



Effingham Parish Council  
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5<sup>th</sup> of May 2022

At the Effingham Parish Council meeting held on 26<sup>th</sup> April the Council Resolved that *subject to confirmation from EVRT (Effingham Village Recreation Trust) that they wish to adopt the Sole Trustee model, that Effingham Parish Council will take on the responsibility as the Sole Trustee.*

This resolution was in response to a formal request made in February by the Board of Managing Trustees of EVRT, the charity that runs the King George V Hall and playing fields, for the Parish Council to become the sole trustee of EVRT. In the intervening period, the Parish Council took legal advice and advice from the Charity Commission that has confirmed the feasibility for the Parish council to take on this role.

Although legal advice is usually private between the lawyer and those seeking advice, at the meeting on 26<sup>th</sup> April, the Council agreed to seek permission to publish the advice as it was in the public interest and may help Effingham residents to understand some of the background to the Council's resolution.

I am pleased that permission has been granted by our lawyer and the report is attached.

ARNOLD PINDAR

Vice Chairman

Effingham Parish Council

Jon Short ~ Clerk

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## **Legal advice:**

The Council has asked a series of questions which I have answered in a different order for logical reasons:

**EPC seeks advice on the following questions:**

**Q1. Are the proposed arrangements acceptable and correct in terms of both Local Government and Charity Law? Can you recommend any amendments or improvements?**

**Q2. Is the proposed revised 2022 charity scheme acceptable? (EVRT will also be seeking advice from the Charity Commission on this revised scheme.)**

**Q3. As sole trustee, does EPC automatically remain the custodian trustee as well as the managing trustee?**

**Q4. How does EPC as Local Authority (LA) provide funding to EPC as trustee? Is it sufficient to simply agree the funding at a meeting of EPC as LA? Is there any need for declarations of interest or dispensations when this is done, since members of EPC as LA are also members of EPC as trustee? At present, EPC has a formal funding agreement with EVRT to provide an agreed level of funding over four years up until 31 March 2023. EVRT also receives occasional grants from EPC's Community Fund.**

**Q5. Are there any complications regarding employment by EPC as trustee versus EPC as LA? In particular, will the switch to the sole trustee model require a change of employment contract for the existing employee? What limitations or guidelines would you suggest in the event that the charity deems it necessary to employ a clerk or executive officer? How would this individual relate to the parish council's clerk? Would it be possible for the clerk to EPC as LA to undertake some of the administrative tasks for EPC as trustee, or would it be preferable for work required by the charity to remain fully separate and carried out by an individual not linked to EPC as LA?**

**Q6. Are there any other issues that EPC should be aware of when deciding whether to take on the role of sole trustee?**

### **Current governance**

The current governing document of the charity is the Charity Commission scheme of 2009, the terms of which were amended by the trustees in 2018. The land subject to the charity's control is in four parcels albeit in three titles. The KGV field is in one parcel although the documents are not all noted on the title register. The original key documents are the conveyance of 1938 and the deed of 1947 (a conveyance to the Council to hold on charitable trusts pursuant to s 14 of the Local Government Act 1894 (now s 298 of the Charities Act 2011)) being the same charitable trusts as existing in 1947. It is evident that the land was subsequently dedicated as a KGV field under the protection of Fields in Trust, although there is no evidence of that deed of dedication, but you will see the entry from the Fields in Trust website (attached). While I see no evidence for the assertion in your note about the land's being held by the Council for ever, the 1938 and 1947 conveyance and deed make clear that the land is clearly to be used for a designated purpose and possibly permanent endowment which means that its disposal is circumscribed. I have not investigated the title to the other parcels referred to in the 2009 scheme schedule. Given the layers of protection, I do not suggest that further layers need to be introduced, certainly so far as the KGV field is concerned.

The details set out in the governing document suppose that the Council is the custodian trustee and the charity trustees are the committee of management (however described) but appointed in

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accordance with clauses 6-9 of the scheme. The Council has the power to appoint nominated trustees.

I should make two points here:

- 1 a custodian trustee holds the legal title to the land (and any other assets entrusted to it) but plays no part in the management of the charity.
- 2 The entire management of the charity is in the hands of the charity trustees. Once appointed by the appointor, those trustees owe their first duty to the charity and not to the appointing organisation, so Council-appointed trustees are not the Council's delegates. There is a clear separation in the roles of councillor (subject to local government law) or Council-appointees and those of trustees (subject to charity law). This separation is also relevant to what I say below.

### **The Council as sole managing trustee Q1**

A council can be appointed as sole managing trustee by the governing document, by a Charity Commission scheme or by resolution of the charity trustees. It has to be said that the Charity Commission is chary of local authorities being sole managing trustees because of the potential confusion of roles between the council as a local authority and political body (in the small "p" sense and potentially in the party political sense) and as charity trustee governed by charity law – the essence of which it to act in accordance with the charity's trusts and objects for the benefit of the beneficiaries of the charity (which could vastly differ from the local authority's views of the public interest and its own objectives). The council as sole managing trustee acts as a corporate body and individual councillors are not individual trustees. Individual councillors do not, therefore, have disclosable pecuniary interests (DPIs) or other interests to declare in relation to the charity and the council, of course, does not have a declarable interest.

You may wish to consider: [Trustee handbook \(publishing.service.gov.uk\)](https://publishing.service.gov.uk) Local authorities as charity trustees and [g056a001 Local authorities as trustees \(charitycommission.gov.uk\)](https://charitycommission.gov.uk) (the Charity Commission's technical guidance):

#### **2. Local authorities acting as sole trustees**

Many local authorities act as sole trustees of local charities - especially charities for recreational or educational purposes.

In order to be a charity, a body must be established for exclusively charitable purposes. It cannot be established to further the purposes of some non-charitable body such as the local authority itself. Local authorities and charities often both have close interests in local topics. The charity needs to be independent of the local authority in the sense that decisions about the administration and operation of the charity need to be taken solely in the interests of the charity, with a view to furthering its charitable purposes, and for no other purpose. Against this background, although there may be benefits in a particular case in having a local authority as trustee, in general there are potentially serious disadvantages, which are summarised in [OG 56 C1](#). Therefore, in exercising our power under s.69 of the 2011 Act to appoint charity trustees, unless there is a compelling reason for appointing the local authority, we will generally try to make some other trustee arrangement. [OG 56 B1](#) provides further guidance on this.

[Top of page](#)

#### **3. Local authorities acting as sole trustees: Issues at Registration**

[OG 56 B2 section 1](#) provides further guidance on issues to consider at registration, for example where a local authority is to be the trustee or where the charity is being set up to take on a local authority facility (such as, perhaps, the provision of a leisure centre).

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[Top of page](#)

#### **4. Local authorities acting as sole trustees: Issues after Registration**

Where we have serious concerns about the ability of a local authority to act as trustee because, for example:

- it fails to deal satisfactorily with conflicts of interest; or
- its members become involved in internal council disputes over the charity which cause the administration of the charity to break down; or
- it fails to separate clearly its statutory property from that of the charity; or
- when a local authority is proposing to lease charity property to itself in its corporate capacity or vice versa ([OG 56 B3](#) provides guidance on this subject),

we should be prepared to advise the local authority that it would be appropriate for it to stand down voluntarily as a trustee, whilst recognising that we can remove a trustee only where the normal conditions set out in s.79(3) of the 2011 Act apply (a formal inquiry having been opened first) .

We should also bear in mind our concerns when making a Scheme for a charity of which the local authority is already sole trustee. We should consider whether other trusteeship arrangements might not be more appropriate, and, in suitable cases we should suggest that the local authority retires in favour of a suitably constituted body of individual trustees.

We should not, however, as a matter of course open new cases simply to seek to replace a local authority as trustee where there are no other good reasons for doing so.

#### **OG56 B1 Local authorities as trustees - 8 June 2012**

##### **1 Application for registration from charities with a local authority as sole trustee**

If the charity is an ecclesiastical charity or a charity for the relief of poverty, we must point out that by virtue of s.139(3) of the Local Government Act 1972, local authorities are prohibited from acting as trustees of such charities. We should suggest that alternative trustee arrangements should be made either before registration or as soon as possible after registration.

In all other cases, when we receive these applications, caseworkers should always check:

- for potential conflict of interest between the roles of the local authority as charity trustee and its role in its statutory capacity, which might arise, for example, from a contractual relationship between the two; and

- whether the local authority in its statutory capacity will receive any undue benefit  
Any concerns should be raised with the promoter (who will almost certainly be the local authority itself). If it appears that a body of individual trustees may be more appropriate, subject to the points in [OG 56 B2](#), this should be suggested to the promoter.

If, in such a case, the promoter insists that the local authority should be trustee, the application for registration can only be rejected if the evidence is such as to indicate that the purpose of the institution is not its declared charitable purpose, but is, in fact some ulterior non-charitable purpose of the local authority which is promoting it.

This inevitably involves the assertion that the promoters are acting in bad faith in seeking to establish the institution as a charity, and legal advice should be taken as to whether the organisation can be said to be properly established for wholly charitable purposes and thus required to register as a charity.

If there are **particular** concerns about the future administration of the charity, caseworkers should consider the circumstances in line with the Risk Framework to see if there are regulatory issues that require further action from Operations or Investigations and Enforcement.

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#### **4. Constitutional issues for local authorities when acting as charity trustees**

In cases where a local authority is sole trustee, it should be remembered that it is responsible in the same way as any other charity trustee for carrying out the normal duties and responsibilities of a charity trustee.

##### **4.1 Who may make decisions**

It is up to the local authority to decide, within the scope of local government law, what structures should be used to reach decisions in its name as trustee. An alternative to requiring all the decisions to be reached by the full body of councillors, for example, is to set up a separate committee to discharge its responsibilities as trustees (see section 101 of the Local Government Act 1972).

##### **4.2 Position of individuals acting on behalf of a local authority**

Whatever the structure employed, the individuals concerned are not themselves charity trustees. They must, however, act in a responsible way so as to ensure that the local authority acts properly as a charity trustee. If they fail to do this, they may be liable to the council under local government law for any losses it bears as charity trustee (see [section 6 below](#)).

#### **The role of custodian trustee and the need for a custodian trustee – Q3**

It is always open to the charity trustees to appoint and to remove the custodian trustee. So the Council could be removed as custodian trustee. However the title to land would have to be vested in a new custodian or holding trustees or the charity trustee body (neither of the latter two are to be recommended because for one reason at least - the constant need to effect change of trustees by deed). The role of a custodian trustee is to hold as a corporate body the legal estate and therefore the Council's becoming the sole managing trustee makes its continuing to remain as custodian otiose.

#### **A parish council's grant making powers – Q4**

A parish council has three primary grant-making powers in the circumstances:

- 1 S 137(3) of the Local Government Act 1972 (grants to charities) which is available to both eligible and non-eligible parish councils although non-eligible councils are subject to the s 137(4) cap
- 2 S 19 of the Local Government (Miscellaneous Provisions) Act 1976 (grants to voluntary organisations) for the provision of recreational facilities (not capped)
- 3 S 1 of the Localism Act 2011 (the general power of competence) for eligible councils.

Grants would be made in accordance with the council's usual grant-making criteria and procedures.

#### **Financial and administrative arrangements for parish councils acting as trustees – Q5**

The cardinal rules are that the council and the charity must keep their administration, finances and decision-making procedures including meetings entirely separate. A council can grant aid the charity as it can grant aid other organisations. It can enter into a co-ordination arrangements with a charity effectively acting as its contractor but that is something that should be put on one side for the time being. It could make staff and staff time available to the charity but logically those should be recharged to the charity. If staff are currently employed by the charity but will remain employed

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by the charity, then there might be no need to change. However, this depends on who is the employer because an unincorporated body cannot act as if it were a corporate body and let contracts for supplies, services, works or of employment, and it might make sense for those staff to be transferred to the Council. The clerk to the council need not be the clerk (if one is needed) to the charity although the parish council clerk does often act as clerk to the charity but be alive to the need to apply the different rule-making and observing conditions. A council acting as a sole managing trustee will not include the assets or the financial information on its AGAR but will make the charity return to the Commission.

### **The proposed changes to the governing document QQ1 and 2**

My immediate reaction is that the proposed changes are likely to be rejected by the Commission for the following reasons:

- 1 the document and the administrative arrangement read as a local government document and not as a charity governing document. Cl 6, 9(3), 10(1), 11, 13 all require attention. I suggest that the charity should look to a Charity Commission model for assistance – the CIO model will assist although the Council would not be a CIO.
- 2 as I have mentioned above, it is the Council as a body corporate which is the trustee. Several of the changes read as if individual councillors are individual trustees.

### **Summary**

The Council could be constituted as sole managing trustee by an amending scheme made by the Commission although I think that a such a position could be reached by resolution of the charity trustees under s 280 of the Charities Act 2011. The Council would have to separate its roles, administration and finances as a local authority and a charity and keep them at arms-length. The Council while acting as a charity will need to give the impression (as well as the actuality) that it is fulfilling a different role governed by different rules. Many parish councils do act as sole managing trustees.

If I can help further, please let me know.

### **Ian Davison**

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