

## **Cabinet 19 September 2011 - Proposed expansion of Dundonald primary School and impact on Dundonald Recreation Ground**

### **Additional note from CSF and Legal Services officers on reputation and financial risks**

#### **Summary**

1. The reference from The Children and Young Persons Overview and Scrutiny Panel recommends Cabinet seeks more information on reputation and financial risks so that these can be taken into account in reaching its decision. The Panel received representations from the 'Protect Dundonald Rec.' campaign group, which challenged the advice of legal officers and indicated that the group may be prepared to seek a judicial review of any decision to proceed with proposals affecting the recreation ground. This additional note covers these aspects. It also clarifies wording for one of the report's recommendations and the position in seeking the modification to the covenant.

#### **Clarification of legal advice**

2. The recommendation that an application should be made to the Upper Tribunal to modify the restrictive covenant is made with the benefit of external expert legal advice on issues in relation to this case.
3. The Upper Tribunal has power to discharge or modify a restrictive covenant if the covenant is obsolete, or is impeding reasonable use of the land contrary to the public interest. Our advice is that there are good grounds for modifying the covenant.
4. With regard to the timescale, objections to the application can only be made by persons able to show that they are entitled to the benefit of the covenant, for example by producing deeds or other documents to prove entitlement. Despite research from the council and a well publicised public consultation the council is still not aware of anyone with the benefit of the covenant and we would anticipate a timescale of 6-12 months. On the basis of an application being made in October and a decision being reached in 6-7 months it need not delay the ideal timescale for the scheme commencing in summer 2012 for completion for September 2013.
5. The report recommends that a modification is sought to the restrictive covenant on the council's title to the recreation ground to widen the permitted use to enable the construction of the new building for school and recreational use. The council's title to the school site also has a restrictive covenant, which requires that buildings on the site should only be used for the purpose of a school or school buildings or as a private residence. A number of options have been proposed for the school expansion. Should a design based on option C be pursued, which would lead to part of the school site being used for community use, consideration may need to be given to an application to also modify the restrictive covenant on the council's title to the school site, to enable this use of the relevant part of the school site

6. We are therefore suggesting recommendation C be amended to be “To apply to the Upper Tribunal (Lands Chamber) for a modification to the existing restrictive covenant on Dundonald Recreation Ground *and if so advised for a modification to the restrictive covenant applying to the Dundonald Primary School site*”

### **Requirement to seek a modification to the covenant**

7. As stated in paragraphs 6.10 to 6.12 to the Cabinet report, the council could choose to act contrary to the covenant given the fact that investigations have found no landowners that have the benefit of it. However there would then remain the risk of legal action to prevent the project proceeding brought by someone who could show entitlement to the benefit of the covenant. Moreover, the council as a public body has to act reasonably and in accordance with public law principles.
8. The recommended course of action to seek a modification would ensure there was no risk of a future claim against the Council relying on the covenant and the use of the statutory procedure for the modification of the covenant is likely to be regarded as the most reasonable course of action for the council to take.

### **Consultation**

9. The “Protect the Rec.” group also allege that the council has failed to consult properly on its plans. The purpose of the consultation was to allow Cabinet to have a more informed view for the following:
  - As a statutory consultation under Education Acts and the related government guidance on expanding schools, to decide whether the council should go to the next stage of publishing a statutory proposal.
  - To decide whether to progress further work on the design of an intended scheme for a pre-planning application consultation; the further work on design should be informed by the responses to the consultation undertaken in May to July 2011.
  - To decide whether to undertake a consultation through advertisement as required under Section 122 of the Local Government Act 1972 as part of the procedure for a change of designated use of any part of the recreation ground before considering any objections to this and reaching a decision.

The courts have defined the requirement to consult as meaning that:

- the consultation must be at a time when proposals are at a formative stage;
  - sufficient reasons and information must be given to enable consideration and response;
  - adequate time must be given for consideration and response and
  - the product of consultation must be conscientiously taken into account.
10. Officers’ view is that the consultation has fulfilled these essential requirements. It is for Cabinet to decide whether they are satisfied with the consultation in the light of the representations that have been made about it

## Financial risk

11. All major capital projects have a financial risk in that they have no guarantee that they will proceed until all permissions from relevant authorities, such as planning permission, is given.
12. This project has a higher risk than our other school expansion projects in that the project entails use of open space involving consideration of formal appropriation of the land, planning permission requires a minor departure from planning policy on open space, and because of the issue of the restrictive covenant. The main risks are abortive design fees and legal fees.
13. Design fees. The design and project management fees are in the region of 12% of the capital build value; 40% of this figure is required to obtain planning permission, and 65% to be at the point of agreeing contract terms to commence on site.
14. The council could choose to reduce this risk by undertaking no further design work until the covenant issue is resolved. However, the full costs for a single temporary classroom is over £150,000, so there is a cost of this sum for every academic year a permanent expansion scheme is delayed.
15. It is hoped that there would be a good case for receiving planning permission on the basis that any build on open space would be marginal, and that we should be able to state that there are no practical alternatives to the Dundonald scheme in order to provide sufficient school places in the area within a reasonable timescale. This can only be tested through a detailed planning application, thus it is an inevitable requirement to risk the cost of design fees
16. Legal fees: The legal cost to seek the modification would be in the region of £10,000, if there were no valid objections and around £30,000 for a contested hearing. Whilst the representative of the "Protect Dundonald Rec" group indicated that they may seek a judicial review of the council's decision, it is not known on what grounds. Where an application is made for judicial review, the court will first consider whether to grant permission for a review.
17. The cost to defend a judicial review would depend on whether the permission was granted for judicial review and the seniority of counsel employed to represent the council. If the matter proceeded to a full hearing the council could incur between £15,000 and £30,000 in counsel's fees. Costs may be awarded by the Court to be paid by the party which is unsuccessful

## Reputation risk

18. The council's reputation could be damaged a) if the council decided to proceed with the scheme but later decided to abandon it because planning permission could not be obtained or if the application to modify the covenant were unsuccessful, or b) there were a successful judicial review of the council's actions in relation to the project. Equally, the council's reputation could be damaged if it failed to provide sufficient local school places.