

## **Decision of the Charity Commission for England and Wales**

### **Hughenden Community Support Trust – Application for removal from the register of charities.**

#### **The Application**

1. The Applicant has made an application under section 36(1)(b) of the Charities Act 2011 (the 2011 Act) to the Charity Commission to remove Hughenden Community Support Trust from the register of charities on the ground that it is not a charity, or that it does not operate.
2. The Commission must under section 34 of the 2011 Act remove from the register:
  - a. Any institution which it no longer considers is a charity; and
  - b. Any charity which has ceased to exist or does not operate.

#### **The Decision**

3. The application to remove the charity from the register is rejected.
4. The Commission concludes that the land held under several inclosure awards continues to be held subject to overriding charitable trusts. The charitable trusts did not cease either by virtue of the transfer of legal title to Hughenden Parish Council (the Parish Council), as local authority, or as a result by the powers of management being given to the Parish Council by virtue of various statutory enactments.

#### **Background to the application**

5. Under two separate awards certain land was allotted under the provisions of the Inclosure Act 1845 upon trust as allotments for the labouring poor. The trust created by the awards was registered as a charity and entered on the register of charities in 1966. The charity was known as Allotments for the Labouring Poor.
6. On 7 October 2015 the Commission made a scheme under the provisions of 2011 Act and Commons Act 1899 for the future administration of the charity and by which it became known as Hughenden Community Support Trust. The Applicant applied under section 319 of the 2011 Act to challenge that scheme. In that application the Appellant contended that the land held subject to the inclosure awards was not held subject to a charitable trust but rather was held by the Parish Council upon a public trust subject to its statutory powers and that accordingly the Commission did not have jurisdiction to make a scheme.
7. Following a hearing of the First-tier Tribunal (Charity) on 13 July 2016 Judge McKenna directed the Applicant to apply to the Commission for the removal of the charity under section 36 of the 2011 Act. The Applicant made this application by letter dated 8 August 2016. The Commission is satisfied that the Applicant is a person affected within section 36 (1) of the 2011 Act.

#### **Grounds for removal**

8. The Applicant has set out a number of grounds for removal which in summary are as follows:
  - (a) That the land was settled upon a public trust and not a charitable trust.

- (b) That if the land was held upon charitable trust it ceased to be so held by virtue of subsequent statutory enactments.
- (c) That the charity does not operate.

9. The Applicant makes further arguments in relation to the Commission's jurisdiction to make a scheme but it is not necessary to consider these in this decision.

### **Persons affected**

10. In accordance with the directions of the Tribunal the Commission has sought representations from those who may be affected by any decision to remove the charity from the register of charities.

11. Representations were received on behalf of the current trustees and the Parish Council. These have been considered in reaching the decision.

### **Issues to be determined**

12. The issues to be determined are:
- a. whether the land held under two separate inclosure awards was held upon charitable trust;
  - b. if the land was originally held upon charitable trust whether it has ceased to be or is held upon charitable trust;
  - c. if any charity established by the awards has ceased to operate.

13. In making this decision the Commission has considered the position at the time at which the scheme was made.

### **The Inclosure Awards**

14. The land the subject matter of this decision is contained in two separate inclosure awards.

15. By award dated 27 March 1855 land was allotted to the Churchwardens and Overseers of the Poor: *'to be held by them and their successors in trust as allotments for the labouring poor of the said parish of Hitchenden<sup>1</sup>*

16. By further award dated 4 August 1862 land was allotted to the Overseers of the Poor of the Parish of Hughenden *'to be held by them and their successors in trust as allotments for the labouring poor of the Parish.'*

17. Together these are referred to in this decision as the Hughenden Allotments.

### **The Statutory Framework**

18. The law relating to allotments is complex and subject to a series of enactments. The statutory framework, so far as relevant, is summarised below.

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<sup>1</sup> Hughenden was also known at the time by the name Hitchenden.

### The Inclosure Act 1845

19. The Inclosure Act 1845 made provision to facilitate the enclosure and improvement of commons and lands and to allot land for charitable and public purposes.

- Under section 31 of that Act provision was made for the allotment of land for the labouring poor.
- Under section 108 allotments for labouring poor were to be managed by 'allotment wardens'.
- Section 112 provided that any surplus rent was to be applied to the overseers of the poor in aid of the poor rates.

### The Commons Acts 1876 and 1899

20. The Commons Acts of 1876 and 1899 made further provision for management of allotments.

21. The Commons Act 1876, in its Preamble, stated that allotments that were created for the labouring poor under the Inclosure Acts 1845 to 1868 were to be referred to in that Act as 'field gardens'.

- Section 26 of the Commons Act 1876 provided power to let any allotments not required for the labouring poor at best rent obtainable.
- Section 27 provided surplus rent may be applied in maintenance and provision of allotments and provided a power of sale.
- Section 18 of the Commons Act 1899 gave the Commission power to modify provisions for field gardens and other forms of allotment for public or parochial purposes by way of scheme.

### Local Government Act 1894

22. The Local Government Act 1894 (the 1894 Act) brought into existence Parish Councils.

23. By virtue of sections 5 and 6 of the 1894 Act legal title and management of the allotments was vested in parish councils subject to existing trusts.

### Small Holdings and Allotments Act 1908

24. By virtue of the Small Holdings and Allotments Act 1908 (the 1908 Act) parish councils acquired certain powers of management over the land including a power of sale.

25. In summary the key provisions were as follows:

- Section 23 imposed a duty on local authorities, including the Parish Council, to provide a sufficient number of allotments, and let such allotments to persons belonging to the labouring population.
- Section 25 provided a power to acquire land for the purpose of allotments.
- Section 26 provided a power to improve. Surplus income from letting could be applied for this purpose as an expense of the provision of allotments.
- Section 27 provided a power to let including a power to let for best rent obtainable for period not exceeding 12 months if the allotments could not be let in accordance with the Act. This reflects the power in section 26 of Commons Act 1876.

- Section 28 provided a power to make rules for letting and preventing undue preference in the letting of the allotments.
- Section 32 provided a power of sale and made provision for the application of proceeds. The power extended to the application of proceeds to non-charitable purposes.
- By virtue of section 33(4) powers transferred to a parish council under the Act were exercisable in relation to land which that council had acquired by virtue of other enactments as well as land acquired under its general powers under the Act.
- The expression 'allotment' within the Act includes a field garden.

26. The Land Settlement Act 1919 removed reference to 'labouring' from the 1908 Act.

**A) Whether the terms of the Inclosure Awards created a charitable trust**

27. The terms of both awards state the land is to be held 'in trust'. The purpose which follows is 'as allotments for the labouring poor.' The relief of poverty is an accepted charitable purpose and the provision of allotments for the poor as providing direct relief.<sup>2</sup>

28. It is argued by the applicant that the Hughenden Allotments provided under the 1845 Act were not held upon charitable trust but rather upon public trust. This is based on the side note to section 73 of the 1845 Act which simply refers to 'allotments for public purposes.' Further reliance is placed on the wording in section 73 which reads:

*"all Allotments which shall be made to the Churchwardens and Overseers under this Act shall be held by the Churchwardens and Overseers of the Poor for the Time being in the same Manner and with the same legal Powers and Incidents as if the same Allotments were Lands belonging to the Parish, but in trust nevertheless for the Purposes for which the same shall be allotted, and subject, as to the said Allotments for the labouring Poor, to the Provisions in relation thereto herein-after contained,"*

29. A charitable purpose may be a public purpose but not every public purpose is a charitable purpose. That the 1845 Act made provision for the allotment of land for different public purposes does not mean that certain of those purposes could not also be a charitable purpose.

30. The High Court judgment in *Snelling v Burstow*<sup>3</sup> did not in any way question that the original grant under the Inclosure Act 1845, which was in similar terms to the Hughenden allotments, was charitable. That also appears to have been the position in the Court of Appeal. The question which arose was whether the trust subsequently was brought to an end; see paragraphs 44-45 below.

31. The Commission is satisfied that the land granted under the inclosure awards was held upon charitable trust.

**B) Has the land ceased to be held subject to charitable trust?**

32. In order to consider the issue to be determined it is necessary to consider the statutory provisions in more detail.

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<sup>2</sup> *Crafton v Frith* (1851) 4 DE G & Sm 237.

<sup>3</sup> [2013] EWHC 46 (Ch)

### Vesting and transfer of the land

33. The vesting of legal title in the land and the transfer of the management of allotments to Hughenden Parish Council arose under sections 5 and 6 of the 1894 Act:

*5 c) The legal interest in all property vested in either the overseers or in the churchwardens of a rural parish, shall if there is a parish council, vest in that council, subject to all trusts and liabilities affecting the same.*

*6 Upon the parish council or rural parish council coming into office, there shall be transferred to that council:-*

*(1)(c)(iii) the holding or management of parish property, not being property relating to the affairs of the church or held for an ecclesiastical charity, and the holding or management of village greens or for allotments whether for recreation grounds or for gardens or otherwise for the benefit of the inhabitants or any of them.*

*4. Where any act constitutes any persons wardens for allotments, or requires or authorises the appointment or election of any wardens committee or managers for the purposes of allotments, then after a parish council for a parish interested in such allotments comes into office the powers and duties of wardens, committee or managers shall be exercised and performed by the parish council and it shall not be necessary to make the said appointment or hold the said election.*

34. Following this vesting, the land continued to be held subject to the charitable trust created by the Inclosure Awards as provided for in section 5(c).

### Management powers under the 1908 Act

35. The key provisions of the 1908 Act in relation to the transfer of management and exercise of powers by the Parish Council are contained within sections 33(3) and (4). These provide

*33(3) Where, as respects any rural parish, any Act constitutes any persons wardens of allotments, or authorises or requires the appointment or election of any wardens, committee, or managers for the purpose of allotments, the powers and duties of the wardens, committee, or managers shall, subject to the provisions of this Act, be exercised and performed by the parish council, or, in the case of a parish not having a parish council, by persons appointed by the parish meeting, and it shall not be necessary to make the said appointment or to hold the said election*

*33(4) The provisions of this Act relating to allotments shall apply to land vested in, or the management whereof has been transferred to, a council under this section or the corresponding provision of any enactment repealed by this Act in like manner as if the land had been acquired by the council under the general powers of this Part of this Act.*

36. The purpose of section 33(3) is not entirely clear given that the management of allotments would appear to have effectively passed under the 1894 Act. Section 33(3) is effectively a re-enactment of section 6(4) of 1894 Act which the 1908 Act repealed.

37. In any event by virtue of section 33(4) the general powers of management given to the Parish Council in sections 23-32 of the Act became applicable and were exercisable by the Parish Council over the Hughenden Allotments. The Act is specific in that the powers are applicable both to land acquired under the Act and to land vested in or managed by the local authority by virtue of other enactments. In this case the land had become vested in the local authority by virtue of section 5 of the 1894 Act and management transferred by section 6(4).

#### How did this affect the charitable trust?

38. The 1908 Act as outlined above provided the Parish Council with a range of powers which were applicable to both land acquired under the powers within the Act and field gardens, including Hughenden Allotments, which were subject to charitable trust and had become vested in it. However the Act did not specifically extinguish the trusts. It allowed the local authority to manage its allotments including those subject to a charitable trust on similar terms. There was no inconsistency in the use of the powers with the charitable trust, the statutory power to provide allotments for the labouring population being consistent with a class of beneficiaries of the labouring poor.

39. The Commission accepts that the power of sale given to the Parish Council under section 32 of the 1908 Act was exercisable both in relation to land acquired by the Parish Council under the powers in the 1908 Act and land acquired by virtue of the statutory enactment, either section 5 or 6 of the 1894 Act or the 1908 Act.

40. It is agreed that the exercise of the power of sale in section 32 of the 1908 Act would bring to an end the charitable trust. This is confirmed by the Court of Appeal in *Burstow v Snelling*<sup>4</sup>:

*'It is both clear and common ground that if the 1908 Act conferred the s32 power of sale on parish councils which had acquired allotment land and management responsibility under s 6 of the LGA 1894 then it was exercisable according to the terms and no trust charitable or otherwise, attaches to the proceeds of sale.'*

41. However the 1908 Act did not expressly revoke or extinguish the trusts upon which the property was held by the Parish Council having been transferred as provided for in section 5 of the 1894 Act subject to *'the trusts and liabilities affecting the same.'* It cannot be implied that the powers of management given to the Parish Council in the 1908 Act revoked those trusts. That would have required an express revocation.

42. In the absence of any provision revoking or extinguishing the trusts the land remained subject to the trusts upon which the land was transferred.

#### Land Settlement (Facilities) Act 1919

43. The 1919 Act removed reference to the 'labouring' in section 23 of the 1908 Act.

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<sup>4</sup> [2013] EWCA Civ 1411

44. This raises the question whether, as a result, the land was held by the Parish Council for the statutory purpose of allotments under section 23 and without reference to the charitable class of beneficiaries such that the land ceased to be held upon charitable trust.

45. The question was raised in the case of *Snelling*<sup>5</sup> but was not considered further. Lord Justice Patten in the Court of Appeal observed:

*'The judge (referring to the decision in the High Court) expressed the view that the possible cessation of the charitable trust by the exercise of the s.32 power could be regarded as consistent with a dilution in the 1876 Act and in subsequent legislation of the requirement that the allotments should be the exclusive preserve of the labouring poor of the parish. The Land Settlement (Facilities) Act 1919 removed references to the labouring poor and required councils to provide allotments where there was a sufficient local demand regardless of the circumstances of the would-be allotment holders. But it is not in my opinion necessary to attempt to delve further into that particular issue.'*

46. The matter for consideration in *Snelling* related specifically to whether the power of sale in section 32 was exercisable or whether the relevant parish council could only rely on the provisions in section 27 of the Commons Act 1876. The conclusion was that both were exercisable:

*'The better view is that these are different, although overlapping provisions, and the Council may choose between them'*<sup>6</sup>.

47. Accordingly this suggests that the charitable trust had continued in existence alongside the powers provided to the council under the 1908 Act. The removal of the reference to 'labouring' in section 23 of the 1908 by virtue of the 1919 Act did not extinguish the charitable trust upon which the land had transferred to the local authority. Section 23 was a provision imposing, as set out in the side note to the section 'a duty of certain councils to provide allotments'. As originally enacted it read:

*'If the council of any borough, urban district, or parish are of opinion that there is a demand for allotments for the labouring population in the borough, urban district, or parish and that such allotments cannot be obtained at a reasonable rent and on reasonable conditions by voluntary arrangement between the owners of land suitable for such allotments and the applicants for the same, the council shall provide a sufficient number of allotments; and shall let such allotments to persons belonging to the labouring population resident in the borough, district, or parish, and desiring to take the same.'*

48. The provision imposed the duty to provide allotments and the sections which followed gave power to purchase land for that purpose and to manage such land. The effect of the removal of

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<sup>5</sup> above at paragraph 40.

<sup>6</sup> at paragraph 41

reference to the labouring was to extend and widen the duty of the local authority to provide allotments beyond the labouring population.

49. For the same reasons as set out in paragraph 41 such allotments, including the Hughenden Allotments, continued to be held upon the declared trust as allotments for the labouring poor. There was no express revocation of the trust in the 1919 Act and such revocation could not be implied. The provision of allotments for the labouring poor was not inconsistent with the wider power of the local authority to provide allotments.
50. In observing those trusts, if and in so far as the allotments ceased to provide an effective method of relieving the poor then power existed under section 19 of the Commons Act 1899 for the Commission to make a scheme.
51. The practice of the Commission has been to do so. The practice of the Commission to do so was recognised by Parliament in The Departmental Inquiry Report into Allotments 1969 (the DIR) and prior to that the Royal Commission on Common Land 1958<sup>7</sup>. In its conclusion the DIR reported *'We do not quarrel with the view that the cy près doctrine applies to every allotment site governed by a charitable trust, but we suggest the Commission's interpretation of the doctrine in this instance to be too narrow. There can be little doubt that the primary purpose of a field garden was to benefit the poor but in the case of the site provided by a private individual, the donor's intention is more difficult to define.'*
52. As such the continued existence of a charitable trust was not itself questioned.
53. Both Reports recommended field garden allotments should be transferred to the allotment authority and that they should be treated as ordinary (i.e. non charitable) allotments. Such a recommendation would be unnecessary if the charitable trust had already been extinguished and the authority held such allotments for non- charitable purposes
54. That the trusts remain is also the view in Arnold Baker 'Local Council Administration' *'Whatever their origin, an allotments authority manages its allotments as one unit; the great majority are provided under the Allotments Acts 1908–1950, but these Acts apply whether the allotments are provided under them or not<sup>2</sup>; nevertheless, the trusts upon which a given allotment was originally held will remain in force.'*<sup>8</sup>
55. Accordingly in relation to issue b) the Commission is not satisfied and it has been established that by virtue of the statutory enactments the charitable trust upon which the land is held has been extinguished.

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<sup>7</sup> Cmd 462

<sup>8</sup> at 29.2



### **C. Has the charity ceased to operate?**

56. The Applicant argues that the charity does not operate, on the basis that it is managed by the local authority with other allotments and that it has no income, the cost of maintaining the allotments is greater than the income.
57. The allotments which form the subject of the trust still remain in existence. They are still managed and made available as allotments to the members of the public. Income has been received from the letting of allotments and funds expended on the upkeep of allotments. There is a distinction between ceased to operate and ceased to operate as a means of relieving poverty. That the allotments have ceased to operate for the relief of poverty establishes a reason for the exercise of the Commission's jurisdiction.
58. The Commission rejects the argument that the charity does not operate.

### **Conclusion**

59. The application that the charity be removed from the register is rejected.

### **Right of Appeal**

60. The Commission's decision was made under section 36(1)(b) of the 2011 Act.
61. The Commission's decision can be challenged in the First-tier Tribunal (Charity). The Tribunal is an independent legal body which has the power to look again at decisions made by the Commission and to overturn them or adjust them.
62. **To start a case in the Tribunal, a 'Notice of Appeal' must be sent to the Tribunal within 42 days of the date on which the notice of our decision was sent to you. Weekends and bank holidays are included in the 42 days. If you miss this deadline, you will need to ask the Tribunal for an extension of time and this may not be granted.**
63. If you wish to challenge our decision in the Tribunal, you may find it helpful to visit the Tribunal's website for more information about time limits, the form of the Notice of Appeal and how to start a case: <https://www.gov.uk/guidance/appeal-against-a-charity-commission-decision-about-your-charity>.

**20 December 2016.**