



CabinetOffice

Office for Civil Society

Making it easier for charities to sell and make other disposals of land

Consultation on extending the definition of “qualified surveyor” in section 36(4) of the Charities Act 1993

Government Response

September 2010

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INTRODUCTION

This document is the Government's response to the consultation "Making it easier for charities to sell and make other disposals of land - consultation on extending the definition of "qualified surveyor" in section 36(4) of the Charities Act 1993".

It covers the following:

- background to the consultation exercise
- a summary of the responses to the consultation
- Government responses to specific questions in the consultation
- the next steps following this consultation

Further copies of this response and the consultation paper can be obtained by contacting David Hale at the address below:

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This response and the original consultation document are also available on the Cabinet Office website

www.cabinetoffice.gov.uk/voluntary-sector/charity-law-regulation/latest-consultations-proposals.aspx

BACKGROUND

Trustees of charities in England and Wales who want to sell or otherwise dispose of land, or interests in land, must normally get a written report from a professional adviser who is a “qualified surveyor” within the definition given in section 36(4) of the Charities Act 1993 (the section 36 definition). The Act allows the section 36 definition to be changed by statutory instrument.

At present “qualified surveyors” have to-

- be fellows or professional associates of the Royal Institution of Chartered Surveyors; and
- be reasonably believed by the charity trustees to have ability in, and experience of, the valuation of land of the particular kind, and in the particular area, in question”.

These requirements do not allow trustees to take into consideration the experience and qualifications of the professional adviser in a way that is proportionate to the nature and type of disposal. The 2005 Better Regulation Task Force Report “Better Regulation for Civil Society”¹ suggested that the section 36 definition is too narrow and recommended extending it.

Consequently, the Cabinet Office, which is responsible for the legal and regulatory framework for charities in England and Wales, consulted to help decide whether to extend the section 36 definition to include Fellows of the National Association of Estate Agents (FNAEAs) or leave it unchanged. The consultation document proposed that allowing charity trustees to obtain reports from suitably experienced FNAEAs will be a useful simplification of the requirement and in many cases:

- increase trustees’ choice about who they can consult; and
- consequently make it quicker, easier and often less expensive to get the information they need to enable them to make decisions about disposals and follow the statutory procedures.

The consultation period ran from 7 March 2010 to 7 June 2010.

¹ <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/betregforcivil.pdf>

SUMMARY

Twenty five responses to the consultation have been received. Professional bodies and umbrella organisations that have responded include:

- Action with Communities in Rural England
- Central Association of Agricultural Valuers (CAAV)
- Charity Law Association (CLA)
- Community Sector Law Monitoring Group
- National Association of Estate Agents (NAEA)
- Royal Institution of Chartered Surveyors (RICS)

There were also responses from charities, firms of solicitors and property professionals as well as individual surveyors and a legacy consultant. A full list of respondents is attached at annex A. Sixteen of the respondents are in favour of the change and nine are against.

While the majority of the respondents are in favour of extending the section 36 definition, five of those in favour of the change qualify their comments by saying that the extension should only apply to residential sales, where estate agents' real expertise lies. Interestingly, five out of the nine respondents that are against making the change indicate that they do not question estate agents' ability to advise on residential property sales, but do not think them suited to advise on other types of property. So there is a degree of agreement even between those in favour of, and those against, the change.

In addition the CAAV argue for people that hold their Fellowship to be included in the definition, because of their expertise in valuing agricultural land.

The consultation document also invited respondents to make general comments about the proposals. Eight of the respondents, including the CLA working group, are critical of the lack of clarity and proportionality in the Charities Act 1993 where sales and other disposals of charity land are concerned (particularly as only leases for terms of seven years or less have any sort of "light touch" regulation)².

Cancer Research UK proposes that legacy properties that have never been used by or for the purposes of a charity should be completely exempt from the requirements set out in the Charities Act 1993.

² Section 36(5) of the Charities Act 1993

GOVERNMENT RESPONSE

Reference to question numbers in this section is to those used in the consultation. The consultation document also invited respondents to make more general comments about the proposed change.

Question 1

Do you agree that the section 36 definition should be extended to include Fellows of the NAEA?

Only nine of the respondents are not in favour of extending the definition, the remainder to varying degrees are in favour. Of the nine respondents not in favour of the change, one is RICS and five of the other respondents are either “qualified surveyors” or submitted on behalf of organisations by “qualified surveyors”.

Those in favour of changing the definition include NAEA and CAAV. The latter organisation proposes that people that hold its Fellowship should also be included in the definition.

Five of the respondents in favour of the change are concerned that estate agents’ expertise is with marketing and selling residential property and that any extension of the definition should only apply to such property. However, apart from a professional qualification section 36(4) also requires the “qualified surveyor” to “be reasonably believed by the charity trustees to have ability in, and experience of, the valuation of land of the particular kind, and in the particular area, in question”. This requirement, which is explained in detail in Charity Commission guidance³, ensures that no surveyor should seek to advise charities on disposals of land unless they are experienced in dealing with that type of property in the locality where it is situated.

Two of the respondents are also concerned that the proposals put too much responsibility on charity trustees when choosing a “qualified surveyor”. However such a responsibility is very similar to the trustees’ duty of care when choosing an investment adviser under the Trustee Act 2000. Section 5(4) of that Act simply requires trustees to obtain “*the advice of a person who is reasonably believed by the charity trustees to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment*” without specifying any qualification or minimum level of experience.

³ See section D3 of *Sales, leases, transfers or mortgages* (CC28) <http://www.charitycommission.gov.uk/library/guidance/cc28text.pdf>

Government response

The current definition is not proportionate and should be extended to include Fellows of the National Association of Estate Agents.

Question 2

Do you agree that, if implemented, the extension will reduce the cost of obtaining reports for charities? If you agree and can provide an estimate, how much do you think the average saving will be? In what circumstances are savings likely to be made?

Eight respondents who are in favour of the change agree that the extension will reduce costs (two did not answer this question). No respondent believes that basic costs will increase. However there is significant disagreement about what savings will be achieved. Three respondents argue that RICS qualified surveyors' fees are either negotiable or carried out below market rates and one indicates that the fees can be as low as £350 plus VAT. This is considerably less than the estimate of an average overall cost of £850 in the partial impact assessment that accompanied the consultation document.

However, Tozers LLP, Solicitors, refer to cases where a charity has used an estate agent to market a property without realising that a "qualified surveyor" had to be consulted. The charities then have to engage a "qualified surveyor" at a cost of £400 or more to prepare a separate report that a good estate agent would have been able to do without further cost.

Deafblind UK estimate that the change could save them up to £15,000 a year.

The Fakenham, Wells and Holt Circuit of the Methodist Church believe that the savings will remove a disincentive to trying to resolve minor, financially negligible, property issues.

Government response

The proposal will reduce the cost of obtaining reports for charities, even if the saving only applies to residential property and the estimate of the cost of a report from a "qualified surveyor" in the partial impact assessment is high.

Question 3

Do you agree that, if implemented, the change will increase charity trustees' choice and make it easier for them to find a "qualified surveyor"?

Eleven respondents in favour of the change agree that the change will increase charity trustees' choice; even if the change only applies to residential property (two did not answer the question, although one of those argues that trustees should be allowed to decide who is a suitable advisor for any sale). Of those respondents against the change, only one agrees that the change will increase trustees' choice, but only for residential sales.

Three respondents who are against the change were concerned that by increasing choice, there is a possibility that the quality of the advice will suffer, particularly as RICS' training is generally wider than that of FNAEAs.

Three respondents who are against the change also argued that it is not difficult to find surveyors that fall within the section 36 definition.

However extending the definition will increase charities' choice of "qualified surveyor" by enabling them, where appropriate, to consider using FNAEAs as well as surveyors that hold RICS qualifications. Also before consulting a "qualified surveyor" about a possible disposal charity trustees are required to satisfy themselves of the person's ability to advise them on that particular transaction.

Government response

The change will increase charity trustees' choice and consequently increase competition for this work. It will also improve the proportionality of the requirement by increasing the ability of charities to match the type of sale to a "qualified surveyor" who is appropriately experienced to advise them.

General comments

The questionnaire invited respondents to make more general comments about the proposal and eight of them have taken the opportunity to explain their concerns about the general lack of proportionality that applies to the regulation of charity land disposals. Bates, Wells and Braithwaite London LLP's, Solicitors, response states that "the aims of the Consultation ... will be achieved not just by dealing in the narrow confines of "qualification" but by looking more broadly at the entire process".

The extensive response from the CLA working group states:

“While noting the pragmatic approach in this consultation of promoting a suggestion which can be implemented with relative ease by way of regulation, the concern is that the proposal only papers over a crack, leaving the underlying structure in need of some major maintenance.”

The CLA working group’s comments, which are also broadly reflected in other responses, include:

- the term “disposition” is not defined causing confusion to lawyers about which transactions it applies to;
- while the granting of a lease for a period of seven years or less benefits from a “light touch” procedure, the same does not apply to the surrender of such a lease;
- it is not clear at what point during the disposal process that charity trustees should consult a surveyor.

This is the same for a minor disposal, such as the grant of a right of way, as it is for a complex sale, such as for development purposes.

Unlike the extension of the section 36 definition these changes cannot be made by a straightforward statutory instrument, they must be made by an Act of Parliament or possibly a Legislative Reform Order.

There are also criticisms of the lack of proportionality in the Charities (Qualified Surveyors’ Reports) Regulations 1992 (SI 1992 No. 2980), which specify the content of the reports that qualified surveyors have to complete when advising charities.

Government response

The Government accepts that the legislation that regulates sales of charity land needs to be more proportionate and will seek an opportunity to change this. This will require primary legislation.

CONCLUSION AND NEXT STEPS

There are grounds to extend the section 36 definition to include people who are Fellows of the NAEA. This will increase charities' choice and their ability to match the skills and experience of their "qualified surveyor" to the type of disposal they are considering. On this basis, there is also scope to consider extending the section 36 definition to include other property professionals, such as Fellows of the CAAV.

However, while they do not relate directly to this consultation, the criticism by respondents of the general lack of proportionality and clarity in the regulation of sales and other disposals of charity land should not be ignored.

Charities in England and Wales make thousands of sales and other disposals of interests in land each year and it is important that the regulation of these transactions is supported by legislation that is clear and proportionate.

Therefore the Government has decided that the regulation of sales and other disposals of charity land should be considered as part of the review of the operation of the Charities Act 2006 that, under the provisions of that Act, must begin in 2011. To do otherwise would miss an opportunity to bring clarity and proportionality to this important area of charity law. Consequently, the Government has also decided that:

- it will extend the definition of qualified surveyor, but do this as part of any changes following the 2011 review; and consequently
- the results of this consultation will inform the broader review.

That review will be able to consider the wider issues raised by the respondents to this consultation and recommend how best to revise the regulation of sales and other disposals of charity land (including changing the definition of "qualified surveyor"). It will also make it possible to take the changes forward in a way that is cohesive with any other changes to charity law that the review recommends, rather than in a piecemeal way.

ANNEX A – LIST OF RESPONDENTS

Action with Communities in Rural England
Bates Wells & Braithwaite London LLP, Solicitors
Cancer Research UK
Carter Jonas LLP, Property Consultants
Central Association of Agricultural Valuers
Charity Law Association
Community Sector Law Monitoring Group
Deafblind UK
Crispin Ellison, Legacy Consultant
Fakenham, Wells and Holt Circuit of the Methodist Church
Frankham Projects Ltd, Specialist Development Consultancy and Management
Consultancy
Knight Frank LLP
Daniel Knowles
London Diocesan Board for Schools
Patrick McGreal
National Association of Estate Agents
Royal Institution of Chartered Surveyors
Royal National Lifeboat Institution
Scope
Smiths Gore, Rural Property Managers
Stone King Sewell LLP, Solicitors
Tozers LLP, Solicitors
United Reformed Church, Yorkshire Synod
Keith Wallace, Chief Executive and Clerk, St John Hackney Joint Estates
Charities
John Wilson FRICS