

APPENDIX D

HASTINGS AND ST LEONARDS FORESHORE CHARITABLE TRUST (the Charity)

CONFLICTS OF INTEREST POLICY

Introduction

1. This policy is fundamental to the proper functioning of the Charity which, as an unincorporated body, can only act by its trustee. The Hastings Borough Council (the Council) is appointed as the sole trustee for all purposes of the Charity under the Charity Commission Scheme dated 13 January 2011.
2. As a principal local authority, the Council has its own priorities which it has developed out of consultation with the residents of the Borough and which may change in response to public opinion. The local authority is guided by its priorities when making decisions in the best interests of the resident, council tax or ratepayer. The Council's current priorities can be seen at (provide link)
3. The objects of the Charity are:-
 - (1) to hold and maintain the Foreshore for the common use, benefit and enjoyment of all Her Majesty's subjects and of the public for the time being for ever; and
 - (2) subject to (1) above, such charitable purposes within the area of the Borough of Hastings as the trustee thinks fit.
4. To a considerable extent the Council's priorities and the objects of the Charity coincide. However, history has demonstrated that there can be acute conflicts of interest which have to be addressed and managed to avoid any actual or perceived breach of trust by the Council as charitable trustee.
5. However, whilst this is probably the greatest area for concern for the Charity and its Trustee, this is just one aspect of conflict of interest which will be considered further below.

What is a conflict of interest?

6. The Charity Commission has issued extensive guidance on identifying and managing conflict of interest for charitable trustees. They define conflict of interest as follows:-

“A conflict of interest is any situation in which a trustee’s personal interests, or interests which they owe to another body, and those of the charity arise simultaneously or appear to clash.

We recognise that it is inevitable that conflicts of interest occur. The issue is not the integrity of the trustee concerned, but the management of any potential to profit from a person’s position as trustee, or for a trustee to be influenced by conflicting loyalties. Even the appearance of a conflict of interest can damage the charity’s reputation, so conflicts need to be managed carefully.

The need to declare and manage conflicts of interest does not just apply to charity trustees. The Committee on Standards in Public Life (the Wicks Committee) – <http://www.public-standards.gov.uk/>, set up by the Government with the aim of ensuring the highest standards of propriety in public life, acknowledged the need to declare and manage conflicts of interest, in its "Seven Principles of Public Life", which it believes should apply to everyone who holds a public office. These principles state that holders of public office should declare any private interests relating to their public duties and should take steps to resolve any conflicts in a way which protects the public interest.”

7. The law is quite clear that a trustee must not receive any benefit from the charity out of being a trustee unless there is express authorisation for it, either in the trust documents or from the Charity Commission or the Court. The law requires that a trustee should not have to consider his own interest when acting as trustee – his concern should only be what is in the best interests of the charity. So it is the potential for benefit, or indeed disbenefit, that must be accounted for. The main area of concern for the Charity is the position of the Trustee as local authority and charity trustee. Charity law requires that the charity trustee’s only concern should be the best interests of the charity and not of the local authority. This is clearly a primary area of conflict of interest that should be considered by members of the Charity Committee, which exercises the functions of Trustee on behalf of the Council and is the most relevant of those set out in the following paragraph. There is further consideration of this important area of potential conflict of interest later in this policy. However, every Trustee or fiduciary has also to be aware of other areas of conflict.

How to identify a conflict of interest

8. The Charity Commission's Guidance states that conflicts of interest may come in a number of different forms:
- direct financial gain or benefit to the trustee, such as:
 - a. payment to a trustee for services provided to the charity;
 - b. the award of a contract to another organisation in which a trustee has an interest and from which a trustee will receive a financial benefit; or
 - c. the employment of a trustee in a separate post within the charity, even when the trustee has resigned in order to take up the employment.
 - indirect financial gain, such as employment by the charity of a spouse or partner of a trustee, where their finances are interdependent;
 - non-financial gain, such as when a user of the charity's services is also a trustee; and
 - conflict of loyalties, such as where a trustee is appointed by the local authority or by one of the charity's funders, or where a friend of a trustee is employed by the charity.
9. The Trustee, in this case, is of course the Council, a corporate body, and, as such, not all of these situations could apply. However, the Trustee makes its decisions through a Committee of members who may have such conflicts of interest and, as fiduciaries, they are bound by the same fiduciary duty as the Trustee itself..
10. Councillors are familiar with the Councillor Code of Conduct and the need to register certain interests and to declare personal and prejudicial interests at meetings.
11. Personal interests under the Code of Conduct fall into two categories; those which are registrable and those which affect the well-being of the councillor or a relevant person to a greater extent than other residents etc of the ward affected. The interest is also prejudicial if a member of the public with full knowledge of the facts would reasonably regard the interest as so significant as to prejudice the councillor's judgement of the public interest and (in this context) it affects the financial position of the councillor or of a relevant person body or one described in that part of the Code concerned with registrable interests. With certain exceptions which are not relevant here, councillors with a prejudicial interest must leave the room where the meeting is held. The full Code of Conduct is attached as an appendix to this policy.
12. One particular paragraph of the Code is, however, extremely relevant and should be set out in full here:-

“(3) If you are a member of Charity Committee, which is the committee of Cabinet that makes decisions on behalf of the Council as charity trustee, you have a personal, and where appropriate prejudicial interest when sitting on Cabinet, Council or any other committee of Cabinet or Council, except the Charity

Committee, and there is a consideration of a matter or matters relating to or affecting the Hastings and St Leonards Foreshore Charitable Trust.”

Application of the Code of Conduct

13. The Charity Committee is a committee of the executive and the provisions regarding declaration of interests apply equally to a meeting of the Council meeting as Trustee of the Charity as they do to meetings of the Council, Cabinet and other committees.
14. Breach of the Code of Conduct at worst results in disqualification for up to 5 years but can result in no action, depending upon the severity of the breach. Under the Code of Conduct, this would almost certainly amount to conduct bringing the office of Charity Committee member into disrepute. Where, however, the Committee makes decisions on behalf of the Council as charity trustee, then it is bound by trustee duties. The implications of the breach of such duties can amount to a breach of trust which is actionable against the trustee and/or action by the Charity Commission as regulator of charities.

The Trustee duty of loyalty

15. The charity trustee duty of loyalty is owed to the public and has been explained judicially thus

” It is an inflexible rule of a Court of Equity that a person in a fiduciary position is not, unless expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and his duty conflict.”

The duty of loyalty is, therefore, a duty not to let self interest conflict with duty. Moreover, the Courts have held that the possibility of conflict of interest is enough to give rise to challenge.

16. The Council is the trustee and the Council owes the duty of loyalty to the charity. The Charity Committee makes the decisions on behalf of the Council as trustee and so its members must be aware at all times of this duty of loyalty to the Charity.
17. There are two aspects to this duty of loyalty:-
 - The duty to act without payment unless expressly authorised by the trust deed or Charity Commission scheme. This means that there can be no element of profit when charging to the charity for officer time expended in the operation of the Trust. This does not prohibit claiming for expenses where this is to reimburse the trustee for expenses personally incurred and paid out. It also does not affect the allowances paid to councillors under the Member Scheme of Allowances, both the basic allowance and a special responsibility allowance such as that

received as Chair of Charity Committee, provided that these allowances are not met out of the charity's funds but by the local authority.

- The duty not to profit from the trust. "Self-dealing" is prohibited. This means that the trustee cannot buy property from the trust nor sell to it. Any such transaction would require an order under Section 26 Charities Act 1993 from the Charity Commission authorising it. There is a duty to account for profits received by virtue of the trustee's position as trustee and for the profits of any opportunity arising out of the trust office.

The Position of Charity Committee members as Fiduciaries

18. Whilst the Council is the trustee, those members who make decisions on behalf of the Council are fixed with similar responsibility as fiduciaries and they have to uphold the duty of loyalty in the same way as the Council, so that they are not putting themselves in a position of conflict or personally profiting from their position on the Committee.

Conflict of interest between the Council and the Charity

19. However, it is not just a case of personal benefit. Members of the Charity Committee are also elected members of Hastings Borough Council and they will be charged also with the fiduciary duty that they owe to Council tax payers and residents of the Borough. Whilst the personal benefit will usually be reasonably simple and easy to recognise and deal with by appropriate withdrawal, the conflict between the interests of the Charity and the Council may be more subtle and overlooked without a rigorous examination of the situation.
20. Members of the Committee have always to return to the objects of the Charity and to consider whether what is proposed is in the best interests of the Charity. The fact that a proposal might benefit both the Charity and the Council is not conclusive on this question of what is in the best interests of the Charity. It may be that what is proposed undoubtedly promotes or improves the social, economic or environmental well-being of the area but whether that also is compatible with the Charity's objects requires careful consideration. There may be a conflict of interest for the individual member between what s/he wants to do as a member of the local authority and what s/he knows must or must not be done as charity trustee. Care has to be used to ensure that, where a conflict exists, it is resolved in favour of the Charity. The first duty is to the Charity.

Identifying conflicts of interest

21. Probably the greatest concern for members of the public is this potential of a conflict of loyalties for the Committee between the

Council and the Charity. Officers will assist the Committee in identifying and advising on how to address conflicts of interest appropriately. Each report to Committee contains a paragraph where any real, potential or perceived conflict of interest is identified and examined in detail.

22. Prior to reporting to the Committee, officers will have consulted the Protector in relation to the matter giving rise to concern. The Protector is empowered by the Scheme to examine relevant papers and to make recommendations to the Committee in relation to any such matter and the Committee has to have regard to the recommendations of the Protector in reaching their decision. The Protector is particularly concerned with the incidence or potential incidence of conflict of interest and how this is managed for the benefit of the Charity and, under the Scheme, the Protector has a fiduciary duty to ensure the integrity of the administration of the Charity.
23. There may be a situation where it is perceived that officers cannot give independent advice to the Committee and it is appropriate that the Committee receives independent financial and/or legal advice. Here there will be a clear separation of the consideration of the subject matter so that the Charity Committee and the Cabinet reach their conclusion without undue influence from the other. The Guidance on Governance provides detailed guidance on this.
24. There may be a situation where there is a residual perception that the Committee is influenced by member loyalty to the Council and its priorities rather than to the Charity and its objects. Where this cannot be resolved satisfactorily in consultation with the Protector, the Committee may seek the approval of the Charity Commission to a proposed course of action and that it is in the best interests of the Charity. An example of this would be where the Council requests and exchange of lands to permit the Council to undertake some development on the Charity's land which is inconsistent with the Charity's objects. In these circumstances, before it could make a decision to proceed it would need to take independent advice from a land valuer and be satisfied that the exchange was in the best interests of the Charity – this is a consideration not only of the relative value to the Charity of the areas to be exchanged as a useable asset but also the financial consideration passing to the Charity. For the exchange to benefit the Charity financially, one would expect enhanced financial consideration benefitting the Charity rather than a straight swap. As the Trustee is a connected person under the Charities Act 1993, an order would be required from the Charity Commission authorising the exchange. Whilst the Charities Act requires Charity Commission approval in this situation, the ability to seek an order from the Commission approving certain intended action is available in any situation where the conflict cannot be resolved satisfactorily by the Committee. However, whilst this comfort is available to the Committee, it should be seen as a last resort to avoid unnecessary work for the Commission.

So how does the Committee deal with conflicts of interest?

25. On every agenda of Council meetings, there is an item entitled "declarations of interest". Any member with a Code of Conduct interest will declare his or her interest at this stage.. The member is required to not only declare that the member has an interest but also the nature of that interest. The Code requires that a member with a prejudicial interest must leave the meeting room when the business affected is under consideration. The position is the same in Charity Committee and the member will be required to leave the meeting room and not take part in the discussion or voting. Care will be needed to identify such interests in advance of the meeting so that an appropriate substitution can be made from executive members to ensure that the Committee is quorate to make a decision.

26. Generally, it is only where the interest is financial that it will be prejudicial in the context of Charity Committee decisions. There are, however, situations where the member does not have a financial interest but he or she is subject to such influence that he or she is seen or perceived to be biased towards a certain view. This may result in a conflict of loyalties so that the Committee member should not take part in the discussion or decision. It may be that the member has been lobbied by constituents concerning a matter relating to the Charity so that there is a real danger of bias and a conflict of interest for the member. In those circumstances, the member should explain the position and withdraw. Under the Council's Constitution ward members may address a committee on behalf of constituents. Where one of the ward members was a member of the Committee, the other ward member would address the Committee and the sitting member would withdraw and a substitute executive member takes part in the decision-making.
27. Paragraphs 25 and 26 deal with the interests of individual members of the Committee but we have also to consider a conflict of loyalties between the Council and the Charity – a conflict that all Councillors will have and so it cannot be dealt with by withdrawal and substitution of another executive member.
28. As indicated earlier in this policy officers will assist to identify actual and potential conflicts of interest for members of the Committee in the text of the written report which is subject to the usual rules of public access. The Monitoring Officer will advise on the position pointing out the position in law for a trustee making a decision that favours itself – the Committee is the decision maker on behalf of the Council as trustee. A decision by the Committee that, therefore, has the potential to benefit the Council as local authority presents a conflict of interest. In this situation, the report would also include the views of the Protector.
29. It is the duty of the Committee on behalf of the Council to have regard to the recommendations of the Protector. The Monitoring Officer would remind members of this duty and the Code of Conduct requires members to have regard to the advice of the Monitoring Officer when the advice is in relation to legality, as this would be.
30. When making its decision the Committee will give reasons for its decision/s. Where it is minded to make a decision, contrary to the recommendations of the Protector and the Monitoring Officer, it will give reasons why it is not minded to follow the recommendations of the Protector or the Monitoring Officer. When minded to make such a decision, the Committee will ask the Monitoring Officer to seek the guidance of the Charity Commission and, if appropriate seek an order approving the intended action.