

Report on Arthur Nicholson Recreation Ground Registered Charity No. 278976

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Background

The Arthur Nicholson Recreation Ground is a trust of land governed by a trust deed dated 3 August 1929 and registered with the Charity Commission. It was established by Major Nicholson of Bidborough Hall when he donated the land to the Parish Council in memory of his son. It is registered at the Charity Commission with charity number 278976. Bidborough Parish Council are noted on the Commission records as the trustees of the charity.

The objects of the charity centre around the use of the recreation ground for the parishioners of Bidborough for outdoor sports and recreation with a particular focus on cricket. The Objects state that the land is a recreation ground for the inhabitants of the Parish of Bidborough and especially for cricket so that this national game may be always in the forefront of the village sports and recreation and also for all other outdoor sports, outdoor recreations and outdoor entertainments as may be found expedient for the benefit of the inhabitants without distinction of age, sex or of political or other opinions.

The BSA is registered with the Charity Commission (registration number 287245) and its governing documents are a Constitution adopted 26 May 1983 as amended 9 June 2005. Its charitable objects are the promotion of community participation in healthy recreation in particular by the provision of facilities for the playing of sports in the parish of Bidborough.

Key provisions clauses of the Trust Deed

I have reviewed the trust deed and will highlight the key clauses of the document and give a brief explanation of their significance:

Clause 1: The objects clause in clause 1 describes and set out the purpose of the charity. The purposes must be adhered in order for the charity to justify that they are charitable to the Charity Commission and as a result be eligible for tax relief.

Clause 3: This clause sets out that a Committee of Management shall manage and control the recreation ground and should be made up of 6 members; 3 members from the Council and 3 members nominated by the local cricket club, the Stool Hall Club and tennis club. The charity is legally required to comply with the governing document and should therefore ensure this Committee is in place to manage the recreation ground.

Clause 4: This sets out that two Committee members shall change each year in rotation.

Clause 9: This clause gives power to the Committee so that they may make certain changes in relation to the terms for which the recreation ground is used and sums received in relation to this use.

Clause 12: This clause states the Council is responsible for the maintenance of the land to the standard that is necessary to fulfil its purpose; the use of recreation for outdoor activities.

We have previously advised on the Arthur Nicholson Recreation Ground Trust (the Charity) and this Report is an extension to that advice. This Report follows on from our meeting with the Clerk to Bidborough Parish Council (the Parish Council).

Current issues

1. The lease – can Bidborough Sports Association (BSA) build on leased land and the extent of the land leased.
2. Consideration of the Management Committee.
3. How best to run the Charity.
4. Specific queries about funding and housing of play equipment.

1. Property and lease

The land within the trust is registered at the Land Registry with title number K934559 and is described as the freehold land edged in red being The Arthur Nicolson Recreation Ground, Spring Lane, Bidborough, Tunbridge Wells. The Proprietor is stated as being The Bidborough Parish Council care of The Clerk to the Council as trustees of charity.

The Title shows a lease from 17.01.2017 to 03.08.2115. There is a restriction against any disposition to which section 117-121 or section 124 of the Charities Act 2011 applies unless the instrument contains a certificate complying with section 122(3) (a statement certifying that the charity trustees have the necessary power to dispose of the property and that they have complied with sections 117 to 121) or section 125(2) of that Act.

In our previous Report, we noted there may be issues with the lease but as we had not had sight of it we were unable to comment further. We have now seen various documentation relating to this including a Charity Commission Scheme sealed 20 August 1982 giving permission to grant a confirmatory lease to the trustees of the BSA on the terms of a previous lease dated 16 May 1980. We have also had sight of a lease dated 4 November 2002 from Bidborough Parish Council to the BSA for a term of 25 years expiring on 3 November 2027 for £1 per annum. The leased premises includes the Cruikshank sports pavilion and the bowls pavilion, bowling green and tennis court within the recreation ground. There is a further lease dated 17 January 2017 between Bidborough Parish Council and the trustees of the BSA expiring on 3 August 2115.

A question has been asked as to whether the BSA can build on the land they have leased. We can, if necessary, seek further assistance from our property teams; however, on the face of it, we would suggest it is possible for the BSA to build on the leased land. However, this would need to be subject to the terms of the lease and would be in relation only to the leased land, and this would also be subject to any planning permissions. If the BSA wish to build on land, they should seek approval from the landlord, the Parish Council as the Corporate Trustee of the Charity. If the BSA were to build without appropriate approval, they could then be liable to remove any unapproved structures and pay damages.

2. Management Committee

Clause 3 of the Trust Deed sets out that the general management and control of the Trust premises and the arrangements of their use shall be in the Council (in their role as trustees) and states that they shall appoint a Committee of Management to manage and control the recreation ground. This should consist of 6 members, defined as 'the Committee'. This is to be composed of 3 members from the Council and 3 members nominated by the local cricket club, the Stool Hall Club and Tennis Club.

Clause 7 of the Deed confirms that if any of the clubs cease to exist, or if there are no clubs from which persons are willing to serve, the Council shall then decide in what way if at all the vacancy or vacancies shall be filled.

You have confirmed that the Management Committee has not been in existence for some 20 years. The Trust requires the Committee to be made up of representatives from various local clubs, some of which are no longer in existence.

In an email from the Charity Commission dated 14 April 2021, they refer to the Committee of Management highlighted in clause 3 of the trust deed and note that this is no longer in place. You told me it is unclear why this Committee of Management was abolished and whether this was done validly or not through a change to the charity's governing document (and we have no record of that change).

If a valid change has not been made, the Committee of Management should be reinstated to legally comply with the governing document. It may be possible for the trustees to resolve at a trustee minute to change this, but it would need to be agreed and minuted.

3. Separation of the Parish Council from the Trustees

Parish councils can be trustees of Charity land and assets. Such charities can be the cause of confusion for Parish Councillors; firstly because of the failure to identify property held by them as charitable; secondly, because the Council might be holding property as the sole trustee or as custodian and be the appointor of managing trustees; and thirdly, because of the potential conflicts of loyalty around discharging the functions of the Parish Council and the fiduciary duties of charity trustees.

In your case, the same individuals as are appointed as Parish Councillors as the trustees of the Charity. This means the Parish Councillors are the mechanism that the Charity Trustees (the Parish Council) uses to carry out its decisions. The Parish Council is the body corporate which is the sole trustee of the Charity, and the individual persons who, from time to time, handle the management of the corporate body are not themselves trustees of the charity. The duties, responsibilities and liabilities of trusteeship lie with the corporate body, the Parish Council. That body must act through individual persons to express its will. If the body corporate commits a breach of its duty as a trustee, it will have done so only because of a breach by its individual officers of their duties towards the body corporate. They cannot be held liable directly by the Charity, but they may be held liable to the corporate body for any liability it has incurred in respect of the Charity. For this reason, it is important that the officers of corporate trustees that they should familiarise themselves with the terms of the Charity's governing document and prescribed legal procedures.

In order to limit the issues caused by the two distinct roles being blurred, we recommend a clear separation of the role of trustee of the Charity from that of their position as Parish Councillors. As the individuals making up the Parish Council and the Charity are one and the same, to avoid conflict of interests it is advisable to keep the two bodies as separate as possible in their activities and decision-making.

The Parish Council and the trustees of the Charity have the same aims, in that they wish to provide the facilities to those in the area which they serve. The Parish Council is not itself charitable, but the purpose of the Charity must be compatible with the aims of the Parish Council. In practice, the Parish Council and the Charity have similar aims, in that they want to provide facilities that enhance and improve the wellbeing of those in the Parish.

The accounts and finances of the Parish Council and of the Charity should be kept separately. The inherent danger is that when doing anything that affects the Charity and its assets, the Parish Council must act only in the Charity's best interest to further the aims of the Charity. The Parish Council may wish to sell the playing field for development, for example, but the Charity's aims are to provide a playing field, and selling this for development would not be acting in the best interests of the Charity or furthering its aims. The corporate body should make sure it keeps up to date with the roles and responsibilities of trusteeship by regularly reviewing the Charity Commission Essential Trustee Guidance. The assets of the Charity must be administered separately from the Parish Council corporate body because the Charity is an entirely separate entity from the corporate body.

The funding for the Parish Council, the annual precept, is allocated by the district council and is taken from the area's council tax. At present, the Charity receives limited funds as there is a peppercorn rent for the lease to the BSA and receives no other funding.

The Charity's financial records on the Charity Commission website show no income and no expenditure. Going forward, we suggest the proper way of dealing with day to day management of the Charity's assets, the land and bank accounts, should be dealt with separately from the decisions of the Parish Council. For example for grass cutting or the costs of maintenance of the play area, the Parish Council should donate money to the Charity as required and then the Charity should arrange and pay for that work. The assets should be accounted for separately and income and expenditure should be channelled through discrete cost centres. The Parish Council can top up the finances of the Charity but no funds should pass from the Charity to the Parish Council, other than any costs of administration which are recoverable.

This keeps a clear separation of funds and responsibilities. This will also enable the Charity to achieve further funding through grants and fundraising achieving the most efficient and proper way of dealing with the day to day management of the Charity's assets.

Similarly, meetings of the trustees of the Charity should be separate from the Parish Council meetings and should be minuted as such.

It is not clear at present how the insurance for the Charity's land is dealt with, but it is presumed that the leased land is dealt with by the BSA and the remaining Charity land by the Parish Council. Again, it would be advisable for the Parish Council to donate funds to the Charity and the Charity to take out and pay for the appropriate insurance if possible.

It may be possible to achieve complete separation if the Parish Council were to retire as trustee of the Charity, but this would require Charity Commission approval by way of a Scheme. This could be considered as an option if the current situation became unworkable.

4. Specific queries about funding and housing of play equipment

We have also been asked to give opinion on the following queries:

- 1 Could the Council purchase the equipment and get permission from the Trust to place it on its land remaining the owner and taking responsibility for its maintenance
- 2 Could the Council purchase the equipment and present it to the Trust and seek repayment from them over a 10/15/20 year period
- 3 Give them a loan which would need to be repaid over a 10/15/20 year period, though this is really no different to 2.

We understand that you are seeking advice on these questions as the Parish Council could be limited in the amount of money it can give the Charity as it would be defined as a donation to a Charity and therefore it is restricted.

Our understanding is that Section 137(1) of the Local Government Act 1972 is the relevant statute giving powers to the Parish Council to make donations. This states:

Power of local authorities to incur expenditure for certain purposes not otherwise authorised.
(1)

A local authority may, subject to the provisions of this section, incur expenditure which in their opinion is in the interests of, and will bring direct benefit to, their area or any part of it or all or some of its inhabitants, but a local authority shall not, by virtue of this subsection, incur any expenditure—

(a)

for a purpose for which they are, either unconditionally or subject to any limitation or to the satisfaction of any condition, authorised or required to make any payment by or by virtue of any other enactment; nor

(b)

unless the direct benefit accruing to their area or any part of it or to all or some of the inhabitants of their area will be commensurate with the expenditure to be incurred.

As well as considering the powers of the Parish Council to make a loan or donation, the questions you raise require consideration of the transaction from the viewpoint of the Charity.

For your questions numbered 2 and 3, the Charity would need to consider whether it has the power to borrow. Most charities' governing documents will include an express power to borrow and if there is no such power then there may be power to rectify this if there is a power of amendment or a "catch all" provision allowing the charity to carry out what is needed to further the purposes of the charity. It may also be possible for the Charities Act 2011 to be used to include a power to borrow (provided that such amendment is not expressly prohibited under the constitutional document). If it is possible for the Charity to borrow, the Charity will then need to consider whether taking a loan is in the best interest of the Charity, whether it can raise the funds in a more preferable way and whether the repayment terms are reasonable and can be met.

As to whether the Parish Council can purchase and own the equipment and then the Charity allow it to be placed on Charity land, with the Charity being responsible for its maintenance, this would require us to consider a number of issues and would require further consideration. One immediate concern would be that any conflict of interest would need to be avoided between the Parish Council as the trustee of the Charity and the Parish Council in their civil duty. Trustees have a legal duty to act only in the best interests of their charity. They must avoid putting themselves in a position where their duty to their charity conflicts with their personal interests or duty to another person or body.

We can undertake further research on this issue if you are happy for us to do so. Our initial advice is that the simplest routes would be for the playground equipment to be owned by the Parish Council and placed on the charity land. Another way of doing this may be for the charity to take donations from the Parish Council over a period of time (so that the Parish Council does not breach its annual limits) and save up the money to buy the equipment required or raise surplus funds required by other fundraising and grants in order to purchase and own the equipment itself.

Summary of recommendations

In order to achieve separation, and give better clarity to the differentiation between the two entities, that of Parish Council and that of Charity Trustee, we recommend:

- The reinstatement of Management Committee;
- Ensure there are clear guidelines for officers and councillors about their roles, responsibilities and decision-making in the administration of the Charity;
- Ensure you have clear processes for identifying and managing conflicts of interests arising and put in place a process for making independent decisions for the charity when those conflicts arise;
- Ensure any charitable assets, such as land or bank account, for the Charity are managed independently from the accounts of the Parish Council and the Charity and keep spending separate;
- keep trustee meetings separate from Parish Council meetings;

- have a clear distinction between decision-making for the day to day running of the Charity from the Parish Council decision-making; and
- periodically review whether it continues to be in the best interest of the Charity for the Parish Council to remain as trustee of the Charity.