

## Guidance on Charity Property Transactions

### 1. Background

Many UK charities own property (including freehold property). A charity or other type of organisation might find itself engaged in a short-term or long-term lease, a leasehold tenancy at will, or a leasehold tenancy by agreement.

There will be various reasons for a charity to acquire a property, and the property might be, for example, an office, a shop, a field or garden. For example:

- acquire property and then lease it out to a tenant;
- buy or lease property for a day centre, residential care home, etc;
- buy or lease property for a day centre, residential care home, etc;
- where it has property, lease it out to a tenant;
- take a short-term lease of property for a fundraising event or activity;
- take a short-term lease of property for a fundraising event or activity;

Please note that not all of the following Charities Act 2011 provisions apply to a charity lessee as a charity lessee is not a charity and the grant of a lease to a charity lessee is not a disposal.

### 2. Scope of this Guidance

In addition to seeking legal, commercial, financial and other advice of when dealing with property, a charity should also consider its status as a charitable organisation.

The aim of this guidance is to provide the technical formalities of such matters specific to charities and professional advice should be sought.

In its 2017 Report, the Charity Commission noted that the technical and it may be the case that the disposal of land by a charity is not covered by the Charities Act 2011.

to acquire or dispose of property (including leasing property) in as many types of transaction as any commercial organisation. Depending on the size and activities of a charity it might be, for example, a freehold property or land, granting or taking a short-term lease, surrendering a lease, granting or taking a long-term lease of land/premises.

A charity might need to acquire property or temporary rights to use property for a particular purpose. The transaction might be, for example, an office, a shop, a day centre, residential care home, etc.

and then, if it is not already leased to a tenant, lease the property to a tenant and then sell the property to realise its investment;

building to use for operational purposes e.g., as a day centre, residential care home for beneficiaries;

volunteers to use to administer the charity;

property, sub-let it to another person or organisation;

ed office;

a shop or other space so that it can sell goods to

days) licence of premises or land for a fundraising event or activity (e.g., a garden party).

Now lease by a charity a “disposal” which is subject to the provisions of the Charities Act 2011: an assignment or surrender of a lease held by a charity is regulated, as outlined below, in the same way as a disposal.

as necessary, and considering all the usual legal, commercial, financial and other matters which a charity needs to take account of in addition to the additional matters specific to a charity arising from its status as a charitable organisation.

Some of those specific matters, in particular some of those specific matters which charity law imposes on charities. It does not cover all matters which a charity needs to consider when considering any proposed property transaction, but it does cover, in particular a solicitor, surveyor, and accountant.

identified that the Charities Act 2011 was unnecessarily complex and it may be the case that the disposal of land by a charity is not covered by the Charities Act 2011. The Commission has simplified some parts including those in respect of the disposal of land by a charity. The Commission Note takes into account the provisions of the Charities Act 2011 from 14 June 2023 by the relevant provisions of the Charities Act 2011.

Charities Act 2022 following implementation

expected in late 2023 and this Note will be updated

### 3. General requirements

Unless an exception applies, a charity must obtain the Charity Commission approval before disposing of land. The requirements set out in the Charities Act 2011 are designed to ensure that the sale of property is properly managed in the charity's best interests and that the best price reasonable in the circumstances is obtained. These requirements are subject to certain exceptions. Failure to comply with the requirements would result in a transaction being liable for breach of trust.

Firstly, a charity must have the legal power to enter into the transaction. The charity's governing document must provide that there is no prohibition on disposing of property which would prevent the charity from doing so. Trustees will then usually find the necessary powers in their Articles. If there is no such power, trustees will need to obtain an order from the Charity Commission allowing it to proceed.

Charity trustees must seek the advice of a "designated adviser" before proceeding. For more information on designated advisers, see below.

The trustees must be satisfied that it is in the charity's best interests to proceed with the transaction and that the best price reasonable in the circumstances is obtained.

Provided the above conditions are met, trustees can generally dispose of property, except in the case of a "prohibited disposal" in which case the disposal is prohibited without the prior approval of the Charity Commission. "Prohibited disposals" are defined in Section 118 Charities Act 2011 and include:

- trustees, agents or employees of the charity or their close relatives or spouse/civil partner;
- donors of land or other property to the charity or their close relatives or spouse/civil partner;
- people in business with the charity or their close relatives or spouse/civil partner;
- an institution or other body in which any of the above have a significant interest.

An example is where a charity sells or leases property to one of the trustees or to a person who is a trustee's relative.

The Charities Act 2011 also provides that trustees can now let a residential property to an employee to be used as the employee's home. This now requires trustees to obtain the Charity Commission's consent to do so. For example, a housemaster in a boarding school, where residential property is let to a

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As a charity to deal with its land without Charity Commission approval, charities must abide by the very particular requirements of the Charities Act 2011. These are designed to ensure that the sale of property is properly managed in the charity's best interests and that the best price reasonable in the circumstances is obtained. These requirements are subject to certain exceptions. Failure to comply with the requirements would result in a transaction being liable for breach of trust.

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An example is where a charity sells or leases property to one of the trustees or to a person who is a trustee's relative.

The Charities Act 2011 also provides that trustees can now let a residential property to an employee to be used as the employee's home. This now requires trustees to obtain the Charity Commission's consent to do so. For example, a housemaster in a boarding school, where residential property is let to a

Legal advice should be sought on any particular proposed transaction under the Charities Act 2011 in that case.

Other more detailed advice may also apply, depending on the nature of the transaction, but the main principles of this Guidance Note.

#### 4. Taking Advice

Recent changes have made taking advice less prescriptive.

- obtain and consider the advice instructed by the charity;
- decide that they have obtained the best advice which the sale can reasonably be expected to achieve for the charity.
- The Charity Commission has approved a range of professional advisers who can provide advice on a "designated adviser" basis.
- a fellow of the Royal Institution of Chartered Surveyors (RICS) or
- a fellow of the Chartered Institute of Building (CIB) or
- A fellow of the Chartered Institute of Estate Agents (CIEA) or
- Charity trustees should ensure that the designated adviser is able to manage the sale and provide a written report.

Written reports must include:

- the value of the property;
- Whether the value is enhanced and what steps which could be taken to enhance that value;
- whether and, if so, how the property should be marketed;
- anything else which would be in the best interests of the charity;
- any other matters which the charity trustees should be aware of;
- the adviser must state whether he has ability in, and experience of, the valuation of land and whether there is a conflict of interest with the interests of the charity.

Trustees have more discretion to advertise a property if they do not follow those recommendations.

whether an exception applies in the case of any particular proposed transaction that needs to be done to comply with the Charities Act 2011.

also apply, depending on the nature of the transaction, but the main principles of this Guidance Note.

#### Advertising

Charities must comply with the requirements for advertising and the requirement for a written report. Charities are required to:

- obtain and consider the advice instructed by the charity;
- decide that they have obtained the best advice which the sale can reasonably be expected to achieve for the charity.

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## 5. Overview of situations

### Taking (and granting) licences/land

- **Grant of licence**

A charity may wish to take or grant a licence for a period not exceeding 2 years.

This will usually be a written document distinct from a lease, tenancy agreement, or arrangement is a licence which gives the licensee a temporary arrangement to use the premises/land.

In law, a licence is a personal right, whereas a lease is a real right. The period of the licence is usually shorter than the period of the lease. The arrangement of a licence is a personal transaction (although it is of course related to the property). Consideration is not required for taking on a licence.

Even though a charity is not bound by the terms of the licence, it is important that the charity's details are correct and correctly stated in the licence, and that the licence is correctly signed by the relevant trustee/s or other person/s.

We have included examples of typical instances of licences in the Property Folder to cover the following situations:

- *Two or more charities sharing office premises or rented premises*
- *Three or more charities sharing office premises or rented premises*
- *An agreement for a charity to use premises for a number of days*
- *An agreement for a charity to use premises without a business purpose*

- **Grant of a licence**

Similarly, when a charity grants a licence to another organisation or person, it will need to be satisfied that the details of the arrangement and ensure that the details of the licence are correct.

- **Taking a lease**

When a charity takes a lease from a landlord, or grants a lease to a tenant, the following matters should be considered:

The charity's details should be correct and correctly stated in the lease, and that the lease is correctly signed by the relevant trustee/s or other person/s.

They will also need to be satisfied that the terms of the lease are fair, reasonable, and acceptable to the charity, and that they understand the obligations to which they are entering.

## Actions

### Licences/land

A charity may wish to take or grant a licence for a short term, e.g., for a day or two, or for a longer period, e.g., for a year or more.

A licence is a written document which describes itself as a "licence" (as opposed to a lease, tenancy agreement, or tenancy at will). The essence of such an arrangement is that it is a personal transaction and available on a non-exclusive basis (unlike a lease which gives the licensee exclusive possession for the period of the lease), and it is a personal right.

A licence gives the licensee equal rights on the licensee against the licensor, but not legal rights in and over the property itself for the period of the licence. Taking on a licence is in the nature of a "business" transaction (although it is of course related to the property). It is a personal transaction and specific restrictions and formalities which apply to leases do not apply.

Even though a licence is not a lease, it will need to be satisfied that the details of the licence are correct and acceptable in all of the circumstances, that the licence is correctly signed by the relevant trustee/s or other person/s (where it is an unincorporated charity) are fully satisfied, and that the licence is correctly signed by the relevant trustee/s or other person/s.

We have included examples of typical instances of licences in the Property Folder to cover the following situations:

- *Two or more charities sharing office premises (where the charity does not charge for any services provided by the owner, or for such services)*
- *Three or more charities sharing office premises (where the charity does not charge for any services provided by the owner, or for such services)*
- *A "pop up" shop for a short period (either a self-organised shop, a shopping centre, or a retail space in a shop or other building)*
- *An agreement for a charity to use premises for an event or activity for a number of days (e.g., a fete, sponsored sport or other activities)*
- *An agreement for a charity to use premises without a business purpose (Although a tenancy not a licence, this is in effect a licence, and legal rights over the property.)*

When a charity grants a licence to another organisation or person, it will need to be satisfied that the details of the arrangement and ensure that the details of the licence are correct.

When a charity takes a new lease or sublease granted to it by a landlord, or grants a lease to a tenant of an existing lease or sublease), the charity should consider the following matters before it proceeds.

The charity's details should be correct and correctly stated in the lease, and that the lease is correctly signed by the relevant trustee/s or other person/s.

They will also need to be satisfied that the terms of the lease are fair, reasonable, and acceptable to the charity, and that they understand the obligations to which they are entering.

# S A M P L E

the charity will be affordable, and that the rent is on the market and that there is security of tenure.

They must be signed by the charity's details (or trustees' details where it is an unincorporated charity) and the charity's legal adviser.

It is advisable to engage a solicitor to advise about the proposed rent and service charges, and to review the terms of the lease and generally.

The above documents should be included in the Property folder to cover the proposed lease of premises/land:

We have included typical instalment lease agreements in the Property folder to cover the proposed lease of premises/land:

*Lease (up to 25 years) - shared building*

*Lease (up to 25 years) - shop*

- **Buying freehold property**

The following documents should be considered before the charity proceeds:

- The charity's details (or trustees' details where it is an unincorporated charity) and the charity's legal adviser.
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(See below for more details.)

- **Statements on acquisition of freehold/leasehold property**

Section 122 of the Charities Act 2011 requires particular statements to be included in documents relating to the acquisition of property, confirming that it is to be held by the charity. Your legal adviser should check that the correct wording is included in the transfer, lease or contract for sale/lease. The documents should be signed by the charity's details (or trustees' details where it is an unincorporated charity) and the charity's legal adviser.

lease, that the rent and other outgoings will be paid is a fair one compared with similar properties. The charity should consider whether the proposed lease will give it the security of tenure that it requires, and whether that is acceptable to it.

The charity's details (or trustees' details where it is an unincorporated charity) and the charity's legal adviser should be correctly stated in the lease, and that it is correctly signed by the charity's details (or trustees' details where it is an unincorporated charity) and the charity's legal adviser.

It is advisable to engage a solicitor to advise about the physical premises and the proposed rent and service charges, and to review the terms of the lease and generally.

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# S A M P L E

- **Acquiring property**

For present purposes, a mortgage is a loan, not a security. It is the acquisition of a loan, not the acquisition of a security. Trustees have a duty to ensure that the interest rate on the mortgage is the best available for the charity at the time the mortgage is made.

Section 124 of the Act sets out the requirements for a mortgage. The requirements are set out in the Commission's guidance.

The Act requires trustees to have obtained and considered advice given to them in writing before they decide to mortgage property.

- whether the charity wants to mortgage property
- whether the mortgage is in the best interests of the charity
- the advice given to the charity on those terms the sum proposed to be paid by the charity

The Act requires trustees to be qualified by the Charity Commission in relation to the mortgage. The Commission will consider whether the trustees are qualified by possessing the necessary knowledge, skills and experience of the mortgage market.

Subsections (2) to (4) of section 124 require trustees to obtain and consider advice from a person the trustees reasonably believe to be qualified to give advice on financial matters and who has no financial interest in the mortgage. The Charity Commission will consider whether the person should be professionally qualified as well as the advice mentioned above. This could be the charity's accountant or a professional adviser. The person may be another officer, or a charity trustee.

A charity considering a mortgage in any circumstances should ensure that it has a full audit trail of the decision-making process. This should include a record of the proposed transaction, including advice as to what is needed to ensure that the mortgage is in the best interests of the charity and all other relevant factors.

- **Granting a lease**

Section 120 of the Act sets out the requirements for a lease. The requirements are set out in the Commission's guidance. Trustees must obtain and consider a report from a person who has the ability and practical experience to advise them on the terms proposed for the lease. There are no restrictions on the terms proposed for the lease before complying with the requirements of the Act.

that a mortgage will be to secure repayment of a loan. If its constitution allows it, a charity can finance the acquisition of a mortgage but note that the trustees must ensure that the mortgage is on terms reasonably obtainable by comparing the mortgage with various lenders. They must also ensure that the mortgage is not out of the resources of the charity which are available for the mortgage. They must also have budgeted for any potential rises in interest rates.

Section 121 of the Act contains the following restrictions and requirements for a mortgage. A charity is to mortgage a freehold or leasehold. If these requirements are not met, the mortgage should not usually have to involve the Charity Commission.

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## Leases

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these require the person selected to provide reliable advice. An employee of the charity with expertise and experience as a surveyor or a member of a

will not need to be involved. As long as the ability and expertise to provide the trustees with no reason why one of the trustees or even an as the adviser provided they have the right interest. The adviser need not be a qualified Charity Commission recommends that they are a body.

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From June 2020 a residential charity can allow their home.

Charity Commission is no longer needed to grant access to an employee to live in the property as

We have included a typical instalment

template agreement in the Property Folder to cover a lease of premises/land:

*Underlease of office premises*

- **Sale/transfer of long lease of a premises**

For a sale/transfer of a lease over 7 years, or other disposal other than in the case of a lease:

- obtain an independent valuation or exclusions
- consider the advice of a designated advisor and follow their recommendations
- be satisfied that the terms are the best that can reasonably be obtained in the circumstances

an report from a “designated advisor” acting

making any recommendations from the “designated advisor” and reasoning on why recommendations were not

- **Statements and certificates included in documents on sale of a freehold or grant of lease**

Subsections 86-88 of the Charities Act 2011 require particular statements and certificates to be included in documents where a charity is selling or otherwise disposing of a freehold or lease. Your legal adviser should check that the correct words are used in the transfer, lease or contract for sale/lease document. These requirements apply to any other disposal by a charity of any freehold property or lease, and to any grant by a charity of a new short or long lease. Changes are expected later in 2023.

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