

FAQs on the Management Committee decision to pursue a change of form of organization to become Co-operative Society.

What legal form of organization is our current set-up, Whitemoor Gardenholders Association?

We are currently an unincorporated association. This means that trustees represent the association legally; and they (or perhaps their families, after their death) are also legally liable for any claim against WGHA. Legal documents etc. have to be signed by trustees – the association itself doesn't have a legal identity.

Why do we want to change our form of organization?

The old 'trustee' structure is no longer considered sustainable or fit for purpose because of the legal risks trustees are exposed to. In today's world, where legal action against an association is more likely than it used to be, it is much harder to find people willing to stand to be trustees. Indeed, with families of trustees potentially legally liable after the death of the trustee him or herself, it seems frankly inadvisable to take on the role, and we do not want any individual or their family members to face such risks. Following Willie's death, we no longer have any living trustees.

The council would like us to be an incorporated organization so that they can deal with us as a legal entity – we would be able to enter into a lease as an association, not a group of individual trustees; they also don't want us to be at risk of legal action against individuals and their families, which could lead to a messy and damaging situation for the council too.

How have we approached finding out which would be the most appropriate form of organization?

The committee delegated investigation of this question to the legal sub-group.

We've read up on different options, including: Community Interest Company (CIC), Co-operative Society (CS), Company Limited by Guarantee (CLG); Charitable Incorporation Organization (CIO); Community Benefit Society (CBS). We also have thought about what we need – incorporation, which means that the organization has the ability to act as a legal entity so that individuals do not bear the risk of being sued; simple, democratic structure and governance; straightforward regulation.

We attended a meeting at Nottingham Community and Voluntary Service (NCVS) where we spoke to one of the advisers there – this was facilitated (and paid for) by the Council.

We have consulted the National Society of Allotment and Leisure Gardeners (NSALG) to find out about their recommendations for legal structures.

We arranged a meeting with John Kidger of the Nottingham Federation of Allotments and talked to him about various matters, including form of organization and the new lease offered by the Council.

Two members of the legal sub-group and our Chair had a meeting with the Allotment Officer, Alex Begg, to discuss issues to do with legal structures and the new lease.

Which legal structure have we chosen?

We are recommending the Co-operative Society (the former Industrial and Provident Society – updated by the 2014 Co-operative and Community Benefit Societies Act).

This description is pasted from an FCA (Financial Conduct Authority) document available on its website:

Co-operative society

Co-operative societies are formed primarily to benefit their own members, who will participate in the primary business of the society.

To satisfy us that it will be a bona fide co-operative, a society will normally have to fulfil the following conditions, the first four of which also reflect the International Co-operative Alliance's Statement on the Co-operative Identity:

- **Community of interest** - There should be a common economic, social or cultural need or interest among all members of the co-operative.
- **Conduct of business** - The business will be run for the mutual benefit of the members, so that the benefit members obtain will stem principally from their participation in the business. Participation may vary according to the nature of the business and may consist of:
 - buying from or selling to the society;
 - using the services or amenities provided by it; or
 - supplying services to carry out its business.
- **Control** - Control of the society lies with all members. It is exercised by them equally and should not be based, for example, on the amount of money each member has put into the society. In general, the principle of 'one member, one vote' should apply. Officers of the society should generally be elected by the members who may also vote to remove them from office.
- **Interest on share and loan capital** - Where part of the business capital is the common property of the co-operative, members should receive only limited compensation (if any) on any share or loan capital which they subscribe. Interest on share and loan capital must not be more than a rate necessary to obtain and retain enough capital to run the business. Section 2(3) of the 2014 Act states that a society may not be a bona fide co-operative if it carries on business with the object of making profits mainly for paying interest, dividends or bonuses on money invested with or lent to it, or to any other person.
- **Profits** - If the rules of the society allow profits to be distributed, they must be distributed among the members in line with those rules. Each member should receive an amount that reflects the extent to which they have traded with the society or taken part in its business. For example, in a retail trading society or an agricultural marketing society, profits might be distributed among members as a dividend or bonus on purchases from or sales to the society. In other societies (for example, social clubs) profits are not usually distributed among individual members but members benefit through cheaper prices or improvements in the amenities available.
- **Restriction on membership** - There should normally be open membership. This should not be restricted artificially to increase the value of the rights and interests of current members, but there may be grounds for restricting membership in certain circumstances, which do not offend co-operative principles. For example, the membership of a club might be limited by the size of its premises, or the membership of a self-build housing society by the number of houses that could be built on a particular site.

Why does the legal sub-group recommend the Co-operative Society structure?

It is the legal structure recommended by NSALG as most appropriate for an allotment society and they are able to offer support with setting one up. It is an incorporated form of organization, so we would exist legally and have limited liability. It exists for the benefit of its members, and is regulated by the FCA, the Financial Conduct Authority. It fits our purpose and the way we want to be organized.

We rejected other structures as follows:

Community Interest Company and Community Benefit Society – both these must be able to demonstrate that they operate for the benefit of the wider community, not just the membership. It is sometimes possible to demonstrate that allotments benefit their local communities, but it is difficult and open to challenge. We don't feel this accurately reflects what we are.

Charitable Incorporation Organization – the regulation involved with charities is far too demanding and rigorous for our small organization, and the benefits of charitable status not clear for our purposes. We would be disproportionately burdened by cumbersome regulation.

Company Limited by Guarantee – this model is a possibility, but the 'company' structure involves significant regulation as well as requirements for company directors. Accounts must be submitted annually, and regulation is by HMRC and Companies House. The personal details of directors are recorded as part of the registration. This structure seemed less appropriate than the Co-operative Society in terms of the identity of the organization.

Are there any disadvantages to the Co-operative Society?

There is no 'asset lock' in a Co-operative Society, though we should note that there is currently no asset lock with our unincorporated association. CICs have an asset lock, which means that if the organization is wound up, the assets held by the CIC have to be transferred to an organization with the same aims. We would be able to determine in the 'Rules' (constitution) how assets are disposed of in the event of the society being wound up, but the Rules can be changed. In the end we didn't think this should prevent us choosing the CS, because the key asset is the land, and we don't own that anyway.

Accounts must be submitted each year to the FCA for scrutiny.

There is an annual cost to maintain the registration.

What is the cost of setting up a Co-operative Society?

The registration of the Co-operative Society is approved by the FCA, the Financial Conduct Authority. Registering would cost between £40 and £950, depending on whether we used model rules (cheapest), model rules with a few amendments (next cheapest), or a bespoke/freely drafted set of rules (most expensive). There is an annual fee to the FCA of £60 to £460, depending on the society's total assets.

If we agree to set up a CS, how will the transition work? How long will it take, and what will happen to money and assets of WGHA?

An Annual General Meeting or Special General Meeting would have to agree to set up a CS – a meeting open to all tenants.

The FCA undertakes to register a new CS within three weeks of application, if the paperwork is all in order.

We plan, on the recommendation of the Allotment Officer, to set up the new organization in parallel to the old one. When the new CS is registered, tenants would be able to join it. We envisage that this would happen at the next rent-taking in October 2019. Rent would be paid into the account of the new CS. The Allotment Officer advised that the old WGHA could continue to hold the current lease, but the rents would be paid to the new CS and financial assets could be transferred to the new organization. When the old lease runs out (2026) or when we decide to move to the new lease (perhaps in 2021, when our rent is revised and brought in line with direct let rents), it would be the new CS that signs the lease. The old Association would be wound up.

It's not quite clear how the parallel working would operate – would plot holders sign a tenancy agreement with WGHA or with the new CS? Would the CS be a tenant of WGHA? We need to find out more about how this will work, but the Allotment Officer was very confident that it would be possible and would not be problematic, because it would be in the interests of all parties.

Where can I find out more about Co-operative Societies and their legal set-up?

The FCA website has comprehensive information – here's the link:

<https://www.fca.org.uk/firms/registered-societies-introduction/co-operative-community-benefit-societies-act-2014>

Does this process have anything to do with the new lease?

Not really. Because the Council's wish to move allotment sites to a new lease is (coincidentally) happening at the same time as we urgently need to address our legal structure as an organization, it is easy to conflate the two. However, the two issues are not causally connected, and changing the form of organization will not mean that we immediately have to sign a new lease.

The issues over the lease are the same, regardless of our form of organization.

If we were to set up a CS, the two organizations would exist in parallel, with the existing WGHA holding the lease – it cannot be transferred to the new organization. The lease runs until 2026, but in 2021 our rent will be reviewed (this happens every 5 years) and will be linked to direct let rents. At this point, we anticipate that we would face a very large rent rise unless we decided to accept the new lease. The new lease would be signed by the CS. If we decided not to accept the new lease, our old lease could be retained until 2026, but at that point we'd be forced to accept whatever lease the Council offered.

If we don't change our form of organization, we will hold our current lease potentially for its duration. The lease runs until 2026, but in 2021 our rent will be reviewed (this happens every five years) and will be linked to direct let rents. At this point, we anticipate that we would face a very large rent rise unless we decided to accept the new lease. It's not clear how we would be able to

sign the new lease because we have no trustees to sign it. If we decided not to accept the new lease, our old lease could be retained until 2026, but at that point we'd be forced to accept whatever lease the Council offered. If we chose not to sign a new lease, or if (as seems likely) we were simply unable to sign one due to our lack of trustees, we would revert to being a direct let site, which will involve a very large rent rise, and which the Council doesn't want either. Or we would cease to exist as an allotment site. If we did want to sign a lease, it's not clear how we'd do this without trustees.

What happens if we do nothing to change our form of organization?

We exist in a precarious legal situation, with a lack of clarity as to who bears legal responsibility if the organization is sued – possibly the families of our late trustees. We have insurance, of course, but it might well be considered irresponsible not to resolve our legal predicament, when the means to do so has been provided by the establishment in law of various organizations suitable for social enterprises.

In 2021, lacking the ability to sign a new lease, we would face a very large rent rise as our rent is pegged to the rent charged for direct let sites.

In 2026, lacking the ability to sign a new lease, we would be unable to continue as a leasehold site unless we could persuade more people to become trustees of WGHA. The legal sub-group of the committee would advise any tenant against becoming a trustee, because of the legal liabilities that trustees or possibly their families would be exposed to. We'd probably have to become a direct-let site, or cease to exist as an allotment site.

In our view it is unsustainable to continue as an unincorporated association without any living trustees; and it would be unethical to accept new trustees, as they would be taking on risks none of us would accept.