

Agenda Item No:

Report to: Charity Committee

Date of Meeting: 29 March 2011

Report Title: COASTAL USERS' GROUP CONSTITUTION

Report By: Jayne Butters
Borough Solicitor

Purpose of Report

To advise Committee of the legal advice received and to recommend an updated draft Constitution for approval by the Committee

Recommendation(s)

- 1. That the Committee notes the report.**
- 2. that the amended Constitution is agreed by the Committee as appropriate for the functions of the Coastal Users' Group under the Scheme.**

Reasons for Recommendations

Under the Scheme the Council has to consult with the Coastal Users' Group on certain matters and it is essential that the Group is properly constituted for that purpose. The amended Constitution takes account of guidance and legal advice received.

Introduction

Update

1. At its first meeting the Committee was requested to approve a constitution for the Coastal Users' Group, which the Charity Commission has determined to be the first Coastal Advisory Group under its Scheme.
2. The Group had been consulted on the draft constitution and their amendments had been included in the draft recommended to Committee.
3. The Protector was also consulted and he raised a concern regarding the chairing of the meeting as the draft provided that a designated Council officer should be the chair. His concern related to the independence of the chair and public perception.
4. Committee resolved, at the suggestion of the Protector, that independent legal advice should be taken on the question of chairing the meeting and generally on the suitability of the draft constitutions of the Coastal Users' Group and the Grant Advisory Panel.

Charity Commission Advice

5. Prior to taking independent legal advice, I approached the Charity Commission for guidance on the proper approach to this. The guidance given was not formal advice under Section 29 Charities Act 1993 but was given to facilitate discussions regarding the suitability or otherwise of an officer chair.
6. The informal advice received from the Commission (Andrew Wherrett) makes clear that it was aware that the Group had a "HBC chair" at the time when they decided that the Group was a suitable Coastal Advisory Group under the Scheme - " First, I will clarify that the Commission was aware when it decided to make the scheme that the Coastal Users Group already existed. In your email of 23 April 2010, you'd included a list of members, stating that ward councillors were members, referring to an officer of HBC and stating "Chair - HBC." You also included a draft constitution. The draft constitution contained different provisions for chairing the CUG but you did explain that it was up to the group whether and what constitution it adopted. Based on what the Commission was told about the group, it was satisfied that it was suitable for the purpose of consulting users on the matters set out in part 1 of the schedule."
7. The guidance went on to "unpack the issue" and to state that the Committee needed to examine how the Group was constituted, including its arrangements for chairing, in order to determine whether or not the Group as constituted was suitable to perform the function of the Coastal Advisory Panel under the Scheme.
8. The guidance continued as follows:-

"Unpacking the issue

The question for the Charity Committee is whether or not the CUG is suitable to perform the functions set out in the first schedule to the scheme (and I suppose, so far as they can legitimately influence its structure, use that influence to improve its suitability). It must decide whether the provisions for chairing it make the CUG unsuitable for the purpose. If their conclusion is that it is unsuitable, then they would have to propose an alternative group to carry out that function. Having identified a suitable alternative, they would then have to apply to the Commission for it to specify that alternative group to be the new AG.

Is the CUG suitable? First, the Charity Committee will have to analyse the functions of the AG. Its function is, on the one hand, to give the trustee ready access to the perspectives and views of users to better inform its decisions on the matters in part 1 of the schedule. On the other hand, part of its function is to provide a greater degree of transparency in its decision-making, to enhance beneficiaries' confidence in the administration of the charity.

The Charity Committee will need to consider issues like:

The type and volume of matters for consultation;
Its need for responses to be recorded and relayed;
Whether this requires any permanent secretariat functions and the extent to which those functions need to work together with the chair;
The dynamics of the CUG;
The need for open, balanced discussion where all interested persons have the opportunity to comment;
The need for the CUG to dispose of business in the time it has available to it;
The skills, qualities and characteristics required of a chair;
The contribution the CUG and the consultation process makes to beneficiaries' confidence in decision-making and 1) any impact the identity of or process of selection of the chair may have on that and 2) any impact the performance of the chair may have on that.

There are likely to be other relevant issues and the Charity Committee is better placed to identify those.

The Charity Committee must consider the suitability of the CUG for the charity's needs. It must not take into account the CUG's suitability for any other Council needs. It must of course take into account any adverse impact on suitability that alternative demands made by the Council may have.

Clearly if consideration of the first seven points lead to the conclusion CUG is ineffective to perform the basic function in the scheme, then it is ineffective however transparent or open it looks.

If, as is suggested, the CUG is open to suggestion from the Charity Committee about how it might organise itself (and in particular the arrangements for chairing), then the Charity Committee needs to consider what suggestions it might make.

It will need to consider all the options which are reasonably available. Once it has identified that range of options, it needs to select those which have a realistic prospect

of securing the performance of its substantive functions under the scheme. Of those, it will then need to identify which, if any, are consistent and are most consistent with enhancing beneficiaries' confidence in the decision-making process.

In the final design of any proposal, the Charity Committee will need to consider whether there are any proportionate additional procedures or safeguards which could be built-in to enhance beneficiaries' confidence in the process further. For example, would a publicised process and selection criteria for the chair help? Would a publicised mandate for the chair help? Would regular feedback from GUC members on the chair's performance against relevant criteria help?

Certainly if there is a proposal which would make the CUG suitable to be the AG under the scheme, then the success of its implementation needs to be kept under review by the Charity Committee."

Coastal Users' Group

9. This advice was shared with the Coastal Users' Group as was initial independent legal advice that it was not inappropriate to have an officer chair. At their meeting, however, the Group voted unanimously that it wished to elect its own chair, though there was comment that the Group might well elect an officer as chair.

10. Advice has been received from Gordon Nurse, Counsel of Radcliffe Chambers, who specialises in charity law. In paragraph 21 of the advice he states:-

"I fully understand the suspicions that lie behind any reluctance to have anyone appointed by the Council as Chair of the CUG. However, it is very important also to have regard to the checks and balances that have been built into the Scheme in order to ensure that the charity is properly administered and its charitable objects furthered. One of the reasons why the Council is again to become the Trustee is because it is in the best position to administer the charity efficiently. In my view, the potential advantages of having the Chair of the CUG a member or officer of the Council is that he/she is likely to be better able to liaise with the Charity Committee, which will result in the more efficient management of the charity as a whole. This appears to be an argument that is accepted by Andrew Wherrett, having regard to the checks and balances that are also in place to avoid (and indeed also minimise the perception of) bias arising from the possible conflict of interest in having a member of the Council as Chair of the CUG."

11. He makes the suggestion that a compromise would be to provide for the Group to elect their chair from members and officers of the Council, who would be the only members eligible to stand.

12. It is suggested that Committee agrees the amended provision that the Group elect their own chair. The amendment includes provision that members and officers of the Council are eligible to be elected as chair. Provision for election of a vice-chair is included since the likelihood of conflict of interest for the chair is increased since non-Council members attend representing particular interests along the Foreshore. As the final paragraph of the Commission guidance says, the Committee needs to keep the arrangements under review to ensure that the process of consultation works.

13. As advised by Counsel, I have included the responsibilities of the chair of the meeting.

Membership of the Group

14. As reported to the previous meeting, the Coastal Users' Group set up a sub-group who were tasked with reducing the membership to a more manageable size, with rationalisation of membership to those who have a direct interest in the Foreshore, and keeping representation of the organisations represented down to one individual. The detail is set out in the draft Constitution in Appendix A.

15. The proposals from the sub-group included certain voting rights and provided that the Lead Member and officers should not have a vote. This is reasonable. However, at the meeting it was moved and agreed by 13-2 that councillors attending as ward members should not be able to vote. I had advised the Group that Ward members attend in a representative capacity and, as such, they should be voting. This is represented in the amended draft and I would recommend that Committee insists that ward members attending in that capacity should be able to vote. The rationale behind the motion was conflict of interest but the draft Constitution provides for conflicts of interest and ward members would be affected in the same way as any other member of the Group.

The Protector

16. Counsel advises that the draft Constitution should be amended to include the right of the Protector to attend and speak at meetings, and should provide expressly for him to be given notice of all meetings and copies of all minutes and relevant papers and this has been included.

Constitution generally

17. Counsel advises that he has not attempted a clause by clause analysis of the draft Constitution, but subject to the points set out above, he considers the Constitutions to be generally satisfactory and that they ought to be workable. It would be possible to produce more detail but it is not necessary to do so.

Wards Affected

None

Area(s) Affected

None

Policy Implications

Please identify if this report contains any implications for the following:

Equalities and Community Cohesiveness No

Crime and Fear of Crime (Section 17)	No
Risk Management	No
Environmental Issues	No
Economic/Financial Implications	No
Human Rights Act	No
Organisational Consequences	No

Background Information

Background document - Counsel's opinion - Gordon Nurse, Radcliffe Chambers, 13 March 2011.

Appendix A - amended draft Constitution

Officer to Contact

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