



# WIMBLEDON AND PUTNEY COMMONS CONSERVATORS

## ACCESS FRAMEWORK

### 1. Purpose

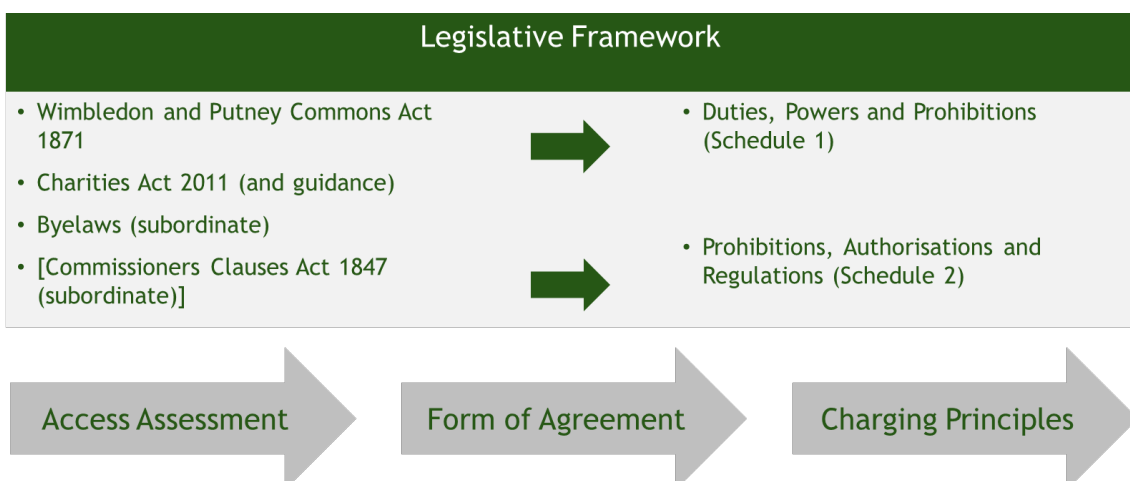
The purpose of the Access Framework is to allow requests for access to Wimbledon and Putney Commons to be considered in a comprehensive, consistent and structured manner that respects the duties, powers and prohibitions that govern the Commons as set out in the relevant legislation.<sup>1</sup>

### 2. Legislative Framework

Wimbledon and Putney Commons are vested in and protected by the Wimbledon and Putney Commons Conservators (WPCC), a body corporate, which was constituted under the Wimbledon and Putney Commons Act of 1871 ('the 1871 Act'), as amended by primary and secondary legislation. The Commons are also governed by the Commissioners Clauses Act 1847 ('the 1847 Act'), as amended, as well as Byelaws made under the 1871 Act, both of which are subordinate to the 1871 Act.

WPCC was registered as a charity on 14 April 1972 and as a charity is also governed by the Charities Act 2011; the Charity Commission has published considerable guidance relating to the Charities Act 2011, much of which sets out good practice 'that the Charity Commission expects trustees to follow and apply to their charity or be able to explain why not'. Conservators serve as 'charity trustees' of the charity (i.e. the persons in control of decision-making) and are also the only members of the charity.<sup>1</sup>

The legislative framework provides the basis for which requests for access to use the Commons are both assessed in terms of compatibility with the legislation and, if deemed compatible, the form in which any agreement to use the Commons should take and the charging principles that apply.



<sup>1</sup> The charity established by the 1871 Act is the corporate body called the Wimbledon and Putney Commons Conservators (WPCC) itself, and that WPCC technically holds the land and other assets beneficially for the purposes set out in the 1871 Act rather than holding them subject to a charitable trust. Further, instead of WPCC being the trustee of the charity, the Conservators individually are the 'charity trustees' of the charity within the meaning of section 177 of the Charities Act 2011.

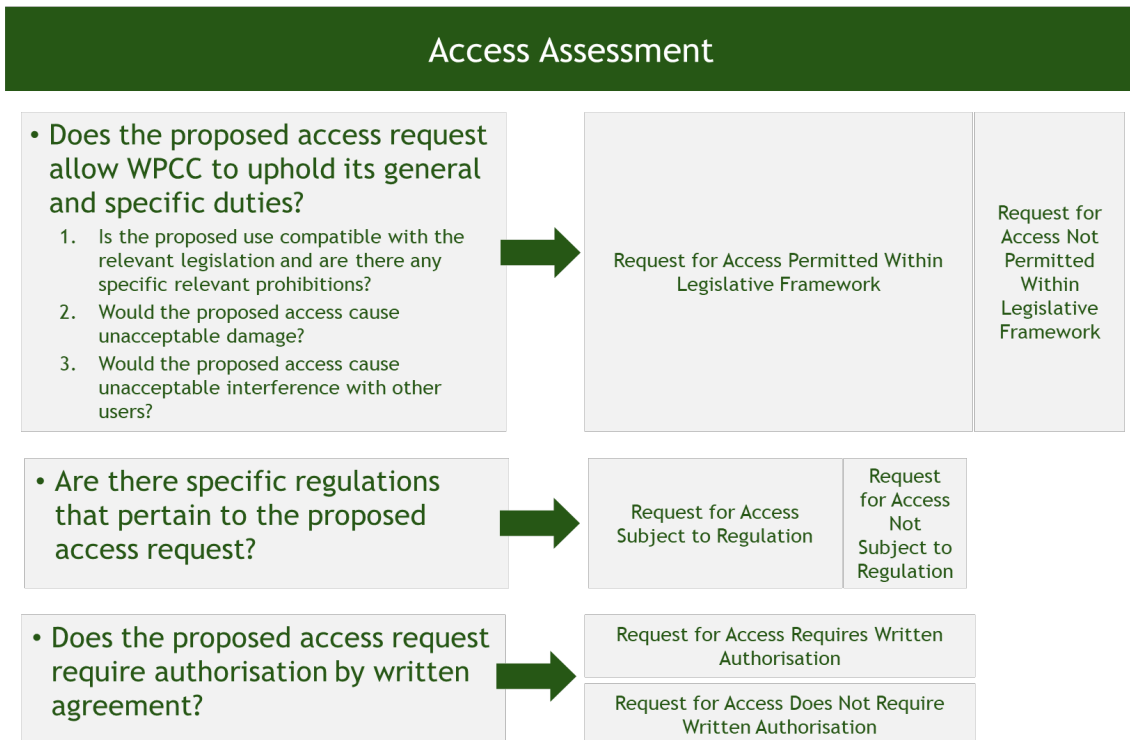
### 3A. Access Assessment

The charitable purpose and fundamental duty of WPCC, as set out in the 1871 Act, is to ‘preserve, protect and enhance the Commons and to keep the Commons forever open, unenclosed and unbuilt on for the purposes of exercise and recreation’. Any proposed use of the Commons must therefore be assessed against the duties, powers and prohibitions of the Conservators in pursuit of this purpose as set out in both the 1871 Act as well as other relevant legislation. A summary of the relevant provisions in this legislation is set out in Schedule 1.

The three fundamental criteria against which any request for access must be assessed reflect the principal duties of the Conservators as set out in the 1871 Act:

1. Is the proposed use compatible with the stated purposes of ‘exercise and recreation’?
2. In the context of the Commons being established in order to be used for recreational purposes for the public benefit, but subject to the duty to protect and conserve their natural features, vegetation and wildlife, would the proposed use cause unacceptable levels of damage?
3. Would the proposed use cause interference with other users that could not be readily managed?

If the proposed use fails to meet the requirements of these three fundamental criteria, the request for access would not be permitted.<sup>2</sup> Within permitted requests, the legislative framework establishes a body of specific regulation through the Byelaws and rules. In assessing any request, these regulations must be considered. A summary of these regulations is set out in Schedule 2.



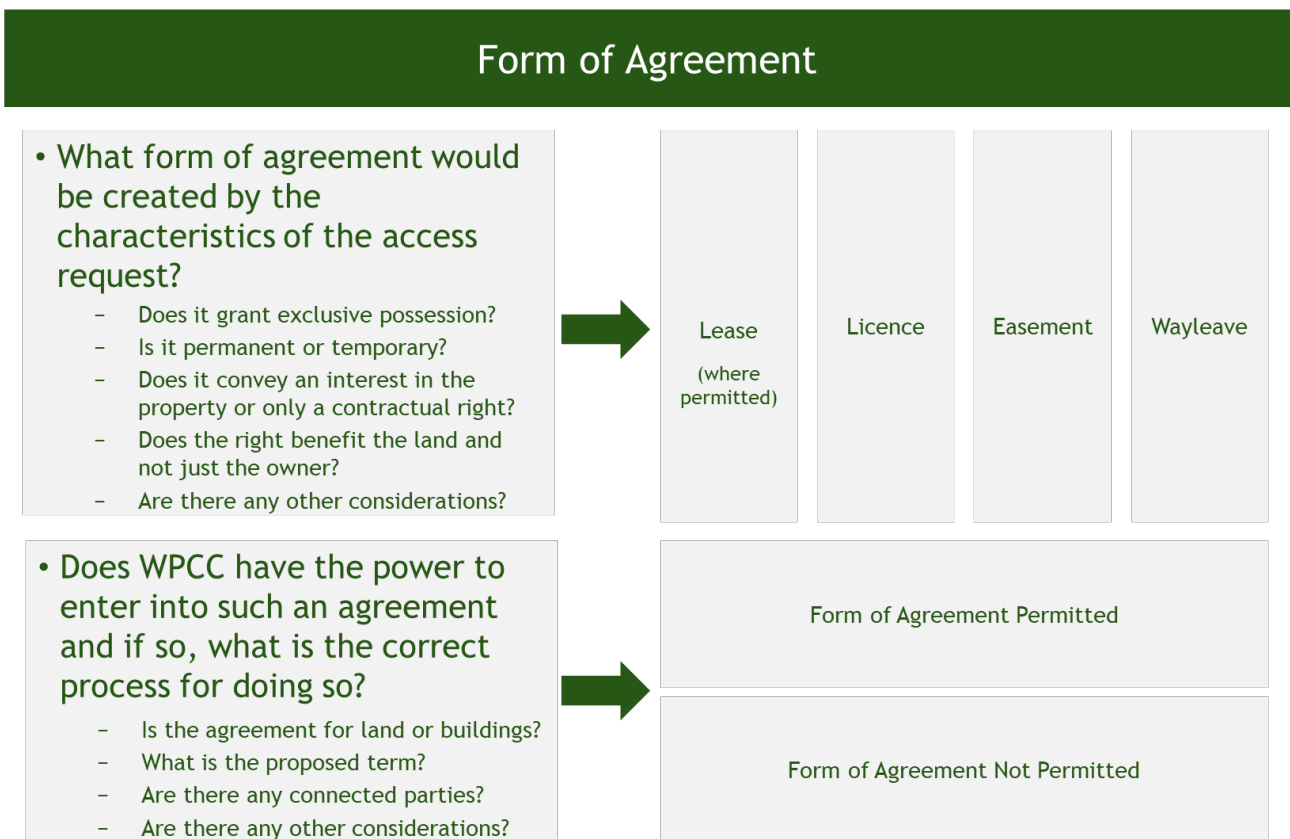
<sup>2</sup> Access arrangements are also required to support infrastructure projects initiated by both public and private bodies, particularly utility companies.

### 3B. Form of Agreement

For uses that are deemed to be compatible with the legislative framework, written authorisation may or may not be required. In certain cases, it will be clear that written agreement is required due to the nature of the proposed arrangements constituting a lease, easement or wayleave agreement. In the case of licences, whilst a written licence will always be necessary if the access is subject to charging, even if charging is not required, licences may still be the best way in which the obligations of both parties are best set out. Ultimately, it will be WPCC’s decision on whether or not written authorisation is required.

If written authorisation is required, the characteristics of the access request will determine the type of written agreement necessary: lease, licence, easement or wayleave.

The legislative framework sets out WPCC’s ability to enter into particular types of written agreements and the processes that must be followed in entering into written agreements. (Both the 1871 Act and the Charities Act 2011 are of particular importance in this area.)



**Leases** – These are legal arrangements that give a possessory interest through the granting of an exclusive right to inhabit or occupy a property. WPCC has the legal capacity to grant leases or tenancies of its property. However, a lease is a disposal, and there is in section 35 of the 1871 Act an express prohibition on the sale, lease or other disposal of land forming part of the Commons, as explained above, unless such disposal is permitted by the 1871 Act. That prohibition extends to land acquired as part of the Commons under section 68. The only provision in the 1871 Act which permits the grant of leases of any part of the Commons is section 38, which authorises the letting of the buildings which were transferred to WPCC by the Act itself, together with the associated enclosures (i.e. yards or gardens adjacent to the buildings). WPCC may, however, enter into leases either as the lessor or lessee on land that does not form part of the Commons. A lease can only be terminated on appropriate notice as defined by statute or in the lease itself. A lease is by definition for defined period (the ‘term’), even if this is merely a week or month in the case of a weekly or monthly tenancy. The

leading case on this subject is *Street v Mountford*, in which the House of Lords held that a so-called licence was actually a lease because it gave the tenant exclusive possession of the property.

*Licences* – These are purely contractual arrangements in which a property owner permits an individual or an entity (e.g. a company, charity, club or a school) to use the property for a specific purpose for a specific period and stipulating the conditions of use. A licence usually offers very little security to the licensee and the essential feature is that the arrangement does not provide the licensee with exclusive possession of the property. A licence is by nature a temporary arrangement and can always be terminated (i.e. permission can be withdrawn) on reasonable notice whether or not there is a written agreement to that effect).<sup>3</sup> (What is ‘reasonable’ depends on all the circumstances.<sup>4</sup>) Licences may vary in complexity and may be either unilateral or bilateral, setting out not only the rights granted on the licensee but the licensee’s contractual obligations.

There is no express mention in the 1871 Act of any general power for WPCCC to grant licences in relation to the Commons. Section 8 of the Act constituted the Conservators as a corporation with full capacity to act as a legal person in acquiring, holding and disposing of land and other property, but section 35 expressly provides that they would be acting unlawfully (i.e. *ultra vires*) if they disposed of any part of the Commons otherwise than under an express power conferred by the Act. A disposal, or disposition, of land involves its alienation by means of the transfer to or creation of a legal interest in the land in another person. A licence does not involve the creation or transfer of a legal interest in land but is the effect of a contract, or agreement, permitting the other person to use the land for specified purposes.

There is no doubt that, as a legal person whose activities necessarily include, for example, the employment of staff and the engagement of contractors, and whose powers include the purchase of property, WPCCC has ample power to enter into contracts so far as necessary or desirable in carrying out its functions. (See for example sections 68 and 90 of the 1871 Act and section 56 of the 1847 Act.) The scope for the grant of contractual licences relating to the Commons, however, is strictly constrained by WPCCC’s duties to preserve the Commons as open spaces, unenclosed and unbuilt on, to protect the vegetation and facilitate the use of the Commons by the public for exercise and recreation. (Refer to the preamble and sections 34 and 36 of the 1871 Act.) WPCCC cannot lawfully permit a third party to use the Commons in any way which would be inconsistent with the proper carrying out of those duties.

*Easements* – These are legal arrangements that grant certain rights with respect to the property such as access over or under land. The grant of an easement creates an interest over the property and is designed to benefit another property (rather than an individual). As such, the benefit will pass from owner to owner.

The possibility of easements being granted over the Commons has been considered in two recent cases. An easement is a legal right over land such as a right of way. In 2008, the Court of Appeal decided that WPCCC could lawfully grant an easement over the Commons provided that no enclosure or building was permitted, and the Commons remained open for public exercise and recreation, and thus that a right of way over an access road across part of the Commons could be acquired by prescription, hence the importance of guarding against encroachments referred to in section 34 of the 1871 Act.<sup>5</sup> Although an easement creates a legal interest over the land, and was arguably caught by

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<sup>3</sup> See *Minister of Health v Bellotti* [1944] KB 208.

<sup>4</sup> Clearly it is often convenient for the landlord to agree that the licence will remain in existence for a period of years but the nature of the transaction is that the landlord can nevertheless terminate the agreement before that period has expired so long as it gives the licensee time to make alternative arrangements and move out. To avoid arguments over whether a breach of contract has been committed by the landlord it is wise for the landlord’s right to terminate to be mentioned expressly in the licence and, if appropriate, for the minimum period of notice to be specified rather than risking argument over what length of notice is ‘reasonable’.

<sup>5</sup> See *Housden and Another v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172.

section 35, it did not amount to a ‘disposal’ of any part of the Commons as such within the meaning of that section, interpreting the 1871 Act in the light of its social and environmental intentions.

In 2014, a differently-constituted Court of Appeal followed the Housden decision in deciding that WPCC could grant easements consistently with their obligations as to the preservation and protection of the Commons under the 1871 Act, and also commented on the need for WPCC to exercise judgement in deciding what was appropriate.<sup>6</sup> The Court viewed the 1871 Act as giving WPCC a measure of flexibility rather than taking a literalist approach to its interpretation.

*Wayleaves* – These are arrangements that don’t bind future owners; most wayleaves relate to the right by a property owner for an entity, normally a utility company to install, access and maintain utilities that run on or under land. When the need for it ceases, the agreement will usually be terminated. Wayleaves differ from easements in so far as easements can only be made between adjoining land owners. An easement is also registrable as a legal interest at the Land Registry, whereas a wayleave is not, although since 2002 they must now be disclosed on an application to register the property, which means that they will be noted on the register as an overriding interest.<sup>7</sup>

### **3C. Charging Principles**

An integral part of the Access Framework is the charging regime that underpins the contractual arrangements between WPCC and third parties, which is dependent on the form of agreement that any such arrangements take.

#### *Leases, Easements and Wayleaves*

Under sections 117 to 121 of the Charities Act 2011, specific restrictions apply to the process and pricing for the sale, or (as the case may be) the lease or other disposition of a charity’s land.<sup>8</sup> In accordance with the Charity Commission’s Operational Guidance 548 therefore, leases, easements and wayleaves are normally subject to the procedures set out in sections 117 to 121 of the Charities Act 2011.<sup>9</sup> (In the case of WPCC, leases of land forming part of the Commons (other than leases of certain buildings and associated enclosures) are in any case not permitted.)

Further, however, Leading Counsel has advised that as a result of an exemption under section 117(3)(a) of the Charities Act 2011 those statutory restrictions in any event do not directly apply to WPCC. Nevertheless WPCC is under a duty to achieve the same kind of result when disposing of

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<sup>6</sup> See *Evans v Wimbledon and Putney Commons and Another* [2014] 2 P and CR.

<sup>7</sup> See <https://www.land-search-online.co.uk>.

<sup>8</sup> Section E1.2 of the Charity Commission’s Operational Guidance 548 states, ‘The Charities Act uses the term “disposition of land”. In this guidance we talk about the disposal of charity land and in this context a disposal is by way of lease or freehold sale. But disposal will also include, for example granting: rights (such as fishing rights), easements (such as rights of way), a wayleave to allow access to facilities on that land’.

<sup>9</sup> Guidance provided by the Charity Commission under section 110 of the Charities Act 2011 dated 18 March 2020 confirms that the treatment of wayleaves in relation to the Charities Act is a complex matter. For the purposes of compliance with the Charities Act 2011, certain wayleaves would constitute easements and therefore would fall under sections 117 to 121 whilst other wayleaves would constitute licences and therefore not fall under sections 117 to 121. For the purposes of ensuring compliance with the Charities Act 2011 in all instances and in accordance with the Charity Commission’s advice, it is therefore proposed that WPCC treat all wayleaves as easements for compliance purposes.

land as would be achieved by complying with the restrictions.<sup>10,11</sup> WPCC's trustees have a fiduciary duty to ensure that 'the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity'. In meeting this requirement, accepted best practice is that trustees obtain and consider advice from a qualified surveyor, by analogy with the provisions of sections 117 to 120 of the Charities Act 2011, about the terms of the transaction and the need (if any) to take further steps to ensure, by means of advertising, that the best terms are obtained.<sup>12</sup> (For avoidance of doubt, in practice, the fiduciary requirement to follow the statutory provisions as best practice applies to the grant of leases, easements and wayleaves subject to the qualification above.) The Charities Act 2011 also sets out, inter alia, notification requirements that must normally be followed, the qualifications of the valuer and the need for Charity Commission consent (or the consent of the Court) for agreements with connected parties.

### *Licences*

A 'disposition' does not include a licence. Section E1.6 of the Charity Commission's Operational Guidance 548 states that 'no specific power is required by a charity to grant a licence, even over designated land, and section 117 procedures do not apply'. Trustees do however have a fiduciary duty to ensure that the terms are in the best interests of the charity and as such the guidance goes on to state that 'the licence should be granted on the best 'market terms' unless it is intended to further the objects of the charity'.

In this context, in order to demonstrate best 'market terms', where practical and possible, it is considered best practice is to obtain independent advice and follow the processes set out in section 117 to section 120 of the Charities Act 2011 if this is deemed feasible.<sup>13</sup>

The licensing regime that covers the wide range of activities that take place on the Commons (informal and formal sports, recreational and educational activities as well as one-off events such as fairs and circuses) is quite complex. Although determining the 'right' charge may seem to be a straightforward process, there are a large number of factors that affect charging that need to be considered. Many of these are competing and often controversial; issues identified below need to be considered when considering what an appropriate charge might be.

### *Best Market Terms*

In some cases, a qualified valuer's assessment of what can be achieved under best 'market terms' is possible and in such cases an assessment of this type should be sought. In other circumstances, a valuer's assessment is either neither practical nor possible. In all cases however factors that should be considered for the purposes of determining best 'market terms' are set out below.

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<sup>10</sup> Section 117 (3) of the Charities Act 2011 states, 'The restrictions on disposition imposed by this section and sections 119 to 121 apply regardless of anything in the trusts of a charity; but nothing in this section or sections 119 to 121 applies to—

(a) any disposition for which general or special authority is expressly given (without the authority being made subject to the sanction of an order of the court) by—

(i) any statutory provision contained in or having effect under an Act'.

<sup>11</sup> Section 8 of the 1871 Act provides WPCC with the power 'to take and hold, and to dispose of (by grant, demise, or otherwise) land and other property (which body corporate is in this Act referred to as the Conservators)'.<sup>12</sup> It is not the case that the charity's land is subject to any trust. This means that section 121 does not apply, even by analogy.

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<sup>13</sup> The Charity Commission has published Operational Guidance 548 for its staff in relation to licences and leases. (Refer to Appendix 1.)

A. Revenue and Profit – The revenue and profit associated with licence arrangements is a critical factor in assessing the benefit that accrues to the licensee; user charges are therefore an important consideration, as is the overall revenue/profitability of the licensee. Disclosure of its financial accounts is often the best way of understanding these considerations.

The charitable status of the organisation to whom the licence is granted is also a consideration. A run organised by a third party commercial operator with 500 participants with a non-trivial entry charge for participants should be recognised as serving a different purpose from a ‘club run’ organised by a charity with a small number of participants and no, or a merely nominal, entry charge.

B. Costs – The costs that WPCC incurs in order to provide the agreed service and meet its obligations under the licence agreement are also an important consideration in assessing the relevant charges. Licensees should be expected to contribute to some or all of the cost of providing the service where such costs can be directly attributed to the use. These include:

- access to and preparation of the site (including parking);
- litter management;
- facility management (supervision and management) and emergency response arrangements;
- site restoration obligations;
- WPCC administration (e.g. preparation of licences, valuations, etc).

Such activities may be either explicitly set out in the licence as components of the charges to be levied or as duties to be fulfilled by the licensee (such as restoration works).

C. Scale of the Activity/Intervention – Charges need to reflect the scale of the activity; a small one-off event such as a children’s organised party at the REMPF is quite different to the five-day Rosslyn Park Rugby Sevens event. Where an activity requires considerable infrastructure, or significant (though acceptable) interference with the enjoyment of the Commons by other users, consideration needs to be given to obtaining a more formal basis for the charge. This might be through benchmarking or a valuation by a specialist land agent.

D. Duration and Term – The duration (both in terms of physical presence on the Commons and also the length of any licence/wayleave) is an important consideration. An afternoon activity for a small photographic shoot is very different from, say, a three-year licence to utilise facilities at the REMPF pavilion and playing field. Where a licence is proposed over several years, a professional valuation should normally be obtained.

E. Benchmarks – The use of comparable charges for similar local facilities/services provides a helpful guide on the level of charges as well as the competitive environment, although consideration needs to be taken of the following issues:

- Access – whether the same or similar access arrangements to facilities/services are available at competing sites, for example, availability of local transport, car parking or the extent of opening hours;
- Quality – whether the quality of provision offered in terms of customer care, standards of cleanliness of the facility, level of service and also condition of the asset itself in relation to its use is comparable with other local services;
- Availability of alternatives – whether the same or similar services can be obtained from other public, private or voluntary sector providers at lower cost or with greater value.

### Furthering the Objects of the Charity

A. Service Objectives – WPCC should also set charges in order to achieve a number of service objectives, as set out below, in no order of priority:

- Maximising (without unacceptable damage to the Commons) the availability of the services and promoting the benefits of activities, particularly where this involves membership of clubs and organisations that promote sport and recreation;
- Encouraging participation by all in healthy outdoor activities; where concessionary charges apply, they should be set at 50% of the full price for the facility and apply to young people under 17, students in full time education, people aged 60 or over, disabled people, unemployed people and schools/youth organisations, on production of the appropriate identification;
- In recognising WPCC's duty to conserve the Commons and manage potential interference between users, rationing use of a service where demand exceeds supply, particularly at peak times of use, through increased charges or other restrictions; in such cases, however, the concessionary charges for those facilities should not also be increased; where appropriate for under-used facilities, services should be set at a lower charge and monitored on a six monthly basis.

B. Historical Rights – In considering the appropriate level of charges, the longstanding rights of access across the Commons (e.g. golfers, horse-riders, walkers and runners) should be considered with care. These issues can often be overlooked and can be deep-seated, with the introduction of charges creating tensions that can quickly escalate and could cause reputational damage to the charity if not properly handled. It is desirable to maintain positive working relationships with the user organisations and make them aware of the purposes for which WPCC holds the Commons, including in particular their conservation and the need to keep them available for various different activities.

C. Contribution to WPCC – There are many organisations that contribute directly towards the facilities that are provided on the Common. The golf clubs contribute significant costs towards the annual upkeep of their golf course. The horse-riders have launched appeals to raise money towards the upkeep of rides. Running organisations such as Parkrun have charity events to raise money specifically for the Commons, whilst the Windmilers provide annual support at the Commons Open Day managing the car parking arrangements.<sup>14</sup>

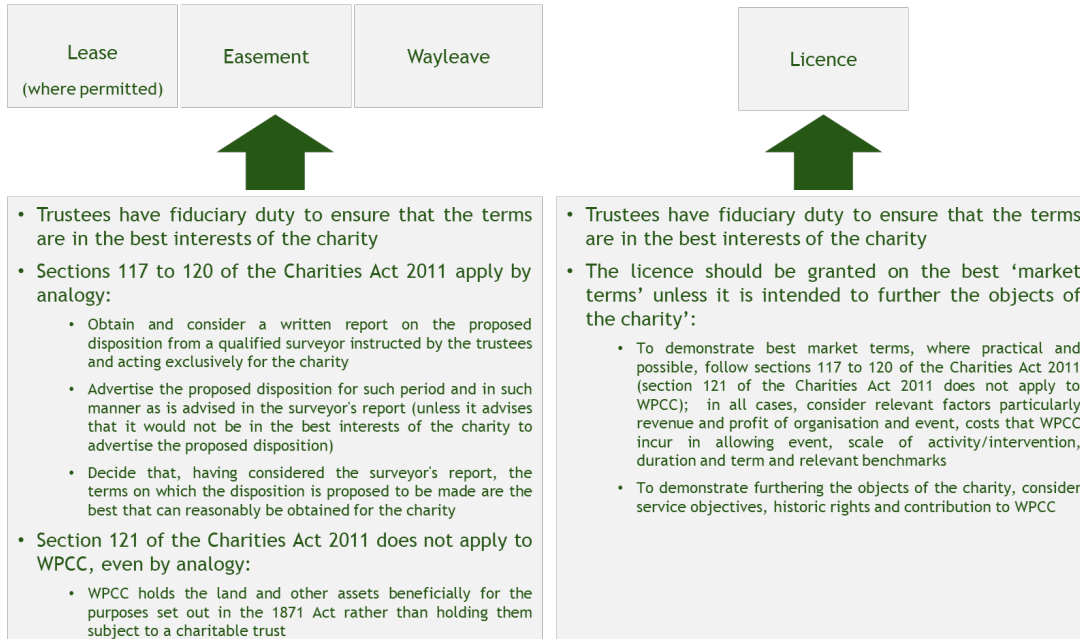
These contributions and gestures of goodwill should be incentivised in any charging arrangements. The loss of goodwill can be very damaging.

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<sup>14</sup> *Housden and Another v Conservators of Wimbledon and Putney Commons* [2008] 1 WLR 1172.29 states, 'During the course of the hearing there was discussion about the part of the common used as a golf course by the Wimbledon Common Golf Club and its predecessors since before the passing of the 1871 Act. The decision of the London South West Valuation Tribunal (31 May 2007), in which the restrictions on the commons were considered, was cited. It was a rating case. The Tribunal noted that the golf clubs using the course had no lease or licence to use the land for golf. There was no permission document. The use was with unwritten permission without payment, but accompanied by annual voluntary contributions. The Tribunal concluded that the course was sufficiently defined for it to be capable of being a hereditament for rating purposes, but the clubs did not have paramount or exclusive control and were joint occupiers'.



# Charging Principles



## Appendix 1

Section E1.6 of the Charity Commission's Operational Guidance 548 states,

### "E1.6 Granting a licence or a lease

A licence:

gives the licensee a contractual right to use the part of premises to which the licence refers for an agreed purpose; does not confer an interest in the land and is therefore subject to contract law – it has no effect on the nature of the charity's legal interest in the property; is likely to be granted where the lessee is to carry out a particular activity and the charity needs to retain access to the part of its premises to be occupied. Examples of a licence might include where a bar business is set up in a village hall. The licence would give the licensee access to the hall to carry out the bar business but would still allow the hall to be used for the usual other activities that take place. (In this example the licensee would also need to comply with the alcohol licensing laws, which is a different situation from the licence the trustees are granting for the use of part of the hall.)

A lease:

gives exclusive possession of a defined area of land; is for a fixed period (the term of the lease); creates an interest in the land; is more likely to be granted where the charity's land, property or premises is to be occupied on a more permanent basis and the lessee will have independent access and his/her own separate areas. Rent will usually be paid but this is not an essential element in recognising a lease. Exclusive possession for a term under an enforceable agreement, for example a deed, will be sufficient. It is probable that the letting of a residential unit to a tenant will be a lease rather than a licence.

However, it is not necessarily what term is used, licence or lease, but rather the effect of the arrangement. An agreement that confers exclusive possession of the premises is probably a lease. An agreement that merely confers a privilege to occupy the land of another for some particular purpose is a licence. This can be a difficult legal area and if there is any doubt as to whether the trustees are granting a lease or a licence, seek legal advice.

No specific power is required by a charity to grant a licence even over designated land, and section 117 procedures do not apply. However, the charity cannot grant a licence which is incompatible with the trusts to which the land is subject. For example, if the designated land is a playing field designated for the use of a recreation ground charity, it would probably not be possible for the trustees to grant a licence to use the land as a car park (except perhaps for an occasional or 'one-off' event). In addition, the licence should be granted on the best 'market terms' unless it is intended to further the objects of the charity."

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<sup>i</sup> For the purposes of this document, the term access refers to proposed access to Wimbledon and Putney Commons by any party for any use. The Access Framework sets out the basis on which such access would be assessed including whether such use would be permitted, any authorisation that the proposed access would require and, if so, the form in which that authorisation would take and the charges that would be payable. Most informal users of the Commons do not require specific authorisation though all users remain subject to the provisions of the 1871 Act including the Byelaws.