

Place-Making and Innovation Executive Advisory Board Report

Ward(s) affected: Holy Trinity

Report of Director of Community Services

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Future use of Foxenden Deep Shelter

Executive Summary

Background

Foxenden Deep Shelter ("the Shelter") was constructed in 1941 and consists of approximately 230 metres of tunnels located 15 metres beneath Allen House Grounds. The Shelter was formerly opened to the public on heritage days but closed in 2010 on safety grounds. There are various works required to make the Shelter suitable for public access and the cost of the works combined with ongoing management costs could not be justified to allow infrequent visits.

In September 2017, an enquiry was received about using the Shelter for whiskey maturation and trade tastings. There have also been previous enquiries about the use of the Shelter.

Allen House Grounds was gifted to the Council in 1914 and the Shelter is subject to the same restrictive covenants and charitable status as Allen House Grounds. These restrictions include a prohibition on the sale, production and consumption of alcohol. The restrictions can only be modified or removed if the Charity Commission approves an application. The Charity Commission's approval will also need to be obtained for the grant of a lease of the Shelter. Any disposal must achieve best consideration and be in the best interests of the charity.

Prior to submitting the application to the Charity Commission, a 4 week public consultation about the proposals must be undertaken.

The Council is the sole charitable trustee and the Executive has delegated decision making to the Executive Shareholder and Trustee Committee ("the Trustee Committee"). Following completion of the public consultation, the outcome of the consultation must be reported to the Trustee Committee and a decision must be taken by the Trustee Committee about whether to proceed with the application to the Charity Commission. The process is likely to be lengthy.

In order to make the Shelter usable, there will be significant expenditure required on items relating to health and safety, improving ventilation and providing lighting. Historic estimates costed these works at around £20,000. There are also works required to replace load bearing steel beams in the Shelter, which could be in the region of £50,000. This is only an estimate and further advice is awaited on the extent of work required and likely cost.

Regardless of whether the Charitable Trust ("the Trust") proceeds with a disposal of the Shelter, it may be necessary to address the structural issues. It should be noted that any expenditure incurred by the Council on the Shelter must be treated as charity expenditure on behalf of the Trust and accounted for accordingly. Equally, any income received from leasing the Shelter must be used for the benefit of the Trust.

An incoming tenant may agree to undertake the required works in return for a rent free period and there may be grant funding available from external funders to cover or contribute to the cost of works.

Conclusions

A decision is required by the Trustee Committee on whether to proceed with the public consultation and make an application to the Charity Commission. Proceeding with the consultation and Charity Commission application will have resource implications for the Council.

If the Trust proceeds with an application to the Charity Commission then the application will be either to remove the restrictions on alcohol entirely or amend them so they do not apply to the Shelter. The Council's Parks and Leisure Services favour the removal of the restriction to enable events to take place on Allen House Grounds.

If an application to the Charity Commission is successful then a decision will need to be made on how to market the opportunity and on what terms.

Recommendation

To seek authority from the Executive Shareholder and Trustee Committee to undertake a public consultation regarding the modification or removal of the restrictive user covenants and the grant of a lease of the Shelter.

Reason(s) for Recommendation:

The Shelter is currently disused and may require expenditure to avoid structural failure. If the Trust proceeds with an application to the Charity Commission and this application is successful then the likelihood of being able to obtain a tenant increases, thereby creating a potential income stream for the Trust.

1. Purpose of Report

- 1.1 To make the Executive Advisory Board aware of issues concerning the future use of Foxenden Deep Shelter ("the Shelter"), which is held by the Council as sole charitable trustee and is subject to legal constraints on its use.

2. Strategic Priorities

- 2.1 The grant of a lease of the Shelter will generate rental income. The income would contribute to the management, maintenance and improvement of Allen House Grounds.

3. Background

- 3.1 The Shelter was constructed in 1941 for housing up to 1,000 people during air raids and is located approximately 15 metres beneath Allen House Grounds. The Shelter is accessed via York Road Multi Storey Car Park and has previously been opened by the Council to members of the public on heritage days. Photographs of the Shelter are attached at Appendices 1 and 2.
- 3.2 Allen House Grounds was gifted to the Council in 1914 and is held by the Council as the sole charitable trustee. Decision making has been delegated to the Executive Shareholder and Trustee Committee ("the Trustee Committee").
- 3.3 The Deed of Gift, the Council's title and charity law contain the following relevant restrictions:
1. The land can only be used as public gardens and pleasure grounds. The sale, production and consumption of alcohol is prohibited;
 2. There can be no disposition of the land without the consent of the Charity Commission;
 3. The Trust may only sell the land (this includes the grant of a lease) if the Trust decides that on grounds of expense or otherwise it is necessary or advisable to discontinue the use of the land for the object of the charity; and
 4. Any income generated by Allen House Grounds belongs to the Trust and must be invested back into the Trust and cannot be used elsewhere by the Council.
- 3.4 The charitable status and restrictions that apply to Allen House Grounds also apply to the subsoil of the land and therefore apply to the Shelter.
- 3.5 In 2010 concerns about the condition of the Shelter resulted in it being closed to the public on health and safety grounds. It was concluded that the initial capital expenditure and ongoing management costs could not be justified to allow infrequent public access. A plan of the Shelter is attached at Appendix 3.
- 3.6 An enquiry was received by the Trust in September 2017 about whether the Shelter could be utilised for whiskey maturation and requesting permission to view the Shelter.
- 3.7 The expression of interest is only currently in an outline form but involves the storage of alcohol and would require a lease of at least 25-30 years.

- 3.8 Other organisations have previously expressed an interest in visiting and leasing the Shelter.
- 3.9 Use of the Shelter by any party is likely to require planning consent for change of use.

Charitable status and legal implications

- 3.10 To increase the chance of letting the Shelter, the user clause in the Deed of Gift will need to be widened, the restrictions on alcohol modified or removed and the grant of a lease approved by way of an application to the Charity Commission. Decisions on these matters will need to be taken by the Trustee Committee.
- 3.11 Prior to submitting the Charity Commission application, a decision to proceed will need to be taken by the Trustee Committee. This decision will need to be informed by a 4-week public consultation. The consultation will involve putting notices up on the land, in the local press and on the Council's website. The notices will need to include details of how to respond and someone will need to review the responses. The responses or a summary then need to be available for the Trustee Committee's consideration when they make their decisions.
- 3.12 Informal contact with the Charity Commission has already been made to try and establish whether it is likely to look favourably on an application from the Trust. However, the Charity Commission would not give a view on this and stated that a full application will be required. It is worth noting that the Deed of Gift was previously varied in 2014 so that the Trust can let any pavilion or structure erected on the land to any local charity for charitable projects.
- 3.13 The Charities Act 2011 requires that any disposal of charitable land must be in the charity's best interests and achieve best consideration for the charity. It is also necessary to obtain valuation advice from a suitably qualified external surveyor before agreeing to a disposal.
- 3.14 Up to four parking spaces adjacent to the Shelter entrances would also need to be closed to ensure that the entrance doors are not blocked by parked vehicles. The Guildford Off Street Parking Places Order 2008 requires that the Council display a notice in York Road Multi Storey Car Park regarding the closure of any spaces.

Condition of the Shelter and possible expenditure

- 3.15 A structural survey was undertaken in 2015, which identified a number of steel load bearing beams in the Shelter that need to be replaced or treated. Another survey is now required to identify whether further deterioration has taken place. We do not yet have an estimate for the cost of addressing these issues but it is likely to be significant.

- 3.16 Regardless of whether the Trust proceeds with granting a lease of the Shelter, it may be necessary to deal with any structural repairs to avoid the risk of structural failure causing the land above the Shelter in Allen House Grounds to subside.
- 3.17 The electrical installation has been damaged by water ingress and would need to be repaired and upgraded if lighting is required.
- 3.18 Ventilation needs to be improved to increase airflow and reduce condensation levels. There are also various health and safety related works required to make the Shelter suitable for regular use and access. An incoming tenant may also incur additional expenditure to make the Shelter suitable for their particular use.
- 3.19 It should be noted that the Trust currently has no funds available to pay for any remedial works required to the Shelter. Works will need to be funded from a Council revenue budget and must be treated as a grant from the Council to the Trust. If this is a grant for capital works then the Council will need to have a capital budget approved.

4. Consultations

- 4.1 Car Parking and Parks and Leisure Services have been consulted and have raised no objections to the principle of a lease of the Shelter being granted. A formal four week public consultation will take place if this is supported by the Trustee Committee.

5. Equality and Diversity Implications

- 5.1 If a lease of the Shelter is granted then the Trustee Committee will need to consider whether the incoming tenant should be required to open the Shelter to the public. Providing access to the elderly or disabled may not be possible without additional investment in the Shelter's access arrangements.

6. Financial Implications

- 6.1 If the Shelter is leased to a commercial tenant, then it will generate rental income but this must be invested back into the Trust. This could off-set any expenditure incurred in relation to the management and maintenance of Allen House Grounds.
- 6.2 There will be costs incurred by the Trust in obtaining a valuation to comply with the Charities Act 2011, which are estimated to be in the region of £2,000. There will also be costs associated with letting and marketing the Shelter. Letting fees are typically around 10% of the first year's rent (disregarding any incentives/rent free periods given) and marketing fees are approximately £500.
- 6.3 There will be expenditure required to make the Shelter usable, although this could be undertaken by an incoming tenant in exchange for a rent free period. Previous estimates in 2012 were £20,000 to deal with health and safety and lighting issues. There is also likely to be significant expenditure required on

treating and replacing steel beams in the Shelter. The cost of this could be in the region of £50,000. However, there may be grants available to cover or contribute towards these costs.

- 6.4 Car parking revenue from York Road Multi Storey Car Park will reduce due to the loss of up to four parking spaces adjacent to the Shelter's entrances. This could potentially be as much as £2,300 per space per annum but this assumes that the car park is always at full capacity, so in reality the income reduction will be lower. As stated above, income generated by the Shelter must be invested back into the Trust and therefore cannot be used to off-set any reduction in the Council's car parking income.

7. Legal Implications

- 7.1 As outlined earlier in this report, the use of the Shelter is restricted by the same covenants that apply to Allen House Grounds. The charitable status of Allen House Grounds also applies to the Shelter.
- 7.2 Any change of use and leasehold disposal requires approval from the Charity Commission. The Council is obligated to undertake a public consultation before reporting the outcome of the consultation to the Trustee Committee and seeking authority to make an application to the Charity Commission.

8. Human Resource Implications

- 8.1 It will be necessary to invest officer time in proceeding with an application to the Charity Commission. This is difficult to quantify because it depends on the level of response to the public consultation but it will be managed using existing staff resources.

9. Summary of Options

- 9.1 The Trust could leave the Shelter in its current state but it is likely that works will be required in future to prevent structural failure.
- 9.2 If the Trust proceeds with the public consultation and is successful in applying to the Charity Commission then it could market the Shelter. Given the previous interest expressed in the Shelter and the requirements of the Charities Act 2011 on achieving best consideration for the charity, it would be prudent to offer the Shelter on the open market before entering into a lease.

10. Conclusion

- 10.1 A decision is required by the Trustee Committee about whether to proceed with the public consultation and make an application to the Charity Commission. It must be stressed that completion of the public consultation and application to the Charity Commission will be a lengthy process. Furthermore, it should be noted that there is a risk of the Council investing resources in this proposal with no guarantee that the Charity Commission will approve the Trust's application.

- 10.2 The Trust does not currently have any funds and the likelihood is that expenditure on the Shelter will be greater than any income being generated over the short term. Therefore, it is likely that the Council will need to fund expenditure from a revenue or capital budget as a grant to the Trust to cover any shortfall.
- 10.3 If the Trust proceeds and the application is successful then the Trust will incur expenditure on valuation and letting fees.
- 10.4 If a lease is granted then it should include provision for public access on heritage days. The terms of the lease will also need to ensure that the use of the Shelter does not prevent or restrict any future redevelopment of York Road Multi Storey Car Park.

11. Background Papers

None

12. Appendices

Photographs of the Shelter are attached at Appendices 1 and 2 and a drawing of the Shelter is attached at Appendix 3.