Malvern Hills Trust

Special Meeting of the Board

Thursday 10 October 2024 at 7 pm

The Council Chamber,
Avenue Road,
Malvern, WR14 3AF

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Agenda

Introduction

1. Apologies for absence

2. Chair's Announcements

3. Declarations of Interest

Items for Decision

4. To consider the Consultation Responses and whether the Trust wishes to amend any of its proposals for a Private Bill as set out in paper A.

   Paper A

5. Urgent Business

6. **Date of Next Meeting**

   17 October 2024

7. Confidential item
   Resolution to exclude the public for discussion of item 8 and 9 on the agenda on the grounds that publicity would be prejudicial to the public interest by reason of the exempt or confidential nature of the business to be transacted (legal advice).

8. To agree response to Charity Commission — Paper B

9. Third party costs — Paper C

Malvern Hills Trust
Special Meeting of the Board
Consultation outcomes and whether any changes should be made to the Trust's proposals for a Private Bill in response.
10 October 2024

Background

Trustees are aware of the reasons why the Trust needs to update its governing Acts and the work which has been put into shaping its proposals over the last 10 years. The background to the Trust's two public consultations is set out in Paper A for the meeting held on 19 September 2024 ("Paper A").

At the end of the consultation period, a working group was set up at the Board meeting on 8 August 2024 and the group have reviewed all the key topic areas (land management, licences and leases, administrative provisions, constitution of the Trust and its objects) which had been identified by the Board as having attracted the most significant comments. The working group considered the background to the current proposals, sought additional input where needed and prepared reports setting out their recommendations. The first tranche of recommendations were considered at the Board meeting on 19 September. Since then there have been further reports and two further workshops on 20 September and 3 October. These have given trustees the opportunity to consider the remaining issues with the working group's recommendations and to request any additional information in advance of this meeting.

Consultation responses

The Trust again thanks those who responded to the consultation. The working group carefully considered all the responses.

As stated in Paper A, the consultation responses evidenced a degree of confusion about the Trust's status. The Trust is a charity and the trustees' duty is to act in accordance with the Malvern Hills Acts to care for the Malvern Hills and preserve the land under its jurisdiction as an open space for the enjoyment of everyone, and not to conduct its affairs for the benefit of any particular section of the public. Although this may mean some hard choices, when considering and responding to the consultation, trustees must act solely and exclusively in the best interests of achieving the Trust's objects.

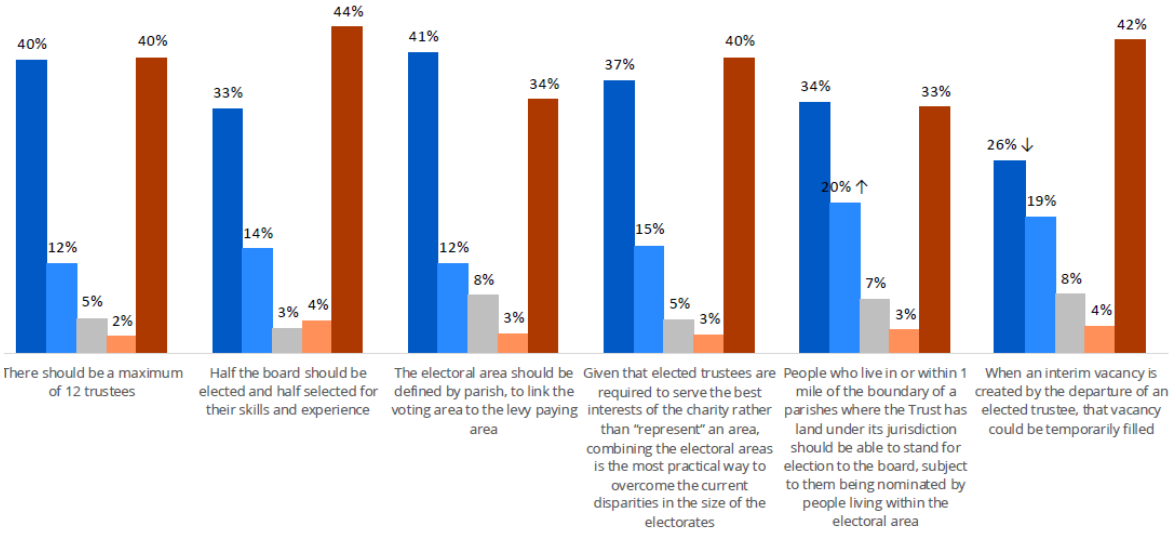
General points

Trustees are reminded that the Charity Commission have asked to be informed of any changes to the proposals which the Trust set out in its s74 application and which formed the basis of the Trust's public consultation.

The budgeted legal costs for the Bill were based on the proposals in the s74 application. Any significant changes in response to the consultation will incur additional costs.

Appointment of Board members

Consultation outcomes



Background

Trustees are well aware of the current process for appointing trustees and how this contrasts with what is considered good practice for a charity board. That the Trust is different from most charities because of its power to raise a levy means that special considerations must apply. At present there are 11 elected trustees, who make up 38 % of the Board. The reality is that few of these seats are contested in Trust elections (three in the 2023 elections and four in the 2019 elections). This means that most levy payers do not have the chance to vote and anyone who wants to stand has a good chance of getting on the Board, which is not a satisfactory method of appointing trustees by any criteria. Low turnout also means that a trustee can be elected by a very small number of the total electorate.

The Trust is in a position where a number of the bodies who have the opportunity to appoint trustees do not do so and none has a legal obligation to consider whether the trustees they do appoint have any skills or experience relevant to the running of a charity caring for a nationally important landscape with an income in excess of £1million per year. Most of the appointing bodies rely on finding volunteers and again this is not a good sole criterion for appointment. The Trust needs a board of trustees who are motivated by their obligation to put the interests of care of the Malvern Hills first and are equipped with the right skills and knowledge to do so.

Working Group

The working group was tasked with revisiting the following topics:

- The mix of elected and selected trustees and the number of trustees
- The electoral area
- The process for appointing selected trustees and the criteria for selection that need to be outlined in the Bill (a majority of consultees were in favour of an independent selection process).

The background to the present proposals on appointment of trustees is:

- More time was spend developing these proposals than any other area of the reforms.

- It was agreed at an early stage that there needed to be a different way of appointing trustees in order to meet the Charity Commission recommendation that trustees should be appointed for their relevant background, skills and knowledge. At the moment the Trust gets the trustees it is given. Originally the proposed number of elected trustees was the same percentage as now – around 40 %.

- The original plan was a Council and Board model similar to the National Trust. The Council would have a fixed composition, possibly with some members appointed by the bodies who currently appoint trustees but with a much wider membership including people with a conservation and land management background. The Council would appoint the Board (who would not have to be Council members).

- Whilst there was a range of views, as now, 12 has always been the number of trustees that a majority felt was right.

- A working group led by Prof John Raine interviewed trustees and staff and produced a report in October 2017. This formed the basis of the current model of six elected and six selected trustees, with the selected trustees being appointed by an independent panel, and one quarter of trustees retiring annually in rotation.

- Prof Raine also tried to find a model which might produce six separate voter areas using local government boundaries, but the Board's conclusion was it was not achievable to produce six areas with geographic links and something approaching similar voter numbers. The single voter area with a single list was preferred, particularly as elected trustees are not representatives of the area that elects them, but have to act solely in the best interests of the charity's objects. This, combined with widening the area from which people could stand for election, also reduces the risk of candidates being elected unopposed.

- There have been some refinements since then but this basic model was the basis for the consultation.

Consultation outcomes

From the numerical data, a majority of individual and organizational responses were in favour of a maximum of 12 trustees, defining the voter areas by parish, using one single voting area and extending the area from which people can stand for election.

The majority of organisations agreed that half the Board should be elected, and half selected, and that interim vacancies should be temporarily filled by the Nomination Panel. A 1 % majority of individual respondents disagreed with these two proposals.

Online consultation comments

Not all the comments reflected an understanding that the Trust is a charity, that trustees once appointed have to act solely and exclusively in the best interests of the charity's Objects and that there is a requirement for the charity to ensure no decision making should involve trustees with conflicts of interest.

There was a significant number of comments against the amalgamation of wards/parishes into a single voter area, which centred around levy payers wishing to appoint someone who was "accountable" to them and who would represent their interests (which as a matter of law they cannot). There were also a number of comments suggesting more than half trustees should be elected.

There was a recognition that having selected trustees opened up the opportunity to bring in skilled and knowledgeable people from outside the levy paying area, particularly as Malvern Hills and Commons are of national importance for nature conservation and as a recreational amenity. Others were of the view that all Trustees, including those appointed, should come from the Malvern area or be levy payers.

There were a few comments suggesting there should be places for "special interest groups" on the Board. (eg someone from Castlemorton or someone with "appropriate ecological expertise" or an environmental non-governmental organisation)

There were a number of suggestions about the composition of the Nominations Panel but no clear solution emerged.

Other comments

The Trust has been in contact with a number of people with an interest in its proposals to introduce a Private Bill and one has written to the CEO commenting:

"*Suppose there is a single-issue pressure group generally opposed to any development, and particularly the granting of easements. They put forward only six candidates and they make it quite clear that they are in the group which is opposed to development. I already think that you will experience low turnout, but many of those who do vote might just look for the six who are opposed to developments. Once they are trustees and with a mandate, the six will have a majority if any one of the other appointed trustees is absent or not appointed.*"

Trustees should take due note of this significant risk which would also apply to other pressure groups eg those for and against the cable car proposed a few years ago or an "anti-cycling" group. This risk would be greatest during the transition phase when all six

seats will be contested at once. In subsequent rounds usually a maximum of three seats would be contested, reducing the risk of a complete takeover from a pressure group.

The mix of elected and selected trustees and the number of trustees

The current proposals already increase the number of elected trustees from 38% to 50%. A further increase would not reflect either the current percentage of elected trustees or the financial contribution – generally around 40 to 45% of MHT's income - made by the levy payers (although it is acknowledged that this is substantial in monetary terms and the levy payers have no option but to make the payment).

In its response to the consultation, Malvern Hills District Council (MHDC) stated that it had seen "no compelling evidence" to limit the number of elected trustees to six, suggesting that it thought a higher number might be appropriate. However, they also acknowledged that trustees with relevant skills and experience would help the work of the Trust.

Working Group recommendations

There have been no compelling reasons advanced for changing the number of trustees from 12.

Twelve is the maximum number recommended by the Charity Commission for efficient decision making. This has been discussed by the Board on very many occasions and although there are differing views on the margins in favour of more or fewer trustees, the decision has always been that 12 is the optimal number and this was supported by the majority of consultation respondents.

The working group recommends no change to the current proposals

There was a 1% majority against equal numbers of elected and selected trustees. This did not differentiate between those who thought there should be fewer elected trustees and more selected for their skills and background or vice versa. There is a real risk to the Trust of a single issue pressure group influencing the composition of the board through the election process by having equal numbers of elected and selected trustees. It would be difficult now to seek to reduce the proposed number of elected trustees. Given that good practice is for a charity to select trustees for their skills and background **the working group recommends making no change to the balance of elected and selected trustees**

Extending the area from which candidates can stand for election

Working Group recommendation

This was supported by a majority of respondents and the working group recommends no change to the current proposal

Using the same definition for the electoral area and the levy paying area

Working group recommendations

This was supported by the majority of respondents and is the only logical choice. **The working group recommends no change to this proposal**

Single electoral area

This proposal was supported by a majority of respondents.

Dividing the voter area using local government boundaries runs the risk of voting districts being wrecked by future local government boundary changes. The vulnerability of trying to subdivide the area in this way is highlighted by the fact that the warding arrangements within Malvern Town were changed both in the review of the District Council electoral area and again in the review of Country Council divisions. The Trust understands that the proposal to make Worcestershire a unitary authority may be revived in the foreseeable future. Having a single electoral area future proofs the provisions of the Bill.

Having noted the comments in the consultation responses from individuals opposed to a single electoral area, in the workshops, the trustees considered three possible options for dividing the electoral area:

a) By parish and parish ward to form six divisions, each appointing one trustee. The downside, as identified, is changes to local government boundaries, as the Trust has learnt to its cost.
b) To have groups of parishes electing a trustee and then a single list within Malvern, eg Colwall and Mathon elect one trustee, West Malvern, Wells and Guarlford elect one trustee. Malvern elects four trustees from a single list. This carries less risk.
c) Dividing the area by map. An option identified at the first workshop was to divide the electoral area by use of a map. This could make use of existing local government boundaries where possible to simplify the creation of the Trust's unique voter lists, but the divisions would not be affected if local government boundaries changed. It would also allow for by-elections should a trustee leave during their term. The downside would be the cost of creating the Trust's bespoke electoral lists and reviewing them against the electoral roll every time there was an election. It would also increase the overall cost of the first elections.

Points to consider: one electoral area vs division of the area

This is not an exhaustive list.

Against splitting the electoral area:

1. Divisions defined by map or "former" parish areas would mean there may be no chance of the District Council running conventional elections in the event of future boundary changes, if the proposal for an entirely postal vote system did

not find favour in Parliament. The District Council could run conventional elections for a single area as long as the parishes still existed.

2. In terms of consultation responses, those against a single electoral area were in the minority (around 200 people opposed). To make a change would be against the balance of the views of consultees. Making the change to separate divisions' would affect perhaps 14,000 levy paying households on the basis of a response from 200 people, which is something the Trust should weigh very carefully.
3. Having divisions would increase the risk of getting areas where no candidates stand for election, or where someone is elected unopposed.
4. Having divisions would increase the risk of getting several good candidates in one division, (all but one of whom would be knocked out, to the detriment of the Trust). Hopefully with a single list, the Trust would get the best six candidates.
5. People (particularly those from outside the division) will be uncertain where to stand.
6. Having divisions would re-enforce the idea that electors have a "representative". The Trust has noted the concerns raised on this topic and has said that post-election/appointment, it would allocate a trustee to areas to act as liaison. This provision could probably be incorporated into the legislation.

Points with both benefits and disadvantages

1. The cost of running the elections directly affects the amount the Trust needs to raise by way of a levy. The table below sets out the cost of running an election over a single electoral area compared with the cost of running elections over six different divisions. Two companies have given "ball park" figures for the cost of running elections by post /online.

	Running an election over a single electoral area
	Running an election by division

	£	£
Malvern Hills District cost of conventional election over a single electoral area	87,972	
Postal elections	Company A	Company B
Cost of running an election over a single electoral area	29,000	38,000

Cost of setting up bespoke electoral lists. One company gave no time estimate, the other said two days	1,000 per day	950 per day
Running a ballot per constituency (about 5,000 electors)	6,750	8,000
Simultaneous election over all 6 divisions (ignoring cost of setting up the electoral lists)	40,500	48,000

It must be stressed that these figures are very much a best guess.

2. Dividing the electoral area would accommodate the comments from some respondents that smaller electoral areas would allow people to feel they had their own trustee. However, this would increase the risk of conflict of interest eg where there was an easement application, request for play equipment, signage on Trust land etc. Having the single list mitigates this to a large extent.

In favour of divisions

This would open up the possibility of holding by-elections if someone died/stood down, getting rid of the perceived problem of having a nominated trustee in the interim period before the next scheduled elections.

Working group recommendation

The working group makes no recommendation, save that if the proposal for a single electoral area is retained, the Parliamentary Agent should be asked to advise on including a provision in the Bill to require the Trust to appoint trustees to liaise with particular local areas.

Independent Nomination Committee

Whilst this was supported as a concept by the Board and in the consultation, the matter of how to constitute a nomination committee or panel was never satisfactorily resolved.

Selection and appointment of trustees is ultimately a board responsibility.

The Trust's lead charity law adviser (Con Alexander from VWV) has been asked for his views and the benefit of his wide experience. He commented as follows:

A large number of charities select new trustees by using a Selection Committee comprising trustees who carry out the selection process. Some other charities do have some independent input on trustee selection.

He could not see a way of setting up a completely independent trustee selection panel in a fool proof way. If external bodies are specified to appoint to a nomination committee, they may fail to act or there is a risk the body may in future be abolished.

The National Trust governance requires the nomination committee to have on it at least one member who is external to the charity and similarly, universities normally have a requirement for the committee nominating board members to have external members.

He suggests the Trust might set out a requirement to have a nomination committee as a standing committee, with a fixed composition of say two trustees and two external members with the CEO or other staff member included in an advisory but not voting capacity. The Act would need to define what was meant by "external", and might include criteria such as relevant expertise.

Bodies would advertise for their external committee/panel members, who might then serve for a set term. This would then leave the Trust in control of the appointment process but retaining a level of independence that would fetter the ability of trustees to appoint just from their associates or friends.

Trustees have seen a "worked up" proposal at the workshop on 4 October.

Working group recommendation

The working group recommends adoption of this proposal for appointment of selected trustees.

Electoral rules

Note: This was not a matter on which the Trust consulted but if the Trust was to set up its own electoral arrangements, there will need to be some provision for the Trust to set up regulations under the statutory framework. Comment was made in the course of the consultation process that there would need to be a cap on candidate's election expenses.

Conclusion

There is no perfect model for appointment of trustees. It is a case of finding an optimal arrangement that will work, which will minimise the chance of trustees being conflicted, and give the Trust the ability to recruit trustees with the right knowledge and skills to serve the interests of the charity. These factors need to be balanced with a recognition that those who pay the levy should have an appropriate say in the appointment of trustees.

Trustees have spent years considering the options. The present proposal balances those considerations although it does increase the proportion of elected trustees from

38 % to 50 % with attendant risks. All trustees are under a legal obligation to act in the best interests of the charity but this does not mean that all trustees necessarily will.

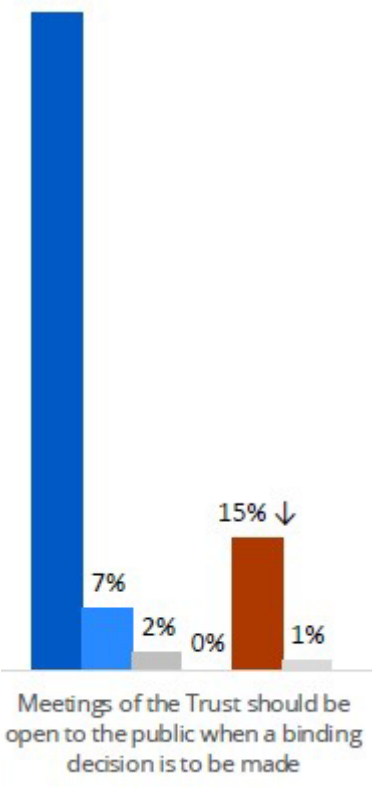
The single electoral area overcomes the problem of future boundary changes throwing the provisions in the Act into disarray.

If trustees wish to make any significant change to the arrangements they will need to work on them quickly, to leave time for drafting and for the changes to be put to the Charity Commission if the Bill is to be lodged in November 2024.

Miscellaneous

The working group identified a small number of topics which were not included on the schedules referred to at the meeting on 8 August, on which they felt they should comment. These were: public attendance at meetings, fixed penalty notices and a power to build.

Public access to meetings



Public comments

There were a number of comments expressing the view that all meetings of the Trust should be open to the public whether a decision is being made or not, and including in some cases where confidential matters were being discussed.

Present position

MHT meetings are open to the public under 1995 Act which incorporated the provisions of Part VA and Schedule 12A of the Local Government Act 1972. This includes all committee and sub-committee meetings. Trustee meetings at other charities are not normally open to the public. The present requirement to hold public meetings reflects the unusual position of the Trust, as a levying body and the Trust is content to be transparent in its decision making processes except where it involves legal, personnel or commercially sensitive matters, which must be discussed in the absence of the public.

The purpose of the committee system is to enable smaller and hopefully more specialist groups of trustees to work through issues surrounding a particular topic and make recommendations to the Board. The Board can then instigate a further discussion and a decision is made. With very limited exceptions, no decisions binding on the Trust are made in committee meetings. Meetings are closed to the public when exempt business is discussed (legal, personnel and commercial matters where confidentiality is essential).

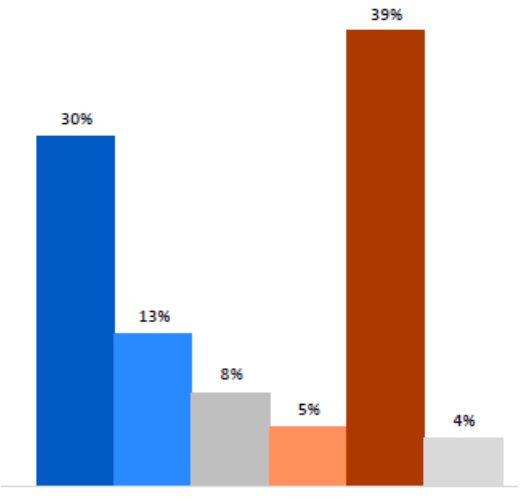
Current proposal

With a smaller Board it will be easier to have more effective discussion and decision making, so there should be less need to use committees. However, there will on occasions be a need for a committee to give detailed scrutiny to a particular topic (eg preliminary discussions on a budget or when a particular task is being planned). It is proposed that meetings where no binding decision is made should be closed to the public to enable trustees to have a frank and open debate. Because a committee's remit is limited to making recommendations, further discussion and the decision will be made in a Board meeting which is open to the public and the process will remain transparent. –

The proposal is also to have an express power to close meetings if the normal conduct of the meeting is being disrupted by members of the public.

Working group recommendation
The working group recommends retaining the current proposal to have meetings in public only where a binding decision is being made. (With a power to close meetings to the public where the conduct of the meeting is being disrupted).

Fixed Penalty Notices



Public comments

There were a number of supportive comments but also numerous comments expressing concern about the safety of employees issuing fixed penalty notices. There were also comments about the difficulty of observing and evidencing byelaws breaches and a small number of comments suggesting that this power would be used as a money making exercise or that this was the job of the police to enforce the byelaws.

Officer comments

The only option available to the Trust for enforcing byelaws (other than in relation to failure to display a parking pass or ticket in the car parks) is to take offenders to court. This is a cumbersome and extremely expensive process. The police have always declined to prosecute under the byelaws (although they can).

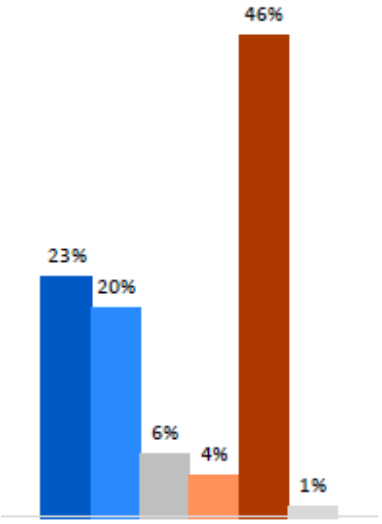
This power will never be a substitute for giving advice and an explanation why certain behaviours are not permitted. In reality, the power will only be used in limited circumstances – eg where there is a repeat offender known to the Trust

The Trust is fully aware of its responsibilities to its employees and should it be permitted to use fixed penalty notices, would need to put procedures and training in place for employee protection.

Working group recommendation

The working group recommend retaining a provision to allow the Trust to use Fixed Penalty Notices

Power to build



Subject to obtaining planning and other necessary permissions, the Trust should have a power to build in furtherance of its objects, on land which does not form part of the commons for the purposes as set out on page 50 of the consultation document

Public comments

The main concerns expressed were centered on this power potentially leading to buildings being used for commercial purposes. There was a query in the responses about current ancillary land and this is Lidiards, a field at Hollybed Common and the Trust's offices at Manor House.

Officer comments

The Trust clearly needs to have premises from which it can run its operations. At the moment the Trust operates from two sites, the office in Malvern Town centre and Top Shed at the Wyche. The Trust does not have a space big enough to host a board meeting, a full staff meeting, a training workshop for volunteers or a public information event. The Trust may in future want a facility for volunteers, to welcome and provide information for visitors and facilitate educational talks etc.

From an operational point of view, and to support a team ethos - the field staff and office staff have very limited contact with each other - it would be helpful to work from one site. The chances of finding a site with the right range of facilities is slim and the Trust's existing powers to acquire land need to be supplemented with a power to build on land acquired for operational purposes.

The Trust can already buy offices and build sheds. This is a minor extension to this existing power. For the avoidance of doubt the Trust has a power to sell, exchange or otherwise dispose of ancillary land and this power should be retained.

Like so many of the other proposed provisions, no plans have been worked up for any such project and it would need to be included in the business plan if the power is granted.

Working group recommendation
The working group recommends no change to the current proposal to include a power for the Trust to build on ancillary land.

Recommendations

Constitution of the trust
That the Board resolves to make no change to::

1. the proposal to have a maximum of 12 trustees
2. the balance of elected and selected trustees
3. the proposed area from which trustees can stand in Trust elections
4. to the proposal that the levy paying area and the voting area for the Trust are defined by the same criteria, namely the parishes of Malvern, West Malvern, Malvern Wells, Guarlford, Mathon and Colwall

And the Board resolves:

5. [decision on whether to retain a single electoral area], and if the proposal for a single area is retained, trustees should be assigned to act as liaison between the Trust and local areas..
6. To adopt the proposal for a nominations Committee as outlined in the paper.

Miscellaneous

That the Board resolves:

7. To retain the current proposal to open all Board meetings to the public (except where exempt business is to be discussed) but only to open committee meetings to the public where a decision binding on the Trust is being made under delegated authority.
8. To retain the provision to permit the issue of Fixed Penalty Notices.
9. To add the power to allow the Trust to build on ancillary land for the purposes set out in the consultation document.

David Core, John Michael, Mike Wilkinson, Sheila Wren
Working Group

Susan Satchell
Governance Change Officer
7 October 2024