

Taking the power back

Zahra Kanani considers the results of a recent consultation over disposal of land by charity trustees



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Charity trustees can generally rely on the power contained in the Trusts of Land and Appointment of Trustees Act 1996 (known as the 'statutory power') to dispose of a charity's land. The term 'disposition' is wide and includes, *inter alia*, a sale, transfer or conveyance of freehold land and the grant of a lease for more than seven years. Use of the statutory power is dependent on the trustees:

- exercising the power in a way that is compatible with the trusts of the charity;
- complying with the requirements of s36 of the Charities Act 1993 (the 1993 Act); and
- complying with the standard of care set out in the Trustee Act 2000.

Charities may have wider powers written into their governing document that they can rely on. Charitable companies will almost always have a power of disposal in their memorandum and articles of association. This will usually be in the form of an explicit power or may be inferred from the 'sweeping up' power, which permits the exercise of any other powers that further the objects of the charity.

This article will concentrate on the restrictions on dispositions of charity land imposed by s36 of the 1993 Act, in particular the provision set out in s36(4) that requires trustees to obtain a written report from a professional adviser who is a 'qualified surveyor' within the meaning set out in the 1993 Act.

The general position

The general position, as set out in s36(1) of the 1993 Act is that

no land held by or in trust for a charity shall be conveyed, transferred, leased or otherwise disposed of without an order of the court or of the (Charity) Commission.

This is qualified by s36(2), which stipulates that, as long as such a disposition does not involve a 'connected person' or a trustee or nominee of a 'connected person', and provided further that the requirements of either ss36(3) or 36(5) are met, there will be no need to obtain an order of the court or the Charity Commission.

The definition of a 'connected person' is found in Schedule 5 to the 1993 Act and includes trustees and donors and their immediate family members, as well as officers, agents or employees of the charity, and corporate bodies in which such persons have a substantial interest.

Section 36(3) applies to the majority of dispositions which charity trustees may wish to enter into and provides that, prior to entering into an agreement for the disposition in question, the charity trustees must obtain advice from a qualified surveyor. This is considered further below. Section 36(5) applies to disposals by way of lease for less than seven years or where no fine or premium is paid to the charity (the 'light touch' approach).

The 'light touch' approach

The statutory requirements for entering into a lease for less than seven years or where no fine or premium is paid to the charity are less demanding than those which will be discussed below. The trustees will usually be able to complete such a transaction without an order from the court or Charity Commission unless the transaction involves a connected person.

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For such a disposition, under the requirements imposed by s36(5) of the Act, the charity trustees must, prior to entering into an agreement for lease:

- (a) obtain and consider a report from someone who has the requisite ability and practical experience to provide them with competent advice on the proposed disposition; and
- (b) decide that they are satisfied, having considered that person's advice, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.

The 1993 Act does not stipulate who can provide such advice, although the Charity Commission's guidance CC28 recommends that a person who is a member of a professional body such as the Royal Institution of Chartered Surveyors, the Architects' and Surveyors' Institute or the Institute of Revenues, Rating and Valuation be instructed to provide such advice. The guidance points out that there is no objection to one of the trustees or a suitably qualified employee of the charity acting as the adviser. However, although the trustees are free to choose their adviser, they must be able and prepared to justify their decision if it is subject to challenge.

It is worth noting that if one of the trustees is asked to give advice, they are not entitled to be paid for providing such advice unless there is a power such as a professional charging clause in the governing document or unless the conditions in s73A of the 1993 Act are met.

Other dispositions

For a sale, transfer or conveyance of freehold land, a lease for more than seven years, a lease for less than seven years where a premium or other fine is paid to the charity and other disposals of an interest in land, the charity trustees can complete such disposals without the need for an order of the court or Charity Commission (unless the transaction involves a connected person) provided that s36(3) is complied with.

Section 36(3) stipulates that before entering into any agreement for sale or lease or any other disposition, the charity trustees must:

- (a) obtain and consider a written report on the proposed disposition from a qualified surveyor instructed by the trustees and acting exclusively for the charity;
- (b) advertise the disposal for such period and in such manner as

report, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity.

The surveyor's report must conform to the requirements set out in the Charities (Qualified Surveyors' Reports) Regulations 1992.

Section 36(4) defines a 'qualified surveyor' as a fellow or professional associate of the Royal Institution of Chartered Surveyors or of the

The charity trustees must reasonably believe that the surveyor has the ability to and experience of valuing the type of land in the particular area in question.

the surveyor has advised in their report (unless they have advised it would not be in the best interests of the charity to advertise the disposition); and

- (c) decide that they are satisfied, having considered the surveyor's

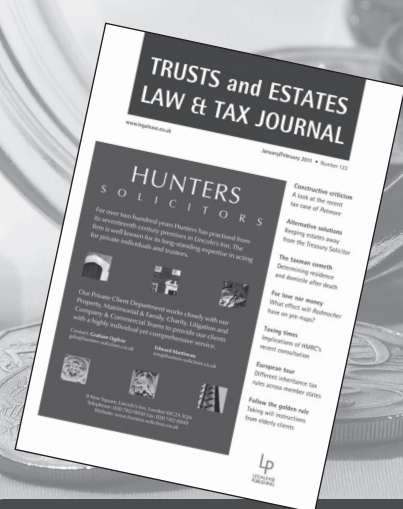
Incorporated Society of Valuers and Auctioneers. Further, the charity trustees must reasonably believe that the surveyor has the ability to, and experience of, valuing the type of land in the particular area in question. This requirement is explained in more detail in the Charity Commission's guidance

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CC28, which states that the qualified surveyor must:

- (a) have considerable experience of the property market in the town or district where the land is situated;
- (b) be familiar with the factors which affect the value of the type of land (for example, agricultural,

definition to include Fellows of the National Association of Estate Agents (FNAEAs) or leave it unchanged. The consultation period ran from 7 March to 7 June 2010. The consultation document proposed that allowing charity trustees to obtain reports from FNAEAs (in relation to disposals of commercial and residential properties) would be a useful simplification of the

When selling their home, most people rely on estate agents to value, market and negotiate the sale of the property rather than seeking out someone who meets the current s36(4) definition.

freehold or leasehold, residential, light industrial etc) within the market; and

- (c) know which methods of marketing and disposal are most likely to succeed in the market of that type of land.

Section 36(4)(a) allows the definition of ‘qualified surveyor’ to be amended by regulations made by statutory instrument.

Extension of the definition of ‘qualified surveyor’ for the purposes of s36(4)

In 2005, the Better Regulation Task Force Report ‘Better Regulation for Civil Society’ suggested that the s36(4) definition of ‘qualified surveyor’ was too narrow and recommended extending it. It was argued that the s36(4) requirements do not allow trustees to take into consideration the experience and qualifications of the professional adviser in a way that is proportionate to the nature and type of disposal. The example quoted in the consultation document is that when selling their home, most people rely on estate agents to value, market and negotiate the sale of the property rather than seeking out someone who meets the current s36(4) definition.

Consequently, the Cabinet Office, which is responsible for the legal and regulatory framework for charities in England and Wales, consulted to help decide whether to extend the s36(4)

requirement, and in many cases, would increase the choice available to trustees about who they could consult and would consequently make it quicker, easier and often less expensive for trustees to obtain the information they need in order for them to make decisions about disposals and follow the statutory procedure.

Summary of responses received to the Cabinet Office consultation

In total, 25 responses were received by the Cabinet Office from professional bodies, charities, solicitors and property professionals. Sixteen of the recipients were in favour of extending the definition with nine against. While the majority of the respondents were in favour of extending the definition of ‘qualified surveyor’, five of those in favour of the change qualified their comments by saying that the extension should only apply to residential sales, as this is where estate agents’ real expertise lies. The Central Association of Agricultural Valuers further argued that people who hold their fellowship should be included in the definition because of their expertise in valuing agricultural land.

Some respondents were concerned that the proposals put too much responsibility on charity trustees when choosing a ‘qualified surveyor’. However, the government responded by comparing this to the trustees’ duty of care when choosing an investment adviser under the Trustee Act 2000.

Conclusion and next steps

As a result of the consultation, the government has concluded that the current definition of ‘qualified surveyor’ is not proportionate and should be extended to include FNAEAs. Further, the government is of the opinion that the proposal will reduce the costs of obtaining reports for charities, even if the saving only applies to residential property. It is believed that the extension of the definition will increase the pool of professional advice available to charity trustees and consequently increase competition for this kind of work. It is thought that it will also improve the proportionality of the requirement by increasing the ability of charities to match the type of sale to a qualified surveyor who is appropriately experienced to advise them.

The consultation also invited respondents to make more general comments and many took the opportunity to explain their concerns about the general lack of proportionality that applies to the regulation of charity land disposals. The Charity Law Association specifically commented on the fact that the term ‘disposition’ is not defined, therefore causing confusion. The Charity Law Association also noted that, while the granting of a lease for a period of seven years or less benefits from the ‘light touch’ approach, the same does not apply to the surrender of such a lease. However, unlike the extension of the s36(4) definition, these changes cannot be made by a straightforward statutory instrument and must be made by either an Act of Parliament, or possibly a Legislative Reform Order.

In light of the responses received and comments made, the government has decided that the regulation of sales and other disposals of charity land should be considered as part of the review of the operation of the Charities Act 2006, which, under its provisions, must begin in 2011. The review will consider the wider issues raised by the respondents to the consultation and recommend how best to revise the regulation of sales and other disposals of charity land, including the extension of the s36(4) definition of qualified surveyor. ■