

**Land at Failsworth Lower Memorial Park
(Registered charity number 1136597)**

Decision Review

1. Definitions

- 1.1. **The Act** – the Charities Act 1993
- 1.2. **The Charity** – the charity known as ‘Land at Lower Failsworth Memorial Park’ and registered with the Commission under charity number 1136597. The objects of the Charity are ‘for the purposes of a recreation ground only’¹
- 1.3. **The Commission** – the Charity Commission for England and Wales
- 1.4. **Connected Person** – has the meaning set out at Schedule 5 of the Act and includes a charity trustee or trustee for the charity
- 1.5. **FTC** – Failsworth Trust Committee – a Cabinet sub-committee of three OBC Councillors established by the Trustee to act on behalf of the Trustee with regard to the administration of the Charity
- 1.6. **Independent Advisory Committee** – an independent committee established to advise the FTC with regard to the Land, comprised of four independent members of OBC’s Standards Committee and/or Audit Committee
- 1.7. **The Land** – that land at Lower Failsworth Memorial Park which is held in trust for the Charity ¹
- 1.8. **O AFC** – Oldham Athletic Football Club
- 1.9. **O BC** – Oldham Metropolitan Borough Council
- 1.10. **The Trustee** – OBC in its capacity as sole trustee of the Charity

2. The issue

- 2.1. The Commission has been asked to make an Order authorising the disposal by the Trustee of part of the Land to OBC.
- 2.2. The Commission’s consent is required because the disposal of part of the Land to OBC would be a disposal to a Connected Person and within the restrictions set out in s.36 of the Act (see Annex B: The Regulatory Framework).

3. The decision

- 3.1. The Commission is satisfied that despite the Land being held on trusts to be used as a recreation ground forever, the Trustee has power to dispose of it (or part of it) by way of a swap for land of equal or greater financial value and amenity value in respect of that purpose if the Trustee properly considers this is in the best interests of the Charity.
- 3.2. Before it recognised that the Land is held on charitable trusts, OBC (in its statutory (local authority) capacity) considered proposals to dispose of the Land to O AFC in connection with the development of a new football stadium (see also paragraphs 4.2 – 4.3 below). When the Land was identified as being held on charitable trusts OBC, in recognition of its status as Trustee of the Charity and the different decision making framework that therefore applied, put in place processes to ensure that it managed the inherent

¹ The Commission considered in a separate decision review whether the Land is held on charitable trusts and concluded that “the Land is held by [OBC] as trustee on trust to hold it as a public recreation ground forever”. See further Annex B.

conflicts between its two roles and that it acted, in its capacity as Trustee, solely in the best interests of the Charity.

- 3.3. The Commission is satisfied that the powers and functions of the Trustee have been properly delegated to the FTC and that the FTC has authority to act in the administration of the Charity on behalf of the Trustee.
- 3.4. In the opinion of the Commission, the Trustee (acting through the FTC) has demonstrated that in making the decision to dispose of the Land and to apply for the requisite Order it:
 - acted in good faith;
 - managed conflicts of interest appropriately;
 - adequately informed itself;
 - took all relevant factors into account; and,
 - did not take any irrelevant factors into account.
- 3.5. In so doing, the Commission is satisfied that the Trustee arrived at a decision which it believes to be in the best interests of the Charity. The Commission is also satisfied that the decision to proceed with the disposal is within the “range of reasonable decisions”² open to the Trustee.
- 3.6. In light of paragraphs 3.1 to 3.5 above and the proposal for an overage clause set out in paragraph 3.7 below, the Commission is satisfied that the proposed disposal of part of the Land by way of a land swap is “expedient in the interests of the Charity”² and has accordingly decided to make an Order to authorise the disposal of part of the Land.
- 3.7. The Order authorising the proposed disposal of part of the Land will require the Charity to include an ‘overage clause’ in the contract for the land swap. The Commission understands that the Trustee has an in principle agreement with OBC as to the overage provision that should apply. The Commission would emphasise that, as part of the Trustee’s duty to act in the best interests of the Charity, it must negotiate the overage provision solely in the interests of the Charity. The Trustee must also be satisfied that any provision adopted represents a reasonable agreement as to the share of any increase in value of the Land and/or proceeds arising from the Land (through its future development) that is to be secured for the Charity.
- 3.8. This decision has been made on behalf of the Commission by the Head of the Large Charities Division, Beryl Hobson, and constitutes the Commission’s final decision on this matter.

4. Background

- 4.1. The Charity is registered with and regulated by the Commission. OBC is the sole trustee of the Charity.
- 4.2. For some time before the Commission’s involvement, OBC (in its capacity as a Local Authority) and OAFK had been in discussion about possibly developing some or all of the Land for a stadium for OAFK and a new shopping centre. During this process it was identified that the Land might be held on charitable trusts. OBC made an application to the Commission for the Land to be registered as a charity and the Charity was registered on 24 June 2010.
- 4.3. When it realised that the Land was held on charitable trusts, OBC recognised that any disposal of the Land would be governed by the applicable provisions of the Act, in particular s.36. In the case of a disposal of the Land by the Charity to OBC, it was recognised that the Trustee could not dispose of the Land without first obtaining an Order from the

² See Annex B.

Commission. It was also recognised that in its capacity as the Trustee, OBC (acting through the FTC) would need to make a fresh decision as to whether to proceed with the land swap, such decision to be made solely in the best interests of the Charity (which is concerned only with furthering the Charity's purpose as a recreation ground for the public benefit).

- 4.4. In its capacity as Trustee, OBC asked the Commission in September 2010 for authority to dispose of 8.62 acres of the Land to OBC in its statutory (local authority) capacity. In return, it was proposed that the Charity would be given other land at Warwick Road and Vale Lane which currently belongs to OBC in its statutory capacity. In February 2011, the Commission decided not to authorise the proposed disposal of the Land and OBC subsequently asked the Commission to review its decision.
- 4.5. In accordance with the Commission's Decision Review process³, the Commission reconsidered whether it should authorise the disposal, taking into account any new information which was relevant.

5. The test for the Commission

- 5.1. In considering whether to authorise the proposed disposal by way of Order the Commission is required to act within the legal framework set out at Annex B.
- 5.2. In arriving at a decision to authorise the disposal the Commission must be satisfied that:
 - the disposal is "expedient in the interests of the Charity";
 - the Trustee's view is that the disposal is in the best interests of the Charity; and
 - the Trustee's decision to proceed with the disposal is within the range of reasonable decisions that the Trustee could make.
- 5.3. Charity trustees are under a duty to act in the best interests of their charity. However the test for the Commission when making a s.36 Order is different. To make the Order requested the Commission need only be satisfied that the disposal is "expedient in the interests of the charity". There may be several options which could properly be said to be in the interests of the charity.
- 5.4. To determine whether the disposal is "expedient in the interests of the Charity", the Commission must consider whether the Trustee made a valid decision to proceed with the disposal:-
 - 5.4.1. Did the Trustee act within its powers?
 - 5.4.2. Did the Trustee act in accordance with its procedures in deciding to proceed with the disposal and to apply for the requisite Order from the Commission?
 - 5.4.3. Did the Trustee comply with its duties in making these decisions? In particular:
 - Did the Trustee act in good faith?
 - Did the Trustee take sufficient account of all relevant factors in reaching its decision (and disregard any irrelevant factors)?
 - Did the Trustee deal appropriately with any conflicts of interest?
 - Did the Trustee adequately inform itself?
 - Are the decisions within the range of reasonable decisions which the Trustee could make?

³ See the Commission's guidance on the decision review process at: www.charity-commission.gov.uk/Library/about_us/decision_review.pdf

6. Consideration of the issues raised / applying the legal test

6.1. *Power to dispose of the Land*

The Commission is satisfied that the Trustee can rely on a statutory power⁴ to dispose of the Land provided that the disposal proceeds (as planned) by way of a swap for land are of equal or greater financial and amenity value. See Annex B for further details.

6.2. *The Trustee's decision making process:*

- 6.2.1. As OBC is the sole trustee of the Charity, it was necessary to put in place processes to enable it to handle the inherent conflicts in making a decision to swap the Land for other land held by OBC in its statutory capacity. This was all the more important as OBC in its statutory capacity had already formed a view that disposing of the Land was in the interests of the authority.
- 6.2.2. OBC's legal advice recommended that an Independent Advisory Committee be established to advise the FTC. It was suggested that this be comprised of independent persons from OBC's Standards and/or Audit Committee. It was agreed that the Independent Advisory Committee should consider the matters relating to the administration of the Charity and the use of the Land and make recommendations to the FTC.
- 6.2.3. At its meeting on 14 July 2010 OBC delegated its powers as Trustee of the Charity to the FTC. The FTC would be comprised of three Members of the Cabinet, two of whom were not Members of the Cabinet when discussions relating to the Land were previously considered. The FTC was given the authority to act in the administration of the Charity on behalf of the Trustee and the 'legal capacity to make and implement decisions in its own right without the need for ratification by the Council'. OBC agreed that decisions of the FTC were to be binding on both the FTC and OBC.
- 6.2.4. The officers of OBC advised the Commission that only Cabinet Members can be Members of a Cabinet sub-committee. At the time, the Cabinet was formed of a coalition of Liberal Democrats and Conservative Councillors so the FTC could only comprise members from these political parties.
- 6.2.5. The terms of reference for the FTC contained the statement 'The Failsworth Trust Committee will at all times act in the best interests of the Trust and in accordance with the provisions of the Charities Act 1993'.
- 6.2.6. The terms of reference also indicated that agendas and papers would be issued to members of the FTC at least five working days before any meeting.
- 6.2.7. At its first meeting on 30 July 2010, the FTC considered a written report asking it to review the proposals for the future use of the Land and to consider whether or not it would be in the best interests of the Charity to proceed with the possible land swap. The report included:
 - background information;

⁴ s.6 Trusts of Land and Appointment of Trustees Act 1996.

- details of six possible alternative sites, and recommendation of a preferred option if a land swap went ahead (Medlock Vale/ Vale Lane and Warwick Road/ land to the rear of Leicester Road);
 - details of the public consultation regarding the future use of the Land;
 - comments on the financial implications, based on two valuations which were included as appendices;
 - a copy of the circular by the Failsworth Residents Action Group opposing the plans;
 - a reference to the findings of the Independent Advisory Committee, which had recommended that it would be in the best interests of the Charity for the land swap to proceed as it would be the most effective way of achieving the continuing purpose of providing public recreational facilities in the Failsworth area and protecting and enhancing the value of the Charity's assets. Indeed, one of the members of the Independent Advisory Committee considered that a swap of just one site in exchange for the Land, rather than two would have been satisfactory;
 - reference to guidance issued by the Commission which outlined the duties of a trustee and guidance on dealing with property transactions. This guidance was attached as an appendix.
- 6.2.8. At the first meeting of the FTC on 30 July 2010, following a lengthy public question submitted by a local resident, the members of the FTC who were present⁵ agreed that they wanted more time to consider all the options for the future use of the Land, including retention of the current site (this issue had been raised separately by a member of the public in an email to Councillor Masud, Chair of the FTC). It was agreed that the FTC would reconvene at a later date to enable full consideration of all the issues raised.
- 6.2.9. The FTC met again on 25 August 2010⁶. A similar report to that presented to the July meeting was submitted by officers of OBC. It also included a copy of the question from the member of the public and a letter in response from the OBC's Executive Director, Economy Place and Skills. This letter addressed the concerns raised and made particular reference to the original Conveyance. It addressed the question that had been raised about the beneficiaries of the land being the people of Lower Failsworth by stating that this was not referred to in the Conveyance or the 1923 minutes of Failsworth UDC.⁷
- 6.2.10. At the meeting on 25 August, the FTC members agreed to proceed with an application to the Commission for permission to proceed with the land swap, which they considered was in the best interests of the Charity.
- 6.2.11. The minutes relating to the meetings outlined above are limited in that they do not detail the discussion leading to the decision making

⁵ One member of the FTC had declared a conflict in respect of the consideration of the disposal of the Land to OBC and had absented herself from this part of the meeting – see para 6.3.5

⁶ See footnote 5 – the same member again absented herself in respect of the discussions concerning the possible disposal of the Land.

⁷ See Annex A

by the FTC members (the Commission has been advised by OBC that they are in line with normal local government governance arrangements). It was not possible therefore for the Commission to determine the full extent of discussions about the issues from the documents alone.

6.2.12. It was therefore necessary to ask for further information from the members of the FTC, who advised us that:

- They had considered the option of retaining the Land (particularly as this has been put to them as an option by a member of the public). However the evidence in favour of the land swap seemed to them to be overwhelmingly in the best interests of the Charity – the reasons for this included improved recreational facilities for the people of Failsworth, increased asset value for the Charity, and the fact that the Land is contaminated, so affecting its recreational potential.
- They had considered the two valuation reports included in the report, both of which indicated that the asset base of the Charity would be increased by the land swap, both in terms of the size of the land that would be held by the charity and in terms of its value.
- They had considered the recommendation of the Independent Advisory Committee.
- They had considered who were the beneficiaries of the Charity and concluded that this was ‘the people of Failsworth’⁸. They felt that the new sites were more centrally located within Failsworth and therefore more accessible to a greater number of beneficiaries.
- Two consultation events had been held, which were publicised by way of posters, a formal public notice and press release in the Oldham Evening Chronicle. There had been two consultation meetings (both based on the local Partners and Communities Together (PACT) group’s meetings). Both were accessible as they were held in district centres, the regular meeting places for OBC business. One of the consultations was in Failsworth and was held from 2pm to 8pm. The other was in Chadderton, from 2pm to 5pm. The Commission was advised by a member of the FTC that this was considered to be the ‘less relevant’ meeting as Chadderton is approximately 1.25 miles from the Land. Most residents gravitated towards the district centre in Failsworth that was approximately 1,000m away from the Land.
- The possible disposal was also covered on OBC’s website, providing the option to respond to the consultation online.
- They had considered the adequacy of the public consultation meetings and concluded that these had been situated in locations and held at times which meant they could be accessed by the majority of people in Failsworth.
- They had considered the concerns of the objectors about the removal of recreational facilities from the current location, which is why they had determined to retain 3.13 acres of land in the current location. They considered that this amount of land would seem suitable for the recreational use for which the Land was

⁸ It had been suggested to the FTC that the beneficiaries of the Charity were the people of Lower Failsworth. However the FTC disagreed with this – see paragraph 6.2.9 above.

used (primarily dog-walking). They also pointed out that there is a significant amount of other open land close to the Land which could be used by these residents.

- They felt that the proposed land swap was in best interests of the Charity regardless of the proposal to develop the Land for O AFC and confirmed that the Charity would seek to proceed with the land swap regardless of the position regarding O AFC.
- The issue regarding responsibilities of trustees had been drawn to their attention by the Borough Solicitor, the pre-meeting reports and also by a member of the public. The reports provided to them had a copy of the Commission's guidance on this subject attached.
- One of the issues raised with the Commission in the representations was that the consultation exercise was inadequate in terms of both the location and time of the events. However, the Trustee (acting through FTC) had no obligation to publicly consult on the proposals regarding the Land. Section 36(7) of the Act allows for no public notice to be given when designated land is being replaced (as is the proposal here). Equally, the Commission understands that OBC when acting in its capacity as charity trustee is not bound by any local authority rules that might otherwise require public consultation in respect of certain decisions. However, in making a decision trustees need to ensure that they have adequately informed themselves. One way of doing this is by undertaking consultation with beneficiaries and other stakeholders. The members of FTC indicated that in their view and experience, and given who they thought were the beneficiaries of the Charity, the consultation was adequate and provided sufficient opportunity for the Trustee to be adequately informed of public opinion with regard to the disposal of the Land. One of the concerns that had been raised in the consultation – the loss of recreational facility particularly for dog walking – had been addressed in the proposal to retain 3.13 acres of land.

6.3. *Conflicts of interest*

- 6.3.1. The issue of conflicts of interest for local authorities acting as sole trustee for a charity is well recognised and guidance is provided on the Commission's website⁹.
- 6.3.2. OBC has demonstrated to the Commission that it received external legal advice from Counsel about how to manage conflicts.
- 6.3.3. As outlined in paragraph 6.2 above, OBC, in its capacity as Trustee of the Charity, created the FTC to exercise the functions of the Trustee in the administration of the Charity and to enable it to deal with the inherent conflict of interest. The aim was to create a sub-committee where none of the members had previous involvement with OBC's two previous decisions taken on the Land. Councillors Masud (who had only recently been appointed to the Cabinet), Knox (who had voted on one of the two decisions), and Hulme (a new

⁹ Available at: www.charitycommission.gov.uk/Charity_requirements_guidance/Specialist_guidance/Local_authorities/default.aspx#1

Cabinet member) were appointed as the members of the FTC. All other Cabinet members were considered to be conflicted, having been involved in the previous decisions.

- 6.3.4. Councillor Hulme was new to the Cabinet in May 2010 and therefore was not a decision maker on the previous Cabinet decisions regarding the disposal of the Land. In advance of the first meeting of the FTC, Councillor Hulme had taken advice on whether he should declare a conflict of interest because he had been the Conservative group leader in OBC when in opposition (before the Liberal Democrat – Conservative coalition). In his role as group leader he had attended a meeting between OAFc and the three political party group leaders. Councillor Hulme did not express his own personal views at this meeting but was purely a messenger for the Conservative group as a whole. This meeting was before the local elections (when the Liberal Democrats were in power). He was advised that he did not have a material conflict which would prevent him voting or forming part of the quorum for FTC matters.
- 6.3.5. On the advice of Counsel, Councillor Knox left the FTC meetings when the proposed land swap was discussed because it was considered that she was conflicted as she had previously voted on one of the previous decisions regarding the Land made by OBC.
- 6.3.6. The paper presented to OBC on 14 July indicated that advice had been provided by Counsel that ‘no decision shall be taken without consideration of advice and recommendations from the independent person as to what action is in the best interest of the Charity’. In addition to the advice from two chartered surveyors on the value of the land, it was proposed that independent persons on the Standards and/or Audit Committee would be asked to form an Independent Advisory Committee to advise the FTC. These were independent people who were not Councillors or employees of OBC. The independent members produced a report that included the valuations. They considered whether to keep the existing site and reviewed the proposed sites. They also visited the site. Their advice to FTC was that it was in the best interests of the Charity to swap the Land in order to further the Charity’s objects of recreational use.
- 6.3.7. The officers of OBC, acting on behalf of the FTC, told the Commission that before the meetings of 30 July and 25 August the members of FTC received a briefing from the Executive Director and Borough Solicitor on the duties of trustees. This was confirmed verbally to the Commission by Councillors Masud and Hulme
- 6.3.8. OBC also advised that OBC Councillors, in common with Councillors in local government, were aware of conflicts of interest in the course of their day to day work, and the issue was at the front of their minds in all their dealings. OBC and a member of the public had made the members of the FTC aware of the Commission’s guidance.
- 6.3.9. The Trustee had initially obtained a valuation report from the District Valuer. It subsequently decided to commission a second independent valuation as it was considered that a report by the District Valuer might not be considered sufficiently independent. Both reports were provided to both the Independent Advisory Committee and the FTC.

7. Conclusion

- 7.1. Having considered all the information before it:
 - 7.1.1. The Commission was satisfied that the Trustee's conclusion that the new land was of greater financial value and more suitable for furthering the purpose of a public recreation ground was reasonable on the information it had seen. As a result it was satisfied that the Trustee has the power to swap the Land for the new land.
 - 7.1.2. The Commission concluded that the Trustee had the power to dispose of the Land by swapping it for replacement land and that the FTC had the power to make the decision under its delegated powers from the Trustee and to apply to the Commission for the requisite Order.
 - 7.1.3. The Commission concluded that the Trustee had taken sufficient account of all relevant factors in reaching its decision (and disregarded any irrelevant factors).
 - 7.1.4. The Commission was satisfied that the Trustee adequately informed itself before taking the decision.
 - 7.1.5. The Commission was satisfied that it was reasonable for the Trustee to conclude that the beneficiaries of the Charity are the inhabitants of the district of Failsworth, not the inhabitants of the area previously known as 'Lower Failsworth'.
 - 7.1.6. The Commission was satisfied that the FTC did consider other alternatives, including taking no action, but this was considered not to be in the best interests of the Charity.
 - 7.1.7. It is clear to the Commission that OBC and the members of the FTC were aware of the potential for a conflict of interest and managed it in an appropriate manner.
 - 7.1.8. The Commission saw no evidence of the decision being made otherwise than in good faith.
- 7.2. Having considered the issues outlined above, and having given careful consideration to the representations which were made¹⁰, having considered the legal test for expedience and the relevant provisions of the Act, and having considered the Commission's public law duties as they are relevant to this decision¹¹, the Commission was satisfied that the Trustee's decision that the swap is in the best interests of the Charity is within the range of reasonable decisions the Trustee could make. The Commission as a result concluded that the disposal is expedient in the interests of the Charity and that it would make a s.36/26 Order to authorise it. As noted at paragraph 3.7, the Order will include a condition requiring that the contract governing the land swap should include an overage clause in respect of the potential increase in value of the Land (and/or proceeds arising from the Land) by way of any future development.
- 7.3. Section 89(2) of the Act gives the Commission power to publicise an Order which has been made. The Commission does not intend to use this power in this case. Whilst the issue has been high profile in the Failsworth and Oldham area, there have been two opportunities for the public to make representations to the Commission, and these representations have been given due consideration and weight. It is unlikely therefore that any further

¹⁰ See Annex A.

¹¹ See Annex B.

representations would raise any new issues that need to be considered. It would not, therefore, be a good use of the resource of the Commission nor of the Charity should the Commission exercise its power to require it to publicise the Order.

- 7.4. This decision will be sent to the Trustee and all the parties which made representations to the Commission.

8. The review process

- 8.1. The decision review process included:
 - 8.1.1. A review of the representations made by OBC on behalf of the Trustee to the Commission in support of their original application for an Order.
 - 8.1.2. A review of the subsequent representations made by OBC on behalf of the Trustee.
 - 8.1.3. A review of the 96 representations received from objectors to the proposed land swap in the period October 2010 to February 2011. Similar representations had also been put to the Commission when the Charity was registered.
 - 8.1.4. An opportunity for OBC to make further representations to the Commission as to why authority for the disposal should be given. This was done at a meeting between the decision reviewer and three officers of OBC and their legal advisor on Friday 1 April 2011.
 - 8.1.5. A similar opportunity to speak to the decision maker was extended to those persons who had previously submitted their representations to the Commission. Those who had previously contacted the Commission were invited to ring Beryl Hobson on Wednesday 25 May and Friday 27 May 2011. The correspondence indicated that their previous written representations would be taken fully into account and it was only necessary to contact the reviewer again if there was any point they thought may be unclear or any additional points to add. Seven people took advantage of this opportunity, including four people who had not previously written but had heard about the issue from someone else.
 - 8.1.6. A telephone conversation between the decision reviewer and the two members of the FTC, Councillors Masud and Hulme, who had made the decision on behalf of the Trustee to proceed with the disposal.
- 8.2. At the end of each meeting or telephone call the Reviewer asked if those making representations had provided everything they thought relevant to the Commission.
- 8.3. The process between OBC applying for a decision review and this decision being made took longer than the Commission's usual standards for such reviews. At the meeting on 1 April, OBC explained that the issue of the Land and possible redevelopment was a local political issue. In light of the pending local elections on 5 May, the Commission (following OBC's request) took the decision to take no further action (such as inviting further representations) until after the election period.
- 8.4. A summary of the representations from OBC as Trustee and those opposed to the proposed land swap are attached as **Annex A**.

9. Recommendation

- 9.1. Consideration of this case, in particular the quality of decision making by the FTC, has not been assisted by the minutes produced following FTC meetings.
- 9.2. The executive of OBC has explained that the style of the minutes is in line with the standard for local government – i.e. Councillors receive substantial reports setting out the various options, and their final decision is reported in the minutes. This means that the minutes are simply a record of the decision, rather than a description of how the decision was made. This has created a particular difficulty in this case where it has been necessary to establish exactly what issues were taken into consideration, and how the FTC members arrived at their decision.
- 9.3. We would recommend that the Trustee should consider making more comprehensive minutes for issues relating to charity matters.

ANNEX A: The Representations

A summary of the representations made on behalf of the Trustee and by members of the public opposed to the proposed land swap are shown below:-

1. Representations made on behalf of the Trustee

- 1.1. The Land is not fit for purpose as a recreation ground.
- 1.2. Financially, the Land is valued at £60,000 – the land to be swapped is valued at £172,000 (the combined value of two plots).
- 1.3. The FTC on behalf of the Trustee met validly and decided that the disposal is in best interests of Charity.
- 1.4. There is land immediately adjacent to the Land that can be used for recreational purposes and OBC will be safeguarding this land.
- 1.5. There is possible contamination of (and therefore liability issues with) the existing Land.
- 1.6. OBC consulted the Charity's beneficiaries on the land swap.
- 1.7. The land swap would double the size of land held by Charity and would allow for a greater range of uses.
- 1.8. OBC managed conflicts by appointing the FTC and the Independent Advisory Committee. The advisory committee was independent and recommended that the land swap would be in the best interests of the Charity. The conflicted member of the FTC sat out of discussions concerning the disposal of the Land.
- 1.9. 3.13 acres of the Land will be retained by the Charity and made available for recreational use in accordance with the purposes of the Charity.
- 1.10. The replacement land is more centrally located within Failsworth and thus more easily accessible to a greater section of the beneficiaries of the Charity.
- 1.11. The Charity's beneficiaries are the inhabitants of the whole of Failsworth.
- 1.12. The Trustee did consider retention of the Land.
- 1.13. OBC was well aware of the distinction between acting in its statutory capacity and acting as the Trustee.
- 1.14. FTC deferred a decision on the disposal of the Land in order to have the opportunity to fully consider all relevant factors and to be better able to take the views of the beneficiaries into account.
- 1.15. Prior to the first FTC meeting, Councillor Hulme took legal advice from the Borough Solicitor on a specific possible conflict of interest and was advised that he was not conflicted.
- 1.16. OBC took appropriate, independent professional advice both regarding the Land (and the possible replacement land) and regarding issues such as conflicts of interest and the duties of charity trustees.
- 1.17. OBC considered the amenity value of the respective pieces of land.
- 1.18. OBC considered a sale direct to a developer (this was not a realistic option because of the difficulty that would have arisen in purchasing suitable alternative land for recreational purposes within the Failsworth area).¹²
- 1.19. OBC identified the positives and negatives that would result from the disposal.

¹² OBC, on behalf of the Trustee, also noted that where a surveyor prepares a report in connection with a proposed disposal of charity land that is governed by s.36 of the Act, the surveyor has to make a specific statement advising that the charity in question should seek planning permission in respect of the land, if it is felt that will secure best value for the charity. No such comment was made in this case.

- 1.20. In accordance with the advice as set out in the surveyors' reports, OBC obtained the best terms reasonably obtainable for the Land.
- 1.21. OBC, on behalf of the Trustee, and following the advice of Counsel, specifically asked the independent surveyor whether a more robust overage agreement could or should be sought on behalf of the Charity with respect to the possible future development of the Land. The surveyor advised that the overage proposed was sufficient given the remediation issues that would need to be addressed before the Land could be developed.
- 1.22. FTC members went on site visits to the Land and the land to be swapped.

2. Representations from members of the public

The public representations could be grouped into four main categories:-

2.1. *Charity Land was given as a gift:*

- The Land was bought by donations given by the people of Failsworth
- The Land was not bought by OBC
- Donors wishes should be respected, and green space preserved
- The Land was donated as a memorial for fallen soldiers in WW1 – there is a moral issue to not betray the donors and soldiers
- The proposed swap does not reflect the gift
- The proposed land swap is not in the spirit of the law or the original gift

The Commission has considered these views in the light of the objects of the Charity, the beneficiary group and the legal framework (see paragraph 6.1).

2.2. *OBC decision making:*

- The public consultation on the land swap by OBC was not adequate
- The consultation occurred before local residents were aware that it was happening
- OBC's first consultation was inadequate – there was short notice of meetings, meeting were held during working hours
- The FTC does not represent local people
- OBC does not make the relevant information publically available
- The members of the Independent Advisory Committee that considered the proposed land swap are not accountable
- The FTC does not seem to make its own decisions
- The Land has been valued too cheaply
- OBC are conflicted and are not acting in the best interests of the Charity
- The FTC has not met frequently enough
- Claims that a deal between OBC and OAFB has already been done
- Manchester residents live close to the site but were not consulted as they are not in Oldham borough
- The members of the Independent Advisory Committee were not actually independent (no substantial evidence provided)

These issues were considered by the Commission in determining whether the Trustee had made a reasonable decision regarding the best interests of the Charity – (see the whole of paragraph 6).

2.3. *Effect on beneficiaries:*

- The proposed new sites would be too far away from residents and no one would go
- Access would be difficult – there is no public transport to reach the new sites
- Land would be taken from local beneficiaries
- The proposal would impact on allotments
- The Warwick Rd site is less suited to recreation. The Woodhouses land is isolated with no public transport links

- There is little public space in Failsworth compared to the rest of the Oldham Borough so this park should be retained
- Major roads need to be crossed by local residents to reach the new locations – this is unsafe for the old and young
- Local residents enjoy the park’s open space
- The Land is the only open, natural land in the local area and is used for recreation
- The land swap would affect more residents of Manchester than of Oldham

The Commission is satisfied that the beneficiary group had been considered and the effect on the beneficiaries had been taken into account (see paragraph 7). See also the consideration of impact on the Commission of the “public sector equality duty” at Annex B.

2.4. *Planning issues:*

- Local residents do not want a football club (or stadium development) so close to their homes
- There are already two large local football clubs
- Local residents enjoy the park’s open space
- The Land is the only open, natural land in the local area and is used for recreation
- Local residents purchased their homes for peace and quiet - the land swap would allow a football stadium to be built
- The land swap would affect more residents of Manchester than of Oldham
- Any development of the Land would affect the residents’ lifestyle and the local wildlife
- The land could become part of a proposed local country park (Moston Brook)
- The park is long established
- The development would impact on other local parks

These concerns relate to planning issues, which are outside the remit of the Commission and not relevant to this decision of the Commission.

ANNEX B: The Regulatory Framework

1. Legal framework

- 1.1 Disposals of “charity land”¹³ are governed by the Act. In particular, s.36 of the Act imposes certain restrictions on disposals, including where a disposal is to a Connected Person. In such cases, a proposed disposal will often need to be authorised prior to completion by an Order of the Commission. (There are some circumstances in which an Order would not be required, but these do not apply here). Accordingly, when a charity requests an Order authorising the disposal of land the Commission must decide whether it is appropriate for an Order to be made.¹⁴
- 1.2 Before deciding to authorise a disposal of charity land, the Commission must be satisfied that the disposal is “expedient in the interests of the charity”.
- 1.3 If an Order is made, the Commission has a statutory power to either give public notice “of the making or contents of the Order”, or require the applicant to do so (see s.89(2) of the Act).
- 1.4 Section 13(4) of the Act (in conjunction with Schedule 3) provides a power, in specified circumstances, for a Scheme to be made to alter the purposes of a charity by enlarging the area of benefit specified in its trusts. One of the specified areas of benefit that can be so enlarged is “any area in a district” which can be enlarged by way of Scheme to (amongst others) “the district”. The Commission is not making such a Scheme in this case; however s.13(4) demonstrates Parliament’s view that, in appropriate cases, enlargement of a charity’s area of benefit can be a suitable basis on which to amend a charity’s purposes.

2. Commission’s regulatory interest

- 2.1 In exercising its powers under s.36 (as with the exercise of any of its other powers) the Commission must act (so far as is reasonably practicable) in a way that is compatible with its statutory objectives and which it considers most appropriate for meeting those objectives. The Commission’s statutory objectives include:
 - Increasing public trust and confidence in charities;
 - Promoting the effective use of charitable resources; and
 - Enhancing the accountability of charities to donors, beneficiaries and the general public.

¹³ “charity land” means land in England and Wales held by or in trust for a charity.

¹⁴ In some cases where, as here, the land being disposed of must be used for the purposes of the charity, the charity trustees are obliged to give public notice of the proposed disposition and take account of any representations made (see s.36(6) of the Act). Here however, the disposal is being made with a view to the acquisition of replacement property. In such cases the obligation to give public notice does not apply (see s.36(7)).

3. Commission's policy on disposals of charity land

- 3.1 The law and the Commission's policy and practice in relation to charitable land disposals are explained in the Commission's operational guidance 'OG54: Disposals of Charity Interests in Property' and publication 'CC28: Sales, leases, transfers or mortgages' which are available at the Commission's web site¹⁵.
- 3.2 To assist in the application of the legal test, the Operational Guidance states, as policy guidance, that the Commission's power under s.36 of the Act should only be used to authorise a disposal where the trustees:
- Have understood the professional advice they have received (for example, the surveyor's report);
 - Have looked at and understood any powers or restrictions contained in the charity's governing document;
 - Know what they are disposing of;
 - Can make the case that the disposal is in the best interests of the charity;
 - Have obtained the best terms for their charity that they can reasonably achieve in the circumstances; and
 - Have managed any conflicts of interests.
- 3.3 The Commission's policy, whilst a guide to the application of the Act, must not and has not unreasonably fettered the proper exercise of discretion in the making of this decision.

4. Trusts on which the Land is held

- 4.1 Prior to receipt of the application for an Order to dispose of the Land, the Commission considered the trusts on which the Land is held when considering the application for the registration of the Charity. As part of this, the Commission reviewed the Conveyance pursuant to which the Land was acquired. The Conveyance states that the Land is to be held on the following basis:

"To hold the same unto and to the use of the Council in fee simple as to the first described premises for the purposes of a Recreation Ground only"

- 4.2 Having examined the Conveyance and the other evidence before it, the Commission concluded that the Land is held by OBC as Trustee on charitable trusts for use as a public recreation ground for ever. The decision was finely balanced but the balance of probability pointed towards charity as the Land was purchased with moneys raised by charitable appeal and the intention was clearly that it be held as a public recreation ground as a war memorial for generations to come.
- 4.3 The Conveyance is silent as to the beneficial class. The charitable appeal was to the people of Failsworth and the legal title to the Land was held by Failsworth Urban District Council. The Land is described as both Lower Memorial Park and Lower Ward Recreation Ground, Failsworth. These

¹⁵ See:

http://www.charity-commission.gov.uk/about_us/ogs/index054.aspx
<http://www.charity-commission.gov.uk/Publications/cc28.aspx>

descriptions could equally be of the geographical location of the Land as of the intended beneficiaries of the Charity. At the time of the Conveyance the Commission understands that there were two wards within the Failsworth district known respectively as Higher and Lower Failsworth Ward.

- 4.4 The legal ownership of the Land is now vested in OBC (as Trustee), OBC being the successor body of Failsworth Urban District Council. The Commission understands that Higher and Lower Failsworth Wards are no longer applicable descriptions of statutory areas.
- 4.5 The Trustee has considered who are the beneficiaries of the Charity and has concluded that they are the people of Failsworth. The Commission does not have jurisdiction to reach a conclusion as a matter of law on this issue. As the Conveyance is silent, and in light of the factors set out above, the Commission concluded that the Trustees' decision in this regard is reasonable.

5. Charity's power to dispose of the Land

- 5.1 The governing document of the Charity is the 1924 Conveyance pursuant to which OBC acquired title to the Land. The Conveyance does not contain any general power for the Trustee to dispose of the Land. Further, the general powers of OBC to deal with its local authority property do not apply to the property such as the Land, which OBC holds on trust.
- 5.2 Section 6 of the Trusts of Land and Appointment of Trustees Act 1996 provides a general statutory authority for the disposal of land held in trust. This is not available generally where land is held for a specific purpose "forever", as in such cases the sale of the land would in effect require changing the trusts on which the land is held.¹⁶
- 5.3 However, where as here, land held on trust is being swapped for alternative land to be used for the same purpose, the statutory power at s.6 may be available provided that the replacement land is as or more suitable for the purposes for which it is held and is of equal or greater financial value (or a diminution in financial value can be justified by an increased amenity value).¹⁷ This power is also not available where the qualities of the land is itself the subject matter of the trust such as a historic house or land of outstanding natural beauty, but this is not the case for the Land.
- 5.4 In this case, the Trustee has concluded (on the basis of appropriate professional advice) that the proposed replacement land is of greater financial value than the Land and is more suitable for the purposes of a

¹⁶The statutory power will also not be available where the character or attributes of the land itself are integral to the purposes for which the land is held – for example, a historic house or an area of outstanding natural beauty. This is not the case in respect of the Land. Although it was suggested that the Land has a special status as a war memorial (see Annex A), there is nothing integral to the Land which makes it more suitable as a memorial than either of the alternative sites which are proposed to be within the land swap. Further, it appears that a physical war memorial was in fact constructed from the same fund with which the purchase of the Land was funded, but this is not located at the Land.

¹⁷The court confirmed this power to swap land in *Oldham Borough Council v Attorney General* (1993) Ch 210.

recreation ground. Accordingly the Trustee can rely on the statutory power as authority for the proposed disposal (provided that it proceeds by way of the land swap as planned).

6. Human Rights

6.1 The Commission has a responsibility under s.6 of the Human Rights Act 1998 ('HRA') not to use its powers in a way that is incompatible with 'Convention rights'¹⁸.

6.2 The Commission therefore gave careful consideration to the Convention rights in considering the exercise of its powers in this case. For the reasons set out below, the Commission is satisfied that in making this decision it has not acted, in a manner which is incompatible with Convention rights.

6.3 To determine whether a decision is compatible with Convention rights involves firstly identifying the Convention rights that may be affected. It is then necessary to identify the persons whose rights may be engaged and, in the case of qualified rights, consider whether any interference with those rights is a proportionate means of achieving a legitimate aim.

6.4 The Commission considers that the proprietary rights set out at Article 1 of the First Protocol to the Convention may be engaged by this decision. Article 1, Protocol 1 states:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law... The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest..."

6.5 The natural or legal persons who have possessions that might be said to be affected by this decision are in the opinion of the Commission:

- Those who object to the land swap and/or the beneficiaries of the Charity; and
- Those who own property adjoining the Land, who might argue that the decision devalues their property.

6.6 In respect of the first category, the Commission noted that individual persons do not have any general or freestanding legal right to benefit from a charity. The manner in which benefits are conferred is within the discretion of the charity trustees (subject to the trusts of the charity and provided that the trustees act reasonably). The Commission noted that in relation to the Charity, the beneficiaries are the inhabitants of Failsworth. These persons will in general, as a result of this decision and the consequent land swap benefit from a larger, more suitable and more valuable area of land for use as a recreation ground, with the potential for an additional fund of money in relation to the possible development value of the Land. A piece of the Land is also being retained for ongoing use as a recreation ground. The Commission therefore concluded that its decision to authorise the disposal

¹⁸ "Convention rights" means the particular rights and freedoms of the European Convention of Human Rights specified at s.1 HRA.

did not interfere with the Convention rights of the beneficiaries of the Charity or of those persons who have objected to the land swap proposal.

- 6.7 In respect of the second category of persons, the Commission noted that its decision to authorise the disposal of the Land does not provide authority for any change of use of the Land (that would be a decision of the planning authority). Nor is it an inevitable consequence of the Commission's decision that the Land will no longer be used as a recreation ground. Accordingly the Commission concluded that its decision does not interfere with the Article 1 Protocol 1 rights of adjoining owners, as its decision does not deprive such persons of their possessions (or diminish the value of those possessions).
- 6.8 If the Commission is wrong in its conclusion that its decision does not engage rights protected by Article 1 Protocol 1, the Commission notes that the Article is not an absolute right and does not "impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". The statutory framework of s.36 of the Act sets out Parliament's view as to how the public interest should be protected in the context of disposals of charity land. It is implicit that s.36 is deemed (by the UK government) to be a necessary means of controlling the use of such property in accordance with the general interest.
- 6.9 In terms of the Commission's exercise of its powers under s.36, the Commission's view is that making the requested Order is a "proportionate means of achieving a legitimate aim". The Commission noted that s.36 of the Act gives power to the Commission to authorise disposals of charity land to Connected Persons. The "legitimate aim" in deciding to authorise the disposal here is to give effect to the overriding principle that it is for charity trustees to make decisions in the best interests of their charity (that is, furthering the purpose of their charity for the public benefit). Provided that the Commission is satisfied that a decision by a charity to seek authority for such a disposal has been lawfully made and falls within the range of reasonable decisions the charity trustees could make, the Commission should authorise it. This decision sets out in great detail why the Commission is satisfied on these points.
- 6.10 It is also a legitimate aim for the Commission to promote the most effective and efficient use of charitable resources¹⁹. In this case the Trustee has concluded that this would be best achieved by swapping part of the Land for land of greater recreational use and financial value. The Trustee has also recognised the need for an overage agreement and the Order made will be conditional on the incorporation of an overage clause in the contract governing the land swap.
- 6.11 The Commission's decision is to authorise the Trustee's decision to dispose of part of the Land. This decision of the Trustee is one that the Trustee could not make without the authorisation of the Commission (or the Court) as it is a disposal of the Land to itself in another capacity (its capacity as local authority). The Commission's decision is that the disposal of part of the Land is "expedient in the interests of the Charity" and is not a decision as to what would or might be in the best interests of the Charity as

¹⁹ See further the Commission's specific statutory objective in this regard at s.1B(3)4 of the Act.

previously explained (which is a matter for the Trustee). The Commission's decision is also not a decision to dispose of the Land, nor is it a decision about the use to which the Land will or should be put once disposed of to OBC.

7. Equalities Act

- 7.1 In making this decision the Commission has also been mindful of the “public sector equality duty” set out at s.149 Equality Act 2010 ('EA'). This requires public bodies such as the Commission to have due regard to the need to:
- Eliminate unlawful discrimination, harassment, victimisation and other conduct prohibited by the EA;
 - Advance equality of opportunity between people who share a protected characteristic and people who did not share it; and
 - Foster good relations between people who share a protected characteristic and people who do not share it.
- 7.2 In particular, the Commission has considered in this regard the submissions made by some members of the public (see further Annex A paragraph 2.3) that:
- The proposed new sites would be too far away from residents and no one would go;
 - Access would be difficult – there is no public transport to reach the new sites; and
 - Major roads need to be crossed by local residents to reach the new locations – this is unsafe for the old and young.
- 7.3 In light of these submissions (and the other information available), the Commission has considered the possibility that the land swap could have a particular adverse impact on persons with one or more protected characteristics - for example, persons living near the Land who (by reason of a protected characteristic) have limited mobility and who would accordingly find it difficult to access the replacement land.
- 7.4 However, in deciding how best to provide benefits through the resources of the Charity, the Trustee must consider all potential beneficiaries, i.e. all the inhabitants of the Failsworth District. Whilst the land swap might make it particularly difficult for some beneficiaries with protected characteristics to access the Charity's land, it is equally the case that beneficiaries with the same protected characteristics, not living near to the Land, will experience the same disadvantage under the existing arrangements. Taking the beneficiary group as a whole, no evidence has been put forward to suggest that persons with protected characteristics will be particularly disadvantaged by the land swap.
- 7.5 In this regard it is also important to note that the Charity will retain over three acres of the Land for ongoing recreational use. This will help to ensure that persons living near the Land still have access to recreation ground space. Equally, as noted at paragraph 4.7 of this Annex B, the Commission's decision does not provide authority for any change of use of the Land and it is not inevitable that the disposal of the Land will result in that part of the Land that is swapped being put to an alternative use.

- 7.6 Subject to the paragraphs above, the information put to the Commission by both OBC and others making representations has not suggested that the Commission's decision to authorise the disposal will have a particular impact on persons with one or more protected characteristics. Equally, it is not apparent that the decision will have a greater or lesser effect (than a decision not to authorise), on (for example):
- Removing or minimising disadvantages suffered by people due to their protected characteristics;
 - Meeting the needs of people with protected characteristics;
 - Encouraging people with protected characteristics to participate in public life or in other activities where their participation is low; or
 - Tackling prejudice and promoting understanding between people who share a protected characteristic and others.
- 7.7 The Commission is accordingly satisfied that this decision (and the decision making process that has been followed) is consistent with the public sector equality duty.