

**FALKIRK COUNCIL**

**Subject: FALKIRK COMMUNITY STADIUM LTD**  
**Meeting: FALKIRK COUNCIL**  
**Date: 12 March 2014**  
**Author: CHIEF EXECUTIVE**

**1. INTRODUCTION**

1.1 This report provides Members with a further update in respect of Falkirk Community Stadium Ltd., (FCSL) being the arms length organisation established, originally in 2003, as a joint venture between Falkirk Council (FC) and Falkirk Football and Athletic Club (FFAC) and now a wholly owed subsidiary of the Council following the demerger exercise approved by Members in March 2009. It also explores the way forward for delivering the full potential of the Falkirk Community Stadium site, including the development opportunities adjacent to the existing stadium building.

**2. BACKGROUND : 2003-2009**

2.1 The Council initially agreed to lease an area of approximately 42 acres at Westfield Falkirk to enable the development of a new stadium. FCSL was set up in 2003 as a joint venture between FC and FFAC to construct and operate Falkirk Community Stadium in order to provide a new home for FFAC and to provide a range of community facilities. The stadium was constructed in phases; the west stand, including the football playing and support facilities being completed in 2004 and the north and south stands being delivered in 2005 and 2008 respectively. The potential east stand site remains undeveloped at this time. The Council and FFAC invested around £6m from the proceeds of the sale of land at Brockville and Hope Street, Falkirk. The Council also advanced loans of c£5.1m to FCSL.

2.2 The company operated in this joint venture capacity for some years, overseeing the construction programme described above; the occupation of commercial spaces within the west stand and the operation of a 5-a-side football offering within the curtilage of the stadium site. It also saw FFAC successfully relocate from its previous home at Brockville, in the heart of the town of Falkirk to its new location, creating a stadium that was Scottish Premier League compliant and enabling the club to play in the top league in Scotland following promotion in 2005.

2.3 In 2008 the FCSL board carried out a strategic review of its operations given the passage of five years since its inception. The outcome of this review was reported to Members at its meetings of the Full Council held on 22<sup>nd</sup> September, 2008, and 4<sup>th</sup> March, 2009. In essence, the company evaluated options for taking the company forward against three strategic criteria:-

- Delivering a completed stadium and site development
- Repaying the loans from Falkirk Council, and
- Ensuring financial sustainability of the ongoing operation

2.4 At that time, FCSL concluded that a reorganisation of the company in a commercially attractive and tax efficient manner provided the most effective way to deliver the strategic objectives. This was to be delivered by means of a demerger exercise, effectively splitting FCSL into two parts; one part to be wholly owned by the Council (the current FCSL) and the other to be wholly owned by FFAC. The split reflected the best fit with the respective organisational objectives, FFAC being football focussed and the Council having wider community facing interests.

This resulted in the Council taking responsibility for all the existing commercial activities (including all non-football tenancies in the West Stand) and for the development of the entire site excluding stands. FFAC took responsibility for all the football related areas including the West and North Stands (excluding non-football activities in the West Stand), pitch, floodlights and for the development of the South and East Stands. This split allowed both shareholders to concentrate on their own core activities. The table below summarises this.

<b>Revised and Refocused FCSL</b>	<b>FFAC</b>
West Stand Conference centre Five-a-Side football Third party leases Development plots Catering	Leases: West Stand footballing areas Ground lease – pitch, north stand, south stand, east stand plot
<b>Responsibilities</b>	<b>Responsibilities</b>
Management of conference centre Five-a-side football Management of third party leases Management of communal areas Service charge development and collection West stand maintenance and development Development agreement for corner pods and associated developments Café Westfield	Development of football related assets in West Stand North Stand East Stand development South Stand development Pitch Maintenance Share external maintenance of West Stand

This proposal was considered and agreed by Members at the 2009 meeting referred to earlier. The Council retained its overall ground lease over all areas of the site covering the areas leased to FCSL and FFAC.

2.5 Now FFAC lease the accommodation they occupy within the west stand, including the spectator seats, with maintenance and operational liability being borne by the club as was agreed by Members in 2009. The distribution of the assets and future tenure settled at that time is represented pictorially on the plan(s) annexed hereto.

2.6 At the time of the demerger exercise, specialist expert advice was taken by the Council on the relative value of the assets to be distributed to the then joint venture partners. Notwithstanding that, between first considering the demerger proposal in 2008 and finally agreeing to its terms, asset valuations were particularly volatile and uncertain due to the prevailing market conditions, nonetheless, given the Council's strategic interest in the site and following valuation advice obtained from the District Valuer, the view taken was that the demerger distribution proposal still represented the best value option for the Council. Members also carefully considered the issues of delivery of the masterplan for the wider site development while acknowledging the revenue and legal implications of the changes.

2.7 The approved restructuring proposals were thereafter implemented.

### 3. BACKGROUND : 2009 TO DATE

3.1 At the time Members approved the demerger plan, discussions were ongoing with Henry Boot Developments Ltd., in relation to the potential development of the plots transferred to the new FCSL. The Council was also working with development partner MacDonald Estates with a view to taking forward the strategic development opportunity at Falkirk Gateway site, along with co-landowner Callendar Estates. Due to the continuing challenging property environment, neither of these developments have progressed as had been envisaged but the Council's respective interest in these sites remains significant when property markets recover.

3.2 As has been separately reported to Members, the Council's Tax Increment Funding Initiative (TIF) has significant potential to assist in supporting development of these key gateway locations. Further market interest still exists with enquiries from time to time all of which are pursued. Whilst development interest in the site remains constrained due to prevailing property market and wider economic conditions, this location is considered likely to prove attractive to developers and end users on market recovery, more particularly given the proposed investment in enabling infrastructure via TIF.

3.3 In addition, shortly after the March 2009 demerger decision, Members agreed to the various terms of the partnership agreement with (the then) British Waterways Scotland (now Scottish Canals) to deliver the £43m Helix project, which has the Community Stadium at its heart. The significant level of national and international interest that the project continues to attract can only raise the profile of the adjacent development sites and interest from the market.

3.4 In 2009, as has previously been stated, the demerger proposals were effected in, at that time, the most tax efficient manner. The main reason for FCSL continuing was the tax liability that would need to be paid had FCSL been wound up. The FCSL Board and Council Officers have now identified a potential alternative delivery model which is fully explained at section 4 below.

3.5 This now presents an opportunity, should this prove to be the best way to proceed, for the Council to take over the assets currently vested in FCSL.

3.6 Another relevant change since 2009 has been the establishment of Falkirk Community Trust (FCT).

The Trust was established to optimise the operation of the culture and leisure assets in the Council's ownership. As a charitable company it can be structured in a way that secures savings that would not otherwise be available to the Council. In particular it can receive donations or "gifts".

The Trust's annual Business Plan sets out the Trust's objectives for the coming year. These include continuing the development of culture and sport in the area and making a positive contribution to the wider tourism offer. The Council continues to be the main funder of the Trust and has 5 Directors on its board. The Council and Trust discuss and agree the strategic priorities for the coming year. These are largely derived from continuing to offer a wider range of culture, libraries and sports facilities across the Council area augmented by a diverse programme of activity that supports the delivery of the Strategic community plan and the Council's own priorities. FCT has identified a desire to improve and develop the customer experience in its venues and to ensure that the services it offers are accessible to all and reflect the needs and wishes of the local community within the resources available. Council will recall that the responsibility for the on-going management and maintenance of the Helix project has been transferred to FCT. The Stadium sits at the heart of the Helix and integrating it fully within the wider operation may improve efficiency and contribute more strongly to the wider community offering.

- 3.7 Since the de-merger, the Board of the new FCSL has been reviewing the operations and longer term management arrangements of the company. Part of this review has been to consider the most appropriate future governance arrangements, since the demerger decision, given the passage of time and the changes of circumstances described above.

#### **4. THE PROPOSAL**

- 4.1 In considering the proposal, it is important to examine some of the key drivers involved. Firstly, the current structure of FCSL is unsatisfactory for a number of reasons. The share capital of FCSL, whilst being appropriate for a joint venture, is no longer appropriate for a company which is ultimately wholly owned by the Council (through its shareholding in Falkirk Community Stadium (Holdings) Ltd (a company established for the sole purpose of effecting the 2009 re-organisation). There is no point in the Council having a preference in circumstances in which it is the sole shareholder. Secondly, FCSL has accrued debt to the Council which it is unlikely to be able to repay. It is appropriate to eliminate this debt and allow the company to be wound up. Thirdly, were the development sites to be sold by FCSL there would be a capital gain on which FCSL would be required to pay corporation tax. If the development properties were sold directly by the Council there would not be any corporation tax to pay. In general, FCSL has served its purpose, is now wholly owned by the Council and it is considered preferable if FCSL's assets were now divided between FCT and the Council and FCSL was wound up.

- 4.2 The proposal is, in as tax efficient a manner as possible, to allow:-

- the removal of the debt owed by FCSL to the Council;
- FCSL to dispose of its assets (the saleable assets being transferred to the Council so it could then sell them in the future); and
- the subsequent winding-up of FCSL.

The steps required to achieve these objectives would be to simplify the share capital of FCSL, to capitalise the existing debt due by FCSL to the Council by issuing the Council with new shares in satisfaction of the debt due to it, to transfer the assets of FCSL to the Council and FCT and wind up FCSL.

- 4.3 As noted, one of key objectives to the proposed reorganisation is to return FCSL's development sites to the Council so that those assets can be sold without a corporation tax charge being suffered by FCSL. A simple transfer by FCSL of the assets to the Council gives rise to a capital gain and hence corporation tax in the hands of FCSL. The proposed approach, therefore, is to shelter the gains made on the transfers by (a) using accumulated losses in FCSL of approximately £600,000; and (b) creating further tax capacity by “gifting” some of FCSL's assets to FCT using the terms of section 203 of the Corporation Taxes Act 2010 which gives relief on the transfer of a qualifying interest in land to a charity. In terms of the leased property, the “gift” would be the transfer of the tenant’s interest under the lease – not transfer of outright ownership of the property. Following the gift, FCSL would then be in a position to be wound up with its remaining assets being returned by the liquidator to the Council without any tax charge being suffered by FCSL. In order to achieve the tax sheltering effect necessary to allow the return of the development sites to the Council it is proposed to transfer to FCT all of FCSL's property other than the development sites.
- 4.4 There are a number of considerations in relation to the involvement of FCT.
- 4.5 FCT must be prepared to accept the gift of the assets being transferred to it. The treatment of any related liabilities will require to be agreed. The existing staff of FCSL would transfer to FCT and The Transfer of Undertakings (Protection of Employment) Regulations 2006 would apply to that transfer. While it is noted that FCT is broadly comfortable with the proposal, it will require to obtain its own advice in relation to the proposal and the transfer. While some or all of the assets may be capable of being held for direct charitable purposes it might be better for FCT to hold those assets which are simply commercial leases in its trading subsidiary. Provided the assets are being applied only for its principal purposes it appears that the Articles of FCT are wide enough to permit the acceptance of the transfer and, if thought fit, the onward transfer of relevant assets to the trading company. Again, however, that would require to be clarified by FCT with its own advisers.
- 4.6 FCT is the tenant of a number of properties on leases from the Council. Standard forms of lease and licence have been agreed (differing having regard to the nature of the property let) and are acceptable to OSCR, particularly with regard to the repair and maintenance provisions. The Ground Lease interest in the stadium properties other than the development sites, which is the asset that would be gifted to FCT, is not a lease in the standard form adjusted between the Council and FCT. It would need to be determined which lease form ought to apply and, following the transfer, re-organise the terms of the lease documentation to create forms normal for the Council's relationship with FCT. Once transferred, the tenant's interest in the leases would become charitable property, to be applied by FCT for its charitable purposes. For the avoidance of doubt, were the lease with FCT to be brought to an end, the property would no longer require to be used for charitable purposes.
- 4.7 To the extent that moveable property is transferred from FCSL to FCT, it would be proposed to replicate the arrangements between the Council and FCT in respect of moveable property. That arrangement is that FCT, in terms of the Funding Agreement between FCT and the Council, is treated as owing to the Council a sum equal to the agreed value of assets transferred to it. On the expiry of the Funding Agreement, FCT may return the moveable assets to the Council in satisfaction of the debt.

- 4.8 The Council provides funding to FCT on an annual basis based on a Business Plan. The extent to which the Business Plan would require to be adjusted as a consequence of assuming the assets and liabilities of FCSL would need to be assessed and accounted for.
- 4.9 The staff of FCT are admitted to the Falkirk Council Pension Fund. It would be intended that staff transferring from FCSL to FCT would be treated in the same way as other staff of FCT. Arrangements would need to be made for their admission into the pension scheme.
- 4.10 It is clear from the above that there would need to be an adjustment effected of the Council's arrangements with FCT to take account of the transfer of the operations of FCSL to FCT.
- 4.11 It is not considered that OSCR consent to the transfer would be required as FCSL is not a charity. Unless FCT concludes otherwise, it is not thought necessary to consult OSCR on the proposals.

## **5. IMPLICATIONS AND NEXT STEPS**

- 5.1 It would appear that the proposal has some merit. FCSL currently sits apart from the Council both legally and operationally whilst ownership sits entirely with the Council. FCT is already established and the nature of the work it would effectively undertake in relation to the west stand operations is in line with the work it already undertakes on behalf of the Council. Members will recall that, in June 2012, it was agreed that the governance body for delivering the Helix project be dissolved and new governance arrangements be established with FCT at its heart. This was based on the same principles outlined here.
- 5.2 The Council, in turn, is best placed to directly drive forward the opportunities offered by the development sites particularly given the increasing profile of the stadium site and the platform for future investment that will be offered by the Council's TIF initiative.
- 5.3 Further detailed examination is required of certain areas, particularly around the amendment of the service specification for FCT, its funding agreement, the FCSL staff transfer and development of the legal documentation required to liquidate the company and effect the new arrangements. As a preliminary, the FCT board has already been asked to consider, in principle, if the Trust might be prepared to consider the proposed new governance arrangement. Without this in place, there would have been little scope for putting the proposals to Members with a view to seeking similar in principle consent from the Council. The Trust has confirmed that it is content to further explore the proposals.

## **6. IMPLICATIONS**

- 6.1 Legal  
As will be noted above, if the proposals are progressed, there is a significant amount of legal work involved in the arrangements for winding up FCSL, effecting the transfer of assets and making appropriate adjustments to the existing arrangements with FCT.
- 6.2 Financial  
FCSL derives rent and service charge income from its tenants as well as five-a-side football and conference and catering activities.

The following table provides a summary of the financial results in the years 2009/10 to 2012/13, together with a forecast for 2013/14.

	<b>2009/10</b>	<b>2010/11</b>	<b>2011/12</b>	<b>2012/13</b>	<b>2013/14</b>
	<b>Actual</b>	<b>Actual</b>	<b>Actual</b>	<b>Actual</b>	<b>Forecast</b>
	<b>£'000</b>	<b>£'000</b>	<b>£'000</b>	<b>£'000</b>	<b>£'000</b>
<b>Income</b>					
Rent	161	189	185	182	224*
Service Charge	206	237	231	226	210
Five-a-Side	98	104	79	72	64
Conferencing (net)	42	63	180	56	136
Other Income	4	21	13	15	18
	<hr/> 511	<hr/> 614	<hr/> 688	<hr/> 551	<hr/> 652
<b>Expenditure</b>					
Employer Costs	249	293	391	270	260
Other Expenditure	266	276	327	361	350
	<hr/> 515	<hr/> 569	<hr/> 718	<hr/> 631	<hr/> 610
<b>Net Expenditure/(Income)</b>	<hr/> <b>4</b>	<hr/> <b>(45)</b>	<hr/> <b>30</b>	<hr/> <b>80</b>	<hr/> <b>(42)</b>

\* includes one-off income of £36,000

The above figures show that despite a couple of difficult years the company is now back in surplus, prior to the impact of depreciation.

The Council does not make any direct financial contribution to FCSL. Moreover, as previously reported to Council, most recently in September 2008 FCSL owes the Council around £1m in respect of professional fees and pre-2009 payroll costs. It has always been anticipated that these debts would be met from the proceeds of further development of the site.

### 6.3 Personnel

In line with the formation of the Trust and the change in the governance arrangements with the Helix project there will be staff who would be transferring with TUPE rights from FCSL to FCT. As with any significant change this needs to be managed carefully. All appropriate consultation will be addressed within the project plan.

## 7. RECOMMENDATIONS

### 7.1 It is recommended that Members:

- (a) confirm their agreement in principle to the proposals contained in this report and in particular, Paragraph 4 of this report;
- (b) subject to all necessary approvals and consents being agreed by the stakeholders involved, in particular FCT, authorise the Chief Executive or her nominee to take forward work required to implement these proposals; and
- (c) instruct the Chief Executive to report back to a future meeting of the Full Council for final approval of the detailed proposal noting that, in the event that the work referred to at recommendation (b) above result in any significant changes being made to the proposals, such changes will be specifically drawn to the attention of Members.

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**CHIEF EXECUTIVE**

Date: 20 February 2014

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### **LIST OF BACKGROUND PAPERS**

1. Project files\*

\* Items not for publication on the grounds they involve the disclosure of exempt information as defined in Paragraph 9 of Part 1 Schedule 7a of the Local Government (Scotland) Act 1973