

Advantages and disadvantage of trust status

Main report paragraph 4.51

The advantages and disadvantages explained below are based on extensive research and consultation from the Milestones work:

Advantages

Single focus

Whilst the Canal is an integral part of the local authorities, there are a range of agendas which determine the strategy and objectives of the Canal, for example the respective authorities' objectives and priorities, Gershon efficiencies and CPA(Comprehensive Performance Assessment). Independence will enable development and delivery of a clear strategic proposition and a focussed delivery of that proposition by the team.

Responsive decision making

The speed of decision making is typically much faster in an independent trust compared to an environment of local authority bureaucracy. The trust director will have a high degree of autonomy and work closely with the trustees.

User led

The emphasis of the trusts is on audience development (users and non-users), and very much market led, whereas with an authority there is greater emphasis on the health and safety and risk related aspects relating to the safe operation of the Canal, with much less focus on the community benefit/development.

Community engagement

The best practice advice has highlighted the potential scope for a 'friends association' which would bring the benefits of community identity, more repeat visitors, volunteers, good ideas, and also potentially legacies and donations. An expanded network of community contacts would also help with future recruitment of trustees. How this would sit with the Canal Society would need to be explored further to determine if this was a viable proposition for the Canal.

Ability to attract sponsorship and donations

Industry advice is that independent trusts have the potential to attract private finance in terms of commercial sponsorship, legacies and donations. Best practice research indicated that private funding tends to be for modest amounts, typically £10k to £20k, for specific development projects.

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

More commercial approach

The team are likely to feel a higher level of ownership and focus in the more exposed environment of an independent trust, without the same level of control and security which exists in a local authority environment. The skills of the team will need a more commercial bias to succeed in the new environment.

More entrepreneurial culture

Trust status creates a market led climate that fosters more risk taking and creativity than a local authority environment.

Income generation opportunities

New ideas for income generation can be tested and followed through within a more entrepreneurial culture. This needs to be considered carefully regarding the actual scope of new income generation given the current ability to work in partnership with the Canal Society to realise income that would not normally be available to local authorities. Coupled with this is consideration of how the significant administrative burden related to attracting, securing, monitoring and reporting for all grants would be provided – this could be undertaken within the trust or bought in.

Opportunity to develop new partnerships

Increased levels of partnership working could deliver further benefits to the trust including funding, shared costs and infrastructure, shared risks, audience development and product development. Organisations may be more willing to partner an independent trust where the 'balance of power' is more acceptable than with a large local authority.

Expertise and contacts of trustees

The skills and expertise of trustees will typically include legal, financial, commercial, marketing, fundraising and professional trusteeships. Ideally, trustees would also be selected for their affinity with the product, their ability to attract private finance and play an important advocacy role on behalf of the Canal. The make up of trustees and whether or not a membership based trust would be appropriate would be part of further detailed work into trust status.

Partnership relationship with, and independence from, local authorities

Trust status can be described as having the 'best of both worlds' since there is a high degree of autonomy from the local authorities whilst retaining a level of security of funding. Partnership working between the trust and the authorities should continue to flourish where this is beneficial.

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

Disadvantages

Risk of failure

There is a level of risk associated with setting up the Canal as an independent trust. Many Canal trusts struggle and there are none that are managed in the way that the Basingstoke Canal is currently – with two joint owners and six further riparian partners. Some museum trusts have been highly successful, however there have also been a proportion of failures, especially small, single site museums.

Less security from local authorities

In moving to a more ‘arm’s length’ funding agreement, there is no certainty than the local authorities would cover any deficit.

Conflict of interests for authority members on trust board

There is a degree of uncertainty around the legal position regarding local authority representation on a trust board. Normal practice is for the authorities to hold less than 20% representation on the trust board, however there may be decisions taken where a conflict of interest arises between the Canal interest and the local authority interest which will require careful management.

Unreasonable expectations

There is often a perception that once a Canal is set up as a trust, it will soon significantly improve its performance. In practice, the trust will usually inherit most of the problems of the Canal and often take several years to establish its new direction and sustainability. The core problems around the Basingstoke Canal are the significant geological issues resulting from the fact that it is a Victorian sand structure with a significant backlog of structural repairs.

Reversibility is difficult

Legal advice states that once a trust is created with a defined charitable purpose, it is difficult to use the trust assets for any other purpose.

Rules relating to trading activities

Charity law imposes a range of rules governing trading activities which may limit the scope for income generation.

High dependence on grant funding

Basingstoke Canal Options Appraisal

Joint Advisory Group update 22 September 2006

The Basingstoke Canal would be a single site trust that must inevitably be highly dependent on grant funding. For comparison, there are other trusts in existence, including Canal trusts, which rely on other income streams such as

- Tolls
- Membership subsidies
- Retail income from a prime retail site
- Donations
- Cross-subsidy from cash generating sites within a portfolio

The costs of independence

Whilst the Canal is part of the authority, many of the costs and effort of supporting the operation of the museum such as finance, IT, HR are part of the overall machinery of local government. Cross charges are often not made or are made at rates not related to market value.

For an independent Canal, local arrangements are often more suited to a smaller, responsive organisation. The drawback of putting in place local arrangement is the direct payment for many services which were previously provided for free or below market value and for which additional funding does not exist.

The costs of independence include:

VAT:	the local authority is able to reclaim all VAT on expenditure, whilst an independent trust will only be able to partially recover VAT
Insurance:	the County Council self insures without any cross-charge for these arrangements, with the exception of the property which is insured with a third party under the terms of the lease
Statutory responsibilities:	there are a number of statutory responsibilities including company returns, banking and audit
Support services:	Costs such as IT, payroll, personnel, recruitment

The financial case for the trust options is shown in the main report.

Additional costs of a trust including set up costs and effort

The setting up of a new trust will require several months of management effort and entail expenditure, the largest element of which is third party legal costs estimated at between £50k and £100k.

The financial analysis and implementation sections provide further details of set up costs and implementation activity.

Initially it appears that trust status would result in additional running costs, rather than savings as the NNDR is not currently borne by the BCA, and no significant gift aid would be achievable as the Canal, unlike Milestones Museum, is not largely driven by admission charges.

Analysis of factors to be considered

Main report paragraph 4.52

Lawrence Graham (Lawgram) were commissioned by Hampshire County Council and Basingstoke and Deane Borough Council, through a tendering process, to assist in investigating the possibility of transferring Milestones Museum to a non-profit-distributing organisation to deliver a sustainable future for the Museum.

Legal form

Company limited by guarantee and alternatives

The most common legal vehicle, and the one recommended by Lawgram, is the company limited by guarantee and registered as a charity. This main advantages of this form are statutory rates relief, strong governance regime, limited liability for trustees and familiarity to the private sector.

Other alternatives evaluated by Lawgram include unincorporated trust, industrial and provident society and community interest company.

Charitable Incorporated Organisation

The new Charity Bill, which is due to become enacted in 2006 will allow the formation of a new 'Charitable Incorporated Organisation' (CIO). The main difference between this vehicle and the company limited by guarantee/charity is that the CIO is regulated by a single body: the Charity Commission. Whereas the company limited by guarantee/charity is regulated by two bodies: the Charity Commission and Companies House. However, the dual statutory responsibilities of companies limited by guarantee/charities are not considered unduly onerous and the impact of the CIO not a significant advantage. Since CIOs are untried and tested, there could be risks and drawbacks which will come to light only after a few months of operation.

It is recommended that any trust is initially set up as a company limited by guarantee/charity and once CIOs are established within the culture sector, consider conversion if there are sufficient benefits.

Local authority controlled trust

Establishment of a local authority controlled trust is not an area of law that has been tried and tested. Lawgram strongly advise against creation of a local authority controlled trust. Their main areas of concern are

- the trust achieving charitable status and thus the ability to benefit from the rates saving
- the adverse affect on the Prudential borrowing calculation for the local authorities
- local authority accounting requirements which may require consolidation of the museum accounts

Basingstoke Canal Options Appraisal
Joint Advisory Group update 22 September 2006

- less attractive to private investment
- the trust would be unincorporated and trustees would have unlimited personal liability

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

Governance and relationship of local authorities with the trust

Elements of partnership

The relationship between the authorities will become a multi-faceted partnership, underpinned by several elements, most of which would be embodied in written agreements:

- the landlord/tenant relationship on property
- grant funding
- monitoring and review
- support services provision (see section below)
- board representation
- other partnership working, for example, relating to the provision of education for schools, joint marketing initiatives

Property

The Canal extends to 37 miles long running from Greywell to beyond Woking. It has 29 locks, 28 of which are located within the Surrey County boundary. It is a cul-de-sac Canal connecting only at one end with the River Wey Navigation. It is joint funded by the two owners, Hampshire and Surrey County Councils, and the six riparian authorities through whose boundaries the Canal runs via a funding arrangement. The operation of the Canal is managed on behalf of the owners by the Basingstoke Canal Authority (BCA), who employ 17.05 fte staff with staffing cost £472,700 (including NI and pension costs) per the 2005/06 budget.

There are a number of buildings:

- the Canal Visitors Centre, Mytchett
- Lockgate workshop, Deepcut, Surrey
- Ash Lock Depot, Hampshire
- Pump House Located lock 1, Surrey
- Chemical Disposal Point at Bridge Barn, Woking, Surrey
- plus five Ranger houses and a historic barn

The freehold of the Canal is owned by the two County Councils – Hampshire and Surrey. As a result any structural capital works are the responsibility of the two owners and not that of the riparian partners. There is currently a backlog of structural repairs which was valued at £3m in 2001.

It should be noted that there is no further development potential along the length of the Canal

Further consideration will need to be given to the transfer/ownership of the assets of the Canal.

Lack of clarity in this area has been a stumbling block for other trusts where responsibilities have not been clear, the authorities have not met the costs expected,

Basingstoke Canal Options Appraisal

Joint Advisory Group update 22 September 2006

which has resulted in unaffordable property liabilities for the trust. This is a pertinent point for the Canal relating to the proposal for charitable trust status. A detailed schedule will be required, showing where responsibilities fall to the authorities and where they fall to the Canal.

Grant funding

The long term security of grant funding from the authorities is a fundamental dependency of setting up a trust. The funding agreement would be linked to the service agreement setting out the obligations of the museum to the authorities and goals to be met. It is envisaged that there would be regular, for example, quarterly reviews.

A rolling five year term is recommended which would mean, for example years 2-6 are set after year 1.

The level of local authority funding could diminish after an initial period of say 5 years, depending on the performance of the trust once established.

The Canal itself

The essential principle advised by Lawgram, relating to Milestones Museum, was to protect the museum collections by separating out the ownership and management of the collection. It was seen as essential that the collections remained the property of the authorities in order to prevent liquidation of assets in the event of failure of the trust. Public ownership is also an important principle in terms of public perception. Much of the collections on display at Milestones are held in trust by the County Council.

The Canal is one of the highest corporate risks within both Hampshire and Surrey County Councils. Advice would need to be sought as to the best approach in terms of ownership of the asset given the serious consequences of a breach and the potential flood risk for developments alongside the Canal.

Support services

The authorities currently provide a range support services to the Canal. Some of these are paid for by BCA, for example IT services from HCC. Other services are provided in kind, for example HR support, accountancy support, the Visitors Centre site.

Discussions would need to be held with regard to the ongoing nature of support. For Milestones the County Council has committed to continue to provide existing services in kind for an initial period and to provide property services in kind over the long term. This principle has been agreed verbally by the Director of Recreation and Heritage and the Director of Property Business and Regulatory Services and may need to be ratified at member level.

The best practice research indicated that it is beneficial common practice for trusts to function independently from the authorities after an initial period. The framework, processes and systems for functions such as IT, procurement, HR and accounting

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

suitable to a large local authority do not lend themselves to the streamlined and responsive operation of a relatively small trust.

Where the trust is paying for support services, un-recovered VAT will be incurred. It is therefore more beneficial, from a VAT perspective, to minimise the level of support service charging from the authorities. This would necessitate a corresponding reduction in grant income which would, in turn, affect the funding formula.

Lawgram have advised that for the authorities to be able to charge the trust for services, Milestones/Canal will need to register as a public body and that this is a straightforward procedure.

If the trust is registered as a public body, the Canal will be able to source items on the terms of advantageous purchasing contracts of the authorities.

Constitutional Options For A New Independent Trust - Trustees

A new independent Canal Trust would be a company limited by guarantee and registered as a charity. Local authority Member involvement on the Trust's governing board or committee would be less than 20%. The Trust could either have an appointed board or could be a membership Trust. In either model the trustees (board members) would have limited personal liability.

In the appointed board model the trustees (board members) would be chosen initially by a recruitment process. The trustees would be chosen for their mix of skills and expertise. There could be a "Friends of the Canal Trust" with a membership paying a subscription and encouraged to play an active voluntary role.

In the Membership trust model the trust would have a membership paying a subscription and encouraged to play an active voluntary role. The membership would elect board members (who would also be trustees) on a rotational basis at the Annual General Meeting. The board could co-opt other board members to bring in skill and expertise. Members of a membership Trust would be likely to have more "ownership" of the Trust than members of a "Friends" group. A membership Trust is also likely to be more independent of the local authorities.

A constitution for a "Basingstoke Canal Trust Limited" was drawn up in 1977. This followed the Membership Trust Model. This constitution allowed for the Surrey and Hampshire Canal Society to be a member of the Canal Trust. Local authorities could become corporate members and could appoint a representative who could vote at General Meetings and could be elected or appointed to membership of the board.

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

Best practice research – from Milestone’s work

Key best practice key findings in relation to trustees were:

- trustees should be carefully handpicked via a recruitment process
- the Chair is an especially crucial role
- a ‘shadow board’ of c. 3 core trustees would direct the set up phase in the months leading up to the go-live
- a mix of skills and expertise is required, which are different from those required to run a local authority, including legal, financial, trusteeship, fundraising and other commercial experience
- the diversity of the board should be considered in terms of age, sex, race and background
- it is advantageous to have trustees that can enable private funding to flow to the museum

The trustees will want to protect their personal, professional reputations and it would be undesirable for them to be associated with an unsuccessful trust.

Recruitment of trustees

It is recommended that a core ‘shadow board’ is recruited to manage the set up phase for the trust and shape the strategic proposition to take the trust forward. The remaining trustees would be recruited once the trust is live.

Trustee role, responsibilities and liabilities

The Charity Commission define a trustee as ‘anyone responsible for controlling the management and administration of a charity’.

The trustees would have limited liability under a company limited by guarantee and would also obtain a level of protection through indemnity insurance. There are a range of responsibilities and liabilities for trustees which can be summarised:

Company law and contractual liability

Becoming a charitable company will bring the charity within the scope of company law, which imposes its own range of extra duties. Contract law in relation to companies will need to be observed.

Liability for breach of trust

All trustees must administer their charity in accordance with the terms of its governing document and with the requirements of charity law. A charity's governing document sets out the charity's objects and powers that the trustees can exercise in pursuing those objects. A breach of trust occurs when trustees act in a way that is contrary to the terms of their governing document, or when they fail to perform their duties as trustees. Using the charity's resources for some purpose not within the charity's objects is a breach of trust as is, for instance, investing the charity's money

Basingstoke Canal Options Appraisal

Joint Advisory Group update 22 September 2006

in a type of investment not permitted under the investment rules applying to the charity.

Although the trustees are not normally personally liable for any deficit, if the trust is trading when insolvent, there would be a breach of trust and the trustees may be personally liable for losses.

Other types of liability

Charities are no different from other organisations in the duty of care owed to their employees and to members of the public visiting charity's premises. Charities that employ staff are required by law to have employer's liability insurance, and charity vehicles must be insured in accordance with the legal requirements.

Trustees have a duty to safeguard the property of their charity, and it is important that they insure it adequately. If they do not do so, and the property is lost or devalued, the trustees may be personally liable for the loss.

Trust deficit, failure and exit clause

The trust memorandum and articles will need to include a clause to cover the potential failure of the trust. Recommended standard practice for a trust which is created and supported by local authorities under the circumstances of Milestones or the Canal is as follows:

- The property and collections would revert to the authorities
- The staff would revert to being employed by Hampshire County Council
- Any debts would not be the responsibility of the authorities

If the trust were in deficit, the authorities would have two basic choices

- a) supplement the funding
- b) precipitate the closure of the Canal – the issues pertinent to risk would need to be considered further here

The exit clause will need to be agreed in writing by the authorities at the time the trust is set up.

Management

The best practice research identified that whereas in a local authority a museum/Canal manager would typically be fourth tier, the director of the trust needs to be the equivalent of typically second tier management. The trust director will be dealing directly with trustees, influencing potential funding providers, forging strategic partnerships and networking with other museum directors.

The recommendation for Milestones as an independent trust is that a museum director would be appointed by the shadow board during the set up phase – this could reasonably be applied to the Canal as well.

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

Insurance

As an independent trust, the Canal would no longer be part of the self-insurance umbrella of the County Councils.

To determine whether the Canal would be a) insurable and b) at an affordable level a quotation from Zurich Insurance is awaited. This could essentially drive the decision around the most appropriate trust model to adopt relating the ownership of the assets around the Canal.

VAT

VAT recovery of the trust

Under the County Council VAT umbrella, the Canal can reclaim all VAT on expenditure. As an independent trust, the Canal could only partially claim back VAT on expenditure, depending on the ratio of exempt (i.e. admission) income to other income. The cost of un-recovered VAT will be particularly high in years of high capital expenditure.

Grant funding

It is common practice for the grant funding from the authorities to the museum to be presented as a 'service charge', classified as non-VAT exempt income for the museum and increasing the level of input VAT recovery. This scenario is assumed in the financial calculations.

Cross charging from the authorities to Milestones

It is recommended that the authorities bear capital and revenue expenditure where possible in order to minimise un-recovered VAT costs of the trust. For example, instead of the Canal paying the authorities for support services and incurring unrecovered VAT, it would be preferable to not charge for support services and reduce funding by a corresponding amount. This would require adjustment of the funding formula.

Customs and Excise advice would need to be sought prior to implementing arrangements to minimise VAT costs.

Gift aid

There are new gift aid rules effective from April 2006 which broadly provide that gift aid may be claimed at the rate of 28p for £1 of admission where the visitor is a UK tax payer and either :

- a) an annual season ticket is purchased
- b) the donor pays an amount at least 10% higher than the published admission price

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

In addition, there is certain administration and form filling to operate a gift aid scheme.

The best practice research informed that, in practice, b) is extremely difficult to administer and charities are reshaping their admissions pricing and marketing to convert a high proportion of visitors to annual season ticket holders.

It is recommended that the trust reshapes its admissions to maximise season tickets and does not attempt to administer the '10% rule'.

The financial analysis assumes that the annual season tickets are maximised. Estimates of gift aid to the trust are included in the financial schedules.

Trading subsidiary

Where there are significant trading operations, it is necessary to set up a trading subsidiary to protect charitable status. The subsidiary does result in a number of cost and administrative implications in terms of company registration and statutory responsibilities, tax accounting, banking and staff employment.

Trading operations at Canal would include the shop, room hire and café. It would need to be considered if the scope of current activities would warrant creation of a separate trading subsidiary – it does not at Milestones. It may be therefore recommended that, initially, a trading subsidiary is not created, but potentially set up at some point in the future, dependent on the scale of trading activities.

Staffing, TUPE and pensions

Detailed discussions with HR need to be held once a clearer decision around direction to understand the implications for the Canal.

Partnership working

There could be considerable scope for partnership working with a range of organisations that could bring a range of benefits including:

- broadening and enhancing the product
- cross-selling to audiences
- sharing risks and costs
- complementing the Milestones 'wet weather' appeal with an open air attraction
- providing role enrichment for staff

Identification and evaluation of potential partnerships is outside the scope of this trust evaluation exercise. However, it is considered that a trust would provide a better vehicle than a local authority control for realisation of beneficial partnership arrangements due to the advantages of freedom, flexibility, responsiveness, commercial skills and trustee connections. The exception would be in realising

Basingstoke Canal Options Appraisal Joint Advisory Group update 22 September 2006

greater partnership working within the authorities, where retaining the museum within the county council would be preferable.

If a trust were created, it is recommended that the board of trustees, together with the museum/Canal director, consider partnership working within the context of developing the strategic proposition.

Strategic proposition

The Canal would need a clear vision and robust strategic rationale to succeed in a competitive environment. A business plan would be required, providing the basis and definition of the

- brand
- market
- product
- unique selling points and differentiation from competition
- analysis of competition and relative positioning of the museum
- routes to market e.g. web based, direct mail
- strategic analysis of where partnership working is appropriate for delivery of the vision

A market survey would provide a useful 'stocktake' and ensure the Canal has a clear understanding of its market. An analysis of the market and development of a business plan is outside the scope of this exercise.

If a trust were created, it is recommended that the new trust board and Chief Executive develop the strategic proposition for the Canal in the context of the freedom, flexibility and focus of trust status, within the first few months of appointment. This will provide the new team with strong ownership of the future direction for the Canal.

Culture within the County Council

Hampshire County Council does not have a record of outsourcing services currently provided in house.

Setting up the Canal as an independent trust would mean the County Councils would be providing significant funding to a body where they do not hold a controlling management interest.

It was recommended for Milestones that the Funding Agreement is the key channel for County Council influence and sets out the service delivery expectations in keeping with County Council objectives. This would also be applicable to the Canal.

Basingstoke Canal Options Appraisal

Joint Advisory Group update 22 September 2006

Risk analysis

A risk is a possible problem that might threaten project success and needs to be monitored. The key risks and strategies to mitigate are analysed in the table below. Whilst the information below is from a Museums source it could also be applied to the Canal. (*source: MLA report 2006 Moving to Museum Trusts: 'the risks faced by devolved museums'*)

Risk No	Summary of Risk	Containment
1	Stagnation of core funding means other income required is beyond realistic levels	Core funding linked to museum performance. Prudent assumptions about other income.
2	Over-reliance on external project funding	Prudent assumptions about private funding.
3	Change in local authority/philosophy of local authority	Include clause in funding/service agreement.
4	Change in tax law	Lawgram advised unlikely.
5	Increasing pension liabilities	Prudent assumptions and thorough assessment at outset.
6	Inability to recruit high calibre trustees	Proactive recruitment methods.
7	Poor quality internal audit, regulatory and reporting structures	Recruit good calibre Finance Manager.
8	Lack of definition in relationship between trust and local authorities	Provide sufficient time at the outset to define and document partnership arrangements. Regular reviews to maintain and improve working between museum and authorities.