CHARITY COMMISSION DECISIONS OF THE CHARITY COMMISSIONERS FOR ENGLAND AND WALES MADE ON 21 APRIL 2004

APPLICATIONS FOR REGISTRATION OF (i) TRAFFORD COMMUNITY LEISURE TRUST AND (ii) WIGAN LEISURE AND CULTURE TRUST

1. The issues before the Commissioners

The Commissioners considered two separate applications for registration as charities by two companies limited by guarantee, Trafford Community Leisure Trust ("TCLT") and Wigan Leisure and Culture Trust ("WLCT"). If the organisations were established as charities they should be registered on the Central Register of Charities under section 3(2) of the Charities Act 1993.

The Commissioners made the decisions in two separate final reviews under the Commission's review procedures. The Commissioners considered that the applications by TCLT and WLCT for registration as charities raised similar issues and accordingly it would be appropriate for the outcomes of the two review procedures to be reported together.

2. Decisions

The Commissioners:

- having separately considered the cases submitted to them by TCLT and WLCT, including legal submissions and supporting evidence, and
- having considered and reviewed the relevant law and the respective governing documents and activities of TCLT and WLCT

concluded that, subject to clarification of the expressed objects of TCLT and WLCT by the amendments proposed in paragraph 7 below, both were established for exclusively charitable purposes.

In consequence, TCLT and WLCT should be registered as charities.

3. Background to the Decisions - the objects and activities of (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust

Objects:

3.1.1 TCLT incorporated on 4 February 2003 as a company limited by guarantee with Memorandum and Articles of Association. Clause 3 of the Memorandum states TCLT's objects as follows:

"[*TCLT*] *has been established for public benefit primarily for the community and visitors to the metropolitan borough of Trafford and the surrounding areas for the following purposes (the "objects")*

(a) to provide or assist in the provision of facilities for recreation or other leisure time occupation in the interest of social welfare such facilities being provided to the public at large save that special facilities may be provided to the persons who by reason of their youth, age, infirmity or disability, poverty or social or economic circumstances may have need of special facilities and services; and/or

(b) to promote and preserve good health and well being though community participation in healthy recreation; and/or

(c) such other charitable purposes beneficial to the community consistent with the objects above as the Trustees shall in their absolute discretion determine"

3.1.2 WLCT incorporated on 23 December 2002 as a company limited by guarantee with Memorandum and Articles of Association. Clause 3 of the Memorandum states WLCT's objects as follows:

"[*WLCT*] *has been established for the benefit of the public primarily for the community and visitors to the Borough of Wigan and surrounding areas for but not limited to the following purposes:*

(a) the advancement and support of education, culture, arts, heritage and history including the provision of libraries, museums, galleries, learning and information centres, archives and other related services; and/or

(b) the provision or assistance in the provision of facilities for recreation or other leisure time occupation in the interest of social welfare such facilities being provided to the public at large save that special facilities may be provided to persons who by reason of their youth, age, infirmity or disability, poverty or social or economic circumstances may have need of special facilities or services; and/or

(c) the promotion and preservation of good health and well-being through community participation in healthy recreation; and/or

(d) the provision or assistance in the provision of public cemeteries and/or crematoria and the maintenance of the same for the public benefit; and/or

(e) *such other charitable purposes beneficial to the public consistent with the objects above as the Trustees shall in their absolute discretion determine."*

Activities:

3.2.1 TCLT was established to operate the sports and leisure facilitates which Trafford Borough Council previously operated. TCLT now operates 4 leisure centres and 2 golf courses. The leisure facilities were leased to TCLT from Trafford Borough

Council for a term of 20 years. In addition the local authority's 216 staff working in these facilities will be transferred to TCLT in 2005. TCLT entered into a partnership agreement with Trafford Borough Council on 31 March 2003.

3.2.2 WLCT was established to operate the functions previously undertaken by the Leisure and Cultural Services Department of Wigan Council. The local authority's decision to "hive off" leisure and associated services to WLCT was in response to the local authority's view that the Government's expected role for local authorities was as leaders and co-ordinators for the provision of public services but not necessarily the providers. WLCT is now the largest provider of leisure services in the Wigan borough. Its services include management of 8 sports centres, green space areas (including formal parks, a golf course, bowling greens and war memorials), Haigh Country Park, the heritage service (including museums and archives), Wigan Pier museum, arts development, children's play areas, community festivals and services for young people (including a newsletter and information line). WLCT entered into a partnership agreement with Wigan Council on 28 March 2003.

3.2.3 The partnership agreements for TCLT and WLCT respectively have very similar terms. The partnership agreements regulate the respective local authorities' funding of the organisations. The terms of both partnership agreements include that the respective local authorities have "*resolved to work in partnership … in delivery of the agreed Common Objectives*". The Common Objectives are linked to the local authorities' strategic objectives for the social, economic and environmental well being of the area as set out in Trafford Borough Council's Community Strategy and in Wigan Council's Community Plan. The performance of TCLT and WLCT is subject to monitoring to ensure that the respective local authorities' funding has delivered the Common Objectives and demonstrate Best Value. Best Value is defined as "the duty of local authorities to make arrangements to secure continuous improvement in the delivery of services as required by the Local Government Act 1999."

4. <u>The framework for the issues considered by the Commission</u>

The Commissioners considered that there were two principal legal issues relevant to whether TCLT and WLCT respectively could be considered charitable in law. These were:

(i) whether TCLT and WLCT were sufficiently independent from the respective local authorities; and
(ii) the extent to which TCLT and WLCT could be charities if they were established to carry out statutory duties imposed on governmental authorities.

5. Consideration of whether (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust were sufficiently independent from the respective local authorities

5.1 The Commissioners noted that the Commission's guidance *The Independence of Charities from the State - RR7* sets out clearly the extent to which charities may be set up by governmental authorities. It is not a bar to charitable status that a new body has been created with a view to discharging a function of central or local government, provided that the new body was established for exclusively charitable purposes (which may coincide with a governmental authority's function) and not for furthering the non charitable purposes of securing and implementing the policies of any governmental authority.

5.2 The Commissioners noted that the RR7 guidance sets out certain criteria[1] which may be used to establish whether or not a body has been created for an unstated non charitable purpose which confers non-charitable benefits on the governmental authority. These criteria are designed to establish that the governance of the body is as a matter of practice independent from the governmental authority.

5.3 The Commissioners noted that the Board Members of both TCLT and WLCT were selected following an extensive consultation, advertisement and open selection process. The Board Members were recruited on the basis of their skills, local knowledge and experience of the voluntary sector. Both TCLT and WLCT drew up their own objectives, aims, policies and business plans. Both Memoranda and Articles contain appropriate provisions to manage any potential conflict of interests regarding the local authorities' representatives on the respective trustee bodies.

5.4 TCLT and WLCT both identified a number of common objectives which they shared with the respective local authorities and agreed to work in partnership with the local authorities in furtherance of these common objectives. The terms of the leases of the leisure facilities and the support funding were negotiated with the local authorities. The negotiations were conducted at arm's length and TCLT and WLCT had respectively received their own legal and financial advice.

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[1] These criteria are:

- the trustees would have a choice about whether or not they accepted funding on the terms proposed by the governmental authority;
- they would take their own legal and financial advice;
- they would draw up their own policies and business plan;
- they would conduct arm's-length negotiations with the governmental authority;
- a trustee who was subject to a conflict of interest would not participate in discussions;
- the funding arrangements would preserve the trustees' fundamental discretion as to the selection of beneficiaries and the provision of services;
- the trustees would not commit themselves simply to giving effect to the policies and wishes of the governmental authority;
- the trustees would not agree to conditions that undermined the confidentiality of their discussions (such as the presence at their meetings of an observer from the governmental authority); and
- the trustees would be free to make their own decisions on matters outside the scope of the funding arrangement.

5.5 The partnership agreements between TCLT and WLCT and the respective local authorities permit the local authorities to monitor the funding of TCLT and WLCT. However the local authorities indicated that the intention of such monitoring was to safeguard the funding in the event of receivership, liquidation or fraud. The Commissioners noted that this was the usual practice in such funding agreements because governmental authorities are in a strong negotiating position. The partnership agreements require regular review meetings to take place with the respective local authorities to review the progress of achievement of the common objects. Outside of these meetings, the local authorities have no input into the respective organisations' operations. The Commissioners accepted that the partnership agreements did not fetter the trustees' discretion in deciding who will benefit, what services or facilities should be available and on what terms the facilities and services should be made available. The terms of the partnership agreements allow TCLT and WLCT to contribute to the respective local authorities' future policies but TCLT and WLCT were not obliged to implement the local authorities' current policies.

5.6 The Commissioners concluded that no issues of independence arose in respect of TCLT or WLCT which would impact on these bodies being recognised as charities.

6. Consideration of the extent to which (i) Trafford Community Leisure Trust and (ii) Wigan Leisure and Culture Trust could be charities if they were established to carry out the statutory duties imposed on governmental authorities

The appropriateness of charities established to carry out statutory functions and services of a governmental authority:

6.1.1 In considering this matter the Commissioners noted that in some cases a governmental authority has an absolute duty to provide a particular service and has no discretion over the level of service to be provided. In other cases a governmental authority has some discretion, when assessing needs, over the level of provision it makes to fulfil its statutory obligation to meet those needs. In exercising its discretion it is entitled to take account of the costs of providing that type of service and the resources that it has generally available. The term "statutory duty" is used to apply to the statutory obligations of governmental authorities both where there is discretion over the level of provision and where there is not. The term "discretionary power" is used where the governmental authority has a power but not a duty to provide functions or services.

6.1.2 For example local authorities have a discretionary power to provide sports and leisure services but are under a statutory duty to provide libraries and cemeteries. [2]

6.1.3 The Commissioners noted the Commission's guidance *Charities and Contracts – CC37*[3], deals with a charity's relationship with funding bodies. The Commissioners noted particularly that the CC37 guidance indicates that trustees cannot normally use a charity's funds to pay for services that a governmental authority is legally required to provide at the public expense. However, trustees might use a charity's resources to supplement what a governmental authority provides.

6.1.4 The Commissioners considered the extent to which a charity may be established for a purpose, where the activities in furtherance of that purpose would include either directly or indirectly relieving a statutory duty imposed on a governmental authority. They also considered the extent to which an existing charity could use charitable funds arising under contract or generally to discharge the statutory duty (either directly or indirectly) of a governmental authority.

6.1.5 The Commissioners concluded that provided that new bodies were established as independent organisations with exclusively charitable purposes operating for the public benefit, there was no rule of law which prohibited such bodies from being charities, notwithstanding that they operated to discharge a function or service that a governmental authority had a responsibility to provide. In so concluding the Commissioners noted that it was accepted as a good charitable purpose to relieve the community from general or local taxation provided that such purpose was applied for the benefit of a sufficient section of the community.[4]

6.1.6 In the case of an existing charity, the Commissioners considered that the extent to which trustees could properly apply charitable funds in furtherance of their objects towards discharging a statutory duty or discretionary power and therefore relieving the governmental authority was an issue which related to the exercise of trustees' duties in the proper administration of a charity.

6.1.7 The Commissioners concluded that there was no rule of law which prevented trustees from entering into a contract with a governmental authority to carry out a function or service of that authority, whether or not the authority was under a statutory duty or discretionary power to provide that function or service. The guiding principles for trustees were: (i) whether the function or

[2] The Cremation Act 1902 and the Local Authorities Cemetery Order 1977; Public Libraries and Museums Act 1964

[3] In particular paragraphs 21 -29 of CC37

[4] Att-Gen v Bushby (1857) 24 Beav. 299; Thellusson v Woodford (1799) 4 Ves 227; Nightingale v Goulbourn (1848) 2 PH 594

service fell within the objects and powers of the charity, (ii) whether undertaking the function or service was an effective way for the charity to meet the needs of its beneficiaries, and (iii) whether the trustees were able to secure, in the best interests of the charity, proper consideration from the governmental authority in terms of funding and resources for the function or service to be delivered.

6.1.8 The Commissioners further considered in what circumstances trustees might enter in to a contract with a governmental authority which did not provide full consideration for the service to be delivered. The factors considered included (i) the extent to which trustees might use charitable funds either to subsidise that service or to provide an enhanced service, and (ii) the extent to which trustees might provide a service which a governmental authority was under either a statutory duty or had a discretionary power to provide without any consideration from that governmental authority.

6.1.9 The Commissioners concluded that trustees could so act, such matters clearly falling within the discretion of the trustees, provided that at all times the trustees acted within the objects and powers of the charity, had due regard to the proper exercise of their powers and acted in the charity's best interests. In certain circumstances the effect might be to relieve the governmental authority, in whole or in part, of a statutory duty. The Commissioners had previously noted (in paragraph 6.1.5 above) that the relief of general or local taxation was in certain circumstances a charitable purpose, but that it was unnecessary in their view for that particular purpose to be present in the objects of a charity for charitable funds to be applied in manner contemplated in paragraph 6.1.8 above. The key issue for the trustees was whether the expenditure on the service proposed was justified as a proper and effective use of the charity's resources in meeting the needs of its beneficiaries.

6.1.10 In considering whether to apply charitable funds in the manner set out in paragraph 6.1.8 above, trustees would need to give consideration to the following factors:

- Where entering into a contract for service provision with a governmental authority, the need to negotiate to secure a proper level of funding and resources for the level and the standard of service to be delivered, particularly where the service is a statutory duty of the governmental authority where the governmental authority has no discretion over the level of provision as opposed to a statutory duty where there is discretion over the level of provision or a discretionary power of the governmental authority. Where trustees contract to deliver services which a governmental authority

is legally required to provide with no discretion over the level of provision, they should generally expect the governmental authority to meet the full cost.

- In deciding whether to commit charitable funds to subsidise or enhance the level and standards of service to be provided under a contract, to have regard to (i) the social and economic need for such service and its enhancement over and above that which the governmental authority would support, (ii) the effective use of the charity's resources and (iii) the best interests of the charities beneficiaries.

- In deciding whether to provide a facility or service which is the legal responsibility of a governmental authority, trustees must first consider any apparent reason why such responsibilities are not being carried out, particularly if the function is a statutory duty where the governmental authority has no discretion over the level of provision as opposed to a statutory duty where the governmental authority has discretion over the level of provision or a discretionary power of the governmental authority. In that context the trustees should consider carefully whether the use of the charity's funds to provide the facility or service in the wider context of the social and economic need for such a facility or service, is the most effective use of the charity's resources and in the best interest of its beneficiaries.

The application of these principles to TCLT and WLCT:

6.2.1 With regard to TCLT, the Commissioners noted that the library facilities at TCLT's two leisure centres were not operated by TCLT. Trafford Borough Council Library Service is charged rent for using the space within the leisure centres. Therefore TCLT is not operating any of the services which Trafford Borough Council has a statutory duty to provide. TCLT provided evidence that five of Trafford Borough Council's wards are in the most disadvantaged 25% in England. Ethnic minorities account for 6.9% of the population in the borough overall rising to 49.6% in the Clifford Ward and there are concerns about social exclusion. There are pockets of wealth in the borough but leisure services in these areas are provided for by the private sector.

6.2.2 Trafford Borough Council provides one of the main sources of income for TCLT. However the partnership agreement allows funding from other sources and TCLT has also received funding from the North West Regional Development Agency. TCLT indicated that as a result of pressure on Trafford Borough Council to provide services such as housing and education which it was under statutory duties to provide, other services including the leisure services, tend to suffer disproportionately when financial savings are required. TCLT recognised that there

was growing local concern that the level of community service provision among the local community did not match the demands of the local population. TCLT therefore considered it to be in the best interests of its beneficiaries to provide leisure and associated services.

6.2.3 WLCT's activities include the management of 16 libraries and 9 cemeteries which Wigan Council is under a statutory duty to provide. WLCT's main source of income is from Wigan Council. However the partnership agreement with Wigan Council permits WLCT to receive funding from other sources and the Neighbourhood Renewal Fund has provided such funding.

6.2.4 WLCT provided evidence that the Wigan borough suffers severe deprivation when compared nationally. WLCT also recognised that pressure on Wigan Council to provide services which it is under a statutory duty to provide means that other services tend to suffer disproportionately when financial savings are required. WLCT also recognised that there was growing local concern that the level of community service provision among the local community did not match the demands of the local population. WLCT regarded it to be in the best interests of its beneficiaries to provide leisure and associated services.

6.2.5 The Commissioners concluded that TCLT and WLCT were both established with exclusively charitable objects (subject to the amendments detailed in paragraph 7 below) and being satisfied that the respective trustees bodies had considered their powers, objects, beneficiaries and consideration from the local authorities, the Commissioners also concluded that TCLT and WLCT are both charitable notwithstanding that TCLT and WLCT provide services and functions that the local authorities are under a statutory duty or have a discretionary power to provide.

7. Conclusion

7.1 The Commissioners were satisfied that TCLT and WLCT were both sufficiently independent from the respective local authorities and were established for exclusively charitable objects.

7.2 The Commissioners were also satisfied that TCLT and WLCT had both demonstrated that the social and economic need for leisure services had been considered and that it was an effective use of resources and in the best interests of the respective beneficiaries.

7.3 The Commissioners concluded that subject to the deletion of the words "but not limited to" in the preamble of clause 3 of WLCT's memorandum and the deletion of words "and well being" in clause 3(b) of TCLT's memorandum and clause 3(c) of WLCT's memorandum, TCLT and WLCT were both registerable as charities.