

**Epping Forest District Council**

**Epping Forest Museum Service**

**Proposal to Establish a Development Trust**

**Legal Report**

**December 2015**



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## 1. INTRODUCTION

Winckworth Sherwood LLP (“**WS**”) have been jointly appointed with the Management Centre Consultancy (“**MC**”) to advise on the establishment of a new Development Trust as part of a structured fundraising strategy for the Epping Forest District Museum and Lowewood Museum which form part of the Epping Forest District Museum Services (“**Museum Services**”).

We are delighted to have been appointed in relation to this project.

We fully appreciate the importance of the Museum Services, which are inextricably linked to the Council’s aspirations for the economic and social prosperity of the area.

The proposal to establish a Development Trust is at the forefront of thinking in terms of a structured fundraising strategy.

This is an important and high profile project for the Council.

It is critical that it is a success.

Critical to that success will be the new governance arrangements.

This report focuses on those arrangements and the key success factors for a project of this nature.

## **2. EXECUTIVE SUMMARY**

### **2.1 Recommended Model for the Development Trust**

The recommendation of MC is to establish the new Development Trust as a company limited by guarantee and registered charity.

We wholly endorse this recommendation.

This optimises commercial and charitable benefits.

The company model is up to date, modern and flexible.

The charity model maximises tax benefits.

The new Development Trust will, therefore, be able to operate in a dynamic entrepreneurial way but with a tax efficient structure that maximises fundraising opportunities to continuously develop the museum offer.

There are significant advantages of the recommended Development Trust model.

These are set out in detail in Section 4 of our report.

In summary, it is our view that the establishment of a Development Trust for the Museum Services would:

- Create a new governance model which combines commercial and charitable benefits
- Demonstrates the Council's commitment to exploring new ways of funding the Council's cultural services
- Ensure the Council retains ownership and control of the assets
- Enable the Council to retain day-to-day management of the Museum Services
- Enshrines the Council's involvement in the Development Trust
- Allow for wider representation at board level to harness additional skills and expertise
- Work collaboratively with the Council and other key stakeholders to maximise outcomes
- Reinvest 100% of any surpluses generated to continuously improve the Museum Services
- Be 100% exempt from corporation tax
- Be eligible for gift aid
- Be tax attractive for corporate donations and sponsorship
- Be eligible for legacies

- Be eligible for grants only available to charities
- Be able to establish a trading subsidiary to maximise commercial opportunities in a tax efficient structure (if applicable)
- Be a low risk option for the Council

### 3. ALTERNATIVE LEGAL MODELS

There are a range of Development Trust models available to assist with the development of the Museum Services.

These include:

- Unincorporated association
- Community benefit society (charitable or non-charitable)
- Company limited by guarantee (charitable or non-charitable)
- Charitable incorporated organisation (charitably only)
- Community interest company (non-charitable only)
- Company limited by shares (non-charitable only)

In determining which is the right legal model, there are two key determining factors:

- Incorporation v unincorporation
- Charitable status v non-charitable status

#### 3.1 Incorporation v Unincorporation

We set out below the advantages and disadvantages of incorporation:

<b>Incorporation</b>	
<b>Summary</b>	<ul style="list-style-type: none"><li>• Creation of a separate legal entity</li></ul>
<b>Advantages</b>	<ul style="list-style-type: none"><li>• Clear legal structure</li><li>• Legal entity which has limited liability</li><li>• Legal entity will enter into the supply contracts/ leases/ employee contracts. Any debts or liabilities will be those of the company not the individual board members</li></ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"><li>• Administration of a company or other corporate entity</li><li>• Board members will have duties and responsibilities under Company Law or other relevant legislation</li></ul>

We set out below the advantages and disadvantages of unincorporation:

<b>Unincorporation</b>	
<b>Summary</b>	<ul style="list-style-type: none"><li>• No separate legal entity</li></ul>

<b>Advantages</b>	<ul style="list-style-type: none"> <li>• Simple structure</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>• Individual board members will be personally liable for the debts and liabilities of the unincorporated entity, protected only by relevant insurances</li> <li>• Individual board members will sign contracts in their own name and own property in a personal capacity</li> <li>• Difficulty in borrowing. Board members will, potentially, be required to provide personal guarantees</li> <li>• In relation to a charitable model, any property must be vested in the Charity Commission as Official Custodian</li> </ul>

It is our recommendation in relation to an initiative of this nature, which will involve potential liabilities, that the Development Trust be established as an incorporated legal entity.

This will provide significant protection to the board members of the Development Trust and greatly assist both in recruiting trustees but also dealings with third parties.

### 3.2 Charitable v Non Charitable

The next key determining factor is charitable or non-charitable.

We set out below the advantages and potential disadvantages of charitable status:

<b>Charitable</b>	
<b>Summary</b>	<ul style="list-style-type: none"> <li>• An organisation which is recognised as a charity in law</li> </ul>
<b>Advantages</b>	<ul style="list-style-type: none"> <li>• The public generally have confidence in charities. It is a trusted “brand”.</li> <li>• It is increasingly recognised that the public sector and third sector can deliver better outcomes when working collaboratively in a local community</li> <li>• Charities established as companies limited by guarantee are regulated by the Charity Commission. The Charity Commission is an independent and effective regulator. It requires high standards of governance and compliance. This gives confidence to those dealing with the charities sector</li> <li>• Charities are exempt from corporation tax. Hence 100% of surpluses can be reinvested back into the charity in furtherance of its objects</li> <li>• Charities are “tax attractive” and there are opportunities to</li> </ul>

Charitable	
	<p>maximise tax giving through:</p> <ul style="list-style-type: none"> <li>• Gift aid</li> <li>• Corporate donation</li> <li>• Sponsorship</li> <li>• Philanthropic investments</li> <li>• Legacies</li> </ul> <ul style="list-style-type: none"> <li>• Charities can only give to other charities. Therefore, there is an opportunity to lever in additional funding from grant making charities with a particular interest in young people</li> <li>• Charities are eligible for up to 100% business rate relief (not necessarily immediately relevant here)</li> <li>• In the event of the winding up of a charity, any assets remaining, e.g. cash at bank, must be transferred to another charity with similar charitable purposes. This is the concept of “asset lock”. Again, giving confidence to all those dealing with the Charity, that assets will not be distributed to “shareholders” but will be used to continually fulfil the objects of the charity, i.e. continuous improvement of the museum service</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>• Regulation by the Charity Commission. However, as stated above, this is an advantage as it gives confidence to those dealing with the charity that it is subject to independent regulation</li> <li>• It can only carry out charitable activities. Here, the provision of assistance in the provision of a museum or museums as a charitable activity. The new Development Trust would, therefore, be eligible for charity registration</li> <li>• However, any non-charitable activities (or high risk activities) could be carried out by a trading subsidiary</li> </ul>

For completeness, we set out below the advantages and disadvantages of non-charitable status.

Non Charitable	
<b>Summary</b>	<ul style="list-style-type: none"> <li>• A non-charitable/ commercial organisation</li> </ul>
<b>Advantages</b>	<ul style="list-style-type: none"> <li>• No restriction on the range of activities that can be</li> </ul>



Non Charitable	
	<p>undertaken</p> <ul style="list-style-type: none"> <li>• Depending on model, an opportunity to distribute dividends to shareholders. However, query if a dividend model fits with the ethos and culture of the Council and these types of Museum Services?</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>• No tax advantages</li> <li>• No charitable grants</li> <li>• No gift aid, donations or legacies</li> <li>• Limited opportunities for fundraising</li> </ul>

Having regard to the significant advantages of the charitable model and in particular, the fundraising opportunities, it is recommended that the new Development Trust be established as a charitable entity.

### 3.3 Charity Models

The next key decision is which legal model would be most appropriate for the new Development Trust for the Museum Services. The options are:

- Charitable company limited by guarantee
- Charitable community benefit society
- Charitable incorporated organisation

Our recommendation is the charitable company limited by guarantee, for the following reasons:

Company Limited by Guarantee	
<b>Summary</b>	<ul style="list-style-type: none"> <li>• A legal entity established under the Companies Acts and regulated by Companies House</li> <li>• The company has members rather than shareholders. The members act as the guarantors of the company. The members undertake to contribute to the assets of the company in the event of the company being wound up as a contribution to the debts and liabilities of the company. As this is a charitable entity and there is no intention to expose the members to any risk, this liability will be capped at £1.</li> <li>• Therefore, limited liability for the members.</li> <li>• Limited liability for the directors.</li> </ul>

<b>Company Limited by Guarantee</b>	
<b>Advantages</b>	<ul style="list-style-type: none"> <li>• A company operates in a modern regulatory regime.</li> <li>• It is subject to the Companies Acts, which are regularly reviewed and updated to ensure that they are up to date with business law and practice.</li> <li>• A company is regulated by Companies House - an efficient and helpful regulator.</li> <li>• All company filings e.g. report and accounts are available on the Companies Register which is easily accessible and available for online inspection. This transparency provides significant confidence to all those dealing with the company.</li> <li>• The company model is the model with which third parties are most familiar. This will make dealings with other funding partners, banks and suppliers easier.</li> <li>• It is still the recommended model for incorporated charities. Although the charitable incorporated organisation (CIO) is now available for use, this is still relatively new and not familiar to the wider public.</li> <li>• The company model is extremely flexible. It is easy to create subsidiaries/ group structures/ consolidate groups/ SPVs for new business ventures.</li> <li>• The directors will be subject to duties and responsibilities under the Companies Acts. These clearly define the statutory requirements of directors.</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>• The company will be required to file annual report and accounts at Companies House. This is not onerous and ensures the company is complying with the rigours of company accounting.</li> </ul>

### **3.4 Charitable Incorporated Organisation**

The charitable incorporated organisation is a very new legal model for charities.

It was introduced under the Charities Act 2006.

However, the statutory instruments setting out the key provisions of the charitable incorporated organisation were only introduced last year.

It has the prime advantage of only being regulated by the Charity Commission and not Companies House.

This may, however, also be a disadvantage.

Registration at Companies House provides a quick and easy way for third parties dealing with the charity to confirm its status and financial standing.

Further, as a very new legal model, the legal status of the charity may cause some uncertainty and/or confusion.

It is suggested, therefore, that, for the time being at least, the new charity be established as a company limited by guarantee and registered charity.

A company limited by guarantee can easily convert to a charitable incorporated organisation.

If, therefore, in the future there is a perceived disadvantage of being a company limited by guarantee and not a charitable incorporated organisation, the charity can easily convert.

In terms of establishing a charitable company limited by guarantee, the first stage is to incorporate the company and, then, to apply to the Charity Commission for registration.

It is recommended that the company be established at the earliest opportunity and then an application be made to the Charity Commission following the recruitment of the shadow board.

## 4. POTENTIAL RISKS/MITIGATION FACTORS

### 4.1 Potential Risks of the Development Trust Option

There are a number of potential risks of the Development Trust option, although these can all, in our view and experience, be mitigated:

Risk	Summary	Mitigation
<b>Dual Regulation</b>	If the Development Trust is established as a company limited by guarantee (as we recommend) then it will need to be registered with the Charity Commission to achieve charity status. This means the organisation will be regulated by Companies House and the Charity Commission. This does, therefore, require dual regulation and administration.	It is our view, however, that registration with the Charity Commission is a positive advantage. The Charity Commission is a well-regarded regulatory body whose prime objective is to safeguard charitable assets and ensure that charities operate to the highest standards in terms of corporate governance.  It is our position, therefore, that registration with the Charity Commission should be welcomed by all those involved and, in particular, the local authority.
<b>Reversibility</b>	Charities have an asset lock. This means that charity assets can only be used for charitable purposes and can only be transferred to other charitable bodies for similar purposes in the event of the charity winding down.	We do not recommend, therefore, that any assets, e.g. artefacts, are transferred to the Development Trust.
<b>Independence of the charity</b>	To be registered as a charity, the organisation must have exclusively charitable purposes. It is the Charity Commission's view that it is an "unstated charitable purpose" if the organisation has simply been established to fulfil the wishes of a local authority.	It is essential, therefore, when applying for charity registration that we are able to demonstrate that the charity has retained its discretion with regards to how it will fulfil its charitable purposes within a framework agreed with the local authority.
<b>Fundraising</b>	Fundraising is not in itself a charitable purpose. It is a means by which a charitable purpose is achieved.	It is critical, therefore, that the governing document for the charity clearly sets out the objects of the charity, i.e. the education of the public through the establishment and

Risk	Summary	Mitigation
		maintenance of a museum and differentiates between the powers of the charity, i.e. to fundraise and provide financial assistance to establish and maintain a museum.
<b>Administration</b>	The new organisation will be both a company and a charity and, therefore, will have additional administrative requirements in relation to annual accounts and filing.	These are not, however, onerous.
<b>Trustees</b>	<p>As stated in this report, it is critical to the success of this initiative that we recruit Trustees of the highest possible calibre.</p> <p>It is essential that the Trustees have a range of skills and expertise and who can contribute to the success of this initiative.</p>	Whilst this is a potential risk associated with an initiative of this nature, we are confident, having undertaken our stakeholder interviews, that a high profile and well run Trustee campaign will attract first class Trustees who can help the Council achieve its vision for its Museum Services.
<b>Duties and Responsibilities</b>	<p>The board of directors of the company limited by guarantee will be directors and also Trustees.</p> <p>They will have duties and responsibilities under the Companies Act and under Charities Act. These should be taken seriously but are not onerous.</p>	There will be a comprehensive induction for all newly appointed directors/ Trustees to ensure they are fully familiar and comfortable with their role as directors/ Trustees.
<b>Succession Planning</b>	<p>Having recruited high calibre Trustees for the first board, it is essential that careful consideration be given to succession planning to ensure the long term success of the project.</p> <p>We would recommend a similarly rigorous process with regards to recruiting all future Trustees.</p>	To ensure a rigorous Trustee recruitment process for any future Trustees.

Risk	Summary	Mitigation
	<p>Therefore, we would recommend an open advert and/or targeted advert, depending on any specific skills and expertise sought.</p> <p>All potential applicants should complete an application form and be interviewed by the Chair and two or three other Trustees.</p> <p>Importantly, all new Trustees should undertake a full induction process to ensure that they fully understand the vision and aspirations of the local authority and the objectives of the charity.</p>	

## 5. TAX AND TRADING ISSUES

### 5.1 Tax and Trading

Profits made by a charity are exempt from Corporation Tax where the profits are applied solely for the purposes of the charity.

Charities can undertake trading activities which are exempt from Corporation Tax.

Permitted trading activities are as follows:

- Primary purpose trading
- Ancillary trading
- Trading within the terms of the small scale exemption

Primary purpose trading is trading which contributes directly to one or more of the objects of a charity as set out in its governing document.

Profits from primary purpose trading are exempt from Corporation Tax on the basis that the profits are applied solely for the purposes of the charity.

Ancillary trading is trading that contributes indirectly to the successful furtherance of the purposes of the charity.

The small scale exemption is an exemption from Corporation Tax on the profits from small scale non-primary purpose trading.

An example would be conferencing events.

The current level of small scale trading exemption is as follows:

<b>Charity's gross annual income</b>	<b>Maximum permitted small trading turnover in that chargeable period</b>
Under £20,000	£5,000
£20,000 - £200,000	25% of charity's total incoming resources
Over £200,000	£50,000

For the avoidance of doubt, therefore, the relevant threshold for non-primary purpose trading is £50,000.

In addition to the above there are tax exemptions for certain fund raising events e.g. fetes, fairs and festivals, exhibitions, jumble sales, dances or concerts.

In the event that the Development Trust wishes to carry out significant non-primary purpose trading or trading activities which are regarded high risk, then it is recommended that the organisation establishes a trading subsidiary.

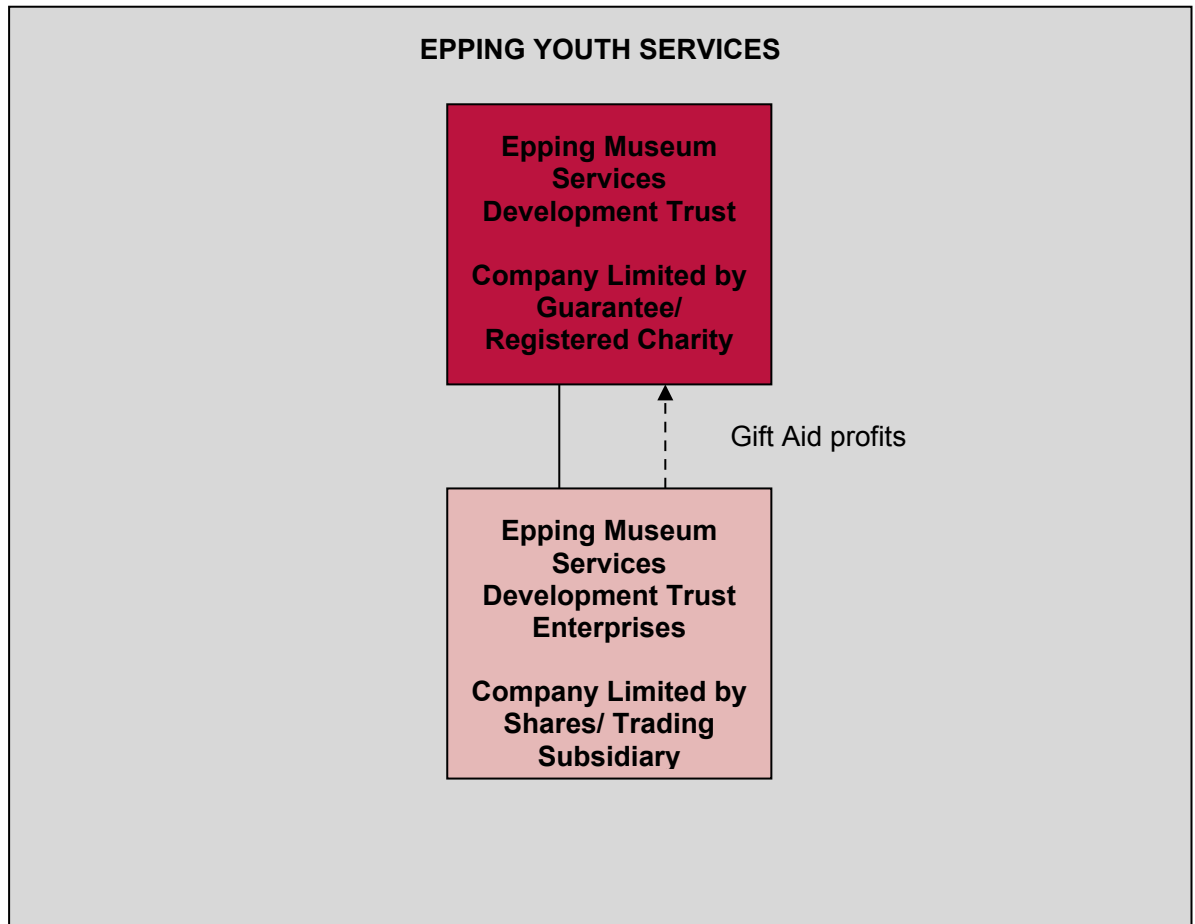
The trading subsidiary would be wholly owned by the charity and established as a company limited by shares.

Any profits generated by the trading subsidiary would be subject to Corporation Tax in the normal way.

To mitigate the Corporation Tax liability the trading subsidiary would gift aid all or part of its profits to the charity.

In the hands of the charity the profits will be tax exempt as the profits will be applied for its charitable purposes.

This is, therefore, a tax efficient structure.



Notwithstanding the above, it is proposed that the Council will continue to manage and operate the museum services, including new retail opportunities. The local authority itself will not be liable to any corporation tax.

The Council could consider establishing a trading company to manage and operate the new retail offer. This would create a potential corporation tax issue which could be mitigated by gifting surpluses to the Development Trust. Whilst this would create a potential revenue stream to the Development Trust, it would deprive the Council of this revenue scheme which would otherwise be applied towards the Services.



It is suggested that this proposal would only be required if there was a risk that the retail revenue would be applied for other purposes (e.g. the Council's general purposes and not "ring fenced" for Museum Services), in which case, gifting surpluses to the Development Trust would be a way of "locking in" surpluses for investment in the Museum Services.

## 6. KEY PROVISIONS OF GOVERNING DOCUMENT

The governing document for the Development Trust will be its Memorandum and Articles. We set out below a summary of the key provisions of the Memorandum and Articles of Association.

Clause/Articles	Proposed Drafting
<b>Name</b>	<p>The proposed name of the new company is to be confirmed.</p> <p>It should be noted that there is no need to include the word “Limited” in the name of the company as this will be a charity and there is an “exemption” under the Companies Acts in these circumstances.</p>
<b>Objects</b>	<p>The objects clause will set out the purposes for which the charity has been established.</p> <p>To be registered as a charity it must be established with exclusively charitable purposes.</p> <p>Further, the Charity Commission recommends that charities use, where possible, “model objects”, i.e. objects which have been approved by the Courts.</p> <p>A proposed objects clause is set out below:</p> <p>“The company is established for public benefit to:</p> <ul style="list-style-type: none"> <li>• Advance the education of the public by the establishment and/or maintenance of a museum in the London Borough of Epping and, in particular (but not limited to) developing and promoting programmes to advance the knowledge, appreciation, awareness, understanding and enjoyment of the arts and history of the London Borough of Epping; and/or</li> <li>• Advance the education of the public by the establishment and/or maintenance of a museum in the Borough of Broxbourne and, in particular, to develop and promote programmes to advance the knowledge, appreciation and awareness, understanding and enjoyment of the arts and history of the Borough of Broxbourne; and/or</li> <li>• Pursue such other charitable purposes consistent with the above as the Trustees in their absolute discretion shall determine (together the “Objects”)</li> </ul>
<b>Powers</b>	<p>The articles will set out a comprehensive set of powers to enable the charity to fulfil its charitable objects.</p> <p>The articles will, however, also include some specific and express powers relating to the support of Epping Forest District</p>

Clause/Articles	Proposed Drafting
	Museum and Lowewood Museum through fundraising activities.
<b>Liability</b>	The articles will confirm that the company has limited liability.
<b>Guarantee</b>	The articles will confirm that the members' liability is capped at £1.
<b>Non Distribution</b>	There will be a prohibition on distributing profits.
<b>Winding up</b>	In the event of the winding up of the company, the articles will provide that any residual assets will not be distributed to members but given or transferred to another charitable organisation with similar objects.
<b>Membership</b>	<p>Membership of the Charity needs careful consideration.</p> <p>Members are equivalent to “shareholders”. In a guarantee company, the members undertake to guarantee the debts and liabilities of the company in the event of an insolvent winding up.</p> <p>The guarantee is capped at £1.</p> <p>However, the members also have residual rights and powers under the Companies Acts, including, for example, the right to approve certain decisions of the Board, for example, changing the objects of the charity.</p> <p>It is common in the charitable company model for the Trustees to also be the members (and, therefore, not to have a wider membership).</p> <p>Here, it is proposed that consideration be given to the Council being a Corporate Member together with the Trustees.</p>
<b>General Meetings</b>	<p>The articles will set out the procedure for the calling and conduct of member meetings.</p> <p>Subject to confirming the board size, it is suggested that the quorum for meetings is fixed at three.</p> <p>It is suggested that to be quorate, there must be a majority of independents in attendance.</p>
<b>Trustees</b>	<p>It is suggested that the board is fixed at a minimum of three and maximum of [seven] and the board composition be as follows:</p> <ul style="list-style-type: none"> <li>• 1 Trustee nominated by the Council (Council Trustee)</li> </ul> <p><b>[NB: QUERY BROXBORNE BC NOMINEE?]</b></p>

Clause/Articles	Proposed Drafting
	<ul style="list-style-type: none"> <li>Up to 6 Trustees with relevant skills and expertise (Independent Trustees)</li> </ul>
<b>Election of Development Trustees</b>	<p>The Council Trustee will be selected and appointed by the local authority for such period the Council determines.</p> <p>The first “independent” Trustees will be selected following a rigorous Trustee recruitment process.</p> <p>Future Independent Trustees should be selected following an equally rigorous selection process.</p>
<b>Disqualification and Removal of Development Trustees</b>	<p>Trustees may resign at any time by giving written notice.</p> <p>Trustees will be automatically disqualified from acting in certain circumstances, e.g. if he or she is incapable due to mental illness or is otherwise disqualified from acting as a Trustee/director.</p> <p>In addition, the Trustees have the power to remove a Trustee in certain circumstances.</p>
<b>Retirement</b>	<p>The Independent Trustees will be required to retire by rotation.</p> <p>This means that every year one third of the board is required to retire.</p> <p>It is suggested that this requirement does not apply for the first three years following the start date of the new arrangements.</p>
<b>Proceedings at Development Trustee meetings</b>	<p>The Trustees will be required to meet at least four times per year.</p> <p>It is suggested that the quorum is fixed at three.</p> <p>All decisions will be made by a majority vote.</p>
<b>Chair</b>	<p>The chair will be a critical position.</p> <p>It is suggested that the chair should not be a Council Trustee.</p> <p>Subject to that, it is suggested that the chair be given a second or casting vote in the event of an equality of voted.</p>
<b>Executive</b>	<p>The board will be responsible for developing the strategy to achieve the Trust’s charitable objects.</p> <p>This will be set out in the Trust’s business plan.</p> <p>Day to day delivery of the business plan will be undertaken by</p>

Clause/Articles	Proposed Drafting
	<p>the executive team on behalf of the board.</p> <p>The executive will be paid employees of the Trust.</p> <p>It is anticipated that the Trustees will not receive any remuneration.</p> <p>The Trustees can claim reasonable expenses.</p>
<b>Subcommittees</b>	<p>The board can, as required, establish subcommittees with clear terms of reference.</p> <p>In addition, the board can establish working groups to help progress specific projects/fundraising initiatives.</p> <p>The charity might, for example, establish a working group to focus on encouraging volunteering or to develop an education programme.</p>

## **7. RECRUITMENT OF DIRECTORS / DEVELOPMENT TRUSTEES**

### **7.1 Skills on the Board of the Development Trust**

It is essential that the board is made up of individuals with a range of skills and expertise and who can contribute to the success of the Development Trust.

This is, therefore, a real opportunity to engage with key stakeholders and harness public, private and voluntary sector expertise.

We would recommend, therefore, that the board includes representation from the following key sectors:

- Business / enterprise
- Fundraising
- Retail
- Marketing
- Hospitality
- Education

Board members should all be committed to the objectives of the new organisation and fully embrace the Council's vision for Museum Services.

Ideally, board members should also have key specialisms/professional qualifications including:

- Finance
- Fundraising
- Retail
- Marketing
- Hospitality
- Social media

Achieving the right balance of skills and expertise will be key to the success of this project.

It is, however, a great opportunity to harness private sector expertise in particular.

The recruitment, selection and appointment of Trustees is one of the key success factors for an initiative of this nature.

We have successfully recruited over 750 directors/ Trustees in relation to initiatives of this nature. We have every confidence that an important and high profile project of this nature, will attract high calibre Trustees.

It is imperative that we achieve a balance of skills and expertise and, most importantly,

We set out below a summary of the key steps for Trustee recruitment:

- Prepare Trustee Recruitment Pack (**Appendix 4**) including a person specification (an example person specification is set out at **Appendix 6**)
- Prepare draft advert to be placed in local, national and specialist press (an example advert is set out at **Appendix 7**).
- Identify potential “targets”.
- Contact local press to get some editorial alongside advert.
- Place advert and send advert direct to known potential candidates.
- Fix deadline for expressions of interest.
- Fix date for an open evening.
- Hold open evening.
- Fix deadline for submissions of CVs and formal application to be a Trustee.
- Confirm make up of Trustee selection panel.
- Fix date for Trustee interviews (ideally on one day).
- Selection panel to conduct interviews and shortlist shadow board members.
- Inform short-listed candidates.
- Fix date for first Trustee meeting.
- Second phase recruitment campaign/interviews if required.

## 8. CRITICAL SUCCESS FACTORS

The establishment of a Development Trust is an essential part of a structured fundraising campaign – not only to assist with the immediate capital costs of the scheme but the long term sustainability of the Museum Service.

Long term success will depend on the following critical success factors:

### Key success factors

- Elected member and senior officer support
- A well-resourced dedicated project team
- A high profile and professionally run Trustee recruitment and induction process
- A comprehensive staff consultation plan
- A shared vision for the new arrangements
- An experienced management team with the right balance of specialist and commercial skills
- Appointment of external legal and fundraising specialists with proven track record in relation to similar projects
- A robust business plan and fundraising strategy

The Development Trust model has a proven track record in assisting local authorities achieve their aspirations for their art, museum and heritage assets.

It is our view that a Development Trust for the Museum Services is a real opportunity to ensure the long term viability and sustainability of both Epping Forest District Museum and Lowewood Museum and, most importantly, contribute to the wider social and economic prosperity of Epping and its surrounding areas.



**APPENDIX 1  
DEVELOPMENT TRUST LEGAL ENTITIES**

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets “locked in” for community benefit?	Can it be a charity and get charitable status tax benefits?
<b>Unincorporated Association</b>	<p>Informal structure</p> <p>No statutory regulation of this structure.</p> <p>Governed by own rules.</p> <p>No legal personality.</p>	<p>Nobody owns an unincorporated association</p> <p>Run entirely according to own rules.</p>	<p>No: it is an unincorporated entity and, as such, has no separate legal personality.</p> <p>Those running it will have to enter into all contracts and hold all property in their own name.</p> <p>Unlimited liability for those running the association who could be personally liable</p>	<p>Depends on own rules.</p> <p>If the association is to be charitable, restrictions on some personal benefits will apply.</p>	<p>The rules of the association could provide for this but do not necessarily have to unless charitable status is being sought.</p>	<p>Yes: if it meets the criteria for being a charity.</p>
<b>Development Trust</b>	<p>Set up by way of Development Trust deed.</p> <p>Deed will set out the terms of the Development Trust including the purposes for</p>	<p>Legal title in all assets is held by the Development Trustees.</p> <p>Beneficial ownership of the assets is with the beneficiaries of the</p>	<p>No: it is an unincorporated entity and, as such, has no separate legal personality.</p> <p>Development Trustees will have to enter into all contracts and all hold</p>	<p>If the Development Trust is not charitable, then Development Trustees can benefit from the Development Trust.</p> <p>If the Development Trust is charitable,</p>	<p>Not necessarily.</p> <p>For social enterprises and charities, assets would need to be locked in for community/public</p>	<p>Yes: if it meets the criteria for being a charity.</p>

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets “locked in” for community benefit?	Can it be a charity and get charitable status tax benefits?
	<p>which assets are held and for whom.</p> <p>Legal ownership is separated from beneficial ownership.</p>	<p>Development Trust.</p> <p>The Development Trustees administer and manage assets for the benefit of the beneficiaries in accordance with the terms of the Development Trust.</p>	<p>property in their own name.</p> <p>Unlimited liability for Development Trustees who could be personally liable.</p>	<p>then the general rule is that Development Trustees cannot personally benefit unless the governing document, the Charity Commission or a court has sanctioned such benefits. .</p>	<p>benefit.</p>	
<p><b>Company Limited by Guarantee</b></p>	<p>Incorporated vehicle.</p> <p>Board of directors and a membership.</p> <p>Flexible and familiar vehicle.</p> <p>Most commonly used corporate legal structure.</p>	<p>Directors manage business on behalf of members.</p> <p>Some governance requirements are imposed by statute but, within those restrictions, there is considerable flexibility over internal rules.</p>	<p>Yes: it is an incorporated entity and, as such, has a separate legal personality.</p> <p>The company itself enters into contracts and holds all assets.</p> <p>Members’ liability limited to amount of the guarantee,</p> <p>Liabilities of the company sit with the company itself although directors may be personally liable in</p>	<p>If not charitable, then yes, benefits can be paid.</p> <p>If charitable, directors and members cannot benefit unless the governing document, the Charity Commission or a court has sanctioned such benefits.</p>	<p>For a social enterprise or a charity, assets can only be applied in furtherance of the company’s objects (which would state that they were for public benefit)</p> <p>In addition, there would be a ‘non distribution’ clause ensuring that all surpluses were reinvested into the stated</p>	<p>Yes: if it meets the criteria for being a charity.</p>

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets “locked in” for community benefit?	Can it be a charity and get charitable status tax benefits?
			limited circumstances		objects of the company	
<b>Community Interest Company (CIC)</b>	<p>Limited company structure specifically for social enterprise.</p> <p>Secure “asset lock” and a focus on community benefit. The asset lock means that all assets of the CIC and any surpluses generated by them are used for the benefit of the community.</p> <p>CIC ‘branded’</p> <p>Can be a guarantee or a share company.</p> <p>If a share company, can issue dividends</p>	<p>As for a company limited by guarantee above but subject to additional regulation to ensure community benefits.</p>	<p>Yes: it is an incorporated entity and, as such, has a separate legal personality.</p> <p>The company itself enters into contracts and holds all assets.</p> <p>Members’ liability is limited to amount of the guarantee or the amount unpaid on shares.</p> <p>Liabilities of the company sit with the company itself although directors may be personally liable in limited circumstances</p>	<p>Yes: but must benefit wider community as well.</p> <p>Can pay limited dividends to private investors. There is a statutory cap on the amount of dividends payable which is set by the Secretary of State.</p> <p>The cap is on the amount of profits capable of distribution (currently, the aggregate cap is 35% of distributable profits).</p>	<p>Yes: through standard provisions which all CICs must include in their constitutions.</p>	<p>No: a CIC cannot be a charity and a CIC does not benefit from any tax advantages.</p>

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets “locked in” for community benefit?	Can it be a charity and get charitable status tax benefits?
	to investors subject to a cap					
<b>Community Benefit Society (formerly industrial and provident society)</b>	<p>Incorporated entity.</p> <p>For the benefit of the community generally i.e. not its own members.</p> <p>Board members and shareholders.</p> <p>Common model in housing sector.</p>	<p>Board members manage on behalf of the members.</p> <p>One member / one vote irrespective of the size of shareholdings</p>	<p>Yes: it is an incorporated entity and, as such, has a separate legal personality.</p> <p>The Society itself enters into contracts and holds all assets.</p> <p>Members’ liability is limited to amount unpaid on shareholdings.</p> <p>Liabilities of the Society sit with the Society itself although board members may be personally liable in limited circumstances</p>	<p>Must primarily benefit non-members</p> <p>Asset lock applies.</p>	<p>Yes .</p>	<p>Yes: if it meets the criteria for being a charity.</p> <p>Depending on the particular circumstances, it would either be a registered charity or an exempt charity.</p>

Legal Structure	Key features	Ownership, governance and constitution	Is it a legal person distinct from those who own and/or run it?	Can its activities benefit those who own and/or run it?	Assets “locked in” for community benefit?	Can it be a charity and get charitable status tax benefits?
<b>Charitable Incorporated Organisation (CIO)</b>	<p>Bespoke vehicle specifically for charities.</p> <p>Created by the Charities Act 2006.</p> <p>Board and a membership.</p> <p>Two models available – either members as Development Trustees or a wider membership.</p>	<p>Similar to a company</p> <p>Different terminology to a company (e.g. there is no concept of ‘directors’ – instead, ‘charity Development Trustees’).</p>	<p>Yes: it will be an incorporated entity and have a separate legal personality.</p> <p>The CIO itself will enter into contracts and hold all assets.</p> <p>Members will have either no liability or limited liability</p> <p>Liabilities of the CIO will sit with the CIO itself although Development Trustees may be personally liable in limited circumstances.</p>	<p>Charity Development Trustees can only benefit personally if the constitution, court or Charity Commission permit it.</p>	<p>Yes.</p>	<p>Cannot be anything but a charity, and must meet the criteria for being a charity.</p>

**APPENDIX 3  
DEVELOPMENT TRUSTEE RECRUITMENT CAMPAIGN**

<b>Key Steps</b>	<b>Target Date</b>
Confirm approach to Trustee recruitment	8 January 2016
Prepare Trustee information pack including a person specification	15 January 2016
Identify “targets” for Trustees	15 January 2016
Prepare draft advert to be placed in local, national and specialist press	15 January 2016
Fix date for an open evening	29 January 2016
Contact local press to get some editorial alongside advert	29 January 2016
Place advert and send advert direct to known potential candidates	29 January 2016
Hold open evening	11 February 2016
Fix deadline for submissions of CVs and formal application to be a Trustee	25 February 2016
Shortlist Trustees	w/c 29 February 2016
Confirm make up of Trustee selection panel	w/c 29 February 2016
Fix date for Trustee interviews (ideally on one day)	w/c 29 February 2016
Selection panel to conduct interviews and shortlist shadow board members	w/c 14 March 2016
Inform short-listed candidates	w/c 21 March 2016
Fix date for first Trustee meeting	31 March 2016
Second phase recruitment campaign/interviews if required.	1 April 2016

**APPENDIX 4**  
**TRUSTEE INFORMATION PACK**

1. Details of facilities/ Museum Services
2. Background to initiative
3. Duties and responsibilities of a Director
4. Duties and responsibilities of a Trustee
5. Invite to open evening
6. Person specification
7. Application form

## **APPENDIX 5 TRUSTEE ADVERT**

### **TRUSTEES NEEDED FOR MUSEUM INITIATIVE**

Epping Forest District Council has a proven track record in delivering first class Museum Services which includes:

- Epping Forest District Museum
- Lowewood Museum
- North Weald Airfield Museum

The Epping Forest District Museum is currently closed whilst a major refurbishment project is completed. This involves significant investment from Epping Forest District Council and, also, an invaluable contribution of £2 million from the Heritage Lottery Fund.

The refurbished museum will be open in April 2016 with state of the art displays, increased exhibition space and a new activity room.

This is a hugely exciting initiative.

It is recognised, however, it will also be a challenge.

Trustees are needed with knowledge and expertise to support the Council's existing management team in the maintenance and continuous development of the museum offer.

We would welcome applications from Trustees throughout the region who are not only committed to promoting Museum Services in Epping but who also have the following specialist skills in particular:

- Business / Enterprise
- Finance
- Fundraising
- Marketing/ Hospitality
- Education
- Volunteering and community engagement

All positions are unpaid but expenses are available.

To learn more about this opportunity email [ ] for a Trustee Information Pack and attend the open evening to be held at [5 p.m.] on [ ] 2016 at [ ].



**APPENDIX 6  
PERSON SPECIFICATION**

Category	Criteria
<b>Experience</b>	<ul style="list-style-type: none"> <li>• Proven track record in business or a relevant profession</li> <li>• Involvement in community service (paid or voluntary)</li> </ul>
<b>Skills and abilities</b>	<ul style="list-style-type: none"> <li>• Specialist skill, e.g.               <ul style="list-style-type: none"> <li>• Business / Enterprise</li> <li>• Finance</li> <li>• Fundraising</li> <li>• Retail</li> <li>• Hospitality</li> <li>• Marketing</li> <li>• Education</li> </ul> </li> <li>• Commitment to the objectives of the new organisation and, in particular, promoting awareness and appreciation of the arts and history of Epping</li> <li>• Communication skills</li> <li>• Analytical skills</li> </ul>
<b>Other requirements</b>	<ul style="list-style-type: none"> <li>• Availability for evening meetings and possibly some daytime meetings</li> <li>• Awareness of local issues and the linkage between a vibrant arts offer and the economic and social prosperity of the area</li> <li>• Appreciation of status and functioning of charitable organisation</li> <li>• Experience in fundraising and/or networking</li> </ul>
<b>Additional skills for chair</b>	<ul style="list-style-type: none"> <li>• Ambassador for the initiative</li> <li>• Experience of planning and conducting board meetings</li> <li>• Establishing a constructive working relationship with and providing support for the museum team</li> <li>• Impartiality, fairness and ability to respect confidences</li> <li>• Availability for additional meetings</li> </ul>

Category	Criteria
	<ul style="list-style-type: none"><li data-bbox="416 271 719 309">• Media experience</li></ul>

## **APPENDIX 7 CHARITY ISSUES**

It is permissible for a local authority to establish or promote a charity carrying out a public function.

It is critical, however, that the charity is established for exclusively charitable purposes.

A local authority and a charity can work together to deliver common objectives where the objectives of the local authority and the charitable organisation coincide.

The concern of the Charity Commission will be to satisfy itself that the body has not been created for an **“unstated non-charitable purpose”**.

An “unstated non-charity purpose” would be where the organisation has been established simply to give effect to the wishes and policies of the local authority.

Thus, it is essential when establishing a new organisation and presenting it to the Charity Commission for charitable registration, that we demonstrate to the satisfaction of the Charity Commission that it has been established for **exclusively charitable purposes**.

The Charity Commission provides helpful guidance on the characteristics of an independent charity when negotiating a funding settlement with a local authority.

These characteristics include:

- The Trustees draw up their own policies and business plan.
- The Trustees conduct arm’s length negotiations with the local authority.
- Any Trustees with a conflict of interest do not participate in those discussions (e.g. local authority nominees).
- The funding arrangements preserve the Trustees’ fundamental discretion on the selection of the beneficiaries and provision of Museum Services.
- The Trustees do not simply commit to giving effect to the policies and wishes of the authority without exercising any discretion.
- The Trustees do not agree to conditions that undermine the confidentiality of their discussions e.g. the presence at their meetings of an observer from the local authority.
- The Trustees are free to make decisions on matters outside the scope of the funding arrangements.

The fewer of these characteristics that a body displays, the more likely the Charity Commission will conclude that it has been established for an “unstated non-charitable purpose” and will not be registered as a charity.

The issue of independence is critical not only at the point of registration of the charity but also in terms of its ongoing governance.