

BRISTOL CITY COUNCIL

BRIEFING NOTE

For:
Informal Cabinet

22nd April 2010

Title: Community Access to School Playing Fields

Department: Children and Young People's Services

**Officer presenting report: Michael Branaghan, Service Manager
Capital, Assets and Access**

RECOMMENDATION

That:

- a) The investment into Purdown and Stoke Lodge should be allowed to continue.
- b) Schools should be approached individually to see whether they are willing to allow open access to the playing fields and an evaluation of the cost implications for those schools established and reported back to informal cabinet for further evaluation and possible wider scrutiny and discussion.
- c) In undertaking an evaluation of the cost implications for open access arrangements the revenue and capital implications are identified and possible funding sources identified.

1. INTRODUCTION

- 1.1. Tenders have been received for the construction of the playing field at Fairfield School on Purdown and the erection of a bridge link across Muller Road (from Fairfield School to the new playing field). Authority to award the tenders, valued in total £496,930, is subject to delegated approval.
- 1.2. Additionally, funding is available to complete a major refurbishment of the Cotham School playing fields at Stoke Lodge. This is to be funded from Section 77 funding and a grant from Sport England.

- 1.3. The Executive member has indicated that the schemes should be frozen until a decision on the future of open access to school playing fields is made.

2. BACKGROUND INFORMATION

- 2.1. There has been a growing concern within local communities about the loss of green space within the city. Although the city has an extensive green heritage, there are still a number of communities where there is insufficient access to quality green space. Work, undertaken by the Parks Team within the Neighbourhoods Department, to develop the Area Green Space Strategy (and associated Green Space Plans) has identified a number of CYPS sites that might contribute to accessible open space provision.
- 2.2. The following Neighbourhood Partnership Areas are under the minimum quality standard of 18m² per person (and where no resident is further than 400m from an accessible open space) as established within the strategy. These are:
 - Bishopston, Cotham and Redland;
 - Cabot, Clifton and Clifton east;
 - Ashley, Easton and Lawrence Hill
- 2.3. During the delivery of the Secondary School Investment Strategy, through the Building Schools for the Future Programme and earlier capital schemes (including the development of Fairfield School), representation has been made by local communities about the loss of access to green space and some school playing fields associated with the investment initiative.
- 2.4. In November 2009, four cases were highlighted by Informal Cabinet:
 - Fairfield School – the loss of green space to the proposed development of playing pitch facilities at Purdown;
 - St Bede's – the loss of access to playing fields following the removal of gated access to school playing fields (this issue has since been resolved by the creation of additional community access to existing public open space adjoining the school);
 - Stoke Lodge Playing Fields – the proposed exclusion of public access to school playing pitches;
 - Bishop Road Playing Fields – the exclusion of the public to school playing fields
- 2.5. This report seeks to address the issues raised and identify an acceptable way forward which meets the needs of the schools and local communities.

2.6. The report is structured into seven key areas to address the questions that open access would generate:

- What is the DCSF view on community access to school playing fields?
- What powers does the local authority have to direct a governing body to provide open access to school playing fields?
- What impact would open access have in terms of the potential for registration of land as a town green or village green under the Commons Act 2006?
- What are the health and safety implications of a decision to provide open access to school playing fields?
- What are the crime/antisocial behaviour impacts of adopting open access to school playing fields?
- What are the potential revenue implications of a decision to provide open access to school playing fields?
- What are the implications for Stoke Lodge and Purdown if investment were frozen in favour of open access?

DCSF GUIDANCE ON COMMUNITY USE

2.7. The DCSF have published guidance to local authorities in their document 'The Protection of School Playing Fields and Land for Academies - July 2007'. In this publication the DCSF consider that school premises are a resource not only for pupils, but also for the wider community. With this in mind, local authorities and schools are encouraged to seek out opportunities to develop their community role in a formalised access arrangement to protect the playing field from wear and tear, and possible abuse. A summary of the DCSF perspective is provided in Appendix A.

2.8. Many schools in Bristol do allow structured community access to playing fields. This demonstrates that solutions are possible, but need to be progressed on a bespoke basis that recognises the needs of local communities; the status of individual schools; and their vision/values etc.

THE LOCAL AUTHORITY'S POWER OF DECISION

2.9. The control of school premises is subject to the provisions of the School Standards and Framework Act 1998¹ (SSFA). This includes playing fields (both detached and not detached) in

¹ School Standards and Framework Act 1998 Schedule 13

educational use. Appendix B summarises the Local Authorities powers in terms of community, foundation and voluntary schools.

- 2.10. The SSFA states that the occupation and use of school premises (both during and outside school hours) within a community school is under the control of the governing body² and is subject to any directions given by the Local Education Authority³.
- 2.11. In practical terms the direction given by the Local Authority to community and voluntary controlled schools relates only to how the school premises should be used. The direction does not take away the governing body's responsibility, but can cover matters such as making sure that the community use of the school's facilities does not affect the day-to-day use of the facilities by pupils (e.g. making sure the outdoor sports pitches are not overused).
- 2.12. A decision to agree open access to school playing fields by a foundation school or voluntary school would be at the discretion of the governing body.
- 2.13. When a local authority is considering an open access policy to school playing fields it is Counsel's opinion⁴ that the Authority should seek to persuade the governing body that they themselves should willingly adopt a policy of open access.

THE LEGAL STATUS FOR SCHOOL PLAYING FIELDS

- 2.14. The Commons Act 2006⁵ allows for the registration of land as a town green or village green where:

"... a significant number of inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on land for a period of at least 20 years".

- 2.15. If an open access policy were to come into effect on school playing fields (this potentially could include informal recreational use⁶), and remain so for a period of twenty years or more the prerequisite qualification for registration would potentially be met. Appendix D summarises earlier Counsel Advice on the potential mitigation for the establishment of registration rights under the Commons Act 2006. Unfortunately, this advice has been superseded by a judgement of the Supreme Court on 3rd March 2010 in the Redcar case⁷. This case has set a precedent which offsets previous mitigation to registration.
- 2.16. The judgement of the Supreme Court is important in two respects:

² School Standards and Framework Act 1998 Schedule 13 paragraph 1

³ School Standards and Framework Act 1998 Schedule 13 paragraph 1(3)

⁴ Nigel Giffin QC, Bristol City Council: Access To School Playing Fields, 14th December 2009, par 7, pp 2, fn 3

⁵ Commons Act 2006 s15

⁶ *R v Oxfordshire CC ex p. Sunningwell PC* [2000] AC 335

⁷ *R v Redcar and Cleveland Borough Council & anor* [2010] UKSC 11

- It has made it materially easier to register new greens;
- It has further explained the consequences of the registration of a new green.

2.17. The outcome of the decision is that registration is now possible, after twenty years open access use, even though the land owner had given revocable permission for such access. The implications for a landowner requiring the land in the future for development purposes are that such future aspiration will be frustrated where a period of twenty years or more has elapsed since community access was available. Landowners now need to proactively take steps to keep people their land to prevent future registration.

2.18. For the City Council, this implies that there is no option for revocable permission after twenty years community use of a school playing field if there is a desire to utilise the playing field for other development uses in the medium/long term future. Subsequent registration would impact on the ability to declare a playing field surplus in the future. This would reduce opportunities for future capital receipts.

HEALTH AND SAFETY ISSUES

2.19. There is a duty of care owed to pupils in a school in relation to their physical safety. It is possible that if members of the public were to make use of a school playing field they may leave behind detritus that could pose a risk to the health and safety of pupils using the field for sport as part of the delivery of the curriculum. Such detritus could include broken glass, dog faeces and 'sharps'. There is also the possibility that the grounds themselves, or equipment (such as goal posts and artificial cricket wickets) could be damaged creating additional health and safety risks.

2.20. Appendix E identifies the potential liability arising from open access.

2.21. There would be a need to undertake individual risk assessments for each school playing field where open public access was permitted. Although some risks will be similar, there are some which would be bespoke and related to the proximity of the field to residential dwellings or other facility such as a public house or off-licence.

2.22. It is inevitable that the each school would be required to undertake an inspection and risk assessment on a daily basis (and possibly several times a day where access was occurring on a 24 hour a day basis).

CRIME AND ANTISOCIAL BEHAVIOUR

2.23. Where a school playing field adjoins school building assets there are issues relating to the possibility of crime/anti social behaviour

occurring by virtue of the open access to the school via the playing fields.

2.24. The issues that arise can be considered under three eventualities:

- Staff, pupils and visitors being subjected to violence, threats of violence, and harassment by individuals gaining access to the school playground and buildings from the open access playing fields during school hours;
- Staff, pupils and visitors being alarmed or distressed by acts of violence, criminal activity occurring on the playing field or in the school grounds (by individuals gaining access to the school playground and buildings from the open access playing fields) during school hours;
- Non CRB checked individuals using the open access to playing fields to gain access to vulnerable people in school.

2.25. Where the playing field is required for school activity, there may be difficulties experienced with the exclusion of the general public from the playing field. This is easily resolved when the playing field is gated and fenced, but places teaching staff and pupils at risk when members of the public have to be challenged for interfering with the delivery of the curriculum.

2.26. In terms of the security and safety of buildings, the mitigation would be through compartmentalisation of the school from the field by security fencing. In many cases this would require a capital investment from the school or the local authority.

2.27. The City Council's Underwriter has indicated that there is an expectation that school buildings would need to be segregated from the open access area by suitable secure fencing to provide mitigation against risk of damage etc to school buildings and contents.

INSPECTION REGIEME AND REVENUE IMPLICATIONS

2.28. The need to establish an inspection regime was considered in paragraph 2.22. Appendix F summarises the issues that relating to the need for an inspection regime. Schools have indicated that if they are responsible for the additional pitch inspection it would be time consuming and have a financial impact on the individual school budget.

2.29. Colleagues from the Parks Service in City Development have been consulted on the maintenance requirements for open access. The cost of an operative and vehicle to undertake general site inspections etc, for 190 days each year would potentially cost between £6,650 (primary) to £14,250 (secondary) per school during school time. Open access beyond the 190 days would be substantially more costly (See Table One in Appendix F).

- 2.30. The existing maintenance costs for school playing fields are based on a bespoke regime negotiated between the school and the grounds maintenance contractor. The cost reflects the frequency of maintenance for each feature (grass is usually cut on a ten day frequency), the facilities on site and the level of security on the site. Secure sites tend to have less detritus than unsecured sites and therefore require less litter collections and a less intense inspection regime prior to mowing.
- 2.31. As part of the maintenance regime, the grounds maintenance contractor is usually responsible for undertaking an inspection of the grass surface prior to mowing. This is to ensure that there is no harmful detritus that may cause third party injury or damage to machinery and equipment.

IMPLICATIONS FOR THE STOKE LODGE AND THE PURDOWN CAPITAL PROJECTS

- 2.32. Within the current Capital Programme are two key investment areas in relation to school playing fields.
- Fairfield School - Purdown Playing Fields £496,930;
 - Cotham School - Stoke Lodge Playing Fields £1.6m

Fairfield School - Purdown Playing Fields

- 2.33. The Purdown scheme is for the construction of playing fields and the construction of a bridge to provide a link from the Fairfield School, across Muller Road, to the facility to be provided on Purdown (See Appendix I).
- 2.34. The fencing to be provided is either 'estate type fencing' or ball court fencing. This is dependant on location of the fence on site (See Appendix G and H). There is no other fencing proposed on the site.
- 2.35. Tenders have been received for this project and await approval under officer delegation and an order to be placed. This is on hold until a decision can be made concerning open access.
- 2.36. If the development of this project were suspended, there would be a need to continue funding of off-site facilities rental for formal games. There would also be a need for revenue funding for coach hire. Additionally, capital funding would be required to make permanent modifications to the frontage of the Fairfield School buildings to accommodate turning and parking facilities for coaches to pick-up students to take them to the off-site provision.
- 2.37. The changes to the site would require planning consent for the coach drop-off and pick up, and for the modifications to internal roads and building frontage. The estimated cost of the modifications would be £250,000.

Cotham School - Stoke Lodge Playing Fields

- 2.38. Stoke Lodge (including the north western side of the site) was acquired for education purposes in 1947. The south east site was an earlier acquisition for temporary housing purposes in 1946 and transferred to education in 1950.
- 2.39. Stoke Lodge Playing Field was formerly used by Fairfield High School when it occupied the premises at Fairlawn Road. When the school relocated to the new site in Allfoxtan Road the management of the site moved to Cotham School.
- 2.40. In August 2009 Cotham School entered into a short term agreement with Bristol University which allows the University to utilise the field for sport activity. The University, during the period of the agreement, undertake the management of the facility as part of the remuneration for this exclusivity.
- 2.41. The playing field is currently unfenced and allows unfettered community access.
- 2.42. The Stoke Lodge Playing Fields project proposes a major refurbishment of the field including the development of community facilities to the edge of the pitch, changing room improvements and pitch improvements. The scheme includes fencing to the perimeter of the site. It will be funded from a section 77⁸ consent for an investment of £1m (from the proposed disposal of a portion of land at the former Romney Infant/Junior Schools) that has DCSF approval⁹. Additionally, a £600k Sport England Grant has been awarded for the scheme.
- 2.43. If this project is suspended, the grant would be withdrawn and a new consent would need to be filed with the DCSF for the £1m investment to be targeted to another school playing field improvement scheme. The Cotham School would continue with their arrangement with the University.

3. FINANCE

Capital Funding

- 3.1. There has been a suggestion in the past that the capital funding allocated to the above schemes could be utilised to fund revenue elements of the site inspection and cleansing regime. CIPFA rules prohibit the allocation of capital funding to revenue work streams. Additionally, the two funding sources: the Section 77 funding; and the Sport England Grant are specific allocations to the Stoke Lodge scheme and would not be available for revenue funding work stream elements or unidentified capital projects.

Revenue Funding

- 3.2. The community use of school playing fields is not eligible use of the Dedicated Schools Grant which funds the education of pupils at the school. As such funding for the daily inspection/clean and costs for

⁸ School Standards and Framework Act 1998 Section 77 (5)

⁹ The School Playing Fields General Disposal and Change of Use Consent (No.3) 2004 order

repairing vandalism would need to be provided by the Council (e.g. through the devolved Neighbourhood Partnership Budget).

- 3.3. Where the playing field form part of a PFI school and are opened up for community use, there would be a significant additional charge as the access to premises is controlled through a legal agreement with specific 'community time' access already being utilised by the schools as part of their extended school provision.
- 3.4. Some schools have indicated that charges made for community access to their facilities is an important funding stream for the school. This income is often used to subsidise the extended maintenance of the facility where the school allow 'authorised' community access.

4. CONSULTATION WITH SCHOOLS

- 4.1. A number of head teachers have been consulted over the proposal to provide open access to school playing fields. The Head Teachers' perception is that the need for an inspection, every time a pitch is required for the delivery of the curriculum, is a significant resource hungry process.
- 4.2. The schools have indicated that they believe the health and safety of their children will be compromised especially as the children often use the playing fields first thing in the morning before the start of the school day. If there were a dangerous substance on the field and access was gained prior to the inspection there is a danger that the children may come to harm.
- 4.3. Schools have indicated a concerned about damage to property and the danger of possible trespass into the playground and school buildings. Many playing fields are not segregated from the main school buildings and would normally only be accessible through the school or a secure gated access. Open access would remove the security of the play ground and class room direct access unless additional investments were made into formal segregation of the playing fields from the school buildings and play grounds.

5. CONCLUSION

- 5.1. The Council is in a position to give direction or impose an open access policy on community schools and voluntary aided schools (where the playing fields form part of the Council's estate). This is not possible for foundation schools (including Trust Schools) or some voluntary controlled schools. If such a policy were adopted, there is a high probability that an application for registration would take place if the open access has been, or is permitted, for a period of twenty years or more. Previous mitigation against registration has been eroded by virtue of the Redcar case.
- 5.2. Many schools in Bristol allow structured community access to playing fields demonstrating that solutions are possible. The delivery of an open access strategy will need to be progressed on

a bespoke basis to recognise the needs of local communities; the status of individual schools; and their vision/values etc.

- 5.3. If the City Council wishes to retain opportunities for future development on school playing fields, options to avoid registration will need to be secured by placing a time restriction on the open access arrangement to ensure that the open access is only permitted for a period of less than twenty years in total. There would be a need to pass or publish a formal resolution to the effect that the open access would represent the granting of a revocable permission within this time frame.
- 5.4. Open access will require individual risk assessments to be undertaken for each participating school. Additionally, an investment will need to be made, either by the city council or the school, in terms of revenue to fund inspection and maintenance; and for capital investment in providing secure fencing to segregate playgrounds and buildings from the open access playing fields.
- 5.5. The investment into Purdown and Stoke Lodge should be allowed to continue as the alternative option is not suitable for long term delivery of the outdoor curriculum.

6. RECOMMENDATION

That:

- a) The investment into Purdown and Stoke Lodge should be allowed to continue.
- b) Schools should be approached individually to see whether they are willing to allow open access to their playing fields and an evaluation of the cost implications for those schools established and reported back to informal cabinet for further evaluation and possible wider scrutiny and discussion.
- c) In undertaking an evaluation of the cost implications for open access arrangements, the revenue and capital implications are identified and possible funding sources identified.

APPENDIX A

THE DCSF PERSPECTIVE – A SUMMARY OF ‘The Protection of School Playing Fields and Land for Academies - July 2007’

- 1.1. The DCSF consider that school premises are a resource not only for pupils, but also for the wider community. With this in mind, local authorities and schools are encouraged to seek out opportunities to develop their community role. This is because community use may bring about a sense of ownership and belonging to the school. In seeking these opportunities, authorities and schools are asked to give priority to activities which support and promote pupils' learning and the wider community generally. This includes homework and after-school club activities; other study support activities; basic skills courses; adult education; youth service activities; and family learning opportunities.
- 1.2. The DCSF understand that in many locations the school is the main or even only place that can provide the local community with sports and other facilities. The DCSF have decided that, in assessing applications for disposal or fencing of school playing fields under section 77, it is right that the Secretary of State takes into account community use of school playing fields. Where the fencing off of a school playing field displaces or disadvantages authorised community users, the Secretary of State will take into account the circumstances of the closing off of the playing field and of the alternative provision, if any, provided to the former users.

1.3. It is the DCSF view¹⁰ that only authorised community use of playing fields should be taken into account, whether or not such authorised use is covered by formal or informal agreements. Such use may be by:

- local sports clubs for practice or the playing of arranged games;
- local youth and community groups for sport or recreation, for example local scout groups;
- nursery, pre-school and day care groups;
- after school and out of hours groups;
- groups involved with educational programmes run in partnership with schools;
- Charitable groups for fetes, sports days, and other fund raising events on an annual or more regular basis.

1.4. There may be a misconception in the local community that school playing fields are public parks and, therefore, are open to any public access and use. The DCSF emphasise that school playing fields are provided primarily for the physical education and the enjoyment of children attending the school¹¹.

1.5. Although schools and authorities make their playing fields available for authorised community use, the DCSF are aware that unauthorised use may cause damage to these resources. Although it may appear to be harmless to allow children ad hoc use of school playing fields to kick a ball about at evenings and weekends, there is a likelihood that the quality of school sports pitches may suffer as a result. Sports pitches can only be used for a limited amount of time, particularly in extremes of dry or wet weather, and must be allowed periods to recover.

1.6. When the Secretary of State considers applications for the enclosure or closure of school playing fields no account is taken of unauthorised uses. Such unauthorised uses include:

- local residents exercising and walking dogs;
- unauthorised 'kick-around' by local children or as a golf practice range by local residents (unauthorised use of school grounds may also be considered to be trespass);

¹⁰ 'The Protection of School Playing Fields and Land for Academies July 2007', DCSF (2007), par 74. pp23

¹¹ 'The Protection of School Playing Fields and Land for Academies July 2007', DCSF (2007), par 75. pp23

- Use as an unofficial picnic, camping, or caravan site.

APPENDIX B

THE LOCAL AUTHORITY'S POWER OF DECISION

1. The SSFA states that the occupation and use of school premises (both during and outside school hours) is under the control of the governing body¹². This is subject to any directions given by the Local Education Authority¹³.
2. When a local authority is considering an open access policy to school playing fields Counsel opinion¹⁴ is that the Authority should seek to persuade the governing body that they themselves should willingly adopt the policy of open access. If necessary, the Local Education Authority is in a position to direct that there should be open access to school playing fields of community schools (but not foundation schools or voluntary aided schools). Such a direction would need to be specific about what is actually intended by allowing the open access. The exercise of this discretionary power by the local authority could be challenged on normal judicial review (see Appendix C).
3. If the local authority has taken proper account of the relevant considerations, including the views of the governing bodies of the

¹² School Standards and Framework Act 1998 Schedule 13 paragraph 1

¹³ School Standards and Framework Act 1998 Schedule 13 paragraph 1(3)

¹⁴ Nigel Giffin QC, Bristol City Council: Access To School Playing Fields, 14th December 2009, par 7, pp 2, fn 3

schools concerned, it is unlikely that there would be any viable grounds for a challenge under judicial review¹⁵.

4. The position in relation to foundation schools and voluntary schools is different. For a foundation school the control of occupation and use rests with the governing body and is not subject to any power in the local authority to give direction¹⁶. A decision by a foundation school or voluntary school would be up to the discretion of the governing body to agree to open access to its playing field. This is even though the SSFA¹⁷ requires the governing body, in relation to occupation and use outside school hours, to have regard to the desirability of the school premises being made available for community use. The governing body may still refuse to agree to an open access policy if they had some coherent reason refusal.
5. In the case of a voluntary controlled school, the Local Education Authority has some power of direction¹⁸ subject to a particular provision about weekend use¹⁹. For voluntary aided schools, the Local Education Authority has no powers to direct open space access to playing fields.
6. There are opportunities for a dispute between the Local Education Authority and a governing body to be referred to the Secretary of State for determination²⁰. A determination could result in an open access direction made by the Local Education Authority being overturned (and for a failure to agree to the implementation of an open access agreement by a governing body to also be overturned). Such intervention is only likely if the DCSF believed that one party or the other was behaving in a way that was seriously unreasonable.
7. Opportunities to enter into a transfer of control agreement with a third party may be a solution where there is a particular activity proposed on the playing field but Counsel advice²¹ is that it may not be an appropriate solution to achieving open access to a site.

¹⁵ Nigel Giffin QC, op cit, par 7, pp2

¹⁶ School Standards and Framework Act 1998 Schedule 13 paragraph 3

¹⁷ School Standards and Framework Act 1998 Schedule 13 paragraph 3(3)

¹⁸ School Standards and Framework Act 1998 Schedule 13 paragraph 5

¹⁹ School Standards and Framework Act 1998 Schedule 13 paragraph 7(1) and (2)

²⁰ Education Act 1996, s 495

²¹ Nigel Giffin QC, op cit, par 12, pp4

APPENDIX C

JUDICIAL REVIEW

1. The courts may intervene to quash a decision if they consider it to be so demonstrably unreasonable as to constitute 'irrationality' or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made in the *Wednesbury* case²²:

"If a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming..."

2. However, the threshold will be a lower one, that of proportionality, when European Union law or Human Rights Act breaches are involved. In general terms, the concept of proportionality requires a balancing exercise between, on the one hand, the general interests of the community and the legitimate aims of the authority and, on the other, the protection of the individual's rights and interests.

²² Lord Greene *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, HL.

3. One approach to assess the risk of judicial review is to ask:
 - Is the Authority's objective legitimate?
 - Is the measure suitable for achieving it?
 - Is it necessary, in the sense of being the least intrusive means of achieving the aim? And
 - Does the end justify the means overall?
4. The onus also lies upon the Authority to show that these conditions can be met²³.

APPENDIX D

THE LEGAL STATUS FOR SCHOOL PLAYING FIELDS

1. Counsel advice on the 'as of right' access by a neighbourhood or locality and the generation of the subsequent opportunity to seek registration of the land under the Commons Act 2006 may be prevented by virtue of the competing use of the playing field by the school and whether the governing body has acquiesced to the use of the facility by a neighbourhood or locality. If the governing body has, then registration might be possible. If on the other hand actions have been taken to indicate that such access is under licence only and as such the permission is revocable then the risk of registration is substantially reduced²⁴.
2. Such mitigation could be achieved by the placing of signs on the boundary of each site²⁵ stating that 'public use of the playing fields is

²³ Public Law Project Information Leaflet 3

²⁴ Nigel Giffin QC, op cit, par 18, pp6

²⁵ Nigel Giffin QC, op cit, par 18, pp6, fn 8

solely by the permission of Bristol City Council/the governing body of the school), and such permission may be revoked at any time'. Alternatively, closing the land to public use on certain days of the year might effectively demonstrate that such public use only took place with the land owner's permission.

3. Counsel has suggested that there are difficulties in demonstrating implied permission²⁶. There is a danger that if expressed permission is demonstrated by signage, such signage could be forgotten over time and disappear. Additionally, closing land on certain days in the year may be forgotten over time. Each would generate a loophole by which 'as of right' access could be demonstrated over time.
4. The fact that the school would continue to use the playing field during school hours, prior to the Redcar case²⁷, would have been seen as an official restriction of public access during that period.

**PLEASE NOTE THAT THIS ADVICE WAS GIVEN PRIOR TO
THE REDCAR CASE AND THE ADVICE IN PARAGRPH 1 to
4 IS NO LONGER RELEVANT**

5. *The Redcar case makes it easier to register new greens by disapproving the judge-made rule that land cannot be registered as a new green where it has been used by both the landowner for his own purposes and by local people for recreation in circumstances where the local people deferred to the landowner's use. Landowners will need in future to take active steps to exclude recreational trespassers. The judgement has also explained the consequence of registration in terms of future landowner development opportunities²⁸.*
6. The above case changes the original advice given by Counsel in December 2009 where it was believed that under current law there would be no right to register the land as a green²⁹. The only foreseeable exception to this conclusion would be if the law changed or if part or the entire field failed to be used for school activities for a period of 20 years. Counsel advice is that the situation of open access would have to be reviewed every few years³⁰.

²⁶ *R (Beresford) v Sunderland CC* [2004] 1 AC 889

²⁷ *R (on the application of Lewis) v Redcar & Cleveland Borough Council & anor* [2010] UKSC 11

²⁸ Mr Vivian Chapman QC, notes dated 12th March 2010 – referring to *R (on the application of Lewis) v Redcar & Cleveland Borough Council & anor* [2010] UKSC 11

²⁹ Nigel Giffin QC, op cit, par 20, pp7

³⁰ Nigel Giffin QC, op cit, par 20, pp8

APPENDIX E

HEALTH AND SAFETY ISSUES

1. There is a duty of care owed to pupils in a school in relation to their physical safety. The potential liability arising from open access can be considered at two levels:
 - **The liability of the staff at the school.** They would have to exercise reasonable care, in light of the policy, to ensure they take reasonable steps for the maintenance of the field. The authority (in the case community schools) and the governing

body (in the case voluntary and foundation schools) would be liable for any breach in this duty of care³¹.

- **The liability of the council or the governing body (whichever was responsible for the open access decision)** if they were aware that a particular school was not taking proper care in terms of maintenance and failing to keep pupils safe. They would be directly liable for a failure to take remedial action (including the termination of the policy and possible fencing off the site: especially where there is a significant problem with members of the public trespassing and leaving hazardous litter or waste despite not being permitted access)³².
2. Counsel had suggested that there might be a possibility that any insurance cover the local authority may have for the playing fields may require a sizeable excess or that the cover could be invalidated if public access were permitted³³. This has been investigated with the City Council's Underwriter and is not the case. The Underwriter has indicated that there is an expectation that school buildings would be segregated from the open access areas by suitable secure fencing to provide mitigation against risk of damage etc to school buildings and contents.
 3. There would be a need to undertake individual risk assessments for each school playing field where open public access was permitted. The risk assessment would be different for each school dependant on proximity to residential dwellings or other facility such as a public house or off-licence.
 4. It is inevitable that the each school would be required to undertake an inspection and risk assessment on a daily basis (and possibly several times a day where access was occurring on a 24 hour a day basis). Counsel has stated that the legal duty is not to eliminate risk of injury³⁴ but to take reasonable care in all circumstances in the same way as a reasonable careful parent would³⁵. Parents do allow their children to play games in open grassed spaces to which the public have access, and which is not inspected. Often this land is within local authority ownership and there have been few challenges under health and safety legislation or public liability claims.

³¹ Nigel Giffin QC, op cit, par 24, pp9

³² Nigel Giffin QC, op cit, par 24, pp9

³³ Nigel Giffin QC, op cit, par 24, pp9, fn 9.

³⁴ Nigel Giffin QC, op cit, par 27, pp11

³⁵ *Kearn-Price v Kent CC* [2003] ELR 17

APPENDIX F

INSPECTION REGIEME AND REVENUE IMPLICATIONS

1. Schools have indicated that if they are responsible for the additional pitch inspection it would be detrimental to the wellbeing of children. This is because of the time that would be consumed to inspect a pitch thoroughly for dog faeces; used needles; broken glass; and general

detritus left by open access. The close scrutiny required would take a significant time and financial commitment.

2. Not surprisingly, schools are concerned about the cost implications and who would be expected to undertake this task.
3. The use of caretakers is not seen an option. Schools believe that the caretakers already have a range of essential duties to perform at the beginning of the day that the additional playing field inspection would tie up essential resources. Delegating this responsibility to a teacher or teaching assistant is not seen as appropriate use of resources. Finally, delegating the inspection to a governor or parent holds specific problems relating to cover during absence and liability and training issues.
4. Officers from the Parks Team within the Neighbourhoods Department have identified the cost of an operative and vehicle to undertake general site inspections, emptying bins, collecting litter and walking the site looking for sharps, general litter and debris on a daily basis would be a better option.
5. It is estimated that the cost would be approximately £35 (primary) to £75 (secondary) per day (dependant on the size of the playing field). The task would be more effectively undertaken if delegated from the school to a contractor working on behalf of the school.
6. There is a legal requirement for schools to be open for 190 days each year. This means that the inspection regime would potentially cost between £6,650 (primary) to £14,250 (secondary) per school during school time. Open access beyond the 190 days would be substantially more costly (See Table One).
- 7.

Site	Hours per site	Cost per school day	Total estimated cost for 190 school days	Total estimated cost for 365 days
Luckwell School	1	£35	£6,650	£12,775
Compass Point	1	£35	£6,650	£12,775
Bishop Road Playing Field	2	£70	£13,300	£25,550
Stoke Lodge Playing Field	2	£70	£13,300	£25,550
Salcombe Road	1.5	£55	£10,450	£20,075
Purdown	3	£80	£15,200	£29,200
TOTAL COST			£65,550	£125,925

Table One: Estimated Inspection Costs (for six example sites)