

## **APPENDIX B**

### **HASTINGS AND ST LEONARDS FORESHORE CHARITABLE TRUST**

#### **GUIDE TO GOVERNANCE OF THE CHARITY**

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## **HASTINGS AND ST LEONARDS FORESHORE CHARITABLE TRUST**

### **Guide to Governance of the Charity**

This document sets out guidance on the powers and duties of Hastings Borough Council (the "**Trustee**") as sole trustee of the Hastings and St Leonards Foreshore Charitable Trust (the "**Charity**"). It also provides information on Trustee liability and the potential liabilities of members of the Trustee.

#### **1 BACKGROUND**

##### **1.1 Governing Documents**

The governing documents of the Charity are a conveyance of 8 September 1893 between Her Majesty Queen Victoria, Sir Robert Nigel Fitzhardinge Kingscote, the Board of Trade and Hastings Corporation (the **1893 Conveyance**), the Hastings Borough Council Act 1988 (the **1988 Act**), and a scheme of the Charity Commission dated [•] (the **Second Scheme**) which replaces a previous scheme of the Charity Commission dated 22 March 2006 (the **First Scheme**). It is important to note that the Charity was created by the 1893 Conveyance and not by the Schemes, and the Charity has therefore been in existence since 1893. However, the Schemes amend certain provisions of the 1893 Conveyance. The First Scheme appointed a number of individuals to act as trustees in place of Hastings Borough Council. The Second Scheme provides for the re-appointment of the Council as trustee in place of the individual trustees (the **Outgoing Trustees**), and the framework for the governance and administration of the Charity, including charitable purposes for the surplus cash and assets, and it includes a requirement for an annual public meeting, the establishment of a Coastal Advisory Group and a Grant Advisory Panel and for a Protector.

##### **1.2 Particular Provisions of the Second Scheme**

###### **1.2.1 Objects of the Charity**

These are the original objects i.e. to hold the Charity's land for the common use, benefit and enjoyment by Her Majesty's subjects and the public for the time being for ever as well as an additional new object of such charitable purposes within the area of the Borough of Hastings as the Trustee thinks fit. The additional object may only be furthered once the Trustee has met the proper costs of administering the Charity and of managing its assets (including the repair and insurance of its land) and a suitable level of reserves will need to be kept to ensure that such costs can be met. Please see further information at paragraph 6 of this document.

###### **1.2.2 The Protector**

Clause 13 of the Second Scheme provides for there to be a Protector for the Charity.

Attached is a Guide to the role and responsibilities of the Protector. The Trustee must co-operate with the Protector and produce any material, documents or evidence that the Protector may reasonably require in order to fulfil his responsibilities. The Trustee must also give the Protector sufficient notice and accompanying papers in relation to all meetings of the Trustee, committees and delegates of the Trustee and the Annual Public Meeting.

The fiduciary duty of the Protector is to ensure the integrity of the administration of the Charity and the propriety of its procedures and, if necessary, report matters of serious concern to the Charity Commission. The Protector has been given a number of powers to enable him to carry out his fiduciary duties so as, among other things, to:

- (a) satisfy himself that the Trustee is allocating income and expenditure correctly between the Council and the Charity; and
- (b) ensure that the Trustee takes proper steps to manage conflicts of interest in relation to both land and expenditure which may arise from time to time.
- (c) raise any concerns he has with the Trustee and endeavour to resolve them, and, if necessary, report such concerns to the Charity Commission to enable it to intervene.

In addition the Protector may attend and speak (but may not vote) at meetings at which the Trustee is conducting the business of the Charity and at the annual public meeting, at which he may take note of issues raised by the public. He must prepare each year a statement explaining the function of the Protector, how that function has been exercised during the financial year and any action he has taken. The Trustee must publish the statement by the Protector in its Trustee Annual Report.

The first Protector was nominated by the Outgoing Trustees and appointed by the Second Scheme. The first Protector is Christopher John Rutton May FCA. The Second Scheme provides the framework for the appointment of future Protectors including the necessary qualifications.

### 1.2.3 Public meeting

Clause 7 of the Second Scheme provides that the Trustee must hold an annual public meeting which the Protector and all persons residing in the Borough of Hastings may attend. The meeting should normally be held within 6 months of the end of the Charity's financial year. The date, time and location of the meeting and the intended business must be published in a suitable newspaper circulating in the Borough of Hastings at least 28 days in advance of the meeting. The purpose of the meeting is to receive the annual report and accounts of the Charity for the last financial year and for the Trustee to make available a summary of its operating procedures on running a charity. The report should describe the activities and intended activities of the Charity. A summary of this report should be placed on the Council's website and be available in documentary form.

It should be noted that the annual public meeting is not governed by any of the procedural rules relevant to the conduct of local authority business and which govern the normal administration of the Charity. The Trustee should therefore draw up all necessary procedural rules to enable the meeting to be conducted properly.

### 1.2.4 Consultation on Foreshore Matters

Clause 5 of the Second Scheme provides that the Trustee must consult with and have regard to the recommendations of the Coastal Advisory Group in relation to the following:

- (a) the standards or specifications for the maintenance of the Charity's land;

- (b) the Charity's policy relating to the activities and events arranged or permitted on the Charity's land; and the arranging or permitting any such activity or event on the Charity's land which is outside that policy;
- (c) the Charity's policy relating to the exercise of any power under the Hastings Borough Council Act 1988 or otherwise to manage, let, sell or otherwise dispose of the Charity's property, or the exercise of these powers other than in accordance with established policies;

The Coastal Advisory Group means the Coastal Users' Group or such other body as the Commission may from time to time specify in writing. ***[details of composition and current status of the Coastal Users' Group and information about the Charity's grant-making policy to be inserted.]***

#### 1.2.5 The Grant Advisory Panel

Clause 6 of the Second Scheme states that there must be a Grant Advisory Panel comprising 4 - 8 members (excluding councillors, officers and employees of the Council). Members are appointed by the Trustee on the basis of their knowledge and experience of the voluntary and charitable sector and, in particular, their knowledge of these sectors in the Borough of Hastings.

The Grant Advisory Panel must consider and make recommendations to the Trustee in respect of:

- (a) the criteria for making grants which the Trustee adopts from time to time;
- (b) the content and format of grant application forms;
- (c) the advertisement of availability of assistance by way of grant from the Charity;
- (d) individual applications for grants and proposals of the Trustee for making grants.

The Trustee must have regard to the recommendations of the Panel. The Trustee appoints the Panel and must establish procedures for the operation of the Panel (for example, the conduct of, and quorum for, meetings), including provision for management of conflicts of interest. ***[information re the composition of the Panel and grant-making criteria to be inserted.]***

#### 1.2.6 Accounts, Annual Report, Annual Return and Bank Account

Clauses 9 and 10 of the Second Scheme include explicit reference to the Trustee's duties under the Charities Act 1993 concerning the keeping, preparation, audit and filing with the Charity Commission of the Charity's accounts as well as its Annual Report, and the requirement to keep a separate bank account.

#### 1.2.7 Use of Income and Capital

Clause 11 of the Second Scheme provides that the Charity must firstly apply its income and capital, where it can be properly charged, to meet the proper costs of administering the Charity and managing its assets (including the repair and insurance of its land and buildings). Only after the payment of these costs, can the Trustee distribute remaining income as grants and then it must be in furtherance of such charitable purposes within the area of the Borough of Hastings as the Trustee thinks fit.

### 1.2.8 Public information

In the interests of transparency this Guide to Governance of the Charity and the Guide for the Protector should be made available to the general public, for instance through the Council's website.

## 2 TRUSTEE DUTIES

### 2.1 Overview

The Trustee is Hastings Borough Council, which is a statutory corporation having a separate legal identity from the Councillors (members). The Cabinet consists of the Leader of the Council and up to 9 additional Councillors. Cabinet members, who are all elected Councillors, are in turn elected to the Cabinet by the full Council. The Council has adopted the 'Cabinet' style of governance,<sup>1</sup> the statutory effect of which is that certain functions (including the administration of the Charity) are classed as 'executive' functions carried out by the Cabinet. The Cabinet has the power to delegate the administration of the Charity to a sub-committee of the Cabinet. It is expressly provided<sup>2</sup> that any function which is the responsibility of the executive is exercisable by the executive on behalf of the particular local authority, and that any such function is not to be discharged by the local authority. Therefore it is only the members of Cabinet (the **Executive Councillors**) who have responsibility for the administration of the Charity on behalf of the Cabinet, which technically acts on behalf of the Council as Trustee. The nature and statutory framework of the Council's Constitution, including the Cabinet's power to delegate executive functions to a sub-committee, is implicit in the Scheme. The Cabinet has agreed that, in the interests of reducing the risk of conflict of interest, the executive's functions in relation to charities are to be undertaken by a committee of Cabinet, the Charity Committee.

Although the Trustee may only act as such through the Cabinet, as the charity trustee it is subject to other specific duties set out in legislation and at common law. Certain duties are imposed by legislation (e.g., the Trustee Act 2000 (the **2000 Act**) and the Charities Act 1993), but they are imposed on the Trustee not directly on individual Executive Councillors. Instead, the Executive Councillors are termed "fiduciaries" and have duties at common law. The duties of a non-trustee fiduciary are similar, but not identical in law, to the duties of a trustee, and are owed directly to the Council. In essence, the Executive Councillors have to be careful to act honestly and reasonably and only to exercise their powers for the purpose for which they were conferred. A claim for breach of duty can be made against the Executive Councillors either by the Council or on behalf of the Charity itself in circumstances in which it is not practicable to bring it against the Trustee. The Executive Councillors' fiduciary duties are, in other words, virtually equivalent to the duties of a trustee.

Every Executive Councillor has a personal duty, during his or her term of office, to ensure that the Cabinet carries out the objects of the Charity and acts only within the powers of the Trustee, and is personally responsible for the proper management of the Charity by the Cabinet and any Cabinet sub-committee. If Executive Councillors fail to exercise proper supervision, and there is a loss to charitable funds as a result of a breach of the Trustee's duties, they may be held

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<sup>1</sup> See section 210 Local Government Act 1972; section 13(2) Local Government Act 2000; Functions and Responsibilities Regulations

<sup>2</sup> Section 13(9) and (10) Local Government Act 2000

liable personally to make good the loss, either jointly or severally. It is very important, therefore, for Executive Councillors to acquaint themselves, and ensure compliance with, the duties of the Trustee which are described below.

## 2.2 **Duty on becoming an Executive Councillor**

Each Executive Councillor must acquaint himself or herself with the provisions of the governing documents of the Charity i.e. the 1893 Conveyance, the 1988 Act and the Second Scheme. He must acquaint himself with the extent of the Charity's property, its assets and its liabilities. This means that he must be able to identify the Charity's property, its current use and any obligations of the Trustee in relation to that property. In addition, he must be aware of, and monitor, the capital value of the Charity's assets, the income arising from those assets and the extent of any actual and contingent liabilities of the Charity (e.g. debts due or claims against the Trustee).

A newly appointed Executive Councillor should investigate whether there have been any past breaches of trust. For example, he should consider whether expenditure is properly charged against the Charity's assets and whether proper value has been received for disposals of the Charity's property (including land swaps). He should also ensure that the Charity's property is used in accordance with the objects of the Charity and the powers of the Trustee.

## 2.3 **Duty to comply with the terms of the governing documents**

Executive Councillors must exercise the powers of the Trustee in accordance with the governing documents, in furtherance of the objects and only in the best interests of the Charity.

## 2.4 **Duty to participate in the management of the Charity**

The Executive Councillors have a continuing duty to manage the Charity.

## 2.5 **Duty to avoid conflicts of interest**

### 2.5.1 Background

Executive Councillors are under a duty to avoid putting themselves in a position where their personal interests or the duties which they owe to the Council or others could influence, or appear to influence, their duties to the Charity.

### 2.5.2 Examples of Conflicts of Interest

Set out below are some examples of ways in which conflicts of interest may occur and ways in which Executive Councillors may improperly benefit from them.

#### **Unauthorised financial gain or benefit to a Councillor - direct**

- (a) The purchase from or sale to the Charity of assets, whether directly or indirectly (e.g. through a nominee or an agent).
- (b) The award of a contract to an organisation in which an Executive Councillor has an interest or from which an Executive Councillor will receive a financial benefit.
- (c) The employment of an Executive Councillor when paid for with the Charity's money.

- (d) The remuneration of an Executive Councillor for goods or services when paid for with the Charity's money.

#### **Unauthorised financial gain or benefit to an Executive Councillor - indirect**

The employment of a close relative, such as a spouse or partner of an Executive Councillor, whose salary is paid out of the Charity's funds (because the finances of the Executive Councillor and his relative could be interdependent and the Executive Councillor could therefore benefit indirectly from the arrangement).

#### **Conflict of loyalties**

Where the interests of the Charity conflict with an Executive Councillor's duty to act in the best interests of the Council extreme care should be taken. A conflict of loyalties could arise in a number of ways which do not result in a personal financial benefit to an Executive Councillor. They may easily arise because the interests of the Council and of its tax and rate payers are opposed to those of the Charity. In particular, Executive Councillors must ensure that:

- (a) income and expenditure is allocated properly between the Council and the Charity;
- (b) the amount of any expenditure is reasonable and necessary in the interests of the Charity (as opposed to the interests of the Council); and
- (c) where proposals for Charity land to be disposed of or redeveloped are under consideration, that the Protector and the Charity Commission are kept fully informed.

In some circumstances, contracts entered into by the Council will be intended to provide services both for Council property and for the Charity's property, e.g. car parking services, street cleaning and lighting. In terms of obtaining the best value, it may be that the Council's and the Charity's interests coincide. However, this may not always be the case and in considering the terms of particular contracts, not only must the provisions of the 2000 Act be complied with, but also, more generally, Executive Councillors should have regard to instances where the Charity might benefit from different terms to those applicable to Council property.

An example of this type of conflict of interests would be where the Council wishes to dispose of land consisting of both Council land and the Charity land, perhaps in the context of a redevelopment and where the interests of the Charity are not necessarily the same as those of the Council, having regard to future restrictions on the use of that land by the public. Another example might be where expenditure by the Charity would offset or replace expenditure by the Council.

#### **2.5.3 Land transactions between Trustee and Charity**

If the Trustee as local authority wishes to enter into a land transaction (for example, a sale, purchase, lease, exchange or grant of an easement) with itself as trustee of the Charity, a number of special considerations apply. In the first place, the conflict of interests and duties will be acute, and in order to manage the conflict it is essential that the Charity's part in the transaction is controlled solely by the relevant cabinet committee, i.e. Charity Committee and that an information barrier is in place to prevent any leakage of confidential information from the Charity to the Council. Specific advice should be sought as to the measures



required; for example, restrictions to access to documents and premises and the necessity for signed undertakings.

The Trustee must satisfy itself both that the proposed transaction in itself is in the Charity's best interests (having regard to its charitable objects) and, in the case of a disposition of Charity land, that the terms are the best that can reasonably be obtained. Any disposition of Charity land has to be considered alongside the provisions of the 1893 Conveyance and the 1988 Act. If necessary, the Charity Commission should be asked to make a scheme to alter the trusts sufficiently to enable the proposed transaction to take place.

The Trustee should in any case employ professional advisers – solicitors, surveyors and if necessary financial or technical advisors - who do not act for the Trustee as local authority and whose responsibility is therefore to the Charity alone. The District Valuer, for example, would not be a suitable adviser for the Charity.

In view of the equitable rule against self-dealing, no such transaction will be valid without either:

- (a) a scheme;
- (b) an order of the Charity Commission giving consent under section 36(1) of the Charities Act 1993 in the case of a disposition; or
- (c) an order under section 26 of the 1993 Act in the case of an acquisition.

In the case of a disposition, the Commission would normally require to see a report from a qualified surveyor acting solely in the interests of the Charity which complies with the requirements of section 36 and the Charities (Qualified Surveyors' Reports) Regulations 1992, recommending the Charity to proceed with the proposed transaction in the interests of the Charity. Among matters that the surveyor would need to advise on are whether or not it would be desirable to market the land in question, and whether planning permission should be sought. Where the Charity is acquiring land, the Commission will require evidence from a surveyor that the land is suitable for the Charity's purposes and that the price or other terms are reasonable.

Further information about land transactions is contained at paragraph 7.3.3 of this document.

#### 2.5.4 Trustee Remuneration

The general law provides that a trustee cannot be remunerated for services provided to his charity except as provided for:

- (a) by statute;
- (b) by express provision in the governing document; or
- (c) by order of the Charity Commission or the court.

The general rule is applicable in that the Council (in its capacity as the Trustee) cannot profit from, or receive remuneration for services provided to, the Charity. The statutory power to pay some of the trustees for their services to a charity under section 73A of the Charities Act 1993 applies only where there are a number of trustees, not to a sole trustee or its individual members. Nothing in the governing documents permits the remuneration of trustees. Any remuneration to

an Executive Councillor would therefore require express authority to be obtained in advance from the Charity Commission (or the court).

This also applies to a person connected to the Executive Councillor. A person is connected to a Councillor if, among other things, he or she is a child, parent, grandchild, grandparent, brother, sister, spouse or civil partner of the Executive Councillor, a business partner of the Executive Councillor or any of those connected persons, an institution controlled by the Executive Councillor or any of the foregoing connected persons (or any two or more of them) or a corporate body in which any of them, singly or together, hold a substantial interest (i.e. 20% or more).

#### 2.5.5 Other unauthorised benefits

Neither the Council nor any of the individual Executive Councillors may acquire an interest in property belonging to the Charity or be interested in a contract with the Charity unless the prior written consent of the Charity Commission is obtained. Similarly, they are not permitted to receive or retain any other benefit, whether direct or indirect. This effectively prevents dealings with, or benefits to, persons connected with Executive Councillors or to firms or companies in which they have more than a minimal interest.

#### 2.5.6 Authorised benefits

Receipt of the following is permissible:

- (a) the payment of expenses necessary to allow Executive Councillors to carry out their duties in relation to the Charity (e.g., the provision of special transport for a disabled Executive Councillor or the reasonable expenses of travelling to meetings to discuss the Charity's business);
- (b) attendance allowances receivable in their capacity as members of the local authority, from the authority's funds, despite the fact that such an allowance is referable in part to work done for the Charity;
- (c) benefits that are generally available to the public (e.g., copies of literature about the Charity);
- (d) reasonable and proper costs incurred by the Council in administering the Charity's property; and
- (e) indemnity insurance for the Council as Trustee (which may extend to the Executive Councillors as fiduciaries) under section 73F of the Charities Act 1993.

#### 2.5.7 Conflicts of interest policy

A conflicts of interest policy should be adopted. This should set out a procedure for managing conflicts, which would mean that an Executive Councillor with a conflict of interests or a conflict between his duty to the Charity and his duty to the Council or some other body would have to abstain from discussing and voting on matters where a conflict of interest arises or is likely to arise. The declaration of interests form and the conflicts of interest policy should help to ensure that the Charity is managed transparently and that the Executive Councillors do not inadvertently breach the rules on conflicts of interest. It should not be forgotten, however, that identifying and managing a conflict of interests may not be adequate. For example, if the Council or an Executive Councillor stands to benefit

personally from a contract, lease or other matter affecting the Charity's property this would not be authorised by law. Any transaction carried out in breach of the law could be rendered void, and the Council or (as the case may be) an Executive Councillor who had received money from the Charity could be required to repay it to the Charity, with interest, notwithstanding that his interest had been duly declared.

#### 2.5.8 The Role of the Protector and the Charity Commission

If Executive Councillors are unsure about whether a specific situation gives rise to a conflict of interests, or if a particular transaction could be called into question, they should seek professional advice. In addition, they should inform the Protector and may seek guidance from the Charity Commission (section 29 of the Charities Act 1993).

### 2.6 **Duty to protect the Charity's property**

Once newly appointed Executive Councillors have ascertained the extent of the Charity property, its assets and its liabilities, they are under a duty to protect it. This means ensuring that the Cabinet has financial control over the Charity and that any income from the Charity's property is received by the Trustee. If there is a debt due to the Charity, the Trustee must take all reasonable steps to recover it. Failure to recover a debt could in certain circumstances be a breach of trust by the Trustee.

Each Executive Councillor is under a duty to ensure that proper safeguards are put in place to protect the Charity's property and funds (including bank accounts). A separate bank account should always be maintained for the Charity's cash deposits and income. The Charity's money should never be mixed with Council funds.

The Trustee must preserve the assets of the Charity so that they can be used effectively to further the Objects. This duty must be borne in mind whenever tasks are delegated to employees, committees or to one or more of the Executive Councillors. The Charity's resources should be used only for purposes which fall within the Objects.

In order to discharge this duty, Executive Councillors must ensure that the Charity's property is adequately insured and that surplus funds are invested prudently. There are specific duties regarding investment in the 2000 Act. Executive Councillors should also seek professional advice on their insurance needs and on other matters relating to the Charity (e.g. employment law or health and safety obligations). Sometimes suitable advice will be available from within the Council but there will also be occasions when outside expert advice is needed.

### 2.7 **Charitable Expenditure**

The Trustee is entitled to an indemnity out of the Charity's funds for costs reasonably and properly incurred in the administration of the Charity.

Proper expenses would include:

- (a) a fair and reasonable proportion of the salaries of Council employees (but not of the remuneration or allowances of the Executive Councillors) based on actual time spent on the business of the Charity, including the preparation of the Charity's report and accounts, filing of annual returns and other compliance information with the Charity Commission and HMRC,

and preparing for and attending all meetings in connection with the business of the Charity;

- (b) the Protector's fee and other expenses;
- (c) the costs incurred in preparing, and providing suitable accommodation for the annual public meeting;
- (d) the costs incurred by the Council in administering the Charity's land; and
- (e) external professional fees.

The Trustee must however:

- (a) seek the advice of the Charity Commission under section 29 of the Charities Act 1993 (or its permission under section 33 of the 1993 Act to apply to the court for a *Beddoe* order) if the Council as Trustee of the Charity is a party to court proceedings as defendant or claimant in relation to any dispute whether or not it relates to the Charity's land; failure to obtain this protection may put the Council at risk of not being able to recover legal costs out of the Charity's money;
- (b) adopt a formula for determining the basis on which expenses are to be charged to the Charity which is transparent and open to inspection and questioning by the Protector who must be entitled to gain access to supporting documentary or electronic evidence and to discuss matters with members of the Cabinet and Council officers. Where expenses are attributable partly to the Council and partly to the Charity, any apportionment must be made on a fair and reasonable basis. By way of example, the following methodology was agreed between the Outgoing Trustees and the Trustee in relation to the Charity's financial years ending 31 March, 2004, 31 March 2005 and 31 March 2006:
  - (i) Where income and expenditure are wholly attributable to the Charity's property it should be allocated to the Charity;
  - (ii) where income and expenditure are not wholly attributable to the Charity's property, allocation should be made on a fair and reasonable basis consistent with the basis adopted for the Charity's financial years set out above;
  - (iii) car parking Penalty Charge Notices and income from season tickets sold in relation to the Charity's car parks should be allocated on a reasonable and consistent basis;
  - (iv) the Council must not charge depreciation nor make amortisation entries on the Charity's assets;
  - (v) the Council must not charge business rates to the Charity unless required to do so by law.

## 2.8 Common law duty of skill and care

In the exercise of his duties, each Executive Councillor is under a duty to act with the same diligence and care as men or women of "ordinary prudence and vigilance would in the management of their own affairs". The courts have developed this

duty to mean that fiduciaries are expected to act as ordinary prudent men and women of business.

This duty assumes an awareness, but not detailed and technical knowledge, of financial and legal issues. However, persons who hold themselves out as experts in a particular field, e.g. accountants, have a greater degree of responsibility placed on them.

The discharge of this duty may require Executive Councillors to seek and to act on professional advice from time to time.

In addition to this common law duty of care, the statutory duty of care imposed by the 2000 Act applies to certain trustee functions (see paragraph 7 of this document).

### **3 DUTIES UNDER THE CHARITIES ACT 1993**

#### **3.1 General**

There are a number of duties imposed on the Trustee by the Charities Act 1993. They are:

- (a) a duty to ensure that proper accounting records are kept and to prepare annual audited accounts for the Charity; in order ensure that the Charity's finances are maintained separately from the finances of the Council, the auditor for each body should be different. The Outgoing Trustees selected and appointed Buzzacott LLP as auditor for the Charity;
- (b) a duty to prepare and submit to the Charity Commission an annual report on the activities of the Charity within ten months of the end of each financial year; and
- (c) a duty to make an Annual Return to the Charity Commission within ten months of the end of the Charity's financial year.

#### **3.2 SORP Compliance**

The Trustee is required to prepare an annual report and statement of accounts in accordance with the Statement of Recommended Practice "Accounting and Reporting by Charities" (Revised 2005) (the SORP) and the Charities (Accounts and Reports) Regulations 2008 (S.I. 2008/629). Accounts are to be prepared on the accruals basis to give a true and fair view of the Charity's financial activities and position.

The SORP clarifies how the Charity's accounting is affected by legal requirements. It provides the Charity with an interpretation of accounting standards and principles and clarifies treatment for sector specific transactions. In doing so it enables the Trustee to meet its legal and other reporting duties for the accounts to give a true and fair view.

The Charity's accounts are accompanied and complemented by information that does not form part of the financial statements. The accompanying information is primarily provided through the Trustees' Annual Report.

The SORP recognises that such accompanying information is of high importance for users of the Charity's accounts in understanding its activities and achievements as

a whole and therefore provides best practice recommendations for the content of such reports, which are underpinned by law.

The Trustee must approve both the Annual Report and Accounts and the date should be stated.

## **4 LIABILITY OF TRUSTEES**

### **4.1 Contractual Liability**

The Trustee will from time to time enter into contracts on behalf of the Charity in order for work to be carried out or, as is more likely, for the supply of goods and services.

The Charity is unincorporated and as such it does not have its own legal personality; consequently it is the Trustee rather than the Charity who will be a party to any contract. Provided that the Trustee acts reasonably and within its powers in entering into a contract, it can use the Charity's money to meet obligations arising under the contract. If however the Charity has insufficient funds to meet those obligations then the liability to meet those obligations remains with the Trustee.

The Trustee should ensure that all contracts are reviewed regularly. Particular care is required where a contractual arrangement relates partly to Council business and partly to business transacted on behalf of the Charity - please see paragraph 2.5 above.

### **4.2 Liability for breach of trust**

A breach of trust will occur when the Trustee acts in a way that is contrary to the terms of the trusts of the Charity or when it fails to perform, or adequately to perform, its duties as Trustee. If the Charity's resources are used for purposes not falling within the Objects, a breach of trust occurs. When that breach of trust results in a financial loss to the Charity the Trustee may become liable to make good that loss. If a breach of trust has occurred for which the Trustee is liable it may apply to the Charity Commission or to the court to be excused from liability. The Charity Commission or the court will consider whether the Trustee has acted honestly and reasonably and ought fairly to be excused.

The statutory power to take out indemnity insurance for the Trustee enables the Trustee to protect itself from the consequences of inadvertent breaches of trust, including the acts or omissions of a member or employee for which it may be vicariously liable. It does not extend to deliberate or reckless breaches of trust. The Trustee must be satisfied that the purchase of insurance cover is in the Charity's best interests and exercise the duty of care referred to in the 2000 Act before exercising the power to take out such insurance.

## **5 PROPERTY OF THE CHARITY**

The property of the Charity consists principally of:

- (a) the land and buildings identified on the attached plan;
- (b) cash and other investments;
- (c) the income arising out of the land, buildings, cash and other investments;

- (d) any debts due from third parties;
- (e) any intellectual property such as copyrights in published material;
- (f) any vehicles, equipment or other chattels.

## 6 THE OBJECTS

### 6.1 The Land and Buildings

The objects of the Charity in relation to the land and buildings are set out in the 1893 Conveyance. They are to hold the land conveyed upon trust for the common use, benefit and enjoyment of all Her Majesty's subjects and of the public for the time being for ever. The Trustee must be able to demonstrate that the Charity benefits the public. The land and buildings must be open to the general public, save to the extent that the 1988 Act permits private use, for the purpose of effecting maintenance and repair of the land or on a temporary basis to facilitate the holding of public events which would have the effect of excluding the general public from gaining access. As most of the Charity's property is open space which is accessible to the public, the objects are being fulfilled and the public benefit test is satisfied. The provision of car, coach or lorry parking spaces for a reasonable charge is charitable where it facilitates the use, benefit and enjoyment by the public of the Charity's property in other ways.

### 6.2 The income arising from the land, buildings and other property.

The objects of the Charity relating to property other than land and buildings are set out in the Second Scheme and at paragraph 1.2.1. The Trustee is permitted, after meeting expenses of the Charity, to apply surplus funds for any charitable purposes within the Borough of Hastings. In applying surplus funds, the Trustee should consider the requirement for the Charity to hold reserves and in so doing the Trustee must balance the needs of the current and future beneficiaries of the Charity.

Therefore, subject to meeting proper and reasonable expenses incurred in connection with the management of the Charity's land, the Trustee should use surplus funds to make grants to charities operating in Hastings, to make grants towards local charitable projects and activities, and/or to organise such projects and activities directly. This should not generally include payments to enable the Council to meet its statutory obligations, e.g., street cleaning and waste collection, since it is accepted that the Council should be meeting the cost of carrying out its statutory duties from its own funds or central Government funds.

The Trustee must act in accordance with the requirements of the Scheme in relation to consultation with the Grant Advisory Panel as detailed at paragraph 1.2.5 above.

## 7 TRUSTEE POWERS

The powers of the Trustee are extensive and some are contained in the 1988 Act.<sup>3</sup> Other powers are implied by law. We deal with each in turn.

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<sup>3</sup> Please see paragraph 7.1 for further information on the powers under the 1988 Act.

## 7.1 **Powers under the 1988 Act and in the 1893 Conveyance**

The 1988 Act grants certain powers to the Council in relation to the land transferred by the 1893 Conveyance. These powers are set out below:

- (a) Section 3(2) of the 1988 Act provides that the Council may use any specified land for a permitted purpose and, for any such purpose, may erect buildings, structures or works on any part of such land, except the area shown edged blue on the map deposited with the 1988 Act;
- (b) Section 3(3) provides that the Council may allow any other person to use any specified land for a permitted purpose and to do on it anything the Council may do under section 3(2). In addition, the Council may let or otherwise make available any part of the land, or anything on the land, on such terms and conditions as they think fit;
- (c) Section 3(5) provides that the Council or any person allowed to use any specified land, or anything on such land by virtue of section 3(3) may charge for the use of any facilities provided by them in such sums as they think fit.

Details of the specified land and the permitted purposes are set out in a Schedule to the 1988 Act. The specified land is referred to on the map deposited with the 1988 Act. The permitted purposes are, in relation to certain specified tranches of land as set out on the map, (1) the parking of vehicles; (2) use as a boat compound; (3) religious and cultural activities, entertainments, amusements, sports, leisure activities, illuminations, information, and the sale of refreshment and beach requisites; and (4) a lifeguard station and functions of the coastguard, police and borough council not inconsistent with the trusts imposed by the 1893 Conveyance.

## 7.2 **Implied powers**

Certain powers in furtherance of the Objects are implied. They include the following:

- (a) to raise funds. Subject to the provisions of the Act, in exercising this power the Trustee should not undertake any substantial permanent trading activity and should comply with any relevant statutory regulations;
- (b) to buy, take on lease or in exchange, hire or otherwise acquire property and to maintain and equip it for use for the Charity's purposes;
- (c) to co-operate with other charities, voluntary bodies and statutory authorities and to exchange information and advice with them;
- (d) to establish or support any charitable trusts, associations or institutions formed for any of the Objects;
- (e) to create advisory committees;
- (f) to employ and remunerate such staff as are necessary for carrying out the work of the Charity; and
- (g) to do any other lawful thing that is necessary or desirable for the achievement of the Objects.



### 7.3 **Other Statutory Powers and Duties**

The 2000 Act contains a series of default provisions that apply to all trusts whenever created. These powers are in addition to any powers conferred by the Scheme and subject to any restrictions or exclusions contained in the Scheme. The 2000 Act is divided into 6 parts. Parts 1 to 4 are relevant to the Charity.

Part 1 introduces a statutory duty of care.

Part 2 confers a general power of investment.

Part 3 authorises trustees to acquire land for any purpose.

Part 4 provides for delegation by the Trustees to agents, nominees and custodians.

#### 7.3.1 Part 1: Statutory Duty of Care

Under the 2000 Act the Trustee has a duty to exercise such care and skill as is reasonable in all the circumstances, having regard in particular to:

- (a) any special knowledge or experience that the Trustee has or holds itself out as having; and
- (b) if the Trustee acts in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that business or profession.

The "knowledge and experience" for these purposes, is that of individual Executive Councillors for the time being.

The statutory duty is largely a codification of the position at common law but this new statutory duty only applies in certain circumstances. These include:

- (a) where the Trustee exercises a power of investment;
- (b) where the Trustee is carrying out its duties to consider the standard investment criteria and to take advice before exercising a general power of investment (see paragraph 7.3.2 of this document);
- (c) where the Trustee exercises the power to acquire land;
- (d) where the Trustee enters into arrangements with agents, nominees and custodians. The duty will apply when selecting the person who is to act and when determining the agent's terms of appointment, and if an asset management function is being conferred, to the preparation of a policy statement;
- (e) where the Trustee is reviewing the appointment of agents;
- (f) where the Trustee exercises powers to compromise claims or to settle debts under section 15 of the Trustee Act 1925 (e.g. settling a claim for a personal injury sustained on the Charity's property); and
- (g) when deciding whether to take out indemnity insurance.

It is important to note that the statutory duty of care applies not only to the exercise of the powers conferred by the 2000 Act but also to any express powers contained in the Scheme or the 1988 Act which have equivalent effect.

### 7.3.2 Part 2: General Power of Investment

The Trustee may, subject to certain provisos, make any kind of investment that it could make if it were absolutely entitled to the assets of the Charity. This power expressly excludes investment in land but this is dealt with further in part 3 of the 2000 Act (see paragraph 7.3.3 below). This power is only exercisable in relation to surplus cash from which the Trustee is under an obligation to derive the maximum return in order to:

- (a) pay expenses of managing the Charity;
- (b) pay charitable grants. The extent of the obligation to invest surplus cash will depend upon the sums available for this purpose.

The Trustee must have regard to the standard investment criteria when making and reviewing investments. **These criteria are mandatory.**

#### **What are the Standard Investment Criteria?**

The Trustee must have regard to:

- (a) the suitability to the Charity of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind; and
- (b) the need for diversification of the investments of the Charity, insofar as is appropriate to the circumstances of the Charity.

In addition to having regard to the standard investment criteria, before exercising any investment power the Trustee is required to obtain and consider proper advice about how, having regard to the standard investment criteria, the power of investment is to be exercised or, in the case of reviewing an investment, the investment should be varied. The advice required is that of a person who the Trustee reasonably believes to be qualified to give it by reason of his ability in and practical experience of financial and other matters relating to the proposed investment. However, the Trustee is relieved of the duty to obtain proper advice if the Trustee reasonably concludes it is unnecessary or inappropriate to do so. Advice can be given by an employee in the course of his employment.

### 7.3.3 Part 3: Statutory Powers relating to Land

The Trustee has power under section 8 of the 2000 Act to invest in land. There is also a power to acquire land for charitable use. As trustee of a 'trust of land', the Trustee also has, under section 6 of the Trusts of Land and Appointment of Trustees Act 1996, all the powers of an absolute owner in relation to the land it holds - provided that such powers are exercised solely for the purposes of the Charity.

The exercise of the power to acquire land is subject to the statutory duty of care. Where land is being acquired for investment the duty to have regard to the standard investment criteria and to take proper advice applies.

There is no power to dispose of or mortgage the Charity's non-investment land, other than as provided in the 1988 Act.

Where a disposal of land is authorised, the Trustee must comply with the provisions of sections 36 to 38 of the Charities Act 1993 (as amended by the Charities Act 2006). A synopsis of those provisions is set out in this paragraph but the Trustee should always seek professional advice rather than rely upon this document, which does not set out the position in full.

Under section 36(1), a disposal of land is void without the consent of the court or the Charity Commission. However, it is not necessary to obtain the consent of the court or the Charity Commission and a disposal will not be void if:

- (a) the disposal is made to a person who is not a "connected person" or a trustee for, or nominee of, a connected person; and
- (b) the Trustee has complied with section 36(3).

A "connected person" would include the Trustee, any individual Councillor, officers and employees of the Council and their respective spouses or civil partners; a donor of land to the Charity; and the Protector. Given that the land is in Hastings and the people who manage the Charity are also likely to be living in Hastings, particular care is required to ensure that any disposal of land to a connected person is sanctioned by the prior consent of the Charity Commission.

If a disposal is not to a "connected person", the Trustee must:

- (a) obtain and consider a written report on the proposed disposal from a qualified surveyor (as defined in the 1993 Act) instructed by the Trustee and acting exclusively for the Charity; there are Regulations<sup>4</sup> setting out the information which must be contained in the written report;
- (b) advertise the proposed disposal for the period and in the manner as advised by the surveyor in the written report (unless the advice is that it would not be in the best interests of the Charity to advertise the proposed disposal); and
- (c) decide that it is satisfied (acting through the Charity Committee) that the proposed terms of disposal are the best that can reasonably be obtained for the Charity.

If the proposed disposal is the grant of a lease for not more than seven years and no premium is payable, the advice can be obtained from someone who is reasonably believed by the Trustee to have the requisite ability and practical experience to provide the Trustee with competent advice.

There are similar provisions in section 38 of the 1993 Act relating to mortgaging of land.

These provisions are only applicable where the Trustee has a power, whether express or statutory, to dispose of the land. The Trustee should always seek professional advice on the applicability of these provisions.

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<sup>4</sup> Charities (Qualified Surveyors' Reports) Regulations 1992 (SI 1992/2980)

#### 7.3.4 Part 4: Delegation

##### (a) Statutory Powers regarding Delegation

Generally, a trustee has a duty to act personally. While the Trustee cannot delegate its duties it can delegate certain powers and functions.

The provisions of the 2000 Act regarding delegation are likely to be useful to the Trustee where it is necessary to use third party service providers (such as estate agents, investment managers, car parking agents or street cleaning agents) or where it may be expedient to invite individuals who are not Councillors or officers to advise on aspects of the work of the Charity. The 2000 Act provisions do not apply, however, to delegation by the Council to the Cabinet, any sub-committees or to officers and staff. That type of delegation is covered by the Council's internal governance procedures.

The 2000 Act empowers the Trustee to delegate those functions which:

- (i) consist of carrying out a decision that the Trustee has taken; or
- (ii) relate to the investment of assets; or
- (iii) relate to the raising of funds otherwise than by means of profits of a trade which is an integral part of carrying out the Charity's objects - sometimes referred to as primary purpose trading (e.g. charging the public for the use of the car parks); or
- (iv) are prescribed by an order of the Secretary of State.

The 2000 Act permits the Trustee to authorise any person (including a company) to exercise any of the above delegable functions as their agent. This includes delegation to a person who is also appointed to act as the Trustee's nominee or custodian.

Under the 2000 Act an agent may be appointed on such terms as the trustee determines (including as to remuneration) but unless it is reasonably necessary to do so the Trustee should not authorise the agent to appoint a substitute, cap his liability or act where he has a conflict of interests.

##### (b) Asset Management

There are special restrictions for agents who manage investments:

- (i) There must be a written agreement between the Trustee and the agent;
- (ii) no delegation is permissible unless the Trustee has prepared a written policy statement as to how the asset management function should be carried out; and
- (iii) the agreement with the agent must include an express undertaking from the agent that he will comply with the policy statement or any amended or substituted statement.

##### (c) Nominees and Custodians

All appointments of nominees and custodians must be in writing. The Trustee may set the amount of remuneration and determine any other matters in relation to nominees or custodians as it thinks fit.

The 2000 Act requires the Trustee to follow guidance produced by the Charity Commission<sup>5</sup> when appointing nominees and custodians under the provisions of the Act.

(d) Responsibility for review of actions of agents, nominees and custodians

The Trustee has a duty under the 2000 Act to review the actions of its agents, nominees and custodians. The Trustee must consider:

- (i) whether the appointed person remains a suitable person to carry out the function;
- (ii) whether the terms of the appointment remain appropriate; and
- (iii) the manner in which the appointed person is performing his/her functions.

In addition the Trustee must consider whether it should exercise any power of intervention that it has or to revoke the authorisation or the appointment. If the Trustee considers that there is a need to exercise such a power the Trustee is under a positive duty to do so. Finally, where the agent is carrying out asset management functions the Trustee must keep under review whether the policy statement has been complied with and whether the policy statement should be revised or replaced.

(e) Delegation to Employees

It is inevitable that the Charity will expect staff employed for general Council purposes to carry out work for the Charity and a reasonable and directly attributable proportion of the salary and other related costs of such staff may be charged to the Charity's funds. The deployment of staff does not, however, absolve the Trustee from responsibility for the management of the Charity and Councillors will always be under a duty to supervise the discharge of functions delegated to staff. Appropriate systems should be in place to ensure that the Trustee complies with its legal duties and to supervise and appraise staff adequately. Staff must therefore take instructions from the Cabinet (on behalf of the Trustee) and be made aware that their role is to implement the decisions of the Trustee and that they must seek approval from the Cabinet (on behalf of the Trustee) before taking any decision on behalf of the Charity unless they have been given the necessary delegated powers.

## 7.4 Exercising Powers

The important thing to remember is that the exercise of a power is optional. A power should only be exercised if the Trustee is satisfied that it is necessary or desirable in carrying out its purposes and that the manner of exercising the power will further the interests of the Charity.

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<sup>5</sup> (Publication No. CC42)

## 7.5 **Political activities**

English law restricts the extent to which charities can further their objects through political activities. Political activities do not consist solely of party political activities. An organisation set up to advocate, or oppose, changes in the law, government policy or government decisions, or simply seeking to influence public opinion on a political issue cannot be a charity. However, campaigning and political activity may be carried out by a charity as a means of furthering its charitable objects.

This coincides with the statutory prohibition under section 2 of the Local Government and Housing Act 1989. The Charity cannot provide support to a political party and it is very unlikely that the support of other political activities would further the interests of the Charity or fall within the objects of the Charity. To the extent that they do, however, they must be carried out responsibly and be supported by reasoned argument that is based on research or direct experience.

## 7.6 **Amending the Scheme**

Section 74D of the Charities Act 1993 empowers the Trustee to amend the existing trusts by altering the administrative powers of the Trustee or altering any procedural provisions. This power does not extend to the alteration of the Charity's Objects, the expenditure of its permanent endowment or the duties of the Trustee or the Protector.

The Charity Commission must be notified of any amendment to the Scheme and a copy of the amendment must be kept with the governing documents of the Charity.

## 8 **FURTHER INFORMATION**

Further information on issues affecting charities and charity trustees is available on the Charity Commission's website (<http://www.charitycommission.gov.uk>). In particular, the document entitled 'Councillors' Guide: to a council's role as charity trustee' published jointly by the Charity Commission and the Local Government Association is a useful reference point.

***This document has been drafted by Berwin Leighton Paisner LLP and agreed with Hastings Borough Council.***

**Berwin Leighton Paisner LLP  
January 2011**

**Amended by Hastings Borough Council in [ ] 2011.**