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| Spending Permanent Endowment without replacing it |
| OG545-1 |
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**OG545-1 Spending Permanent Endowment without replacing it**

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# Policy Statement/Overview

For the purposes of the Charities 2011 Act, “permanent endowment” is property subject to a restriction on being expended which distinguishes between income and capital (s.353(3) of the 2011 Act).

The default position is that the trustees cannot spend the capital.

Put simply, permanent endowment is property that a charity must keep rather than spend.

There are two main types of permanent endowment:

* money or other assets given to a charity for investment. Only the investment income can be spent; and
* property given to a charity which must be used only for a particular purpose. For example, land or buildings given for use as a school or recreation ground.

Example: a charity was set up with a donated lump sum of money. The donor specified that the money must be invested to provide an income for the charity and only the income could be spent.

The law allows charities to spend permanent endowment in certain circumstances, but they may need our permission.

Sections 281 to 284 of the 2011 Act provide trustees with a range of options for making the most effective use of their investment permanent endowment:

* All charities have power to release (spend) investment permanent endowment (i.e. that is not designated land or functional permanent endowment). If the permanent endowment fund (“the fund”) exceeds the value of £25,000, our concurrence is required. We have 60 days from receipt of the application in which to respond to the resolution. This time period is suspended where we either direct the trustees to (a) give public notice of their resolution or (b) provide us with more information or explanations.
* Trustees also have power to borrow from their investment permanent endowment (up to 25% of the value of the fund and subject to a 20-year maximum repayment period) – see OG545-2 Borrowing from Permanent Endowment, for which our consent is not required. However, if they are unable to repay the amount borrowed under arrangements in place, they must apply to us for an Order to direct them how to proceed – see OG545-3.

Trustees who have adopted a total return approach to investment (ie investing assets with a view to optimising the overall investment return, no matter whether that takes the form of capital or income) can use investment permanent endowment for potentially loss-making social investments with a negative or uncertain financial return (where the trustees expect to receive back less than the initial capital outlay which would not otherwise be permitted as “investments”). [See s.104AA of the 2011 Act](https://www.legislation.gov.uk/ukpga/2011/25/section/104A). For more information about [total return](https://www.gov.uk/government/publications/total-return-investment-for-permanently-endowed-charities), see our guidance.

Trustees of all types of permanent endowment can also:

* use the statutory power of amendment for unincorporated charities in s.280A(8)(a) of the 2011 Act to change the purposes for which the permanent endowment is held. See OG518-06 Amendments to Governing Documents: Unincorporated charities: additional regulated alterations; and
* use the power to alter the restrictions making property permanent endowment in s.280A(8)(d), which they cannot do using s.281 and s.282.

Our consent would be required if trustees sought to use either of these s.280A powers.

# Summary of the guidance

This guidance is about when and how sections 281 and 282 of the 2011 Act allow charities to release the restrictions on spending permanent endowment and when our concurrence is required. It explains:

* What permanent endowment is.
* When charities can release the restrictions on spending permanent endowment and when our concurrence is required.
* What caseworkers need to consider when dealing with resolutions passed by trustees under sections 281 and 282 of the 2011 Act.
* When public notice may be required for the trustees' resolutions.
* The timescales involved for the Commission’s concurrence (i.e. consent) or non-concurrence with resolutions.
* When we can authorise the expenditure of permanent endowment without replacement under s.105 of the 2011 Act when the statutory powers in s.281 or 282 cannot be used.

There are other OGs dealing with permanent endowment issues:

* OG545-2 explains how trustees can *borrow* from permanent endowment (a) under the statutory power in sections 284A to C of the 2011 Act and (b) by Order under s105 of the 2011 Act.
* OG545-3 explains what happens when trustees borrow from the charity’s permanent endowment using the statutory power and are then *not able to repay it* - s.284D of the 2011 Act.
* OG518-03 explains when the statutory power of amendment in s.280A(8)(a) of the 2011 Act can be used to *amend the purposes* for which all forms of permanent endowment and designated land are held.
* OG518-06 explains when the statutory power of amendment in s.280A(8)(d) of the 2011 Act can be used to *alter a restriction making property permanent endowment*.
* OG548 has a section which explains when and how trustees can sell *designated land* and how they may use the proceeds of sale.

# Casework Guidance

## B1 Procedures for dealing with resolutions to spend permanent endowment

### B1.1 Section 281 and 282 provisions

Section D2 sets out in detail the circumstances when the permanent endowment restriction can be removed by the trustees of a charity so that the available endowment fund can be spent. The 2011 Act refers to an “available endowment fund of a charity”. In this OG, references to a “charity” are references to the permanent endowment charity.

The table below acts as a reminder of the conditions in which a charity can pass a resolution to spend its available investment permanent endowment.

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| **Section 281** **Smaller Charities** | The market value of the whole of the available permanent endowment fund does not exceed £25,000 | Commission concurrence is **not** **needed** |
| **Section 282** **Larger Charities** | The market value of the whole of the available permanent endowment fund exceeds £25,000 | Commission concurrence is **needed** |

Which statutory power trustees will need to use to spend investment permanent endowment depends on the size of the “available endowment fund” - the whole of a fund which is subject to the same restriction. A charity might have several permanently endowed funds, each of which would be an “available endowment fund”. For example, a school charity might have several prize and scholarship funds, each of which could be a separate endowment fund for the purposes of sections 281 and 282.

The Commission’s view is that permanent endowment is expected to be held on trust by an incorporated charity. Where it is, and where the income is applicable for distinct (narrower) purposes within the incorporated charity's general purposes, that trust is a special trust and the incorporated charity is its trustee. The special trust may be (able to be) registered as a linked charity to the incorporated charity that is its trustee and reporting charity for accounting purposes (see OG46 Special Trusts and OG555 Linking Charities).

**NOTE:** It is possible (but expected to be rare) for an incorporated charity’s governing document to provide that property which falls within the legal definition of permanent endowment is held beneficially by that charity. **If there is any question as to whether an incorporated charity may hold permanent endowment beneficially, you MUST seek legal advice, as** **it may have implications on the charity’s ability to use the statutory powers to release restrictions or amend the purposes**.

When determining whether the available endowment fund falls above or below the £25,000 threshold (and therefore whether our concurrence is required), the trustees must take account of any outstanding borrowing from the charity’s permanent endowment - the value to be calculated by including the amount of any such borrowing. Therefore, if the current available endowment fund value plus the outstanding borrowing is over £25,000, our concurrence would be necessary to the release of the permanent endowment restrictions.

If the permanent endowment fund is subject to existing borrowing under a s.105 recoupment order, the trustees can pass a resolution to release the restriction on spending the entire endowment fund, which includes a resolution that the obligation to repay any outstanding borrowing ought to cease to have effect.  This would mean the obligation to repay any outstanding borrowing in the recoupment order would cease to have effect.  It does not terminate or ‘cancel’ the recoupment order (only we can do that by further order – see OG545-02 section 3) but as a result of the resolution, the trustees no longer need to recoup those funds.  No further order is needed from the Commission to terminate the recoupment order.   The Commission’s concurrence would only be needed to the resolution to release if the available endowment fund (ie value of the fund + the outstanding borrowing) is more than £25,000.

The effect of a resolution under sections 281 and 282 is to release the restrictions on spending permanent endowment. This does not mean that the trustees have to immediately spend the released capital on its purposes, although they may wish to do so. They can, for instance, decide to spend it over a period of time.

Spending the permanent endowment will usually involve spending its liquidated value, in other words (where the permanent endowment is not held as money) the proceeds of any sale of the investment property (such as stocks, shares or land) net of the proper costs of disposal.

### B1.2 Case handling

**What is an ‘available endowment fund’?**

The 2011 Act refers to an “available endowment fund”. This is defined in s.281(7) as meaning:

1. the whole of the charity’s permanent endowment if it is all subject to the same trusts; or

(b) any part of its permanent endowment which is subject to any particular trusts that are different from those to which any other part is subject.

For example:

* A grant-making trust makes payments to persons resident in a specified area who need financial assistance. All of its property is investment permanent endowment held on the same trusts. For the purposes of s.281 and s.282, the ‘available endowment fund’ is all the charity’s permanent endowment.

* A school charity has investment permanent endowment comprising numerous prize and scholarship funds, each held on separate trusts. For the purposes of s.281 and s.282, each prize and scholarship fund is a separate endowment fund.

As explained above, the requirement for our concurrence is determined by a financial threshold based on the value (and not the income) of the permanent endowment fund of £25,000. Therefore charities with a value of up to and including £25,000 are ‘smaller available endowment funds’ and charities with a value exceeding £25,000 are ‘larger available endowment funds’.

Smaller charities (s.281)

For smaller charities who want to spend their permanent endowment under section 281, we may receive (where the charity is registered) either confirmation that the charity has ceased to operate or a request for voluntary removal where annual income is £5000 or less.  Where a smaller charity is spending only part of its permanent endowment or is not registered, we may hear nothing.

Larger charities (s.282)

Charity trustees will use the [online application form](https://www.gov.uk/guidance/permanent-endowment-rules-for-charities) to inform us that they have resolved to spend permanent endowment under s.282 of the 2011 Act. The online form requires the trustees to set out the charity's details, ask for authority to spend the permanent endowment and explain why the charity needs to take this action. It also asks the trustees to certify that the provisions of s.282 have been met.

The trustees confirm

* the assets in question are permanent endowment;
* any relevant changes to the charity's circumstances;
* that they are satisfied that the purposes of the available endowment fund can be carried out more effectively if the capital of the fund, or the relevant portion of the fund (as applicable) is expended as well as the income accruing to it, rather than just the income; and
* the resolution was properly passed.

When considering the information supplied, we recognise that the trustees are certifying that they are conforming with the requirements of the Act and in straightforward cases we will not question this further. Most cases will be straightforward. However, doubts may arise about the reasoning given by trustees on how spending permanent endowment would make the charity more effective and this will cause us to take a more in-depth look at the application. For instance:

1. if it appears that the trustees have not considered their general duty of even-handedness, that is, to balance the interests of current and future beneficiaries; or
2. We may have concerns that the land in relation to which the resolution is passed is designated land and not investment permanent endowment.

Sections [B1.4,](#_B1.4_Section_282) [B1.5](#_B1.5_Section_282) and [B1.6](#_B1.6_Section_282) below set out factors that may lead us to ask for more information or request the trustees give notice of their intentions before we make our decision.

### B1.3 Section 281 smaller charities - what we must do

The trustees of these charities, using the power in section 281 of the Act, can spend the permanent endowment as soon as they have passed a resolution. If the charity is not registered with us they can proceed without reference to us.

If the charity is registered with us and its gross annual income after spending its permanent endowment is £5,000 or less, the trustees:

* may, if the charity is still operating, ask us to remove it from the Register (see OG531-1 Dissolutions and Voluntary Removals from the Register); or
* must, if the charity has ceased to operate, confirm this fact so that the charity can be removed from the Register.

### B1.4 Section 282 larger charities - what we must do

The resolution and statement of reasons for the trustees' action will usually come via our [online application form](https://www.gov.uk/guidance/permanent-endowment-rules-for-charities). In rare cases where we get resolutions and accompanying information sent to us in other formats these should be considered in the same way as online applications. However, if the information provided to us is incomplete, we can suggest that the trustees re-submit the application using the online facility.

When we receive the resolution and the statement of reasons (either via our online application form or other formats) we have 60-days from the date of receipt to consider them and concur with or reject the resolution, unless we require the trustees to:

* publish a notice – in which case the 60-day period is suspended until 42 days from the date on which the trustees give public notice of the resolution; or
* provide us with information or explanations – in which case the 60-day period is suspended until the information or explanations are provided.

Before the end of the 60-day period we must confirm in writing, based upon the information received, that we either concur with or reject the resolution.

Failure on our part to respond within 60-days means that the charity can proceed as if we had concurred.

### B1.5 Section 282 larger charities - considering the resolution

The online form confirms that the trustees:

* are properly appointed in line with the charity's governing document;
* have identified properly the property to which s.282 applies (the trustees will need to take their own legal advice about the nature of the property to confirm it is investment permanent endowment);
* have passed the resolution properly in accordance with the charity’s governing document; and that
* the charity is one which correctly falls for consideration under s.282 - where the market value of the permanent endowment exceeds £25,000.

**We will not consider these points further unless we have particular reason to think they are not correct.**

**When considering whether to concur with the trustees’ resolution, we must take into account**:

* any evidence provided as to the wishes of the donor or donors of the available endowment fund; and
* any changes in circumstances relating to the available endowment fund since it was established (including, in particular, the financial position of the fund, the needs of those who can benefit from the fund, and the social, economic and legal environment).

Such considerations may, for example, lead us to refuse to concur with a resolution from a relatively new charity on the basis that circumstances may not have changed very much since the charity's inception and the donor's wishes could still be carried out using the income from the endowment. The same considerations might lead to a different conclusion where, for example, the value of an available endowment fund gifted 100 years ago may have declined in real terms to such an extent that its income does not allow the charity to achieve its objects.

**We must not concur with the resolution unless we are satisfied that:**

* + the resolution’s implementation accords with any gift or gifts to the available endowment fund; and
	+ the trustees have complied with their statutory obligations under s.282 when they passed the resolution.

In most cases the trustees will have supplied sufficient information for us to concur with the resolution. However, where we have doubts about whether the resolution accords with the terms of the gifts to the available endowment fund, or about the trustees' decision-making process, we will need to look in further detail. We will take account of our Risk Operating Model before making our decision whether to concur with or reject the resolution.

We may need to direct that the trustees:

* give public notice of the resolution in a way that we decide - see section [B1.6](#_B1.6_Section_282)below; and/or
* provide us with more information or an explanation about the circumstances in which they have decided to act and the how the statutory requirements for passing the resolution have been met.

When making the decision about the trustees' compliance with the statutory requirements for passing the resolution, it is helpful to consider:

* The charity's history - evidence of previous concerns, whether they were serious or minor, reliability of meeting our accounting and reporting requirements;
* The type of charity - this includes size (in terms of income and assets), numbers of beneficiaries and their needs, and how beneficiary needs are met;
* Previous non-compliance - whether we have had any particular cause for concern on the way the charity has been run that has caused us to open a regulatory compliance case, which may have an impact on the resolution;
* Sector impact - whether there is anyone who would be adversely affected by what is proposed and should reasonably be allowed to make representations or whether the public profile of the charity is such that there could be a wider local or national interest; and
* Complexity and urgency - the proposals may be complex thereby creating greater risks to charity property. You may require legal or accountancy advice immediately bearing in mind that strict deadlines are imposed (see [B1.4](#_B1.4_Section_282)).

### B1.6 Section 282 larger charities - requests for information and requirement to give notice

At any point before the expiry of the time limit we can direct the trustees to provide more information, which may clarify procedures taken or allay any concerns we have about the trustee actions in making the decision. We might also ask for further documentary proof of permanent endowment or for other documents that would allow us to make our decision. The 60-day period is suspended from the day that we give the direction to the trustees until the date on which they provide us with the required information or explanations.

Example – further information

|  |  |  |
| --- | --- | --- |
| 1 September | Resolution received | Approval or rejection mustbe given by 30 October (60 days). |
| 20 September | We direct further information from the trustees | Time limit suspended at 20 days. 40 days remain. |
| 20 October | Information received | Time limit resumes running from 20 days. Approval or rejection must now be given by 29 November (40 days later) |

We also have the option to direct the trustees to publish notice of their intention to spend permanent endowment. Circumstances where this might apply include:

* where the charity has been founded comparatively recently and it is not clear to us that the charity's circumstances have changed in a way that justifies the action proposed and there is no evidence that the trustees have consulted with the founder/donors;
* where the restriction on spending the capital will be lifted on a large available endowment fund and the trustees have not provided us with evidence that they have consulted those who may have an interest;
* where there is a history of mismanagement or misappropriation of charity assets;
* we are aware that the proposal has created a lot of public interest.

While it is for the trustees to decide on the precise wording of the notice, the model text in [Section E](#_E._Model_text) below sets out the information that the trustees must include in the notice and also includes details of the declaration the trustees must make to us once public notice has been given. We should include the model text in any correspondence with trustees where we decide that public notice is necessary.

We should agree the method of notice with the trustees (in most cases it will be sufficient to publish a single notice, in a way chosen by the trustees using their local knowledge of the area of benefit) and we should specify this in the direction. Usually we will simply agree with the trustees' proposal as long as they confirm that the method of publication is appropriate in the circumstances - providing details of where notice will be published (such as on a website) and why this is the best way to bring their intentions to those who may be interested.

Those who may be interested include:

* beneficiaries;
* original donors or their descendants;
* other charities or sector representatives;
* local authorities;
* those owed money by the charity;
* donors;
* employees.

Where we direct notices to be published we allow 28 days from the date of first publication for representations to be made to us. The relevant date will be set out in the public notice declaration the trustees must submit once public notice has been given. The 60-day period for giving concurrence would then be suspended from the day on which we give the direction until 42 days from the date on which the charity trustees give public notice of the resolution (s.284(4)(A) of the 2011 Act).

At the end of the public notice period we will consider the representations made. We then have to make our decision **and** notify the trustees within the remaining 60 days.

Example - public notice

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| --- | --- | --- |
| 1 September | Resolution received | Approval or rejection mustbe given by 30 October (60 days). |
| 10 September | We direct the charity to publish a notice | Time limit suspended. The trustees publish the notice and inform us of the date. 50 days remain. |
| 20 September | Trustees give public notice.  | Period of suspension starts running for 42 days ending on 31 October. |
| 31 October |  | Time limit resumes. Approval or rejection must be given by 20 December (50 days)  |

**IMPORTANT NOTE: Legal advice should be taken where we have any doubts about whether a response is from someone with a legitimate interest.**

### B1.7 Section 282 larger charities - what we need to do when we have given concurrence

**KEY POINT: When we concur with a resolution under s.282 we should record this fact on the Register of Charities.**

Charities with a gross annual income of more than £5,000 are required to be registered with us (unless exemptions or other exceptions apply) and charities having a gross annual income of £5,000 or less may register voluntarily.

Where a charity is registered voluntarily and will remain as an active charity following the resolution the trustees can ask for the charity's entry to be removed from the Register, in which case we must remove it (s.34(3)).

If no indication has been given by the trustees we can, when giving our concurrence suggest that they have the charity removed from the Register to save them from the burden of keeping the charity's entry on the Register up to date. See OG531-1 Dissolutions and Voluntary Removals from the Register.

Where the charity will not continue, the trustees must confirm that it has ceased to operate so that we can remove it from the Register. We can signpost them to the guidance and online charity closure form on our website [How to close a charity - GOV.UK (www.gov.uk)](https://www.gov.uk/guidance/how-to-close-a-charity).

Registered charities with a gross annual income of more than £5,000 must remain registered until either:

* their gross annual income falls to £5,000 or less; or
* all the property has been spent and the charity has ceased to exist.

In all cases where the charity is to remain on the Register, the Register entry should be amended to indicate that the trustees have passed a resolution under s.282 of the 2011 Act and include the date on which we gave concurrence (or the date on which the resolution became effective, if the 60 day threshold was reached without the Commission concurring, requesting further information or notice to be given or declining to concur).

The application to release permanent endowment will be made using the online form. The completed form will arrive with caseworkers in an email. We should reply to this email, attaching a letter containing the model text:

‘This letter may be taken as the Commission's notification that it concurs with the trustees' resolution under s.282 of the Charities Act 2011. The resolution is effective from the date of this letter. This means that from today the resolution becomes part of the trusts of the charity and the trustee[s] can spend the capital subject to the resolution as if it were income. In this case the resolution applies to ***[all] [x proportion] [£x amount]*** of the permanent endowment. The resolution and this concurrence should be retained as part of the records of the charity.’

The concurrence letter should be saved on the case file and in the charity’s Governing Document Folder on CeRIS. Because the charity’s GD folder is a public record we must ensure that there is no personal information in the concurrence documentation. To do this, we should always give concurrence by letter and attach this to an email for the customer. We should then save only the letter into the GD folder making sure we remove any personal information before saving this as a pdf.

### B1.8 Authorised Officer powers

Authority for a resolution to spend permanent endowment under these provisions will be given in line with OG702 Authorised Officer Powers.

## B2 Procedures for authorising the spending of permanent endowment outside of the statutory power

In most cases, trustees wishing to spend permanent endowment will be able to use either:

* the power to release permanent endowment in s.281 or (with our concurrence) s.282 (see section [B1](#_B1_Procedures_for) above); or
* if they want to borrow from the permanent endowment and replace it, the statutory power in s.284A (see OG545-2).

There may be rare cases where the trustees want to spend permanent endowment without replacement but cannot use the powers in sections 281 or 282. In these circumstances, we can consider making an Order under s.105 of the 2011 Act if we consider it would be expedient in the interests of the charity and available endowment fund (if different) to do so. Our power to make section 105 Orders is explained in full in OG501. **Legal advice should be taken in such cases**.

**Note:** The circumstances in which trustees may wish to borrow from permanent endowment but cannot use the statutory power in s.284A are dealt with in OG545-02. This is likely to be because they wish to spend more than the permitted amount or recoup the expenditure over more than 20 years.

# Case Studies

## C1 Examples of what may be found in trust documents to indicate the nature of the assets held

### ****C1.1 Land and buildings are held to be used for a specific charitable purpose, for example, to provide homes for the elderly, with no power for them to be sold.****

This is likely to be functional permanent endowment (which is known as designated land where the functional permanent endowment is land) because the property must be used for the purpose of the charity. If there is no power of sale in the governing document, that might indicate that the founder's intention was that the property should be retained forever.

### ****C1.2 Money donated is to be invested and the income received from the investment is to be used for the charity's purpose.****

This is investment permanent endowment. This is common for charities that need to provide a regular income, such as school prize funds or educational bursaries. It is also common for many old local charities to be endowed in this way to provide an income that can be used for a range of purposes, such as relief of those in need or the maintenance of a parish church.

### ****C1.3 Property is to be held 'forever' or 'in perpetuity'.****

The property is likely to be permanent endowment. It may be land or investments or some other kind of property such as works of art or documents of historic importance. Depending on its nature the property may be either investment or functional permanent endowment.

### ****C1.4 Land and buildings are to be used for specific purposes and can only be sold in certain specified circumstances.****

This is functional permanent endowment. Where there is a power to sell only on the occurrence of a specified event, or where the charitable need no longer exists, there will usually be a direction about how the proceeds of sale can be used. When the specified event occurs the property may cease to be permanent endowment. Legal advice should be taken if you are unsure of the position.

### ****C1.5 Money donated is to be invested but can be spent on the charity's purposes if the trustees so decide.****

Where the governing document gives the trustees the power to resolve to spend a capital fund held for investment without the Commission’s concurrence, it is commonly referred to in the sector as expendable endowment or expendable capital. As the trustees of expendable endowment have a power to resolve to spend investment capital in the governing document, they would normally use that power and not the statutory powers in s.281 / 282.

If the trustees wish to spend the capital, or lift any conditions or restrictions on the use of the capital, and it is not clear if the trustees can use a power in their governing document to do so, you should take legal advice.

**NOTE:** As there is a restriction on spending expendable endowment which distinguishes between capital and income, expendable endowment funds commonly fall within the legal definition of permanent endowment. If you are unsure how a fund is held seek legal advice.

### ****C1.6 A house bought as an investment to be let, producing an income for the charity.****

If the money used to buy the property is investment permanent endowment, the house represents investment permanent endowment and, if sold, the proceeds of sale continue to be investment permanent endowment. If the money used to buy the property is not investment permanent endowment, the house will not be permanent endowment and the proceeds of sale can usually be spent on the charity's purposes.

If the house was bought with a combination of permanent endowment and the charity’s general funds, the trustees need to keep a record of the proportions of each that were used to provide the purchase money. If the property is sold the trustees must divide the proceeds, after all the expenses of the sale have been met, in these proportions.

In each case, all income from letting the property can be spent. If the permanent endowment fund has specific purposes for which the income can be spent, then the proportion of the income attributable to the permanent endowment can only be spent on those specific purposes.

### ****C1.7 A charity's governing document directs that the charity's assets can be used to provide land and buildings to be used for the charity's purposes.****

The land and buildings might be functional permanent endowment , depending on the provisions in the governing document. If in doubt, seek legal advice.

### ****C1.8 A charity's governing document allows the trustees to set aside surplus income to be invested as permanent endowment to increase the annual income of the charity.****

This is investment permanent endowment. This is a power to accumulate and so will be subject to s.14 of the Perpetuities and Accumulations Act 2009. Take legal advice if this issue arises in casework.

# Legal/ Policy and Accountancy Framework

## D1 What is permanent endowment?

### D1.1 How we identify permanent endowment

In general terms permanent endowment covers any land, investment or other asset belonging to the charity, which the trustees cannot spend because of a restriction in the charity's governing document. Section 353(3) of the 2011 Act says that a charity has permanent endowment if its property is subject to a restriction on being expended which distinguishes between income and capital (see further explanation in [Policy Overview](#_Policy_Statement/Overview)).

In most cases the permanent endowment restriction exists permanently, as its title suggests. However, in some cases permanent endowment can exist until a particular situation arises which changes the trusts on which the property is held. A common example is where land and buildings are held for a specific purpose (such as the provision of a village hall or community centre) with a proviso that if it is no longer needed for that purpose, it can be sold and the proceeds “applied” (rather than “held”) for other charitable purposes; but whilst the property can fulfil its purpose then it remains permanent endowment.

Interpreting the governing document provisions can sometimes be difficult. If there is nothing to indicate that there is a restriction on spending capital, we will usually agree that it can be spent on the charity's purposes. It is not necessary for there to be a clear power to spend capital to support the view that the charity's assets are not subject to a permanent endowment restriction. However, if a power to spend income is given but the governing document does not mention capital, that is an indication that the fund is likely to be permanent endowment. Whilst we can express a view to trustees, we cannot determine whether property is or is not permanent (s.70(1) of the 2011 Act), as only the court can do this.

The governing document may not always be available or provide a definitive answer on whether a fund is held as permanent endowment. Therefore, it may be necessary to look to other available evidence, such as conveyances, other deeds, wills or historical evidence of how the asset has been used. However, care needs to be taken not to rely on single facts, for instance where historical evidence shows that it is income only from a fund that has been spent but there is no evidence to support why this should have been so. We have had cases where trustees' presumption of permanent endowment has been found to be misplaced.

Examples of permanent endowment can be found in the [Case Studies section.](#_Case_Studies)

### D1.2 Specific forms of permanent endowment

There are two main forms which permanent endowment takes:

* **'Investment' permanent endowment**: This can be a fund or assets, such as shares or land, that the trustees are required to invest to produce an income to fund the charity’s activities. The trustees can sell an investment in the fund to purchase another, but it cannot sell an investment and spend the proceeds to further its purposes. The document that directs how the property should be held and used will usually specify that the capital should be invested and the income from the investments spent on specific charitable purposes.
* **'Functional' permanent endowment**: This is property (often land/buildings but it may be other property such as paintings) which must be used for a specific purpose or purposes of the charity. Other guidance we provide also refers to land held on functional trusts as designated or 'specie' land (see OG548). Common examples of functional permanent endowment include village halls, recreation grounds, housing, museums and historic buildings. How any specific property held as functional permanent endowment is able to be used will depend on what is set out in the governing document. Often with this type of permanent endowment the distinction between capital and income may not be obvious in practice as the property may not generate any income.

There is an important legal distinction between investment and functional permanent endowment which affects the statutory powers available to the trustees to release or remove the restrictions or to spend it and what authority from the Commission will be needed:

For **investment permanent endowment**, the restriction on expending capital is an administrative restriction [see **Re Laing Trust** [1983] 3 Weekly Law Reports p.886.]

The trustees can decide to remove administrative restrictions using either s.281 or s.282 or to remove or alter them using the statutory power of amendment in s.280A(8)(d), as appropriate depending on the administrative restriction. These decisions would require the Commission’s concurrence (if made using s.282) or consent (if made using s.280A(8)(d)).

The sale of **functional permanent endowment** (such as designated land) may involve a change of purpose, depending on the provisions of the governing document (see OG548 which explains when and how trustees can sell designated land and how they may use the proceeds of sale).

The trustees would need to use either an express power of amendment in the governing document, or the statutory power in s.280A(8)(a), to change the charitable purpose, which would require the Commission’s consent. We can also, exceptionally, make a cy-près Scheme to change the purpose.

See Changing your Charity's Governing Document CC36 and OG 500 and OG 501 guidance about Schemes and Orders.

Trustees have a general duty of even-handedness - to balance the interests of current and future beneficiaries. This normally means that trustees will need to invest their investment permanent endowment to:

* produce enough income to meet the charity’s current needs; and
* maintain the real value of the investment by way of capital growth to produce a sufficient level of income for future beneficiaries.

See “Charities and investment matters: a guide for trustees ([CC14](https://www.gov.uk/government/publications/charities-and-investment-matters-a-guide-for-trustees-cc14))”.

## D2 The statutory power to spend permanent endowment - which charities can use it and when

The statutory power to spend permanent endowment without replacement can be found at sections 281 and 282 of the Charities Act. Section 281 is to be used by those charities that fall below the financial threshold and s.282 is to be used by larger charities. There are different procedures for charities to follow under sections 281 and 282.  The legal requirements for spending permanent endowment are explained below and the procedures for dealing with resolutions to spend permanent endowment are set out in Casework Guidance.

### D2.1 Definitions

We use specific terms in this guidance for the way we apply the provisions of the 2011 Act.

**'Market value'** means the market value of a charity's available permanent endowment fund:

* as recorded in the accounts for its last full financial year; or
* if no such value was recorded, the current market value of the fund as decided by a valuation carried out for that purpose.

### D2.2 Circumstances in which charities can use the statutory powers in s.281 & s.282

Trustees can use the powers in sections 281 or 282 to spend the charity’s available permanent endowment in furtherance of its purposes without replenishing it. The sole criterion which determines which of these two powers can be used (and thus the need for our concurrence) is the value of the available permanent endowment fund.

**Section 282** of the 2011 Act sets out the provisions for larger permanent endowment funds where the market value of the whole of the available permanent endowment fund exceeds £25,000.

The procedures for dealing with resolutions made under s.282 are set out at section [B1.5](#_B1.5_Section_282).

**Section 281** of the Charities Act sets out the provisions for trustees of available permanent endowment funds that are below the financial threshold for section 282, i.e. where the market value of the available permanent endowment fund does not exceed £25,000.

### D2.3 How the trustees begin the process of releasing the restriction on spending permanent endowment

In all cases the trustees must pass a resolution to spend permanent endowment. The trustees must:

* be satisfied that the purposes set out in the available permanent endowment fund’s trusts could be carried out more effectively if they use some or all of the capital of the available permanent endowment as well as its income, rather than income on its own; and
* formally pass a resolution that the permanent endowment restrictions should be removed from all or part of the available permanent endowment fund.

To pass such a resolution they must call a meeting or otherwise act according to the charity's governing document (i.e. the governing document of the available endowment fund) for the proposals to be voted on. The trustees must satisfy the quorum provisions of the charity's governing document and the provisions for voting (usually carried by the majority vote of trustees present). A meeting and vote conducted by electronic means, or a postal vote, may be used if permitted by the charity’s governing document.

### D2.4 Functional permanent endowment

The trustees will not be able to use the powers in s.281/282 to spend property held as functional permanent endowment. This is because the power in s.281/282 can only be used to remove an administrative restriction on the expenditure of permanent endowment – it cannot be used to alter the purposes for which the permanent endowment is held. Functional property, such as designated land, is held on trust to be used for a specified charitable purpose. The sale of functional property and expenditure of the proceeds would mean that the trustees are no longer able to carry out the charity's objects. Therefore, in order to sell the functional property and spend out the proceeds, the trustees will first need to change the purposes for which the property is held.

The trustees would need to use either an express power of amendment in the governing document or the statutory power in s.280A(8)(a) to change the charitable purpose, which would require the Commission’s consent. We can also, exceptionally, make a cy-près Scheme to change the purpose.

See Changing your Charity's Governing Document CC36 and OG 500 guidance about Schemes.

For guidance on when and how designated land may be sold and on how the proceeds may be used, OG548 has a section which explains when and how trustees can sell designated land and how they may use the proceeds of sale.

**IMPORTANT NOTE: Legal advice should be taken before responding to any queries regarding powers to sell and apply the proceeds of functional permanent endowment (including designated land).**

## D3 What we must consider in making our decision

We should consider using the powers to direct additional information or to publish notices in any case where the resolution and available evidence does not resolve any doubt we have about whether or not we should concur with a resolution.

### D3.1 Making our decision

When considering resolutions made using s.282 of the 2011 Act we must consider:

* any information available to us about the wishes or intentions of the people or institutions who donated the property; and
* any changes in the circumstances of the charity since the property was first given.

We cannot concur with a resolution unless we are satisfied that:

* its implementation accords with any gift or gifts to the available endowment fund; and
* the trustees have met all the legal requirements in connection with the resolution - see [D2.3](#_D2.3_How_the) above.

We should expect that in most cases:

* the trustees with their knowledge of the charity will be in the best position to decide that the resolution meets these criteria; and
* we can concur with the resolution without the need to publish a notice or ask for more information where the trustees use the online application form which will normally give us all the information we need to make the decision.

However, there will be cases where we will not agree with the trustees' decision. This is more likely to occur in cases where the charity has been established more recently where, unlike older charities, the value of the endowment may not have had the chance to decline, or the purpose of the charity can still be delivered in accordance with any gift or gifts to the available endowment fund. Legal Advice will be helpful in these circumstances particularly about the way in which the Commission should respond.

# E. Model text

## Public notice of s.282 resolution

Where we have decided to direct the trustees to give public notice of their resolution to spend permanent endowment, it will be for the trustees to decide on the wording of the notice. However, the notice should:

* include the date on which it is first published; and

* make it clear that any persons with an interest in the charity may make representations to the Commission by emailing [*insert team email address*] within 28 days from the date on which the notice was first published.

Please arrange for the notice to be placed [on a local public notice board] [once in a local newspaper] [on the charity’s website] [once in a national newspaper] as soon as possible and no later than [*insert date which is 28 days after we received a copy of the resolution*]. Please also reply to this e-mail address confirming the date that publication commences so we can calculate the period for consideration of the representations (if any).

When the public notice has expired, please declare to us (by e-mail) that public notice has taken place. A form of words for the declaration is given below. We will then inform you of the new time period for concurrence which will re-commence 42 days after publication of the public notice.

### Form of declaration

I declare that to the best of my knowledge and belief the notice in respect of the trustees’ resolution to spend permanent endowment was published as follows:

|  |  |  |  |
| --- | --- | --- | --- |
|      | Where published  | Date put up or published  | Date taken down  |
| Brief details of where any notice board was situated  |    |    |    |
| Details of any website where the notice was displayed  |    |    |    |
| Name of any publication in which the notice was displayed14    |    |    |    |

 Full name:

 Date:

**Making our decision**

At the end of the public notice period we will consider any representations made before deciding whether to concur with or reject the trustees’ resolution. We are required to notify the trustees of this decision within 60 days of the date on which the resolution was received by the Commission subject to the suspension of time whilst public notice is undertaken. However, if we receive representations and need to direct you to provide us with more information or explanations, this time period may again be suspended while we await a response.