

## **APPENDIX B**

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

#### **GUIDANCE FOR THE PROTECTOR**

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## Hastings and St Leonards Foreshore Charitable Trust

### Guidance for the Protector

#### 1 BACKGROUND

The governing documents of the Hastings and St Leonards Foreshore Charitable Trust (the **Charity**) are a conveyance dated 8 September 1893 (the **1893 conveyance**) as amended by the Hastings Borough Council Act 1988 (the **1988 Act**) and a scheme of the Charity Commission made on [ ] (the **Second Scheme**) which replaces a previous scheme of the Charity Commission dated 22 March 2006 (the **First Scheme**).

The 1893 conveyance provides that the objects of the Charity are to hold defined land "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".

Under the 1893 conveyance, Hastings Borough Council (the **Council**) was appointed as the Trustee. The 1893 conveyance did not provide the Council with any express powers of management of the Charity's land - hence the passing of the 1988 Act, which conferred on the Council limited powers to use specified areas of land for public purposes, including car parking, a boat compound, religious and cultural activities and police and emergency services. Generally, the powers given were consistent with the objects in that they facilitated the use and enjoyment of the land by the public. Powers for the Council to let and develop specified areas of land are also contained in the 1988 Act.

At the time of the 1893 conveyance, the land given was an area of foreshore which was between the high and low water marks and it was, therefore, only accessible when the tide was out. The build-up of the beach over the years since the 1893 conveyance means that the land now largely consists of an area of promenade (with adjacent car parking facilities) which runs along the length of the seafront next to the main road. Further conveyances after the original 1893 conveyance have also added to the Charity's land. In addition, a settlement agreement between the Charity and the Council dated 25 August 2010 has further amended the boundaries. All these changes mean that the boundaries of the Charity's land have moved somewhat from their original position. The Second Scheme (at clause 11(2)) requires the Council to publish in a reasonably accessible way sufficient details of the Charity's land to enable members of the public to identify it. ***[NB As at the date of writing the plan is agreed and is the subject of application to the Land Registry for registration as a separate title. It will be published once the Land Registry registers the separate title to the Charity's land.]***

The Council's continuing role as trustee of the Charity was called into question when proposals for development and regeneration in Hastings which included the Charity's land led to the need for conflicts of interest to be managed. This led to the establishment of the First Scheme and the appointment of individual trustees (the **Outgoing Trustees**) in place of the Council. The conflicts of interest were related to the duty of the Council to its ratepayers (whose interests are wider than those affecting the Charity's land alone) on the one hand and the duty of the Council to beneficiaries of the Charity land on the other hand. The regeneration proposals concerned both the Charity's land and Council land. The Outgoing Trustees were appointed in part to manage these conflicts. Upon the appointment of the Outgoing Trustees under the First Scheme, they investigated the affairs of

the Charity and discovered that the Council had, over the years, failed to account for funds belonging to the Charity with the result that charitable funds may have been misapplied by the Council in breach of trust to meet the general expenses of the Council. So the Council may have been indebted to the Charity. The suspected breach of trust was settled, without admission of liability on the part of the Council, in the sum of £1.35 million in accordance with the terms of a settlement deed dated 20 June 2008 (the **First Settlement**).

In addition, the Outgoing Trustees were concerned to identify the scope of the Charity's land. In December 2008 the Outgoing Trustees put the Council on notice of a claim that the boundaries of the Charity's land as shown on the Land Registry title plan were not accurate. A settlement of this claim was documented in a settlement agreement between the Charity and the Council dated 25 August 2010. The settlement agreement encompassed an agreement as to:

- (a) the boundaries of the Charity's land, by reference to an agreed line marking the northern boundary and the southern boundary to be the southern boundary as shown on the filed plan issued on 15 April 2008 of registered title number HT6185 or the line of the medium high tide between the spring tides and the neap tides whichever is the more southerly; and
- (b) re-payment by the Council of historical income in relation to certain land agreed by the parties as belonging to the Charity of approximately £7,000.

In addition to providing for the future administration of the Charity, the Second Scheme provides for new and additional objects for surplus funds arising out of the Charity's assets, principally rental income, income from parking activities and the monies received under the First Settlement.

However, the Outgoing Trustees considered that the arrangements under which they acted as trustees were administratively unworkable because there were insufficient funds available to the Charity to establish a segregated management infrastructure and because to a large extent it was not possible to function without the on-going co-operation and assistance of the Council, which is a difficulty since the Council is custodian trustee. The Outgoing Trustees also concluded that the costs of maintaining a separate infrastructure would lead to duplication of costs and time which would not have been in the interests of the Charity, its beneficiaries or the council taxpayers. There is considerable overlap between the interests of the beneficiaries of the Charity and the Council's taxpayers as the Council's taxpayers are amongst the principal beneficiaries of the Charity. However, the beneficiaries also include visitors to the Charity's land who are not council taxpayers. Various options were considered and rejected and the Outgoing Trustees concluded that the Council was the only viable trustee and considered that the re-appointment of the Council as sole trustee of the Charity in their place would be in the interests of the Charity and its beneficiaries provided that proper safeguards were put in place to manage areas of risk.

Following consultation with the Charity Commission, it was agreed that, once the breaches of trust and other claims had been settled, the Charity Commission would consider re-appointing the Council as trustee in place of the Outgoing Trustees.

However, the Outgoing Trustees wished to see safeguards introduced so that the Council would administer the Charity without being influenced by its wider responsibilities to ratepayers and taxpayers which could lead to conflicts of interest and decisions being made which would adversely affect the Charity's interests. It was the Council's conflicted role in connection with proposals for regeneration of its

own land and the Charity's land as well as its role as a planning authority, which led to the making of the First Scheme in order to secure the interests of the Charity. Whilst the original regeneration proposals have fallen away, similar circumstances may arise again. There may also be proposals for smaller scale developments which affect both the Council's land and the Charity's land from time to time.

Furthermore, before the Charity Commission was prepared to consider the re-appointment of the Council as the sole Trustee, they wanted sufficient safeguards to be put in place to ensure that conflicts of interest were properly managed and that income and expenditure of the Charity were properly accounted. Therefore, the Second Scheme provides for the office of Protector of the Charity to be established. In addition the Trustee is required to hold an annual public meeting at which the Trustee must present the Trustee Annual Report and Accounts and make available a summary of the Charity's governance arrangements and conflicts of interest policy. Following public consultation on the draft Scheme, the Charity Commission amended the draft Scheme to include a requirement for the Trustee to consult with and have regard to the recommendations of a Coastal Advisory Group and a Grants Advisory Panel in relation to the matters set out in the Scheme.

This Guide for the Protector should be read in conjunction with the Guide to Governance of the Charity which has been prepared for the Council and for Councillors.

## 2 **WHO IS THE TRUSTEE OF THE CHARITY?**

The Trustee is Hastings Borough Council, which is a statutory corporation having a separate legal identity from the Councillors (members). 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, which 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 Cabinet has the power to delegate the administration of the Charity to a sub-committee of the Cabinet. In the circumstances, the sub-committee in question is the Charity Committee, a committee of Cabinet which will be the decision-maker on behalf of the Council in its capacity as trustee of the Charity. 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.

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 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"

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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

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 the Charity 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 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 fully described in the Guide to Governance of the Charity.

### 3 **WHAT ARE THE CHARITABLE OBJECTS?**

- 3.1 The 1893 conveyance provided that the objects of the Charity are to hold defined land "UPON TRUST for the common use benefit and enjoyment of all Her Majesty's subjects and of the public for the time being forever".

The extent of the Charity's land was agreed between the Outgoing Trustees and the Council pursuant to the settlement agreement between the Charity and the Council. ***[NB As at the date of writing the plan is agreed and is the subject of application to the Land Registry for registration as a separate title. It will be published once the Land Registry registers the separate title to the Charity's land.]***

- 3.2 In addition the Trustee holds cash representing
- (a) parking and rental income derived from the letting of parts of the Charity's land; and
  - (b) the sum of £1.35 million which arose under the First Settlement plus interest thereon.
- 3.3 Other property of the Charity consists principally of:
- (a) investments;
  - (b) the income arising out of the land, buildings, cash and other investments;
  - (c) any debts due from third parties;
  - (d) any intellectual property such as copyrights in published material; and
  - (e) any vehicles, equipment or other chattels.
- 3.4 The Second Scheme of the Charity Commission provides that, after meeting expenses of the Charity, the surplus income and any surplus expendable endowment may be applied for any charitable purposes within the Borough of

Hastings. The Trustee must appoint members to a Grant Advisory Panel on the basis of their knowledge and experience of the voluntary and charitable sector in the area of the Borough of Hastings. The Trustee must establish procedures for the conduct of the business of the Grant Advisory Panel. The Grant Advisory Panel must then make recommendations in respect of the Trustee's grant-making criteria, the content and format of grant application forms and the advertisement of grants. In devising policy for the making of grants and determination of individual grant applications, the Trustee is to have regard to the recommendations of the Grant Advisory Panel.

#### **4 QUALIFICATIONS OF THE PROTECTOR**

Under clause 13(3) of the Second Scheme, the Protector must hold a qualification awarded by a member of the Consultative Committee of Accountancy Bodies.

A person cannot be the Protector if he or she is or has been within the previous five years:

- 4.1 a Councillor, officer, employee or paid consultant of the Council or any person or organisation which is controlled by the Council; or
- 4.2 interested in any contract with the Council either on his or her own behalf or as a member of any organisation (not counting the interest of a company in which the Protector has less than a 1% shareholding).

#### **5 APPOINTMENT OF THE PROTECTOR**

The Outgoing Trustees selected the first Protector, Christopher John Rutton May FCA, who was appointed by the Charity Commission under the Second Scheme for an initial term of three years. Thereafter the Council, as Trustee, will appoint the Protector, each time for a term of up to three years. A Protector may serve for an unlimited number of terms.

When a vacancy in the office of Protector arises, the Trustee must advertise the post and take all reasonable steps to make an appointment as soon as possible.

#### **6 DUTIES OF THE PROTECTOR**

The general duty of the Protector is to ensure that the Trustee administers the Charity properly. If necessary, the Protector must report matters of serious concern to the Charity Commission and may also wish to inform the Council's auditors for the time being. The Protector therefore has a "watchdog" role and must monitor the Trustee and ensure it is not abusing its powers or breaching its duties. More positively, the Protector must also seek to ensure, as far as possible, that the Charity is administered in accordance with the terms of the governing documents. In particular, the Protector should:

- 6.1 satisfy himself that the Trustee is accurately allocating income and expenditure on a fair and reasonable basis between the Council and the Charity and in accordance with the objects of the Charity;
- 6.2 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. Executive Councillors must bring to the attention of the Protector any actual or potential conflicts of interest. As far as conflicts of interest in relation to land are concerned, the Council must give the Protector reasonable notice of any proposed disposals of the Charity's land so that the Protector can satisfy himself that any

conflicts of interest are managed properly and that disposals of land are within the powers of the Trustee having regard to the objects as expressed in the 1893 conveyance and consequently the need to ensure that the Charity's land remains accessible to the public;

- 6.3 be consulted by the Trustee in relation to the appointment of an auditor. The auditor for the Charity should be conversant with charity accounting and not be the auditor responsible for auditing the Council's statutory accounts;
- 6.4 prepare each year a statement explaining the function of the Protector, and how that function has been exercised. This statement is to be published by the Trustee as part of the Charity's annual report and accounts;
- 6.5 attend the annual public meeting. This is to enable the Protector to take note of issues raised by the public which have a bearing on the proper administration of the Charity; and
- 6.6 raise any concerns he or she has with the Trustee and endeavour to resolve them. If necessary, the Protector should report such concerns to the Charity Commission.

The Protector will not be in control of the Charity's property, or be responsible for its administration or its use or application. These roles are reserved to the Trustee. Nevertheless, the Protector does have fiduciary duties in that his or her duties under the Second Scheme are conferred on him or her for the protection of the Charity.

There has been some judicial debate concerning the fiduciary duties of protectors of trusts. In any event, the Protector owes a duty to familiarise himself or herself thoroughly with, and abide by, the terms of the Second Scheme, and to exercise his or her role as Protector within the ambit of the powers given to him or her.

The Protector is acting in a professional capacity, and must exercise the powers which are given to him or her to enable him or her to carry out his or her duties both reasonably and in a bona fide manner, and with a view to safeguarding the interests of the Charity and the furtherance of its charitable objects. The Protector should therefore carry out his or her duties in a positive and considered way.

## **7 POWERS OF THE PROTECTOR**

To enable the Protector to exercise his or her powers in a proper manner, the Protector is entitled to receive notice and accompanying papers in relation to all meetings of the Trustee, the Cabinet and any relevant sub-committees in relation to any matter relating to or affecting the Charity. The Protector should ensure that he or she receives the papers, and studies them with care, in order to equip him or herself to carry out his or her duty to ensure that the Trustee is administering the Charity properly.

In the exercise of his fiduciary duties the Protector may:

- 7.1 attend and speak at all meetings relating to the administration of the Charity including meetings of the Trustee, committees and delegates of the Trustee and the annual public meeting, and table items for discussion but not vote. The Protector is not obliged to attend meetings. Procedures relating to the conduct of Council meetings, the tabling of items for discussion and the circulation of reports are set out in the Council's constitution to which reference should be made.



7.2 call for any information relating to or affecting the Charity and seek any professional advice he or she considers reasonably necessary to enable him or her to carry out the powers and duties of the Protector. The Trustee must supply to the Protector reports on the Charity's income and expenditure and in addition supply details of grants made out of surplus income and any further information which the Protector reasonably requires; and

7.3 consult with the Charity Commission on any matter relating to the Charity. The Protector should keep proper records of his or her consultations.

The Trustee must immediately inform the Protector if, among other things, it:

7.4 ceases to operate or is declared insolvent; or

7.5 deals with or disposes of the Charity's land and buildings in an unauthorised manner. Whilst the Trustee may have the power, for example, to acquire and dispose of land purchased with surplus cash, the Trustee would not have the power to dispose of the land in the 1893 conveyance other than as provided in the 1988 Act or as a result of compulsory purchase.

## 8 **REMUNERATION OF THE PROTECTOR BY THE CHARITY**

The remuneration of the first Protector will be fixed by the Outgoing Trustees. Subsequent Protectors will receive reasonable remuneration, at a level to be fixed by the Trustee. Remuneration can include indemnity insurance against claims which relate to the proper exercise of his or her functions.

The Protector is also entitled to reimbursement of out-of-pocket expenses properly incurred in carrying out his or her role as Protector.

## 9 **DUTIES OF THE TRUSTEE**

9.1 The Trustee has a duty to carry out the charitable purposes of the Charity, using the powers given to it in the 1988 Act and the Second Scheme, to abide by the provisions of the Act and the Second Scheme, and generally to act in the best interests of the Charity. The Trustee's duties are also affected by statute and case law.

In administering the Charity and exercising its powers, the Trustee has a duty of care. This duty is a duty to exercise such skill and care as is reasonable in the circumstances having particular regard to any special knowledge or experience that the Trustee has or holds itself out as having. The Trustee acts through its individual Executive Councillors. The duty of care should therefore be observed by all Executive Councillors. For the general duties of the Trustee please see the Guide to Governance of the Charity.

The Protector is entitled to expect the Trustee to observe the rules of good governance and to be properly equipped to do so. A failure in the Trustee's governance procedures could lead to maladministration of the Charity and censure by the public and the Charity Commission.

## 10 **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  
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