

April 2011

PRIVATE ACCESS TO COUNCIL LAND

1. Many councils find that properties they own abut the gardens of private residences. Sometimes the owners of these residences wish to have direct access to council land which they facilitate by, for example, putting a gate in their fence. The situation is particularly common when the council land in question is a recreation ground.
2. For a council anxious to curb or control this practice, a number of questions need to be asked and answered.
3. First, it is important to check the status of the council's land so far as the public is concerned. If the public have no statutory rights of access over the land, as will be the case if the land is a playing field, then it is obviously easier to take appropriate action since entry to the land will, without the council's permission, be a trespass (subject to any implied licence which is discussed below). Even if the land is a public recreation ground, however, unwanted access may still be prevented by legal action, because the council is entitled to restrict the points or times at which access to the land is given.
4. Secondly, it is necessary to know what physical barriers exist at the boundary point. If the only barrier is the resident's own fence, then in the absence of any covenant to repair he cannot be prevented from creating an opening in it, or even putting in a gate but that, in itself, does not **authorise** his entry on to the council land. If on the other hand, the fence or hedge belongs to the council then any attempt to create a gap can be prevented by legal action, since it is a trespass to the fence and, possibly, criminal damage. Sometimes it is not clear who owns the boundary fence or hedge, in which case the council might have to consider an additional obstacle in the form of a further fence on its own land, an approach which can also be used where the gap appears in the resident's own fence.
5. Thirdly, the council may not wish to prevent access altogether but simply ensure that the resident does not, by the passage of time, gain a legal right of access. A failure

by a council to do anything for 20 years might cause a legal prescriptive right to be created. An acknowledgement in writing from the resident that he has an access only by the continuing permission of the council would prevent him acquiring a legal right. For further information on this please, see LTN 47 (Easements).

6. A suitable form of words for such an acknowledgement is as follows:

“This agreement between the (insert name) Parish/ Community Council and (insert name and address of resident) dated (insert date) records that (insert name of resident) and the members of his family residing at (insert resident’s address) may, with the permission of the council have access by foot only to and from the council’s land known as (insert name, description and address by which land is known and any necessary identification) at the point (this should be described and clarified by an attached plan marking the points of access) where the council’s land adjoins (insert resident’s address), on the understanding that such permission is personal to (insert name of resident) and the members of his family residing at (insert resident’s address) and may be withdrawn at any time by the council.

Signed: (Resident)

Signed: (2 members of the council)”

7. In practice it will be much easier to obtain the above acknowledgement where the resident is seeking a new permission. If access already exists, a council seeking to regularise the practice should first attempt to get the resident to sign a similar agreement to the above. If that fails, then the subsequent action by the council depends on the facts of the particular case, and the reasons, if any, why the resident refuses to sign the acknowledgement. Consequently, such problems should be referred to NALC for individual advice.

Implied Licences

8. The above advice holds good for most property owned by councils but particular care should be given in respect of some types of land to which the public may have some rights of access. An example of one case is *Wandsworth London Borough v A* which was decided by the Court of Appeal in 1999. The facts of the case were that A’s son attended a school in Wandsworth which was owned and run by the council. A was allegedly aggressive and/ or abusive towards members of staff and, consequently, A was banned from entering the school by the headmaster. A refused

to accept that she was barred from the school, and the council sought an injunction restraining her from entering upon the school premises.

9. The court decided that A, together with the other parents, had some sort of licence to enter the school because parents were permitted (or encouraged) to come into the school. The court also held that the relationship between a school and a parent was such that a parent could not be excluded from school premises without any regard to public law. Importantly, the court also found that the headmaster should have given A an opportunity to make representations before he banned her from the premises and the failure to do so meant that the decision to exclude her was flawed and unlawful.

10. The practical consequence of the decision in the Wandsworth case is that councils should consider whether individuals have some sort of right to visit premises (e.g. an implied licence) before taking a decision to ban them. If individuals do have a right to enter premises, councils should allow them to make representations before making a decision as to whether or not to exclude them from premises. NALC recognises that it is not always easy for councils to recognise whether individuals have an implied licence to enter premises and, therefore, recommends the following steps. Either:
 - councils should seek from NALC in individual cases; **or**
 - councils should assume that all individuals have rights to enter premises and should consult with them before withdrawing that right.

Other Legal Topic Notes (LTNs) relevant to this subject:

LTN	Title	Relevance
42	Occupiers' Liability	Distinguishes between visitors and trespassers and the legal duties owed by councils as occupiers of land.
44	Trespass to Land	Sets out some powers of councils to deal with trespass.
47	Easements	Sets out the circumstances in which rights of way may be acquired through long use.
77	Public Rights of Way	Sets out the rights and responsibilities for a Footpath, Bridleway, Byway Open to All Traffic (BOAT), or Restricted Byway.