



Barham Park Trust Committee
28 January 2015

**Report from the Strategic Director,
Environment and Neighbourhoods and the
Director of Legal and Procurement**

For Action

Wards Affected: Sudbury

**The Future of Barham Park Trust – Alternative Models of
Governance**

1.0 Summary

- 1.1 Following the report that was presented to members of the Barham Park Trust Committee on 15 October 2014 and after obtaining specialist legal advice, this report sets out for consideration alternative models in relation to the future governance and management of the Barham Park Trust.
- 1.2 There are five options and officers recommend that Members decide to continue with the current management and governance arrangements regarding the Barham Park Trust. Officers are recommending that Members agree to the first option of continuing with the current governance arrangements. However, this is a recommendation from officers and it is up to Members to decide which option to choose and how they wish to proceed. If Members wish to choose one of the other four options, this will need to be referred to the full Cabinet for a final decision.

2.0 Recommendations

- 2.1 That Members choose option 1 as set out in paragraphs 3.8 and 3.9 of this report to continue the current governance and management arrangements for the Barham Park Trust.

3.0 Detail

Background

- 3.1 The land (which includes various buildings) known as Barham Park was given by George Titus Barham on trust to the Council in 1938. The terms of the trust are 'to preserve the same for the recreation of the public in such manner and subject to such regulations in all respects as the Council may from time to time think proper'. It was registered with the Charity Commission in June 1963 and is regulated by that body.

- 3.2 The land is held by the Council on trust and accordingly can only be used in furtherance of its stated charitable purpose. In making decisions about the trust property and finances, the Council must act in the best interests of the trust and must be mindful of any conflict of interest.
- 3.3 Until 2012, the Executive made decisions about the Trust in its ordinary executive meetings. It was made apparent from the content of those reports that the decisions were in relation to the Trust. In 2012, it was decided to create a more apparent and defined separation of roles and the Executive established a sub committee, the Barham Park Trust Committee, to deal with decisions regarding the Trust land, property and finances. Over the past two years decisions have been made in accordance with the governance arrangements set out in that report and separate accounting systems have been established.
- 3.4 While the current arrangements provide a significant improvement on the previous position, the Council as trustee has a responsibility to periodically consider whether the current arrangements best serve the charitable purposes and whether alternative arrangements should be explored.
- 3.5 At the meeting of the Barham Park Trust Committee on 15th October 2014, a decision was taken to obtain independent expert trust law advice in this regard.
- 3.6 Brent Legal Services obtained advice from Bircham Dyson Bell, which specialises in the law of trusts and charities, regarding the options and alternative models regarding the management of the Barham Park Trust and the advantages and disadvantages of those respective options. In addition to the advice on the law of trusts and charities, further specialist advice on local government law was obtained from Nigel Giffin QC.
- 3.7 The five options which Bircham Dyson Bell have proposed regarding the future governance of the Barham Park Trust and they are set out below. For all five options, the Council would still have powers to make byelaws in respect of Barham Park.

Option 1 – Maintain the status quo

- 3.8 There are a number of advantages with this option. The functions regarding the management of the Barham Park Trust have been properly and lawfully delegated to the Barham Park Trust Committee. This option is perhaps the least likely to affect the longer-term financial stability of the Trust, since any annual subsidy from the Council would continue to be justifiable on the basis that the Council is the legal owner of the land. There would be less need to rely on outside sources of funding and the arrangements would be much easier to review than would be the case were the land to be transferred to another legal entity. This option would also allow flexibility as the Council currently has very broad powers regarding the running of Barham Park, which would not necessarily be possible under an alternative structure. This option provides the greatest scope for the involvement of the local community as meetings of the Barham Park Trust Committee are held in public and members of the community have been accustomed to being consulted on decisions that might have an impact on Barham Park or the way it might be used.
- 3.9 One disadvantage with this option is that the Council continuing to meet the various costs of running the Barham Park Trust, including the grounds maintenance costs, the day to day management costs for the Park and the buildings and the cost of

providing the advice of the Council's in-house legal team and other experts in advising the Barham Park Trust Committee. However, it does mean that the Council has control over the subsidy it gives to the Barham Park Trust. One concern is the potential for conflicts of interest between acting in the best interests of the Council and that Barham Park Trust, which do not arise often. However, such concerns can only be eliminated totally if the Council gives up all direct or indirect involvement with the administration of Barham Park.

Option 2 – Appoint additional trustees alongside the Council

- 3.10 This option involves appointing additional trustees to act alongside the Council in the governance and management of Barham Park. This option reduces the potential for conflicts of interest that might arise between the Council and the Barham Park Trust and helps to avoid any perception of bias. Another advantage of having independent trustees is that this would allow individuals to be selected on the basis of their particular skills or expertise and bring new perspectives in the management of the Barham Park Trust.
- 3.11 There are some significant disadvantages with this option. This option will inevitably mean the Council relinquishing some control over the Barham Park Trust and its assets. It is possible that this could cast doubt over the financial stability of the Trust if it becomes more difficult in future for the Council to justify its continued financial support. Furthermore, as the Trust is not currently self-sufficient, unless alternative sources of funding were identified in advance, it may be difficult to justify this option as being in the best interests of the Trust and its beneficiaries.
- 3.12 Under the current legislation, only members of the Cabinet may be appointed to an Executive committee –in this case, the Barham Park Trust Committee - so additional trustees could not be appointed to that Cabinet sub-committee. Therefore, this option seems to entail two layers of decision-making - one internal to the Council about how it should act as trustee and one at trustee level, involving the Council's representative(s) alongside the other trustees. The difficulty of having additional trustees to act alongside, and in addition to the Council, is that this would provide an unwieldy and unsatisfactory structure which would be likely to cause confusion in the future.

Option 3 – Appoint a corporate trustee

- 3.13 This would involve the establishment of a new corporate entity (most likely a company limited by guarantee) with the specific object of supporting the Barham Park Trust. This entity would be appointed as sole trustee (hereafter referred to as "the Corporate Trustee") of the Trust in place of the Council, which would instead become the sole company member (rather like a sole shareholder) of the Corporate Trustee. In effect, the Corporate Trustee would be a wholly owned subsidiary of the Council which, in structural terms, would sit as an additional layer between the Council and the Barham Park Trust. This model is similar to the current arrangements involving Brent Housing Partnership, albeit that is a much larger organisation.
- 3.14 The Corporate Trustee's board of directors could include one or more Council representatives. If the majority of the directors were independent, this would significantly avoid conflicts of interest. The directors would act as agents or appointees of the Corporate Trustee and, as such, would have a shared responsibility for ensuring that the Corporate Trustee fulfilled its duties when

managing the Trust. The directors would therefore need to be aware of, and adhere to, the duties of a charity trustee when making decisions about the management of the Trust (as well as about the Corporate Trustee) but they would not themselves be charity trustees or become personally liable as such.

- 3.15 As sole member of the Corporate Trustee, the Council would retain overall control of the make-up of its board (as the Companies Act reserves certain fundamental rights to members, including a statutory right to remove directors from office). It would also be possible to reserve additional rights to the Council – such as the sole right to appoint directors, and the right to be consulted under certain circumstances – in its Articles of Association but this would not make the Council a charity trustee under the definition set out in the Charities Act 2011.
- 3.16 There are a number of advantages with this corporate trustee option. This option would enable a clear separation between the Council and the Trust, without loss of overall Council control. Liability for decisions affecting the Trust would rest with the Corporate Trustee, not its individual directors. Although it would retain control over the make-up of the board of directors (and hence the decision-makers), the Council itself would not be involved in the decision-making process, thereby avoiding conflicts of interest at Council level. As the Council would remain at the top of the group structure and therefore, in essence, the “owner”, there would be no reason for it to discontinue or vary its financial or other support of the Trust, as might be the case were Barham Park to be transferred to another body. In relation to providing financial support to the corporate trustee, the Council has the power to provide such support under its grant-making powers under section 164 of the Public Health Act 1875 (which confers a power to “support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever”) and section 1 of the Localism Act 2011 (known as the “general power of competence”).
- 3.17 There are some disadvantages with this option. One drawback is that this would create additional administration, especially the introduction of a new corporate entity into the structure. As a company, the Corporate Trustee would be required to file annual returns and accounts with Companies House, which would be the responsibility of its board of directors. In practice, however, these requirements are not onerous. The other concern is whether there may be sections of the local community which may not want control in the running of Barham Park and the Trust to be removed from the Council. Although it is possible for the Council to take back control of the Barham Park Trust and the running of Barham Park if the corporate trustee was in serious difficulties, this process of taking back control of the management of Barham Park would be expensive, administratively burdensome and could take a considerable period of time to complete and resolve. Another disadvantage is that this creates a complicated structure for what is a small trust.

Option 4 – Establish a new corporate charity to take on ownership and control of Barham Park

- 3.18 This option would be similar in many respects to that described in option 3 as set out above except that it would involve winding up the Trust and transferring all of its assets to a new corporate entity (either a company limited by guarantee or a charitable incorporated organisation). The new entity would, in effect, replace the existing charitable trust altogether.
- 3.19 As this option would involve the creation of a new charity (albeit with purposes identical to those of the Barham Park Trust), it would provide the opportunity to modernise the Trust documentation governing how the Park is to be run, while still

leaving room for the making of new or replacement regulations and bye-laws by the Council in the future. This option would also give rise to a number of the advantages associated with a corporate trustee – i.e. it would enable the appointment of independent directors, for example, and the Council could still retain overall control by becoming the sole corporate member.

- 3.20 The main disadvantage of this option would be the disappearance of the existing charitable trust, which might give rise to concerns among members of the local community that their voice would be lost and that their use of the Park would be adversely impacted in some way – even if this was not the intention in practice. These concerns might be greater if the decision was made to have an entirely independent board, without the presence of Council representatives, as the means by which the Council would nonetheless be able to exert control might not be appreciated. Equally, the local community might feel that a completely new charity was too far removed from the status quo, or not in keeping with Mr Barham's original wishes with regard to who should manage the Park. Also, as similar with option 3, this option would mean additional administration and cost in setting up a new corporate charity and this would also create a complicated structure from what is a small trust.
- 3.21 Equally, from the Council's perspective, this arrangement might have the appearance of being rather more at arm's length than at present, which may make the Council's continued financial support of the charity more difficult to justify in the longer term – particularly if, in practice, the charity was seen to be operating efficiently with little or no Council oversight or intervention. Were the charity to become too independent of the Council, it might risk losing its subsidy which, in the absence of alternative income streams, would not be in the Trust's best interests. One concern is that the Council's powers to take back full control of Barham Park if the new corporate charity ran into difficulties would be more limited than options 1 and 2 above and even more difficult and cumbersome than option 3 above.

Option 5 – Outright transfer to another charity

- 3.22 It would be open to the Council to transfer the Trust in its entirety to another body (either pre-existing or newly created) with similar objects, completely severing its ties with Barham Park in the process. There is much to be said for this option from a pure charity law perspective, as the recipient charity would operate at a complete remove from local authority control, thereby removing the potential for conflicts of interest of the types described above. It is possible that an independent charity would be more successful in terms of fundraising than has perhaps been the case with the current Barham Park Trust. Corporate donors and high-net-worth individuals are often reluctant to donate to charities associated with public bodies, as there is a commonly held perception that the assets and activities of such charities are subject to state or local authority control. Were the charity transferred away from the Council altogether, this would no longer be a cause for concern.
- 3.23 As with option 4 above, however, there may be the potential for considerable resistance from the local community if this route was taken – not least because a completely independent charity might decide not to adopt the Council's practice of holding meetings in public and otherwise giving the local community the opportunity to be heard. One concern is that the Council would have no power to take back control of Barham Park if future serious difficulties arose after the Council transferred the Trust and its assets to another charity.

Timescales and Way Forward

- 3.24 With regard to options 3 to 5, it is difficult to give precise timescales for completion. A broad estimate is 6 to 12 months taking into account the Council's decision making processes and the work needed to set up a company, to set up a corporate trustee and/or to set up a charity. Furthermore, changing the governance arrangements of the Barham Park would require the agreement of the Charity Commission.
- 3.25 If Members are minded to choose option 1, this is a decision that can be made by the Barham Park Trust Committee to continue with the current governance arrangements. If Members are minded to pursue another option (ie any of options 2 to 5) regarding changing the future management and governance of the Barham Park Trust, this would need to be approved by the full Cabinet committee and Members of the Trust Committee would then be invited to recommend that their preferred option (which does not include keeping the status quo) is submitted to the Cabinet for consideration. It would be wise and advisable for the In this scenario, officers would recommend that the Cabinet should go out to consultation on a preferred option before making a final decision regarding changes to the Barham Park Trust's governance arrangements.

4.0 Financial Implications

- 4.1 Options which involve setting up a separate legal entity will require the advice and assistance of external solicitors and are therefore more costly in the short term than maintaining the status quo. Although the cost should be met from Trust funds, there is a shortfall between income and expenditure which is met by the Council.
- 4.2 The cost of the advice obtained from Bircham Dyson Bell will be met from the Barham Park Trust and the advice from external Counsel on the local government aspects will be met by the Council.
- 4.3 The treatment of VAT incurred in running and maintaining the park will need to be carefully considered in any change in the management of the Trust.

5.0 Legal Implications

- 5.1 These are set out in the body of the report.

6.0 Diversity Implications

- 6.1 There are no diversity implications.

7.0 Staffing/Accommodation Implications (if appropriate)

- 7.1 None are envisaged though at least three of the five options set out in section 3 of this report will involve considerable officer time which will be met from current staffing resources.

Background Papers

Report to Barham Park Trust Committee of 15 October 2014
Charity Commission Guidance
Brent Council Constitution

Contact Officers

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