

# Capital Projects – The Property Elements

Caroline Campbell

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## Capital Projects – the property elements

### Introduction

My colleague Huw Williams has provided an overview of the issues challenging a charity in carrying out a capital project. I will be considering the commercial property issues which arise within the context of the capital project.

On the assumption that Huw's top two tips have been followed and the charity's trustee body and constitution will have been set up, are fit for purpose and have a dedicated committee to run it, we next need to consider the duties of the trustees in acquiring the land, if the charity does not already hold the land in its ownership.

### Trustees' Duties

Trustees have a general duty to act reasonably and in the interests of their charity. What constitutes reasonable will depend on all of the circumstances and must bear in mind the knowledge and experience of the individual trustee and in the case of a trustee acting in the course of a profession or business the knowledge or experience that it is reasonable to expect of a person acting in accordance of that profession or business. The trustees need to take all reasonable steps to ensure the following:-

1. that they have the power or authority to acquire the land. The power to acquire land is often provided for expressly or by implication in a charity's governing instrument. If such a power is excluded expressly or by implication it may be appropriate to seek either a Scheme to permit the acquisition of such property or an order sanctioning a particular transaction; and
2. the property needs to be suitable for its intended use and not subject to any restrictions which would conflict with that use. The property also needs to have the benefit of any necessary planning permission; and
3. the price or rent to be paid is a fair one considering similar properties in the market place; and

4. the charity can either fund the acquisition itself or has obtained a loan on the best borrowing terms available.

## Surveyors Report

The Charity Commission strongly recommend that the trustees obtain a report from a qualified surveyor acting exclusively for the trustees prior to acquiring any land.

This report should confirm that the property is suitable for the intended purpose and recommend the price and any other terms as being in the best interests of the charity concerned.

## Order Of The Charity Commission

It is not usual for an order of the Charity Commission to be required before acquiring land. The main occasions when such an order will be necessary is if the charity:-

- a) wishes to buy land without the power to do so; or
- b) is buying land from a trustee or another connected person; or
- c) is using money which represents a permanent endowment to acquire land other than freehold land

### TOP TIP 1

Ensure the trustees have taken all reasonable steps in acquiring the property

## TOP TIP 2

Secure an independent surveyors' report recommending that the acquisition is in the best interests of the charity.

## TOP TIP 3

If the circumstances require, apply and obtain an order of the Charity Commission prior to the acquisition

## Practical Issues Of Land Assembly

Regardless of whether or not site is being acquired by a charity there are certain practical issues of land assembly which will affect all such property transactions. I will be considering the Wales Millennium Centre as a case study with this in mind.

Any buyer has to investigate the title to a property to ensure the seller is able to transfer the property to the buyer with good title.

Title to the WMC site was fraught with problems mainly due to the myriad of landowners' interest in the site. When the footprint for the site was finally decided upon it became apparent that the majority of the site was owned by Grosvenor Waterside Investments Limited with the residue vesting in the County Council of the City and County of Cardiff and the WDA. Following extensive negotiations there was a series of transfers leading to the freehold of the site vesting in the National Assembly for Wales with the exception of one section which was the Council's title to the Butetown tunnel and which for practical reasons is to remain with Cardiff Council. The National Assembly for Wales was granted a lease over this part of the site and subsequently the National Assembly for Wales was able to grant an underlease of this area to WMC and lease of the main part of the site to WMC.

The Millennium Stadium is another good example of a capital project where various landowners' interests had to be rationalised and reorganised prior to a suitable interest in the site being established which was capable of transfer to the end user. The majority of capital projects may not give rise to land assembly issues of this level of complexity but it is important to bear in mind the potential costs and time implications of getting to a point where a seller can transfer the site with good title.

#### TOP TIP 4

Does the seller have good title to the site? If not consider what the time and cost implications will be of assembling the land in order that it can be appropriately transferred with good title.

When establishing if good title can be obtained a charity also needs to consider what additional rights if any will be required to ensure it can use the site for the purpose intended. For example, with the WMC site various rights needed to be put in place to enable the construction servicing and maintenance and use of the Centre. Some of these rights were temporary and expired on completion of the construction, others were permanent. The site adjoins Pierhead Street at a point where it is unadopted and therefore special rights for drainage and access had to be negotiated. The access issue in particular was complicated by the National Assembly for Wales needing to ensure it reserved sufficient rights for access for its construction vehicles to the assembly building.

As the WMC building was extended to the perimeter of the site additional rights to erect hoarding and scaffolding together with rights over adjoining land for tower crane oversailing and turning circles for lorries delivering construction materials all had to be separately negotiated. Another concern for WMC was to try to ensure an ability to restrict the use of the area of public space leading to the main entrance to the Centre so that it wouldn't be used in a manner which would detract from the amenity of this area. An agreement was reached with the Council to ensure the interests of WMC were balanced with the Council's need to use the Oval Basin for various entertainment and ancillary activities.

## TOP TIP 5

Consider what ancillary rights may be needed to facilitate construction and to ensure adequate ongoing maintenance, access and servicing of the site?

Once the title and ancillary rights issues have been settled the transfer to the charity needs to be documented in accordance with relevant statutory requirements. Under the Charities Act 1993 Section 37 all agreements for the purchase lease or other disposition of land in favour of a charity and all transfers, leases and other instruments giving effect to such dispositions must state;

- a) that the land will as a result of the disposition be held by or in trust for a charity;
- b) whether the charity is an exempt charity or a non-exempt charity; and
- c) if it is not an exempt charity that the restrictions imposed by the Charities Act 1993 Section 36 will apply to the land

## TOP TIP 6

Ensure all statements required under the Charities Act 1993 are correctly incorporated in the legal documentation evidencing the acquisition

## Funding

Huw has examined in some detail the terms and conditions imposed by funding agreements. Most funding agreements will require a charity to provide security in the form of a charge or mortgage over the land. A mortgage or legal charge over charity land must be sanctioned by an order of the court or of the Charity Commission unless it is a mortgage by way of securing the repayment of a loan where the charity trustees have obtained and considered proper advice by a person who is reasonably believed to be qualified by the ability in practical experience of financial matters and who has no financial interest in the making of the loan in question. The advice must be given in writing and cover the following matters:-

- a) whether the proposed loan is necessary in order for the charity trustees to be able to pursue the particular course of action in connection with which the loan is sought by them; and
- b) whether the terms of the proposed loan are reasonable and in regard to the status of the charity as the prospective borrower; and
- c) the ability of the charity to repay on those terms the sum borrowed

The trustees must certify both that they have obtained and considered such advice and that they have power under the trust or the charity to grant the mortgage. If there is any doubt in a particular case as to the propriety of exercising the powers of mortgaging trustees may seek the sanction of the Charity Commission to the proposed transaction.

As with the deeds relating to other land transactions mortgage deeds must contain certain statements and certificates and it is the responsibility of the trustees solicitor to ensure the necessary statement certificates are included in the deed in the correct form.

## TOP TIP 7

Either obtain an order of the Charity Commission if this is necessary prior to entering into mortgage, or obtain advice on the mortgage in accordance with Section 38 of the Charities Act 1993.

## TOP TIP 8

Ensure the legal charge or mortgage contains the correct charity statements and certificates.

## Disposals

In this context disposal of land incorporates not only sales but leases, grants of rights of way, exchanges of land and all other transactions in which the trustees part with or grant an interest in their land excluding the grant of a mortgage.

Trustees must consider four issues prior to disposing of land belonging to their charity:-

### 1. Do they have the power to dispose of the land?

Trustees need to establish whether they have the power of sale in their governing documents. If such a power exists then any conditions attaching to that power must be satisfied. For example, if the governing document states a public meeting should be held before land is disposed of then this needs to be arranged by the trustees.

In the event that the governing document does not contain a power of disposal then the trustees may either rely on the powers contained in Section 61 of the Trust of Land and Appointment of Trustees Act 1996, or alternatively approach the Charity Commission for a Scheme to be set up.

An order from the Charity Commission may be required prior to disposal if the land forms part of the permanent endowment of the charity. Two exceptions are where it is proposed to purchase replacement property to be used for the purpose of the charity or where the land sold was used to produce an investment income in which case the proceeds can normally be used to purchase investments designed to generate income. If the investment would however be permanent endowment it must be retained.

## **2. Secondly will the disposal be beneficial to the charity?**

For example, if the trustees are disposing of land which is let for an income they must be satisfied the sale of the land is more beneficial than the retention of the land. Trustees may need to seek professional advice on comparing the income which would be generated if it was retained rather than disposed off and the sale proceeds invested.

If the trustees are considering granting a lease or tenancy they need to take into account the effect it will have on the current and future use and value of the land and also the terms of the lease.

In the case of Wales Millennium Centre on acquiring the land it subsequently disposed of part of its interest via agreements for leases to Welsh National Opera, Urdd and a number of other resident arts organisations. In addition, it has disposed of part of its interest in the centre via lease arrangements to retail users. The combination of these disposals ensure that the Centre is used not only for performing arts but is serviced by appropriate restaurants, bar and gift shops thereby securing an income and satisfying its charitable objects. Trustees need to be able to justify any particular disposal by showing why it is in the interest of the charity both now and in the future.

**3. The third consideration for trustees are whether the terms are the best that can be obtained for the charity.**

This means trustees must seek professional advice on the timing and manner of disposal, ensure the land is marketed in a way which encourages the most offers and, unless there are special factors, accept the best financial offer.

**4. Finally, trustees must consider if the Charity Commission consent is needed for the disposal.**

Usually if trustees follow the statutory requirements contained in Sections 36 – 40 of the Charities Act 1993 they will not need to obtain Charity Commission consent. Charity Commission will give the consent for a disposal where the trustees are unable to follow the statutory requirements. The Charity Commission consent is normally required if disposal is to

- a) a connected person; or
- b) the surveyor was unable to recommend the terms of transaction; or
- c) the trustees do not wish to use a surveyor or the surveyor the trustees used was not qualified as set out in the 1993 Charities Act.

## TOP TIP 9

Ensure the trustees have the power to dispose of the land, the disposal is beneficial to the charity and are on the best terms that can be obtained and consider whether or not the Charity Commission consent is needed.

## Statutory Requirements

Statutory requirements do not need to be followed where there is an express authority for the disposal contained in the statutory act or instrument or Scheme of the court or Charity Commission.

In all other situations the nature of the statutory requirements will depend on the type of disposal. In the case of the lease for seven years or less where the charity receives no premium, Charity Commission consent will not be required if the trustees have obtained the advice of a person they reasonably believe to have the ability and experience to advise them competently on the granting of the lease and the trustees have satisfied themselves that the terms of the lease are the best that can be reasonably obtained and the land is leased to someone who is not a connected person.

For all other transactions including leases for more than seven years, leases or premiums, freehold sales, rights and options, an order for the court or the Charity Commission is not needed provided the trustees have complied with the four requirements set out in the Section 36 of the 1993 Act

- a) to obtain a considered report from a qualified surveyor instructed by the trustees and acting exclusively for the charity; and
- b) advertised the property in accordance with the surveyors' advice; and
- c) trustees have considered the surveyor's report and satisfied themselves that the terms of the disposals are the best that can be reasonably obtained and
- d) the person to whom the trustees are selling are otherwise disposing of the land is not a connected person

## TOP TIP 10

To obtain Charity Commission consent to a disposal unless trustees can satisfy the statutory requirements relating to the relevant disposals.

## Summary

In summary, when considering the property aspects of a capital project it is important to break the project down into stages. In considering the acquisition of the site it is important to think outside the box and not only consider the title and the use of the property, but what ancillary rights if any which will be required and the time and cost it will take to obtain these. For all acquisitions, mortgages and disposals it is important to obtain where necessary professional advice and surveyor's reports, orders of the charity commission and to ensure the legal documentation contains the necessary charity certificates and statements.

This briefing note is intended solely as an overview of the law. It was last updated on 27 April 2006. No responsibility can be accepted for the completeness or accuracy of this briefing note and professional advice should be taken in relation to any specific problems.

For further information please contact Caroline Campbell at our Cardiff office on (029) 2023 8239.