

Custodian Trustee

To discuss whether to request the charity to remove the council as custodian trustee and vest the land in the Official Custodian for Charities (project action 64), as referred to in the essential trustee

One of the recommendations from the feasibility study at the start of the project was for the council to relinquish its role as custodian trustee, due to the conflict of interest:

“Recommendation 2: The Council should obtain legal advice to confirm whether it is legally a custodian trustee, and whether as the actual owner of the land it is able to appoint the Official Custodian as trustee. If so, it should relinquish its role as custodian trustee and request that the Official Custodian is appointed to avoid any related party conflicts.”¹

This has therefore been included on the project list under the separate custodian trustee section.

NALC's LTN notes:

“The council must realise it has a dual role, first, as a local authority and secondly as a charity trustee and the two roles must be kept entirely separate... There are advantages to having a local council as trustee, but there may also be disadvantages. Conflicts of interest between the council and the charity can often occur as well as a failure by the council to appreciate that it must deal with the charitable property in accordance with the charitable trusts... Council officers and employees have a duty to ensure that they act in the best interests of tax payers and trustees have a duty to act in the best interests of the charity and its beneficiaries. These duties can, and frequently do, conflict. A conflict can arise in a number of situations and a classic example is the sale or lease of land by one body to the other. For example, trustees leasing or selling land to a council are under a duty to obtain the best price or rent. At the same time, council officers or employees are under a duty to ensure that tax payers' money is spent prudently. Another example is where contracts are agreed by one body to the other. Clearly, it is extremely difficult to comply with both duties at the same time.”²

The benefit for the charity is that:

“Many charities find it convenient to appoint the local council as custodian trustee because the council has a perpetual legal status and identity and thus is capable of holding charity property forever. The situation may be contrasted with other trustees who die or retire and, consequently, new trustees are required and the charity property has to be transferred into the name of the new trustees.”³

Approval was given from the [Charity Commission](#) to lease land and property from the charity. In order to remove the conflict, one option previously tabled is to request to rescind the role of custodian trustee. Legal guidance has been sought on this, which is shown below:

Query to Solicitor:

“What is the process should the council wish to cease being the custodian trustee for the charity? Can this only be done by charity agreement e.g. under s280 of the 2011 Charity Act? They could for example have the land held by the governments Official Custodian for Charities.”

Response from Council Solicitor:

“The appointment is made by the Managing Trustees of the Charity. The Council has to advise them that they wish to retire and appoint the Official Custodian as the Custodian Trustee. The Managing Trustees then ask the Official Custodian to make the necessary Order.”

The charity has discussed changing to a different legal model in time, which could provide the opportunity to hold documents and contracts in the charities name and could mean the council's role becomes redundant.

Now the leases have been put in place, the project action is being re-visited, as agreed on the project plan. Options are for the council to:

¹ LGRC (2024) St Andrews Community Centre options – final report, pp24

² NALC (2022) LTN28

³ NALC (2022) LTN28

I. Resign as Custodian Trustee and request the Official Custodian for Charities to be appointed.

Pro's

- Eliminates conflicts of interest.
- Aligns with best practice and Charity Commission guidance.

Con's

- Additional workload and cost created for the council with little gain, now SPRG project is nearing completion to correct issues identified.

Risk: Reputational risk - perception not supporting local facilities and sport and recreation

2. Remain as Custodian Trustee

Rationale: With the charity governance issues now settled, the council could continue as CT, retaining legal continuity, administrative efficiency, and oversight of the land. The dual-role conflicts are easier to manage now the lease is in place.

A significant amount of officer and council time has been invested in the recreation ground project to regularise charity and council activities with the indenture. Removal of the council as custodian trustee would then require extensive resources to implement changes which have just been completed in the current project.

Risks: Conflicts of interest remain, particularly in transactions or contracts involving the council. Public perception and governance oversight still require careful management.

Future transactions become problematic.

Loss of trustee knowledge on charity matters if council staff/cllrs changes

Mitigation Measures:

- Separate decision-making for any lease, sale, or contract between council and charity including trustees/cllrs declaring interests
- Transparent reporting and documentation of all decisions in the charity's interest by the council and CT decisions
- Periodic review of the council's role as CT, with the option to transfer to the Official Custodian if future risks increase.

Recommendations:

The council remain as CT provided the above mitigations are implemented, noting the option remains to resign and seek to appoint an Official Custodian for Charities if governance or conflict risks increase in the future.