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# **Advice in relation to the proposed transfer of Charfield Playing Fields and Memorial Hall to a new charitable incorporated organisation**

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**Charfield Parish Council**

24 October 2018

## 1. Background

- 1.1. We have been instructed by Charfield Parish Council (the "**Council**") in relation to the proposed incorporation of the charitable trust known as "Charfield Village Hall and Playing Field" (registered charity number 301482) (the "**Charity**"), which will include the transfer of Charfield Playing Fields and Memorial Hall (the "**Premises**") to a new Charitable Incorporated Organisation (the "**CIO**").
- 1.2. The Council is the custodian trustee of the Premises and, as we understand it, has some concerns in relation to the Charity's proposed incorporation.
- 1.3. The Premises are subject to permanent endowment trusts (see section 3 below for further details) and are used by the local community for various community activities. The Premises are the main asset of the Charity, and they are used to further the Charity's charitable purposes (see section 2 below for further details).
- 1.4. We understand that the Charity proposes that the CIO will hold the legal title to the Premises and manage it in future i.e. there will be no need for the Council to continue in its role as custodian trustee of the Premises. We have been informed that the Charity has asked the Council to sign a vesting declaration in order to vest the legal title to the Premises in the CIO.
- 1.5. We also understand that Charfield has been named as an "area of strategic development" by South Gloucestershire Council. The Council therefore wishes for the Premises to be protected against any future development and is concerned that if the Premises are transferred to the CIO, the trustees may dispose of them for development.
- 1.6. In light of the Council's concerns, the Council requires advice on the following matters:
  - 1.6.1. The status of the conveyances establishing the Charity (see section 2 below).
  - 1.6.2. Whether the Council is the legal owner of the Premises or whether it holds the land on trust for the Charity (see section 4 below).
  - 1.6.3. Whether the Council does have to legally relinquish ownership of the land and if so, whether it can demand that a clause be included in the CIO's constitution requiring the land remains permanent endowment (see sections 4 and 7 below).
  - 1.6.4. Whether the Council can do anything to prevent the CIO from being established (see section 4 below).
  - 1.6.5. Whether it is possible to transfer the Premises by way of the vesting declaration (see section 7 below).
- 1.7. The purpose of this advice note is therefore to address the Council's concerns as outlined above and also to provide the Council with further information in respect of the legal framework in which the Charity (and the new CIO) is required to operate.

## 2. The Charity

- 2.1. The legal title to the Premises was transferred to the Council pursuant to a conveyance dated 13 March 1948 (the "**1948 Conveyance**").

- 2.2. The 1948 Conveyance confirms that the Council is to hold the Premises "forever" and to use the Premises as a village hall and playing field on the trusts set out in the first Schedule, namely:

*"for the purpose of physical and mental training and recreation and social moral and intellectual development through the medium of a playing field reading and recreation rooms library lectures classes recreations and entertainments or otherwise as may be found expedient for the benefit of the inhabitants of the Parish of Charfield in the County of Gloucester and its immediate vicinity without distinction of sex or of political religious or other opinions..."*.

- 2.3. The 1948 Conveyance therefore established the Charity. The conveyance also provided for a committee to be established which has the general control and management of the Charity.
- 2.4. Subsequent conveyances dated 4 December 1953 and 5 April 1957 transfer additional pieces of land to the Council to hold on the same trusts and to be managed by the committee as established under the 1948 Conveyance. References to "**Conveyances**" in this advice note are to the 1948 Conveyance, the 4 December 1953 and 5 April 1957 conveyance. (Please note that the parcel of land subject to the memorandum of agreement dated 8 February 1968 made between the Council and Gloucestershire County Council has been given up and dedicated to the public as a highway (rather than a play area, as previously thought. Therefore, this land no longer forms part of the Premises and will not be subject to the vesting declaration.)
- 2.5. On 28 January 1965, the Charity Commission authorised a scheme (the "**1965 Scheme**") to govern the Charity. The Scheme replaces the charitable trusts set out in the Conveyances, including the administrative provisions e.g. in relation to the committee and its proceedings, although the property aspects of the Conveyances will continue to subsist.
- 2.6. The Charity's governing document was amended on 3 January 2008 (the "**Constitution**"). References to the "Scheme" in this advice note are to the 1965 Scheme as amended by the Constitution collectively. Clause references relating to the Scheme are references to the 1965 Scheme, unless otherwise specified.
- 2.7. We note that the Charity was registered by the Charity Commission on 30 March 1965, shortly following authorisation of the Scheme.
- 2.8. The Scheme provides for the Council to be the "custodian trustee" of the Charity and that in this role, section 4(2) of the Public Trustee Act 1906 (the "**PTA 1906**") shall apply (see section 4 below for further information).
- 2.9. Clause 15 of the Scheme confirms the charitable purposes of the Charity (the "**Objects**") as:
- "the provision and maintenance of a village hall and playing field for the use of the inhabitants of the Parish of Charfield and the neighbourhood without distinction of sex or of political, religious or other opinions, and in particular for use for meetings, lectures and classes, and for other forms of recreation and leisure-time occupation with the object of improving the conditions of life for the said inhabitants"*.
- 2.10. The Council will note that the Objects are broadly the same as the charitable purposes set out in the 1948 Conveyance.

- 2.11. Like the 1948 Conveyance, the Scheme confirms that the Charity will be managed and controlled by a committee. The members of the committee from time to time are the charity trustees (referred to in this advice note as the "**Managing Trustees**").
- 2.12. The Managing Trustees must ensure that the Charity's assets, principally the Premises, are used to advance the Objects for the public benefit at all times.

### **3. The Premises**

- 3.1. We have reviewed the 1948 Conveyance and our view is that the Premises are "permanent endowment" i.e. an asset of the Charity which must be retained in perpetuity. This is also evidenced by the Scheme, which confirms at clause 2 that the Charity has an "endowment".
- 3.2. The Scheme does not contain a power allowing the Charity to dispose of the Premises. We explain in more detail below the effect of the proposed vesting declaration. However, it should be noted that if this is completed, the Premises would be required to be held by the CIO on the same trusts as currently apply to the Premises. Therefore, the permanent endowment trusts will remain in place.
- 3.3. In order to dispose of the Premises in future, our view is that the Charity would need to request authorisation from the Charity Commission. The Charity Commission would need to authorise a new scheme in these circumstances, which, if there is no intention of the Charity to replace the Premises once sold, would also amend the Objects. Even if the Charity did intend to replace the Premises, the Charity Commission is still likely to need to authorise a new scheme providing a power of disposal.
- 3.4. Generally, the Charity Commission would require public notice of such a scheme, although there are circumstances in which notice can be waived by the Commission, our view is that in this case, it is likely that the Commission would require notice of the scheme.
- 3.5. The Charity would be required to give notice of the draft scheme locally e.g. in a local newspaper and at the Premises, and the Charity Commission would give notice of the draft scheme on its website. The notice period is at the discretion of the Commission, but is generally one month. Within this time, members of the public may make representations in respect of the draft scheme. The Commission is required to take any representations into account in deciding whether (or not) to authorise the new scheme.
- 3.6. Even if a new scheme is authorised allowing for the disposal of the Premises, the Charity would also need to comply with the provisions of the Charities Act 2011 (the "**2011 Act**") in disposing of the land. As the Premises are subject to permanent endowment trusts, the Charity would be required to give public notice of the intended disposal and take into consideration any representations made. The Charity Commission has the power to waive this notice requirement if it is satisfied that it would be in the interests of the Charity to do so.
- 3.7. There are therefore safeguards in charity law and regulation relating to any proposed disposal of the Premises. In the event that the Managing Trustees did decide that it was in the best interests of the Charity to dispose of all or part of the Premises (and assuming that the legal title is transferred to the CIO), the Council is likely to have the opportunity to make representations in respect of the proposed disposal, which would be required to be taken into account by the Charity Commission and / or the Charity.

#### **4. The Council as custodian trustee**

- 4.1. As we have confirmed at paragraph 2.8 above, the Council is the "custodian trustee" of the Premises. This term has a particular legal meaning under the PTA 1906. The PTA 1906 also confers certain powers and duties on custodian trustees.
- 4.2. It is important to note that, whilst a custodian trustee will hold the legal title to trust property, the management of that property and the exercise of any power or discretion exercisable by the trustees of the trust remain vested in the trustees other than the custodian trustee i.e. in this case, the Managing Trustees.
- 4.3. The PTA 1906 confirms:
- "The custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power of discretion vested in them...unless the matter in which [the custodian trustee] is required to concur is a breach of trust, or involves a personal liability upon [the custodian trustee]...but unless [the custodian trustee] so concurs [it] shall not be liable for any act or default on the part of the managing trustees or any of them".*
- 4.4. Therefore, as custodian trustee, the Council is required to act at the direction of the Managing Trustees unless to do so would be to act in breach of trust (or would incur personal liability).
- 4.5. We understand that the key purpose of establishing the CIO is to be able to operate the Charity via a limited liability legal structure, which will protect the trustees from personal liability (in most circumstances) and therefore have the effect of attracting new trustees. There are other benefits to operating the Charity via the CIO (rather than in the current unincorporated structure) including that the CIO can enter into contracts and sue and be sued in its own name, rather than in the names of the individual trustees and there will be a modern governing document in place to operate the CIO. These are common reasons why charity trustees look to "incorporate" by transferring the assets of the original charity to a new incorporated charity, such as the CIO. Therefore, it is our view, that in transferring the legal title to the Premises to the new CIO, the Council would not be acting in breach of trust nor would incur personal liability. Accordingly and pursuant to the PTA 1906, the Council would be required to act at the direction of the Managing Trustees by entering into the vesting declaration.

#### **5. Management and maintenance of the Premises**

- 5.1. Although the Council is the custodian trustee of the Premises, it is the role of the Managing Trustees to manage and maintain the Premises. However, we understand that in practice, the Council has used its own funds to maintain the Premises for several decades.
- 5.2. For example, we understand that the Council purchases, manages and insures play equipment, a skate park and tennis courts at the Premises, which the Managing Trustees have stated that they do not want responsibility for. Also the Council pays for the grass to be mown and Council members give up their time each week to assist with maintenance, including conducting weekly safety inspections.
- 5.3. Examples of specific expenditure include:
- 5.3.1. paying £50,000 to renovate a games area approximately 5 years ago;
- 5.3.2. insuring the Premises for approximately £1,800 per year;

- 5.3.3. paying £400 per year for an external safety inspection; and
- 5.3.4. paying £11,500 to the local tennis club for refurbishment of the courts.
- 5.4. We understand that the Council has estimated that approximately £2,500 each year is required to generally maintain the Premises. Also, certain equipment will shortly need replacing at an estimated cost of £10,000.
- 5.5. It is not clear whether these services or funding has been documented in the past.
- 5.6. From a legal perspective, it is not part of the role of the custodian trustee to meet the cost of maintaining property of which it is custodian from its own funds. The cost of maintaining the Premises should be met from the Charity's income, and this is confirmed in clause 4 of the Constitution (previously clause 17 of the 1965 Scheme). However, possibly as a matter of custom and practice, the Managing Trustees have come to expect that the Council will contribute towards the cost of managing and maintaining the Premises.
- 5.7. That said, it is the duty of the Managing Trustees (and going forwards the trustees of the CIO) to ensure that the Charity has sufficient funds to meet its overheads and other outgoings, which will allow the Premises to be provided for the benefit of the public.
- 5.8. We anticipate that prior to completing the incorporation of the Charity to the CIO and therefore completion of the vesting declaration, the Council will wish to be satisfied that the CIO will have sufficient funds to be able to make the Premises available to the public in a state appropriate for public use and which does not pose a risk to anyone using the Premises. However, even if the Council were to conclude that in its opinion the CIO may not have the required future funding, in our view this is unlikely to present the Council with a reason for not transferring the legal title to the Premises to the CIO (by way of the vesting declaration).
- 5.9. The Council may of course wish to continue to assist the CIO by making grants in the future or providing services, such as mowing the grass. If this is intended, we recommend that this is clearly documented so that the extent of the Council's involvement and responsibility is clear to both parties. We recommend that the Council meets with representatives of the Charity to discuss the Council's involvement in future. We would be happy advise further in relation to any proposed future support the Council proposes to make available to the CIO.

## **6. The CIO**

- 6.1. We understand that on 4 September 2018, the Managing Trustees held a meeting, to which all Charfield inhabitants were invited. A resolution was tabled to establish the CIO and enter into the vesting declaration. This was voted through by those attending the meeting, with 11 votes in favour and 5 votes against. We are not aware of the reasons for voting against the proposals.
- 6.2. We have been provided with a copy of the constitution for the CIO, which appears to generally follow the Charity Commission model constitution for CIOs. Although the constitution itself does not confirm the permanent endowment status of the Premises, as we explain below at paragraph 7.3, the vesting declaration will provide such confirmation.
- 6.3. The charitable purposes of the CIO are the same as the Objects, albeit there are some minor drafting changes. This will allow the Charity to transfer its assets to the CIO, and for the CIO to apply them for the same purposes.

- 6.4. Decisions taken by the Managing Trustees will require a majority to vote in favour. Therefore, it would not be possible for the Council appointed Managing Trustee to block decisions, particularly in respect of the proposed incorporation of the Charity. That said, it is important to remember that all Managing Trustees are required to act in the interests of the Charity at all times, and not in the interests of their appointing body.
- 6.5. We understand that the current Managing Trustees will be the first trustees of the CIO. They will be required to act in the interests of the CIO at all times and ensure that the CIO's assets (including those held on trust e.g. the Premises) are applied to advance the CIO's objects for the public benefit.
- 6.6. The CIO's constitution provides the Council with the right to nominate an individual for appointment as a trustee of the CIO. As we have confirmed above, any individual so appointed must act in the interests of the CIO (and not the Council) in carrying out their role.
- 6.7. We note that membership of the CIO is open to any individual, corporate body or organisation interested in furthering the CIO's purposes. Applications must be made to the trustees. The trustees must give fair consideration to membership applications and give reasons should they refuse an application.
- 6.8. In principle, therefore, the Council could apply for membership of the CIO which would give the Council certain rights in respect of the CIO, including to attend and vote at general meetings. This would allow the Council to keep up to date with the activities of the CIO and raise any concerns in its capacity as a member.
- 6.9. It is important to note that as a member of the CIO, the Council would be under a duty to exercise its powers in good faith in a way most likely to further the CIO's charitable purposes and to act without a conflict of interests. Therefore, if admitted as a member of the CIO, the Council must act in the interests of the CIO only, and not in its own interests.

## **7. Transfer of the Charity's assets to the CIO**

- 7.1. Following the Charity's decision to proceed with the establishment of the CIO, we understand that the Managing Trustees have asked the Council to sign a vesting declaration, transferring the legal title to the Premises to the CIO. This is the approach generally adopted in order to transfer the legal title to charity assets to a CIO.
- 7.2. The effect of a vesting declaration is:
  - 7.2.1. to transfer unrestricted property to the CIO to be held as part of its corporate property;
  - 7.2.2. vest legal title to permanent endowment assets in the CIO to be held on the original trusts (in this case, the trusts confirmed in the Scheme);
  - 7.2.3. appoint the CIO as trustee of the permanent endowment; and
  - 7.2.4. to "link" the CIO and the permanent endowment and allow them to be treated as one charity for registration and accounting purposes.
- 7.3. The Charity Commission's model vesting declaration, which we assume will be used in this case, confirms that permanent endowment will vest in a CIO subject to the same trusts on which it was held immediately prior to the transfer.

7.4. Therefore, in completing the vesting declaration in this case, the key change to the current structure will be that the CIO is the trustee of the Premises in place of the Council. The Premises will remain subject to the same trusts which will mean that the Premises must be used to advance the Objects and held subject to the permanent endowment trusts. The CIO's ability to deal with the Premises would effectively be no different to the current position i.e. the status quo is maintained.

## 8. Summary

- 8.1. The Council is the custodian trustee of the Premises; it does not own the Premises. Instead, the Council holds the legal title to the Premises, which are controlled and managed by the Managing Trustees. The Managing Trustees must ensure that the Premises are used to advance the Objects for the benefit of the public.
- 8.2. The role of custodian trustees is defined by the PTA 1906. Custodian trustees are required to act at the direction of a charity's managing trustees, unless to do so would mean that the custodian would be acting in breach of trust or incur personal liability.
- 8.3. We understand that the Council has been asked by the Managing Trustees to sign a vesting declaration, which would have the effect of transferring the legal title to the Premises to a new CIO. This CIO is being established by the Charity as part of an incorporation project currently being undertaken by the Managing Trustees.
- 8.4. In our view, in accordance with its duties as custodian trustee, the Council would be required to sign the vesting declaration. It appears to us to be unlikely that the Council would be acting in breach of trust or would incur personal liability if it signed the declaration.
- 8.5. As we have explained above, once completed, the CIO would be the trustee of the Premises in place of the Council. The CIO would hold the Premises subject to the same permanent endowment trusts.
- 8.6. The Council will maintain involvement with the CIO via its right to nominate an individual for appointment as a trustee of the CIO. In principle, the Council could also apply for membership of the CIO which would confer certain rights on the Council, including to attend and vote at general meetings.
- 8.7. If the CIO wished to dispose of all or part of the Premises in future, our view is that the trustees would be required to request the authority of the Charity Commission. They would also need to ensure compliance with the 2011 Act, which contains specific requirements in respect of the disposal of land subject to permanent endowment trusts.
- 8.8. We recommend that if the Council proposes to provide funding or services to the CIO in relation to the Premises, a written agreement is entered into between the Council and the CIO which clearly sets out the roles and responsibilities of each party.

We hope that this advice note is helpful in addressing the Council's specific questions and concerns. However, please contact Bryony Thomas ([bthomas@vwy.co.uk](mailto:bthomas@vwy.co.uk) / 020 7665 0973) or Laura Chesham ([lchesham@vwy.co.uk](mailto:lchesham@vwy.co.uk) / 0117 314 5314) if you have any further questions.

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