

COMMUNITY CENTRE

CONFLICTS OF INTEREST - FACT OR FICTION ?



Roger Taylor is a Consultant with Wellers Hedleys Solicitors and in the first of two articles, Roger looks at the conflicts of interest involved with charitable trusts and community buildings

Many Local Councils are either Custodian or Managing Trustees of Charities who are responsible for Community buildings. In those positions, conflicts can frequently arise.

If there is a Community Building it is not unusual for the Local Council to consider having an office or similar facility within that building. This is particularly so if the Local Council has made a substantial financial contribution towards the building, either for construction or towards the annual running costs.

Such an arrangement immediately brings about a conflict of interest where the Local Council is a Trustee. The Charity Commission requires the Trustee to consider whether it is in the best interests of the Charity that such an arrangement exists. Whilst there is usually a benefit to the Local Council the benefit to the Charity is not always obvious.

In addition to this the Charity must always enter into dealings on the basis of market rent or similar best consideration. This will come as a shock to a Local Council who has provided a considerable amount of finance. Even if a low rent can be agreed as compensation in recognition for the contribution the Charity will be advised to include a rent review after a period of years. The Charity will have to obtain independent valuation advice on the terms to be offered.

If such an arrangement is contemplated, it is necessary for the structure of the transaction to be carefully considered, preferably before the project is completed in the case of a new build. If a lease is to be granted this gives rise to further difficulties as it is not possible for a lease to be granted by the same body to itself. This is despite the fact that in the case of a Local Council it will have two separate capacities, being a Charity Trustee and a Local Authority.

Some Local Councils ignore the problem and just occupy the premises with no formal agreement, but it is doubtful whether this is in the interest of the Charity.

If the Local Council is the Custodian Trustee it can resign and the Managing Trustees can appoint another Custodian Trustee, such as the Official Custodian for Charities or another Trust Corporation. Alternatively the Charity can reconstitute itself as a Charitable Incorporated Organisation which has a legal identity and does not require a Custodian Trustee. In the case of an established Charity, the opportunity can be taken to review the Charity's constitution and bring it up to date.

A further conflict can occur if the Local Council misunderstands the role of a Custodian Trustee and tries to dictate to the Managing Trustees how they consider that the Charity should be run. This is a common occurrence and is frequently brought about by the Local Council wanting the Charity to operate in a manner which accords with Local Council policy rather than in accordance with the objects of the Charity.

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A Charity can only operate in accordance with its objects, and these must at all times be charitable. A Charity with the object of operating a Recreation ground for the benefit of the community may be outside its charitable objects if it permits the construction of a Community Building on the site whose main use is not in ancillary to the Recreation Ground but which operates as a Community facility. A charity which operates outside its objects is laying the Trustees open to action, and in extreme circumstances personal liability.

Roger also gives the CPD Course on Charitable Trusts for SLCC.

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WE ARE TRUSTEES – HELP!

IN HIS SECOND ARTICLE ROGER CONSIDERS THE ROLE OF TRUSTEES

Most Community Buildings are owned by Charitable Trusts. The reason for this is partly historic and partly because of the concern about the liability for business rates.

Many Local Councils are trustees of Community buildings but the understanding of the nature of that trusteeship is frequently limited, giving rise to many difficulties and misunderstandings. This can lead to conflict. The majority of Charities are unincorporated charitable trusts, and as such have no separate legal personality, such as is found with a limited company or a Charitable Incorporated Organisation. In the absence of incorporation the Charity can only hold land, or other capital assets, through Trustees.

There are basically three types of Charitable Trustees, Custodian Trustees, Holding Trustees and Managing Trustees.

A Local Council is a Trust Corporation and as such is entitled to act as a Custodian Trustee. The responsibility of a Custodian trustee is to hold the assets of the Charity. This would include the title to the Community Building, and also any capital funds which are owned by the Charity. A Custodian Trustee's only function is to hold the legal title to the assets and ensure that the objects of the Charity are being complied with. We advise that a Custodian Trustee ensures that the building is adequately insured, as any proceeds of the insurance policy in the event of damage to the building come under the control of the Custodian Trustee.

A Custodian Trustee has no responsibility for the day to day running of the Charity, this is solely the responsibility of the Managing Trustees, and the Custodian Trustee must act in accordance with the instructions of the Managing Trustees and can only refuse to comply if those instructions result in a breach of trust.

Many Charities appoint the Local Council as Custodian Trustee in order to preserve the asset but this protection can be illusory having regard to the limited powers of a Custodian Trustee.

It is worth pointing out that the Local Council does not have to be the Custodian Trustee. The Official Custodian for Charities a quasi government body can be appointed, as can commercial organisations such as Bank Trustee companies.

The advantage of a Trust Corporation is that it does not die. If the Charity prefers to appoint individuals to hold the title to their assets, they are called Holding trustees. It is necessary to change the title to the assets as the individuals die or move away from the area. Failure to do so causes considerable problems as the Land Registry will require details of why the individual is no longer a Trustee.

The deed which creates the Charitable Trust will normally specify how the Managing trustees are to be appointed. In the case of a Community Building there will normally be persons appointed by organisations that use the Building on a regular basis. These organisations can change and there is normally power for the list to be changed to meet circumstances. It is important that persons appointed as representatives fully understand that they become Trustees of the Charitable Trust and therefore owe a duty to the beneficiaries of the Trust, rather than to the organisation which appoints them. A Local Council may have the power to appoint one or more representatives and in limited circumstances can be appointed a sole Managing Trustee. The representative need not be a Councillor but it is important that both the Council and the representative understand what is expected of each of them.

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