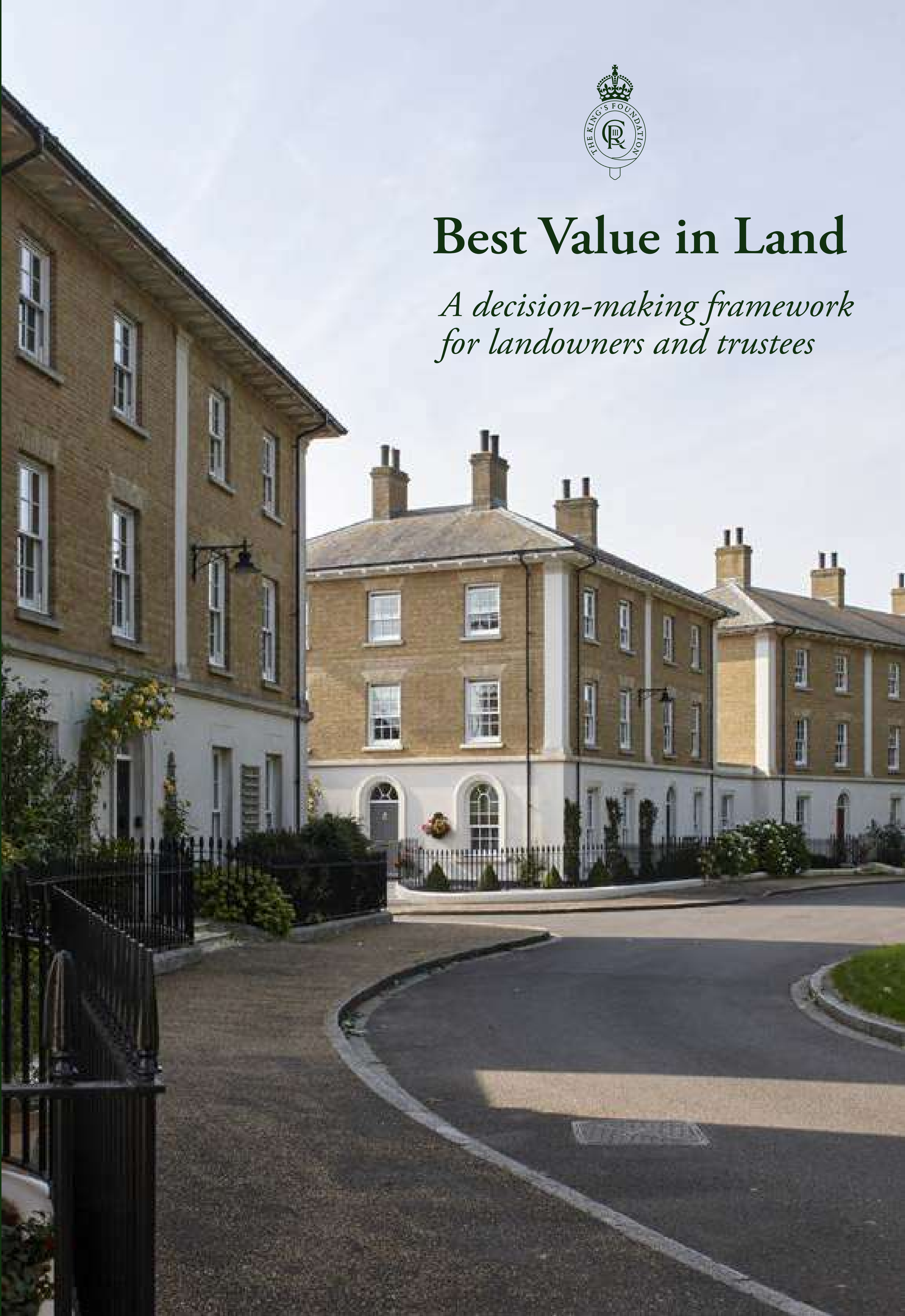
THE KING'S FOUNDATION

Best Value in Land

A decision-making framework for landowners and trustees



THE KING'S FOUNDATION

THE KING'S FOUNDATION

"A landowner is in control of their land until they aren't!"

For generations, landownership has been about stewardship—maintaining, enhancing, and passing on a legacy. When the prospect of development arises, many landowners aspire to create high-quality new homes and thriving places. However, the reality is that achieving such an outcome is often challenging, particularly when faced with the substantial costs of planning and infrastructure. Without the right support, landowners may find themselves relinquishing control to a promoter or housebuilder, often in ways that do not align with their long-term vision.

Landowners and trustees must navigate complex decisions, from selling to the highest bidder to forming partnerships that allow greater influence over development. These choices hinge on balancing risk and reward. While trustees often prioritise short-term financial gains, this may not always serve the landowner's best interests or uphold the broader values and legacy of the estate.

This report offers insight into these critical decisions, exploring different approaches, real-life case studies, and a structured decision-making framework. It emphasises the importance of achieving Best Value—not solely in financial terms, but also with social, environmental, and economic considerations. The unintended consequences of selling land without due diligence can be significant, affecting both the estate and the wider community.

The opportunities of well-planned development include higher-quality buildings and public spaces that enhance estate value, increased revenue from rental yields and estate businesses, and a strengthened local and national reputation. Conversely, poorly considered development can lead to negative social and economic consequences, damaging relationships with the local community and limiting future opportunities.

Focusing on urban development in the UK, this report serves as a practical guide for landowners seeking to align financial viability with long-term legacy. We hope it supports informed decision-making and helps shape thriving places that will build resilient communities that stand the test of time.

BEN BOLGAR MVO
Executive Director of Projects,
The King's Foundation

ACKNOWLEDGEMENTS

The King's Foundation wishes to thank the following individuals and organisations for their participation in the steering group and research which guided the development of this report:

The Lord Best OBE, DL

Charlie Dugdale, Knight Frank

Hugh Petter & Robbie Kerr, ADAM Architecture

Chris Pattison, Bidwells

Roger File, Blenheim Estate

Nicola Sutton, Clarke Willmott

Charles Anderson, Jennifer Ridgway & James Maloney, Farrer & Co

Ben Gummer, Gummer Leathes

Stuart Richmond-Watson, LaSalle

Andrew Howard, Moray Estates

Nicholas Tubbs, Stockbridge Land

Henry Brooks, Tatton Group

This report has been assembled by Ben Bolgar, Executive Director of Projects at The King's Foundation and Gail Mayhew, Director at Smart Growth Associates. Graphic design has been done by Ada Rădescu, Events & Workshop Coordinator at The King's Foundation.

CONTENTS

Introduction

Who should promote and develop land and under what criteria?

The key decision

Land is a precious commodity, particularly on a small island like Britain. Its stewardship should be undertaken with the utmost care to protect our environment; the beauty and productivity of our countryside; to ensure our water supply and to support the good growth, attractiveness and health of our communities.

The decision on the part of landowners as to whether and how land is to be taken forward for development will critically influence the quality and functionality of places that subsequently emerge, and their propensity to meet the social, environmental, economic and place building challenges we face.

Landowners, trustees and beneficiaries need to carefully consider the alternative pathways available to them when land is taken forward for development. Once a development route and structure is agreed this will, to a great extent, determine outcomes.

Acknowledging that preserving value and making the trust fund productive for beneficiaries are inherent obligations for trustees (professional advisors, and other decision makers). At the project inception stage there is an opportunity to test how such obligations can be met through the various potential arrangements available so that the aspiration to preserve and enhance the financial value in land, and secure broader benefits can be fully achieved.

A well-informed, structured decision-making approach will enable decision makers to test how each of the competing routes to development perform in relation to preserving value; the impact of the planned development on the overall land holding; whether an appropriate degree of control is maintained, and risks minimised. It should further help ensure that the greatest possible alignment of interest is secured between the parties and that this is hard-wired into commercial arrangements, thereby mitigating – as far as possible – potential disappointment at outcomes, or costly dispute at a later stage.

This report aims to provide a decision-making framework for landowners, trustees, and beneficiaries to help identify key factors that should be taken into account so that alternative routes can be identified and reviewed against an agreed set of well researched and agreed objectives. This will help to ascertain the propensity of respective routes to deliver best outcomes financially, in terms of the ultimate product, and its wider value impacts. It also touches upon how non-financial value measures can in themselves preserve financial value to the land holder across the lifespan of a development and beyond.

The considerations explained above apply to non-charitable trusts. Where land is owned by a charity its trustees have a different set of considerations which may be shaped by how the charity holds the land: whether as functional land is used for the purposes of the charity (and, moreover, whether there are trusts requiring the land to be used in a particular way); as an investment to deliver a financial return to allow the charity to raise funds to promote the purposes of the charity, or as a social investment, where elements of both may be represented. There may be some overlap in the factors to be considered, but it is crucial that charity trustees ask themselves why and how they hold the land in question and whether any legal restrictions apply to it before embarking on a decision to take forward land for development.

Background

Critical choices when taking land forward for development

Nansledan, courtesy of ADAM Architecture

There are many reasons why a land holder may wish to consider housing or mixed-use development on their land.

The question of development might arise as part of considering an overall estate plan; because a landholding lies within an area that has become attractive for development or because the land holder has been approached by a developer or promoter. Equally, the drive for development may come about through consideration of how estate staff and other key workers are accommodated locally particularly given that the cost of maintaining and retrofitting older properties that may in the past have served to deliver locally affordable accommodation have become extremely expensive, with the dearth of other rural affordable housing options. For a charitable landowner, there may be an intention to further the charity's purposes through the provision of housing for those in charitable need or a wish to achieve a social investment use of the land, encompassing both some element of a financial and charitable return.

Many landowners, trustees and their beneficiaries, when faced with the prospect of development, aspire to create high quality new homes and places in complement to the remainder of the landholding, to protect vital and thriving communities and their reputation locally.

Some landowners may wish to self-promote land for development to maintain control of the process. However, when faced with the costs of obtaining planning permission, and financing up-front infrastructure, many will wish to offset development risk to a promoter or development partner. This relationship can take a number of forms and, whichever route is chosen, some element of control can be put in place to help to ensure that the best outcomes are achieved.

A substantial body of research undertaken by The King's Foundation and others highlights that this original decision on the part of the landowner as to which development route to adopt, and the conditions attached to this initial agreement, is critical to the quality of the outcome.

Where land is held in trust; or where parties assemble their interest to take land forward collectively, and some part is either held in trust or by a charity, the respective trustees have a duty of care to ensure that value in the trust is preserved (albeit that duty may not apply to all charitable landowners, for example in the case of a charity whose purposes are wide enough to encompass the provision of housing for those in charitable need).

*Please note that parts of this paper may not be applicable to all charitable landowners and tailored advice will need be required on the interaction between the charity's purposes, the basis on which it holds the land in question and the proposed promotion or development.

This report aims to assist decision-taking on land promotion and development by setting out considerations for landowners, trustees and beneficiaries in making decisions on land promotion and development with long term impacts for the wider holding.

Critically, this report highlights the need to obtain - as far as possible - alignment of interest between beneficiaries in the first instance; between entities involved in the promotion/development, where there are multiple interests; and then to seek the greatest possible alignment of interest between the landowner / landowning trustee and chosen development partner and agent, such that parties are working towards explicitly identified shared goals and so that conflict down the line is obviated.

It highlights the alternative land promotion and development routes available, and key issues that should be considered when weighing the cost, benefit, risk and potential up-side of respective routes.

In matters of land and property it is important to recognise that value preservation considerations are nuanced, and the question of what represents 'best value' needs to be reviewed in terms of the broader impacts on the retained land and property holding; interrogation of the suitability of land for alternative uses; highest and best use in the short, medium and long term; ability to recruit and retain key staff; compatibility with Environmental Land Management Scheme (ELMS) operating over the balance of the land holding; inter-generational concerns and family / estate reputation. For institutions and charities, 'best value' will need to take account of charitable objects or other aims and objectives that may not be compatible with maximum financial return e.g. environmental outcomes or affordable housing objectives.

Other interacting factors include tax position, preservation of reliefs, appetite and capacity for financial risk, available in-house expertise and time commitment of adopting a hands-on role.

The paper explores mechanisms that can be put in place relative to respective routes to help to ensure that best outcomes are achieved.

Finally, it includes a Decision-Making Framework and Critical Path Trajectory to assist Trustees anticipate key decisions that will need to be made and to assess their requirement for professional support in undertaking due diligence and supporting decision taking.

It is acknowledged that the decision to develop land is extremely onerous, involving multiple risks with little assurance at the start of the process as to either the success or timing of outcomes.

A perverse outcome of the present arrangements – taxation treatment, land deal conventions, commercial options and a nearer term view of preserving value – is that taking a short-term position and exiting early on the part of the land interest can be presented as the most rational decision, when viewed on a narrow value for money and assessment of risk basis. Against this, there is mounting market evidence that highlights both the financial, and broader social and place making benefit that can flow from landowners adopting a longer-term position.

By uncovering some of the issues and tensions emerging from a more nuanced approach to cost and value that is increasingly required in real estate analysis, this report aims to highlight how trustees and beneficiaries can systematically address and navigate the question of what represents good financial value within the overall context of a landholding.

It further starts to underline some of the structural and institutional issues that operate as barriers to landowners adopting the most socially and environmentally beneficial route. It is hoped that the report contributes to the increasing weight of evidence suggesting that some limited but important changes need to be made to remove barriers to landowner participation in patient approaches to securing high quality, sustainable new homes and neighbourhoods.

Trustees' Duty of Care

Non-charitable trustees

A key duty of trustees is to preserve the trust fund, which includes a duty to make the trust fund productive for the beneficiaries. At its simplest, this means that, in considering development opportunities, trustees must consider how to generate "maximum value" for the beneficiaries.

Poundbury, Photo by Morever

In situations where current beneficiaries are keen to support the trustees in engaging in legacy development opportunities and might consent to either a postponed financial output, or lower immediate financial return, but with wider and longer term future financial benefits to the retained trust assets from a development supporting overall best outcomes, trustees must be mindful of criticism of future beneficiaries (or other members of a wider beneficial class) if decisions made in relation to a development might seem to offer a lower monetary result from a development project on trust-owned land.

In situations where the proposed development route is one which will not deliver the best upfront / short-term monetary proceeds, trustees will need to carefully consider and record how and why their chosen development route will nonetheless deliver no worse monetary value for the beneficiaries based on an assessment of longer-term or wider financial value. This guide aims to assist with that process.

In making decisions about how to invest trust assets, trustees must put aside ethical, political or social considerations. Non-charitable trusts cannot be for a "purpose" (under English law), and as a result the trustees are not able to make investment decisions which promote a purpose (for instance improving living conditions or affordability for the local community who are not beneficiaries, or making a positive environmental impact) where doing so would be financially detrimental to the beneficiaries.

However, where the trustees have sufficient evidence to show that there is no financial detriment to a particular development route when value is assessed on a longer term / wider basis (i.e. having already ascertained that on a wider or longer term assessment of financial/monetary value, the

Trevethow Riel, courtesy of Duchy of Cornwall alternative development route delivers no worse monetary value), trustees can consider:

• The beneficiaries' own views, including their views on moral and social issues;

• Non-financial benefit to the beneficiaries, including (for instance) their reputation in the local community or the discharge of a moral obligation on their behalf; and

• The settlor's wishes and guidance (i.e. the trustees should take account of guidance given by the settlor as to how the trustees should be exercising their powers). That guidance, usually set out in a letter of wishes, might include for instance taking account of environmental or local community impact in decision making. In this scenario, decisions would always need to be made for the benefit of the beneficiaries (so a development decision that would be beneficial from an environmental or community perspective but would in fact be detrimental financially to the beneficiaries would not be permitted), but express guidance on these points would assist the trustees in taking these factors into account in their decision-making process. While this sort of guidance may be lacking in older trust structures, where new landowning trusts are created, settlors should be encouraged to consider these issues at the outset.

Given some of the difficulties in measuring likely future and/or wider financial benefits, trustees should also seek to record agreement of adult beneficiaries (particularly those who are most likely to benefit from the trust in the future) to the alternative development route proposed. That agreement might be recorded by way of a Memorandum of Understanding or Family Agreement but needs to be treated with caution in trusts with a wide class and/or where there are minor or unborn beneficiaries as the trustees have a duty to all the beneficiaries (and future beneficiaries), not just those most engaged at the time the decision is being taken.

Where trustees have concerns about how their decision making may be viewed by future beneficiaries, or if some of the beneficiaries are not in agreement, the trustees are able to apply to court to have 'momentous decision' blessed. In some cases, a decision to pursue a very significant development opportunity in a way which results in a much lower upfront return, with the trustees instead expecting to generate a much longer term return (or to achieve wider financial returns which may be more difficult to assess) a blessing application would be prudent. This offers protection for the trustees but is likely to apply only where the size of the development in the context of the overall trust fund is such that the investment decision to proceed with an alternative development route is "momentous", or where there is active disagreement between beneficiaries.

Best Value Assessment

Assessing broadly defined 'value'

Tornagrain, courtesy of Moray Estates

Trustees of non-charitable trusts who, with the support of beneficiaries, are keen to explore ongoing participation in development will need to gather and record tangible evidence as part of the project due diligence exercise. This should consider the long term financial value to the trust that is anticipated to accrue from adopting this development route, and wider value impacts. It is advisable that this is supported by well-informed professional advice.

There is an increasing body of market evidence represented by stewardship-led development projects that are coming to fruition across the UK where a range of social, place and environmental ambitions have been embedded.

Evidence of the response to stewardship-led projects indicates that, in many circumstances, the perceived social value and sympathetic architectural approach represented by these schemes can enjoy a more streamlined route to planning permission with reduced challenge. Equally, where a high-quality product is delivered meeting local planners' and community expectations, expansion of the scheme and other allocations may follow, based on track record of delivery against these objectives.

Market evidence shows that schemes meeting a high standard of place making – including the inclusion of mixed uses, community infrastructure, tenures and price-points – and architectural ambition, display superior performance across a range of financial measures including rate of sale, uptake of rental properties, maintaining value in the second-hand market, as well as impacting favourably on the land value of successive phases and adjacent properties.

Increasingly, investors are seeking a high standard of ESG (Environmental, Social, Governance) compliance in their investments – or other measure of triple bottom line benefit - and, where third party finance will be sought, the attractiveness of a scheme may be heightened to investors where a strong commitment to ESG can be evidenced alongside anticipated monetary returns. Equally corporate occupiers are increasingly driven to demonstrate the ESG compliance of property that they occupy.

A broadly based best value assessment might include consideration of the following:

Tornagrain, courtesy of Moray Estates

Table 1: Qualitative Measures of Scheme Performance

Value Proposition	Material Direct or Indirect Financial Advantage Accruing
Better design & build quality of housing	Leading to a potential competitive advantage with standard-build schemes nearby, broadening the scheme's catchment, which may increase sales rate; sales price or rental value achievable. Fewer building warranty issues and greater customer satisfaction will raise reputation of development (and the estate) locally supporting sales rate. Estate improvement and maintaining high standards of environmental design and living conditions is a legitimate objective to be considered alongside financial return impacting on householder satisfaction and landowner/developer reputation.
Affordable Homes	Inclusion of a substantial percentage of affordable homes designed with local housing need and demand in mind will provide a measurable social benefit.
Better design and delivery of community spaces and amenities	Supporting competitive advantage with competing standard market schemes with overall enhanced 'place' product, supporting sales rate; sales price and rental values, particularly where the costs can be spread across a larger development. Higher occupier satisfaction may lead to greater community involvement in the long-term stewardship of the estate upholding the place quality and ensuring that values are maintained over time.
Greater level of employment uses and amenities / walk-ability	Delivery of mixed uses and amenities leads to trip reduction and enhanced walkability. Creation of a high quality local high street / 'village' or town centre within scheme heightens local economic capture and potentially impacts beneficially on residential values within walkable catchment.
Sustainable/circular approach to water, waste and energy	Can assist with meeting water neutrality and net zero commitments and enhance speed to planning permission. Can obviate competition for water and energy with rest of holding. Could support additional revenue generation to holding through decentralised utilities and power/water storage.
Strong blue/green natural infrastructure approach including bio-diversity net gain, water neutrality measures, sustainable urban drainage, public access to open space, natural shading and landscape enhancement.	Can assist with meeting water neutrality, biodiversity net gain, SANGs and other policy objectives leading to more rapid progress to planning consent. Will complement wider Environmental Land Management Scheme (ELMS) objectives or responsibilities across wider land holding, and potentially create additional opportunities for revenue generation
Ambitious approach to net zero and climate adaption in the design and development homes	May lead to competitive advantage in sales as costs of occupation will be lowered, enabling householders to direct available funds towards payment for housing. Where property is held either for investment purposes or for estate workers, bills will be reduced.
High quality place-making including incorporation of amenities and mixed use	Will increase popularity of scheme and footfall leading to enhanced revenue to related estate businesses such as farm shops, pubs, hotels, car parks, visitor attractions.
Better, more aligned development	Positively enhances the brand value of the estate or wider holding potentially supporting revenues/rentals of other owned properties.
Exemplar of good development practice	Protects reputation at local and national level. Professional interest in estate/project raised as an exemplar of good practice raising profile amongst peer group and professional community.
Partner of preference	Commitment of place-building quality can lead to generating national and local development interest in partnering with land interest of outstanding quality and demonstrable ESG compliance.
Investor attraction	Potential to attract investment interest in scheme of outstanding quality and demonstrable ESG compliance.
Regeneration	The need to set a markedly different tone from existing and/or surrounding development and poorly performing assets to achieve enhanced longer term financial performance is served by pursuing a development approach that explicitly adopts a place building methodology.

Nansledan, courtesy of ADAM Architecture

CASE STUDY: Tregunnell Hill & Nansledan, Newquay

A stand-alone demonstration project of 174 homes at Tregunnell Hill was built out to high standards set out by the Duchy of Cornwall and its SME housebuilders. The high quality design and use of local materials at Tregunnell, alongside the meaningful community engagement over plans for Nansledan, caused Cornwall Council to reassess an initial allocation of 400 homes into a much more significant urban extension to Newquay. The Duch of Cornwall as a master developer was delivering on the vision for quality placemaking guided by local needs, which dramatically changed the conversation with the Local Planning Authority (LPA) who increased allocation at Nansledan from 400 to 4,000 homes to enable the Duchy to deliver so much more of what Newquay needs.

Meaningful community engagements and early investment in high quality placemaking has directly translated into overall opportunity and value for the landowner as master developer. By building a strong alignment of interest with the local planning authority to delivering ambitious commitments for the local community, including 30% affordable homes, use of local materials and an urban village centre creating jobs as well as homes in the early phases. This created sufficient trust was built between landowner and LPA to the extent that the expanded scheme was awarded a Local Development Order (LDO) by Cornwall Council.

The LDO provides confidence of supply to housebuilders, commercial operators and investors as it provides a highly flexible planning consent, enabling the Duchy to certify development is in accordance with the LDO, subject to adherence with the key masterplan parameters and Design Code, with the LPA keeping a watching brief through annual audits of LDO certificates. The LDO arrangement saves time and cost to both developers/investors and the local planning authority, accelerating investment in quality housbuilding and place making, providing a streamlined planning regime for the remaining 20 years of build out, provided design quality standards continue to be met.

CASE STUDY: Poundbury

At Poundbury, over one job has been provided for every house built. This has created a highly walkable new neighbourhood on the edge of Dorchester which is bringing considerable investment into the town. The commitment to jobs and local amenities ensures that people can walk to local amenities and services, and sustain local mixed uses. An economic impact assessment in June 2018 found that Poundbury contributes £105 million per annum GVA to the local economy.

Studies by the Duchy of Cornwall have also shown a related lower than average level of car dependency amongst residents who have the option to walk or cycle to access local amenities.

This serves to illustrate that commitment of a landowner to developing to high quality of place making, including mixed uses, can create a symbiotic interest between creating place value and supporting property value outcomes, as well as socially beneficial impacts.

Poundbury, courtesy of Ben Bolgar

Poundbury, courtesy of Ben Pentreath

Poundbury, courtesy of Ben Pentreath

Investors are increasingly concerned that the ESG credentials of their investments can be shown. Land interests looking to attract investment into their projects should consider that hard-wiring strong ESG performance into masterplans, with demonstrable environmental, social and local economic benefit, will distinguish their project as an investment location.

What if a particular development route is led or supported by beneficiaries who want trustees to act in accordance with environmental or other purpose-based principles, with a request that decision-making is led by adherence to ESG principles in priority to , or instead of, considering monetary value?

Other than charitable trusts, purpose trusts are not a feature of English law, which means that decisions focused on the promotion of ESG (or other purpose-based) principles, or to decisions which meet an ESG purpose contrary or detrimental to the (financial) interests of the beneficiaries, are not permitted.

ESG factors may however be financially material on analysis and evidence of the positive financial impact of development decisions that take ESG principles into account (or evidence of the negative financial impact of making financial decisions which do not uphold ESG principals in relation to high quality estate management and place making) should be taken into account and recorded.

See the Decision Making Framework proposed at APPENDIX A, which offers a structured checklist to help to ensure balanced decision-making.

Professional advisors can help support decision making with insight into the performance of comparable schemes, risk management approaches and the likely value, control and risk impacts of comparable routes to help to structure and support decision-taking.

Partnering with charitably owned land

The Charity Commission has set out detailed guidance on decision making as regards land that is held by or in trust for a charity. This reflects Part 7 of the Charities Act 2011 (reflecting, in turn, the fact that charities are not as free to deal with land that they own as individuals, businesses or trustees of non-charitable trusts). The issues involved can be complex because, as noted above, different considerations may apply depending on the purposes and powers of a charity, the basis on which a charity holds the land in question and whether there are any legal restrictions in this regard.

These factors will need to be considered where some part of a holding that may be considered for development is owned by a charity, the objects of which and decision-making regime may be different to those of the principal or adjacent land interest. This can be managed through establishing a Memorandum of Understanding, and, where the charity does not have a trustee qualified to make decisions on land and property, may require the appointment of a specialist real estate advisor to support the charitable trustees in their decision-making from time to time. It is important that charity trustees understand the interaction between the charity's purposes, its powers, the basis on which they hold the land and any restrictions that apply.

ESG ruling: The Butler-Sloss Precedent in the respect of charity trustees

A recent landmark case in charity law (Sarah Butler-Sloss & Others v Charity Commission [2022] EWHC 974) gives some comfort to charity trustees who may wish to balance non-financial (including environmental, social (and other ESG)) considerations with the requirement to deliver maximum monetary value in the context of development where they are exercising their charity's powers of financial investment in respect of land which the charity owns.

Nansledan, courtesy of ADAM Architecture

Partnering with public land

Where a partnership land interest is being brought together that includes public sector land, this adds a further layer of complexity as public land must also meet a best value test. This is set out within Section 123 of The Local Government Act, 1972.

This provides that local authorities may: "... dispose of land as they see fit, but: (2) Except with the consent of the Secretary of State, a council shall not dispose of land under this section otherwise than by way of a short tenancy, for a consideration less than the best that can reasonably be obtained."

This principle was refined by The Local Government Act 1972: General Disposal Consent 2003 ("the Consent") – Annexed to Circular 06/03, which removes the requirement for authorities to seek specific consent from the Secretary of State for any disposal of land where the local authority considers that the purpose for which the land is to be disposed is likely to contribute to the achievement of any one or more of:

i) the promotion or improvement of economic well-being;

ii) the promotion or improvement of social well-being;

iii) the promotion or improvement of environmental wellbeing; and the "undervalue" (i.e. the difference between the unrestricted value of the interest to be disposed of and the consideration accepted) is £2,000,000 or less.

This is a complex area, also interacting with subsidy control rules and specialist advice should be sought.

Risk Assessment & Mitigation

Poundbury, courtesy of Morever

Other Factors in Establishing an Optimal Route

A number of further issues and risks need to be considered in order to support well-informed decision taking in respect of land promotion and development.

Tax position

Tax is a key driver in all business and investment decision making, and consideration of the taxation impacts of respective routes to development, including the overall taxation 'horizon', will be a key driver of decision-making in all cases.

There are significant complications and some barriers to ongoing landowner participation in projects whether through the early planning stages or through the whole project life-cycle. Land promotion and enabling partnerships, land pooling and equalisation agreements, and development partnerships all come with their own issues, including tax inefficiencies and the threat of creating a 'dry' tax incident (where tax is triggered ahead of a receipt arising). Advisors who are specialist in this area can assist with tax planning. Needless to say, this is the result of a wide accumulation of tax and corporate legislation, none of which was designed with consideration of the impact of the tax regime on the choice of development route in mind. There are solutions, but these come at a cost and increased uncertainty.

This issue, together with concerns around the treatment of reliefs, is a barrier to interests wishing to participate directly in land enabling partnerships, and The Stewardship Initiative is making the case for reform in this area to support parties wishing to adopt a patient capital approach.

Intergenerational Issues

Due to the often extended timeframe of land promotion and development it is prudent to consider impacts on the project and the landholding overall were the holding is to transfer between generations. It is essential that arrangements are robust, and objectives shared between generations.

Professional Costs

Where a land interest or trustees are considering promoting land directly, assessment of the critical path towards development should be undertaken such that an assessment of the professional advice that will be required at each key stage can be made. This will enable an assessment of the costs of committing to this route to be made and weighed in decision making. Research for the Building Better, Building Beautiful Commission highlighted the typical project critical path for an owner exploring development potential of their land. A summarised, illustrative critical path to support trustee decision making is included at APPENDIX B.

The professional costs associated with land promotion and development can seem daunting, with advice required from a range of different professional sources – design, technical, financial, legal, taxation and land agency. Land interests and trustees should endeavour to secure a clear understanding of the professional costs associated with pursuing the chosen route to development as part of the decision-making and forward business planning process.

A critical factor, where a third party is to be involved in the promotion/development of the land, is to ensure – as far as possible – that there is a clear alignment of interest between the land interest and the promotor/developer on the nature and type of development that is sought and professional advisors that will be deployed, such that costly dispute and even litigation does not arise at a later stage. Consideration of how the two parties interact through project briefing, adviser selection and on-going project governance will be a key consideration in drawing up the development agreement and other documentation.

Management Costs

Under all scenarios there will be an on-going time cost to the land interest in participating in decision making and reporting on progress. Once again, this time commitment should be assessed against respective routes and weighed into decision-making. Give the onerous and specialist nature of decisions to be taken, it may be appropriate to seek specialist input and advice where land interests or trustees do not consider that they have the appropriate expertise.

Where the decision is made to promote land directly or within a partnership, this will involve an onerous time commitment, requiring specialist skills and consideration should be given to how this will be resourced.

Market Risk

In assessing which land promotion/enabling/development route to pursue, the performance of national and local property and land markets should be considered either directly or through seeking the advice of suitably qualified expert advice. This will ensure that contextual issues relating to the property cycle, the state of the economy, performance of housebuilding and interest rates are reviewed as part of decision-making, together with analysing place potential. Equally, local factors such as changes to local and more strategic scale planning and infrastructure prioritisation should be assessed, together with likely stakeholder response to development.

Infrastructure Risk

Critical questions to interrogate in the case of large-scale development is what the availability of energy, water and sewage capacity is; and whether there is grid capacity for the proposed level of development. These are factors that can prove problematic and costly to resolve; cause potential extended delays, undermine viability of a project and should be considered from the outset.

Policy Risk

Due to the long-term nature of land promotion, enabling and development it is important to make an assessment of present and predictable future policies that might impact on land both at a national and local level. This is an area where having regard to ESG issues in decision-taking may offer substantial benefit to mitigate against future risk. For example, in areas where water neutrality has become a concern or barrier to development, schemes that adopted a high standard of practice in this area may have been able to mitigate the impact of this policy more readily than sites which adopted more conventional approaches and have suffered delay as a result whilst arrangements for off-setting have been secured.

Stakeholder & Community Risk

Consideration of how a scheme might impact locally should be critically reviewed. If a scheme leads to challenge because it is poorly conceived and fails to take account of third-party concerns appropriately, this could lead to significant delays in securing development and realising land value. It can also impact on goodwill in relation to other parts of a land holding and affect reputation.

Table 2. Critical factors that need to be considered by trustees in evaluating cost, risk and benefit of alternative routes to development.

Key Considerations	Further Questions
Tax treatment of respective arrangements.	What are the tax implications of respective routes? What points will tax crystallise? Is there a threat of "dry" tax charges arising ie ahead of receipts? What are the implications for business reliefs? What mitigations can be put in place?
Other professional costs associated with respective scenarios eg design, legal, agency fees, accounting.	Is there a clear understanding of the professional costs involved in a land promotion/development? Is the budget available to meet these costs? Is there a clear understanding of when these costs will crystallise? If not, can these be offset to the counter-party?
Management costs associated with alternative scenarios.	Consideration should be given to the management time that respective routes under review will require. Is the skillset available within the body of trustees? If no is there the wherewithal to hire in the requisite skills set? Are the trustees able/prepared to meet the time commitment of respective routes?
Market Risk	Consideration of whether the land promotion route under consideration is vulnerable to shifts in the property market, whether cyclical property market movements or changes of practice, or market appetite. How will the chosen route perform under the cycle of market conditions? How will it perform if interest rates or build costs shift?
Policy	Consideration should be given to whether the land promotion is vulnerable to policy or political change locally or nationally. Is the chosen route more or less susceptible to political change? What mitigations might be adopted? Does a promotion's prospects change if commitments around design and quality are defined and offered?
Stakeholder & Community Relations	Consideration of how the scheme might impact locally should be considered. If scheme leads to challenge because it is poorly conceived and fails to take account of third-party concerns appropriately, this could lead to significant delays in realising land value and impact on goodwill in relation to other parts of the land holding and affect reputation. Conversely, a high-quality approach may enhance the standing of a scheme through the promotion process.

These practical risk factors need to be weighed alongside other value preservation/enhancement factors, highlighted above, as well as monetary and timing factors in considering an optimal, thoroughly reviewed value approach, best adapted to the circumstances of the land-holding and its beneficiaries.

As previously stated, the costs and risks to a landowner of maintaining a position in a development proposition on a patient basis are significant, and a clear understanding of the implications should be established to inform decision making. At APPENDIX A, a Decision Making Checklist is included, together with a set of generic questions that can begin to tease out attitudes to risk, monetary returns and overall values to help a structured discussion between landowners and trustees as to how to identify the best route to value preservation and enhancement. The table below highlights potential costs/risk/mitigations, where a landowner is exploring a proactive route alongside other options.

Tornagrain, courtesy of Moray Estates

Table 3: Patient Capital Position - Costs, Risks & Mitigations

Costs / Risks	Mitigations	Action Points
Tax treatment - The risk of more complex or dis-beneficial tax treatment is a very clear driver in decision-making on land.	Expert advice can help to structure bespoke arrangements to mitigate tax risks, however this comes at cost to the holding at an early stage when promotion / development outcomes are far from certain.	The uneven treatment of tax across land promotion / option and equity participation arrangements has been highlighted as a deterrent to long term landowner participation.
Professional Costs - The cost of professional advice to a landholding wishing to retain control or actively participate in land promotion / development is significant.	A clear picture of costs at each stage in the project critical path should be established and all parties should be clearly aware of the costs and risks of progressing a project with active involvement from the outset.	Greater clarity from professional bodies a) as to alternative routes available to land promotion and development, (particularly including long term participation alongside option and standard land promotion agreements), and b) on the professional inputs at each stage of the critical path is urgently needed so as to advise clients clearly on the likely cost and risk implications of alternative approaches; in particular the costs associated with maintaining controls / active participation.
Limited universe of 'master developer' entities - Meaning that the field of joint venture partners is presently narrow.	To offset costs and risks of direct promotion and development, land interests can partner with master developer entities, ideally with a shared set of values in terms of development outcomes. There are presently however only a limited number of such entities.	As awareness of the patient capital approach grows and barriers to entry are resolved, firms and individuals experienced in land promotion and housebuilding will increasingly recognise the market opportunity inherent in this area and the sector will grow.
Access to Finance - Gaps in the availability of finance to support land & infrastructure investment and development on a patient capital basis at each stage in the project critical path make funding challenging.	As the potential for delivery inherent in this area is recognised, and as a new sector of expert master developers emerges with strong track record and proven expertise, finance is likely to follow.	There are parallels to the early days of urban regeneration when English Partnerships launched The English Cities Fund to demonstrate the invest-ability of the regeneration sector. The attraction of finance to this area to plug the funding gaps is crucial and barriers to the commitment of finance to this area need further exploration.
Recruitment - The cost / difficulty of recruitment of key personnel to lead projects	Where a land interest decides to take a proactive role / lead position as master developer, it is essential that an experienced team are recruited, whether to advise internally or in a consultancy capacity to build a robust project strategy.	There is an urgent need to build capacity and skills to service the needs of the sector; identify good practice and set standards.
Timeframe - Even if a land interest decides to pursue a project directly or with strong landowner controls in place, often this does not translate to a rapid planning permission, in spite of the placemaking and housing benefits that can accrue.	Planning remains extremely unpredictable. The retention of an experienced planning advisor will help to navigate the planning system.	The Building Better Building Beautiful Commission's report, 'Living with Beauty', highlighted the potential to streamline the planning trajectory for schemes with clearly demonstrated delivery credentials.
Reputation – it is essential as far as possible to develop a positive profile for a project.	The cost of maintaining an engagement and communications capacity throughout the duration of a project should be factored into business plans. Consideration should be given to how commitments to design and quality can be communicated ahead of delivery. The risk reduces once the first occupations take place and visible evidence is produced.	As ESG and social value is increasingly being measured by the property industry and by occupiers, robust metrics will emerge to highlight the broader 'value' benefits of adopting approaches that return greater place value over time and foster homeowner and occupier goodwill.

Alignment of Interests

Trevethow Riel, courtesy of Duchy of Cornwall

Alignment of Beneficiaries' Interests

A first step in moving towards a development approach to land held in trust will be for trustees to ascertain the views of all adult members of the beneficial class (where land is held as a private trust) or all trustees and stakeholders in the case of a charitable trust. Given the size of some classes of beneficiaries, and differing levels of knowledge and engagement across the class, this may not always be practicable. Where relevant and possible, this process may benefit from a structured meeting at which the respective parties' views can be canvassed; and their concerns and aspirations gauged, including (crucially) issues around the timing of receipt of benefits arising. The development routes available should be fully discussed such that all parties are aware of the alternatives, together with assessed risks, likely implications, and impacts. It may be helpful to formally record the conclusions in a Memorandum of Understanding or Family Agreement.

Within the agreement, the reporting cycle should be clearly identified as to how progress is reported to the beneficiaries including identification of key junctures on the promotion/development critical path at which views should be sought. See APPENDIX B setting out a typical project critical path.

Where there is no alignment of interests, or where there is a wide class with future (minor and unborn) beneficiaries, trustees will need to be rigorous in their evidence gathering and decision-making process, taking professional advice and recording that advice in the portfolio of evidence. As explained above, they may in certain circumstances, consider a court application for a blessing if the development decision is considered momentous or where there is real or possible disagreement between the beneficiaries.

Alignment of counter-party interests

Where multiple land interests need to be brought together to serve an optimal promotion and development arrangement, the position and aspiration of each respective interest needs to be taken into consideration and brought together in a joint arrangement. This requires a party to take the lead position, and this lead may often be the party controlling the largest part of the land or who has greatest access to finance. Where there is a strong public interest case for assembling land interests into a joint approach, there may be a role for a public sector entity taking the lead, or at least actively supporting a collaborative approach. Generally, for the purpose of land promotion a Collaboration Agreement will set out the relationship between the parties and split of cost and future benefit. For larger schemes, a dedicated development vehicle – an Special Purpose Vehicle (SPV) or Limited Partnership (LLP) may be a preferable route.

This is a specialist area, and may require professional support, in particular where parties are under differing ownership and tax structures, or where a party is a charity or public land interest.

Alignment of interest as between land interest and promoting party/development partner

A critical step will be for the trustees and their advisors to explicitly set out the key areas of aspiration that have emerged from discussions with beneficiaries, research and professional advice with the aim of finding common ground, and such that key objectives can be contracted-in to commercial arrangements.

Alternative Land Promotion & Development Routes

Nansledan, courtesy of ADAM Architecture

This section highlights a summary of differing routes to land promotion and development and some of the alignment and control implications that flow from respective routes.

The five principal routes available to landowners and trustees wishing to promote land for development are either:

- Outright sale
- Land promotion agreement with a Land Promoter
- Option/ Sale arrangement with a housebuilder
- Partnership agreement with a developer
- Direct promotion & development

There are a number of variations on these that can be established to meet with specific landowner and site requirements.

The routes through these various options may narrow depending on the choices made at each stage, for example if an Option or Promotion Agreement is chosen (in order to delegate the funding of promotion to a third party) these agreements will likely contemplate an outright disposal once planning permission is determined.

Special attention should be paid to the critical points of value crystallisation under each scenario: typically being on either grant of planning permission; on draw down of a phase of land for enabling; on disposal of serviced land (if applicable); or on disposal of completed homes and premises. These are the moments when land transfers occur with their associated tax treatment. Before and after each value crystallisation moment, the alignment of parties may alter substantially, creating heightened tension and this is when disputes are likely to occur.

It should be acknowledged that joint ventures can be structured in multitudinous ways, for example by way of a contractual development agreement or through a corporate vehicle. Risk and reward can be balanced in different ways and can therefore be adapted to suit the requirements of the trustees. Specialist advice is essential to navigate the options and associated risks.

There will be a strong correlation between taking greater risk and keeping control. Conversely if trustees are eager to mitigate risk, this will inevitably lead to a loss of control. In extremis, and outright disposal will concede delivery control even if it may be possible to exert some ongoing controls via covenants.

Outright Sale

Phase of Activity	Lead Actor	Alignment	Control	Risk
Sale of opportunity land	Agent	Strong alignment of interest between agent and trustees to achieve best price at given point in time.	There is limited opportunity for retaining control without substantially impacting on price. The level of control possible within the terms of the contract will be limited owing to the difficulties of inserting a right of veto within contracts. This will limit the level of design quality or outcomes that can be achieved. Covenants may be attached to land sales with onerous performance criteria, however these will involve incurring fees to create an urban design framework, agree performance criteria and to draw up and legal documentation.	Price represents 'best value' at single point in time; greater value may be captured over time through participation in development where a new value baseline is established through place making. If control is lost, and poor-quality scheme ensues this can result in loss of amenity and brand value to retained land interest. Reputational harm.

Land Promotion Agreement

Phase of Activity	Lead Actor	Alignment	Control	Risk
Land Promotion to achieve Outline Planning Permission	Land Promoter or Agent	Alignment of interest between land promoter and land interest to achieve planning consent in quickest possible time.	Land promoter is in control. Conditions can be negotiated into promotion agreement giving land interest a degree of locus/control.	Promoter seeks to maximise IRR, this may create misalignment however if promoter wants to maximise profit (with little concern to duration or velocity); and partial misalignment on minimising costs which are funded by Promoter and therefore at-risk, but are deducted against land value (so fall to landowner's receipt)
If planning promotion is successful, land is sold with benefit of planning permission to developer	Agent	Strong land owner / promoter alignment to achieve best price for land. Agent aligned with both parties.	Land promoter in control. Conditions can be negotiated into promotion agreement giving land interest a degree of locus/control but costs of imposing such conditions must be taken into account.	If poor quality scheme ensues this can result in loss of amenity and brand value to retained land interest. Reputational harm.
Property development	Housebuilder or developer	Land interest has no on-going locus. Product may not align with landowner/ trustee expectation as viability issues and value engineering may drive ultimate scheme undermining the expected quality.	Developer or housebuilder in control. Quality controls exerted by planning authority. Land holder may retain scope to exercise controls through covenants however tis mechanism is cumbersome and efficacy may be tested by a determined developer.	Opportunity to enhance overall value proposition of holding can be undermined by poor quality development. Reputational harm can arise from poor quality scheme.

Barton Quarter, courtesy of Ben Bolgar

Barton Quarter, courtesy of Ben Bolgar

Housebuilder Option/Sale Agreement

Phase of Activity	Lead Actor	Landowner/Home Builder Alignment	Control	Risk
Land Promotion to achieve Outline Planning Permission	Housebuilder	Strong alignment to achieve planning consent.	Housebuilder	Planning obligations agreed will come at cost to the ultimate land price payable, potentially leading to dispute between the land interest and housebuilder down the line.
If planning promotion is successful, land is bought outright or drawn down sequentially with benefit of planning permission by housebuilder	Agent / Housebuilder	Potential scope for dispute as housebuilder's interest is represented by purchasing land at lowest price.	Housebuilder	Commitments may have been made in process of obtaining planning permission that impact on land value. Agent can become conflicted between seeking best client value and securing the deal.
Property development	Housebuilder	Landowner has no on-going locus. Product may not align with landowner/Local Planning Authority expectation as viability issues and value engineering may drive ultimate scheme leading to loss of trust/misalignment with planning authority.	Housebuilder in control. Quality controls exerted by planning authority.	Opportunity to enhance overall value proposition of holding can be undermined by poor quality development. Reputational harm can arise from poor quality scheme.

Roussillon Park, courtesy of Ben Pentreath

Developer / Partnership Agreement

Phase of Activity	Lead Actor	Master developer / Landowner alignment	Control	Risk
Land Promotion to achieve Outline Planning Permission	Master developer	Strong alignment to achieve planning consent.	Master developer / land interest as negotiated.	Performance risk – can be mitigated through selecting experienced master developer partner. Reputation. Cost of participation.
If planning promotion is successful land is either bought outright; drawn down sequentially by master developer, either as sequence of sales or via build lease with freehold passing to ultimate owner; or is committed as equity where a full partnership arrangement is preferred.	Master developer	Bespoke arrangement can ensure that best value for both sides is achieved phase by phase. Equally, contractual arrangements can build-in some degree of participation or control by trustees. An enhanced level of control will tend to come at cost to the land interest whether through adoption of a patient position on returns or through equity participation.	Master developer / land interest as negotiated.	Performance risk – can be mitigated through selecting experienced master developer partner. Divergence of interests – can be mitigated through establishing clear aims and performance indicators at outset of scheme. Reputation. Cost of participation.
Property development	Master developer (taking forward the land promotion, place-building place-building and infrastructuring of the site). Range of builders – housebuilders, RSLs and SMEs competing for sites and phases, potentially under build/lease arrangement.	Master developer / landowner aligned on achievement of best price for the land phase by phase. Where design quality and other ESG is a concern, this can be addressed via design and quality conditions embedded into contractual arrangements and establishment of a Common Aspiration Agreement.	Controls can be exerted both through planning authority and via master developer/land interest on design and build quality. If development is to be undertaken by third party builders, build-leases/licences can be used to maintain control over outcomes together with legally contracted performance criteria.	Performance risk – can be mitigated through selecting experienced master developer partner. Divergence of interests – can be mitigated through establishing clear aims and performance indicators at outset of scheme and strong masterplan/design code. Reputation Cost of participation.

Direct Development

Phase of Activity	Lead Actor	Landowner / Developer alignment	Control	Risk
Land Promotion to achieve Outline Planning Permission	Land interest or their agent		Land interest / trustees	Financial risk
If planning promotion is successful, land is committed as equity alongside patient capital into a development vehicle to support the improvement, detailed master-planning and infrastructuring of the site on a stewardship basis.	Land interest	Trustees may be under obligation to seek best value for land which must be demonstrated. Where design quality and other ESG is a concern, this can be addressed via design and quality conditions embedded into contractual arrangements with respect to infrastructure and place making.		Financial risk – can be partially mitigated through sale of early phase under masterplan / covenants. Project risk – can be mitigated through securing experienced team. Tax risk – can be mitigated through expert advice.
Property development	Range of builders – housebuilders, RSLs and SMEs competing for sites and phases, potentially under build/lease arrangement or, Landowner assumes developer role taking forward build out of property.	Trustees may be under obligation to seek best value which must be demonstrated. Where design quality and other ESG is a concern, this can be addressed via design and quality conditions embedded into contractual arrangements with third party builders.	Controls can be exerted both through planning authority and via contractual arrangements exerted by land holder also acting in a master developer capacity.	Development risk can be offset to third party developers through sale or lease of 'oven ready' phases under masterplan and quality conditions. Direct development, where this is undertaken, will open up development risk/ warranties etc.

Roussillon Park, courtesy of Ben Pentreath

*To note that specific stages for trustees of charitably owned land may need to be inserted so as to meet the specific duties of a charity trustee, appropriate advice should be taken to ensure that such duties are fully discharged.

Trustees will need to weigh the cost, value and risk inherent in each potential development route against key principles agreed between trustees and beneficiaries and, where there are multiple land parties, against principles set out in a Common Aspiration Agreement.

Advice should be sought from consultants familiar with each of these routes so as to fully weigh impacts, costs, benefits and risks. Where a charity is the promoter, professional advice should be sought on the specific requirements incumbent on charity trustees and to identify what is acceptable within the terms of the charitable deed.

Nansledan, courtesy of ADAM Architecture

Tornagrain, courtesy of Moray Estates

Legal Mechanisms to Secure Best Outcomes

Where control over outcomes is required, routes should be adopted that allow for an appropriate, agreed degree of landowner/trustee control to be exercised both through participation in decision making at key project stages, and through ensuring that the correct commercial and legal documentation is adopted.

Advice should be taken on the exercise of controls and the legal mechanisms to embed controls in commercial arrangements together with consideration of dispute resolution/remedies.

The cost to a landowner of deciding to maintain controls over the project will need to be balanced against the direct and indirect value impacts that should arise through active participation in the scheme.

An illustrative example of junctures at which controls may be exercised and the legal format for embedding these are as follow (to note that these matrices do not specifically consider the position of charity trustees, however form a useful basis for a discussion with professional advisors of parties considering options for development of land):

Project Stage	Control Mechanism	Parties	Key Objectives
Pre-inception	Family Agreement	Beneficiaries / Trustees	Agreement on objectives and conditions for success, however defined; and looks to resolve situations where beneficiary interests diverge.
Evidence Gathering	Business Plan	Trustees / advisors	Evidence is gathered as to how financial value will be delivered (if upfront proceeds are expected to be lower than they would be on standard development) to support Trustees in considering their duties to preserve the value of the trust fund against evidence obtained. Based on the evidence (and the outcome of discussions with beneficiaries), Trustees should consider whether a court application to bless a momentous decision is necessary.
Inception	Common Aspiration Agreement	Land holder / development partner	Agreement of objectives and conditions for success, however defined; and looks to resolve situation where counter-party interests diverge with reference to explicitly agreed performance measures.
Project Promotion	Collaboration Agreement	Respective land interests in a land pooling or land assembly situation.	Agreement of objectives and conditions for success, however defined, and looks to resolve situation where land owner interests diverge. Agreement on how land will be taken forward on achievement of planning consent.
Land Enabling & Development	Consortium Agreement (where land interest decides to adopt high level of control) or other form of Special Purpose Vehicle (SPV) or Joint Venture (JV).	Developer/Land Interest	Identification of provisions for each developer to abide by the consortium terms acting through an executive committee and for expulsion of a defaulting developer from the consortium where this structure is chosen. Performance terms agreed as part of SPV or JV structure.
	Covenants	Land interest & other parties	Definition of performance and quality provisions in line with agreed Common Aspiration Agreement can be covenanted into agreements over the land.
Housebuilding	Development Agreement; Lease of Licence.	Land Interest or Master Developer / builders & developers	Definition of performance provisions for the land holder or master developer to certify completion of place-building elements: houses and relevant infrastructure before the developer(s) may direct the landowner to transfer the houses to the buyer (or the developer(s)); additionally termination provisions for developer default.
Long Term Management	Service Agreement	Estate Management Company or Trust & land interest / master developer and service company. Reciprocal quality obligations: estate management Company or trust & Householder	Where a company or trust is set up to undertake estate management of the common areas of the completed estate quality controls can be embedded into the service agreement. Householders pay the related service charge.
Occupation	Estate Scheme	Land holder / estate management company or trust.	A set of provisions referring to a Design and Community Code to regulate design and alterations and other community matters. These are set up as legal obligations binding all house-owners and are enforceable by the landholder, the consortium, the home owners and the management company or trust.

Looking Forward

Nansledan, courtesy of ADAM Architecture

Environmental, Social and Governance (ESG) performance considerations are increasingly affecting business and personal decision making. As set out above, whilst applicable only to charitable trustees the Butler-Sloss v Charity Commissioners case provides helpful clarification on the non-financial factors that may be considered by charity trustees when exercising their powers of investment. (See commentary at APPENDIX C).

There is a growing acknowledgement of the link between settlement patterns and addressing climate change. More traditionally configured settlement patterns, which are mixed use and relatively dense, enable a reduction in the need to travel whilst supporting local services and public transport and taking up less land. Well planned development – as can be evidenced by traditional Victorian and Edwardian neighbourhoods - often based on relatively intense street patterns designed around commons and generous green spaces, can also support more efficient approaches to infrastructure provision providing a greater levels of custom per developed hectare whilst saving the amount of land taken for development, and providing significant recreational green space, bio-diversity net gain and cooling.

Equally, traditional mixed-use neighbourhoods often enjoy popularity with householders and businesses, supporting strong communities, and can lend a value premium on property sales and rentals.

The Building Research Establishment (BRE) highlighted the broad benefits that can accrue from this approach to development - well-illustrated by legacy schemes such as Poundbury, Tornagrain and Nansledan, whilst more recently a report Placemaking: a stewardship approach to creating communities, highlighted the benefits of adopting a stewardship-led approach to developing new communities.

In tandem with fabric-first measures for individual buildings and the greening of area-based water, waste, energy measures to substantially enhance the environmental and social performance of strategic scale new neighbourhoods, scheme layout & infrastructure has a critical role to play in addressing carbon reduction, climate change, water neutrality and achieving better social outcomes. As such it is natural territory for ESG investment.

As landowners and trustees increasingly begin to consider how land can best be stewarded in order to achieve broad ESG and placemaking objectives; as well as achieving financial objectives, the adoption of an ESG standard for strategic scale development could help to clarify a broad approach to delivering on 'value' on a broadly construed basis to support future-proofing, risk management and assist parties such as ESG investors, planners and others looking to identify ESG compliant projects.

If a land interest is able to adopt a patient approach to capturing value, there is an opportunity to participate in the long-term value created using some of the mechanisms briefly highlighted in this document, whilst also meeting a high standard of ESG performance.

Conclusion

This report is not exhaustive, however it aims to set out the key issues that landholders, (private and charitable) trustees and beneficiaries should consider in assessing and negotiating how land is taken forward for promotion and development.

Good projects emerge from good processes. Through anticipating the range of issues to be addressed, and highlighting the choices, areas of potential tension or conflict, and potential means for addressing these, it is hoped that this framework will assist land interests and trustees in their decision making.

The general principle guiding trustees is to preserve value in the property of the trust for the beneficial class. Predicting and assessing how value accrues in land and property however is challenging and increasingly more nuanced than at first glance. For charity trustees the specific provisions of the charity bring in an additional set of considerations. It is hoped that this report helps to illustrate some of the broader value considerations that should be taken into account, and processes that can be adopted to inform decision making and create as strong an alignment of interest between key decision-making parties as possible.

Tornagrain, courtesy of Moray Estates

APPENDIX A

A Decision Making Framework - Processes to help agree the best value route

At project inception, a workshop session might be structured to involve all trustees and beneficiaries to agree way forward and approach.

Depending on the number of beneficiaries/trustees (trustees and stakeholders in the case of a charitable trust), and complexity and scale of the development anticipated, this could take a whole day. It may require the input of an independent facilitator, and possibly specialist consultants who might be brought in for their expert knowledge and insight.

Session 1 – Key Objectives

- Identify respective beneficiary/stakeholder aspirations.
- Identify respective financial requirements and timeframes.
- Agree key principles to be adopted.
- Decision between profit or return.
- Agree communication method and frequency of reporting.
- Consider risks (divergent beneficiary views and/or size of development and potential proceeds in the context of the wider trust fund) and whether a blessing application would be appropriate for higher risk momentous decisions.

Session 2 – Market Conditions; Staheholder Interests & Comparators

- Commentary on local plan and other locally specific policies that may impact development prospects.
- Consider availability of water and energy grid capacity; waste processing and mitigations that might available.
- Consider any key stakeholder restrictions to development such as water neutrality constraints; environmental and conservation protections and flood risk.
- Consider national market conditions, political ambitions on housing and land supply, interest rates, build costs and point in property cycle.
- Consider comparable schemes and situations where land interest has taken forward land promotion and development.
- Consider likely local response to proposed scheme.

Session 3 – Development Delivery Options

- Identify all potential routes: options and issues (See p. 28-33).
- Identify options / structures to manage risk and capital outlay.
- Consider range of parties who might partner under each scenario.
- Shape business plan, including funding strategy, anticipated returns (as compared to market comparators) and a RAG risk analysis.
- Consideration of optimal tax and governance perspective.

Session 4 – Identification of shared value proposition, issues and aspirations
(i.e. review of different development options and evidence gathered)

- As between beneficiaries.
- As between beneficiaries / trustees (private trust) or trustees/stakeholders (charitable trust)

Session 5 - Evaluation of Options against Objectives

In order to structure a decision-making workshop to support a family agreement, or Memorandum of Understanding as to how to take forward a land promotion and development opportunity, the following table sets out a framework that might be adopted to support parties rate option scenarios against the following value indicators and issues in order to assist collective decision making:

	Sale of Land	Promotion Agreement	Option & Sale	Master Developer / Partnership	Direct Promotion & Development
Monetary Value					
Upfront premium					
Expected Land Receipt(s)					
Income stream arising					
Timing					
Short term					
Medium Term					
Long Term					
Impact on Value of Rest of Holding					
Direct					
Value impact on remaining acreage and properties (including capital value and rent returns).					
Indirect					
Increased footfall for farm businesses?					
Increased spend in local area					
Compatible with ELMs approach?					
Compatible with farm business water and energy requirements?					
ESG Value					
(see Table 1 above)					
Risk Mitigation					
(See Table 2 above)					

APPENDIX B

Standard Critical Path - Key Decisions

Critical Path Juncture	Lead Party	Instrument
Pre-Inception – decision to proceed	Trustees	Trustee Meeting
Evidence gathering and recording	Trustees / advisors	Research exercise / Project Business Plan
Decision on best and optimal use for land	Trustees / Beneficiaries	Estate Plan
Agree beneficiary / trustee objectives	Trustees	Family Agreement / Memorandum of Understanding
Agree respective land interest objectives where land pool is brought together	Trustees /Project Lead	Collaboration Agreement
Project Inception – decision on project objectives	Trustees /Project Lead	Project Business Plan
Agree common aspirations and principles between the parties	Project Lead / Trustees	Common Aspiration Agreement
Project Structuring – decision on how to take forward project	Trustees /Project Lead	
Identification of Delivery Partners	Project Lead	Marketing strategy
Self-promote – finance early-stage costs	Landowner project manager	Business Plan / Funding Agreement
Project Briefing	Project Lead / Landowner project manager	360 Degree Brief / Business Plan
Business Plan for the land promotion & development – irrespective of route	Project Lead / Trustees	Business Plan
Project Promotion – to achieve planning allocation and consent		
- allocation	Project Lead	Representation
- to planning permission	Project Lead	Outline Planning Application (or Hybrid Application to include 'place setting' first phase) / Local Development Order
Where decision is to dispose of Land		
Option: Housebuilder to exercise option	Agent / Trustees	Price negotiation
Promotion Agreement: Promoter to exercise disposal clause of promotion agreement.	Agent / Trustees	Marketing strategy
Self promoting land interest: disposes of permissioned land	Agent / Trustees	Marketing strategy
Under any of the above arrangements contractual obligations or covenants can be built-in to the disposal to provide for scheme quality or content.	Agent / Trustees	Land sale agreement / Covenant
Where decision is to retain an equity interest in the land:		
Land Enabling / Development Entity Structured	Trustees / Project Lead / Agent	Business Plan / JV Agreement / Corporate Entity
Master Developer in lead: agrees land transfer or phased draw down. Consortium or JV entity established.	Project Lead / Trustees / Agent / Legal Advisor	Land sale agreement / development agreement / joint venture or consortium agreement.
Landholder in lead: commitment of land to enabling and 'place building' vehicle / consortium.	Project Lead / Trustees / Agent / Legal Advisor	Transfer of land to land enabling 'place building' entity / Business Plan
Financing		
Landholder self-promoting – finance for infrastructure and enabling costs (longer term finance) to be raised.	Project Lead / Trustees	Funding strategy
Development Phase		
Procurement of property development partner(s) / builder(s).	Trustees /Project Lead / Agent	Common Aspiration Agreement / Building Lease or Licence / Joint Venture Agreement / Build Contract
Agree terms (outright sale of land; conditioned sale; build lease)	Trustees /Project Lead / Agent	Common Aspiration Agreement; Land Sale Agreement / Building Lease / Covenant
Oversight of counter-party performance on contract and delivery	Trustees /Project Lead	Contract
Estate Management		
Procure estate management partner	Project Lead / Trustees	Common Aspiration Agreement; Service Agreement; Estate Management Strategy.
Sale or lease of completed properties to householders or occupiers.	Project Lead / Trustees / Agent	Common Aspiration Agreement; Estate Scheme; Agreed form of transfers.

Poundbury, courtesy of Ben Pentreath

APPENDIX C

The Butles-Sloss Precedent

A commentary on the case and its potential implications for charitable trustee decision making is set out below. Whilst this case only applies to charity trustees when exercising their powers of investment, it is an interesting illustration of developing thinking and practice in this area.

Butler-Sloss v The Charity Commission – the pursuit of charitable purposes through ESG investing

In Butler-Sloss v The Charity Commission for England And Wales [2022] EWHC 974 (Ch) ("Butler-Sloss"), two charitable trusts sought a declaration that they were entitled to adopt an investment policy which excluded investments inconsistent with the Paris Climate Agreement, notwithstanding the fact that this strategy might be detrimental to the anticipated rate of return. The High Court held that trustees' powers to invest must be exercised to further a charity's purposes (in this case, "environmental protection" and the "improvement and relief of poverty"). Although the court ruled that this would normally mean maximising financial returns, it held that trustees had a discretion as to whether to exclude investments which they reasonably believed were in conflict with their charity's purposes.

Butler-Sloss clarifies, and helpfully restates (see [78]), the principles to be derived from the decision in Harries v Church Commissioners for England [1992] 1 WLR 1241 (the "Bishop of Oxford" case). It is trite law that the 'primary and overarching duty' on a charitable trustee is to further the purposes of the trust. In the Bishop of Oxford case, it was held that the purposes of the charity are usually best served by the trustees seeking to obtain the maximum return on investments, whether by way of income or capital growth: "most charities need money; and the more of it there is available, the more the trustees can seek to accomplish." Previously, it was thought that only in "comparatively rare" cases would trustees be justified in departing from this principle. Such cases might include situations in which there was a straightforward and direct conflict between an investment and a charitable purpose (e.g., a cancer research charity investing in tobacco shares), in circumstances where divestment would not result in significant financial detriment.

The decision in Butler-Sloss is significant because it establishes that charitable trustees have a considerably wider latitude in determining a suitable investment policy than previously thought. Mr Justice Michael Green held (at [78](6)) that "where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments," including where this would cause an appreciable detriment to the anticipated rate of financial return. The decision is focused on 'divestment' (i.e., 'negative screening'). Nonetheless, provided that trustees have regard to their obligation to maintain a reasonably diversified portfolio (see s.4(3)(b) of the Trustee Act 2000), its logic also extends to investment decisions designed to simultaneously grow the capital of the trust whilst promoting its charitable purposes ('positive screening'). Aspects of the decision could therefore be read across to inform the correct approach to the exercise of charitable trustees' discretion in relation to "mixed-motive" investments made under Part 14A of the Charities Act 2011.

Trustees must research and think about the relevant issues "responsibly and diligently" (at [84]), and would be "well advised" to have "set out their reasons" for their decisions in writing (at [86]). If trustees reach the "reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes" they should exercise their discretion "by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments." Clearly, the greater the anticipated financial detriment, the stronger the justifications for excluding a given class of investments will need to be (compare the Bishop of Oxford case, at p.1247).

Roussillon Park, courtesy of Ben Pentreath

Significantly, the Court re-emphasised that in considering the "financial effect" of a decision, trustees are entitled to take into account the risk that failing to divest could damage their charity's reputation and decrease support amongst its supporters or the public at large. If consumer pressure for ESG action continues to mount, this factor will undoubtedly take on increasing significance. Nonetheless, we think it relatively unlikely that interested persons amongst the public could legally compel charitable trustees to divest (using the enforcement provisions in s.115 of the Charities Act 2011), in light of the substantial deference granted to the decision making of trustees on this issue (see further below).

Although the Court observed that investments directly conflicting with a charity's purpose "should be avoided if possible," it declined to make this an absolute rule (paragraph [73]). We think this approach is sensible, for at least two reasons. First, in some cases, it may be difficult to define what constitutes a 'direct conflict' (see paragraph [70]), such that it should be automatically excluded. Second, this approach facilitates shareholder activism. For example, in this case, "even though the [charities] had divested their investments in fossil fuel companies, they still retained single shares in them in order to be able to exert pressure on green policies at shareholder meetings." (paragraph [18])

Perhaps the most significant remaining uncertainty rests in the Court's caution to trustees "to be careful" to refrain from making investment decisions with possible financial detrimental implications on "purely moral" grounds (at [78](8)). There are sound reasons underlying this longstanding principle (see, for example, the Bishop of Oxford case, at p.1247). As Rosy Thornton argues, this is because it is likely impossible to come up with "workable or objectively defined criteria for determining what constitutes an 'ethical' investment" (in the abstract) against which one could sensibly judge the actions of trustees." Questions will, however, undoubtedly arise as to the degree of connection required between a given charitable purpose and an investment, such that trustees can justifiably claim that they are not acting on purely ethical considerations that are entirely independent of the trust purposes. As noted by Mr Justice Michael Green, "the boundaries of law and morality are sometimes difficult to define and perhaps even more so in the context of charities, which are often underpinned by a strong sense of moral imperative" (at [64]). Would a charitable trust whose sole aim was the relief of poverty be justified in adopting the criteria ratified by the Court in this case? Given the inextricable link between the effects of poverty and the climate crisis, would this be sufficient to permit trustees to avoid their decision being characterised as one taken purely on moral grounds? Alternatively, what about a charity whose purpose was the advancement and protection of human rights?

In our view, the warning to trustees not to act for "purely moral" reasons should not be understood as implying that it is necessary to show that there is a potential financial detriment to the charitable trust, in order for a conflict to arise. For example, it is easy to envisage cases in which the ability of charities to persuasively advocate or campaign could be undermined by 'contradictory' investment decisions (even, say, where this would make no meaningful difference to the funding received from the public). Leaving such instrumental considerations aside, a power to exclude conflicting investments could arguably be justified by reference to the implied intentions of the settlor of the trust (who could, had they turned their mind to the question, have provided express powers of exclusion in the trust deed). From a practical point of view, this approach also has the advantage of avoiding courts becoming drawn into the heated ongoing debate as to whether divestment strategies actually succeed in raising the cost of capital in a way which meaningfully changes the behaviour and investment decisions of affected firms.

Lastly, there is much to be said for allowing charitable trustees substantial levels of discretion to adopt the investment strategy that they consider best suited to fulfilling their charities' purposes, with the Court adopting a relatively light-touch supervisory rule. First, it is reasonable to assume that, in general, trustees are better placed both to assess how investments might conflict with their charitable purposes and the potential opportunity cost arising out of any possible detriment to the rate of return. Further, in more complex cases, these decisions will also have been reached (as in this case) with the benefit of expert advice (see s.5 of the Trustee Act 2000). Second, in the case of charities, there are no beneficiaries from whom a trustee can seek consent for a proposed 'unconventional' investment strategy, which does not seek to maximise financial returns (see paragraph [52]). Third, from a more practical standpoint, this stance also helps to minimise the need for trustees to apply to the Court (as in this case) to seek approval for their proposed investment policy. This can be an expensive undertaking (perhaps prohibitively so, for smaller charities), as demonstrated by this litigation: at paragraph [92], the court noted, without expressing a view, the Charity Commission's concerns as to the level of costs incurred in this case.

In conclusion, Butler-Sloss is indicative of an increasing degree of trustee autonomy in the charitable trust context. It gives trustees greater latitude to advance the charitable purposes which underpin the trust when exercising their investment functions. There is increasing recognition that the way in which individuals and institutions allocate their investments is not value-neutral and can have substantial real-world effects, whether positive or negative. For this reason, we welcome the ruling as an invitation to charities to consider whether their purposes are best served by an investment strategy solely chasing the highest rates of financial return, and to develop their policies accordingly.

This commentary is directly quoted from C. Somers - Joce and T. Koch. (2022) Butler - Sloss v. The Charity Commisison: The pursuit of charitable purposes through ESG Investing Available at: https://blogs.law.ox.ac.uk/property-law-blog/blog-post/2022/07/butler-sloss-v-carity-commission-pursuit-charitable-purposes).

As with any case, it is subject to legal interpretation (the Somers-Joce and Koch commentary being only one of many) and professional advice should be sought to consider the application of the precedent set by the case to specific circumstances.

APPENDIX D

Resources

Nansledan, courtesy of ADAM Architecture

Key background references

The Kings Foundation, www.kings-foundation.org/resources.

The Stewardship Initiative, www.stewardship-initiative.com.

Role of Trustees

The essential trustee: what you need to know, what you need to do, Charity Commission for England & Wales 2024.

Development Process & Key Decisions

Placemaking: a stewardship approach to creating communities, 2024 Farrer & Co and ADAM Architecture.

Building In Beauty, Knight Frank 2020 property research for the Building Better Building Beautiful Commission.

Planning and Design Quality: creating places where we want to live work and spend time, RTPI 2019.

Building a Legacy; a landowner's guide to popular development 2016, UCEM for the Prince's Foundation.

Comparative Financial Performance and impact of place-making

Cost & Value, Knight Frank 2020 property research for the Building Better, Building Beautiful Commission.

The Value of Place Making, Savills 2016.

Valuing Sustainable Urbanism, Savills 2007, for the Princes Foundation and English Partnerships.

The value handbook, Getting the most from your buildings and spaces, CABE 2006.

Be Valuable – a guide to creating value in the built environment, Richard Saxon for Constructing Excellence 2002.

The value of good design: how buildings and spaces create economic and social value, CABE 2002.

Environmental & Financial Value of Urban Layout

Growing Cooler, Urban Land Institute, https://www.jtc.sala.ubc.ca/reports/GrowingCooler_report_Sept%202007.pdf

Municipal Finance & the Pattern of Urban Growth, Enid Slack 2006, Institute on Municipal Finance and Governance Munk Centre for International Studies University of Toronto, https://imfg.org/uploads/100/international_joint_commission_paper_sep_06.pdf

Smart growth: a sustainable strategy for urban development and regeneration, Building Research Establishment, C Clear, J Fisher and G Mayhew 2012.

Walkability and Mixed Use: making valuable and healthy communities, 2020 The Prince's Foundation with Knight Frank, Smart Growth Associates, Space Syntax.

Area Based ESG Assessment – present standards

UN-Habitat Planning Sustainable Cities – Practices and Perspectives 2010.

Draft Stewardship Kitemark, The Stewardship Initiative 2024, www.stewardship-initiative.com.

Swedish Green Building Council - CityLab

The SGBC has introduced Citylab, an optional program for creating sustainable urban areas. It is the first certification system for sustainable urban development developed for Swedish conditions. Different organizations and companies participate in this program, and sustainability is top of mind throughout the development process. Within Citylab, two different certifications are possible: (1) certification of the planning process for the implementation of urban development projects and (2) certification of the sustainability of a city district.

Design Guidance for Creating ESG Compliant Neighbourhoods

10 Characteristics of Places People Want to Live, RIBA 2019.

The Value of Community, UCEM for The Prince's Foundation 2016.

Shaping Neighbourhoods: for local health and global sustainability, Barton H., Grant M. and Guise R. 2010.

Valuing Sustainable Urbanism, Savills for The Prince's Foundation 2007.

International Precedents

Congress for New Urbanism, https://www.cnu.org/resources/what-new-urbanism.

https://www.cnu.org/resources/project-database.

Historic Approaches to Land and Development Arrangements and role of Trusts

The Transformation of Edinburgh – land property and trust in the 19th C, Richard Rodger, https://catdir.loc.gov/catdir/samples/cam033/00040347.pdf.

Disclaimer: The research cited above and within the main body of the report is produced to assist landholders, trustees and their advisors in undertaking research and testing of emerging development propositions and scenarios. The King's Foundation and the authors of this report accept no responsibility for the research material presented in the report nor on any digital format under which it may be published.

THE
KING'S
FOUNDATION

The King's Foundation. Registered in Scotland. Charity number SC038770.
Registered Office: Dumfries House near Cumnock, East Ayrshire, KA18 2NJ
T +44(0)12 9042 5959 | F +44(0)12 9042 5464 | W kings-foundation.org