

TITLE OF REPORT: PROPOSED CONSULTATION ON CHANGES TO CHARITABLE OBJECTS OF SMITHSON'S RECREATION GROUND, HITCHIN

REPORT OF THE TRUST LAWYER (Smithson Recreation Ground Charity number 264311)

1. SUMMARY

- 1.1 Members of the Cabinet Sub-Committee are requested to consider consultation on changes to one of the Smithson's Recreation Ground's ('the Charity's) charitable objects.

2. RECOMMENDATIONS

That the Sub-Committee resolves that the Trust Lawyer and Lead Officer:

- 2.1 prepare consultation documentation/ and consider medium and consultees (in consultation with the Chairman);
- 2.2 undertake the consultation for a minimum of 4 weeks following the May 2016 election¹;
- 2.3 report any consultation responses back prior to further action.

3. REASONS FOR RECOMMENDATIONS

- 3.1 One of the provisions/ restrictions within the Charity's objects potentially contravenes equality legislation without obvious legal exemption. In the light of this and the fact that this object has not been enforced for some time, the Cabinet Sub-Committee Members, as Trustees, are under a legal duty to review the objects and consider an application to the Charity Commission to change these. The recommended action under 2 is part of the Trustees' considerations.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The only alternatives would be to close and/ or merge the Charity. However, this would normally mean that the Trust property would have to be sold as part of this process or transferred to a similar charity. In doing so the Trustees would normally be guided by the Charity's governing documents on winding up and/ or selling the Charity's asset(s) – i.e. the land. The Smithson Recreation Ground has no such provision within its governing documents; it is therefore unclear how complicated or realistic this would be. In the circumstances this is not recommended as a viable option at this stage.

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 5.1 None at this stage. Consultation with relevant organisations, ward Members and the public would follow any resolution by this Sub-Committee.

¹ To comply with the Council's consultation strategy

6. FORWARD PLAN

- 6.1 This report does not contain a recommendation on a key decision and has not been referred to in the Forward Plan.

7. BACKGROUND

- 7.1 At the Sub-Committee meeting on 8 December 2015, questions were raised regarding the Trust objects and any possible contravention by the improvement/ renovation works.

- 7.2 These provisions were then reviewed. The background, restrictions/conditions and (in this case) Trust objects are as follows:

7.2.1 The land was conveyed to the Council by Sarah Smithson on 5 May 1926 pursuant to the Open Spaces Act 1906 (for the use and enjoyment of the public).

7.2.2 The conveyance was subject to the following restrictions and conditions (agreed by the then Urban District Council of Hitchin at a meeting on 18 November 1925):

- To be maintained by the Council as a recreation ground for the parish of Hitchin, shall be ***limited in its user to women, girls and children – children to include boys user 5 but not later.**
- No playing of football.
- No bands of music without the expressed written consent of the owner or occupier by the house owned or occupied by the grantor opposite the premises.
- such restrictions to be embodied by byelaws as the Council thinks necessary.

7.2.3 The Trust was registered in 1972, with the objects as set out in the conveyance.

- 7.3 The objects of the Trust were not contravened by the proposed improvement renovation works; although, it was clear that the object in bold* seeks to restrict the use of the Recreation Ground to girls above 5 and women. This object would therefore appear to be discriminatory/ in breach of equality legislation; however, the Equality and Human Rights Commission indicates that² it is possible for a charity to provide services for a particular group under organisational exceptions and some specific exemptions that apply to charities, without contravening equality legislation.

- 7.4 This is because one of the purposes of equality law is to support and encourage progress towards equality. So it can be used to address inequality of groups with protected characteristics (eg females) who have experienced disadvantage, have specific unmet needs or are under-represented. Proportionate action can be taken to address these issues through the Equality Act 2010 by exceptions/ voluntary positive action/ equality duties on public sector bodies to pay due regard to equality.

- 7.5 It would nonetheless be difficult to justify a specific exemption, as it is understood that this part of the object not been applied at the Recreation Ground for practicality reasons for some time. There is also no evidence that such a restriction is required to meet a specific unmet need.

- 7.6 In the circumstances there are two issues the Trustees must consider. Firstly, if there is no specific exemption then this object has become discriminatory and unlawful. This potentially opens the Trustees to legal action (*whilst noting that discriminatory action has not followed as the object has not been enforced*). Secondly, having liaised with the Charity Commission, it would appear that as a general charitable law issue, this object

² Equality Act 2010 Guidance for service providers: What equality law means for your voluntary and community sector organisation (including charities and religion or belief organisations)

has potentially 'failed' (under section 62 of the Charity Act 2011) and as Trustees, the Sub-Committee is required (under section 61 of the Charity Act 2011) to consider that object and make a (cy-près) application for a scheme/ change. It is recommended that the Trustees consideration changing the first object to the more generic "**for the use and enjoyment of the public**" to marry up with the Open Spaces Act 1906 requirement.

- 7.7 Before applying for a cy-près scheme, however, the Charity Commission expects Trustees to carry out a consultation exercise. This enables the Trustees to identify any potential issues, gauge public opinion or (*unlikely here, but nevertheless a possibility*) identify reversionary beneficiaries who may challenge the change. This is because following a cy-près application/ and before making a (cy-près scheme) order the Charity Commission must comply with requirements in section 88(2) of Charity Act 2011 giving details of the proposals, inviting representations (usually within 28 days) by public notice. Any person who is or may be affected by a scheme may appeal against an order of the Commission making a scheme (to the General Regulatory Chamber (First-tier Tribunal)).
- 7.8 Any change of the Charity's object would also potentially mean that the restriction on the registered title would have to be changed/ or indemnity insurance sought, as it effectively creates a restrictive covenant. This covenant can be enforced against the Council by the original *transferor*/ or her successors in title. Given the nature of the restriction it is arguable that enforcement would fail (as it could be argued that it is in breach of modern equality law). The risk of enforcement is therefore significantly reduced or removed, although the Trustees would be advised to consider a) obtaining indemnity insurance against enforcement costs; or b) apply to the Upper Tribunal to have the restriction discharged from the land registry on the basis that it is obsolete. The latter would offer more certainty, but the former would be an effective method, given that any potential beneficiaries / or challenges are likely to have been identified already via the consultation and public notice route. *A view on this and costs can be taken by the Trustees once any application process has been progressed.*

8. ISSUES

- 8.1 The issues identified are whether to consider changing the Charity's object (in the light of the background information above).
- 8.2 Additionally under the Council's consultation strategy, consultation would not normally be undertaken in an election period. Whilst this relates to a Trust issue, it is wise to follow the strategy. The consultation would therefore commence after the election, in May or in June (at the site/with relevant groups/ ward Councillors and on the Council's website) and the outcome reported back to the Sub-Committee in either July or August.

9. LEGAL IMPLICATIONS

- 9.1 The Council acts as the Trustee for the above mentioned Charities/ Charitable Trusts and this Sub-Committee of the Cabinet is the managing committee appointed on behalf of the Council to manage them. When carrying out their duties the Trustees must act solely in interests of the Charity. They do not promote the interests of a 3rd party (i.e. the Council), even if that 3rd party appointed them as a Trustee.
- 9.2 The Sub-Committee's role and function under 5.10.4 (a) (b) and (e) of the Council's constitution is to act on behalf of the Council as a Trustee for all assets of the Council; consider all matters relating to those Trusts including to receive reports on any matter, including the property and financial implications concerning those trust assets.

9.3 Cy-près circumstances apply when the original object(s) becomes impossible, impracticable or illegal to perform. The cy-près doctrine (and process) allows the Charity Commission to amend the objects of the Charity when this occurs. Section 62(1) of the Charities Act 2011 sets out the circumstances in which the purposes of a charitable gift can be altered so that it can be applied cy-près:

9.3.1 “where the original purposes were laid down by reference to (ii) a class of persons...which has for any reason since ceased to be suitable, regard being had to the appropriate considerations, or to be practical in administering the gift” (section 62(1)(d)); or

9.3.2 “where the original purposes, in whole or in part, have, since they were laid down (iii) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations” (section 62(1)(e)).

9.3.3 “Appropriate considerations” for these purposes are: “(a) (on the one hand) the spirit of the gift concerned and (b) (on the other) the social and economic circumstances prevailing at the time of the proposed alteration of the original purposes” (section 62(2)).

9.3.4 The “spirit of the gift” means the basic intention underlying the original gift as a whole. The “social and economic circumstances prevailing at the time” is not defined in the Charity Act 2011. The Charity Commission’s guidance states that this is intended to be interpreted broadly and is about evaluating the ongoing usefulness of the Charity’s objects.

9.4 In the event that the Trustees are aware of the failure of the Trust object(s), they have a legal duty under section 61 of the Charities Act 2011 “*where the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied.*” If they do not do so, then the Trustees are potentially open to breach of this duty. Additionally, allowing the object to remain discriminatory also (potentially) leaves the Trustees open to challenge for breaching equality legislation.

10. FINANCIAL IMPLICATIONS

10.1 There are no financial implications for the Trust. Any potential and minimal costs of the proposed consultation will be covered by the Lead Officer’s budget for the Trust. Note the *potential* cost in future of an indemnity policy/ or application to Upper Tribunal (7.8).

11. RISK IMPLICATIONS

11.1 There is a risk of challenge if the Trustees change the Charity’s object. Equally the Trustees could be challenged for not addressing the issue of a potentially discriminatory object. The object has been breached (by offering the Recreation Ground to the wider group) as has the covenant on the land, without complaint. The risk is therefore reasonably low.

12. EQUALITIES IMPLICATIONS

12.1 The Equality Act 2010 came into force on the 1st October 2010, a major piece of legislation. The Act also created a new Public Sector Equality Duty, which came into force on the 5th April 2011. There is a General duty, described in 12.2, that public bodies must meet, underpinned by more specific duties which are designed to help meet them.

- 12.2 In line with the Public Sector Equality Duty, public bodies must, in the exercise of its functions, give **due regard** to the need to eliminate discrimination, harassment, victimisation, to advance equality of opportunity and foster good relations between those who share a protected characteristic and those who do not.
- 12.3 In the light of this and the wording and potential effect of the Charity's object*, the consultation process and thereafter application process must be considered.

13. SOCIAL VALUE IMPLICATIONS

- 13.1 The Public Services (Social Value) Act was passed at the end of February 2012; under the Act, public bodies in England and Wales are required to consider how the services they commission and procure might improve the economic, social and environmental well-being of the area. 'Social Value' involves looking at what the collective benefit to a community is when a public body awards a contract. It applies to all public services contracts and those public services contracts with only an element of goods or works. It does not apply to public work contracts or public supply (goods) contracts. The Act requires public authorities at the pre-procurement phase of procuring services to consider how what is being procured might improve the economic, social and environmental well-being of an area and how the authority might secure that improvement through the procurement process itself.
- 13.2 As the recommendations made in this report do not constitute a public service contract, the measurement of 'social value' as required by the Public Services (Social Value) Act 2012 need not be applied, although equalities implications and opportunities are identified in the relevant section at paragraphs 12.

14. HUMAN RESOURCE IMPLICATIONS

- 14.1 There are no human resources implications from this report.

15. APPENDICES

- 15.1 None.

16. CONTACT OFFICERS

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17. BACKGROUND PAPERS

- 17.1 Conveyance 5 May 1926. Office copy of land registry HD489173.

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