be deemed to have been duly given:

16.2.1 if delivered personally, when left at the address referred to in clause 16.1;

16.2.2 if sent by mail, other than airmail, two Business Days after posting it;

16.2.3 if sent by email, when sent and there has been no communication by the recipient to the sender that the email has not been received,

provided always that a notice given in accordance with the above but received on a day which is not a Business Day or after business hours on a Business Day will only be deemed to be given on the next Business Day.

17 COUNTERPARTS

17.1 This Agreement may be executed in counterparts and by the Parties on different counterparts, but shall not be effective until each Party has executed at least one counterpart. Each counterpart, when executed, shall be an original, but all the counterparts together constitute the same document.

18 GOVERNING LAW AND JURISDICTION

18.1 This Agreement and the rights and obligations of the Parties shall be governed by and construed in accordance with the laws of England and Wales.

18.2 The Parties irrevocably submit to the exclusive jurisdiction of the courts of England and Wales in respect of any dispute or claim arising out of or in connection with this Agreement or any of the documents to be executed pursuant to this Agreement or their subject-matter or formation (including non-contractual disputes or claims).

18.3 This Agreement has been executed as a deed and delivered on the date stated at the beginning of this Agreement.

SCHEDULE 1 - OWNER CONSENT MATTERS

The Company shall not without Owner Consent:

- 1 vary in any respect its Articles.
- 2 permit the registration of any person as a member of the Company other than the Owner in accordance with the terms of this Agreement.
- 3 issue any loan capital or enter into any commitment with any person with respect to the issue of any loan capital.
- 4 make any borrowing.
- 5 pass any resolution for its winding up or present any petition for its administration (unless it has become insolvent).
- 6 engage in any business other than as contemplated by the business plan and budget or defray any monies other than in good faith for the purposes of or in connection with the carrying on of such business.
- 7 form any Subsidiary or acquire shares in any other company or participate in any partnership or joint venture (incorporated or not).
- 8 close down any business operation, or dispose of or dilute its interest in any Subsidiary for the time being, or dispose of any material asset, unless in each case such closure or disposal is expressly contemplated by the business plan and budget.
- 9 amalgamate or merge with any other company or business undertaking.
- 10 alter its name or registered office.
- 11 enter into any transaction or arrangement of any nature whatsoever (including, for the avoidance of doubt, a service contract) with any of its Directors or any person who is connected (within the meaning of sections 1122 and 1123 of the Corporation Tax Act 2010) to any of its Directors, whether or not any other person shall be party to such transaction or arrangement.
- 12 enter into any arrangement, contract or transaction outside the normal course of its business or otherwise than on arm's length terms.
- 13 enter into, as lessor or as lessee, any finance lease if doing so would mean that the aggregate value of such arrangements entered into exceeds £20,000.
- 14 create or permit to be created any mortgage, charge, encumbrance or other security interest whatsoever on any material asset or its business in whole or in part other than liens arising in the ordinary course of business.
- 15 adopt or amend its annual business plan or budget.
- 16 change either its statutory auditors or its financial year end.
- 17 make or permit to be made any material change in the accounting policies and principles adopted by the Company in the preparation of its audited accounts except as may be required to ensure compliance with relevant accounting standards under the CA2006 or any other generally accepted accounting principles in the United Kingdom.

- 18 make any loan (otherwise than by way of deposit with a bank or other institution the normal business of which includes the acceptance of deposits) or grant any credit, guarantee or indemnity (other than in the normal course of trading).
- 19 give any guarantee, suretyship or indemnity to secure the liability of any person or assume the obligations of any person outside the scope of its business plan and budget.
- 20 establish or amend any profit-sharing, bonus or other incentive scheme of any nature for Directors, officers or employees.
- 21 establish or amend any pension scheme or grant any pension rights to any Director, officer, employee, former director, officer or employee, or any member of any such person's family.
- 22 dismiss or appoint any Director.
- 23 dismiss or appoint any chief executive/managing director.
- 24 adopt or amend its Remuneration Policy to in relation to Directors or staff.
- 25 agree to remunerate (by payment of salary, bonus, the provision of benefits-in-kind or otherwise) or to increase the remuneration of any employee, officer of or consultant to the Company unless the annual aggregate amount of such remuneration (by payment of salary, bonus, the provision of benefits-in-kind or otherwise) is in accordance with the Company's current Remuneration Policy or expressly referred to in the business plan and budget.
- 26 institute, settle or compromise any material legal proceedings (other than debt recovery proceedings in the ordinary course of business or where the value of such claim is less than £10,000) instituted or threatened against it or submit to arbitration or alternative dispute resolution any dispute if the effect of this is that its solvency may be imperilled, or it may require additional funding in order to deliver its business plan and budget.
- 27 make any agreement with any revenue or tax authorities or make any claim, disclaimer, election or consent for tax purposes in relation to the Company or its business if the effect of this is that its solvency may be imperilled, or it may require additional funding in order to deliver its business plan and budget.
- 28 acquire any land.
- 29 enter into any contract with a value in excess of £50,000.

