

## MALVERN HILLS BILL

### NOTE ON THE STATUS OF THE CONSERVATORS (INCLUDING THE QUESTION OF WHETHER IT IS A PUBLIC BODY)

#### *The Conservators*

1. The Conservators were established as a body corporate with a seal by s.5 of the Malvern Hills Act 1884 (and re-established in the same form by s.7 of the Malvern Hills Act 1924. In that capacity, the Conservators were charged with (inter alia) the management and control of lands identified in the Acts which included substantial amounts of common land.
  
2. There are a number of other commons which are subject to similar arrangements established under private Acts of Parliament or schemes under the Metropolitan Commons Acts 1866 to 1878 or Commons Act 1876. These include (by way of example):
  - (i) The Wimbledon and Putney Conservators
    - a. A body corporate established by s.8 of the Wimbledon and Putney Commons Act 1871 with a power to levy.
    - b. 5 elected conservators, 3 appointed.
    - c. Registered charity number: 303167.
  
  - (ii) The Bansted Commons Conservators
    - a. A body corporate established by s.12 of the Metropolitan Commons (Bansted) Supplemental Act 1873 - a scheme made under the Metropolitan Commons Acts 1866 to 1878.
    - b. 8 conservators. 2 nominated (formerly by the owners of the soil of the commons, now the Council) and 6 elected by the vestry of the parish of Banstead (now 'elected' at an Executive Meeting of Reigate and Banstead Borough Council<sup>1</sup> as successors to the vestry of the parish of Banstead).
  
  - (iii) The Conservators of Epping Forest
    - a. By s.3 of the Epping Forest Act 1878, the City of London Corporation are the Conservators of Epping Forest.

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<sup>1</sup> <https://bansteadcommons.org.uk/about-us/>

- b. It is described on the City of London’s website as “a charitable trust charged with the management and regulation of Epping Forest”<sup>2</sup>.
  - c. ‘Epping Forest’ is registered as a charity on the Charity Commission’s website (registration no: 232990, from 24 March 1964) with Trustees named as “The Mayor and Commonalty and Citizens of the City of London”.
- (iv) The churchwardens of the Parish Church of Monken Hadley
- a. Incorporated as a “Body Politic and Corporate” by s.115 of the Enfield Chase Act 1777.
  - b. By s.60 of the Act, the Churchwardens, together with ten or more persons residing within the parish of Monken Hadley and assessed to the Poor’s Rates at rate of ten pounds or upwards each could form rules and orders for the governance and management of the common.
  - c. Now repealed by the Monken Hadley Common Act 2022 with the lands vested in the Monken Hadley Common Trust, which was to be incorporated as a charitable incorporated organisation (s.3) and registered as a charity (s.13).
- (v) The Dartmoor Commoners Council
- a. Established by s.3 of the Dartmoor Commons Act 1995.
  - b. A body corporate with a common seal (Schedule 2)
  - c. Members of the board: not exceeding 28, with 20 appointed by commoners, 2 by the Park Authority, 1 by the Duchy of Cornwall, 2 by persons appearing to represent the interests of landowners (excluding the Park Authority and Duchy of Cornwall) and 1 veterinary surgeon (s.3(2)) with the possibility of 2 members co-opted by the Council (s.3(3)).
- (vi) The National Trust
- a. Established as a body corporate (dissolving the previous Association incorporated under the Companies Acts 1862 to 1890) by s.3 of the National Trust Act 1907.
  - b. Board of trustees (minimum 9, maximum 15) who are the trustees of the charity (The Charities (National Trust) Order 2005, clause 3(1) and (4)). Chairman and Deputy Chairman of the Council are automatically members of

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<sup>2</sup> <https://www.cityoflondon.gov.uk/things-to-do/green-spaces/epping-forest/how-we-manage-epping-forest>

the Board of Trustees. Others are appointed by the Council, at least two of whom must be members of the Council (clause 3(5)-(7)).

- c. Council: 36 members, of whom 18 are elected by members of the charity (subject to eligibility requirements) and 18 appointed by the bodies specified in Part 3 of the Schedule (clauses 14, 16, 17)

3. The term “conservators” is discussed in Harris & Ryan ‘An outline of the law relating to common land and public access to the countryside’ (1967), under the sub-heading ‘Trustees’ in Chapter 5 ‘Acquisition, Registration and Management’ at 5-29:

*“In another class of trustee, also appointed under statutory authority, are the conservators of common land. These are persons appointed under the Inclosure Acts, 1845 to 1882, the Metropolitan Commons Acts, 1866 to 1898, and certain private Acts, and given powers of managing common land, preventing encroachments, making by-laws for the protection of the land and the prevention of nuisances on it, and of taking legal proceedings for the enforcement of the by-laws and generally on behalf of the commoners.”*

4. They are also discussed in Cousins and Honey ‘Gadsen & Cousins on Commons and Greens’ (3<sup>rd</sup> Edn, 2020) at 9-39 (in the context of suburban commons<sup>3</sup>):

*“An order usually contained provision for the appointment of a board of conservators to manage the common. Part I of the Commons Act 1876 envisaged that this would be done, although it was not directly required, and in certain circumstances the functions of the conservators might be vested in the sanitary authority (later the district council). The constitution and membership of the board varied from one order to another. Where an order related primarily to upland grazing and its regulation, it was not unusual for the board to consist of the lord of the manor and persons entitled to rights to graze. On the other hand, where the main use to which the common was put was of an amenity nature, the board was more likely to include representatives of the local inhabitants and local authorities, and in a number of such cases, the functions of the board were exercised by the council itself. Otherwise, a representative of an owner of the inhabitant was almost invariably included as one of the conservators....”*

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<sup>3</sup> Previously provided for by Part 1 of the Commons Act 1876 (now repealed)

5. In terms of a trustee's core duties, as set out in Tudor on Charities (11 Edn, 2023) at 17-088:

*"The main duty of the charity trustee has been said to be to carry out the trust according to the terms set out in the trust instrument.<sup>4</sup> This is the same duty as applies to trustees of private trusts. Charity trustees are not delegates of the body that appoints them.<sup>5</sup>"*

6. See also, to similar effect, Halsbury's Laws of England Vol 8 (Charities) (2025) at para 331:

*"The duties of trustees of charitable trusts do not differ in principle from those of non-charitable trustees<sup>6</sup>. Their primary duty is to execute the trust in accordance with its terms, whether contained in a will, a deed, a scheme or any other instrument, and with the general law, in the interests of the intended beneficiaries.<sup>7</sup>"*

7. As to financial arrangements, this is discussed in Harris & Ryan at 5-42, stating (inter alia):

*"If the management of common land is to include any extensive physical works, it is essential that there should be some provision for the financing of the scheme. This may vary according to the legal validity of the scheme; but, if it is a voluntary scheme, it follows that any contributions towards the expenses of administering it must be voluntary also. If, on the other hand, the scheme has been made under statute, then the financial powers will depend upon the terms of the Act. For instance, the Commons Act, 1876, gives comprehensive powers in relation to financial control: powers may be included in a Provisional Order for meeting the expenses of regulation by selling a portion of the common land; and money required for improvement or protection of the land may be raised subsequently by means of rates levied on persons and in respect of property benefitting therefrom, or by any means of the sale of any outlying or small portion of the common not exceeding one-fortieth of the whole area".*

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<sup>4</sup> Footnote in the original: 'Duke on charitable uses at p.116'.

<sup>5</sup> Footnote in the original: 'See RR7, *The Independence of Charities from the State* (2001), para 12 – <https://www.gov.uk/government/publications/independence-of-charities-from-the-state-rr7>.'

<sup>6</sup> Footnote in original: 'These include, eg, the duty not to deviate from the terms of the trust, not to profit from the trust, not to delegate the trust, to act impartially between the beneficiaries, to distribute the trust property only to those properly entitled, and to invest prudently: see trusts and powers vol 98 (2024) para 403 et seq. As to the duty to act gratuitously and the position regarding the remuneration of charity trustees see para 336. See also para 332.'

<sup>7</sup> Footnote in original: 'See *Andrews v M'Guffog* (1886) 11 App Cas 313 at 329, HL. Trustees are also subject to a statutory duty of care: see the Trustee Act 2000 ss 1, 2, Sch 1; para 338; and trusts and powers vol 98 (2024) paras 405–406. See also para 332 '

8. The footnote to the passage cited above refers s.14 of the Commons Act 1876 (now repealed).

This provided as follows:

*“A provisional order for the regulation of a common may provide for the raising from time to time by such persons interested in the common, and for such amounts as the Commissioners : think fit, of money to be applied towards the improvement or ' protection of such common, either by means of rates to be levied on the persons and in respect of the property who and which respectively will be benefited or principally benefited by such improvement or regulation, or by means of the sale of any outlying or other small portion not exceeding in the whole one fortieth part of the total area of such common.”*  
(underlining added as emphasis).

9. Thus, the prospect of funds necessary to maintain common land being raised by way of levy was not unique or specific to the Malvern Hills / Wimbledon and Putney Common but could be included within orders made Part 1 of the Commons Act 1876.

### ***The Trust as a public body***

10. The Bill does not and does not purport to alter the status, functions or duties of the statutory corporation currently known as the Malvern Hills Conservators.

11. There is no single universal definition of what constitutes a ‘public body’ (or ‘public authority’) which applies for all purposes and in all contexts in England and Wales. For example:

- a. for the purposes of the Freedom of Information Act 2000, a ‘public authority’ is a body listed in Schedule 1 to that Act or designated by way of Order made under section 5, or is a publicly owned company as defined in section 6 of that Act.<sup>8</sup>
- b. for the purposes of the Human Rights Act 1998, a ‘public authority’ subject to the duty in section 6 not to act in a way which is incompatible with a Convention right includes “any person certain whose functions are of a public nature” (section 6(3)(b)) but not in respect of acts which are of a private nature (section 6(5)).
- c. For the purposes of the Environmental Information Regulations 2004, a “public authority” means:

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<sup>8</sup> See sections 3-6 of and Schedule 1 to the Freedom of Information Act 2000.

- (a) government departments;
- (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—
  - (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
  - (ii) any person designated by Order under section 5 of the Act;
- (c) any other body or other person, that carries out functions of public administration;  
or
- (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—
  - (i) has public responsibilities relating to the environment;
  - (ii) exercises functions of a public nature relating to the environment; or
  - (iii) provides public services relating to the environment.” (Reg 2(2))

12. To the extent that the Malvern Hills Conservators is currently a public body for the purposes of a particular legislative regime, or its decisions amenable to challenge by way of judicial review,<sup>9</sup> that position would be unaltered by the Bill. Where the Conservators have taken the view, in a particular context, that it is not a public body or public authority subject to a particular legislative regime (or in a particular context) it is and remains open to a person who disagrees to challenge that decision through the measures currently provided for as a matter of general law (for example, by alleging amenability to judicial review in a claim for judicial review) or under the relevant statutory provisions (for example, by way of an application to the Information Commissioner or onward appeal to the First-tier Tribunal (General Regulatory Chamber) where information is sought under the Freedom of Information Act 2000 or Environmental Information Regulations 2004).

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<sup>9</sup> With the additional restrictions which apply where judicial review is sought in “charity proceedings”: see s.115 of the Charities Act 2011 (formerly s.33 of the Charities Act 1993); CPR Part 64 and for an example pertaining to the National Trust concerning management of trust property, *Ex parte Scott* [1998] 1 WLR 226.