

Decision Review: The Recreation Ground, Bath

Introduction

- 1.1 This is a review of the Commission's published proposal to make a scheme for The Recreation Ground, Bath ('the charity').
- 1.2 The charity consists of a recreation ground in the centre of Bath extending to over 6 hectares (15 acres). In 1956 it was acquired by the Mayor, Alderman and Citizens of the City of Bath from the Bath and County Recreation Ground Company Limited¹. This was granted subject to existing covenants, leases and agreements, including an existing lease to three individuals on behalf of the Bath Football Club. Bath and North East Somerset Council (created in 1996) ('BANES') is the successor body and now acts as trustee.
- 1.3 The land was originally administered as a non-charitable trust as part of the Council's estate. However, on 31 July 2002, the trust was determined in the High Court and the judge (Justice Hart) determined that the land was and had been held on charitable trusts and that the trustee (BANES) was charged with maintaining the land "as a recreational facility available for the benefit of the public at large"². The trust was entered on the Register of Charities in November 2002.
- 1.4 There is no accompanying endowment for the maintenance of the land. Income is generated from the lease to the rugby club and other lettings – including the annual agreements with the rugby club for the erection of a temporary stand. The leisure centre car-park also generates income.
- 1.5 Before the land's status was clarified, the land was not being used consistently with the purposes, as they were subsequently recognised by the court in two respects:
 - In about 1974, an indoor sports centre and car park was built partly on charity land (about 11,120 square metres) and partly on council owned land – although the trust only provides for the use of the land for outdoor recreation.
 - In 1995 a new 75 year lease from 1994 was granted to the trustees of the Bath Football Club (now Bath Rugby plc) of about 14,907 square metres (about 3.7 acres) at a rent of £6,500, allowing land to continue to be used and occupied by the Club as a stadium – although this is contrary to the trusts of the charity.
- 1.6 The position has been further complicated by the needs of the rugby club to increase the spectator capacity of the stadium. Whilst these needs are no proper concern of the charity (or the Commission) since they form no part of the charity's objects, from about 2003 the club has required an additional area of land for a temporary seating stand. BANES have granted the club temporary licences and these have been authorised on an annual basis by Orders of the Commission.

2. The Publication of a draft Scheme

- 2.1 For many years, attempts have been made to find a long term solution to the above two issues. The Commission has conducted a long running case, including opening a statutory inquiry that ran from October 2002 to March 2007. In November 2012 the Commission published a draft Scheme. (A Scheme is a document that can change the trusts of a charity.) The Commission can make a Scheme under powers in the Charities Act 2011. The Commission published the draft Scheme according to the Act, seeking representations on it before considering the matter further.
- 2.2 The draft Scheme had three main features:
 - it established an independent body of trustees for the charity in place of BANES;

¹ By conveyance of 1 February 1956.

² Bath and North East Somerset Council v HM Attorney General [2002] EWCA 1623 (Ch)

- it sought to resolve the situation relating to the leisure centre (by changing the purposes for which that land was held (a “*cy-près*” application); and
- it gave the new trustees a range of powers to resolve the issues caused by the lease to the Rugby Club.

2.3 As a result of the publication of the Scheme, the Commission received 1868 representations. Of these, roughly 1624 were in favour of the Scheme and 244 against (although it was not easy to categorise all representations in this way). For the sake of clarification, it is the substance of the representations that is relevant to this process – not the volume of representations received for or against the proposals.

3. The scope of the decision

- 3.1 In accordance with the Commission’s procedure, I was appointed to take the decision whether or not to make the Scheme and if so, in what terms. I am Neil Robertson, Head of Operations Taunton and a member of the Commission’s Senior Management Team.
- 3.2 In conducting this review, I have been mindful of the public sector equality duty set out in section 149 of the Equality Act 2010. I have therefore had regard to the needs set out there: to eliminate discrimination, harassment, victimisation and any other prohibited conduct, to advance equality of opportunity and to foster good relations. I particularly had regard to this duty in considering the composition of the new trustee body and the proposed land swap.
- 3.3 To clarify their representations, a number of people who made representations asked to speak to the reviewer. Meetings were therefore arranged at Bath YMCA and individuals were allowed 20 minutes to put their points across. (One individual opted instead for a telephone conversation.) I also met with representatives of the current trustee and four of the proposed new trustees. I took the opportunity to visit the recreation ground and the proposed new site at Lambridge. I would like to thank all those who made representations and came to speak to me in Bath. Appendix B details the changes that I have made to the Scheme as a result of the representations and meetings.
- 3.4 In considering the representations, I can only consider matters that are relevant to the charity according to the legal framework for making the Scheme. In particular, wider issues about the rugby club and its future plans and the development of the riverside are largely outside of my remit under the legal framework. It has therefore been necessary to consider representations carefully to take into account only content that is properly relevant to the legal framework for making the Scheme.
- 3.5 This has been a long running and involved case for the Commission and I acknowledge that its history may be of interest. However this is not a review of the history of the case. The legal framework for considering the Scheme makes it clear what legal tests are involved and that they stand to be applied in the circumstances applying today. Nor is it within the scope of this decision to consider correspondence relating to the release of information under the Freedom of Information Act, which I consider to be a separate issue.
- 3.6 The published draft Scheme confers powers on the trustees, but does not sanction a particular outcome. It will therefore be for the trustees to decide how to exercise these powers. I am, however, aware of the current proposals involving land at Lambridge, in another part of Bath. It would be unrealistic to ignore this proposal, particularly given it has already been subject to consultation. Further, its existence enables consideration in light of an example of the sort of opportunity the trustees might conceivably consider in connection with the powers under the proposed Scheme. I have therefore considered this proposal, including visiting the site at Lambridge.

4. The current site

- 4.1 It is important to clarify the status of the land owned by the Trust and the lease to the Rugby Club. The trusts are in the 1956 conveyance although their interpretation has not, historically, been straightforward. The difficulty resulted in a detailed analysis by the Court³. Its conclusion was that the meaning of the trusts were that the land was held on trust as “a recreational facility available for the

³ BaNES v Attorney General [2002] EWCA 1623 (Ch),

benefit of the public at large.” There is nothing in the court’s interpretation or in the wording in the 1956 conveyance to say that the trusts also included a requirement that the purpose must be carried-on on the original land; there is no requirement that the original land must be retained⁴. Even taking into account the central, prominent location of the recreation ground land, these are not qualities of the property the Court described as “themselves the factors which make the purposes of the gift charitable eg where there is a trust to retain for the public benefit a particular house once owned by a particular historical figure or a particular building for its architectural merit or a particular area of land of outstanding natural beauty.”⁵ Although it is clear from the decided cases that retaining the original land is not part of the purpose and although the Court made no finding on this, in our view, the “public at large” to whom the Court referred in the BANES case must have been a reference in particular to the people of Bath and the surrounding area.

4.2 I have considered the lease granted to the Rugby Club in 1995. Two issues in particular have been raised about the lease in the representations. The first is that the copy of the lease lodged with the Land Registry has not been executed by the parties and questions have arisen as to whether this indicates that the lease itself was not executed. The second is whether, in the circumstances of the grant of the lease in 1995, it is enforceable by the Rugby Club. The representations question whether, if for any reason the lease is unenforceable by the Rugby Club, the case for a Scheme can be made. Only a Court can determine the validity of the lease and naturally the Commission is concerned in publishing this decision not to give the impression of having formed any authoritative view on the matter which might prejudice the parties’ ability fairly to resolve questions surrounding its validity.

4.3 For the purposes of this decision, the Commission’s conclusions about the lease are limited as follows:

- that a lease was granted in 1995;
- there is no reason to think there was any irregularity in its execution;
- the tenant under the lease is currently in occupation and wishes to stay in occupation; and
- to bring that occupation to an end would involve the charity in the risks and costs of litigation in the face of compelling legal argument to the contrary.

So far as it is relevant to my decision, I have concluded that the lease is valid (without determining the point), but I accept that there may be other views. In reaching this conclusion, I have seen a counterpart of the lease executed by the rugby club trustees. I have also seen the entry in the sealing ledger relating to the other counterpart which confirms its execution by Bath City Council. Since I have not seen any evidence to suggest that the Rugby Club took the lease in 1995 other than in good faith, I can see no reason why they should not be able to rely on S37(4) of the Charities Act 1993 to enforce the lease. However, the new trustees will want to consider this point.

5. The Representations for and against the Scheme

5.1 I have read the representations both for and against the Scheme. A summary of the main points is at Annex A.

6. Is the Commission prevented from acting?

6.1 It has been represented to the Commission that it is prevented from exercising its jurisdiction to make a Scheme because of its contentious character under the provisions of section 70(8) Charities Act 2011⁶.

6.2 I do not consider the Scheme to be ‘contentious’ within the meaning of section 70. There is no dispute about the facts that might require the courts to assess the evidence. The legal framework which applies is clear. Nor do I think there are any other matters that would be better adjudicated by the court. Further any person who is or may be affected by a Scheme may in any event bring an appeal in

⁴ The Court explored the distinction in *Oldham BC v Attorney General* [1993] 2 All ER 432.

⁵ *Oldham* case above

⁶ Section 70 Charities Act 2011 provides that the Commission must not exercise its jurisdiction to make a Scheme which (a) because of its contentious character, or any special question of law or of fact which it may involve or (b) for other reasons, the Commission considers it more fit to be adjudicated on by the court.

the judicial forum of the first-tier tribunal (charity)⁷, which was established for this type of situation. In light of these matters, the matter is not more fit to be adjudicated on by the court.

7. Amending trusteeship of the charity

- 7.1 The Commission may, by Scheme, amend provisions in the charity's trusts for trusteeship. For administrative provisions in contrast to purposes, the legal test for establishing a Scheme is whether, in all the circumstances of the charity, it is expedient to regulate its administration.⁸
- 7.2 Trustees must act only in the best interests of their charity. As a local authority, BANES clearly has wider interests. There has therefore been an inherent conflict of interest which BANES has attempted to manage by the setting up of a sub-committee to effectively act as if they were the trustees of the charity. This situation is best resolved by replacing BANES with a body of independent trustees who can make non-conflicted decisions. I therefore conclude that it is expedient according to the test in *Re Laing* (which for brevity I will now describe simply as "expedient" or "expediency") to regulate the charity's administration by amending the provisions as to trusteeship.
- 7.3 The published draft Scheme provided for a trustee to be nominated by users of the recreation ground. I was unclear as to how this would work in practice, given there is no existing mechanism in place. I have therefore provided for the trustees to co-opt at least one trustee whose skills and knowledge include an ability to represent those groups of beneficiaries that use the recreation ground, other than Bath Rugby Club.
- 7.4 It was represented to me that the new trustees should have the flexibility to be able to co-opt additional individuals for their special knowledge or expertise. The published draft provided for only two co-opted trustees and I have changed this to provide (with the addition mentioned in 7.3 above) that three is the minimum number, so that (following a skills audit) additional trustees can be appointed as required. This will also provide the opportunity to encourage applications for trusteeship from persons who share a relevant protected characteristic where participation by such persons in public life as trustees is disproportionately low. This will also better help to ensure that the charity's facilities meet the needs of such persons.
- 7.5 I have provided for a higher quorum (five) for meetings at which strategic decisions are to be made using the additional powers provided by the Scheme. This means that the decisions cannot be made by the trustees nominated by BANES alone.
- 7.6 I have considered the proposed composition of the trustee body and, having met some of them, I have no reason to believe that the proposed first trustees will act otherwise than in the best interests of the charity. I have therefore concluded that, subject to the amendments I have described, it is expedient that the administration of the charity be regulated according to the provisions for trusteeship in the published draft Scheme.
- 7.7 I would refer the new trustees to the Commission's guide on conflicts of interest for charity trustees⁹. I would also refer the trustees nominated by BANES to the Commission's operational guidance on trustees nominated by a local authority¹⁰. To remind the trustees of the importance of acting independently and properly managing conflicts of interest, it is also expedient to include an additional clause in the Scheme as follows:

Independence

The trustees must:

⁷ A decision to make an Order to establish a Scheme under section 69(1) Charities Act 2011 can be appealed by the charity trustees and any other person who is or may be affected by the Order (schedule 6 Charities Act 2011).

⁸ *Re Laing* [1984]Ch.143

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http://www.charitycommission.gov.uk/charity_requirements_guidance/charity_governance/good_governance/conflicts.asp

¹⁰ http://www.charitycommission.gov.uk/about_us/ogs/g056c002.aspx

- (1) exercise their own independent judgement solely in the best interests of the charity;
- (2) ensure that the charity is independent and exists to pursue its own purposes and not to carry out the policies or directions of the Council or of any other body;
- (3) at their first meeting (or as soon as possible thereafter), adopt a conflicts of interest policy (taking account of the guidance issued by the Commission) and adequately manage any conflicts of interest in accordance with that policy.

8. Bath Sports and Leisure Centre and car park

8.1 The sports and leisure centre and associated car park was constructed in 1975, partly on the charity's land and partly on land owned by the trustee (who was then Bath City Council) in its corporate capacity. The operation of the centre has been contracted by BANES to Aquaterra Leisure, a registered charity (306153). As an indoor recreational facility, the construction of the centre on the recreation ground was not consistent with the trusts.

8.2 This raises the legal question in S62(1)(e)(iii) of the Charities Act 2011, whether the original purposes:

“have ceased in any other way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to (on the one hand) the spirit of the gift concerned and other the social and economic circumstances prevailing”.

Whatever the circumstances of its construction, it is a fact that the centre has been built partly on the charity's land and I must take that into account in deciding whether that, in respect of that portion of land, the original purposes are suitable and effective. That inevitably involves forming a view about the practicability of the charity demolishing the building and returning the land to open space. I have also taken into account prevailing social and economic circumstances and the spirit of the gift.¹¹

8.3 I have concluded that the test in S62(1)(e)(iii) of the Charities Act 2011 has been met and that there has been a *cy pres* occasion. I have taken into account the fact that the land cannot be returned to open space without the expenditure of money on demolishing a building which is put to the use of public indoor recreation, which compliments the current purpose and the spirit of the gift.

8.4 Having established that there is a *cy-près* occasion, I must now consider the *cy-près* application. Although the Commission has wide discretion to decide how the property should be applied *cy-près*, it must have regard to the following matters:¹²

- the spirit of the original gift,
- the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and
- the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances.

8.5 Taking each of the matters in turn:

- I consider the spirit of the gift to be the provision of land for use for a variety of outdoor recreational activities.
- I consider that providing for the land to be used for indoor recreation during the life of the building ensures that the property is applied for a purpose that is close to the original purpose.

¹¹ I refer again to the spirit of the gift and social and economic circumstances in paragraph 8.5 where I expand on what these involve.

¹² section 67(3) of the Charities Act 2011

- There are a number of prevailing social and economic circumstances that are relevant here, including:
 - the building is currently in use for recreational purposes and it would neither be proportionate nor practical to suggest that it should be demolished; and
 - the broader approach to recreational activity since the original gift and the continuing demand for indoor recreational facilities of the type provided at the centre.

- 8.6 The Scheme proposes to appropriate the land for both indoor and outdoor recreation. However, it has been represented that this is not the correct *cy-près* application because the building has a limited life expectancy and, when demolished, the land should revert to being used for outdoor recreation only.
- 8.7 I do think that, given the Commission's wide discretion and the matters mentioned above, there could be justification for a permanent change to the trusts. Nevertheless, given the representations, I have decided to amend the Scheme. Built in 1975, the building will eventually come to the natural end of its life. I consider that, when the building can no longer be used for indoor recreation, the land should be returned to its original use for outdoor recreation only. I have therefore amended the Scheme accordingly. If there is a continuing need for indoor recreation at this site, the trustees should make a fresh *cy-près* application at the appropriate time.
- 8.8 A number of representations expressed concern that the new trustees would take on the liability of the leisure centre, particularly given the state of the building. The charity had proposed to grant a long lease of the centre to BANES in its corporate capacity. The Commission took the view that this would not be consistent with the trusts of the charity. However, I also cannot see how it would be expedient to transfer responsibility to the new trustees. Since provisions relating to trusteeship are administrative provisions, the expediency test I described earlier applies to the decision whether to regulate them by Scheme. I have therefore decided it is expedient for the trusteeship of this land to remain with the Council at the present time. Since this effectively and unsatisfactorily divides the recreation ground into two separate charities, I have concluded it is therefore expedient to include terms requiring the trustees to enter into negotiations with BANES and for the re-uniting of the charity at their successful conclusion.
- 8.9 In the course of the negotiations, the matter of the car parking fees (including any historic right to income as well as future income) will need to be resolved. I consider that this is a matter for the new trustees (who will not be conflicted in this matter) to take forward and negotiate with BANES. Consequently this should not hold up the making of the Scheme.

9. Rugby Club

- 9.1 As I found in paragraph 4.3, I do not think it is realistic for the charity to recover occupation of the land occupied by the Rugby Club under the 1995 lease and not available for the use of the beneficiaries in furtherance of the purposes. In paragraph 4.1, I found that the purposes of the trust are to provide a recreational facility available for the benefit of the public at large (being, in particular, the people of Bath and surrounding areas). I also found that it is not part of the trusts to retain the land in the original conveyance and that in principle at least, the objects could be carried out using alternative land. The question arises whether, if the trustees had the opportunity to acquire alternative land, they would have all the necessary powers to negotiate and carry such a transaction into effect. The Commission has been asked to provide an administrative Scheme to provide the new trustees with the necessary powers.
- 9.2 Since the introduction of such powers would not involve a change in the objects of the charity, they are administrative. I set out the legal test for making provision in a Scheme for regulating the administrative provisions of the trusts. That test does not call on me to form any view about whether any particular transaction is either expedient or in the interests of the charity, but to ask whether, in all the circumstances of the charity, it is expedient to regulate its administration. Clearly the specific proposal the charity has been working on is relevant as part of the circumstances of the charity and by way of illustration of the opportunities any change to the powers might bring within the new trustees' reach.

- 9.3 The proposal involves the surrender of the lease by the Rugby Club. The Rugby Club would be granted a new lease, including additional land, principally for a temporary stand during the rugby season. This would extend the area covered by the 1995 lease, particularly during the season. However this would enable the new trustees to negotiate more favourable lease terms than those contained in the existing lease, such as a full market rent.
- 9.4 In granting the proposed lease, the trustees will need to ensure that any revised terms offer the best returns that the charity can obtain and, in order to be in furtherance of its purposes, must provide (or provide the means to acquire) replacement land on which those purposes may be furthered.
- 9.5 Under the proposal, Bath Rugby Club has offered land it owns at Lambridge (on the eastern outskirts of Bath). It is the Charity's proposal that this land should replace the land to be granted under the proposed lease (that is the land subject to the 1995 lease and the additional strip of land).
- 9.6 As illustrated by the proposal, there are potential features of a land-swap that could be in the interests of the charity. Other things being equal, it would be in the interests of the charity to improve returns on the currently let land and to provide land over and above what is available today for beneficiaries in furtherance of the objects¹³. In deciding whether to include powers to carry out a land-swap, I am not called on to decide whether this particular proposal is in the interests of the charity. That would be for the trustees to negotiate and ensure. However the illustration of the opportunities which might realistically be available to the charity if those powers were available makes a clear and compelling case that, in all the circumstances of the charity, it is expedient to supply those powers.
- 9.7 The new trustees could probably carry out such a land swap without the Commission's involvement - providing it was in the interests of the charity to do so and the replacement land was suitable for the furtherance of the charity's purposes. That is the effect of the Oldham case I mentioned earlier.¹⁴ The trustees would need to take legal advice on this issue as the Commission cannot determine it. However, the likelihood is that a Scheme is not needed to authorise the land swap. Nevertheless, having concluded that in all the circumstances of the charity, it is expedient that the Charity have the power to enter into land swap arrangements, I have also concluded that it is expedient that these powers be expressly stated by way of Scheme for the avoidance of doubt.
- 9.8 As mentioned at 3.6 above, I visited the site at Lambridge (out by bus and returning on foot to central Bath). The ground is on the London Road to the East of the City, less than two miles from the charity's current land and extends to about 4.54 hectares (11.2 acres). It would therefore be likely to have a slightly different catchment area to the Rec. The site consists of two playing fields and an overgrown area separated by a stream. The site also has two buildings which appeared to be in poor condition, as well as a small car parking area.
- 9.9 Numerous representations have been made about the unsuitability of this land for recreational purposes. I understand that both the Lambridge land and the Rec are in areas that have significant chances of flooding. Photographic evidence was provided to the Commission of the flooding of the Lambridge pitches, although I was also told by members of the public I met at the site, that this was not a regular occurrence.
- 9.10 Whilst no one has suggested that persons with a protected characteristic (such as disability) would be disadvantaged by the proposals, I have considered this as part of the public sector equality duty. The land is accessible by both car (small car park which could be further extended) and public transport. With regard to the characteristic of age, I was made aware that many residents of Bath would need to take two buses to reach the site, which would be particularly difficult and expensive for families and could therefore disadvantage children. However I do not think that the potential consequence of the loss of an additional strip of land at the Rec would adversely affect its use by the young. There are also other parks in central Bath near the Rec that are more suited to casual visits and ad hoc children's

¹³ Even if I am wrong and it is somehow realistic for the charity to recover occupation of the land subject to the 1995 lease, I still conclude that it is expedient for the trusts to provide for a power to sell and replace land in order that the charity may (where its trustees decide it is in its interests) benefit from the sort of opportunities to enter into land swap arrangements which are illustrated by the proposal.

¹⁴ Oldham Borough Council v Attorney General [1993] Ch 210

activities. The land at Lambridge would most likely be used for organised games and the acquisition of land in this area would give greater opportunities to people in this area (or those who can more easily access it than the city centre Rec) to participate in games etc.

- 9.11 Whilst I am no expert in this respect, I saw no reason why this land would not be suitable for outdoor recreational purposes. Naturally this is something the trustees must consider if they wish to further explore the proposal. The trustees (particularly given the nominating powers of Fields in Trust and Somerset Playing Fields Association) will be better placed than me to assess the suitability of this (or other land), taking account of such other professional advice as they may deem necessary.
- 9.12 If the new trustees wish to pursue this proposal, they will not only need to assess the benefits and detriments in respect of the land gained and lost, but also obtain valuations. Factors to consider will include amenity value, location, accessibility, suitability for the purposes of the charity and the costs of on-going maintenance. Securing the best terms includes taking account of the opportunity for commercial activity, income generation and stadium development. The trustees' negotiations will need to take account of the very substantial value of the additional strip of land to be included in the lease, since it is key to the Rugby Club's needs.
- 9.13 However, the new trustees should not limit themselves to the current proposal, but must consider all of the options open to them to progress towards a remedy of the on-going breach of trust represented by the Rugby Club's occupation. The trustees must act properly and in accordance with their duties and responsibilities. In order to demonstrate they have done so, they should fully document their decision making process. In particular, their chosen solution must be in the interests of the charity (as opposed to the interests of the club, BANES and other commercial interests) and they should keep records to demonstrate how they reached that conclusion. They must also be careful not to take account of irrelevant issues, such as: the benefit to Bath Rugby Club, uses of the remaining land that would not promote a charitable purpose (such as spectator sports and pop concerts), commercial benefits to Bath (such as tourism) and the development of the riverside.
- 9.14 The evidence provided to me strongly suggests that the occupation of the site by the Rugby Club and its activities has had a negative impact on the users of the land, the proximate area and the local residents – particularly in nuisance terms on match days. The trustees should take this into consideration in their decision making and seek (in entering into any agreements) to require the rugby club to minimise disruption to local residents and to users of the recreation ground.
- 9.15 One option I have considered is to give the trustees the necessary powers in the Scheme to reach a solution, but make them subject to the Commission's final approval. This would give the Commission the opportunity to check that the trustees had acted properly and that any decision made was within the range of decisions that a reasonable trustee body would make. However this would not give the trustees any certainty that any proposals negotiated would be accepted by the Commission and lead to continuing uncertainty. Further, the Commission would be imposing its own judgement over that of the trustees in an area in which it has no expertise. I cannot conclude that such a provision would meet the test of expediency.
- 9.16 On balance, I have concluded that it is expedient that the trustees should have discretion to use the powers provided by the Scheme to reach an appropriate solution within the clear constraints which the Scheme requires.
- 9.17 Nevertheless, expediency requires that the Scheme should contain some guidance for the trustees on their duties and responsibilities in decision making. I have therefore added the following sub-clause to the powers clause. Whilst this does not impose any legal requirements that the trustees would not otherwise be subject to, it seeks to draw the trustees' attention to the key decision making principles.

(2) *In exercising the above powers (and in administering and managing the charity), the trustees must:*

- (a) *act only in the best interests of the charity to further the charity's objects for the public benefit;*

- (b) *act in good faith (meaning acting in a way that the trustees honestly believe to be in the best interests of the charity);*
- (c) *take into account all relevant factors and disregard any irrelevant factors; and*
- (d) *adequately inform themselves, including having regard to the views of those who have an interest in the charity.*

10. Human Rights considerations

- 10.1 The Commission has a statutory obligation to act in a way that is compatible with the European Convention on Human Rights. I have therefore ensured that this decision is compatible.
- 10.2 One point that requires express mention is Article 1 of the first protocol. This provides that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' The Scheme gives the trustees the powers to formalise and extend the use of the recreation ground by the rugby club (and, to a lesser extent, the leisure centre). I can see that this has the potential to impact on neighbouring residents on the peaceful enjoyment of their properties. I have therefore considered whether any such interference would be lawful and proportionate to the aim the Scheme seeks to achieve.
- 10.3 I am satisfied that the Scheme meets the requirement of lawfulness. I consider that the proposals are proportionate for the following reasons:
- Any decision about the future use of the land will be taken by independent trustees acting in the best interests of the charity. It is for them to consider all options open to them. Any option facilitated by the Scheme only confirms an existing state of affairs (given that the existing lease appears to be valid) and will be subject to notice and consultation.
 - If the Scheme was not made, the current situation would remain unresolved and (unless the lease is found to be invalid and overturned) the site would continue to be occupied by the Rugby Club indefinitely.
 - In exercising the powers conferred on them by the Scheme, the trustees are required to use their best endeavours to require the Rugby Club to minimise disruption to local residents and users of the recreation ground.
 - The site of the leisure centre will revert to outdoor recreational use at the end of the life of the current building.

11. Decision

- 11.1 I have concluded that the Scheme should be made, but with the alterations mentioned above. The revised Scheme is at Appendix C.

12. Right of appeal

- 12.1 If you think this decision is wrong, you can ask us to review it by e-mailing the Litigation & Review Case Officer at

litigationandreview@charitycommission.gsi.gov.uk

or by using our online application form at

<http://www.charitycommission.gov.uk/notify-us-of-changes/contact-us/ask-us-to-review-a-decision-weve-made>

We need to be told this within 3 months. Applications submitted outside of this timeframe will not be considered unless exceptional circumstances apply. However, under section 337(4) of the Charities Act 2011, the Scheme can only be overturned on the limited grounds of mistake, misrepresentation or non-conformity with the 2011 Act. Such a review is discretionary and, given the complexity of the issues and the detailed consideration at senior levels within the Commission, a request for an internal review may be declined.

- 12.2 Alternatively you may be able to challenge the decision in the First-tier Tribunal (Charity) if you are a person entitled to appeal. If you wish to appeal against our decision you may find it helpful to visit the Tribunal's website for more information about time limits, form of notice of appeal and how to make an application:

<http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/charity/appeals.htm>

Your application to the Tribunal should be made within **42 days** of the date when this decision was published (weekends and bank holidays are included in the 42 days).

- 12.3 If you ask the Commission to conduct a decision review, the result of that review will not be treated as a new decision if the original decision is upheld. This means that the time limit of 42 days in which an appeal to the Tribunal is required to be made will run from the date of publication. You should therefore be mindful of the Tribunal deadline when submitting an application for decision review. Further details about our decision review procedure and the First-tier Tribunal (Charity) can be found on our website at:

<http://www.charitycommission.gov.uk/how-to-complain/complaining-about-a-decision-we-have-made/>

Neil Robertson
12 June 2013

Annex A

A selection of representations against the Scheme:

- Many respondents considered that the proposed development at the rugby club (which the Scheme might effectively facilitate if the new trustees so decided) would cause nuisance and disruption to local residents. Mention was made of traffic problems on match days with extra vehicles on the local streets.
- A number of planning issues were raised, which are largely outside the scope of this Review – such as the height of the stadium's proposed new riverfront stand and Bath's status as a world heritage site.
- The original trust was intended to provide an open space for recreational and sporting facility – not a rugby stadium and commercial development.
- The rugby club has enough land without granting them the additional strip. Why is the lease of this additional land not being excluded from the security offered by the Landlord and Tenant Act 1954?
- The land at Lambridge is not a fair exchange. It is inaccessible, liable to flooding (photographs provided) and off a busy main road. There is a park nearby.
- The leisure centre and stadium should be re-developed together to reduce the footprint.
- The trustee is being bullied into accepting the proposals to avoid the rugby club moving out of town. The proposals are designed to benefit Bath Rugby Club and maximise the financial rewards of the directors and shareholders.
- There were flaws in the consultation carried out by BANES. The Commission's notice period should have been longer than one month as it was over the Christmas period.
- The leisure centre will bring significant financial liability to the charity at a time when it is ageing rapidly.
- The position of the original covenants should be sorted out before the Scheme is made.
- The main priority should be to provide a first class community sports stadium on the Rec with facilities to be used by both the rugby club and other organisations, including local schools.
- The Scheme will discourage other benefactors from making charitable gifts in the City.
- Other facilities should be provided at the Rec, such as a skate park and BMX track.
- There should be more trustees and they should have the necessary skills and knowledge required by the charity.
- The Council should not be removed, since it has successfully led the charity to the current position. The new trustee body should contain a majority of Council nominees. The new trustee body needs persons with personal knowledge of the district and professional skills such as law, finance, property, health and safety.
- The Scheme does not adequately specify all the factors to be taken into account by the trustees when making a decision.
- After the proposed surrender of the existing lease, the new lease will be granted to a holding company (Arena 1956) – not the rugby club.

A selection of representations for the Scheme:

- The rugby club is essential to Bath and every effort should be made to retain the ground in the city.
- There are other parks in the vicinity that are better suited to recreation; the Rec is for playing games.

- Bath is a city that loves its sport and any additional facilities, such as those at Lambridge, are to be welcome.
- Lambridge has lots of potential. It is next to the river – could water sports like rowing be accommodated at the site?

Annex B

Changes made to the Scheme as a result of the representations

1. Responsibility for the leisure centre will remain with BANES until a satisfactory solution is negotiated with the new trustees.
2. The *cy-près* application of the leisure centre land for indoor recreation is restricted to the life of the current building.
3. The lease of the additional land must be excluded from the security offered by the Landlord and Tenant Act 1954.
4. The temporary stand must be removed for at least three months of the year.
5. In granting any new lease of the land comprised in the 1995 lease, the new trustees must require Bath Rugby Club to minimise disruption to local residents and to the users of the charity's land. They must also give public notice in accordance with the provisions of s121 Charities Act 2011 - whether or not this would otherwise be required.
6. The trustees can co-opt as many trustees as they consider necessary.
7. In recruiting trustees, the trustees must consider whether to advertise the vacancy or use a trustee brokerage service.
8. The proposed nominated trustee to be appointed by users of the Rec is replaced by a co-opted trustee because no mechanism is in place to nominate such a trustee.
9. For meetings at which strategic decisions will be made, the quorum is five.
10. Guidance is included on trustee decision making.

Annex C

1. Definitions

In this scheme:

“the charity” means Bath Recreation Ground. Until the Order is made, this term excludes the property to be known as The Bath Recreation Ground (Sports & Leisure Centre) Trust.

“the Commission” means the Charity Commission for England and Wales.

“the Council” means Bath and North East Somerset Council.

“the 1995 lease” means the lease of land belonging to the charity which was granted to Bath Rugby Club on 23 May 1995.

“the existing trusts” means the conveyance of 1 February 1956.

“the Order” means the order described in clause 2 of this scheme to be made under S69 of the Charities Act 2011 or similar power in any subsequent Act.

“the schedule” means the schedule to this scheme.

2. Administration

(1) The property of the charity identified in part 1 of the schedule is to be administered in accordance with the provisions of this clause.

(2) From the date of this scheme, the property identified in part 2 of the schedule will be administered and managed by the trustees constituted by clause 6 of this scheme in accordance with the existing trusts as altered or affected by this scheme.

(3) Until the Order is made, the property identified in part 3 of the schedule will continue to be administered and managed by the Council in accordance with the existing trusts as altered or affected by this scheme. For the avoidance of confusion, the property will (until the date of the Order) be known as The Bath Recreation Ground (Sports & Leisure Centre) Trust.

(4) By the Order, the Commission will appoint (if it thinks fit):

(a) the trustees constituted by clause 6; or

(b) any charitable company or charitable incorporated organisation established by those trustees

as trustee of the property identified in part 3 of the schedule. At that date, the land identified in parts 2 and 3 of the schedule will constitute the property of a single charity.

(5) The trustees constituted under clause 6 must (with the benefit of such professional advice as necessary):

(a) seek to negotiate and enter into binding arrangements with the Council in respect of the Sports and Leisure Centre for its on going maintenance, including provision for the future demolition when the building is deemed life expired; and

(b) when or if binding arrangements are validly executed, either:

(i) the trustees constituted under clause 6; or

(ii) the trustee of The Bath Recreation Ground (Sports & Leisure Centre) Trust,

must apply to the Commission for the Order.

THE BATH RECREATION GROUND (SPORTS & LEISURE CENTRE) TRUST

3. Sports and Leisure Centre

- (1) In sub-clause (2) below, “the relevant date” is the date on which the existing sports and leisure centre building can no longer be used for indoor recreation for the benefit of the public at large.
- (2) Until the relevant date, the provision in the existing trusts that the land may only be used as an open space is suspended in respect of the land identified in part 3 of the schedule to this scheme. It may be used during this period as a facility for indoor recreation for the benefit of the public at large (including ancillary car parking). For the avoidance of doubt, after the relevant date, the trustees must return the land to open space suitable for the furtherance of the Charity’s objects.
- (3) The Official Custodian for Charities is discharged in respect of the land identified in part 3 of the schedule. From this date, the land is vested in the Council as trustee of The Bath Recreation Ground (Sports & Leisure Centre) Trust.

BATH RECREATION GROUND

(excluding The Bath Recreation Ground (Sports & Leisure Centre) Trust)

4. Powers

- (1) For the purpose of resolving the issues arising from the continuing occupation by Bath Rugby Club of the land contained in the 1995 lease, and in the event of the surrender of the 1995 lease, the trustees may (subject to sub-clause (2) below) exercise all or any of the powers in this clause.
- (2) Before exercising the powers conferred by this clause, the trustees must fully consider all options for the management of the land belonging to the charity (including the option of making no changes to the current arrangements) and before adopting any option satisfy themselves that that option is in the best interests of the charity.
- (3) Sub-clause (4) applies only to the land:
 - (a) currently subject to the 1995 lease; and
 - (b) described in part 4 of the schedule to this scheme.
- (4) Subject to sub-clause (2) above and the conditions, the trustees may grant a lease or leases of the land and receive replacement land instead of, or in addition to, consideration by way of a capital sum and by way of further consideration. The conditions are:
 - (a) the term of any lease(s) must not exceed the unexpired term of the 1995 lease; and
 - (b) any replacement land must be suitable for the purpose of the charity.
- (5) In so far as any lease extends to the land described in part 4 of the schedule:
 - (a) no lease must be granted unless and until all necessary formalities (including the elapse of time if appropriate) have been properly performed and recorded to exclude sections 24 to 28 of the Landlord and Tenant Act 1954 in relation to that lease; and
 - (b) the lease must not permit the tenant use otherwise than as a site for a temporary stand (usually referred to as ‘the east stand’) or playing pitch or access areas and must require

the site to be available as open space for use for the purposes of the charity for at least three months in each year.

- (6) In exercising the powers conferred by this clause, the trustees must:
- (a) before accepting a surrender of the 1995 lease, satisfy themselves that they are doing so on the best terms reasonably available;
 - (b) satisfy themselves (having undertaken public consultation) that any land taken in exchange will:
 - (i) have suitable amenity value for the purpose of a recreation ground; and
 - (ii) be in a location that is reasonably accessible and suitable for the purposes of the Charity;
 - (c) before entering into any commitment to grant, accept a surrender of the 1995 lease or take any interest in land obtain (from a professional valuer) a valuation of the land in question. A valuation must take full account of:
 - (i) the special interest of Bath Rugby Club in securing a grant of the land in part 4 of the schedule and its marriage value with the existing land held under the 1995 lease for the purpose of proposed development by Bath Rugby Club; and
 - (ii) (in valuing any regrant of the 1995 lease) the other commercial uses which may be made within the current use class and under any planning permission that might reasonably be obtained for the land.
 - (d) in granting any new lease of the land comprised in the 1995 lease:
 - (i) ensure that the lease is non assignable, except to subsequent owners of Bath Rugby Club;
 - (ii) ensure that the lease contains a right of pre-emption should Bath Rugby Club cease to use the property as its principal site for professional rugby football;
 - (iii) require Bath Rugby Club to minimise disruption to local residents and to the users of the charity's land; and
 - (iv) give public notice in accordance with the provisions of s121 Charities Act 2011 (whether or not this would otherwise be required).
- (7) In exercising the above powers (and in administering and managing the charity), the trustees must:
- (a) act only in the best interests of the charity to further the charity's objects for the public benefit;
 - (b) act in good faith (meaning acting in a way that the trustees honestly believe to be in the best interests of the charity);
 - (c) take into account all relevant factors and disregard any irrelevant factors; and
 - (d) adequately inform themselves, including having regard to the views of those who have an interest in the charity.

5. Custodian Trustee

- (1) The Council will be the custodian trustee of the charity.

- (2) The Official Custodian for Charities is discharged in respect of the land identified in part 2 of the schedule. From this date, the land is vested in the Council as custodian trustee of the charity.

6. Trustees

- (1) When complete, the trustee body comprises:
- 2 trustees nominated by Bath and North East Somerset Council
 - 1 trustee nominated by Fields in Trust
 - 1 trustee nominated by Somerset County Playing Fields Association
 - Not less than 3 co-opted trustees.
- (2) Except as provided for the first trustees, each appointment must be for a period of three years.

7. First trustees

- (1) The first nominated trustees are the persons listed in part 5 of the schedule to this scheme. They will hold office for the periods shown in the schedule.
- (2) The trustee to be nominated by Fields in Trust should be appointed as soon as possible after the date of this scheme.
- (3) At least three of the first co-opted trustees should be appointed as soon as possible after the first meeting in accordance with clause 8 below.

8. Co-opted trustees

- (1) When appointing co-opted trustees, the trustees must:
- (a) identify the needs of the charity regarding skills or knowledge of its trustees; and
 - (b) consider the extent to which appointees demonstrate the skills or knowledge; and
 - (c) not appoint members of the Council.
- (2) Of the co-opted trustees, the trustees must appoint at least one whose skills and knowledge include an ability to represent those groups of beneficiaries that use the recreation ground, other than Bath Rugby Club.
- (3) In appointing co-opted trustees, the trustees must have regard to the desirability of advertising in the local and/or specialist press or using trustee brokerage services. Candidates must be asked to consider and declare any existing or potential conflicts of interest before appointment.
- (4) The appointment of a co-opted trustee must be made by the trustees at a meeting of which not less than 21 days' notice has been given.
- (5) An appointment may, but need not, be made before the date on which the term of office of an existing co-opted trustee comes to an end, to take effect on that date. In these circumstances:
- (a) the appointment may not be made more than 3 months before the date on which the existing co-opted trustee's term of office is due to end; and
 - (b) any co-opted trustee whose term of office is about to come to an end must not vote in favour of their own re-appointment.

9. Quorum

- (1) Except as provided in sub-clause (2) below, no business may be transacted at a meeting unless at least 3 trustees are present.
- (2) At least 5 trustees must be present at a meeting before any decision can be taken to exercise a power contained in clause 4 above.

10. Rules and regulations

The trustees may make rules and regulations for the administration and management of the charity, which must be consistent with the provisions of the existing trusts and this scheme.

11. Independence

The trustees must:

- (1) exercise their own independent judgement solely in the best interests of the charity;
- (2) ensure that the charity is independent and exists to pursue its own purposes and not to carry out the policies or directions of the Council or of any other body;
- (3) at their first meeting (or as soon as possible thereafter), adopt a conflicts of interest policy (taking account of the guidance issued by the Commission) and adequately manage any conflicts of interest in accordance with that policy.

GENERAL PROVISION

12. Questions relating to this Scheme

The Commission may decide any question put to it concerning:

- (1) the interpretation of this scheme; or
- (2) the propriety or validity of anything done or intended to be done under it.

SCHEDULE

PART 1

Freehold land in the City of Bath described in a conveyance of 1 February 1956 which was made between The Bath and County Recreation Ground Company Limited of the one part and the Mayor Alderman and the Citizens of the City of Bath of the other part, a part of which is subject to a 75 year lease, and other parts of which are subject to subsisting leases dated 25 March 1996, 22 July 2000, 12 September 2002 and 11 December 2008.

PART 2

The land identified in part 1 of the schedule less the land identified in part 3 of the schedule.

PART 3

Land containing 11,120 square metres or thereabouts being part of the land described in Part 1 above with the building thereon known as Bath Sports and Leisure Centre.

PART 4

Land containing 7548 square metres or thereabouts being part of the land described in Part 1 above and adjoining land subject to the 1995 lease.

PART 5

First Nominated trustees

Nominated by Bath and North East Somerset Council

David Dixon for a period of 3 years

Timothy Ball for a period of 2 years

Nominated by Somerset County Playing Fields Association

David Durdan for a period of 3 years