

# REPORT



REPORT OF	MEETING	DATE	ITEM NO
CULTURAL SERVICES BUSINESS UNIT	EXECUTIVE COMMITTEE	28 <sup>TH</sup> SEPT 2005	11

## THE FUTURE OF LOWTHER GARDENS AND PAVILION

### Public/Exempt item

This item is for consideration in the public part of the meeting

### Summary

As part of the work undertaken to establish the suitability of Lowther Pavilion as the location of the Council's Civic Suite the Legal and Democratic Services Officer sought Counsel' s opinion to gauge the robustness of restrictive covenants over the Pavilion and Gardens. The opinion, whilst attaching significance to the covenants, also identified that Lowther Gardens was held by the council on charitable trusts, arising out of the terms of the original gift of the land to the council's predecessor in 1905.. The council now needs to register the charitable trust. It also needs to make arrangements for the future management of the Gardens (including the Pavilion) as a charitable trust. These arrangements may include appointing alternative or additional trustees to administer the trust. This report sets out the detailed background and identifies the available limited options open to the council.

The restrictions of the charitable trust status and the covenants effectively prevent the council from operating a civic suite on this site.

However, a number of health and safety requirements have been recently identified and Members are asked to agree to the allocation of capital funds from the current year's budget in order to minimise this identified risk and satisfy public entertainment conditions.

## **Recommendation/s**

- 1 That the Committee agrees to the registration of Lowther Gardens (Including the Pavilion) with the Charities Commission as an urgent priority.
- 2 That the Committee agrees to the finances of Lowther Gardens and Pavilion being separated from those of the Council.
- 3 That the Committee authorises the appropriate officers to explore, with the Charities Commission and interested parties, the prospect of the operation and administration of Lowther Gardens and Pavilion being transferred to a new or existing Charitable Trust.
- 4 That the Committee agrees to the allocation of £30,000 in respect of essential health and safety improvements as described in the report

## **Executive brief**

The item falls within the following executive brief[s]: Quality of Life (Councillor Patricia Fieldhouse); Environment ( Councillor Alfred Jealous)

## **Report**

### **Background**

Lowther Gardens were gifted to Lytham Urban District Council in 1905 as Parks and Pleasure Grounds by the Squire of Lytham

Lytham UDC, then Lytham St Annes Corporation and finally Fylde Borough Council, have managed and maintained the Gardens since 1905 for the purpose of leisure and recreation. Facilities include two bowling greens, tennis courts, putting green, aviary and a childrens' playground. The gardens are tended by council gardeners and the parks development officers have developed and supported a vibrant Friends of Lowther Gardens community group.

Latterly, significant horticultural and community input has resulted in the Gardens being awarded Green Flag status and has seen the installation of a 'Lytham Shrimper' statue and fountain recognising Lytham's significant heritage.

In 1921 Lowther Pavilion was completed to provide for community use and remained as a facility for this purpose throughout the 30's and 40's.

A range of alterations and improvements were carried out in the 1950s and in 1981 when the building as we see it now was completed. Lowther Pavilion currently is managed by Fylde Borough Council predominantly as a hire out multi-purpose venue. As a 454 seat theatre it is used for amateur dramatic and musical productions as well as craft and antiques fairs, exhibitions and some professional shows. For a number of years it has been the venue for the Council's annual general meeting as well as other committee meetings and gatherings. There is also a busy cafeteria operated by lessees.

The building, although retaining many of the original features, has been extensively remodelled by the addition of foyer and office space, booking office facilities, lighting and

sound systems, heating system and facilities to meet the requirements of the Disability Discrimination Act 1996. This investment was provided by Fylde Borough Council.

### **Considerations**

At the Council meeting on 15<sup>th</sup> July 2004 it was resolved that:

*£1 million of any capital receipts should be topsliced to improve the current facilities and provide community and civic meeting accommodation at Lowther Pavilion*

In the period following this decision the council was approached by the Lytham St Annes Civic Society expressing concern over the council's intention to provide civic and meeting room facilities at Lowther Pavilion. The Civic Society claimed that:

- 1 The proposed development was contrary to covenants attached to the Gardens restricting the extent of addition of the building and prohibits 'political meetings'
- 2 The civic suite, in the view of local people was 'unnecessary' and 'unpopular', and that this facility should be incorporated into the new council back office
- 3 Having taken legal advice it was likely that the gardens were held by the council on charitable trusts and therefore were subject to the jurisdiction of the Charities Commission and that the use of the Pavilion as a civic suite is outside the purposes for which the Gardens were given and would therefore be unlawful.

The Civic Society held a public meeting earlier this year to determine the level of support for their view and this meeting was attended by Council officers.

The Council's solicitor subsequently sought Counsel's opinion to assess the robustness of both the restrictive covenants and the charitable status of the gardens and Pavilion. Counsel advised as follows (summarised):

1. *Whilst the Leasehold Covenant and some of the Conditions may remain enforceable by some owners of land neighbouring the Gardens as restrictive covenants, the most significant aspect of this matter for the Council is that they most probably hold the Gardens upon charitable trust.*
2. *Assuming that the Gift amounts to a charitable trust, by virtue of section 3(7)(a) of the Charities Act 1993 Act the Council is under a duty to apply to the Charity Commission for registration of the Gift of the Gardens in the Register of Charities. I am not aware of any exemption or exception from this requirement that would apply in this case.*
3. *It is of crucial importance that the Council should appreciate the distinction between the basis of land-holding as a charitable trust and that of any other land that they may control under statutory authority: their use of the land is subject to the Conditions imposed in the Gift and subject to the supervision of the courts and the Charity Commission. The primary responsibility of the Council as trustee is to observe the terms of the trust, in this case the Conditions contained in the Gift. Breach of any of the Conditions could lead to legal action being taken against the Council for breach of trust. In the foregoing I have advised as to the potential breaches of trust past, present and future. The key issues of potential contention have been identified as:*
  - *the erection and extension of the Pavilion;*
  - *charging for entry to the Pavilion;*

- *the conduct of Council business in the Pavilion;*
- *car-parking in the Gardens; and*
- *the lease of the café within the Gardens to a private enterprise.*

4. *Of these, it is in respect of*

*(1) the use of the Pavilion for Council business unrelated to the Gardens themselves (which is almost certainly unlawful), and*

*(2) the Pavilion ticket sales (which it may be justifiable to a degree depending upon further detail of the sums involved and the use to which any profit has been put)*

*that the Council is most vulnerable to a claim for breach of trust - although it is fair to comment that each issue holds some risk for the Council.*

5. *Minor internal and external alterations to the Pavilion, unless geared to an unlawful purpose, are unlikely to prove controversial.*
6. *It is therefore prudent for the Council to contact the Charity Commission with a view to registration of the Gift and seeking advice, primarily to confirm the status of the Gift of the Gardens as a charitable trust and the need for its registration. In due course, and insofar as is necessary, the Council may seek further advice under section 29 of the 1993 Act and any necessary Orders under section 26 of the 1993 Act to approve certain uses of the Gardens (such as charging admission for the Pavilion and car park, the lease of the café, and possibly – but more controversially - occasional use of the Pavilion for Council events). It may even be necessary to seek the imposition of a Scheme to allow such uses, should the Commission require so drastic a step.*
7. *However I should add a strong note of caution. Approaching the Charity Commission, and the probable registration of the Charity that would ensue, will invite scrutiny of the past and present use of the Gardens in the hands of the Council. Accounts will have to be made available on request, and annual reports will have to be returned. It is therefore important that the Council should organise its records and accounts in relation to the Gardens in anticipation of the possibility of such scrutiny, which is all the more likely in light of the apparent local concern as to the use of the Gardens. For example, and as mentioned above, any retention of profit from Pavilion ticket sales should be justified and such income kept separate from other Council revenue, if this has not been done already. Care should also be taken, in producing accounts, to check that matters such as the calculation of rates and any VAT have been given proper consideration.*
8. *It is fair to warn that the potential scrutiny of the administration of the Gardens will be intensified because of the Charity Commission's expressions of reservations as to the fitness of local authorities to act as charity trustees. Although local authorities are empowered to act as charity trustees under section 139 of the Local Government Act 1972, as recently confirmed in the Commission's recent decision in respect of the Trafford Community Leisure Trust and Wigan Leisure and Culture Trust, the Commission is wary of the risk that local authorities are more likely to fail to take proper account of their obligations as charity trustees and merely deal with trust property in the same way as their other, corporate property.*
9. *It will be seen, therefore, that the approach to the Charity Commission that I have suggested ought to be handled with utmost care. Doubtless an explanation of the*

*history and administration of the charity over the years since 1905 will need to be proffered and should be carefully thought through. It would seem prudent to stress the current benefit to the community of the present uses to which the Gardens are put, and whatever evidence there is of the popularity of such uses.*

It appears, therefore, that the use of Lowther Pavilion or Gardens for any purpose other than for of recreational activity will be likely to be contrary to the purposes of the charitable trust and use as a civic suite or for routine council meetings, ought not to continue.

On this basis, at the Executive Committee meeting held on 29<sup>th</sup> June 2005 it was resolved no monies received from any capital receipts should be used to improve facilities at Lowther Pavilion

There is also a requirement

- a) For the Gardens to be registered with the Charities Commission
- b) For the finances of the Gardens and Pavilion to completely separated from the council's other budgets.

### **Future administration of the Gardens**

As Lowther Gardens is subject to a charitable trust, the council, as its owner, is automatically its trustee. This means that the council can only manage the Gardens (including the Pavilion) for the purposes of the trust, which is for public recreation, and consistently with the other terms of the trust. It must be administered separately to the rest of the council's assets. Any financial returns from the Gardens must be applied for the purposes of the trust; that is, to maintaining the gardens for public recreation. (Members should note that while the council may not use income from the Gardens to subsidise other council activities, it could, if it chooses, spend its own money on the Gardens.)

Where local authorities hold land as trustee, it is often difficult for those involved to appreciate the separate and distinct duties that fall upon the authority, and to manage the land in accordance with the terms of the trust. For those reasons, the Charities Commission encourages local authority trustees to consider disposing of their charitable land to alternative trustees. These may be individuals from the community or larger charitable organisations. Disposal to new trustees would require the approval of the Commission and the new trustees would be bound by the trusts. In the case of Lowther Gardens and Pavilion, it is almost certain that any trust would require that these facilities should be "subsidised" by the funds of the council to offset the net deficit. Therefore the council would still have a financial commitment to the Pavilion and gardens into the future

An outline of the 2004-05 financial outturn position of both Lowther Pavilion and Gardens is shown below. Members will note that there was a net deficit.

<b>Cost Centre</b>	<b>Gross Expenditure</b>	<b>Gross Income</b>	<b>Net Cost</b>
Lowther Pavilion	£241,358	£102,357	£139,001
Lowther Gardens inc. DSO	£121,338	£ 20,560	£100,778

		<b>Total</b>	<b>£239,779</b>
--	--	--------------	-----------------

## Review of Leisure Services

As part of a review of the Council's Leisure Services by external consultants, Lowther Pavilion was identified as “*an interesting but not particularly high quality venue*”. However, the review identified that the Pavilion had a community role to play in Fylde and identified a number of options for the management of this facility. These options included private sector operation, direct operation by the council and a joint operation with Wyre Borough Council. The recommended option was, however, operation by a new or existing charitable trust bringing a number of advantages, both financially and in the flexibility of operation.

At the meeting of the Council's Executive Committee held on 23<sup>rd</sup> March 2005 the consultants report was received and Members decision was to:

*Commission a feasibility study to evaluate the options for the development of the Lowther Pavilion in tandem with the Gardens and linked to the proposed events function and arts development. Linked directly to this and as an extension to this commission, assess the feasibility of the proposed events company.*

This option needs to be revisited and refined in the light of counsel's Opinion. Any new trust or existing trust whose operation was expanded to include Lowther Pavilion would need to administer the pavilion and the rest of the gardens in accordance with the purposes of the 1905 trusts. As Counsel noted, there are significant tensions between these purposes and some of the opportunities that have been identified for Lowther Pavilion.

## The Immediate Future

A Health and Safety risk assessment undertaken this year has identified a number of areas of work that create significant safety risks for the staff, namely the lifting and storage of the seating and retraction of the tiered seats. In addition the onstage suspension lines have to be replaced in order to meet our requirements under the new Premises Licence. The programme of replacement should begin immediately requiring £10,000. In view of the urgent nature of these issue Members are asked to agree to the indicated funding being found from the 2005/06 budget

Table A provides an indication of the nature and extent of the refurbishment and the health and safety at work identified at the Pavilion. None of these items are provided for within existing budgets.

Table A

<b>WORKS</b>	<b>ESTIMATED COST</b>	<b>COMMENTS</b>
Installation of lifts to store & orchestra pit for seating handling	£15,000	Identified in Health and Safety Inspection
Installation of mechanical 'Bleacher Mule'aid to retract tiered seating	£4,500	Identified in Health and Safety Inspection

Replacement of on stage suspension lines	£10,000 as initial work in programmed replacement.	Required to satisfy conditions of the new Premises Licence
--	--	--

<b>IMPLICATIONS</b>	
Finance	It should be noted that any transfer of the Lowther facilities is unlikely to reduce the Councils costs in the short term.
Legal	No further implications other than those indicated in the report
Community Safety	No identified implications
Human Rights and Equalities	The staff at Lowther have a right to a safe working environment
Sustainability	The future administration of Lowther Gardens and Pavilion is likely to require ongoing subsidy from the Council
Health & Safety and Risk Management	A number of significant health and safety issues, requiring rectification, have been identified. Failure to address these issues will leave the council exposed to an unacceptable level of risk

REPORT AUTHOR	TEL	DATE	DOC ID
Paul Norris/Ian Curtis	(01253) 658440	13 <sup>th</sup> September	

LIST OF BACKGROUND PAPERS		
NAME OF DOCUMENT	DATE	WHERE AVAILABLE FOR INSPECTION
None	-	-

### **Attached documents**

**Lowther Pavilion Condition report summary - August 2003**

# Overall Condition Report

<b>Site Number</b>	02288	<b>Block Number</b>	<b>Building Surveyor</b>	<b>Engineer</b>
<b>Department</b>	Lowther Pavillion West Beach Lytham St Annes	1	Matthew Parkinson	N/A
	Lancashire FY8 5QH	<b>Description</b>	14/08/2003	14/08/2003
		Single storey rendered building with a combination of pitched and flat roofs. Timber windows and doors to most areas with isolated UPVC units. Extensive tarmacadam parking to the perimeter of the building.		
		<b>Floor Area</b>	1320m2	

		£	Priority
	1 Roofs	4424	2
	2 Floors and Staircases	35442	2
	3 Ceilings	392	3
	4 External Walls, Windows and Doors etc.	8344	2
	5 Internal Walls and Doors	2128	4
	6 Sanitary Services	32984	2
	9 Redecorations	28806	2
	9 Redecorations	15904	2
	11 External Areas	6104	4
Block Total		<u>£134528</u>	

12 September 2005