

DECISION-MAKER:	TRUSTEES OF THE CHIPPERFIELD TRUST COUNCIL
SUBJECT:	CHIPPERFIELD TRUST GOVERNANCE
DATE OF DECISION:	12 SEPTEMBER 2012
REPORT OF:	HEAD OF LEGAL, HR AND DEMOCRATIC SERVICES
STATEMENT OF CONFIDENTIALITY	
None	

BRIEF SUMMARY

Robert Chipperfield bequeathed money for the setting up and maintenance of an art gallery, together with his own art collection, as well as establishing a fund to further build the collection. The administration of the bequest was set down in a scheme in 1916, which was incorporated in 1930 and registered as a charity in the 1960s. There have been no changes to the scheme throughout this time. The scheme nominates the Council as Trustee, and sets out how the Chipperfield Trust should be administered by the Council in that capacity.

The Chipperfield Trust now needs to be updated to reflect current demands and needs. The existing scheme gives no direction on separation of roles or how to deal with conflicts of interest. Any decisions in regard to the Chipperfield Trust must be made by Full Council, as trustees of the charity.

RECOMMENDATIONS:

TRUSTEES OF THE CHIPPERFIELD TRUST:

- (i) That the Trustees approve a new governance model for the Chipperfield Trust incorporating an Advisory Committee to Council to advise on matters defined within their terms of reference, and that such arrangements take effect from the Advisory Committee's inaugural meeting to be held in October 2012;
- (ii) That the Trustees approve a change to the National Advisor to the Chipperfield Trust from the National Gallery to the Tate; and
- (iii) That the Trustees approve a series of general updates to the Chipperfield Trust Scheme as set out at Appendix 1 to this report.

COUNCIL:

- (i) That Council establish a Chipperfield Trust Advisory Committee pursuant to s102(4) of the Local Government Act 1972, consisting of 5 independent members and subject to the terms of reference and Conflict of Interest Policy set out at Appendices 2 and 3 to this report;
- (ii) That Council delegate authority to the Director of Corporate Services to undertake a recruitment process to recruit 5 independent members to the Chipperfield Trust Advisory Committee as set out in this report, with appointment following consultation with the Mayor and Group Leaders; and

- (iii) That Council delegate authority to the Senior Manager of Leisure to undertake day to day business of the Trust, including applying for and receiving any external grant funding on behalf of the Trust, and dealing with general management and administrative matters insofar as such matters fall outside the remit of the Advisory Committee.

REASONS FOR REPORT RECOMMENDATIONS

1. Maintaining the status quo does not afford adequate legal protection to the Council's involvement with the Trust, particularly if the Council as trustee wishes to exercise some of the more controversial powers allowed for in the scheme. An alternative governance model is needed to resolve the conflict of interest issue that the Council will, from time to time, have as sole trustee and meet the complex requirements of local government legislation and those of the Charity Commission.

DETAIL (Including consultation carried out)

Background

2. The City Council has an internationally renowned art gallery forming part of the Civic Centre complex in the City of Southampton. The Council's art collection comprises items acquired in a variety of ways. Over the years, the Council has funded the purchase of items itself, received donated items and items of bequest, and purchased further items from bequest and grant monies.
3. The Council's largest and first bequest is known as the Chipperfield bequest. This bequest enabled the art gallery to be established in the 1930's. The bequest was registered as a charity in the 1960's, as the 'Chipperfield Art Gallery and School of Art', registered number 307096. The trustees of the charity were originally the Mayor, Alderman and Burgesses of the Borough of Southampton and now the successor body of the Council itself. The governance arrangements relating to the charity have not been changed since its establishment.
4. In terms of housing the proposed Art Gallery, the Trust Scheme provided funding for the Trustees to *'erect or acquire fit up and complete ready for use a suitable building or buildings in the town of Southampton... and the same may be built either in conjunction with or as an annex to the new proposed Municipal Buildings or Town Hall...'* The Scheme goes on to say that the Council may *'for the purposes aforesaid either make use of any land or buildings now belonging to the Council or may acquire other land or buildings by purchase'* provided that the specified funding limit was not exceeded.
5. In exercise of this power, the Council made provision for the Art Gallery during the construction of the North Block of the Civic Centre in the 1930s, allocating an area of 2925.5m² for this purpose. At that time, the Council decided that the Chipperfield Bequest monies should be applied to the fitment of the building for the Gallery and not the building itself.

6. It was intended by the Scheme that *‘the repair maintenance upkeep and insurance of the Art Gallery and its contents and the payment of such salaries wages and fees...’* should be funded by the income earned from a further amount bequeathed to the Trust. As time has passed, it has proved not to be practical or sustainable to fund these expenses in this way, and the Council has met all or most of these expenses itself under its statutory powers to do so.

Governance and potential conflicts of interest

7. During a wider review of the arrangements in place to manage the Chipperfield Bequest it became apparent that the current governance structure was no longer adequate. Concerns arose particularly in relation to actual or potential conflicts of interest that may arise given that the Council acts both as Trustee and also under its own statutory duties as a local authority. The Charities Commission have also identified this particular issue amongst others in their earlier correspondence with the Council.
8. Any new governance arrangement needs to address the following issues:
 - a) Conflicts of interest arising by virtue of the Council’s dual role as Trustee and also acting under its own statutory duties as a local authority;
 - b) Clarity as to when Councillors are acting as Trustees or Councillors;
 - c) Clarity as to which decisions are decisions taken by the Trustees in relation to the Trust in order to combat the impression that the Council itself is acting (e.g. the Trust acquiring art work at a time of financial constraint by the Council).
9. The Council has been exploring alternative options and a number of different governance arrangements have been identified. The favoured approach has been for officers to continue to administer the day to day running of the charity but for matters where there is a conflict or potential conflict of interest to be referred to a newly convened Chipperfield Bequest Committee.
10. The newly established Committee’s aim was intended to identify, manage and resolve any conflict of interest (or perceived conflict of interest) involving the Council’s dual role as corporate body and charity trustee. This separate decision making body would also address a current lack of distinction between charity and statutory assets.
11. It was agreed that further legal clarification would be sought in relation to the feasibility of the abovementioned preferred new governance model, with a further update to be brought to Group Leaders and then Full Council in due course. This work has now been done, and it has been established that the preferred model is feasible with minor alterations and would be a practical way to address the shortcomings associated with the current governance model.
12. Full details of the preferred model are set out below at paragraph 13. In arriving at this point, various other models have also been considered. For convenience, the alternative models considered are set out below at paragraphs 38 through 48.

Preferred model – Council Advisory Committee of Experts

13. Under this model, the operation of the Trust will be divided into 2 key areas:
 - a) Routine day-to-day decision making which would be delegated to officers, with prescribed and regular reporting to Council (as Trustee);
 - b) Matters meeting certain criteria specified in its terms of reference to be referred to an advisory committee, which would provide advice to Full Council (acting as Trustee) to enable a determination to be made. Proposed Terms of Reference for the Committee are attached as Appendix 2 to this report.
14. The Advisory Committee would be established under s102(4) Local Government Act 1972, and members would have voting rights. The Committee would consist solely of co-opted independent experts/representatives selected through a recruitment-like process similar to that used to appoint independent members to the Council's Governance Committee.
15. Members would ideally be drawn from educational, community, commercial, and industry groups, and would be identified through appropriate publicity in relevant industry specific publications and on the Council's website. Suitable Committee members should possess sufficient knowledge, awareness and appreciation of British art in order for the group to best meet its objectives. The recruitment process would involve a written application and interview, with appointments being made following consultation with the Mayor and Group Leaders.
16. The Committee would be advised by the National Advisor (see paragraph 33 below) who will also be invited to participate in any meetings of the Committee at the National Advisors discretion as an ex-officio member. The Committee will further be advised by the Council's Arts and Heritage Manager and Gallery Curator as necessary, and will be able to avail itself of administrative assistance and minute taking provided by Council officers.
17. It is anticipated that there will be 5 members in total, in addition to the National Advisor attending in an ex-officio capacity. Any larger number would lead to practical difficulties in convening meetings and delays in dealing with Trust business. Substitution of absent members would not be appropriate given the recruitment process undertaken to appoint members to the Committee.
18. All members of the Committee will be subject to a Conflict of Interest Policy which aims to assist them in identifying any conflicts of interest or potential conflicts of interest that they may personally have when dealing with Committee business. Members will further be required to declare any such interests for the purposes of Committee minutes and in a Register of Interests established for the Committee. The proposed conflict of interest policy is attached as Appendix 3.
19. The Committee can rely on legal support from Council employed solicitors when dealing with matters which arise in the ordinary course of its duties, but for matters involving any conflict, the Committee would need to secure

its own independent legal advice (such matters to be defined in the terms of reference and conflict of interest policy). Democratic Services support for the two scheduled meetings of the Advisory Committee will be covered by relevant council officers although a charge will be made to the Trust for this.

20. Under this arrangement, the Council would remain the Trustee of the property and the charity trustee. Elected Members would each be trustees by default, and would act in that capacity when such matters are referred to Full Council. In order to ensure there is a distinction between Council business and Trust business, it would be necessary for a completely separate meeting to be convened at which councillors would act in their capacity as Trustees, usually after a scheduled Council meeting has been closed.
21. The Council would remain responsible for contracting in connection with the Trust, and for the purpose of buying, selling and insuring the Trust property.
22. As mentioned above, the Advisory Committee's terms of reference and conflict of interest policy would identify situations when the Advisory Committee would have involvement, including questions as to:
 - (i) determining which of those items acquired since the Art Gallery was established belong to the Charity or to the Council corporately;
 - (ii) whether any particular potential acquisition should be acquired by the Council or the Charity assuming that the Council is sometimes interested in making acquisitions of its own, rather than merely as trustee;
 - (iii) the apportionment of expenses of running, insuring and repairing the Art Gallery between the Council and the Charity (if not entirely funded by the Council);
 - (iv) the use of any admission fees charged for access to special exhibitions;
 - (v) the ownership and exploitation of any intellectual property rights arising out of any publications associated with the Art Gallery or its collection;
 - (vi) questions as to whether the Charity should (for example) seek a scheme removing any of its existing obligations.
23. Once the Advisory Committee makes a finding on an issue, having taken or arranged any additional advice as may be necessary, the matter would be referred to Full Council. Full Council (acting as Trustee) would be obliged to consider the Committee's findings and would need to justify any decision taken that is incompatible with those findings.
24. Should Council (acting as Trustee) decide not to follow a recommendation of the Advisory Committee, the decision taken would need to be reasonable and justified in all the circumstances. Should the basis for the decision not be substantiated in this way, the decision would be susceptible to Judicial Review.
25. Other day-to-day matters are to be delegated to the Senior Manager of Leisure in the first instance. This delegation is to include applying for and

receiving any external grant funding on behalf of the Trust, and dealing with general management and administrative matters that fall outside the remit of the Committee.

26. Caution must be exercised when any significant amount of responsibility is delegated to an officer, as that individual may become a 'charity trustee' in the statutory sense, i.e. having general control and management of the administration of the Trust. To avoid this, the delegated officer must report regularly to both Council and the Advisory Committee on the general management and administrative duties undertaken on behalf of the Trust, as well as any more significant decisions taken.
27. For the purposes of clarity, the Committee's remit extends only to that property included within the initial Chipperfield Bequest, and any further property that has been acquired on behalf of the Trust. This remit would include the Trust's financial interest in the fitment of the building currently housing the Art Gallery, and any proposal to alter this arrangement in any way.
28. Initially consideration was given to a structure that increased elected and non-elected member involvement, most likely by way of a committee that was either politically proportionate or had a Member from each of the main political parties, with a balance of independents. Establishing a committee in this way is possible under s101 of the Local Government Act 1972, but not desirable for 3 main reasons:
 - a) the independent members would be prevented from voting pursuant to s13(1) of the Local Government and Housing Act 1989. This would result in the committee being ineffective in its intended purpose.
 - b) any elected Members sitting on the proposed committee would most likely be conflicted when any business of the committee came to be considered by the trustees at Full Council.
 - c) the committee would not have the benefit of impartial expert advisors sourced from the local art industry and community, who also serve to further aid perceptions of a truly independent advisor for Council acting as Trustee.
29. By establishing the committee under s102(4) Local Government Act 1972, the committee takes a purely advisory role to Council, is completely independent but its members retain the right to vote and reach decisions on matters referred to it.
30. Meetings of the Advisory Committee will be scheduled each May and October, with additional meetings to be convened if and when required. All meetings of the Committee will be open to the public unless the matter to be considered falls within the provisions of the Council's Constitution pertaining to exempt and confidential information. In all other cases, members of the public and Members are encouraged to attend.
31. The preferred model described above has been presented to the Charities Commission for comment. An initial response from the Commission set out some additional requirements in relation to the accounting methodology currently utilised by the Council in administering the Trust's affairs. Further information was provided to the Commission, and their subsequent response is included at Appendix 5.

32. The Chipperfield Bequest Scheme also made provision for the establishment and operation of a School of Art to benefit the inhabitants of Southampton. This function has for some considerable time been provided through the integrated provision of art instruction across various educational establishments in the area, and will continue to be administered in this way.

Change to the nominated national advisor

33. The Chipperfield Trust scheme specifies that in certain circumstances, the Council must take expert advice prior to taking decisions that affect the scheme and works held by it. The scheme appoints the Director of the National Gallery to this role of National Advisor.
34. The Tate has been identified as a suitable successor to the role of National Advisor due to their particular expertise in modern 20th Century British art and the relevance of this expertise to the collection held under the scheme. The Tate has been acting as a de-facto National Advisor for some years due to this specialist knowledge, and it would be desirable to formalise this arrangement.
35. In addition to the functions expressly included within the Scheme, it is envisaged that the Tate as National Advisor would undertake the following functions:
- Advise on the selection and purchase of new works (contemporary art acquisitions)
 - Advise on the selection of additions to the collection through gift bequest or transfer of same
 - Advise where the Tate does not want to be directly involved or where reporting is preferred (e.g. agree works on art lease)
 - Advise on the transfer of works
 - In the event of a decision to sell or dispose of works, to subsequently advise on which items are appropriate or suitable for disposal in terms of the collection as a whole
 - Agree where standard policies (like accreditation) can replace part of scheme but still meet spirit of Chipperfield.
 - Professional support for the Gallery curator
36. In order to effect this change, the Council must obtain formal written consent from the National Gallery and from the Tate, following which the Council as Trustee may use the statutory power under section 280 of the Charities Act 2011 to make the necessary amendments. All necessary consents have now been obtained, leaving only approval by Trustees required to finalise this arrangement. The Charities Commission will need to be informed of this change once effected, along with the further changes outlined in the remainder of this report.

Further updates to the scheme

37. Following discussions with the Charity Commission, various additional clauses of the Scheme need to be updated to ensure fitness for purpose for the present day. The Commission advises that it does not have a regulatory interest as the Charities Act 2011 grants the trustee the power to

amend the administrative provisions of the Scheme. Such amendments seek to simplify acquisitions, exhibitions and loan arrangements (including collection management, charging for access to some exhibitions, and exhibition content). The full range of changes required to the scheme are detailed in Appendix 1.

ALTERNATIVE OPTIONS CONSIDERED AND REJECTED

Alternative model 1 – Committee of the Council comprising elected Members

38. Under this arrangement, a committee of the Council is appointed (comprised solely of elected Members) which administers the day to day running of the charity with major decisions to be determined by the Council's executive. If Council is conflicted then it acts on advice from an independent advisory group.
39. The advantages of this approach are that for day to day decisions, independence is demonstrated to a degree by appointing a committee of the Council and the obligation for the trustee to act on the advice of an independent advisory group for any conflicts arising.
40. The potential disadvantage is that for administering day to day decisions, such an arrangement is likely to be bureaucratically challenging and will delay and impede the smooth running of the charity. The independent advisory group may advise a course of action contrary to the wishes of the trustee but the trustee will still be obliged to act on its advice. The main problem however, is that the elected Members sitting on the proposed committee would most likely be conflicted when any business of the committee came to be considered by Full Council.

Alternative model 2 – Committee of the Executive including independents

41. Under this arrangement, a committee of the Executive is established, comprising Council Members and independent members, which would manage day to day running of the scheme. As with alternative model 1 above, a separate committee is established but in this case, there is further independence from the Council as it co-opts lay members, who are independent of the Council.
42. If decisions on day to day matters are included within the committee's remit rather than just matters of conflict, again the ability to respond quickly to and make decisions might prove practically challenging. It may also prove difficult to co-opt lay members with the right level of knowledge and experience.
43. Counsel's advice has confirmed that a committee of the Executive could be established in this way, and that the committee could include voting members who are not themselves members of the Authority. However, a practical difficulty exists in that if the proposed committee will include elected Members, they may find themselves in a position of conflict at each meeting. There may also be implications for elected Members in terms of personal/prejudicial interests under the applicable Members Code of Conduct which restrict involvement in any related matters coming before Full Council.

Alternative model 3 – Independent Advisory Committee and Scrutineer

44. Under this arrangement, an independent scrutineer is appointed and an independent advisory committee is set up that deals with day to day management, and advises the Council if it is in a conflicted position. The Council continues as sole trustee but provides robust governance arrangements and appoints an independent scrutineer to oversee the management of the charity. This model would not relieve the Council of its duties as trustee.
45. Independence is introduced by way of establishing an independent scrutineer and advisory committee but the control of decisions still ultimately rests with the Council as trustee. The independent scrutineer could be a specialist from the arts world and therefore be able to hold the confidence of the committee and steer a reasonable approach to matters put before them.
46. A significant challenge is that professional arts bodies may be reluctant to undertake the role of independent scrutineer and therefore it may be difficult to appoint an individual or body with the relevant knowledge and expertise who is not tainted and not restrained by any professional body opinion on controversial matters. Even though the Council as trustee remains the decision maker, if the scrutineer and advisory committee recommend a course of action, it will be difficult for the Council as trustee to justify making a decision contrary to that advice. Any such decision is likely to be challengeable.

Alternative model 4 – Delegation to officers and major decisions by Cabinet

47. Under this arrangement, delegation of day to day management would be made to nominated officers, with major decisions referred to the executive – but there is no provision for management of conflict. This is the current model and not recommended for the reasons outlined earlier in this report.
48. While this model enables the smooth day to day running of the charity and immediate or timely responses to be made where necessary, it does not address the issue of conflict when it arises and leaves the trustee vulnerable in terms of decision making. As with a recent attempt to sell works, the Charity Commission will take a judgement of any proposal where the conflict between the Council as trustee and the Council as corporate body has not been adequately managed and is likely to veto any such proposal. However, a procedure could be added for the management of conflicts of interest, with the most viable choice being the establishment of an independent advisory group.

Consultation

49. The Chipperfield Trust governance arrangements have been the subject of ongoing consultation during development. In addition to discussions with the relevant portfolio holder, two briefing papers have been taken to Group Leaders meetings for comment, the most recent largely reflecting the content of this report.

50. Representations have been received from Councillor Vinson both in a meeting and via email, which are set out at Appendix 4 to this report. Some of these representations have resulted in changes to the scheme, whereas further representations have not been incorporated for the reasons set out in this report.

RESOURCE IMPLICATIONS

Capital/Revenue

51. The establishment of an Advisory Committee will result in a small additional expenditure associated with the initial administration of the Committee and the appointment of members. General legal support will be provided by the Council, but where this is not possible for example in the event of a conflict of interest, the Trust would need to fund external advice as necessary. Democratic Services support for the Committee's two scheduled meetings will be provided by the Council, although the Trust will need to fund this as necessary.
52. Historically the Council has met all or most of the expenses relating to the repair, maintenance, upkeep and insurance of the Art Gallery and it is intended that this will continue as the Trust is not in a position to be self-supporting in this respect.

Property/Other

53. There are no direct property implications arising from this report.

LEGAL IMPLICATIONS

Statutory Power to undertake the proposals in the report:

54. In terms of the current legal position, maintaining the status quo is no longer desirable, particularly if the trustee wishes to exercise some of the more controversial powers allowed for in the scheme. An alternative governance model is needed to resolve the conflict of interest issue that the Council will, from time to time, have as sole trustee and meet the complex requirements of local government legislation and those of the Charity Commission. Such changes can be achieved under section 280 of the Charities Act 2011 and by resolution of the trustees at Full Council.
55. The National Advisor (The Tate) will continue to provide advice on acquisition, transfer and exchange of art which is binding on the trustee, as is necessary under the terms of the scheme. In other areas of activity, The Tate's input will be advisory and a decision is the responsibility of the trustee alone.

Other Legal Implications:

56. None.

POLICY FRAMEWORK IMPLICATIONS

57. None.

AUTHOR:	Name:	Jamie Hollis	Tel:	023 8083 2027
	E-mail:	jamie.hollis@southampton.gov.uk		

SUPPORTING DOCUMENTATION

Non-confidential appendices are in the Members' Rooms and can be accessed on-line

Appendices

1	Updates to the Chipperfield Scheme
2	Chipperfield Trust Advisory Committee Terms of Reference
3	Chipperfield Trust Advisory Committee Conflict of Interest Policy
4	Representations received from Cllr Vinson
5	Correspondence from the Charities Commission

Documents In Members' Rooms

1.	None
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Integrated Impact Assessment

Do the implications/subject/recommendations in the report require an Integrated Impact Assessment to be carried out.	No
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Other Background Documents

Title of Background Paper(s)	Relevant Paragraph of the Access to Information Procedure Rules / Schedule 12A allowing document to be Exempt/Confidential (if applicable)
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Integrated Impact Assessment and Other Background documents available for inspection at:

WARDS/COMMUNITIES AFFECTED:	All
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