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09 October 2007

To: All Members of the Alexandra Palace and Park Board

Dear Member,

Alexandra Palace and Park Board - Wednesday, 10th October, 2007

I attach a copy of the following reports for the above-mentioned meeting which were not available at the time of collation of the agenda:

- 4. REPORT OF THE TRUST'S SOLICITOR UPON THE OUTCOME OF THE APPLICATION FOR JUDICIAL REVIEW OF THE CHARITY COMMISSION DECISION AND CONSIDER THE CHARITY'S OPTIONS AND MAKE DECISIONS IN REGARD THERETO (TO FOLLOW). (PAGES 1 - 14)**

The purpose will be to report and secure the charity trustees decisions as to further conduct.

Yours sincerely

Ken Pryor
Deputy Head of Local Democracy and Member Services

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SPECIAL ALEXANDRA PALACE & PARK BOARD

Agenda Item No

10 OCTOBER 2007

REPORT OF HOWARD KENNEDY, THE TRUST'S SOLICITORS**RESPONSIBLE PARTNER:** Iain Harris Tel: 020 - 7546 8986**REPORT TITLE:** Outcome of the Application for Judicial Review of the Charity Commission decision and consideration of the Charity's present options**REPORT AUTHORISED BY:** Iain Harris of Howard Kennedy of 19 Cavendish Square, London W1A 2AW.
Trust's Solicitors.**1. PURPOSE**

- 1.1 To report to the Board upon the outcome of the application for judicial review of the Charity Commission decision, to consider the Charity's options and make decisions in regard to further conduct.

2. SUMMARY

- 2.1 The High Court quashed and declared unlawful the Charity Commission order of 4 May 2007 authorising the Trustees to complete the Lease to Firoka. Accordingly the Trustees are unable to complete.
- 2.2 The options of the Board as charity trustees are outlined and the Board is invited to give instructions to officers and advisers.

3. RECOMMENDATIONS

- 3.1 The Board notes the outcome of the judicial review application.
- 3.2 The Board decides whether to reaffirm its general strategy and objective of granting a long lease to a developer and its specific strategy of granting such a lease, in the terms agreed to Firoka.
- 3.3 Depending upon its decision, the Board instructs its officers and advisers to proceed accordingly.

4. LOCAL GOVERNMENT (ACCESS TO INFORMATION)

ACT 1985

- 4. No specific papers were used in the preparation of this report other than the court bundles from the judicial review hearing.

5. THE REPORT

- 5.1 Following a debate in the First Standing Committee on delegated legislation on 14 January 2004 the Charities (Alexandra Park and Palace) Order 2004 was made and came into force on 10 February 2004.
- 5.2 The Order empowered the Trustees to lease the whole or part or parts of the Palace and its immediate surrounding area for a term not exceeding 125 years subject to obtaining the consent of the Charity Commissioners by Order made under the Charities Act 1993.
- 5.3 During the course of the parliamentary debate the Minister gave certain assurances with regard to steps that the Charity Commission would take before authorising the grant of any Lease.
- 5.4 The Minister said inter alia:-

“However, it is important that there is an opportunity to have specific consultation on the beneficial issue, as well as on issues connected with the established procedures such as planning. I therefore asked the Commission for an undertaking, which I have now received, to publish the draft of any Order that it might make authorising a Lease under the Scheme and to invite and consider any representations that it may receive.”

- 5.5 Subsequent to the coming into force of that Order, on 10 February 2004, the Trustees conducted a development competition and, in January 2006, selected Firoka as their preferred development partner.
- 5.6 Documentation was eventually agreed between the Trustees, represented in the negotiation process by Berwin Leighton Paisner and Firoka. On 24 November 2006 a Master Agreement was exchanged. The Master Agreement referred to and annexed an agreed draft Lease and Project Agreement. Charity Trustees will recall that this documentation was provided to them as part of the induction process at a meeting on 28 June 2007. It is contained at marker 6 of the bundle that was provided to Trustees on that occasion.
- 5.7 Subsequent to the exchange of the Master Agreement on 24 November 2006, the Charity Commission advertised its intention to make an Order authorising the grant of the long Lease under the 2004 Order.
- 5.8 In February/March 2006 the Charity Commission agreed that it would not require the Lease terms to be published. This agreement was contained in an exchange of correspondence consisting of our letter of 24 February 2006 and the Commission's response of 15 March 2006.
- 5.9 Following publication of the Commission's intention to make an Order Jacob O'Callaghan wrote to the Commission on 3 November 2006 requesting the Commission to provide him with a copy of the Project Agreement and draft Lease. He wrote repeating this request on 5 January 2007.
- 5.10 In accordance with the agreement between the Trustees and the Commission in March 2006 the Commission declined to provide a full copy of the relevant documentation. A redacted copy of the Lease was provided after the consultation

period had closed but the Commission declined to provide a copy of the Project Agreement.

5.11 Following extensive representations to the Commission it eventually decided to authorise the grant of the Lease on 27 April 2007 and an Order was made authorising the grant of both the Lease and the Project Agreement, in substantially the form that was published in November 2006.

5.12 Jacob O'Callaghan challenged the Commission's decision and Order by Judicial Review proceedings that were issued on 26 July 2007.

5.13 The Board as Charity Trustees has previously been provided with copies of documentation in relation to these proceedings and it is not the role of this report to repeat these matters.

5.14 The judicial review application was duly heard on Friday 5 October. Mr Justice Sullivan:-

(a) Granted permission to seek judicial review.

(b) Declared that the Charity Commission Order of 4 May 2007 authorising the Lease was unlawful.

(c) Quashed that Order.

He also directed the Trustees to make a contribution of 50% of Mr O'Callaghan's costs.

5.15 The Judge gave a long and detailed Judgment at the end of the Hearing. We have requested a full transcript of this Judgment which will be provided to Board Members in due course. There is, however, appended to this Report a contemporaneous note of the Judge's reasoned decision.

5.16 In essence, the Judge's decision turned upon the fact that a Minister of the Crown, in the course of a debate in Parliament, had given a solemn promise that there would be specific consultation. The Minister referred to the undertaking she had received from the Commission to publish the draft of any Order. The Judge expressed the view that the Minister's solemn promise needed to be construed

purposively, that is having regard to the purpose for which the assurance was given, rather than legalistically. A purposive construction would mean that the full documentation would need to be made available, while a legalistic construction would mean that only a draft of any Order would need to be made available.

5.17 The Judge took the view that consultation which entailed publication of the draft of the Order, which referred to the draft Lease and Project Agreement, but not these latter documents would render the consultation process “a complete nonsense”. In his Judgment he posed the rhetorical question as follows

“I ask rhetorically what is the point of publishing a draft Order referring to the Lease and refusing to publish the Lease. Mr Kovats (Counsel for the Charity Commission) refers to a confidentiality agreement but it is difficult to see how such a private agreement could negate the effectiveness of a consultation which had been publicly promised by a Minister in Parliament.”

5.18. The Board as Charity Trustees now need to consider what steps they wish to take.

5.19. The strategy and objective of the Trustees has, for many years, been that of seeking to grant a long Lease that would substantially “shift the risk” associated with the Trustees’ ownership of the Palace building. This strategy and objective is consistent with the willingness of the local authority to continue to fund the Charity’s substantial trading deficit whilst it undertakes the process of securing a willing development partner and ultimately granting a long Lease. The Board as Charity Trustees are asked to consider and decide whether this remains its strategy and objective.

5.20 If it does, then the Board will need to consider whether it wishes to direct its officers to continue negotiations and discussions with Firoka. At the time of preparation of this Report Firoka has indicated both through its principal and its solicitors that it remains willing to continue to negotiate although this position may change.

5.21 So long as this remains Firoka’s position, and the Board as Charity Trustees is agreeable to pursuing a course of negotiations, then the next steps will be to engage with the Charity Commission in order to establish what steps they now wish to take in order to comply with the Minister’s assurance with regard to consultation in the 2004 Parliamentary debate.

- 5.22 From informal discussions with the very senior officers at the Charity Commission who were at court at the conclusion of Friday's hearing it is anticipated that the Commission will wish for both draft Lease and Project Agreement to be made available as part of the consultation process, with some of the key financial aspects and provisions in relation to guarantees redacted.
- 5.23 If the Board as Charity Trustees is not prepared to authorise ongoing discussions then serious issues arise with regard to the solvency of the Charity. In the limited time available for preparation of this Report, we have not been able to identify these issues in detail and they will need to be subject of further consideration and a further Special Board Meeting to be convened, if appropriate, as a matter of urgency.

Note of Judgment of Mr Justice Sullivan delivered on Friday 5 October 2007 in
O'Callaghan v Charity Commission and others

In this rolled up application for permission to apply for judicial review and if granted the substantive hearing the claimant seeks a declaration that the Order to enter into the lease under the Charity Commission Order 2004 was unlawful and should be quashed.

The case was listed for one day and was expedited. Time constraints make it impossible to set out the full history.

In summary the finances of Alexandra Palace have been in a parlous state for years. In an effort to keep the palace going funds have been provided from the Local Authority which pays the deficit.

In 1998 the Trustees decided to ask the Defendants to promote a scheme to give permission to grant a long lease.

The Trustees wish to be able to lease the whole of Alexandra Palace for 125 years at the best rent, regard being had to the Alexandra Park and Palace Act 1985 and its purpose authorising use for public resort and recreation area.

The Trustees want to grant the lease to a private developer to get funding on a proper financial footing.

The 2004 Order provides the Trustees with power to lease at clause 3 thus:-

“The trustees may, subject to the consent by order of the Charity Commissioners, grant a lease of the whole or part or parts of the palace buildings and the immediate surrounding area for a term not exceeding 125 years at the best rent reasonably obtainable regard being had to the purpose of the Alexandra Park and Palace Acts and Order 1900 to 1985”

The draft of the 2004 Order was considered in the House of Commons by the First Standing Committee on delegated legislation on 14 January 2004.

A number of members of parliament objected to the Order and in response to those MPs Fiona MacTaggart MP said:-

“However, it is important that there is an opportunity to have specific consultation on the beneficial interest, as well as on issues connected with established procedure such as planning. I therefore asked the Commission for an undertaking, which I have now received, to publish the draft of any Order that it might make authorising a lease under the scheme and to invite and consider any representations that it may receive.”

One of the MP's who was opposing the Order, Mr Foster, expressed delight that the Minister would undertake widespread consultation. He said

“ I am also delighted that she has persuaded the Charity Commission to ensure that there is widespread consultation.”

The Trustees undertook a tender process and chose Firoka as the preferred developer and the outline proposals were displayed in January 2006.

In March 2006 there was a section 36(6) Charities Act consultation. In October 2006 the defendant published the draft Order and a question and answer sheet.

The terms of the draft Order were to authorise the grant of a lease. The Order contained a definition of "the lease" as the lease annexed to the Master Agreement exchanged on 24 November 2006.

The draft Order contained a condition at 5(i) that the “Project Agreement must not be altered”.

It is thus clear that the lease was tied to the project agreement.

The question and answer sheet explained that the Charity Commissioners proposed to make an Order. The background was also set out. The Trustees needed the Charity Commission to consent to grant the lease. Various questions are also answered.

The claimant made representations. Amongst other things, he requested a copy of the Lease. In his letter of 3 November 2006 (page 34) he wrote:

“ However it is self evident that we cannot object in detail to the scheme and the lease until we have sight of both and we trust that you will direct that this be done, in line with the undertakings given in Parliament about the rights of objectors.”

He was not the only one to ask for a copy of the Lease and there was other correspondence in this regard in the bundle.

It is clear that Officers advising at the Charity Commission were well aware of this objection and the representations that the Lease and Project Agreement should have been made public.

Although this was raised and the Officers advising the Charity Commission were aware they gave no answer and none was provided by the Charity Commission.

The reason why the lease and the project agreement were not disclosed is found in an earlier exchange of correspondence between the Charity Commission and the Trustees' Solicitors.

In the letter dated 24 February 2006 (page 540) the Trustees' Solicitors wrote

“The General Manager has indicated his concern that if the preferred developer learns that agreed draft lease terms would be placed in the public domain for consultation he is likely to withdraw any interest that is shown in this project.”

Unfortunately for these proceedings the Charity Commission replied on 15 March 2006 (page 176) saying that they did not require the lease terms to be published.

A report of the Charity Commission said 328 representations had been received and 324 had expressed at least some concern. 4 were in support. This was a case of considerable local interest.

The report summary was sent to the Trustees for comment. The Trustees' Solicitor commented on 13 February 2007. The Trustees responded to concerns expressed by referring to numerous clauses in the lease or Project Agreement. The points made in that letter were taken up in a further report to the Charity Commission on 2 March 2007.

That report said the 2004 Order allowed a lease. (The Judge read at length this letter.)

The reasons for the Charity Commission's decision made on 27 April 2007 are set out in a document. In paragraph 5.3 there is a heading "Consideration of Representations". This sets out the ambit of the Charity Commission's decision.

A number of those making representations had said they needed to see the lease. Thus it is clear that the ambit of the Charity Commissioner's decision was not just whether what was proposed fell under the Act and Scheme but also if it was expedient in the interests of the Charity.

It might have been thought that whether or not it was expedient depended upon the terms.

Against that background there are certain conclusions.

The proper starting point is concerned with a promise of consultation. This promise was made by a junior minister of the Crown on the consideration of delegated legislation. It was a promise to those concerned in the debate:-

1. Of the importance to honour the promise made by the minister or very good reasons not to honour it.
2. The minister's promise has to be interpreted purposively, not legalistically, in a way as to make sense of the promise that beneficial interest will be protected. To do otherwise would make a nonsense of that promise.
3. The consultation must be effective and fair – it must not be ineffective and unfair.

The Charity Commission's approach, as explained by Mr Kovats, was that the Charity Commission had honoured its commitment. given by the MP as the draft Order had been published. In my judgment that makes a nonsense of the MP's promise and strips it of any real effect. To put it bluntly it is a nonsense to give a commitment to consult on X but not then to reveal X.

The reason is that if anyone is asked to comment on entering into a lease – whether to enter into a particular lease – he will be bound to say “show me the lease and agreement and then I can answer your question or at least tell me sufficient.” The draft Order may have been consenting to excellent proposals or not. It all depends on the Lease and the Project

Agreement. It is simply a nonsense to give a public assurance saying that there will be consultation on the Order with a draft Lease and then say nothing about the Lease.

Mr Kovats accepted that whatever the terms of the undertaking there was a requirement for the process to be fair. The unfairness is emphasised by the fact that when representations were referred to the Trustees, the Trustees responded by reference to the lease (letter of the Trustees' Solicitor to Charity Commission of February 2007 sets this out in detail).

I find it difficult to understand how the Charity Commission could have thought that this was a fair process. Alarm bells should have been ringing, particularly as these were flagged out by Officers in the Report.

In his submissions Mr Kovats relied on the fact that there had been compliance with the statutory requirements. The fact that they had been complied with is an indicator of fairness but here there was a specific promise by a parliamentary figure. So far as the proposition that the Charity Commission honoured the undertaking, the Charity Commission appears to have understood the undertaking in a limited way but my judgment is that this understanding was unreasonable and wholly unrealistic.

I ask rhetorically what is the point of publishing a draft Order referring to the Lease and refusing to publish the Lease. Mr Kovats refers to a confidentiality agreement but it is difficult to see how such a private agreement could negate the effectiveness of a consultation which had been publicly promised by a minister in Parliament.

The Charity Commission in apparently changing its position and giving an assurance that the lease would not be made public lost sight of the need for effective and fair consultation in the light of the Minister's assurance.

It is surprising that when the point was raised there was no further consideration of the matter.

There was a redacted copy giving a summary of the documents so there was some idea of what was being consulted about.

Lastly Mr Kovats mentioned the history of disclosure by the Trustees which was elaborated on by Mr Hickman on behalf of the Trustees who relied strongly on a confidentiality agreement between the Trustees and Defendant but as I have said the primary obligation

was on the Charity Commission as a public body to ensure effective and fair consultation took place. It could have redacted rent or financial details but it had to ensure those consulted had sufficient information to enable those consulted to respond meaningfully on this particular Lease.

Reverting to the earlier consultation Mr Hickman referred to the pre 2004 Scheme. There was consultation on Firoka's own Scheme in January 2006 when there was an exhibition in Palm Court. However, Firoka's were outline proposals – the General Manager described these as outline concepts. It was clear the detail would be worked out later and there would be lengthy negotiations and there were various versions of the Lease. At the end of the day it was not the outline exhibited in January 2006 but what was agreed and incorporated into the lease and project agreement. It is plain that changes had occurred. Mr Hickman referred to the consultation with the Statutory and Advisory Committees and the Section 36(6) Consultation.

The notice in respect of the section 36(6) is no more informative than the draft Order.

For these reasons the earlier consultations could not have been regarded as a substitute for the consultation promised by the MP. These were by the Trustees and not the Defendant.

The process was very seriously flawed. Consultees were given inadequate information and no information about what consent was being sought for. It was established that the Trustees would grant the Lease but the Notice given told the consultees virtually nothing beyond that.

For whatever reason no thought was given to the process as to what information could be given. It follows that subject to the question of discretion the claimant is entitled to the relief he seeks.

Mr Hickman strenuously argued on behalf of the Trustees and he made a good point that the claimant made detailed representations but it was equally clear that the claimant asked to see copies of the lease and any agreement subject to the draft Order.

I am not saying that the whole of the documents unredacted should have been given but very serious consideration should have been given as to what should have been given.

It is important to note that the Claimant was not alone. It is clear from a number of representations to the Charity Commission that the issue was of very considerable local interest.

Mr Hickman submitted that the practical consequence would be that Firoka will walk away from the agreement if it was not executed and can treat the Trustees as in fundamental breach.

There is a good deal of secondary evidence. However, it is significant that Firoka have not taken part in this Hearing and have not chosen to play any part in these proceedings except for Mr Kassam's late witness statement.

Mr Hickman did seek permission to put in Mr Kassam's statement of 2 October 2007. He is a director of Firoka. That statement makes it clear that Firoka have invested time and money in the Alexandra Palace project. It also makes it clear that if the Trustees are unable to enter the lease then Firoka will withdraw their interest in Alexandra Palace.

I refer to Mr Kassam's statement at paragraph 6 as follows:-

“If, as a result of what the Court orders in these proceeds, the Trustees are unable to enter into the Judgments which have been agreed between them, Firoka will, as matters currently stand and for wholly commercial reasons, withdraw their interest in Alexandra Palace.”

Mr Kassam goes on to say that it is only the current intention to abandon any interest in Alexandra Palace if it is not allowed to complete in the terms agreed. He is only saying he will give serious consideration – there must be disclosure in full. Looking at the evidence, as it were, from the horses mouth some submissions as to the likely outcome are not made out.

It is also submitted that the Court should reach the view that there would be no chance of a different decision being reached if the lease was published. The Court is very cautious in accepting such a submission reference to R v. Smith (Lord Justice May and Lord Justice Keane agreeing)

As I have mentioned, the question for the Charity Commission was not merely a legal issue but in terms of the trust also a judgmental one, namely what was expedient in the interests of

the Trust. In deciding how to exercise its discretion, Mr Hickman's submission overlooked the starting point which is the assurance given by a Minister in Parliament.

There would need to be very strong grounds to avoid that. In saying that I make clear I am not saying that all of the Lease and Project Agreement has to be disclosed. I am saying that sufficient information about the Lease and Project Agreement has to be disclosed to enable consultees to make a sensible response to the question from the Commission as to whether it should consent. It is axiomatic that for the Trustees to enter into that agreement enough must be known about the Lease to give a sensible response.

It should not be assumed that I am endorsing the extent of the redaction – it is regrettable that the redacted copy did not appear until after the end of the consultation period. It is a matter for the Charity Commission to consider how consultation is effective and fair. There is no doubt that what took place here was not enough.

I grant a declaration that the Order was unlawful and quash it.