

THE FUTURE OF THE REC – LEGAL ISSUES

As part of the Strategic Review, BathSport has been asked to provide background to the legal aspects of its proposals for the development of the Recreation Ground ('the Rec'). The Trustees for the Recreation Ground have already suggested that as part of the review and consultation process, legal advice will be required.

This document is the BathSport contribution to that legal process.

BACKGROUND

BathSport has always had a clear vision that community development of the recreational area of the city is the strategic route forward. It also offers a viable solution to the essential outcome of Bath Rugby staying on the Rec.

The BathSport initiative has always viewed the charitable status of the majority of the recreational heart of the city as an opportunity rather than an encumbrance. Furthermore, the critical role of the Charity Commission has been recognised and accepted from the outset.

The Charity Commission is the arbiter for the future of the Rec based on a screening for legal acceptability. A process to determine the future must first satisfy the Charity Commission and allow its statutory and regulatory obligations to be discharged. This step is likely to eliminate some options prior to assessment of other technical and financial aspects.

At present there are two types of development proposal in the public domain which have been used illustratively in the consultation phase of the Strategic Review:

- Option 2 i.e. a rugby-centric proposal (the 'Bath Rugby scheme') consisting of a new stadium only (which reduces existing amenities by excluding the clubhouse and replacing seating with standing on the temporary east stand) and is intended primarily to meet Bath Rugby's own business needs.
- Option 3 i.e. a community-centric proposal (the 'BathSport scheme') consisting of a community arena, together with a recreational, leisure and cultural complex, providing a broader range of facilities than presently exist; additionally it incorporates new community facilities at Bath Cricket Club.

THREE ISSUES – THREE TESTS

Each option requires scrutiny of legal aspects at various levels to produce a persuasive argument to the Charity Commission which supports future development. The key components are:

- Assessment of the Existing Covenant
- Adherence to Legal Principles, and
- Proposal of new Charitable Purposes.

1. Assessment of the Existing Covenant

The historical intention can be gleaned from the initial 1894 lease from the Bathwick Estate which allowed commercial development of the Rec according to the prospectus “in such a way as to render it suitable for county cricket matches, lawn tennis tournaments, football matches and other sports” with the prime aim of “materially increasing the attractions of the city”.

For the purposes of registration with the Charity Commission, the current objects of the Trust were taken from the habendum of the 1956 conveyance. The words are so important in what will be allowed on the Rec that any analysis must provide space for them:

“The use with or without charge of the whole or any part or parts of the property hereby conveyed for the purpose of or in connection with games and sports of all kinds tournaments fetes shows exhibitions displays amusements competitions or other activities of a like character and for no other purpose and shall maintain equip or layout the same for or in connection with the purposes aforesaid as they shall think fit but so nevertheless that the corporation shall not use the property hereby conveyed otherwise than an open space and shall so manage let or allow the use of the same for the purposes aforesaid as shall secure its use principally for or in connection with the carrying on of sports or games of all kinds and shall not show any undue preference to or favour any particular game of sport or any particular person club body or organisation.”

The High Court was not invited to determine what uses of the Rec are compatible with the charitable trusts. However, the judge offered wise and pertinent comment, and recognised that:

- The conveyance contains an elaborate formula trying to balance use for games and sports, and the retention of open space;
- There is no express reference in the conveyance to the charitable imperative of public benefit, but it is implied;
- The use of the facilities can be restricted from time to time to persons identified by membership of particular clubs, bodies or organisations;
- The public nature of a local authority favours the conclusion that the dominant intention was to be the maintenance of a public recreation ground. Nevertheless, there is nothing in the conveyance which expressly dedicated the land to public use, nor has this been the case in its commercial history;
- The letting powers – combined with the lack of any expressed requirement for letting income to be committed to the trust – suggest that the lettings themselves do not have to be part of some overriding purpose beneficial to the public;

- There is nothing in the express wording of the conveyance which would prevent the whole of the Rec being let on a commercial basis, in such a way as to wholly exclude the wider public for the duration of such lettings.

The High Court was finally, and narrowly, persuaded that the trusts are valid charitable trusts.

In determining the future use and development of the Rec, it is notable that:

- There is a requirement for broad public benefit not limited to Bath citizens alone, although in practice the beneficial area is mainly Bath & North East Somerset as noted in the register of charities.
- Both direct (those persons participating in recreational activities) and indirect (spectators and visitors in general) public benefit has to be embraced;
- Recreational use and broader public appeal has to be balanced and optimised.
- Charitable objects are met by providing open space, together with buildings and facilities.

It is fair and reasonable to conclude that the Rec has always been more a public amenity space than a typical recreation ground.

2. Adherence to Legal Principles – The “Three Tests”

There are three key legal principles – open space, private benefit and undue preference – which are of particular relevance to the future of the Rec.

- **Open Space** – is a relative and not an absolute concept in the context of the Rec, although it is of paramount importance. It is implicit in the conveyance, and accepted in the register of charities, that activities on the open space would be supported by some built enclosures and structures. Any future development must increase the open space rather than encroach into and reduce it.

The BathSport scheme, by partly relocating existing buildings onto council-owned land to be gifted to the Trust, will increase the area of charitable land and increase the open space by ca. 20%, whereas the Bath Rugby scheme requires a larger long-lease footprint and temporary stand thereby reducing open space.

- **Private benefit** – this must be incidental to achieving the charitable purposes. Such private benefit is acceptable if it arises as a necessary, but incidental, consequence of pursuing charitable purposes and the amount of benefit is reasonable in the circumstances.

Bath Rugby, in its current legal form as a commercial company promoting professional rugby as its primary purpose, comes into the category of private benefit. There is no doubt that Bath Rugby, as the only substantial and regular financial contributor, is necessary to help sustain a viable Trust; it is also of significant indirect public benefit through its economic impact on the city

(international/national profile, visitor attraction/spend) and a positive effect on many citizens (social/emotional welfare, civic pride).

Both the Bath Rugby and the BathSport scheme support the necessity of Bath Rugby's continuing financial contribution to sustaining the Trust, but the BathSport scheme provides greater public benefit thereby proportionately reducing private benefit to an incidental and reasonable level.

- **Undue Preference** – the conveyance stipulates that undue preference must not be given to any particular sport or body.

At present, Bath Rugby does not receive excessive use of the Rec as access is strictly limited in space and time, although its dedicated footprint on a long-term lease does require temporary extensions into open space. In return for Bath Rugby relinquishing its long-term lease and avoiding temporary footprint extensions, the BathSport scheme provides for a community arena which can meet Bath Rugby's spectator capacity needs with primacy of tenure on specified and limited occasions. The undue preference argument would be further diminished.

3. Proposal of new Charitable Purposes

The existing covenant is not fit for purpose. In attempting to balance requirements, it lacks clarity which leads to misunderstandings, disparate views and, often, frivolous opinion. New charitable purposes are essential to act as a unifying force and support a development route forward.

The new Charities Act reinforces the public benefit requirement for charities and extends charitable purposes. It also allows for new purposes that make more sense in today's society so long as the changes are consistent with what the charity was set up to do.

The Charity Commission has to be persuaded that the 1956 conveyance, adopted for registration in 2002 but by then almost 50 years old, is inappropriate for 2007 and beyond.

Three new purposes are clearly consistent with the narrow recreational content of the conveyance:

- Advancement of amateur sport – codifying the primary purpose of active participation in recreation.
- Advancement of education – a vital use of the Rec is the out-of-school education of children and young people in the community.
- Advancement of health – promoting activities that have a proven beneficial effect on health as an integral part of the council's 'Get Active' strategy promoted by Government policy.

A further new purpose in the Charities Act material to the history, location and context of the Rec, and which supports the development route, is:

- Advancement of community development – this purpose is directed towards support for infrastructure focused on the community rather than at an individual level e.g. to provide, maintain and improve recreational facilities and public amenities.

The Charity Commission will undoubtedly argue that built structures on the Rec should support outdoor recreation rather than provide indoor recreational facilities. It is likely that the community development purpose will need to be incorporated into a new governing document for a development route to be allowed on the Rec as a public amenity space.

Whilst the community development role of the Rec is entrenched in history, the argument in favour has to reflect its unique location and be based on the vision and strategic direction of the city itself leading to an economic revival. A comprehensive and powerful case will need to be developed and include key context considerations:



























- The 'Future for Bath Vision' – specifically the theme of "promote the city as a world class venue for sport and recreation" and the recognition of the Olympics 2012 opportunity to secure lasting benefit from a cultural and sporting offering. The BathSport scheme, but not the Bath Rugby scheme, provides a platform for this offer.
- Regeneration of the entire recreational heart of the city – the BathSport scheme is an integrated development for community benefit of all the charitable lands (i.e. the Rec and the Bath Cricket Club site); this will be attractive to the Charity Commission.
- World Heritage Site – the BathSport scheme will help to protect this status by removing ugly buildings in the entire recreational area with modern and World-Class architecture; it is very doubtful that the Bath Rugby scheme can offer an appealing contribution.
- Historical link with the city – the BathSport scheme offers a modern interpretation of John Wood's vision of a Royal Forum; the Bath Rugby scheme simply enlarges the built stadium structure in situ and neglects other eyesores.
- Open-View Corridor – the BathSport scheme provides a garden link to the city and opens up the views from the city centre towards the Bathwick Hills, and provides a green barrier between the arena and the nearby residential area; the Bath Rugby scheme increases the scale of built structures adjacent to the residential area and further blocks views from the city.
- 'String of Pearls' – the BathSport scheme provides a pearl at the heart of the city with riverside leisure amenities, together with links to the enhanced and increased open space of the Rec; the Bath Rugby scheme continues to turn its back on the river.

The attachment summarises the relative contributions of the BathSport and Bath Rugby schemes to the key legal issues and the elements of the vision for the sporting, cultural and recreational future of the city.

In conclusion, the BathSport scheme, unlike the Bath Rugby scheme, offers the prospect of a powerful and convincing case to the Charity Commission in support of the development route forward.

ATTACHMENT

RELATIVE CONTRIBUTIONS OF THE BATHSPORT AND BATH RUGBY SCHEMES

ISSUE	SCHEME	
	BathSport	Bath Rugby
Broad Public Benefit		
Optimised Recreational Use and Public Amenities		
Increased Open Space		
Incidental Private Benefit		
Acceptable Undue Preference		
Advancement of Amateur Sport		
Advancement of Education		
Advancement of Health		
Advancement of Community Development		
'Future for Bath Vision'		
Integrated Use of All Charitable Lands		
Protect World Heritage Site Status		
Enhanced Open-View Corridor		
Contribute to 'String of Pearls' Riverside	