

# **Alice Park, Lambridge, Bath**

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## **Advice Note**

### **Bath and North East Somerset Council**

1 November 2019

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## 1 Background

- 1.1 Bath and North East Somerset Council (**BANES**) is the sole corporate trustee of the charitable trust known as "The Alice Park" (the **Charity**). The Charity was established by a conveyance dated 19 May 1937, as amended by a Charity Commission Scheme dated 17 December 1973 (the **Governing Document**).
- 1.2 BANES has established a committee known as the "Alice Park Trust Sub-Committee" (the **Committee**). The Committee has delegated authority from BANES to take certain actions and decisions in respect of the Charity.
- 1.3 The main asset of the Charity is Alice Park which is situated in Lambridge, Bath (the **Park**). The Park is registered at the Land Registry under title number ST277651. The legal title of the Park is held by The Official Custodian for Charities as custodian trustee for the Charity.
- 1.4 BANES in its capacity as trustee of the Charity proposes to grant two leases of part of the Park to BANES (in its local authority capacity) for the development of a skate park and tennis courts (the **Leases**). The skate park and tennis courts will then be operated by BANES (in its local authority capacity) in line with other of its leisure facilities. The proposed rent under the Leases is a peppercorn, (if demanded).
- 1.5 The Heads of Terms for the Leases have been agreed and draft Leases have been prepared in line with these terms.
- 1.6 Clause 5 of the Governing Document gives BANES in its capacity as trustee of the Charity the power to let the Park (or part of it), provided that the provisions of the Charities Act 2011 (the **Act**) regulating the disposal of charity land are complied with. In exercising this power, BANES (in its capacity as trustee of the Charity) will need to ensure that the grant of the Lease is in the best interests of the Charity. Conflicts of interest/duty should be appropriately managed and documented.
- 1.7 In 2008, BANES instructed Anthony Tanner of Falcon Chambers to advise on the proposed grant of a lease by BANES in its capacity as trustee of the Recreation Ground, Bath to BANES (in its local authority capacity).
- 1.8 In his advice, Counsel confirmed that BANES could not grant the lease, even if it acted in each case in different capacities, as it would be void<sup>1</sup>.
- 1.9 As a solution to the issue, Counsel advised that BANES should consider granting the leases to a nominee. The nominee would not be an agent for BANES and therefore the leases would not be void<sup>2</sup>. Also, once the leases are granted, they could be assigned by the nominee to BANES (in its local authority capacity).
- 1.10 BANES proposes to follow Counsel's advice in relation to the grant of the Leases of the Park by appointing a nominee, who would then assign the Leases to BANES (in its local authority capacity).
- 1.11 The purpose of this advice note is therefore to:
  - 1.11.1 advise on whether BANES (in its local authority capacity) has the power to appoint a nominee;
  - 1.11.2 comment on who could act as the nominee; and

<sup>1</sup> This follows the court's decision in the case of *Rye -v- Rye* [1962] AC 496.

<sup>2</sup> This approach was supported by the court in the case of *Ingram -v- IRC* [1999] All ER 297.

1.11.3 identify any issues for the nominee in acting as such.

## **2 Nominees**

2.1 Reference to nominee in this advice is to an individual who has been nominated to act as BANES' nominee.

2.2 A nominee could be appointed if:

2.2.1 it is within BANES' powers as trustee of the Charity to grant the leases; and

2.2.2 BANES in its local authority capacity under local government law is able to hold property in its statutory corporate capacity in the name of a nominee.

2.3 We have considered at section 3 below whether BANES, in its statutory corporate capacity, is able to hold property in the name of a nominee.

2.4 We have confirmed at paragraph 1.6 above that BANES (as trustee of the Charity) has the power to grant leases of the Park. However, there is still a requirement to comply with the provisions governing the disposal of charity land contained in the Charities Act 2011. In this case, the grant of the Leases would be considered a lease to a "connected person" for the purposes of section 118 of the Act. Therefore, in order to enter into the Leases, an Order of the Charity Commission will be required to authorise the arrangements. This authorisation is required regardless of the leases in the first instance to BANES' nominee.

2.5 While the Order of the Commission would allow BANES (in its capacity as trustee of the Charity) to grant the Leases to the nominee (which will then be assigned to BANES as local authority), conflicts of interest/duty will need to be appropriately managed. We recommend that there is a clear audit trail of the decision-making processes adopted, which includes demonstrating how conflicts of interest/duty were managed by the Committee and particularly that decisions were taken solely and exclusively in the interests of the Charity.

## **3 Power to appoint a nominee**

3.1 Section 1 of the Localism Act 2011 grants a Power of General Competence to Local Authorities. This grants a local authority "a power to do anything that individuals generally may do". Since an individual could appoint a nominee, we consider that BANES can also do so.

## **4 Selection of the nominee**

4.1 The nominee could be any individual, but, in these circumstances, our view is that the nominee should either be a member or officer of BANES.

4.2 BANES (in both of its capacities) has an interest in ensuring that the Leases are ultimately granted to BANES (in its local authority capacity) and therefore, the nominee in our view should be someone who BANES is able to control. In practice, it is likely that BANES (in its local authority capacity) will have more control over an officer due to the employment relationship.

4.3 The nominee will hold the Leases as a bare trustee and therefore will be required to act at the direction of BANES (in its local authority capacity), unless to do so would be to act in breach of trust. Therefore, it may be more practical for BANES to appoint one of its employees as its nominee as it will be able to use its role as employer to direct the nominee in the assignment of the Leases. There is likely to be less control over a Council member.

4.4 Although it is intended that the Leases are assigned shortly after they are granted by BANES (as sole trustee of the Charity), if this is not possible, then BANES (in its local authority

capacity) will want to be able to retain control over that individual during the period for which he or she holds the Leases.

- 4.5 A member would have duties under the Localism Act 2011 in terms of managing conflicts of interest. While in this instance we do not foresee that a Council member would have a personal interest in the Leases, there is likely to be a conflict of duty which would need to be managed.
- 4.6 Our view therefore is that the nominee should be an officer of BANES. We understand that there is likely to be an officer willing to act in this capacity.

## 5 **Acting as nominee**

- 5.1 We have confirmed at paragraph 4.3 above, that any nominee appointed to take the grant of the Lease initially would be acting in the capacity of a bare trustee. This requires the nominee to act at the direction of BANES (as local authority), unless to do so would be to act in breach of trust.

### **Taking on the Lease**

- 5.2 As the freehold title to the Property is held by the Official Custodian for Charities, the intention is that the appointed nominee will take the Lease from the Official Custodian. The Official Custodian itself is in a similar role to the nominee in that it must act at the direction of BANES (as the trustee of the Charity) in granting the Leases (unless to do so would be to act in breach of trust).

### **Consequences of accepting the grant of the Lease**

- 5.3 Upon entering into the Leases, the nominee will become liable for the costs involved. These may include:
- 5.3.1 Any lease premium (in this case, there is none).
- 5.3.2 Rent due under the lease (in this case, a peppercorn).
- 5.3.3 Other liabilities under the lease, such as the repairing covenant.
- 5.3.4 Any Stamp Duty Land Tax (**SDLT**) due on the grant of the leases (see below).
- 5.3.5 Land registry fees for registration of the leases - If a Lease is for a term of more than seven years, it must legally be registered at the Land Registry against the property title and a registration fee must be paid.

The proposed term of the Lease is 25 years and registration at Land Registry will therefore be required.

- 5.4 In practice we have assumed that BANES (as local authority) will meet any costs incurred by its nominee.
- 5.5 In our view, it is unlikely that any liabilities will arise for the nominee. However, in the unlikely event that any liabilities arise the nominee by virtue of section 265 of the Public Health Act 1875 (as amended) would when acting in the course of their duties and in good faith, has statutory immunity and is not personally liable for the actions they take. The Act provides for indemnity in relation personal liabilities and also costs. In addition to this statutory indemnity, we have included a specific contractual indemnity in the deeds of assignment which will transfer the leases from the nominee to the Council.

### **Assignment of the Lease**

- 5.6 Once the Leases are granted to the nominee, the Leases can then be assigned to BANES. The assignment is the transfer by the nominee of their rights and obligations under the Leases to BANES (as local authority).
- 5.7 As drafted, the Leases provide that the tenant (i.e. the nominee) is permitted to assign the Leases to BANES without the consent of the landlord (i.e. the Charity). The landlord's consent is required if the Tenant wishes to assign or underlet the Lease to anyone other than BANES (this consent is not to be unreasonably withheld). Therefore, in the very unlikely event that the nominee attempted to assign the Leases to someone other than BANES (as local authority), BANES in its capacity as trustee of the Charity would have knowledge of this.
- 5.8 In order to assign the Leases, the nominee will need to enter into a deed of assignment.
- 5.9 We propose that the deed of assignment will be entered into immediately following the grant of the Leases meaning that, in practice, the nominee will hold the Leases for a very short period of time.
- 5.10 Following the assignment of the Leases, the assignment should be registered at the Land Registry. In practice, we would register the grant of the leases and the assignment within the same application.

### **Liability of the nominee following assignment**

- 5.11 As a lease which is granted after 1 January 1996 (not pursuant to an agreement dated before that date), the Leases will qualify as a "new lease" under the Landlord and Tenant (Covenants) Act 1995.
- 5.12 As new leases, the position is that the original tenant (in this case, the nominee) will be released from liability on assignment. Since the nominee will only hold the Leases for a very short period of time between the grant of the leases and completion of the assignment, we consider the risk of any liabilities falling to the nominee to be minimal.
- 5.13 In any event, we have included a specific contractual indemnity in the deeds of assignment from the Council to the nominee.

### **SDLT**

- 5.14 We understand that you have commissioned a qualified surveyor to prepare a valuation report (in accordance with the Charities Act 2011) to advise on the terms of the proposed Leases, including the peppercorn rent.
- 5.15 Given that the surveyors report confirms that the Lease of a peppercorn (for both the Skate Park and the Tennis Courts) represents the market rate for the Property, the "Net Present Value" (the figure used to calculate your SDLT liability) would be nominal and therefore no SDLT would be payable and no return would be required to be made to HM Revenue & Customs.

If you have any questions in relation to this advice, please contact Rebekah Moore.

**VWV LLP**  
**1 November 2019**