

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are looking at laptops and talking. The room has large windows showing a city skyline at night. The lighting is warm and focused on the people.

geldards

# Pitfalls for Councils as Charity Trustees

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## CHARITY REVIEW

READ ALL ABOUT IT!



Lessons to be learnt from order to pay £89,000 from  
Council funds

## COUNCIL LIABLE TO PAY CHARITY 20 YEARS OF RENT FOR MISUSE OF SPECIAL SCHOOL LAND

EMBARRASSMENT AS CHARITY COMMISSION REPORT  
FINDS AGAINST COUNCIL ON STRONGEST TERMS.

# Content

- Identifying Trust Land and whether it is charitable
- If you discover Trust Land, then what?
- Who can make decisions?
- Dealing with conflicts of interest
- Making the decision
- Good governance
- Separation of Council and Charity
- Potential other complicating factors
- How to avoid issues with Trust Land in future

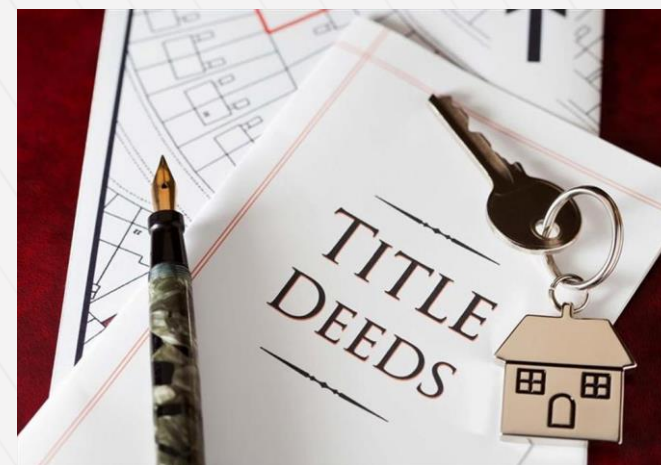


# Identify Trust Land – Practical Issues

- Do you have a record of all of the Trust Land that the Council holds and Trusts of which the Council is a trustee?
- Registered Proprietor at the Land Registry – is it correctly registered?
- Check with your accounts team, is it filing accounts for charities that other parts of the Council are unaware of?

# Identify Trust Land – Title documents

- Review the original title deeds - is it held on trust or under its statutory function?
- Review gifts of land – are they held on charitable trusts?
- Is a trust established?



# Kirkstall Abbey Leeds

- 1<sup>st</sup> December 1890 the Abbey was conveyed under a deed of gift by a Mr North to the Council's statutory predecessor the Mayor, Aldermen and Burgesses of the Borough of Leeds.
- The Abbey was conveyed to the Mayor, Alderman and Burgesses on the following terms:



- “..as Trustees for public ground for the said Borough...to hold the same unto and to the use of the Mayor...in fee simple as a Public Park for the purposes of the Recreation Grounds Act 1859 to the intent that the said ruins and buildings may not be pulled down or destroyed but may at all times be maintained and as far as reasonably possible preserved from injury and decay and to the further intent that no building or other erection may at any time be placed upon any part of the said land except such as may be necessary for the preservation of the said ruins and the safety and comfort of person resorting thereto and as may be in keeping and harmony with existing buildings and In Trust to permit the premises to be forever hereafter used as a public park by all peaceable inhabitants of the borough subject only to such reasonable restrictions as may from time to time be made by the Mayor...for the purposes of preserving the said ruins and securing the decent and orderly use thereof”.

# Is a trust established?

- Was a trust established?
- Under Recreation Grounds Act 1859 or parties created a trust in the deed.
- The Recreation Grounds Act 1859 permits land to be conveyed “... to Trustees to be held by them as open public Grounds..” for “..the Appointment of Trustees...”



# Is the trust charitable?

- The trust imposed was for a purpose which is charitable. In 1955 Lord Reid in a case IRC v Baddley stated that land conveyed under the Act “was clearly regarded as conveyed for a charitable purpose”.
- That a gift of land for the provision of a public recreation ground for the inhabitants of a particular parish was charitable was recognised by the case Re Morgan in 1955.
- As a charitable trust the trust will be governed by the Charities Act 2011.

# What if the statute does not create the trust?

- Indicators that a trust was imposed by the Deed in our example are:
  - The land was conveyed “in Trust” to the Council as “trustee”;
  - The conveyance was a gift and it is likely that a judge would more readily find that there was to be a binding obligation to use the land as intended;
  - The conveyance seeks to “do something more” than the bare terms of the Recreation Grounds Act by making specific direction as to the ruins themselves; and
  - A mortmain licence was applied for and granted.

# How can you tell if land is intended to be held by the Council under its statutory functions?

- This is not always easy.
- Will depend on the wording of the document
- See case Richmond-upon –Thames LBC v AG (1972)
  - Gift of land for “the erection and maintenance of municipal office rooms and public buildings..laying out and maintenance thereon of a public recreation ground.. And the construction and maintenance of the road to lead from Hill Street..”

# How can you tell if land is intended to be held by the Council under its statutory function ? (2)

- The Judge in this case found that the effect of the gift was to cause the Vestry to take the land subject to its statutory purposes rather than upon charitable trust.
- The Judge felt that the passing of modern statutes (such as the Public Health Act 1875) which allowed the Vestry to hold land for statutory purposes “established a dichotomy between the property held by a local authority for its statutory purposes as such and property held by such authority on charitable trust”



# How can you tell if land is intended to be held by the Council under its statutory functions? (3)

- Supporting reasons for deciding that the gift did not create a charitable trust were given as:
  - Reference in all the documents to the Vestry as the sanitary authority for the Parish of Richmond and the lack of any mention of a “trust” or a “charity”
  - The absence of any licence of mortmain
  - The fact that the gift was of land only and that it was the intention that the expense of carrying on the intended works would fall on the Vestry;
  - The fact that the obligation imposed to use only for the specified purposes was negative in form and that “..to create a charitable trust, positive terms would have been more appropriate”, and that the parties may well have chosen not to impose positive obligations because it was not clear at the date of the gift whether funding to build the facilities would be available.

# If you identify Trust Land, then what?

- What is the governing document?
- Are there specified uses?
- Who are the trustees?
- Is the Trust registered with the Charity Commission? If not, should they be (income of over £5,000 per year)?
- Is the governing document still fit for purpose?
- Does the governing document need to be amended?

# Who can make decisions?

- The Trustees are responsible for the management of the charity
- Comply with your trustee duties – CC3
  - Carry out the purposes for the public benefit
  - Comply with governing document and the law
  - Act in the charity's best interest
  - Manage resources responsibly
  - Act with reasonable care and skill in exercising your duties
  - Ensure the charity is accountable

# Who can make decisions?

- Council as body corporate is trustee, not individual Councillors
- Council can be liable for breach of trust
- Executive Function – carried out by Cabinet
- Follow Cabinet's ordinary decision-making procedures
- Delegation to sub-committee
- There will be a conflict of interest in all decisions which involve both the Council and the charity





# Conflicts of Interest

- Two types of conflict:
  - Conflicts of interest – financial gain
  - Conflicts of loyalty – trustee/director of both organisations
- Cannot act in the best interest of the charity
- Applies when there is an actual or a real risk of conflict
- Also apply to connected persons
- Conflicts should be dealt with before decisions are made



# Managing Conflicts of Interest

- Solutions:
  - Appoint independent trustees
  - Delegate to a sub-committee
  - Appoint an advisory committee of non-councillors
  - Identify serious or technical conflicts
- Any independent trustees or a sub-committee of technically conflicted councillors can consider the transaction
- You must always obtain Charity Commission consent for transactions between the Council and the charity as they are connected parties

# When do you need Charity Commission consent?

- If there are not enough unconflicted trustees to form a quorum
- Transactions with connected persons
- Disposing of Designated Land which you are not replacing
- Governing document doesn't contain required powers
- Amending the object clause, trustee benefit or dissolution clause of the governing document

# Make the decision once consent received

- Pass a resolution to enter into the transaction
- Charity should have a separate meeting with separate minutes to the Cabinet meeting
- The minutes should note that Charity Commission consent has been obtained
- Any money received belongs to the charity and should be used for its charitable purposes



# Good Governance

- Review and update governing document
- Ensure good management of charity and assets –e.g. maintenance, insurance, staff
- Have necessary policies in place:
  - Conflicts of interest
  - Trustee expenses
  - Safeguarding
  - Complaints
- Terms of reference for delegations
- Ensure necessary documentation is in place



# Separation of Council and Charity

- Need separate meetings for charity with own minutes
- Need separate accounts (even if charity is not registered with Charity Commission)
- Separate bank account or ringfence charity's funds so they are kept separate
- Ensure charity assets and income are dealt with separately.
- Charity should obtain own independent advice if required
- Unincorporated Trusts does not have a separate legal personality so documents executed by *'[Trustee/Council] as trustee of [Trust]'*

# Charity Income and Expenses

- Charitable funds cannot be used to discharge statutory function
- Any income generated from charity assets belong to the charity e.g. renting out land or building
- Trustee can be reimbursed expenses for running of charity - maintenance costs, employee wages, accountant costs, admin fees.
- If staff shared, reimbursement proportional to time spent working for charity
- Capital expenditure by Council is debt owed by charity to Council which is repayable

# Alternative options

- Transfer Trust Land to an existing charity
- Set up a new independent charity – CIO or charitable company limited by guarantee
- Sell trust land and use proceeds of sale for charitable objects



# Potential other complicating factors

- Do you have the power of sale?
- Is the property Permanent Endowment?
- Is it Designated Land?
- Have you complied with the disposal requirements in Part 7 Charities Act 2011
- Can a local authority grant a lease as charity trustee to itself in its corporate capacity?
- These may require more CC consents.

# How to avoid issues with Trust Land

- Identify your Trust land
- Understand the purposes, governing document and charity trustee role.
- Separate the dealings of the trust from those of the Council
- Delegate trustee function to a sub-committee within Council and have terms of reference to determine scope of delegated powers/set out reserved matters.
- Think about what Charity Commission consents will be needed and allow sufficient time to deal with them.
- Ensure conflicts of interest and loyalty are properly managed.
- Ensure the Land Registry reflects that it is trust land.
- Manage the charity/building (insurances, repairs, staff).
- Have policies in place e.g. conflict of interest, trustee expenses.



# Useful reading

- Local authorities as charity trustees
- Councillors' guide to a council's role as a charity trustee
- <https://www.gov.uk/government/publications/local-authorities-as-charity-trustees>
- CC3 – Trustee Duties
- RR7 – Independence of Charities from State

Any Questions?





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# Thank You

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