

CABINET SUB-COMMITTEE (COUNCIL CHARITIES)

22 AUGUST 2016

*PART 1 – PUBLIC DOCUMENT

AGENDA ITEM No.

6

TITLE OF REPORT: CONSULTATION RESULTS ON PROPOSED 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 the consultation responses on changes to one of the Smithson's Recreation Ground's ('the Charity's) charitable objects and resolve further action.

2. RECOMMENDATIONS

That the Sub-Committee:

- 2.1 consider the consultation responses (Appendix A); and
- 2.2 instructs the Trust Lawyer to apply to the Charity Commission to change the charitable object for the Smithson Recreation Ground (from women, girls and boys up to the age of 5 years but not later *to use by the general public*); and
- 2.3 delegates the decision to obtain an indemnity policy to the Chairman (such decision to be taken following consultation with the Trust Lawyer).

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 this. The recommended action under paragraph 2 follows a 28 day consultation – which has indicated a 72.73 percent agreement with the proposed change.

4. ALTERNATIVE OPTIONS CONSIDERED

- 4.1 The Trustees could chose to ignore this object/ do nothing. However, given the potentially discriminatory nature of the object and therefore potential liability to the Trustees and/ or the legal duty on Trustees to keep such objects under review (explained in the Sub-Committee report of 23 March 2016¹) no other action is deemed appropriate.

¹ <http://web.north-herts.gov.uk/aksnherts/images/att10774.docx>

5. CONSULTATION WITH EXTERNAL ORGANISATIONS AND WARD MEMBERS

- 5.1 Following the Sub-Committee meeting on 23 March, the general public consultation documentation and approach was agreed after the May election with the Chairman (on 10 May). This included posters at the Ground, press statement, a website page / survey monkey and potential paper responses. The consultation ran from 17 May – midday 17 June. 22 public responses were received as detailed in Appendix A.
- 5.2 The consultation poster was also emailed to the ward Members and the Executive Member for Leisure on 13 May explaining the basis of the consultation. No comments were received.

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. The background is set out in the report presented to the Sub-Committee meeting on 23 March 2016 (link above).
- 7.2. In respect of the consultation, before applying to change a charitable object (cy-près application) the Charity Commission expects Trustees to carry out a consultation exercise. This enables the Trustees to identify any potential issues, gauge public opinion and/ or possible challenge to the proposed change.
- 7.3. The consultation (22 responses) demonstrated 73.73% support for the proposed amendment of the object for the use of the Ground. 17 comments were left on the survey monkey regarding this proposal – not all in support and some referring to different issues – such as the use of the Ground for football.
- 7.4. In respect of the comments detailed in the Appendix A, that suggested leaving things as they are/ or to try to restrict the use of the Ground to families and young children, Trustees would have to be satisfied:
 - 7.4.1 that the current object restricting use/ or indeed changing the restriction to other groups could be justified under equality law on the grounds of a specific exemption, and
 - 7.4.2 that the restrictions could be enforced.
- 7.5. As indicated in the report of 23 March 2016, there is no current evidence that such a restriction is required to meet a specific unmet need (in terms of women and girls). In the absence of this it cannot be justified in equality terms.
- 7.6. In respect of unmet need for family and young children-only related use (one of the responses), no bespoke research has been undertaken on this issue. NHDC did commission a Green Space study in 2009 which was used to inform the Local Plan Preferred Options and will be a basis for the proposed submission draft Local Plan. That study identifies *types of play space and also assesses any deficiencies*. The report and figures (on NHDC's website (<http://www.north-herts.gov.uk/planning/planning-policy/local-plan-emerging-policy/evidence-base/green-space-study>)) concluded at paragraph 6.29 that there was a deficiency in play and youth provision in Hitchin (defined to include equipment and adventure play which may be part of larger park areas).

- 7.7. To the extent that the above study is relevant to this issue, whilst there may be a deficit in play and youth provision in Hitchin, a change of the object to family and young children-only use would not add to that play/youth provision (as recreation grounds and parks were taken into account in the study). Such a proposal would also seek to further restrict access for older youths (further exacerbating a deficiency of provision).
- 7.8. Significantly it is highly unlikely that a restriction of this nature could or would be enforced in any event.
- 7.9. Members will recall that if the Trustees are unable to enforce / or ensure compliance with the object then as a general charitable law issue, this object has/ or would potentially 'fail' (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 would be ill-advised to change the object to something that could not be enforced (i.e. would fail) – as is likely with family and young children-use only.
- 7.10. Members will note that some of the consultation responses appeared concerned over the change to “use and enjoyment of the general public”. This is a generic phrase commonly used and would, as indicated, be comparable with the Open Spaces Act 1906 requirement currently imposed under the original transfer.
- 7.11. As previously point out 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/ policy sought, as it effectively created a restrictive covenant against the land title as previously outlined on 23 March 2016. This would only be required once the object has been removed. Preliminary enquiries through our insurance service were that there would be an indicative price of £192 for the policy, based on a £200,000 indemnity.
- 7.12. The issues about enforceability and likelihood are covered in the previous report of 23 March 2016. The likely risk of challenge will be more evident if the Charity Commission agrees to proceed with the change of object and a final decision can be taken following this. The other possibility is to apply under section 84(1) of the Law of Property Act 1925 to the Upper Tribunal (Lands Chamber) to remove this restriction². The Tribunal's power is discretionary. The application fee (£880³) and likely legal costs of undertaking the process make the indemnity policy the preferable option.
- 7.13. In the circumstances it would be appropriate to delegate the decision on whether to take out an indemnity policy to the Chairman of the Sub-Committee, having consulted Trust Lawyer (following the conclusion of any application process to the Charity Commission).

8. ISSUES

- 8.1 The issues identified are: whether to consider applying to the Charity Commission to change the Charity’s object (in the light of the consultation and background information above); and whether to delegate the decision to obtain the indemnity policy.

² Potential grounds: on the grounds that this is now obsolete [Ground (a)].

³ Source: Upper Tribunal (Lands Chamber) Fees Table from 18 April 2016.

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 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 third party (i.e. the Council), even if that third 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 Future / possible costs are as follows:

a) application to Charity Commission – officer time and Public Notice to advertise the change if the Charity Commission proceeds. In the event that the decision is Appealed by a third party, then as an interested party the Trustees may potentially have some

involvement (but the challenge would be of the Charity Commission's decision to proceed).

b) the indemnity policy or application to remove the restrictive covenant costs are detailed in 7.11 and 7.12 above.

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.

11.2 In terms of the use of potential indemnity policy to cover a challenge for failing to adhere to the restrict covenant – the underwriters have assessed this as a very low risk.

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 application process to the Charity Commission should 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 arise from this report.

15. APPENDICES

15.1 Appendix A – Consultation responses.

16. CONTACT OFFICERS

16.1 Jeanette Senior Lawyer / Trust Lawyer 01462 474370, jeanette.thompson@north-herts.gov.uk

16.2 Stephen Geach, Lead Officer for Smithson Recreation Ground, Parks & Countryside Development Manager 01462 474553, steve.geach@north-herts.gov.uk

17. BACKGROUND PAPERS

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

17.2 Report 23.3.16.