

Item No.	Classification: Open	Date: 25/02/03	MEETING NAME EXECUTIVE, meeting as TRUSTEE OF THE SOUTH LONDON GALLERY TRUST
Report title:		South London Gallery Trust Stabilisation – Decisions for Trustees	
Ward(s) or groups affected:		All	
From:		Borough Solicitor and Secretary South London Gallery Steering Group	

IMPORTANT NOTE: The Executive, in considering this report are acting in the capacity as Trustee of the South London Gallery Trust (SLGT). The decisions must be taken solely based on what is in the best interest of the trust and the furtherance of its objects.

The Executive will consider a second report, later on this agenda, in which it will be required to take decisions from the perspective of the Council, in its corporate capacity, as a funder of the gallery, and rating authority.

To avoid unnecessary duplication, the appendices are common to both reports.

RECOMMENDATION(S)

That the Executive acting as Trustee

1. *Notes that in receiving this report and agreeing the following recommendations it is Acting as Trustee of the South London Gallery Trust, a distinct entity which is separate from the Council,*
2. *Note that when acting as Trustee the Executive (on behalf of the Council) owes duty to the Trust and to its beneficiaries which is separate and distinct from the general duty owed by the Council to the inhabitants of the borough.*
3. *Note that a report elsewhere on this agenda asks the Executive to take decisions on behalf of the Council from a corporate perspective,*
4. *Note that the South London Gallery Steering Group was established to provide independent advice on what is in the Trust's best interests, and the Steering Group has taken legal and financial advice independent of the Council in coming to its recommendations,*
5. *Notes the previous decisions made by Ratification Committee on Tuesday 9 April 2002 to proceed with the Strategy for Change (set out in Appendix 1),*
6. *Accept the advice of the South London Gallery Steering Group, contained at Appendix 2, and accordingly note:*
 - (a) *that the freehold gallery building and land are permanent assets of the gallery and will transfer to the newly-constituted trustee company.*
 - (b) *the progress which has been made on the interim building works to bring about immediate improvements to access and provide improved education facilities at SLG, as set out at paragraph 2.20 of the Steering Group's report.*

- (c) *Note the advice of the steering group that in the long term the best prospect of expansion of the gallery to improve access and services to visitors is for the South London Gallery Trust to receive from the council the building at 67 Peckham Road, which was acquired by the Council for the purpose of the Gallery.*
 - (d) *Agree in principle that it would be in the interests of the South London Gallery Trust to accept 67 Peckham Road from the Council*
 - (e) *Note that that the Endowment Fund is the property of the Trust and will need to transfer to the new Trustees.*
 - (f) *Note that an application has been made on behalf of the trust for mandatory 80% rate relief, and that a further application has been made for 20% discretionary rate relief.*
 - (g) *Note the information about the collection set out in Appendix 5, and agree that ownership of individual works should be left for negotiation between the new trustee, once established, and the Council, because of the conflict of interest.*
 - (h) *Note that the part of the collection beneficially owned by the Trust is part of the Trust's permanent endowment.*
 - (i) *Agree in principle, that that part of the collection owned by the gallery should be loaned to the Council and that it is in the best interests of the Trust for which the collection is held for the entire collection to be kept together.*
 - (j) *Agree in principle (subject to confirmation by the new trustee body) that the terms of the proposed Service Level Agreement between the Trust and the Council (set out at Appendix 4) are acceptable from the perspective of the trust.*
 - (k) *Agree to accept the advice of the Steering Group that the transfer of staff to the new trustee company should continue to proceed on the basis that TUPE applies to the transfer.*
 - (l) *Agree that an application be made on behalf of the trust for admitted body status to the Southwark Pension Scheme for the South London Gallery Staff being transferred from the Council to the Trust.*
7. *Agree that, subject to Charity Commission responding in time, a further report will come to the Executive as Trustee in March 2003, to formally agree to transfer trusteeship of the South London Gallery Trust to a new trustee body.*

BACKGROUND INFORMATION

8. This is the first of two reports on tonight's agenda relating to the stabilisation programme for the South London Gallery and the transfer of trusteeship from the Council to an independent company established for the purpose. To reduce copying, the appendices are common to both reports. They contain:

Appendix 1: Ratification Committee decision of 9 April 2002 in which the Strategy for Change was adopted, and in which the Council made an in-principle commitment to ongoing funding for the gallery until



- 2007.
- Appendix 2: Report of South London Gallery Steering Group
- Appendix 3: Background on the South London Gallery's History, and the Stabilisation programme to date.
- Appendix 4: Draft Service Level Agreement between the new Trust and the Council
- Appendix 5: The South London Gallery Collection: Information about the collection's ownership and provenance (about which there is doubt), its proposed future use (about which there is consensus), and an outline of the issues which would arise if any of the collection were to be disposed of.
- Appendix 6: Draft loan agreement, under which it is proposed that that part of the Collection (i.e. most of it) which is owned by the Trust is loaned to the Council to be managed as part of the Museums services.
- Appendix 7: Summary of the South London Gallery Collection (not containing information as to the values of different parts of the collection due to security reasons). Individual Members may view information about values on request.
9. The South London Gallery was established in 1868 and has been on its present site since 1891 when it was registered as a charity with the Charity Commissioners (under the name South London Fine Art Gallery and Library). In 1900 it was transferred to the Borough of Camberwell and subsequently to the London Borough of Southwark, which corporately became the sole trustee.
10. The objects of the Gallery as set out in its Trust Deed (executed 25 May 1891 are:
- "to provide for the people of South London a gallery of works of fine art and a library of high character with a reading room and also lectures on the subject of art, science and literature and generally to promote acquaintance with art, science and literature among the inhabitants of the South of London".*
11. As a Charity, the Gallery has always, strictly speaking, been a separate entity from the Council. However, this distinction has not always been marked in practice. The Gallery has at times been run as if it were part of the Council.
12. In recent years, the separate duty owed by the Council as trustee of the Trust has been recognised, and Members have been advised that when making decisions on behalf of the charity Members must act as Trustee in the best interests of the trust, and avoid potential conflicts of interest with their roles as Councillors.
13. To bring about a clearer separation from normal council business, Ratification Committee agreed to establish a Steering Group, to act as a source of impartial and independent advice to the Council when exercising its responsibility as Trustee, so that the Council, as Trustee, can be seen to be acting in the best interests of the trust.
14. The Strategy for Change agreed at Ratification Committee on 9 April 2002 (which has formed the base of agreements with the funding agencies) provides for the Council to transfer its trusteeship to an independent trustee, for the grant-giving relationship to be formalised via a Service Level Agreement, and for arrangements for the SLG collection to be formalised via a Loan Agreement. The target date for transfer of trusteeship is 1 April 2003, but this is subject to Charity Commission approval and successful conclusion of the consultation on staff transfers.

15. To emphasise the separation of interests, decisions on this issue have been separated into two reports. The first, receives the advice of the Steering Group and asks Members to agree matters on behalf of the Trust. The second report asks Members to take decisions on behalf of the Council.
16. A further report is scheduled to be presented to the Executive acting as Trustee in March at which the final transfer of trusteeship from the Council to the independent body can take place. At that time, the Trustee will be asked to agree to;
 - Transfer of the physical trust property– land and buildings.
 - Transfer of the endowment funds currently held by Southwark Council as corporate trustee.
 - Transfer of the collection of works of art held at the South London Gallery (subject to negotiation with the new trustees over the ownership of specific items).
17. There is consensus between the Steering Group and Council officers representing the Council's corporate interests on most issues. However, on some issues the inherent conflict of interest is such (e.g. ownership of individual pieces of the collection) that it is recommended that the final negotiations be concluded when the trusteeship has passed to a new company.

KEY ISSUES FOR CONSIDERATION

South London Gallery Steering Group Advice

18. Members are referred to the South London Gallery Steering Group report at appendix 2. Further background information on specific issues follows:

Gallery Land and Buildings:

19. The Council as trustee currently holds the freehold of the land occupied by SLG and by the old part of Camberwell College. The land occupied by Camberwell College was leased in 2 separate Charity Commission Schemes of 1906 and 1912. The 1906 Scheme leased the site for a term of 900 years to London County Council (later succeeded by the London Institute as the Governing Body of Camberwell College).
20. The Land Certificate indicates the registered proprietor as "the Mayor and Burgesses of the London Borough of Southwark". However this does not override the Trust and it is clear that the property is held by the Council as Trustee.
21. Note also paragraph 2.19 of the Steering Group report at appendix 2.
22. Currently, access to the gallery is by way of a right of way through the buildings that are leased to the Camberwell College. In effect, the gallery has the right to use the corridor that runs through the building, but not to use the rooms on either side.
23. There is an urgent need for interim building works to provide disabled access to the gallery and separate space for education.
24. More information about the interim building works that are proposed is set out at paragraph 2.20 of the steering group's report.

Number 67 Peckham Road:

25. 67 Peckham Road is a semi-derelict house adjacent to the entrance to SLG. It was acquired by Southwark Council in 1995 for a scheme to extend SLG in partnership

with Camberwell College. The scheme was unsuccessful in attracting external funding and the Council has been unable since then to raise sufficient funds to convert it for this or any other purpose.

26. No 67 is seen by the Steering Group as essential to the longer-term development of SLG. The limitations of the existing site mean that there are few options as to how SLG can be extended to provide better public facilities, education spaces etc. that are critical to the future development of SLG and to its ability to contribute to the Council's key priorities.
27. The Steering Group's advice to the Council as Trustee is that whilst it is not feasible to raise funding and engage architects to work up the full scheme on No 67 in the short term, the Trust could secure funding and develop a Scheme to bring it into use as education space and space for artists residencies linked to the education programme within 3 years with completion of this on a 5 year timescale. In the longer term the Trust could develop a larger scheme incorporating No 67 as part of a redevelopment of the whole SLG site.
28. See also paragraph 2.22 of the steering group's report.

Endowment Fund

29. The Council holds endowment funds totalling £258,853 as trustee of SLG. At present these generate interest that is passed into the SLG Cost Centre annually to support the cost of operating the Gallery. The advice of the Council's Chief Finance Officer is that once the Council ceases to be trustee these funds need to be transferred to the Trust's bank account. Continuing to hold the money to invest and earn interest for the Trust would constitute a form of borrowing by the Council, and this is inappropriate for the following reasons:
 - The borrowing would be inconsistent with the Council's borrowing strategy. Amongst other things, it would increase the Council's borrowing against its limits, and would be contrary to the strategy of reducing borrowing.
 - Apart from short-term cashflow management, the Council is only permitted to borrow to finance capital expenditure. Retaining the endowment funds would be a form of borrowing to on-lend, which is not permitted under treasury controls.
 - The trust should be able to invest these funds in the commercial market for returns similar to the Council's average rate of return. In particular, the disadvantage of a smaller sum than the Council's investments would be offset by the fact of being able to invest the money for a longer term period, not subject to the short-term volatility that the Council's cashflow has to suffer.
30. The report to the Executive acting as Trustee in March will therefore recommend that this be transferred to the trust's account on or before the date it becomes fully independent.

Charitable Rate Relief:

31. At present the SLG pays NNDR (non-domestic rates) in the same way as all other council buildings. When it becomes an independent Charity it will qualify for a mandatory 80% relief with a further 20% being at the discretion of Southwark Council. In the current year the rateable value is £17,000 with £7,429 being paid in NNDR. Non-domestic rates are collected by Liberata on behalf of Southwark Council and then passed to central government.

32. An application has been made for a grant of the remaining 20% discretionary relief on the non-domestic rates. This will be considered by the Council in accordance with its adopted policies and guidelines.

Collection

33. The collection of works of art held at SLG is part in the ownership of Southwark Council and part in the ownership of the SLG Trust. Due to the confusion of the Council's role in relation to the trust, and the fact that the Gallery has at times been managed as part of the library service, it is not entirely clear which artworks are owned by the Council as Trustee and should be transferred to the Gallery, and which are owned by the Council corporately. The bulk of the collection including the higher value items is trust property, and the trust would need the Charity Commissioner's consent to any disposal.
34. Considerable effort has been given to determining ownership – further information is contained in paragraph 6 of the Steering Group report, and in Appendix 5. Given the inherent conflict of interest, it is recommended that the final negotiation as to ownership be conducted with the independent trustee.
35. The future development of SLG positions it as a nationally and internationally recognised centre of excellence in the provision of contemporary visual art exhibitions and live art. These activities do not rely on the use of the Collection. The Steering Group's view therefore is that the Collection is not central to its vision but that the collection should be retained as a whole. The Steering Group acknowledges that the loan of the collection to the Council for the purpose of managing and using it as part of the SDC development is the best way of maximising and unlocking the educational potential of the collection whilst ensuring that it continues to benefit the people of South London.
36. Museum and Gallery education provides a unique, important and valued service, opening up museum collections to the whole community. Learning from objects, like the SLG collection is emphasised in the National Curriculum and provides stimulating and enjoyable ways of learning through formal and informal education. Demand from teachers and others to enable them to make greater use of collections is huge and many museums and galleries have developed creative and challenging education resources, activities and teacher training for schools. The SLG collection has been used in this way alongside the Cuming and other collections held by the authority as a considerable educational asset. The proposal to develop the Southwark Discovery Centre will provide improved facilities and services to make the most of this opportunity. The SLG collection is a key part of this vision and would allow the level of use of the SLG collection to be increased and its care and management improved.
37. It is therefore recommended by the Steering Group that the Trust offers the collection to the Council on a 5-year reviewable loan agreement with the intention that these be used as part of the development of the Southwark Discovery Centre, as this is the most effective way of ensuring the collection fulfils the objects of the Trust.

Service Level Agreement

38. In future, it is proposed that the Council fund the Gallery by way of a service level agreement. A draft agreement is attached at Appendix 4.

Staff

39. At present the Council employs the three permanent members of SLG staff (Director, Curator and Gallery Officer (Admin)). It is intended that these members of staff will transfer to the employ of the Trust when the change of trustee begins. Up to this point, legal advice to Members as Trustee has been that the Transfer of Undertakings Protection of Employment Regulations (TUPE) would apply to a transfer of trusteeship, and the process has proceeded on that basis.
40. The Steering Group has since received conflicting advice on whether TUPE apply to the transfer of staff. Council lawyers, and a barrister previously employed to advise the Council are of the view that TUPE definitely applies, and that where there is doubt as to whether TUPE applies Cabinet guidance requires the Council to assume that it does. Consultation with staff has proceeded on this basis. However, the solicitors employed to advise the steering group, Bates Wells and Braithwaite are of the opinion that TUPE does not apply as in their view a transfer of trusteeship does not involve a transfer of undertaking.
41. The Steering Group's advice is that, to avoid a lengthy legal debate, the transfer of staff should proceed on the basis that TUPE applies.
42. Under TUPE staff transfer with their existing terms and conditions of service preserved. The one exception is with pensions where the obligation is to provide a comparable pension. The view of the Steering Group advising the council as trustee has been that it would wish to apply for admitted body status to the Local Government Pension Scheme for the staff that transfer. The process of application for admitted body status has been commenced and details of staff concerned have been passed through our pensions section to the Actuary for an estimate of the cost to the SLG. A draft agreement is currently being considered by lawyers. The application should be completed by the time of transfer so that there is no gap for the staff concerned.
43. More information about staffing the new gallery is contained at Paragraph 2.11 of the Steering Group report.

Next Steps

44. The Solicitors advising the Steering Group are currently waiting for a response from the Charity Commissioners as to the steps they require be followed to achieve the transfer. It is hoped that the Commission will respond in a timely manner, and that it will be possible to bring a final report to the Executive as Trustee in March, to agree the final matters necessary to transfer the trusteeship to the independent trustee company with effect 1 April 2003. More information will be provided at the meeting.

Policy implications

45. Members should note that in this report, they are making decisions from the perspective as Trustees. The Councils internal policies and strategies cannot be the primary driver of this decision, except insofar as the policies of a funding organisation are relevant to the organisation it funds. It is in this latter way that the Steering Group has, in its report, highlighted the benefits to the Council from transferring Number 67. See paragraph 2.24 of the Steering Group report.

Effect of proposed changes on those affected

46. Information about the transfer of staff is set out above.

47. The future direction of the Gallery includes a focus on improving service delivery to disadvantaged groups in Southwark and issues of access to excellence in the contemporary visual arts.

Resource implications

48. The Gallery has in the past relied on Council funding for its core costs, but has received donations and sponsorship for exhibitions. The approximate balance of funding in the past has been 50% Southwark Council and 50% from external sources. In future this will shift to approximately one third of the funding coming from Southwark Council, one third from Arts Council/London Arts and one third from other sources. The fact that London Arts have made a commitment to a very substantial uplift in their funding of SLG from approximately £23,000 per annum to at least £200,000 per annum from 2004 reflects the regional, national and international significance of SLG. It will also allow SLG to develop and build on its reputation for excellence, extending its work with local audiences and improving its educational provision.

49. The decision of the Ratification in April 2002 committed Southwark Council to in principle revenue funding of £125,000 in 2002/2003 and 2003/2004 and £170,000 per annum on a three year Service Level Agreement for the period 2004 to 2007. The Ratification Committee also imposed the condition that this was subject to London Arts making a commitment of at least £200,000 per annum for the same period.

Legal/Financial Implications:

50. The Steering Group has received independent specialist advice on legal, financial, HR and VAT advice.

51. The Executive, in considering this report are acting in the capacity as Trustees of the South London Gallery Trust. The Trust is a distinct entity which is separate from the Council.

52. When acting as Trustee the Executive (on behalf of the Council) owes a duty to the Trust and to its beneficiaries which is separate and distinct from the general duty owed by the Council to the inhabitants of the borough.

53. Decisions on this report must be taken solely based on what is in the best interest of the trust and the furtherance of its objects.

BACKGROUND DOCUMENTS

Background Papers	Held At	Contact
<i>Minutes of South London Gallery Steering Group Meetings</i>	<i>15 Spa Road and South London Gallery</i>	<i>Stephen Douglass 020 7525 1579</i>
<i>Files of Legal Advice on SLG</i>	<i>15 Spa Road and South London Gallery</i>	<i>Stephen Douglass 020 7525 1579</i>

APPENDIX A

Audit Trail

Lead Officer	<i>Deborah Holmes – Borough Solicitor and Secretary</i>	
Report Author	<i>Rachel Prosser – Senior Legal Officer</i>	
Version	<i>Third Draft</i>	
Dated	<i>14 February 2002</i>	
Key Decision?	<i>Not applicable</i>	
CONSULTATION WITH OTHER OFFICERS / DIRECTORATES / EXECUTIVE MEMBER		
Officer Title	Comments Sought	Comments included
Borough Solicitor & Secretary	Yes	Yes
Chief Finance Officer	Yes	Yes
Executive Member	No	No
Date final report sent to Constitutional Support Services	17 February 2003	