Herefordshire Council

AGENDA

Regulatory Committee

Date: **Tuesday 11 January 2011**

Time: **10.00 am**

Place: **The Council Chamber, Brockington, 35 Hafod Road, Hereford**

Notes: Please note the **time, date** and **venue** of the meeting.

For any further information please contact:

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Agenda for the Meeting of the Regulatory Committee

Membership

Chairman	**Councillor JW Hope MBE**
Vice-Chairman	**Councillor PGH Cutter**
	Councillor CM Bartrum
	Councillor SPA Daniels
	Councillor JHR Goodwin
	Councillor RC Hunt
	Councillor Brig P Jones CBE
	Councillor PJ McCaull
	Councillor GA Powell
	Councillor A Seldon
	Councillor JD Woodward

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AGENDA

Pages

1. APOLOGIES FOR ABSENCE

To receive apologies for absence.

2. NAMED SUBSTITUTES (IF ANY)

To receive details any details of Members nominated to attend the meeting in place of a Member of the Committee.

3. DECLARATIONS OF INTEREST

To receive any declarations of interest by Members in respect of items on the Agenda.

4. APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN 1 - 112

To determine whether land at Argyll Rise, Belmont, Hereford should be registered as a town green.

Please note that this report has been updated from the one which was submitted to the meeting of the Committee held on 2nd November 2010.

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HEREFORDSHIRE COUNCIL

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Herefordshire Council

MEETING:	**REGULATORY COMMITTEE**
DATE:	**11 January 2011**
TITLE OF REPORT:	**APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN**
PORTFOLIO AREA	**ENVIRONMENT AND STRATEGIC HOUSING**

CLASSIFICATION: Open

Wards Affected

Belmont

Purpose

To determine whether land at Argyll Rise, Belmont, Hereford ("the Land") should be registered as a town green. Members should note that the Report is an updated version of the one previously circulated and takes account of advice given by Mr Chapman QC who will be advising the Committee.

Key Decision

This is not a key decision.

Recommendation(s)

1. The Committee makes its decision based on -

(a) the advices appended to this report from Mr Jones, Mr Petchey and Mr Chapman QC that the land should not be registered as a town green

(b) the officer's reasons for considering that the land should be registered as a town green

(c) the written legal submissions from the parties which will be provided to Members prior to the meeting and their oral submissions at the Committee meeting, and the advice given by Mr Chapman QC to the Committee.

Reasons for Recommendation

1. The Council is the registration authority for determining applications to register land as town or village greens.

2. Determination of this application turns on legal arguments about whether use was "as of right" rather than "by right".

Key Points Summary

The Application and the Land.

(a) The Applications

1. This is a second application to register the same Land as a town green. For the first application the Council arranged for a public inquiry conducted by a barrister, Mr Timothy Jones, to hear evidence and legal submissions from the Applicants and the only Objector, Herefordshire Housing Limited which owns the Land. Mr Jones' inquiry report is at Appendix 1, and Appendix 2 is a further advice from Mr Jones. A second opinion was requested from Mr Petchey and Appendices 3 to 6 are his advices. Mr Chapman QC has been requested to advise the Committee when it meets, and his preliminary advice notes are at Appendices 10 and 11.

2. Mr Jones had recommended that the Land should not be registered as a town green for two reasons: (i) it had not been used"as of right" – see the As of Right – Permissive Right/Statutory Right sections of this report and (ii) the disposal of the Land to Herefordshire Housing Limited in 2002 under section 123 (2)(A) of the Local Government Act 1972 defeated any town green status - see the Section 123(2A) section below. Mr Petchey agreed with Mr Jones on reason (i) but not on reason (ii). Mr Chapman QC agrees with Mr Jones and Mr Petchey on point (i) but, like Mr Petchey, disagrees with Mr Jones on point (ii) – see the Further Advices section of this report below.

3. The officer's view is set out in the Key Considerations section of this report, and is that the Land (i) had been used "as of right", even though three barristers with far more experience take the opposite view and (ii) the section 123 disposal did not defeat town green status, and that the Land should be registered.

4. The first application was heard by the Regulatory Committee on the 12th August 2008 and it decided that the land should not be registered as a town green because it had not been used "as of right". The decision notice is at Appendix 7 of this report.

5. This second application, received on the 16th October 2007, was made in order to overcome the obstacle to registration which Mr Jones saw as resulting from the section 123 disposal to Herefordshire Housing Limited. The Commons Act 2006 allows applications to be made within 5 years in relation to use "as of right" which had ceased before 6th April 2007 (Mr Jones considered that any use as of right would have ended when the land was transferred to Herefordshire Housing Limited on 26th November 2002). The Application form is at Appendix 8.

6. For this second application the evidence provided by the Applicants from people who had used the Land is essentially the same as for the first application, except that two pieces of information described in the Additional Information section of this report have come to light. A sample 1 out of 30 evidence forms received is at Appendix 9. The central legal argument still

turns on the "as of right" issue and the information in this report is largely the same as for the first application.

(b) The Land

7. The land is a grassed area of approximately 1.5 hectares bounded by Waterfield Road, Argyll Rise, Pixley Walk, Muir Close and Dunoon Mead in the Belmont Ward and is shown coloured green on the plan attached to the application at Appendix 8.

8. The Land is part of a larger area of land purchased for housing purposes in 1959 by the City of Hereford under the Housing Act 1957 and was subsequently laid out as open space as part of the surrounding housing development during the 1970s. On the 26th November 2002 the Land was one of a number of open spaces included in a transfer of the Council's housing stock to Herefordshire Housing Limited

Community Impact

1. When land is registered as a town or village green the local community have a right to use it for all "lawful sports and pastimes", not just those enjoyed at the time of registration. So if land had only been used for playing football then, following registration, it could also be used for cricket, dog walking and the like, subject to any restrictions which might be lawfully imposed on its use, e.g. by bye-laws.

2. Although the landowner remains the legal owner, registration effectively prevents any development of land that would interfere with recreational use. The court has held that this is not inconsistent with the European Convention on Human Rights when balanced against the purpose of registration which is to preserve open space in the public interest.

Legal Implications

1. An application can be made to register land where "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years"

2 The following tests should be applied:

(a) if there is a relevant "locality" (a legally recognised division of the County such as a ward),
(b) if a significant number of the inhabitants of the locality, or of a neighbourhood (such as a housing estate) within the locality, have used the land,
(c) for lawful sports or pastimes (such as playing games, walking, picnics)
(d) for at least 20 years, and
(e) the use has been "as of right".

Test (e) is the key issue here.

The Inspector's Recommendation

1. Following the public inquiry Mr Jones' conclusion was that tests (a), (b), (c) and (d) above were met in that a significant number of the people from the Newton Farm neighbourhood in the Belmont Ward had used the Land for lawful sports and pastimes for at least 20 years.

2. However, as regards test (e) Mr Jones considered that, since the Council had laid out the Land as open space for the benefit of local residents in connection with the Housing Act power used to develop the surrounding housing, use of the Land had been by an implied statutory permission rather than "as of right" and so the Land should not be registered as a town green (see the Statutory Right section below).

3. Mr Jones also considered that the statutory procedure followed under section 123 of the Local Government Act 1972 when the Council transferred the Land to Herefordshire Housing Limited would have defeated the application in any event (see the Section 123 (2A) section below).

As of Right

1. Use "as of right" means use which is;

(a) not by force (such as by breaking down a fence or intimidating the landowner)

(b) not by stealth (such as only using the land when the landowner is away and would not be aware of the use)

(c) not by permission (which might be express or implied)

2. Mr Jones was satisfied that the use had not been by force or stealth but he considered that use had been by permission.

3. Permission to use land is normally given by a landowner by way of a written or verbal consent, or by a formal licence document. However the courts have decided that permission can also be implied from a landowner's conduct, but there needs to be something beyond mere inaction or tolerance on the part of the landowner to give rise to such an implication.

1. In Mr Jones' view, since the Land had been acquired, laid out and maintained under Housing Act powers as an amenity for local residents it followed that its use had been "by right" rather than "as of right" (i.e. as if permission had been given). In his conclusion Mr Jones referred to the use of the Land as having been "with permission". However, Mr Chapman QC has focused on a distinction between a right to use the Land being by way of a landowner's (the Council's) permission and being by way of an implied statutory right – see the Further Advices section below and Appendices 10 and 11.

2. Mr Jones also felt persuaded to follow a view expressed by Lord Scott in R (Beresford) v City of Sunderland [2003] that the statutory process followed (see the Section 123 (2A) section below) when transferring the Land to HHL would have overridden any public rights of use.

Section 123 (2A) Local Government Act 1972

1. Before disposing of an open space a council is required under section 123 to advertise its intention in a local newspaper for two weeks and consider any objections, which the Council did before transferring the Land to Herefordshire Housing Limited in 2002.

2. In the Sunderland case Lord Scott thought that a disposal of land in accordance with section 123 would override any town or village green status that the land may have. His reason was that, under section 122 of the same Act, if a council holds land for a purpose which is no longer required it can appropriate the land for another purpose. Lord Scott considered that if an appropriation did not override any public rights over the land then it would be ineffective, because the continuance of those rights might prevent the new use for which the land had been appropriated and so the statutory power would be frustrated. He felt that a disposal under section 123 must have the same consequence, i.e. that it would trump any town green status.

Further Advices

1. A second opinion was requested from Mr Petchey on the two legal issues;

   (i) if use of an open space that has been laid out and maintained under Housing Act powers for use by local residents can amount to use "as of " right; and

   (ii) if a disposal of land in accordance with section 123 overrides rights on which town or village green status could be claimed.

2. Mr Petchey's opinions are at Appendices 3 to 6. Mr Petchey agreed with Mr Jones' recommendation that the Land should not be registered as a town green since it had been acquired, laid out and maintained as open space under Housing Act powers so the use had been "by" right rather than "as of" right, but he differed from Mr Jones' view that a disposal under section 123 would override any town or village green rights.

3. Mr Chapman QC, who will advise the Committee, has provided two preliminary advice notes which are at Appendices 10 and 11. He, like Mr Petchey, agrees with Mr Jones that use was "by right " rather than "as of right" and, like Mr Petchey, disagrees with Mr Jones that the transfer of the Land to HHL, in accordance with section 122(2A) of the Local Government Act 1972 defeated any town green claim.

Additional Information

1. Since the determination of the first application two new pieces of information have come to light: (i) prior to the transfer of the Land to Herefordshire Housing Limited 4 nearby plots of land had been sold-off, 3 to other housing associations and 1 to a private developer, and there are now 1,790 postal addresses within the relevant neighbourhood identified by Mr Jones of which 221 (12.4%) are on the 4 plots; (ii) prior to the disposal of the Land to

Herefordshire Housing Limited it is likely that the cost of maintaining it, along with other housing open spaces, had been paid for through contributions from the General Fund and Housing revenue Account. In 2001-2002 the General Fund contributed 38.7% of the cost of maintaining housing open spaces.

2. This additional information did not change Mr Petchey's view that use was not "as of right", see his advice note at Appendix 6.

Key Considerations

1. As Of Right - Permissive Right/Statutory Right

(i) The advices that the use of the Land had not been "as of right" due to its statutory background can be supported by comments from Lord Walker in the Sunderland case. Where an open space is acquired by a local authority under the Open Spaces Act 1906 then it holds the land on trust for the public's enjoyment, so that people using the land do so "by" right as beneficiaries of a statutory trust, rather than as trespassers using the land "as of" right. Lord Walker felt that the position would be the same where land has been appropriated for public recreation under other statutory powers.

(ii) However, although the comments carry considerable weight they are not binding and the issue still need to be judicially determined.

Permissive Right

(iii) There is a difference between use having been "by right" as a result of the action or inaction of the landowner (the Council) and as a result of an implied statutory right. The Land was laid out as open space for use by residents of the surrounding Council housing development. Mr Chapman QC considers this means that use would have been implicitly "by right" rather than "as of right". He advises in paragraph 64 if his Preliminary Note at Appendix 10 that, although some of the points in a, b ,c, d and f below might be correct in relation to the question of whether the Council had permitted residents to use the Land, the points do not deal with the question of whether residents had used the Land under an implied statutory right. In the officer's view use was not under an implied statutory right – see the Statutory Right section below - and that the question of whether there was a permissive right is still relevant. The officer's view is that there was no permissive right for the following reasons:

(a) the Council had not indicated, either expressly or implicitly, that the right to use land was intended to be permanent or that it could be withdrawn at any time. If for example there had been a notice on the Land that local residents could use it for recreation until such time as the Council required it for other purposes, or that they could use it for certain activities but not for others, this would have signalled that use was by permission. However, there is no evidence of that sort of express notice.

(b) as regards any implicit indication that a right to use could be withdrawn, a witness for Herefordshire Housing Limited said that during the 1980s the Land was one of a number of open spaces owned by Hereford Council where permission to have bonfires on the 5th of November was permitted by advertisement in the Hereford Times. This could be construed as implying that all recreational use was under a permission that could be withdrawn. However the officer considers that this would be taking the possible implication too far and is outweighed by the absence of evidence of indications that the other uses, such as games and picnics, were under a permission that could be withdrawn.

(c) if tenancy agreements had stated that rents included an amount towards the upkeep of the Land for so long as the tenants were allowed to use it, that too would indicate that use was by the Council's licence, as would a similar provision in conveyances to tenants purchasing under the Right to Buy. However, there was no evidence that tenancies or conveyances during the relevant 20 years period included any indication that the right could be withdrawn. The officer's view is that a court might well prefer to draw the opposite inference, i.e. that the right was generally understood to be permanent, albeit without any consideration as to why this was so, particularly in relation to Right to Buy purchasers whom, it seems reasonable to assume, would have regarded the availability of the Land for recreation as one reason for deciding to buy.

(d) a revocable right might also be implied if a person paid for the right, e.g. someone paying their neighbour a periodic fee for a right to use an access way across their property. It is arguable that if the upkeep of the Land was paid for from tenants' rents then that element of their rents could be regarded as a fee for the right to use the Land, meaning that use was not "as of" right but rather in return for the maintenance contribution. As regards the contributions made by both the General Fund and the Housing Revenue Account towards the upkeep of housing open spaces, the officer's view is that, since no permission to use the Land was expressed in tenancy agreements, nor any element of rents identified as a contribution towards its upkeep, it would not be reasonable to treat whatever amount of rents went into the pot towards maintaining the Land as a payment for a permission to use it.

(e) with respect to Lord Walker's view that the rights of users of any land held by a local authority for the purpose of public recreation may be the same as those using land held under the Open Spaces Act 1906, in that they enjoy use as beneficiaries of a statutory trust of a public nature, the officer feels that the Land can be distinguished in that it was acquired and laid out in connection with the surrounding housing development, unlike a park which is intended for the use of the public generally. If Parliament had intended that open spaces laid out it connection with housing development should be held on trust it could have legislated in the same terms it did with respect to spaces intended for general public use.

(f) although different legal tests apply when determining town or village green status to those applicable to highway rights, and to those required to assert ownership through adverse possession, there is one common test, which is that the right claimed did not arise from a permission which the landowner communicated, either expressly or by implication, might be withdrawn. The officer considers that the absence of evidence of either an express or implied revocable licence would be likely to sway a court against finding that the Housing Act background of the Land was sufficient to conclude that use had been "by" right rather than "as of" right.

Statutory Right

(i) Mr Chapman QC explains in his two Preliminary Notes at Appendices 10 and 11 why he considers that residents' use was under an implied statutory right, rather than "as of right" - see paragraphs 54 to 62 of the Preliminary Note at Appendix 10 and paragraphs 4 to 29 of Preliminary Note 2 at Appendix 11. In summary, he considers that use was "by right" because if a local authority lays out and maintains land as an open space for use by local residents then it is implicit that they have a right to use it, meaning that use is not as of [their own] right. The legal arguments in the Preliminary Notes are complex and may not be familiar to Members, but Mr Chapman QC will be able to explain his views further at the meeting.

(ii) the reasons why the officer considers that use was not under a statutory right are:-

(a) although, from a common sense point of view, it might seem reasonable to say that local residents have an implied right to use land which has been laid out as open space for their benefit, the consequence, for the purpose of this application, would be that they do not have any right to continue using the open space if the landowner (HHL) decides otherwise. The statutory right argument effectively means that residents do not have a right, of their own, to use the land because they have, implicitly, been given a right to use the open space, but the right can be taken away. The officer considers that this would not be a fair outcome in that it results in an assumed right being used to defeat a case that the residents actually do have a right to continue using the open space.

(b) the fact that the Council had powers under sections 93 and 107 the Housing Act 1957 to lay out open space for the benefit of residents of the surrounding housing estate, and from elsewhere, does not implicitly confer any enforceable rights to those people over the land. The Council could, if it had wished, according to the view of Mr Ground (a barrister appointed to conduct a public inquiry concerning housing open space in Coventry, see Appendix 5, have built houses on the Land using its power under section 92 of the Act. Residents could not have prevented this by saying that they had an implied statutory right to continue using the Land. The argument that they cannot establish a right to use the Land, as a town green, because

they already had an implied statutory right to use the Land seems to give with one hand in order to take away with the other. The statutory right would in effect amount to no right at all if it can be taken away at any time.

(c) Although it would not be correct to describe local people who use the Land as trespassers, the officer considers that this does not mean they cannot establish "as of right" use of the Land through 20 years' use. Mr Chapman QC has highlighted the difference between a right which derives from a landowner granting permission to use land and a right which derives from statute. However, the purpose of section 15 of the Commons Act 2006 is to enable local people to claim land as a town or village green if they have used it "as of right" for 20 years. The officer considers that the argument that residents used the Land by virtue of an implied statutory right, under Housing legislation, would defeat the purpose of section 15 and that, even if use had been under an implied statutory right, this ought not necessarily prevent local people establishing that the nature or quality of their actual use of the Land amounted to use "as of right". There has been no court decision so far on whether an implied statutory right does arise when land is laid out as housing open space. If the Housing Act 1957 had said that residents did have a right to use the Land then that would be an end to the matter – their right would have been "by" right rather than "as of" right. However, we are looking at a proposition that there was an "implied" statutory right which defeats a claim under section 15 of the Commons Act 2006. The courts might feel that the case law on whether there was a permissive right does have a bearing on whether an implied right derives from the Housing Act legislation.

(d) Mr Chapman QC points out, in paragraphs 13 to of his Preliminary Note 2 that a statute might provide a beneficial entitlement for the public to use land which is owned by a local authority. The cases referred to are about whether a local authority was responsible for rates on public land or for a nuisance caused by users of the land (flying a noisy model aircraft). The courts decided that a local authority is not responsible for rates on land which people have an entitlement to use, or for nuisance created by users, except if the nuisance is in breach of bye-laws or is a criminal offence and the authority has not exercised its enforcement powers. However, the cases referred to relate to "public walks or pleasure grounds" under the Public Health Act 1875 and to land which is held "in trust" for the public under the Open Spaces Act 1906. Land which is laid out as housing open space for use by residents is not the same as a "public pleasure ground" and it has not been argued that the Council held the Argyll Rise Land "in trust" for the public. The Council could have built houses on the Land using its powers under section 92 of the Housing Act 1957, and this shows the difference between land laid out as housing open space and the type of park which a local authority is obliged to allow the public to use.

(e) If it were decided that local residents did have an implied statutory right to use the Land, thereby defeating the claim that they had used it "as of [their own] right" then that begs the questions, how can the right

be taken away? In the Section 123 Disposal section below the officers' view is that the method of disposing of the Land in 2002 to HHL would have only freed the Land from any trust arising solely as a result of the Land being held in trust in accordance with the Public Health Act 1875 or the Open Spaces Act 1906. The Land was not held in trust and so the disposal to HHL in 2002 did not override any other rights, whether they derive from an implied statutory right (which the officer considers not to be the case) or from the quality of the actual use (which the officer considers to have been "as of right").

(f) Mr Chapman QC, in paragraph 57 of his first Preliminary Note refers to the 1948 case of HE Green & Sons v The Minister of Health. The court decided that it was not unlawful for a local authority to build houses even though they might be occupied by some people besides those contemplated by the Housing Act 1936. The point of the reference to the case is that some of the people who used the Argyll Rise Land were not Council tenants. However, the officers' view is that, although the case means that the Council could have laid out the Land as open space for use by people as well as Council tenants, it does not deal with the question we are looking at, which is whether people were using the Land under an implied statutory right. In the officer's view there is a difference between housing open space land and a public park or recreation ground. The difference can be seen comparing the play area referred to in paragraphs 14 and 15 of Mr Jones' inquiry report with the adjoining open space Land. Although the Land is used for recreation it is not a park or pleasure ground or recreational ground which the Council had a duty to allow the public to use.

(g) The officer considers that his view that housing open space is different to what would be described as a public park/pleasure/recreation ground is supported by the wording of section 107 of the Housing Act 1957. This enabled local authorities to lay out open spaces on land purchased for housing purposes. The section says that if an authority sells housing land it can contribute towards the development of the land (which might include developing part of it as an open space) and the construction of streets on condition that the streets are dedicated to the public. There is no requirement that any other part of the development such as an open space be dedicated to the public and, in the officer's view, this indicates that there is not an implied enforceable right for people to use open spaces developed under Housing Act powers.

3. Section 123 Disposal

HHL does no wish to pursue its original objection that the section 123 procedure followed when the Land was transferred by the Council in 2002 defeats a claim to town green rights. However, in case the application does

come before a court, the officer has left in his reasons below for considering that a section 123 disposal does not defeat a claim.

(i) with respect to Mr Jones' advice that the use of section 123 when transferring the Land to Herefordshire Housing Limited in 2002 defeats the claim, in accordance with the view of Lord Scott referred to above, the officer considers that Mr Petchey's opinion is more likely to be decided as correct by the court. Although Lord Scott's view would carry significant weight when the question eventually comes to be decided, it is not binding since that particular question was not an issue for decision in the case. Mr Petchey's opinion was that a section 123 disposal does not result in town or village green rights being overridden.

(ii) the officer agrees with that opinion for the following reasons;

(a) section 123 requires a local authority intending to dispose of open space to advertise the intention and consider any objections. Provided it does so then the land can be disposed of free from any trust arising solely from any trust arising from it being held for public use under the Open Spaces Act 1906 or the Public Health Act 1875 which enables the provision of pleasure grounds. In the officer's view this releasing provision does not apply to town green rights claimed over the Land because firstly, if Parliament had meant for housing open space intended to be available for local residents rather than the public generally to be held on trust it could have legislated so.

(b) secondly, even if as Lord Walker suggested open spaces not expressly held for the purposes of the Open Spaces Act or the Public Health Act could be deemed to be so held as a result of the actual use of the land, section 123 only frees the land from any trust arising solely by virtue of it being held on trust. The town green rights are claimed, not on the basis that people using the land did so by virtue of a statutory trust, but because they used it as they did in the absence of any such entitlement.

(c) Lord Scott's reasoning was that an appropriation under section 122 must override any public rights as otherwise its object, to enable a local authority to change the purpose for which land is held, would be defeated if people could continue to assert rights in respect of the former purpose. However, section 122 provides that, subject to the appropriated land being freed of any trust arising solely by virtue of the Open Spaces Act and the Public Health Act, the appropriation is subject to the rights of other persons in, over and in respect of the land. Although section 123 reflects the freeing from trust provisions of section 122 it does not expressly protect other rights in the way section 122 does. In the officer's view the absence of an express protection of third party rights in section 123 should not be regarded as an intention that such rights are not protected. If that were the intention then the officer considers that it would need to have been clearly stated in section 123, particularly to distinguish it from the consequences of an appropriation under section 122 under which an appropriation is subject to third party rights.

Mr Jones considered that the question of third party rights did not arise in relation to the Land because land can only achieve town or village green status once it is registered, and since the Land is not registered there can be no town green rights. Although the officer agrees with Mr Jones on that, he also considers that the ability to claim town green status through 20 years' use is in itself a right and that, although town green rights had not been established by registration on the date the Land was transferred in 2002, the right to establish village green status through the type of use enjoyed up to the transfer was not extinguished by the section 123 disposal.

Conclusion

Mr Jones, Mr Petchey and Mr Chapman all consider that the Land was used "by right" and not" as of right and so it should not be registered as a town green.

Nevertheless, the officer considers, for the reasons given in the Key Considerations section above, that there is a good argument that use was as of right.

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Risk Management

Either party might seek to have the Committee's decision judicially reviewed and so it is important that the decision is made with regard to the legal considerations described above and not on the basis of any perceived benefits of one outcome over the other. The Applicant's representative has also made a complaint to the Local Government Ombudsman regarding what is perceived as a conflict of interest – the Council is a member and director of Herefordshire Housing Limited and has previously supported a bid for funding to develop the Land for affordable housing.

The Committee should note the three possible courses of action described in paragraphs 30 to 34 of Mr Chapman's Preliminary Note 2 at Appendix 11.

Financial Implications

The Council could seek a declaration from the courts as to the law on the two key issues. It could also ask another registration authority to deal with the application. However, it is recommended that the Committee makes a determination and leaves it to the dissatisfied party to seek judicial review if it wishes. There would be costs associated with the alternatives

Consultees

People who attended the public inquiry.

Background Papers

As contained in the Appendices

Argyll Rise Town green Application

Index of Appendices to Report to Regulatory Committee 11th January 2011

Appendix 1

COMMONS REGISTRATION ACT 1965

REPORT TO HEREFORDSHIRE COUNCIL FOLLOWING A NON-STATUTORY INQUIRY INTO AN APPLICATION TO REGISTER AS A TOWN GREEN LAND AT ARGYLL RISE, HEREFORD,

Introduction

1. The County of Herefordshire District Council is the registration authority for the purposes of town and village greens. It has appointed me to conduct a non-statutory public inquiry on its behalf to determine an application that land should be registered as a town or village green under section 13(b) of the Commons Registration Act 1965. The question in such an application is whether a statutory test is met. I have no authority to make any determination other than one that is necessary to determine this question. In particular, I have not been appointed to determine the planning merits of any proposed use of the land or any other planning issue. Should any comment of mine appears to be expressing an opinion on any planning matter, this is unintentional.

2. On 6th February 2006 three Hereford residents, Keith Miller, Jacqueline Kirby and Jackie Mills ("the Applicants") applied to register land ("the Application Site") in the Belmont ward of the City of Hereford as a town or village green ("TVG").

3. There is one objector, Herefordshire Housing Limited ("HHL"), the current owner of the Application Site and a registered social landlord.

4. The County of Herefordshire District Council did not support either party at the inquiry and, so far as I am aware, has not adopted a position on this matter. It role in the inquiry was limited to assisting in the running of the inquiry and in preliminary procedural matters such as circulating my directions and receiving proofs and submissions. I am grateful for this assistance, particularly for the efficient help that I have received from Mr Peter Crilly.

5. The inquiry was held at the Three Counties Hotel, Belmont, on Tuesday 31st July and Wednesday 1st August 2007. I would like to thank all involved, including Miss Morag Ellis QC who appeared for HHL and Mr Christopher Whitmey who assisted the Applicants, for their courtesy and helpfulness.

The Application Site

6. The Application Site concerned is an irregularly shaped parcel of land bounded by Dunoon Mead, Muir Close, Pixley Walk, Treago Grove, Waterfield Road and Argyll Rise. It is mainly mown grass. There are also some trees. It is almost surrounded by housing. Apart from the former play area, to which I shall return, and the planting of some trees, there has been no significant change to the land and its immediate surroundings throughout the period of twenty years prior to the making of the application. Apart from the play area, no part of the application site has been fenced or had any notice placed on it. HHL and its predecessors in title have mown the grass, planted trees and removed rubbish, but have not (outside the play area) carried out any operational development or restricted access to the land.

The Legal Framework

7. The application was made under the Commons Registration Act 1965 section 13 and stated that the land became a TVG "by actual use of the land by the local inhabitants

for lawful sports and pastimes as of right for not less than 20 years". The wording of the application has not been amended; but the area covered by it has been in effect amended by the Applicants' concession that the play area was not a TVG.

8. The relevant definition of "town or village green" is contained is the Commons Registration Act 1965 section 22 (1) and (1A) as amended and inserted by the Countryside and Rights of Way Act 2000 section 98, For the purpose of this application, the material words of section 22 provide: –

> (1)… "town or village green" means land… which falls within subsection (1A) of this section.
>
> (1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either –
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.

9. No regulations have been prescribed under subsection (1A)(b). Its sole relevance is in respect of the date on which the twenty-year period can end.

10. I am not considering the definition that applied before the amendments introduced by Countryside and Rights of Way Act 2000 section 98 took effect; nor am I considering the position under the Commons Act 2006. When considering cases decided under the pre-2000 definition, I have borne in mind the changes in the law effected by section 98.

The Burden and Standard of Proof

11. Each party has made submissions on the burden and standard of proof which in my opinion go to far. The applicants submitted that on the issue of 'as of right' it shifts to the objector; while HHL has submitted that the benefit of any uncertainty should be given

to the objector, a proposition that appears to be essentially the same as a criminal standard of proof.

12. My opinion is that the burden of proof lies on the applicants throughout, but that the standard of proof is proof on the balance of probabilities. The latter point does not mean that the applicants must not prove their case properly and in this respect I have borne in the cautionary words of Pill LJ in *R v Suffolk County Council ex parte Steed* "… it is no trivial matter for a landowner to have land, whether in public or private ownership registered as a town green".[1] I have also borne in mind Lord Bingham's approval of those words and connected observations in *R (Beresford) v Sunderland City Council*.[2]

13. Having said that, I should add that this is not a case where I have had to rely upon the burden of proof or upon any fine points on the standard of proof. Having heard and read a substantial amount of evidence, I have reached conclusions of fact of which I am confident and which are not borderline.

The play-area

14. For much of the twenty-year period a roughly rectangular area in the south-western part of the application site was used as a play area. In the course of the inquiry the applicants conceded that this was not a TVG.

15. HHL has nonetheless requested a determination of the issue. I have no hesitation in stating that the concession was rightly made. The play area was developed and managed as such. It contained play equipment, at least one litter bin, fencing and gates.

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1 75 P&CR 102, CA, 111.

2 [2003] UKHL 60, [2004] 1 AC 889, paragraph 2.

Dogs were banned. There was a sign regulating the age of users. Ultimately, following an accident for which it paid compensation, HHL removed the whole play area, that is all structures and all artificial surfacing. It would have been abundantly clear to everyone that the use of the play area was with permission. Its use was not "as of right".

The twenty-year period

16. The applicants submit that the twenty-year period does not have to end with the date of the application. I have no hesitation in rejecting since it is contrary to the opinion of Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[3] (and incidentally also contrary to what I would in any event have considered to be the clear and natural meaning of section 22(1A)(a) and (b)). The relevant twenty-year period ran until to date of the application. In other words it ran for twenty years until 6th February 2006. While the exact date on which the period ended is not, in the light of the evidence, important; it is important to state that it cannot be taken as having ended in or before 2002 when the land was disposed of under section 123 of the Local Government Act 1972.

17. Subject to that point, nothing turns on the twenty-year period requirement. I am satisfied there has been no significant change in the nature of the use of the Application Site throughout the period since it was first brought into use (other than in respect of the play area).

Significant number of the inhabitants

18. As Sullivan J confirmed in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*[4] the word 'significant', although imprecise, is an ordinary word in the

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3 [2006] UKHL 25, [2006] 2 AC 674, paragraph 43.

4 [2002] EWHC 76 (Admin), [2002] 2 PLR 1.

English language and little help is to be gained from trying to define it in other language.[5] I have no doubt that the application has been used by a significant number of the inhabitants. It is neither necessary nor desirable to attempt to call every person who has used the land, or even as many people as possible. The Applicants' concentration on those whose use has extended throughout the twenty-year period was reasonable. I accept their evidence as to use, which was not in any way shown to be false or inaccurate. That view is reinforced by the nature of the land concerned. It would be surprising if such an obviously useable green space close to a substantial number of houses in a large estate were not used by a significant number of the inhabitants.

19. The test approved by Sullivan J in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* was whether "the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers." [6] I have reached the firm view that it was the former not the latter.

Any locality, or of any neighbourhood within a locality

20. The Applicants' case is that the locality is the civil parish of the City of Hereford or Belmont Ward (each of which is an area known to law) and the neighbourhood is "the Newton Farm yellow area in L2". They rely upon Lord Hoffman's rejection of the technicality of the previous law.[7] On this latter point I agree with the Applicants. The pre-

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5 Paragraph 71.

6 Paragraph 71.

7 *Oxfordshire County Council v Oxford City Council*, paragraph 27.

2000 cases on which HHL relies[8] must be read in the light of the amendment that section 98 introduced and Lord Hoffman's rejection of technicality.

21. HHL draws attention to the absence of any obligation on its part to make good the Applicants' case. It also draws attention to Sullivan J's incidental observations about the meaning of the concept in *R (Cheltenham Builders Ltd) -v- South Gloucestershire District Council*[9] and to the fact that the part of his judgment identifying a requirement for "a sufficient degree of cohesiveness" was not disapproved by Lord Hoffmann in *Oxfordshire*.

22. I consider that the proper approach is to ask whether in plain English (devoid of technicality) the area concerned is a locality or of a neighbourhood within a locality. While such an area must have some cohesion, I see no reason to add any phrase to the statutory test, which in the context of this case has not caused me any difficulty.

23. The site lies within a small conurbation composed of the built-up area of the City of Hereford and some residential development in adjoining parishes, particularly the development in the parish of Belmont closest to the application site. A substantial part of the objector's cross-examination was intended to and did establish that people from parts of Hereford other than the Newton Farm Estate used the land. Like most sites that are arguably a TVG, it is used not exclusively by local inhabitants, but also by family members, friends and other visitors. However its location in the far southwest of the City of Hereford is such that there would be little reason for it to attract people from other parts of the City or from further afield other than people visiting friends and family. I

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8 *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931 and *R v Suffolk County Council ex parte Steed* 70 P&CR 487, CA.

9 [2003] EWHC 2803, [2004] JPL 975 paras 85-86

have no doubt that the predominant use of the site was by local people and not by the public at large. (I consider the different question of right to use later in this report.) While there was also use by friends and families of local people, I have no reason to believe that this was anything more than would be expected for any TVG, or that parliament intended such almost inevitable use to render land incapable of being classified as a TVG under section 22(1A).

24. In the case of an urban area, there will almost inevitably be a gradation of use, with the closest houses generally making greatest use of the site concerned and a decrease of use as one moves further from the site. I consider that this explains the differences between witnesses for the Applicants as to exactly what area the Application Site serves. Nonetheless, the Newton Farm Estate is a distinct part of the City of Hereford shown on maps, well known by that name and capable without undue difficulty of definition. It is more than a mere collection of streets and has a substantial degree of cohesion. As with very many borderlines, there may appear to be some artificiality when adjoining locations immediately to one side and immediately to the other of the border are treated differently. Despite this, my firm overall impression is that the Application Site predominantly served the Newton Farm Estate, that is the area of land bounded by the A 465 Belmont Road, the Great Western Way, the Marches railway line, the boundary of the built-up area of the City of Hereford and the parish of Belmont. In reaching this conclusion as to predominant use, I recognise that there may have been some use by residents of nearby urban parts of Belmont parish that was more than minimal.

25. This is a more extensive area than the one put forward by the Applicants. I have therefore considered whether it would be unfair on my part to take a different area without re-opening the inquiry or at least inviting further written submissions. Since the area I consider appropriate, namely Newton Farm as a whole was expressly considered by HHL in its closing submissions, no doubt because it, like I, considered it to be the

obvious area, I see no need for this. I also consider that it would be wrong to hold against a party that was not legally represented the selection of an area that I did not consider appropriate when I had ample evidence to reach a conclusion myself and when leading counsel for HHL had expressly considered the larger area that I considered to be relevant.

Lawful sports and pastimes

26. I have no doubt that the bulk of the use of the Application Site was for lawful sports and pastimes. Indeed HHL did not argue to the contrary.[10]

27. It is possible that at some stages some bonfires were without express authority and, at least to the extent that they would have caused some damage to the land, a trespass. I do not consider such occasional limited use of a limited part of the land to be significant.

28. The objector argued that dog-walkers who failed to clear faeces were in breach of a byelaw and hence unlawful. Even if I had considered that the byelaws concerned had applied (which I do not), I would not have considered that this rendered the whole act of dog-walking unlawful.

29. I have no doubt that the predominant use of the land has been for activities that can properly be called lawful sports and pastimes.

As of right

30. The term 'as of right' means a user that was not by force, nor stealth, nor the licence of the owner. It does not mean "of right". Rather its meaning is closer to "as if of right". In this case there is no question of force or stealth. Hence the relevant question on

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[10] HHL's original legal submissions (23rd July 2007), paragraph 5.1.

this element of the definition is whether the inhabitants' user was by the licence of the owner. Toleration of a trespass is not enough to defeat a claim, being not inconsistent with user as of right. The mere fact that land is held by a public body for a public purpose is also not enough to defeat a claim.

31. HHL submits that there is a perfectly simple and natural explanation of recreational user, namely that the land was acquired and developed by the then housing authority for housing purposes which included powers to acquire, lay out and manage and maintain areas of ancillary recreational open space. Since 2002 HHL have continued to maintain the land for similar purposes. In respect of the absence of evidence of the appropriate ministerial consents, it relies on the presumption of regularity.

32. Could the users properly be said to be trespassers? I have concluded that they could not. This is not a case of a piece land originally intended for some private purpose, but which was in fact used by the local community; nor is it public land that was originally intended to be subject to controlled entry in specific circumstances. Rather it is land that from the time when this part of the Newton Farm Estate was developed was intended for use by residents of the estate for informal recreation. Users of the application land were never trespassers, not even tolerated trespassers. I have rejected the Applicants' argument that the burden of proof on this point has shifted to the objector; but, even if I had accepted it, I would have been against them. If at some stage in the twenty-year period local residents had been accused of trespassing on the Application Site, they would have been surprised, perhaps astonished. Their likely response would have been that the land was clearly intended to be used by the public.

33. I have some doubt whether judicial statements that implied permission does not negate a claim to use as of right were intended to apply to an implication that arises, not from toleration or mere inaction, but from the original sole intended use of the land.

However, there is a degree of uncertainty in the law, with the implication that I am inclined to make falling between that which is not permissible (mere inaction) and that which is (express exclusion of the public on certain days).[11] It is therefore necessary to consider the statutory provisions that applied to the Application Site.

34. The City of Hereford Council acquired land that included the Application Site in 1959 for housing purposes acting under Part 5 of the Housing Act 1957. This included a power (with ministerial consent) to lay out and construct open spaces. While no such consent has been located, I consider that it likely that the City of Hereford Council acted properly and obtained one. In the case of events that occurred 48 years ago prior to two local government reorganisations in Herefordshire, it is easy to see how a document that may not have been seen as having continuing great importance could be lost. In the circumstances I have no hesitation in applying the presumption of regularity to events at this time. The Application site was laid out, managed and maintained under statutory housing powers.

35. It follows that recreational use was by right on open-space land held for housing purposes. It is clear that both the Council and several members of the public who completed questionnaires considered that there was a general public right to use the land. That is what I would have considered if I had been in their respective positions and it is what I in consider now. A member of the public on the Application Site would not have been a trespasser whether they came from within or from outside the Newton Farm Estate.

36. Herefordshire Council transferred the Application Site and other land to HHL in 2002. Before doing so the Council gave notice of intention to dispose of open space

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[11] *R (Beresford) v Sunderland City Council*, *per* Lord Bingham of Cornhill, paragraphs 5 and 6.

under section 123(2A) of the Local Government Act 1972. This subsection applies to "any land consisting or forming part of an open space". The relevant definition of open space for these purposes[12] is: "any land… used for purposes of public recreation…". Public open spaces are different from town and village greens being land over which the public as a whole, rather than simply local inhabitants have rights.[13]

37. My initial reaction is that the use of section 123[14] is sufficient to defeat a claim to use as of right. That initial reaction is reinforced by comments made incidentally by Lord Scott of Foscote and Lord Walker of Gestingthorpe in *R v City of Sunderland ex parte Beresford* [2003] UKHL 60, namely: –

> "It was, as I understood it, suggested by Mr Laurence that if the "open space" land had achieved the status of a 1965 Act town or village green, then, notwithstanding the disposal of the "open space" land by a principal council, the section 123(2A) procedures having been duly complied with, the land would retain its status as a town or village green under the 1965 Act. Mr Petchey did not contend that this was wrong. Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect." [15]
>
> "I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered." [16]

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[12] Local Government Act 1972 section 270(1) and Town and Country Planning Act 1990 section 336(1).

[13] *R v Doncaster Metropolitan Borough Council ex parte Braim* [1988] JPL 35.

[14] In circumstances such as the present where there is no suggestion that it was in any way improper or artificial.

[15] Lord Scott, paragraph 28.

[16] Lord Scott, paragraph 52.

> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation." [17]

38. As incidental comments these do not bind me. Nonetheless such comments from Law Lords merit very considerable respect. I see no reason to depart from them. On the contrary they correspond with my initial view on the matter.

39. As a result I have no hesitation in concluding that the land was not held as of right.

Byelaws

40. HHL also raised the matter of byelaws. At the inquiry I indicated that I was not persuaded by HHL's arguments in respect of these. In response Miss Ellis stated that these arguments were the "icing on the cake" as far as HHL was concerned. In other words they were not an essential part of HHL's case on the "as of right issue". I agree.

41. The critical issue as far as the byelaws is concerned is whether they applied to the Application Site. The description of the land to which they apply is not clear. Miss Ellis submitted that this meant that the burden of proof lying on the applicants meant that the uncertainty should be interpreted against them. I differ. Burdens of proof apply to matters of evidence, not statutory interpretation. In this case it is clear that nobody treated the byelaws as applying to the Application Site (other than the play area). Evidence from each side shows that there were no notices that referred to the byelaws or the activities they forbade. The situation in the play area and in the land west of Treago Grove was

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[17] Lord Walker, paragraph 87.

different. I do not believe that a responsible authority would pass bye-laws in respect of land and then give local residents no warning of these and have no hesitation in concluding that the byelaws applied to the areas where byelaw notices were erected and did not apply to an area where there was no notice that expressly or impliedly indicated the existence of a byelaw.

Conclusions

42. The relevant test is that contained in subsection 22 (1A) of the Commons Registration Act 1965. I am satisfied that for not less than twenty years prior to the making of the application a significant number of inhabitants of the relevant neighbourhood, the Newton Farm Estate, indulged in lawful sports and pastimes on the Application Site. However I am also satisfied that this use was not as of right but was with permission and that, in any event, Herefordshire Council's use of section 123 of the 1972 Act, defeats a claim to TVG status.

43. It follows that I advise the Council to reject the application and not to register the Application Site (or any part of it) as a town or village green.

Timothy Jones
No 5 Chambers
(Birmingham – London – Bristol)
19th September 2007

- 2007 -

COMMONS REGISTRATION ACT 1965

IN THE MATTER OF AN APPLICATION
TO REGISTER AS A TOWN GREEN LAND
AT ARGYLL RISE, HEREFORD

COUNTY OF HEREFORDSHIRE
DISTRICT COUNCIL

REPORT

Timothy Jones
No 5 Chambers

The County Secretary and Solicitor,
County of Herefordshire District Council,
(F.A.O. Mr Peter Crilly),
'Brockington', 35 Hafod Road,
Hereford, HR1 1SH.
DX: 135296 Hereford 3.

Appendix 2

- 2007 -

IN THE MATTER OF AN
INQUIRY INTO AN APPLICATION TO
REGISTER LAND AT ARGYLL RISE
AS A TOWN OR VILLAGE GREEN

HEREFORDSHIRE COUNCIL

OPINION

Timothy Jones

Herefordshire Council,
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DX 135296 Hereford 3.

OPINION

1. I have been asked to advise Herefordshire Council in respect of my report of 19th September 2007 into an inquiry into an application to register land at Argyll Rise, Hereford, as a town or village green. This request arises from comments made by the objector. I am not sure if these comments have been disclosed to the applicant. They should be.

2. In paragraph 35 of the report I stated: *"It follows that recreational use was by right on open-space land held for housing purposes."* This was a direct consequence of the land's statutory background, namely Part 5 of the Housing Act 1957. The objector's submissions in respect of this were not challenged by the applicant. In particular there was no challenge to paragraph 6.3 of those submissions:

> *"The power included a power to provide and maintain with the consent of the Minister of Housing and Local Government in connection with any housing accommodation, inter alia, any recreation grounds or other land which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation was provided. By s.107, the local authority might lay out and construct open spaces on land acquired for the purposes of Part 5 of the Act."*

3. The right resulting from the creation of open space under Part 5 of the 1957 Act can be overridden under the powers of appropriation and disposal contained in sections 122 and 123 of the Local Government Act 1972.

4. Instructing Solicitor has referred to paragraphs 45 and 49 of Lord Scott of Foscote's speech in *Beresford*. Paragraph 45 begins:

> *"Permission for the public to use land for recreational purposes, or to pass along a path or track, may, depending on the terms of the permission, if it is express, and on the surrounding circumstances, whether or not it is express, indicate to the public that the permission is temporary only, may be withdrawn, and is therefore precatory, or may indicate to the public that their right of use is intended to be permanent."*

5. He then deals with rights of way before adding at the beginning of paragraph 46:

> *"Where a town or village green is concerned, however, a sufficient indication, express or implied, that the right of the public to use the land for recreational purposes was intended to be permanent could not itself endow the land with that status. But the quality of the use of the land by the public, following the dedicatory indications in question, would surely be 'as of right'. "*

6. The point he is making in the first sentence of this quotation is that whatever the intention of the landowner and whatever the perception of the users, such indications do not create a town or village green. The use must continue as of right until the date of the application. Hence, even if the appropriate inference in this case had been that a permanent right to use had been intended, this would make no difference if that use were lawfully terminated under section 123 before the application to register was made. It could therefore not affect my recommendation.

7. I find Paragraph 43 of Lord Scott's speech difficult to interpret. It appears different from that of other judges in the House of Lords that for a use to be as of right it must be *"nec precario"*. As such, the view of the majority must be preferred so that the difficult task of interpreting Lord Scott's comment in this paragraph is academic.

8. In paragraph 28 of his speech Lord Scott stated *obiter*:

> *"An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect."*

9. These comments on section 122 and 123 were not contradicted by any other Law Lord. Instructing Solicitors have pointed out that section 122(1) states that an appropriation *"...shall be subject to the rights of other persons in, over or in respect of the land concerned"*. There is no conflict between this and Lord Scott's *dicta* since there are no rights to a village green as a result of 20 years use until an application is

made. Until that point the landowner may terminate the use and that is an end of the matter.

10. Section 122(2B) applies to land held (a) *"for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds)"*, which was plainly not the case; or *"(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds)"*, which I do not consider to have been the case. The subsection is therefore not relevant to my report. The answer to Instructing Solicitor's question is that the rights referred to in it are exceptions to the preservation rights mention in subsection (1). I have no reason to infer anything in respect of rights in section 123 that is not included within it.

Further points in respect of Mr Whitmey's Additional Comments

11. Herefordshire Council did not instruct me to consider a hypothetical application under the Commons Act 2006. I would have been exceeding my authority to do so. Furthermore it would have been very clearly unfair to the objector to consider a matter raised for the first time in closing submissions when the evidence had not been addressed to this matter. This was especially so in this case where the closing submissions concerned were supplementary closing submissions after the end of the inquiry sessions that had been directed solely on the *'as of right'* issue.

12. On the matter of trespass I consider that the approach of Lord Walker of Gestingthorpe is correct. He stated in paragraph 72:

> *"... This leads at once to the paradox that a trespasser (so long as he acts peaceably and openly) is in a position to acquire rights by prescription, whereas a licensee, who enters the land with the owner's permission, is unlikely to acquire such rights. Conversely a landowner who puts up a notice stating "Private Land - Keep Out" is in a less strong position, if his notice is ignored by the public, than a landowner whose notice is in friendlier terms: "The public have permission to enter this land on foot for recreation, but this permission may be withdrawn at any time".*

13. The use of section 123 of the Local Government Act 1972 means that the decision in *Beresford* is very clearly distinguishable.

TIMOTHY JONES

No. 5 Chambers,

Birmingham - London - Bristol

Tel. 0870 203 5555

9th November 2007.

Appendix 3

A D V I C E

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1. I am asked to advise Herefordshire Council in respect of two applications which have been made to register land at Argyll Rise, Hereford.

Background

2. The land in question is an irregularly shaped area of mown grass and bounded by roads known as Dunoon Mead, Muir Close, Pixley Walk, Treago Grove, Waterfeld Road and Argyll Road. It is owned by Herefordshire Housing Limited ("Hereford Housing"), a registered social landlord. Before 2002 it was owned by Hereford Council, the transfer in that year having come about when that Council transferred its housing stock to Hereford Housing.

3. Hereford Council (or its predecessor local authority) had acquired the land in 1959 as part of a larger area of land acquired for housing purposes under Part V of the Housing Act 1957. It then seems that it was laid out as open space in conjunction with the building of housing on the larger area of land.

4. Before disposing of the land in 2002, Hereford Council gave notice of its intention to do so under section 123(2A), taking the view that the land was open space within that sub-section.

5. On 6 February 2006, Keith Miller, Jacqueline Kirby and Jackie Mills applied under the Commons Registration Act 1965 to register the land as a town or village green. Herefordshire Housing objected and a non-statutory inquiry was held on 31 July and 1 August 2007. This was conducted by Timothy Jones, a barrister in private practice. He prepared a report which is dated 19 September 2007 and has also advised by way of an Opinion dated 9 November 2007.

6. He took the view that the land had been used for 20 years for lawful sports and pastimes by all inhabitants of a neighbourhood within a locality. However he took the view that their use had not been *as of right* but *by right*. This was because he considered that local people were entitled to go on such land to indulge in lawful sports and pastimes. He also took the view that the use of section 123(2A) of the Local Government Act 1972 operated to defeat the rights of local people, following dicta of Lord Scott in *R (Beresford) v City of Sunderland*[1].

7. In response to this Report the applicants have now made a further application for registration. In so doing they seek to rely on section 15(4) of the Commons Act 2006. Section 15 is a re-enactment of the relevant provisions of the Commons Registration

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1 [2004] 1 AC 889.

Act 1965, but incorporating some changes intended to facilitate registration. Sub-section (4) represents one of these changes.

8. I am asked to advise as to the correctness of the two reasons for rejecting the original application identified by the Inspector at paragraph 6 above; and as to whether the second reason for rejecting it is overcome by the second application made under the new Act.

First reason for rejection: use not *as of right*

9. Section 93(1) of the Housing Act 1957 provided as follows:

> *The powers of a local authority under this Part of this Act to provide housing accommodation shall include a power (either by themselves or jointly with any other person) to provide and maintain with the consent of the Minister in connection with any such housing accommodation any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.*

10. Section 107 of the 1957 Act provided as follows:

> *A local authority may lay out and construct public streets or roads and open spaces on land acquired or appropriated by them for the purposes of this Part of this Act and where they sell or lease land under the foregoing provisions of this Part of the Act they may contribute towards the expenses of the development of the land and the laying out and construction of streets thereon, subject to the condition that the streets are dedicated to the public.*

11. It seems that Mr Jones took the view that the land had been laid out under section 93(1). In his Report he said:

> *34. The City of Hereford Council acquired land that included the Application Site in 1959 for housing purposes acting under Part 5 of the Housing Act 1957. This included a power (with ministerial consent) to lay*

> *out and construct open spaces. While no such consent has been located, I consider that it likely that the City of Hereford Council acted properly and obtained one. In the case of events that occurred 48 years ago prior to two local government reorganisations in Herefordshire, it is easy to see how a document that may not have been seen as having continuing great importance could be lost. In the circumstances I have no hesitation in applying the presumption of regularity to events at this time. The Application site was laid out, managed and maintained under statutory housing powers.*

12. I have no doubt that the Inspector was right to conclude that:

> *The Application site was laid out, managed and maintained under statutory housing powers.*

13. I am less confident that this is a case in which ministerial comment would have been sought under section 93(1) and been lost. It seems to me to be equally plausible that the land was laid out under the powers contained in section 107.

14. Pausing at this point, it seems to me that there ought still to be minutes of the Hereford City Council dating from the time that the land was laid out. (I accept that it may not make it clear under what powers the land was laid out). If the minutes are available, I would expect them to refer to the minister's consent if it was obtained; and I would view the absence of such consent as indicating that it was **not** obtained (the land being laid out under section 107). This having been said, I do not think that it makes any difference to the essential issue whether the land was laid out under section 93(1) or section 107.

15. I think that it is helpful to begin by looking at the matter broadly. The land in question has been laid out under statutory powers and made available for local people for their

use. Its status would seem similar to that of a park or recreation ground which is surely not registrable. It seems to me that it would be odd, on the face of it, if such land could become registrable as a town or village green. I think that the initial reaction of a Court would also be to think that it was odd, and an application to register such land as a town or village green might represent an attempt to extend village green law further than it can reasonably go.

16. This all said, if the land is not to be registrable, there has to be the legal basis for so holding. I cannot say that it is altogether clear that such a legal basis exists.

17. As regards parks, these are generally held under section 164 of the Public Health Act 1875. There is authority which has held that council tax payers have a right to enter a park held under the terms of this statute. Where land is held under the Housing Act, the entitlement of council tax payers is less clear – indeed, they may not have such a right. This is because I suspect that investigation will show that during the time that the land was held under the Housing Acts and managed by successive local authorities, it was actually paid for by council house tenants through their rent. This in turn would suggest that council house tenants, at least, had an entitlement to go on to the land. But if so, this entitlement is not "spelled out" anywhere.

18. Further, if one had to choose between an analysis which says that local people (i.e essentially council house owners[2]) have a right to go on to the land and one which says that they do not and that they are therefore, trespassers, I think that one would choose the former analysis. However the matter is complicated by the fact that it is not clear whether the position is that use by local people will be *as of right* only if they are trespassers or whether use by those whose use is permitted – i.e who have some sort of entitlement – may be *as of right*. In the *Beresford* case, Lord Walker of Gestingthorpe suggested that the former was the case[3]; it is clear that Lord Scott took a different view[4].

19. The upshot of this discussion is that this is one of those cases where the only thing that one can say that is clear is that the law is uncertain. I am mindful of a case in Stratford upon Avon where the registration authority registered Housing Act land as a town or village green upon the advice of leading counsel, and I am currently involved in a case in Coventry where the Inspector (comparatively junior counsel, although experienced in this field) has also recommended such land for registration – although the debate in this case has still not been finally resolved (there has been a post-Report exchange of further representations).

Second reason for rejection: section 123 of the Local Government Act 1972

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2 I think that council house owners would have paid for the upkeep of the land in their rent. There is potentially an issue in that the use could have been (at least in part) by those who were not council house owners. However, such owners are likely to predominate among users – else the land should have been maintained as public open space from the non-housing revenues of the Council.

3 See paragraph 14.

4 See paragraph 86.

20. I turn to consider the point on section 123(2A) of the Local Government Act 1972. The idea is that appropriation of local authority open space in accordance with the terms of that section (or its disposition for another use) overrides its village green status (if it be a village green).

21. It is necessary to recall first of all that *Beresford* was decided before the *Trap Grounds*[5] case. The latter case decided that rights are created by 20 years use for lawful sports and pastimes, **where such use is continuing at the time of the application**. The right arises **at the date of the application**. It seems to me clear that in *Beresford* Lord Scott was envisaging a situation where rights had arisen after 20 years use and which were then potentially defeated by the appropriation or disposition of the local authority. I find it hard to apply his reasoning to a situation where the land would be **registrable** as a town or village green **but where such status has not been achieved** and where no application to register has been made.

22. Moreover, with respect to Lord Scott, I doubt his reasoning even if rights have arisen prior to appropriation or disposition. It seems to me that there is a considerable difference between overriding any rights which local people may enjoy by virtue of the statutes under which it has been made available to them as open space by the local authority, and rights which they may have acquired by a process which may be likened to the acquisition of land by adverse possession or the acquisition of rights to use land as a highway i.e which are extraneous to the process by which the land over which they

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5 I.e *Oxfordshire County Council v Oxford City Council and Robinson* [2006] 2 AC 674.

are claimed was made available for use by local people. Lord Scott seems to consider that Parliament envisaged a situation where (i) land could have been made available as open space, (ii) potentially have been registered as a town or village green, but (iii) that by subsequent appropriation/disposition, those rights would be overcome. This seems to me to be implausible. Further, I do not think a pre-existing traditional village green could lose its status in this way[6]. Accordingly I do not think that the argument on section 123(2A) of the Local Government Act 1972 operated to defeat the application in the first application.

23. In these circumstances, it is a bit difficult to advise on the application of section 15(4) of the Commons Act 2006. The idea of section 15(4) is that an applicant has a five year period of grace in respect of use which ceased before 6 April 2007. Thus the applicants are in effect arguing that even if the argument based on section 123(2A) of the Local Government Act 1972 is correct, it is trumped by section 15(4). I think that it is hard to counter the logic of this argument, even though on the view that I take, section 123(2A) does not apply to the situation. Section 15(4) would apply if notices had been put up (making continuing use not *as of right*) on the date of the disposition – why should it make any difference that the use ceased to be as of right by virtue of a disposition under section 123(2A)? I do not in fact think that the position is (or would be) this simple but I would emphasise that it is difficult to advise on a hypothetical view of the law which I consider to be wrong.

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[6] The appropriation of village greens to other uses is addressed by section 229 of the Town and Country Planning Act 1990 and is likely to involve the provision of replacement land. On the face of it there is not an overlap between *open space* (defined for the purposes of section 123 of the Local Government Act 1972 in section 336(1) of the Town and Country Planning Act 1990) and *common* (defined for the purposes of section 229 also by section 336(1) of the 1990 Act to include *town or village green).*

Conclusion

24. Where does this leave matters? First of all, it has to be recognised that it is not unlikely that this matter will end up in the courts whatever the outcome. It seems to me that it would be unsatisfactory for this to happen without there being clarity as to just how it is that the land was laid out as open space. I think that the registration authority should, in reaching its decision, determine whether the land was laid out under section 93 or section 107 – hopefully in the light of the relevant minutes. I think that there also needs to be clarity about just who it was who was paying for the upkeep of this land – council house tenants or rate/council tax payers (and, if the latter, how this came to be the case). I suspect that for this aspect of the matter to be considered there may need to be the opportunity for a further round of representations by the parties.

25. My own view is that the (implied) entitlement of local people to use the land under the Housing Acts means that, like a park, use of the land has not been *as of right*. This of course was the view of Mr Jones, the Inspector. However there are others advising in this area of the law who would take a different view. Cases of this kind involve predicting what a court would do. I think that this is one of those cases where I would be more confident of winning in the lower courts. In the House of Lords, looking at the matter realistically, I think that the chances of success are 50:50.

26. It would be possible to seek a declaration from the Courts as to what is the law. The simpler and cheaper course is to make a decision and leave it to the appropriate party to

seek judicial review, if so advised[7]. Members might however feel that the applicants – if the decision were against them – would be relatively disadvantaged in the ability to bring legal proceedings as compared with the objector. (The applicants did not have legal representation at the inquiry[8], whereas the objectors were represented by Queens Counsel). This is a factor to be taken into account in deciding whether to seek a declaration.

27. I should conclude with what I might describe as a declaration of interest. I regularly advise applicants and objectors about village green applications. In relation to the Housing Act point arising in these instructions I have recently been advising an objector. It also will be apparent from the report in *Beresford* that for Sunderland City Council that I argued that Lord Scott's argument on section 123 was not correct. None of this affects the objectivity of my advice now to Herefordshire Council but I think that it is appropriate that they should be aware of my involvement in the past with the issues raised in these instructions.

PHILIP PETCHEY

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6 February 2008

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7 See a discussion of the issues in the *Trap Grounds* case in paragraphs 91-103 (Lord Scott) and 130-138 (Baroness Hale of Richmond).

8 Although they were assisted by a member of the public with considerable experience of this area of the law.

Appendix 4

FURTHER ADVICE

1. Following my Advice dated 6 February 2008, I was able to supply my Instructing Solicitor with a report of Mr Richard Ground (an independent barrister sitting as an Inspector) to Coventry City Council (a commons registration authority) on an application to register land under the Housing Acts as a town or village green. He held that such land was registrable. My Instructing Solicitor has asked me to comment on Mr Ground's approach and on his conclusion. I should add that I appeared for the City Council as landowner at the public inquiry conducted by Mr Ground.

2. More particularly, the question that Mr Ground was considering was whether use by local people of *open space* laid out under 79(1) of the Housing Act 1936 was as of right for the purposes of registration of a class [c] town or village green under the Commons Registration Act 1965.

3. The simple argument that it is not is that such use was *by right* and not *as of right* (i.e by virtue of an entitlement) or by virtue of a statutory licence to be implied from the terms of the statute.

4. Mr Ground rejected this simple argument. He draws a distinction between *open space* as referred to in sections 122 and 123 of the Local Government Act 1972 and as referred to in section 79(1) of the Housing Act 1936. *Open Space* as referred to in sections 122 and 123 is defined in section 336(1) of the Town and Country Planning Act 1990 as

> *any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground.*

The phrase *open space* is not defined in the 1936 Act.

5. As regards *open space* as referred to in sections 122 and 123 of the Local Government Act 1972 Mr Ground's position as I understand it, is that local people or the public *would* have an entitlement of a kind to go on to the land, protected by the requirement that the procedures of section 122 (or, as appropriate) section 121 must be gone through if that right is to be taken away from them. That entitlement – whatever its precise jurisprudential nature – means that use by local people is *by right* and not *as of right*.

6. As regards *open space* laid out under the Housing Act 1936, Mr Ground takes the view that this is land which remains appropriated to housing use and to which sections 122 and 123 have no application. (This view was consistent with the way the land had been treated when it was transferred from housing to the Council's general fund in 2001).

7. It must be, accordingly, that he takes the view that the land is not land which is not *used for the purposes of public recreation*: the idea, I think, that it is not ***public*** *open space* and therefore not used for the *purposes of public recreation*.

8. In my judgment, land laid out under the Housing Acts does fall within the ambit of sections 122 and 123 of the Local Government Act 1972, and I think that the one case on this section – *R v Doncaster Borough Council, ex parte Braim*[1] - supports that analysis. In that case McCullough J said:

> *What quality of user "for purposes of public recreation" is required before the land is "open space" for the purposes of section 123(2A) of the Local Government Act 1972 as amended? Mr Whybrow contends that it must be as of right, i.e that user under a bare licence will not suffice. He suggests that any other construction would be absurd and inconvenient. I do not agree. Section 123(2A) appears to have been enacted to protect the interests of those lawfully using open spaces. A bare licensee has no interest in land, but so long as his licence exists, he has something which he can enjoy. It can only be brought to an end on giving him reasonable notice. In many cases such notice need only be very short, but it is possible to envisage circumstances in which a significant period would be required. Where a licence has been given, there is no hardship or absurdity in a council having to choose between postponing its disposal of the land until such notice has been given and expired and, alternatively, advertising the intended disposal in the way required.*[2]

Note that in *Braim* the phrase *as of right* is used to mean – confusingly – by reference to a right; and the actual right in that case is obscure. However the point of the passage that I have quoted is that a bare licence - ie a very limited interest – would suffice. As I read Mr Ground's *Report* I think that he would say that the users of the open space in the case before him were trespassers and did not have any entitlement at all to go on the land. In my judgment this is unrealistic. I accept, of course, that it flows from my analysis that the Housing Committee would have had to have re-appropriated the open space had they wanted to develop it with additional housing – but there does not seem to me to be anything necessarily wrong with this requirement.

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1 (1986) 57 P and CR 1.

2 See p.15.

9. Of course, the fact that Mr Ground's analysis may be wrong does not mean that use of land held under the Housing Acts is not *as of right*. My preferred analysis would be to say that one looks at all the circumstances to see whether land was being made freely available for recreational use by the public and, if it is clear that it was, then to say that the use was not *as of right*. If Mr Ground were correct in his conclusion that such use was *as of right* it is hard to see why land that is made available as a park under section 164 of the Public Health Act 1875 (i.e a park) should not be as of right.

10. I accept that these are difficult issues and that the matter is fully arguable on either side. However doing the best that I can, I think that a Court would say that the land held under the Housing Acts was not registrable as a town or village green. I do not think that it would assist at this stage by seeking to elaborate the various arguments.

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16 June 2008

Re Application to Register Land at Luscombe Road Fields, Henley Green, Coventry as a Town or Village Green

ADDITIONAL REPORT

INTRODUCTION

1. The prospective developer BKW after the report dated 18 October 2007 was made available and just before it was taken to the Planning Committee of Coventry City Council wrote a letter dated 29 November 2007 in which they indicated that the Report I prepared dated 18 October 2007 ("the Report") did not deal with one of the principal arguments of the Objectors. The other parties were given an opportunity which they took to deal with BKW's submissions and this additional report is prepared to deal with those points. I have further submissions from Mr Petchey on behalf of Coventry City Council as landowner ("CCAL") dated 21 December 2007 and from the Applicant dated 17 January 2008. I am grateful to all parties for their prompt submissions.

2. The essential point made by BKW is that so far as Area D is concerned when it was held under the Housing Act 1985 and its predecessor Section 107 of the Housing Act 1957[1] that recreational use of it "could not have counted as 'as of right use' for the purposes of section 22 of the Commons Registration Act 1965".

[1] In fact 1857 is said in the letter I assume that to be a misprint.

3. These points are expanded upon by the City Council as Landowner. I will deal with one of their expansions of the point to begin with namely that the further submissions "have implications for Area C".

AREA C

4. On the basis considered in the Report this point does not have a direct effect on Area C.

5. In brief that is because on the basis of the facts and analysis that I reported the appropriation of Area C was made to the City Development and Property Management Committee for the purposes of Section 10 of the Coventry Corporation Act 1920 and became effective on 13 April 1978. It was not void for the reasons that I expanded upon in the Report in paragraphs 118 and 119. The land in Area C was thus held under a very similar statutory provision to the land in ***Regina (Beresford) v Sunderland City Council*** [2004] 1 AC 889 so its use was not 'by right' but 'as of right'.

6. BKW do not in their letter suggest that their submissions on this point should cover Area C. I agree with the submissions of the applicant that the issues sought to be raised only relate to Area D.

AREA D

7. The recommendations in the Report were based on the decision in ***Regina (Beresford) v Sunderland City Council*** [2004] 1 AC 889 to the effect that if there is a legal right to use the land either by a statutory trust or by an appropriation for the purposes of public recreation then the use would be "by right" and could not be "as of right" use necessary to create a village green. This is dealt with at paragraphs 88 to 96 in the generality and then specifically in relation to Area D at

paragraphs 121 to 132. There was no appropriation to public recreational space and the land was not held under a statutory trust and so the use was not "by right".

8. In the light of the further submissions it is perhaps helpful to expand upon why land which is laid out under the Housing Acts does not convey a public recreational right to use the land for recreation in the same way as a statutory trust does so as to make recreational use "by right".

9. The land in Area D was appropriated to Housing purposes in the early 1950s under appropriation sheet 1123/18 together with Area C[2]. The dates of the appropriation on that sheet are various dates in 1951 and 1952. The evidence of Mr Morris and Mr Marriot was to the effect that Area D was laid out in the 1960s with a football pitch.

The Housing Acts

10. When the land was appropriated for housing purposes it was held under s. 79 of the Housing Act 1936. This provided as follows:

> *"79 (1) Where a local authority have acquired or appropriated any land for the purposes of this Part of this Act, then, without prejudice to any of their other powers under this Act, the authority may -*
> *(a) lay out and construct public streets or roads and open spaces on the land…"*

11. When the land was laid out it was held under Section 107 of the Housing Act 1957 which was in very similar terms. It provided that:

> *107. A local authority may lay out and construct public streets or roads and open spaces on land acquired or appropriated by them for the purposes of this Part of this Act and where they sell or lease land under the foregoing provisions of this Part of this Act they may contribute towards the expenses of the development of the land and the laying out*

[2] See AB9

and construction of streets thereon, subject to the condition that the streets are dedicated to the public.

12. Section 13 (1) of the Housing Act 1985 is in materially the same terms.

13. The first point that is taken by the objectors is that when in these statutes "open space" is mentioned it must be public open space and the word public which precedes streets governs "open spaces". It is said that being grouped with highways in the same section shows it is intended to be public open space.

14. I do not agree for two reasons. First the wording of the various sections dealing with the laying out of such land provides that there is a power to create open space and not public open space and secondly that the Housing Acts do not create a right to use such space in any way akin to the rights under the 1906 Act.

15. I will deal firstly with the wording of the sections. The words of subs. S 79(1) Housing Act 1936 and its successors mean that the adjective "public" applies only to "streets or roads" but not to "open spaces". Had Parliament intended otherwise it would not have included the "or" i.e. the syntax would have been "construct public streets roads and open spaces". As such, s. 13(1) merely empowers the local authority to lay out "open spaces". A power to lay out land for "open space" does not confer a right to the public to use it for open space. The use of such land is then within the discretion of the local authority. There is no definition of open space within the statute that would displace this construction.

16. There is no provision in the Housing Acts that creates a right to use such land. In fact the Housing Acts all contain powers for authorities to build on land acquired by them or appropriated by them. This is provided for example under section 72 Housing Act 1936 and section 92 Housing Act 1957. Thus at any time without an appropriation Area D could in fact have been used for the construction of houses or gardens, subject to obtaining planning permission. The land would not enjoy the protection of section 122 (2A) Local Government Act 1972 not only because it was

open space and not public open space but also because it was already appropriated to Housing on the facts of this case. It was not appropriated to public open space purposes. I do not regard the Housing Acts as providing any right to use the land set out for open space by the public. If it does it is entirely precarious and not one that would meet the test required of it in the words of Lord Bingham at paragraph 9 of ***Beresford***. In that paragraph he spoke of provisions which:

> *"Can be relied upon to confer on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes."*

17. It does not come close to a "right" arising by holding the land under section 10 of the Open Spaces Act 1906.

18. It cannot thus be said that laying out land for open space which is administered by the Housing Committee and which is retained for the proposed use of Housing creates a right by the people at large to use it for recreation by reason of the Housing Act.

The factual position and the alleged right to use the land in the period before the appropriation in around 2000

19. It is worth looking at the factual position during the time that the land was held by the Housing Committee to see if properly considered there can be a right to use Area D such as to make the use for recreation 'by right' even if the Housing Acts themselves do not create such a right.

20. The appropriation sheet dated in the early 1950s at AB9 sets out clearly that Area D was being held by the "Housing Committee" for the proposed use "Housing Bell Green No 5". Area D was not at any point appropriated to use as public open space. This is powerful evidence that when the land was being held by the Council under the Housing Acts it was not held as public open space. This is in stark contrast to land in Area A which was appropriated for the proposed use of "public open space purposes". Thus Area D was under the control of the Housing

Committee and held for the purposes of housing. This is strong evidence that applying the reasoning of Lord Walker at paragraph 87 of ***Beresford*** that its use for recreation was not 'by right'.

21. This is in my view strengthened by the fact that the authority indeed treated Area D as open space but not public open space in the appropriation that occurred after it transferred its housing stock to Whitefriars Housing Group on 25 September 2000. This is covered in paragraphs 122 and following in the Report. Indeed at paragraphs 126 to 128 I dealt with the evidence of Mr Clews that it was accepted that Area D was not treated as public open space by the City Council at that time and was not treated as being subject to s 122 Local Government Act 1972. This evidence is consistent with the lack of any appropriation to public open space purposes when it was being held under the Housing Acts. It is said on behalf of CCAL by Mr Petchey that:

> *"As regards the **second** point (identified at paragraph 8 above), although the way the matter was approached in 2000 is obviously a relevant matter by way of background, it cannot be determinative of the status of the land. Just as **now** the Inspector has to address the status of the land at this point so **then** officers had to address it. That status is and was a matter of law for the Inspector to address in his Report."*

22. However the position is clear that prior to 2000 there was not an appropriation to public open space but rather Area D was held for housing purposes. There is no suggestion that this land was held under a statutory trust under section 10 of the 1906 Act or any other statute conferring a trust. In addition the Housing Acts under which this land was set out merely referred to "open space". Thus whilst the land was held under the Housing Acts there was not a right for the member of public to go onto the land such as to make the use by right. This is entirely consistent with the Council treating the land as not being public open space following the 2000 transfer to the Whitefriars Housing Group.

23. The further point that is made by CCAL was that the housing land open space was paid for by the housing tenants in a ring fenced housing budget. It is said that all Council house tenants paid a proportion of the costs of maintaining all the housing land open space in the City of Coventry. From this the submission is made that such Council house tenants must have had an entitlement to go on to the land. This point does not assist CCAL. The matters that the Council tenants are entitled to by reason of renting from the Council are likely to be found in their respective leases. There is no evidence of any lease that gives a legal right to enter on to Area D. The housing budget is no doubt responsible for paying for many repairs of the housing stock some of which have public access and some of which do not. A repair done to the exterior of a council house for example if it were paid from the housing budget would not give a right to other council tenants to go into that house or garden. It simply does not follow that because the upkeep of Area D came from the housing fund budget that all tenants have some right to go onto the land.

24. CCAL make the point that they do not know of any example of a registration of a village green on land laid out under the Housing Acts certainly not one following a determination by the Commons Commissioner. From this it is submitted it should properly give pause for thought. However the fact that there is not a decision either way on land laid out for housing by the Commons Commissioners is not strong evidence that such land cannot become a village green. The judgments in the ***Trap Grounds***[3] case are to the effect that the wide nature of the definition of village greens did not become apparent until ***Sunningwell***[4]. Much land that was not thought to be able to be able to be registered as a village green before ***Sunningwell*** has now been registered. It is said in the same paragraph by Mr Petchey that there is no ruling by the courts as to whether land set out under the Housing Acts as open space can become village green land. The lack of any ruling on this issue by the Commissioners or the Courts is not overly persuasive that such land cannot be registered as a village green.

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[3] ***Oxfordshire County Council v Oxford City Council and another*** [2006] 2 AC 674
[4] ***Regina v Oxfordshire County Council and another Ex parte Sunningwell Parish Council*** [2000] 1AC 335

25. Mr Petchey at paragraph 25 of his additional submissions specifically requests a ruling on whether people used the land as trespassers and suggests that it would be unsatisfactory not to address such an issue. This is in the context of submissions on Area D. It is worthy of note that the House of Lords in the closest case factually and legally to this case in ***Beresford*** did not provide that it was a requirement for registration under this head to decide that the users were trespassers. The position in this case is factually very similar to ***Beresford*** in that the authority clearly acquiesced and in fact in some way positively assisted recreation for example by mowing and putting up a football goal in the relevant period.

26. My analysis though is consistent with the users being trespassers in that they did not have an enforceable right to be on the land. I fully accept that the authority acquiesced in their use and that it may not have been in the minds of the users that they were trespassers. However the House of Lords in ***Sunningwell*** has made it clear that the subjective state of mind of the users is not the relevant question. The reason why I come to this view is that I find no enforceable right for members of the public to use Area D in the relevant Housing Acts. There is no evidence of any enforceable right by reason of any of the users' tenancies and there was no express or implied permission. I am also not surprised by this result since Area D was after all being held by the authority before 2000 for housing purposes by the Housing Committee. If they had chosen to build houses upon it there was no recreational right or any step that would have to be gone through nor was there a need to go through the hurdles under section 122(2A) Local Government Act. Thus if the authority had chosen to fence the land off there would not have been a remedy open to the users. I take the view that the position on Area A was different and it being appropriated as public open space there would have at least been the protections available under section 122 Local Government Act 1972 so that the authority could not appropriate it to another purpose without going through a certain procedure. That is why Lord Walker's analysis in ***Beresford*** that there needs to be land either held under a statutory trust or land which is appropriated for the purpose of public recreation works so well.

CONCLUSION

27. For these reasons I would not make any change to the recommendations in the Report which are to grant the application to register Area D and Area C to the west of the Black Pad up to the centre line of the path. I would recommend that the application is refused on Area A and that it is not so registered.

Richard Ground

25 January 2008

2-3 Gray's Inn Square,
London, WC1R, 5JH.

NOTE

1. The Inspector's Report proceeded on the basis that land had been laid out under section 93 (1) of the Housing Act 1957, namely a power

   To provide and maintain…in connection with any housing accommodation [provided under Part V of the Act] …any recreation grounds, or other..land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.

2. From *HE Green and Sons v Minister of Health (No 2)*[1] it is clear that it is not a limitation on this power that such land may also serve a beneficial purpose for others apart from those from those for whom the housing accommodation is provided.[2]

3. This position is reflected in the provisions of Schedule 14 of the Housing Act 1985 and Schedule 4 of the Local Government and Housing Act 1989: where there are benefits or amenities arising from the provision of housing land which are shared by the community as a whole, the local authority may make a contribution from its general account to the housing revenue account to reflect those benefits.

4. In this case such a contribution of 37% was latterly being made to reflect the fact that 37% of the houses in the District had been sold off. In fact in the neighbourhood identified by the Inspector, some 12% of the houses had been sold off.[3]

5. The Inspector was unaware of the facts set out in paragraph 4. It is pretty clear that he adopted a broad brush approach, and considered that all those members of the public who used the land did so by virtue of an entitlement under section 93.

6. It is evident that it is arguable that a narrower view is appropriate: to say that the local authority's tenants did not use the land as of right because of their entitlement under section 93, but that the public had no such entitlement, and that therefore their use **was** *as of right.* This does not mean that the land **would be** registrable (was the use sufficient?) but on this basis it **could be** because there was qualifying use (ie use that was *as of right*).

7. It seems to me to be highly artificial to say that the use by the council house tenants **was not** *as of right*, but that the use members of the public other than council house tenants – who were, in practice, Council tax payers in the district, and whose use was envisaged by the section and subject to a contribution by the local authority to the hosing revenue account – **was** *as of right*.[4] It is my view that the use of both categories of users was not *as of right*.

[1] [1948] 1 KB 34.
[2] See p41.
[3] These are, I think, the broad facts: I may not have captured all the complications of the position.
[4] As a matter of policy, it seems to me a bit unfair that the effect of selling off the Council houses is that the burden of maintaining a proportionate part of the housing act land was imposed on Council tax payers generally rather than those who had bought their council houses. There may not have been any mechanism to impose it on the council house buyers; and it would have been unfair to impose the burden on those who

8. In my Advice dated 6 February 2008, I explained that this was not a straightforward area of law. There is a respectable argument that land made available under section 93 (1)[5] and used by council house tenants is use which is *as of right.* It seems to me that the better argument for registration does not proceed on the basis of the use by non-council house owners (a minority, albeit not insignificant, of all users) being *as of right* but on the basis of all the use (by council house owners and non-council house owners) being *as of right.* For my part, however, I do not regard this argument as correct because I think that the use of both categories of user is by virtue of an entitlement under the Housing Act and not *as of* right.

PNP
3 September 2010

continued to rent council houses. It seems to me that at the time that council house sales got under way, the Secretary of State should have given some guidance about this. If he did, it has not come to light.

[5] There is a further complication in that the use may have been under section 107 of the Housing Act 1957, by reference to which it is more arguable that use was *as of right.*

Appendix 7

HEREFORDSHIRE COUNCIL

HEREFORDSHIRE COUNCIL

REGULATORY COMMITTEE DECISION NOTICE
APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN

APPLICANT'S NAME	Newton Farm Town Green Action Group.
APPLICATION TYPE	Register land as a Town Green.
COMMITTEE MEMBERS	Councillor Brig. P Jones (Chairman) Councillor JW Hope (Vice-Chairman) Councillors DJ Benjamin, Mrs ME Cooper, PGH Cutter, Mrs SPA Daniels, Mrs H Davies, JHR Goodwin, R Mills, A Seldon and DC Taylor
DATE OF MEETING	12th August, 2008

Members of the Council's Regulatory Committee considered an application to register land at Argyll Rise, Belmont, Hereford as a Town Green.

At the meeting the officer presented all the details about the application, the relevant legal aspects and the alternatives that were available to the Council, together with a recommendation that the application should be approved.

The circumstances which had led to the application being made to the Council were considered. It was noted that the land was part of a larger area which had been purchased for housing purposes in 1959 by the former Hereford City Council under the powers of the Housing Act 1957 and was subsequently laid out as open space as part of the surrounding housing development during the 1970s. In November 2002 the land was one of a number of open spaces included in a transfer of the Council's housing stock to Herefordshire Housing Limited.

The Council had received two applications from the same Applicants to register the Land.The first application was received on 6 February 2006 and the Council had placed notices for two weeks in the Hereford Times and on the Land stating that the application had been made and requesting any objections to be sent to the Council. An objection was received from Herefordshire Housing Limited. A non-statutory Public Inquiry had been conducted by a barrister (Inspector) to hear evidence and legal arguments from the applicants and Herefordshire Housing Limited. It was noted, that if the land was registered as a Town Green, this would effectively prevent any development which would interfere with recreational use. The view of the Inspector was that the application should be refused.

Mr C Whitmey addressed the Committee on behalf of the Newton Farm Town Green Action Group and Mr A Porten QC on behalf of Herefordshire Housing Limited. They suggested that if the Committee was mindful to grant the application, the matter should be deferred because they felt that there was a need to consider all the issues involved.

The Committee determined the application as follows:

We have heard the submissions made by both Mr Whitmey (for the applicant) and by Mr Porten (Counsel for the objector).

We have considered the officer's report and the various written submissions before us in the bundle.

We have studied the report of the Inspector and the second opinion from Mr Petchey.

The burden of proof in this matter rests with the applicant and it is for the applicant to make its case for registration to the civil standard, namely on the balance it probabilities.

We concur with the Inspector that the land in question has been used by a significant number of local residents for various recreational sporting and leisure purposes for over a 20-year period.

This Committee has however to determine whether that use amounts to use "as of right", within the meaning of law to satisfy the test for the establishment of a Town green.

We find that the land in question was acquired for the use of residents of the new residential development, when the estate was laid out following its acquisition under the Housing Act 1957.

We consider that use of the land during the relevant period has been consistent with a site laid out, managed and maintained under the statutory housing powers.

We consider that the recreational use of land was by reason of it being open space held for housing purposes with the context of the estate.

Use "as of right" in the sense of that required to establish Town Green status has not been made out on the balance of probabilities in this application.

The application to register the land as a Town Green therefore fails.

Signed……Councillor Brig P Jones CBE, Chairman of the Regulatory Committee,

12 August, 2008

FORM 44

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:

Application number:

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

Note 1
Insert name of registration authority.

To the

HEREFORDSHIRE COUNCIL

2. Name and address of the applicant

Note 2
If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

Name: (A) (B) (C) JACQUELINE KIRBY, KEITH MILLER, JACKIE MILLS

Full postal address:

(A) 35 MUIR CLOSE, HEREFORD HR2 7EX
(B) 25 DUNOON MEAD, HEREFORD HR2 7BL
(C) 2 ARGYLL RISE, HEREFORD HR2 7BN

Postcode

Telephone number: (A) (01432) 353971
(incl. national dialling code)

Fax number: (A) (01432) 353971
(incl. national dialling code)

E-mail address: (A) megilleland@hotmail.com

3. Name and address of solicitor, if any

Note 3
This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

Name: NONE

Firm:

Full postal address:

Post code

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

Note 4
For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

4. Basis of application for registration and qualifying criteria

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**: ☐

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies: ☐

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*

Section 15(3) applies: ☐

Section 15(4) applies: ☒

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

17th OCTOBER 2002

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

5. Description and particulars of the area of land in respect of which application for registration is made

Note 5
The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable to it to be clearly identified.

Name by which usually known:

LAND BOUNDED BY ARGYLL RISE, PIXLEY WALK, MUIR CLOSE, DUNDON MEAD AND WATERFIELD ROAD KNOWN LOCALLY BY VARIOUS NAMES EG "THE GREEN"

Location:

NEWTON FARM, HEREFORD IN THE BELMONT WARD OF HEREFORD CITY PARISH

** Only complete if the land is already registered as common land.*

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

Note 6
It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

NEWTON FARM ESTATE: THE AREA OF LAND BOUNDED BY THE A465 BELMONT ROAD, THE GREAT WESTERN WAY, THE MARCHES RAILWAY LINE, THE BOUNDARY OF THE BUILT-UP AREA OF THE CITY OF HEREFORD AND THE PARISH OF BELMONT WITHIN THE CIVIL PARISH OF THE CITY OF HEREFORD OR BELMONT WARD

Tick here if map attached: ☒

7. Justification for application to register the land as a town or village green

Note 7
Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

This application is justified because of the results of a two day public inquiry held at the Three Counties Hotel, Belmont, on Tuesday 31st July and Wednesday 1st August 2007 on behalf of the Herefordshire Council and conducted by Mr Timothy Jones, barrister.

Mr Jones having heard and read a substantial amount of evidence reached conclusions of fact of which he was confident and which were not border-line. The facts were included in a report dated 19th September 2007 to the Council ('the Report') and appended to this application.

Mr Jones reached the firm view that:

1. The number of people using the land in question was sufficient to indicate that their use of the land signified that it had been in general use by the local community for informal recreation: the Report [19] - the significant number of inhabitants requirement.

2. The Newton Farm area as a whole was the obvious area in the civil parish of the City of Hereford or Belmont Ward: the Report [20]-[25] - the neighbourhood within a locality requirement.

3. The bulk of the use of the Application Site was for lawful sports and pastimes: the Report [26] - the lawful sports and pastimes requirement.

4. Such use for lawful sports and pastimes had been throughout the period since it was first brought into use: the Report [17]. The site was first brought into use in or about 1976 [see attached evidence forms - the not less than 20 years requirement.

5. There were no notices that referred to byelaws or activities that were forbidden.

6. There was no question of force or stealth: the Report [30] - two parts of the 'as of right' requirement.

7. Herefordshire Council's use of section 123 of the 1972 Act (to transfer the land on 26th November 2002) defeated a claim to TVG status: the Report [42] - the 'without permission' requirement was not met.

At the public inquiry the applicants (the same as in this one) tendered evidence that since use of the site in this application for informal recreation by the inhabitants there had been no overt acts whatsoever by any of the landowners to bring it to the attention of the said inhabitants that user was by revocable permission or licence.

Thirty (30) evidence forms are attached concerning the length of use and lack of the said overt acts.'

Note 8
Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

HEREFORDSHIRE HOUSING LIMITED
LEGION WAY
HEREFORD
HR1 1LN

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 9
List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

NONE

10. Supporting documentation

Note 10
List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

A REPORT INTO THE MATTER OF AN APPLICATION TO REGISTER AS A TOWN GREEN LAND AT ARGYLL RISE, HEREFORD – TIMOTHY JONES, INSPECTOR, 19th SEPTEMBER 2007

30 EVIDENCE FORMS

"MAP A" AND "MAP B"

Note 11
If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

11. Any other information relating to the application

THE DISTRICT COUNCIL OF HEREFORDSHIRE AS A PREVIOUS OWNER.

Note 12
The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date: 15th October 2007

Signatures:

REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I...K. Miller[1] solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if Applicable*

1.[2] I am ((~~the person~~ (one of the persons) who ~~(has)~~ (have) signed the foregoing application)) (~~(the solicitor to (the applicant) (~~[3] ~~one of the applicants~~)).

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.[4] I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

(i) a declaration of ownership of the land;
(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

Cont/

[4] *Continued*

been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said
KEITH MILLER
at LAMBE CORNER SOLICITORS
36/37 Bridge Street
~~Hereford~~
this 16th day of OCTOBER 2007

K Miller
Signature of Declarant

Before me *

Signature:

Address:

LAMBE CORNER
36/37 BRIDGE STREET
HEREFORD HR4 9DJ

Qualification: SOLICITOR

*** The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

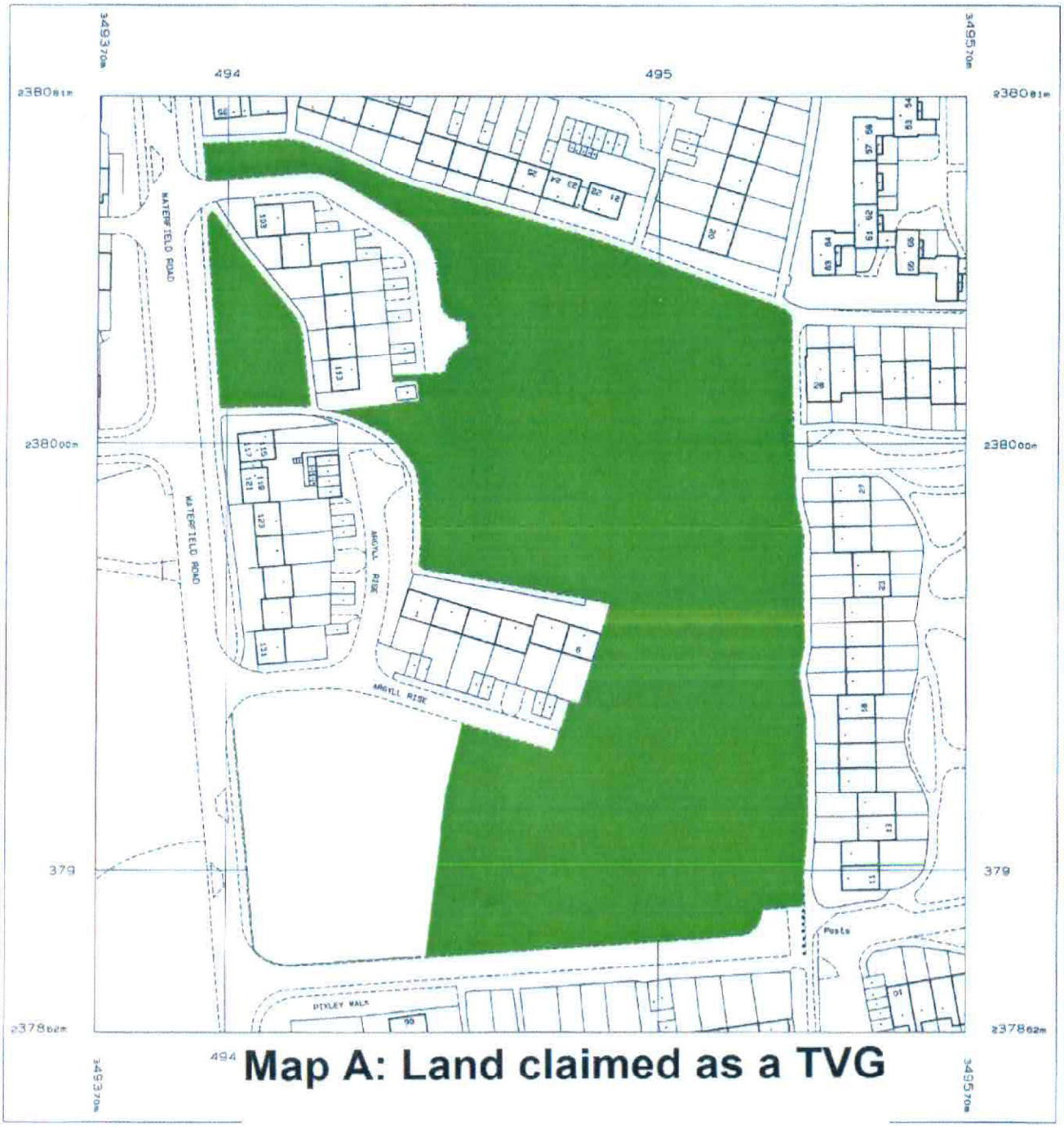
REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

---

Ordnance Survey®

Superplan®



Map A: Land claimed as a TVG

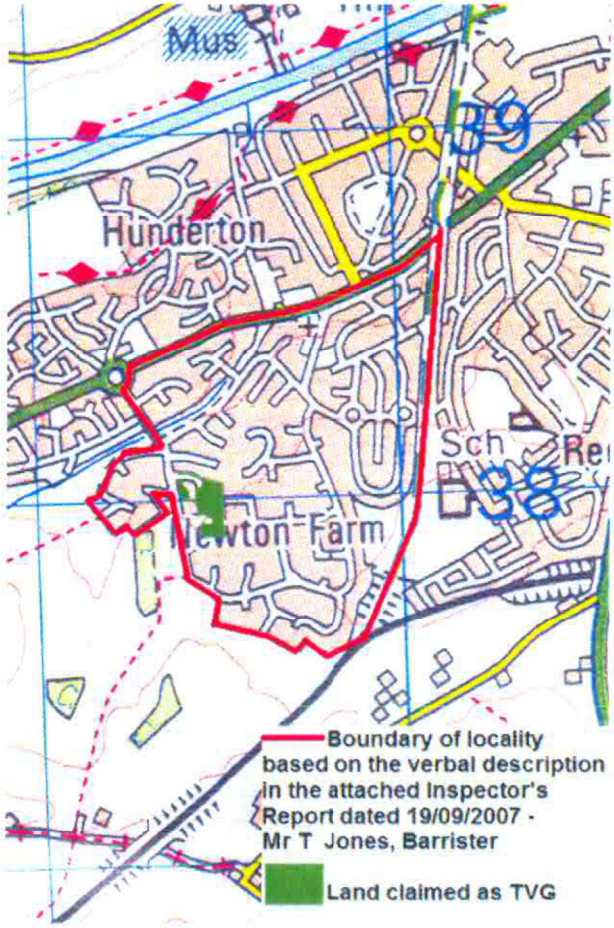
National Grid sheet reference at centre of this Superplan: SO4937NW

The representation of a road, track or path is no evidence of a right of way.

Heights are given in metres above Datum.

The alignment of tunnels is approximate.

Scale 1: 1250



Map B:
The claimed locality

EQ1

EVIDENCE QUESTIONNAIRE IN SUPPORT OF REGISTRATION AS A NEW GREEN (page 1)

Name MRS SUSAN BRUSSAU

Present Address 1 ARGYLL RISE

HEREFORD

Post Code HR2 7BN Telephone 01432 278528

1. Address when you used the land. *(The land in this form means the "claimed land")*

1 ARGYLL RISE

2. Address when you knew the land was used by the local inhabitants.

10 BRONSIL CLOSE, NEWTON FARM, HEREFORD

3. Did you sign the reverse side of "Maps A & B" confirming they relate to this evidence provided by you? Delete as applicable. YES / ~~NO~~.

("Map A" is the map showing the claimed land, and "Map B" the claimed locality which use the land. which should accompany the form and which will subsequently accompany the application. (See Form 44 question 5 and 6)

4. By what name is the land shown on "Map A" known?

THE PARK, THE GREEN, THE FIELDS

5. Has it ever to your knowledge been known by any other name? If so, what name?

6. How many years have you known the land?

From 1964 to 2007

7. Between which years did you use it?

From 1964 to 1970 Then from 1994 to 2007

8. Did you move to this locality for any particular reason? What was the reason?

OPEN SPACE

9. What contact do you have with the people living in your locality?

NEIGHBOURLY, SOCIALLY

10. Do you consider yourself to be a local inhabitant in respect of the land?

YES

11. Where do the people who use this land come from?

NEWTON FARM | BELMONT

12. Whom do you consider to be local inhabitants in respect of this land?

PEOPLE LIVING AROUND THE GREEN + RESIDENTS OF NEWTON FAR

13. What do you consider to be the boundaries of your locality?

BELMONT WARD

14. What recognisable facilities are available to the local inhabitants of your locality? *Please tick facilities that apply and add any OTHER additional matters not covered.*

- ✓ SCHOOL CATACHMENT AREA
- ✓ LOCAL SCHOOL
- ___ RESIDENTS' ASSOCIATION
- ✓ COMMUNITY CENTRE
- ✓ LOCAL CHURCH OR PLACE OF WORSHIP
- ✓ SPORTS FACILITY
- ✓ LOCAL SHOPS
- ✓ AREA POLICEMAN
- ✓ DOCTOR'S SURGERY
- ✓ COMMUNITY ACTIVITIES
- ✓ NEIGHBOURHOOD WATCH
- ✓ A CENTRAL FEATURE
- ___ SCOUT HUT
- ___ OTHER (Please state)

15. To your knowledge are there any public paths crossing the land?

NO

16. Why do you go onto this piece of land?

EXERCISE, DOG WALKING, SOCIAL ACTIVITIES

17. How often did you use the land (apart from the public paths)?

EVERY DAY

18. how often do you use the land?

WEEKENDS

19. What activities did you take part in?

TEAM GAMES, BONFIRE NIGHT + OTHER EVENTS

20. What activities do you take part in?

AS ABOVE

21. Does your immediate family use the land? If so what for?

YES, AS ABOVE

22. Have you seen other people using the land? If so what for?

YES

23. Do you know of any community activities that take place or have taken place on the land? Please list them and state when and for how long they have taken place.

BONFIRE NIGHT ACTIVITIES, AS LONG AS I CAN RECALL

24. Do you participate in any of them?

YES

25. Do any organisations use the land for sports and pastimes?

NO

26. Do any seasonal activities take place on the land?

YES

27. Please tick all the activities that you have seen taking place on the land?

- ✓ CHILDREN PLAYING
- ✓ ROUNDERS
- ___ FISHING
- ___ DRAWING AND PAINTING
- ✓ DOG WALKING
- ✓ TEAM GAMES
- ___ OTHER (Please state)

- ___ PICKING BLACKBERRIES
- ___ COMMUNTIY CELEBRATIONS
- ___ FETES
- ✓ FOOTBALL
- ✓ CRICKET
- ✓ BIRD WATCHING

- ✓ PICNICKING
- ✓ KITE FLYING
- ✓ PEOPLE WALKING
- ✓ BONFIRE PARTIES
- ✓ BICYCLE RIDING
- ✓ CAROL SINGING

28. Do people from outside your locality use the land?

YES

29. Do people from outside your locality have the right to use the land?

DON'T KNOW

30. Do you know who is the owner of the land?

HEREFORDSHIRE HOUSING

31. Do you know who is the occupier of the land?

NO

32. Are you his or her employee? ~~YES~~ / NO

33. Are you his or her tenant? ~~YES~~ / NO

34. Has the owner seen you on the land YES / NO. What did he or she say?

DON'T KNOW. NO-ONE HAS EVER APPROACHED ME.

35. Has the occupier seen you on the land YES / NO. What did he or she say?

DON'T KNOW

36. Was permission ever sought by you for activities on the land. If so, from whom?

NO

37. Did anyone ever give you permission to go on the land?

NO

38. Have you ever been prevented from using the land? If yes, when and the reason

NO

39. Has anyone else to your knowledge ever been prevented from using the land? If yes, when and the reason

NO

40. Has any attempt ever been made by notice or fencing or by any other means to prevent or discourage the use being made of the land by the local inhabitants? If yes, give examples.

NO

41. What right did you have to go onto the land?

OPEN SPACE

42. What right did you think you had to go onto the land?

OPEN SPACE

43. Do you have any photographs or any other evidence of use of the land by local inhabitants?

NO

44. Are you willing to lend them to us?

45. If so, have you signed the reverse of each item?

46. Have you made a separate written statement?

NO

If you have knowledge of others who may be in a position to complete an evidence form, would you please write their names and addresses below.

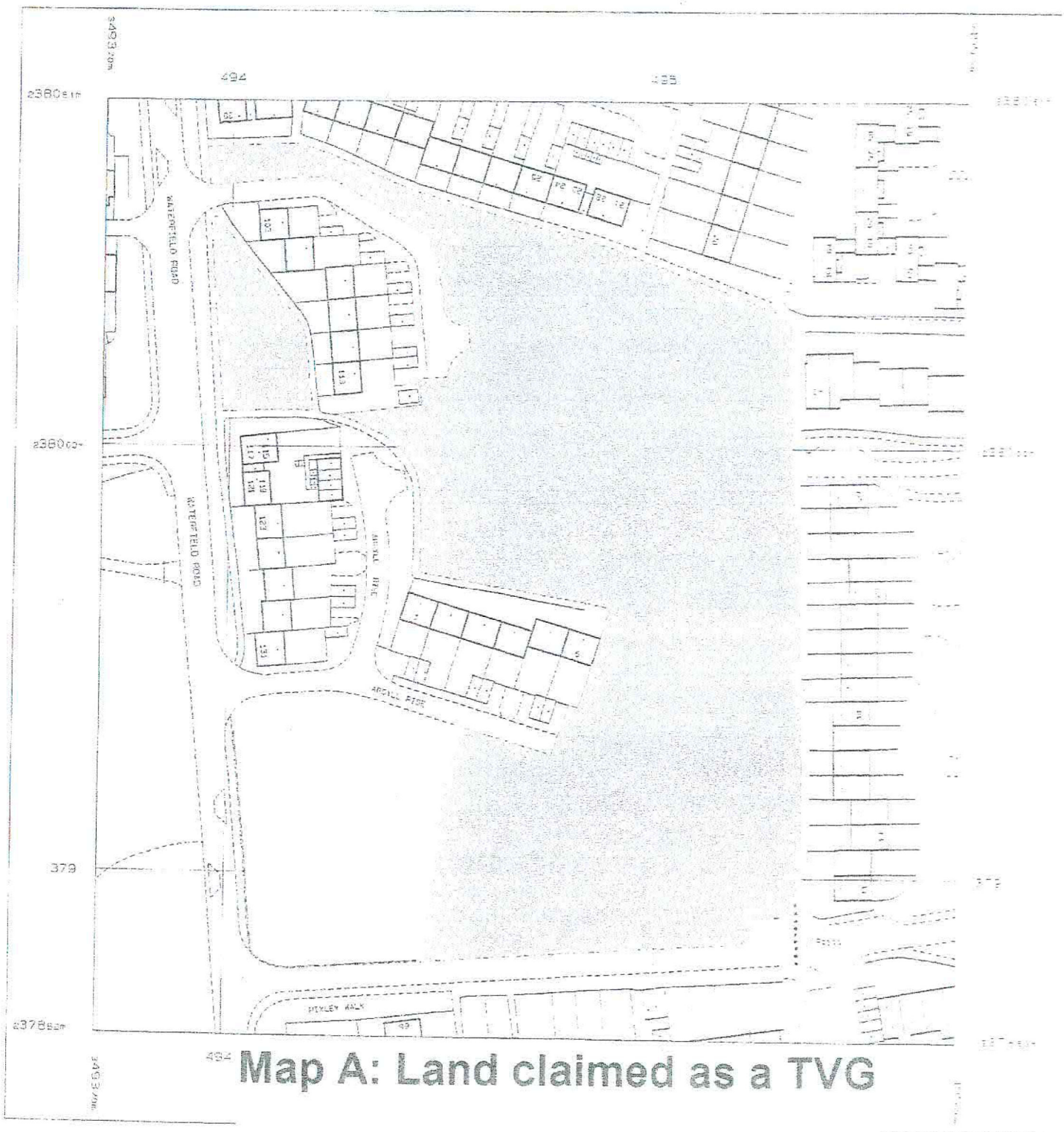
ANN ARMSTRONG
17 GREYFRIARS AVENUE, HEREFORD, HR4 0BE

KERRIE-ANN ARMSTRONG
GREEN BANK, CLEHONGER ROAD, HEREFORD

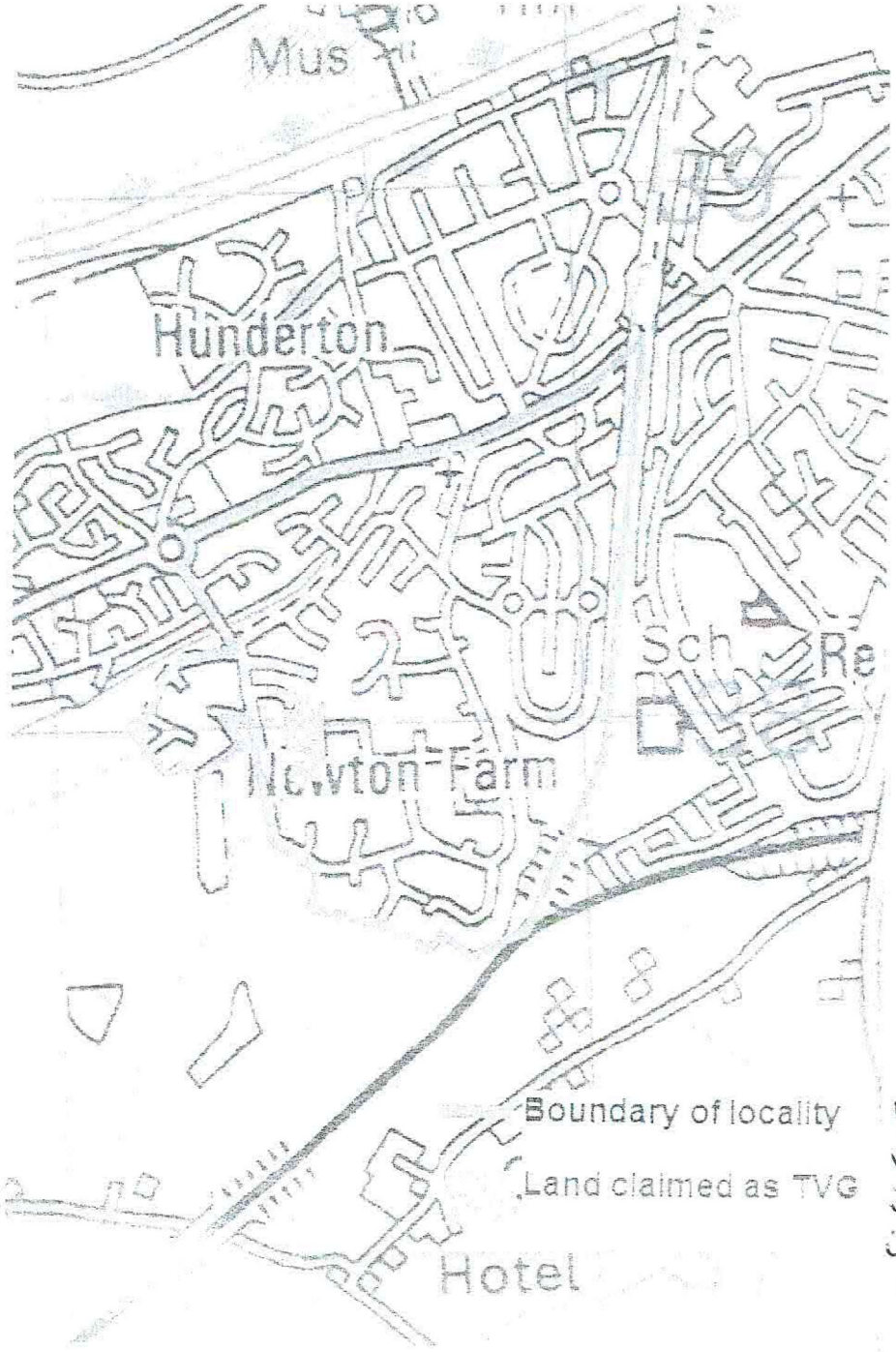
SIGNED S Brassett DATE 11/10/07

Ordnance Survey®

Superplan®



Map A: Land claimed as a TVG



based on the verbal description in the attached inspector's Repo dated 19/09/200 MR T Jones, Barrister

Map B:
The claimed locality

Appendix 10

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 2nd November 2010 @ 2pm

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Herefordshire Council,

Legal Services,

Blackfriars,

Blackfriars Street,

Hereford HR4 9ZR

Ref. PC/NMG

67651/VRC/10/146/wp/S4/Argyll Rise Note

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE

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Introduction

[1] I am instructed to advise the Regulatory Committee of the City of Herefordshire District Council[1] at 2pm on Tuesday 2nd November 2010 in relation to a second application to register land at Argyll Rise, Hereford as a new town or village green[2]. I understand that the format of the meeting will be that the representatives of the parties will have 30 minutes to make oral submissions, that they will answer any questions from members of the committee or from me and that I will then advise the committee. It may assist my instructing solicitor to have this preliminary note of my present thoughts on the second application. The contents of this note are subject, of course, to any arguments, further evidence or other developments before or at the committee meeting.

The first application

[2] On 6th February 2006, 3 residents of Hereford applied to the Council as commons registration authority[3] to register the land at Argyll Rise as a new TVG. The application was made under s. 13(b) of the Commons Registration Act 1965[4]. The application was based on CRA 1965 s. 22(1A) as being:

"...land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right and...continue to do so..."

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1 "the Council"
2 "TVG"
3 "CRA"
4 "CRA 1965"

An objection to the application was made by Herefordshire Housing Limited[5] which is a registered social landlord and the owner of the application land. The land was transferred to HHHL by the Council on 26th November 2002 together with a number of local council houses as part of a transfer of its housing stock. The Council is a member and director of HHL and has previously supported a bid for funding to develop the application land for affordable housing. However, the Council, as CRA, has taken no stance for or against the application.

[3] I have not seen the first application or the evidence adduced in support of or in opposition to the application. However, a non statutory public inquiry was held on the instructions of the Council by Mr. Timothy Jones of counsel in 2007 and I have copies of written submissions made to the public inquiry by Mr. Whitmey on behalf of the applicants and by Miss Morag Ellis QC on behalf of HHL and of the inspector's report dated 19th September 2007.

[4] The inspector did not recite the evidence that he had heard but he set out his findings. He found that the application land was an unenclosed irregularly shaped parcel of land consisting mainly of mown grass with some trees. For most of the 20 years before the application there had been a children's play area on part of the land with play equipment, fences and signs to keep out dogs and to restrict the age of users. After an accident, the play area had been removed from the application land. The application land lies within a small conurbation composed of the built up area of the City of Hereford and some residential development in adjoining parishes. I infer from the report that the application land lies within the former council estate known as the Newton Farm Estate.

[5] The inspector found that the application land had been used by a significant number of the inhabitants of the neighbourhood of the Newton Farm Estate for LSP throughout the 20 year period before the making of the application. The inspector does not make an express finding as to the locality within which the neighbourhood lies but it appears from para. 20 of his report that the Estate lay both within the civil parish of the City of Hereford and Belmont Ward, both of which he regarded as being capable of being a "locality" as an area known to the law.

[6] However, the inspector recommended the rejection of the application on three grounds.

[7] First, he found that the application land had been acquired and laid out as a recreation ground or open space under Part V of the Housing Act 1957 with the result that local people had a right to use the land for LSP. It followed that recreational use by local people was not "as of right" but "by right" (which the inspector equated with use by permission).

[8] Second, he found that the application land had been transferred in November 2002 by the Council to HHL pursuant to s. 123 of the Local Government Act 1972 (as amended) and that the effect of s. 123 was to trump any claim to TVG status.

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5 "HHL"

[9] Third, in relation to the former play area, he found that use by local people was permissive and not "as of right" because of the way in which it was managed by the Council. The applicants conceded this point during the public inquiry.

[10] A further point raised by HHL was that the application land was subject to byelaws made in 1995 and 1997 under s. 164 of the Public Health Act 1875[6] and under the Open Spaces Act 1906. Earlier byelaws of 1975, 1971 and 1981 had not been traced. The inspector held that the byelaws did not apply to the application land other than to the play area. I have not seen the byelaws. I understand from the submissions of the parties that the maps intended to accompany the byelaws could not be traced and that there was no evidence that the byelaws had been displayed on the application land.

[11] After the inspector delivered his report, the applicants were invited to comment and submitted written comments dated 4th October 2007 arguing that the inspector was wrong on two legal points (a) in finding that user was not "as of right" because held for open space purposes under the Housing legislation and (b) in finding that disposal under LGA 1972 s. 123 trumped TVG rights.

[12] On 16th October 2007, the inspector was invited to reconsider his advice on those two legal points.

[13] Mr. Jones advised further in an Opinion dated 9th November 2007. He reaffirmed the advice given in his report.

[14] On 4th December 2007, the council sought a second opinion from Mr. Philip Petchey of counsel on the two legal points.

[15] Mr. Petchey advised in an Opinion dated 6th February 2008. He advised that, although the law was uncertain on the point, he agreed with Mr. Jones that a recreation ground or open space held under housing powers was not used "as of right". However, he disagreed with Mr. Jones's advice on LGA 1972 s. 123 and considered that a disposal under LGA s. 123 would not trump a TVG application.

[16] Meanwhile, Mr. Richard Ground had delivered an Additional Report dated 25th January 2008 on another TVG application in Coventry. He advised that there was no public right of access to open space laid out under the housing legislation, with the consequence that recreational use of such land by local people was "as of right".

[17] In the light of Mr. Ground's additional Report, Mr. Petchey wrote a Further Advice dated 16th June 2008 disagreeing with Mr. Ground and re-affirming his advice that recreational use of

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6 "PHA 1875"

land laid out as a recreation ground or as an open space under the housing legislation was not "as of right".

[18] The parties were given the opportunity to comment on Mr. Petchey's Opinion and Further Advice. On behalf of the applicant, Mr. Whitmey pointed out that it had recently emerged that land in Muir Close adjoining the application land had been sold by the Council to Muir (2) Housing Association Ltd. in 1974 and asking for the public inquiry to be reconvened.

[19] The Assistant Chief Executive prepared a report for the meeting of the Regulatory Committee on 12th August 2008. The report recommended that the Council should accede to the application. The report disagreed with the advice of Mr. Jones and Mr. Petchey that recreational use of land laid out as a recreation ground or as an open space under housing legislation was not "as of right". However, the report agreed with the advice of Mr. Petchey (contrary to the advice of Mr. Jones) that the TVG application was not trumped by the disposal under LGA 1972 s. 123. The report did not deal with Mr. Whitmey's point about the Muir Close land.

[20] On 12th August 2008, the Regulatory Committee resolved to reject the application on the ground that the application land was laid out under the housing acts and was therefore not used for LSP by local people "as of right".

[21] I infer that there was no challenge to that decision by judicial review.

The second application

[22] On 16th October 2007[7], and before the first application had been decided, the applicants made a second application to register the application land (but now excluding the former play area) as a new TVG. I have a copy of this application. The application was made under CA 2006 s. 15(4) on the footing that qualifying user ceased on 17th October 2002. The obvious intention was to deal with possible failure of the first application by virtue of the 2002 disposal under LGA 1972 s. 123. The accompanying Map A showed the 2006 application land less the former play area. The accompanying Map B was expressed to show the "locality" but it is clear from the answer to question 6 in the Form 44 that the intention was to rely on use by the inhabitants of the Newton Farm Estate within the locality of the civil parish of the City of Hereford or Belmont ward. The application was supported by numerous evidence questionnaires. I have a sample evidence questionnaire which seems to be in a form based on one of the standard OSS forms. I also have a summary of the second application evidence forms at page 45 of Mr. Whitmey's bundle. It appears that they amount to evidence of at least 20 years' recreational use of the application land by inhabitants of the Newton Farm Estate before 2002.

[7] I am instructed that it was received on that day although there is no date of receipt stamp on page 1 of my copy of the Form 44.

[23] There was an objection statement by HHL dated 19th November 2008. It took three points:

- The second application was bound to fail on the "as of right" point in accordance with the report of Mr. Jones and advice of Mr. Petchey
- The second application should be rejected on the grounds of *res judicata*
- Generally HHL relied on all other points taken against the first application.

[24] Mr. Whitmey responded in detail on behalf of the applicants on 2nd January 2009. In essence, he argued that the CRA was wrong to reject the first application on the "as of right" point and that it was therefore not precluded by *res judicata* from giving full consideration to the facts and law relating to the second application.

[25] HHL replied on 3rd February 2009. HHL appeared to accept that, since the second application had been accepted, the *res judicata* point had become academic. However, HHL maintained its opposition to the application on all other points of fact and law.

[26] There was then an exchange of emails between the CRA and Mr. Petchey between March and September 2010. It had been discovered that, of the 1,790 postal addresses within the Newton Farm Estate "neighbourhood" relied upon by the inspector in relation to the 2006 application, 221 had been disposed of by the Council to private developers or housing associations before the 2002 disposal to HHL:

49 in 1974
87 in 1975
85 in 1991.

The cost of maintenance of the application land, as part of the cost of maintenance of open spaces within council estates, has been shared by the General Fund (funded by council tax payers generally) and the Housing Revenue Fund (funded out of council house rents). The proportions have been calculated by reference to the proportion of council houses which have been sold under the RTB scheme (i.e. not by reference to the properties disposed of to private developers or housing associations). It is unknown when the General Fund began to contribute to the cost of maintenance, save that it was probably before 1998 when the land was transferred from the then Hereford City Council to the Council. Mr. Petchey was asked whether this affected his advice. He advised that it did not, because he regarded all users of open space laid out under the housing legislation as using the land "by right" rather than "as of right".

[27] I have a copy of the proposed officer report to the Regulatory Committee to be held on 2nd November 2010. It recommends that the CRA should accede to the application, essentially on the same grounds as in the report on the first application. The report notes the discovery of the 1974-1991 property disposals. The report also notes that the applicants have complained to the

Local Government Ombudsman about the perceived conflict of interest of the Council as being a member and director of HHL and having previously supported a bid for funding to develop the application land for affordable housing.

Written submissions

[28] I have copies of written submissions to the Regulatory Committee:

- First, I have written submissions by Mr. Whitmey on behalf of the applicants. They are dated 20th October 2010 with an addendum dated 28th October 2010. I received these submissions as part of a bundle received by post from Mr. Whitmey this morning (Saturday 30th October 2010). I had received parts of the bundle previously by email.

- Second, I have a written Skeleton Argument by Miss Morag Ellis QC (with a bundle of supporting documents) on behalf of the objector. I received these by email yesterday (Friday 29th October 2010)

[29] Mr. Whitmey's submissions can be summarised as follows:

- The application land was laid out as "open space" under HA 1957 s. 107 and not as a recreation ground under HA 1957 s. 93.

- "Open space" for the purposes of s. 107 means open spaces for aesthetic purposes and not for recreation.

- There were no overt acts by the council amounting to communication of permission to users of the application land.

- If the Newton Farm Estate cannot be the relevant neighbourhood because it was predominantly occupied by council tenants, the applicants' neighbourhood should be reduced to Muir Close.

[30] Miss Ellis QC makes the following submissions:

- It is not disputed that the application land was used for LSP by a significant number of the inhabitants of the Newton Farm "neighbourhood" within the "locality" of Hereford for the relevant 20 year period

- It is submitted that the use of the application land for LSP before disposal in 2002 was "of right" rather than "as of right" because the application land was laid out as a public recreation ground or open space under HA 1957 ss. 93 and/or 107 of the 1957 Act

- It is submitted in the alternative that user of the application land for LSP was impliedly permissive because the land was laid out, maintained and managed as a public open space by the Council.

- A claim to TVG status was, in any event, defeated by the 2002 disposal pursuant to LGA 1972 s. 123.

The issues

[31] I see the following issues arising (or potentially arising) before the Regulatory Committee:

- Can the Regulatory Committee properly decide the application at all in view of the alleged conflict of interest?

- Is the Regulatory Committee bound by its previous decision on the first application by virtue of *res judicata*?

- Was use of the application land for LSP "as of right" if it was laid out as a recreation ground or open space under housing legislation?

- Was use of the application land permissive in all the circumstances?

- Did the 2002 disposal under LGA 1972 s. 123 defeat an application for registration as a TVG?

- What is the effect of the discovery that part of the Newton Farm Estate "neighbourhood" had been disposed of by the Council before or during the relevant 20 year period?

- What is the relevance of the byelaws?

- In the light of the above, what decision should the Regulatory Committee be recommended to make?

The conflict of interest issue

[32] It seems to me that there is clearly a conflict of interest, or perhaps more accurately, an appearance of bias (i.e. being a judge in its own cause). The Council is a member and director of the objector and has supported an application for funding for the development of the application land. If the application land is registered as a new green it will be sterilised from development and become worthless. As CRA, the Council is deciding whether to accept or reject the application in a quasi-judicial capacity. In the determination of the second TVG application, the committee can only take account of matters which go to the legal issue whether the application

land has become registrable as a new green. The merits of retaining the application land as an open space or of developing it for affordable housing are equally irrelevant.

[33] However, it is the fact that there have been numerous cases in which the CRA has also been landowner and has decided the application without challenge on the ground of apparent bias. For example, the CRA was also the landowner in the recent *Redcar* case in the Supreme Court. However, so far as I am aware, they are all cases where the CRA has appointed an independent lawyer to hold a public inquiry (or at least to advise) and has acted on his or her recommendation. Nor am I aware that the apparent bias point has been taken in any decided case in relation to a TVG application.

[34] The Council is a pilot authority to which the Commons Registration (England) Regulations 2008 apply. The general rule is that the application must be decided by the CRA to which it is made (reg. 27(1)(a)). It is unclear whether this is intended to override (or indeed is capable of overriding) the power to delegate functions to other local authorities under LGA 1972 s. 101(1)(b). I think probably that the 2008 Regulations do not prevent delegation under s. 101 since such purported restriction on delegation would not be statutory but by delegated legislation. However, by reg. 27(2), certain cases have to be referred to the Planning Inspectorate. One of these cases is where the CRA has an interest in the outcome of the application such that there is unlikely to be confidence in the authority's ability impartially to determine it (reg. 27(3)(a)). However, by reg. 55, reg. 27(3)(a) does not apply to an application made before 1st October 2008.

[35] I consider that the net result is that the CRA can decide the second application without referring the application to the Planning Inspectorate. It must decide the application on relevant legal principles. Where it has referred the matter to a non statutory inquiry, it cannot differ from the recommendation of the inspector without good reason: *R (Chaston) v Devon CC* [2007] EWHC 1209 (Admin). In the present case, of course, the second application has not been referred to a non statutory inquiry. However, the first application, which raised many of the same issues as the second application, was referred to a non statutory inquiry. In these circumstances, I think that the CRA could not properly differ from the advice of the inspector on identical issues arising in the second application without good reason to do so. I think that it would be a good reason if the CRA were satisfied, on legal advice, that the inspector had made a mistake of law.

The *res judicata* issue

[36] The CRA refused the first application on the ground that the application land was not used "as of right" for LSP by local people because it was held under housing powers. Precisely the same point arises in relation to the second application. The question arises whether it is open to the CRA to reach a different conclusion on this point or whether the principle of *res judicata*

applies to prevent the CRA from doing so. The objector does not now pursue this point, but the Regulatory Committee clearly has to satisfy itself as to legal scope of its powers.

[37] In *Thoday v Thoday*[8] Diplock LJ said that the generic term *estoppel per rem judicatam* includes two species (i) "cause of action estoppel" which prevents a party to an action asserting or denying as against the other party the existence of a particular cause of action and (ii) "issue estoppel" which arises where the establishing of a cause of action requires proof of several conditions and one of these has been determined between the parties in prior litigation before a competent court.

[38] In *Brisbane City Council v A-G for Queensland*[9] Lord Wilberforce pointed out that an issue estoppel included an issue which could and should have been raised in previous proceedings between the parties.

[39] In *Crown Estate Commissioners v Dorset County Council*[10] it was held that a decision of a commons commissioner refusing to confirm the registration of certain verges as common land on the ground that they formed part of the highway gave rise to an issue estoppel precluding a party to the hearing before the commons commissioner from re-opening the highway issue in subsequent litigation between the same parties.

[40] In *Thrasyvoulou v Secretary of State for the Environment*[11] the question was whether the principle of issue estoppel applies to appeals against planning decisions or enforcement notices. It was held by the House of Lords that where a statute created a specific jurisdiction for the determination of an issue which established the existence of a legal right, there was a presumption that the principle or *res judicata* applied to give finality to that determination unless an intention to exclude the principle could properly be inferred as a matter of construction of the relevant statutory provisions.

[41] In *Arnold v National Westminster Bank plc*[12] it was held that there was an exception to the doctrine of *res judicata* in the case of an issue estoppel where there became available to a party further material which was relevant to the correct determination of the point involved in the earlier determination but which could not by reasonable diligence have been adduced in those proceedings. It was further held that such further material included a change in the law.

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8 [1964] P 181
9 [1979] AC 411
10 [1990] 1 All ER 19
11 [1990] 2 AC 273
12 [1991] 3 All ER 41

[42] In *R v East Sussex Council ex parte Reprotech (Pebsham) Ltd.*[13] it was held by the House of Lords that the doctrine of *res judicata* had no general application in planning law because of the public interest in planning decisions.

[43] In *R (Whitmey) v Commons Commissioners*[14] Waller LJ thought (at para. 59) that a decision whether to register a new green was akin to a planning decision for the purposes of art. 6 of the ECHR.

[44] In *R (East Hertfordshire District Council) v The First Secretary of State*[15] it was accepted that the *Thrasyvoulou* principle still applied to appeals against planning enforcement notices.

[45] In *Betterment Properties (Weymouth) Ltd v Dorset County Council*[16] there was a very passing reference to the possible application of *res judicata* to an application under CRA 1965 s. 13 at para 39 of the judgment of Lloyd LJ. At para. 41, Lloyd LJ doubted the analogy with a planning decision drawn by Waller LJ in the *Whitmey* case.

[46] I have also read the Report of Mr. Gerard Ryan QC dated 3rd. May 2000 relating to an application to register Spring Common, Huntingdon as a new green. Mr. Ryan said that he would have applied the principles in *Thrasyvoulou* and *Arnold* to the application although it was not necessary to do so on the particular facts of that case.

[47] I find the arguments for and against the application of the doctrine of *res judicata* to applications to register new greens quite evenly balanced.

[48] In favour of the application of the doctrine there are powerful arguments:

- The provisions for the registration of new greens under s. 13 of the CRA 1965 and 15 of the CA 2006 creates a specific statutory jurisdiction to be administered by the CRA in a quasi-judicial fashion
- The exercise of that jurisdiction creates legal rights, i.e. the legal right of recreation on the green, such right being vested in the inhabitants of the relevant locality or neighbourhood
- It would be oppressive to landowners if they could be subject to repeated applications to register their land as a new green on the same factual and legal basis.

[49] In opposition to the application of the doctrine there is the powerful argument that the non-registration of a new green affects not just the parties to the application but also the inhabitants of the relevant locality or neighbourhood. It would be unjust if their rights were lost

13 [2002] 4 All ER 58, [2002] UKHL 8
14 [2005] QB 282, [2004] EWCA Civ 951
15 [2007] EWHC 834 (Admin)
16 [2008] 3 All ER 736

by the fact that the particular applicant overlooked some relevant evidence or issue or the CRA made a mistake in dealing with the application. Repeated applications on the same factual and legal basis could be summarily dismissed by the CRA without involving the landowner in much expense.

[50] I have considered whether it could be argued that the doctrine of *res judicata* applies to applications to register new greens but only where the applicant and objector are the same. However, I think that this would be an artificial distinction since the legislation places no restriction on who can apply for or object to the registration of a new green. Such a rule could easily be circumvented by fielding a new applicant or objector.

[51] It seems to me that *res judicata* cannot be a one-way doctrine, i.e. one which affects one side only. If the doctrine applies, it must apply to both sides. If it does not apply, it applies to neither side.

[52] I have, on balance, come to the conclusion that the arguments against the application of the doctrine of *res judicata* to a second application to register a new green are the stronger arguments. An application to register a new green is not private law litigation. It affects the rights of all the inhabitants of the relevant locality or neighbourhood. It is not just and fair that these rights could be prejudiced by the way in which a particular application is conducted and determined as between a particular applicant and objector.

[53] I therefore conclude that there is no legal reason based on the doctrine of *res judicata* to prevent the CRA from reconsidering the "as of right" point in the second application.

Application of housing legislation

[54] In my view, the critical issue in this case is whether recreational user of the application land by local people was "by right" or "as of right". The application of this issue to recreational land provided under the housing legislation raises difficult legal issues which have not yet been considered by the courts. No doubt they will be litigated in due course, perhaps in this case.

[55] Although the discussion of the point was *obiter*, there is strong guidance from the House of Lords in *Beresford* that user which is under a legal right is not user "as of right"

Lord Bingham paras 3 & 9
Lord Hutton para 11
Lord Scott paras 29-30
Lord Rodger para 62
Lord Walker paras 72, 87 & 88

The comments of Lord Walker at para. 87 are particularly pertinent. He considered that it would be difficult to regard recreational users as trespassers acting as of right not only where there was a statutory trust under s. 10 of the Open Spaces Act 1906 but also where land had been

appropriated for the purposes of public recreation. Under s. 122 of the Local Government Act 1972 (as amended) a local authority can appropriate land from one statutory purpose to another. I understand Lord Walker to be remarking that if a local authority holds land for a statutory purpose which involves public recreational use of the land (albeit without an express statutory trust in favour of the public) use of that land for public recreation would not be "as of right".

[56] I think that it is important to note that this point is a separate point from the main point considered by the House of Lords in *Beresford* which was whether permission for use of the application land for LSP could be inferred in the circumstances of the case. As I read *Beresford*, the House of Lords were not saying that user under a statutory right is permissive. The House was saying that user pursuant to a statutory right is not user "as of right" but rather user "by right" or "of right". I respectfully disagree with the way in which the inspector in the present case equated user pursuant to a statutory right with user with permission (see para. 42 of his report). I prefer the approach of Mr. Petchey, who asked himself the question whether users of the application land were doing so pursuant to a statutory right.

[57] The inspector found that the application land had been acquired with other land in 1959 for housing purposes pursuant to Part V of the Housing Act 1957. Part V dealt with the provision of housing accommodation. It appears to me that the land must have been acquired pursuant to s. 96 of the 1957 Act which authorized a local authority to acquire land as a site for the erection of houses for the working classes and other related purposes. Section 92(1)(a) authorized the local authority to provide housing accommodation by the erection of houses on any land acquired by them. Section 93(1) empowered a local authority to provide and maintain in connection with any such housing accommodation, and with the consent of the Minister, recreation grounds or other lands which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. Further, a local authority had power to lay out public streets or roads and open spaces on land acquired for housing purposes under s. 107 without ministerial consent. Provided that the application land benefited the council tenants (which it clearly did), it did not matter that it also benefited other people within the local community: *HE Green & Sons v The Minister of Health (No. 2)* [1948]. There is no evidence, one way or the other, as to whether the Minister gave his consent to the laying out of the application land. The 1957 Act contains no definition of "recreation ground" or "open space" for the purposes of these sections. It seems to me that the application land must be either a "recreation ground" to which ministerial consent could be inferred under the usual presumption of regularity or an "open space" which did not require ministerial consent.

[58] All these provisions in the Housing Act 1957 were subsequently consolidated without material amendment in the Housing Act 1985 Part II ss. 9, 12, 13 & 17.

[59] The question that arises is whether local people had a legal right to use a recreation ground or open space which was set out under Part V of the 1957 Act and (during the relevant 20 year period) maintained under Part V of the 1957 Act and then Part II of the 1985 Act as a recreation ground or open space open to the public.

[60] The Open Spaces Act 1906 created by s. 10 an express statutory trust for public recreation. However, there is authority that where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it. This point has been explored in relation to Public Health Act 1875 s. 164 (which contains no express trust for public recreation) in a series of cases:

A-G v Loughborough Local Board The Times 31st May 1881
Hall v Beckenham Corporation [1949] 1 KB 716
Sheffield Corporation v Tranter [1957] 1 WLR 843
Blake v Hendon Corporation [1962] 1 QB 283

It seems to me that the same principle must apply to a recreation ground or open space laid out under statute as an area for public recreation on a council estate. Council tenants, who are the primary objects for the provision of recreation must have had a legal right to use the land for harmless recreation. It would be absurd to think of them as trespassers unless they first obtained the permission of the council to use the land for harmless recreation. Where the recreation ground or open space, as in the present case, is laid out and maintained as a recreation ground or open space open to the public pursuant to statutory powers, it seems to me that the public must similarly have a legal right to use the land for harmless recreation. Again, it would be absurd to regard them as trespassers. This view is supported by the *obiter* comments of Lord Walker in para. 87 of *Beresford*. I therefore consider that until 2002, when the application land was transferred to HHL, recreational use of the application land by local people was by right and not as of right. They were not trespassers but were using a public recreational facility provided by the council under housing legislation.

[61] It follows, therefore, that, although I acknowledge that it is a legally difficult issue, I agree with the advice of Mr. Jones and Mr. Petchey that user of the application land before transfer to HHL in 2002 was not "as of right". It follows, in my view, that the second application must fail on that ground.

[62] I am conscious that I am disagreeing with the advice of Mr. Ground in the Coventry case. However, I think that it is fair to say that Mr. Ground did not consider the cases on s. 164 of the PHA 1875 which support the view that the public have a legal right to use land laid out under s. 164 despite the lack of any express provision conferring such a right. Although it is not a critical point, I am also unconvinced by Mr. Ground's argument that, in s. 107 of the 1957 Act, the word "public" cannot qualify "open spaces" as a matter of syntax. I think that the "or" between "streets" and "roads" could equally reflect the fact that land cannot be both a road and a street.

[63] I have considered Mr. Whitmey's argument that "open space" in HA 1957 s. 107 must mean land that is laid out as an open space for aesthetic rather than recreational purposes. He contrasts the requirement for ministerial consent in s. 93 with the lack of any such requirement in s. 107. I agree that the draftsman must have perceived there to be a distinction between a recreation ground and an open space. Perhaps the former carries the connotation of use for organized sports. However, I cannot see any justification for giving so restricted a construction to "open space" as Mr. Whitmey does. It is clear in the present case that the application land was not laid out for aesthetic purposes only but rather for recreational use by local people (council tenants or not).

[64] I have naturally considered very carefully indeed the points made under the heading "Key Considerations 1. As of Right" in the officer report to the Regulatory Committee meeting of 2nd November 2010. Six arguments are advanced, lettered (a) to (f):

- Argument (a): This argument raises the issue whether the Council had indicated to users that the right to use the land was permanent or could be withdrawn. However, I think that this is a point which goes to the issue of permission and not to the issue of whether user was "by right". It is clear from *Beresford* that permission must be time-limited or revocable. An indefinite permission is no different from dedication. I agree that user in this case was not permissive. However, on the issue whether user was "by right", it seems to me that the only question is whether the statute conferred on the users a legal right to use the land.

- Argument (b): This argument turns on the question whether it was possible to infer from a Council advertisement of the 1980s relating to bonfires that user of the application land for LSP was under a permission that could be withdrawn. I agree that it is hard to infer from such an advertisement a revocable permission to indulge in other LSP. However, I do not think that the "by right" point is a point depending on an inference of permission. It is a separate point depending on whether the users had a statutory right to use the application land for LSP.

- Argument (c): This argument turns on the fact that neither council house tenancy agreements nor RTB conveyances contained a revocable permission to use the application land for LSP. Again, it appears to me that this goes to the issue of permission rather than the issue of user "by right". Further, there seems to be no evidence that either tenancy agreements or RTB conveyances purported to grant any right to use the Application Land, whether permanent or temporary. It seems to me that the tenancy agreements and RTB conveyances are neutral evidence on the "by right" issue.

- Argument (d): This argument is that it cannot be inferred that permission to use the land was granted to council tenants simply from the fact that part of the cost of maintaining

the application land was funded out of Housing Revenue account. I agree. However, again, it seems to me that this point goes to permission rather than whether user was "by right".

- Argument (e): This argument is that land laid out for public recreational use under housing powers lacks the express trust for public use to be found in OSA 1906 s. 10. I agree that the core issue is whether a statutory right of public use can be inferred in relation to a recreation ground or open space laid out for public use under the housing legislation. The courts have been prepared to infer such a right in relation to land held under PHA 1875 s. 164. In para. 87 of *Beresford*, Lord Walker seemed prepared to infer a statutory right of recreation in the absence of an express statutory trust in the case of an appropriation to public recreational purposes. However, Lord Walker's comments were *obiter* and he recognized that they raised difficult legal issues for another day. I recognize the force of argument (e) but I consider that the arguments to the contrary are stronger. Time will no doubt tell who turns out to be right.

- Argument (f): This argument turns on the lack of evidence of express or implied permission. However, I consider that the issue here is not permission but whether user was "by right" under a legal right conferred by statute.

Permission

[65] There is no evidence that the Council before the 2002 disposal, or HHL after the 2002 disposal, ever expressly gave permission to local people to use the application land for LSP. Nor, in the light of the *Beresford* case, do I think that the conduct of the Council in laying out and maintaining and managing the application land amounted to an implied grant of permission. Its conduct simply amounted to facilitation and encouragement of recreational use and, according to *Beresford*, that does not amount to implied permission. I agree with arguments (a), (b), (c), (d) & (f) in the officer report that this is not a case where permission can be inferred.

LGA 1972 s. 123

[66] LGA 1972 s. 123 (as amended) authorizes a principal council to dispose of land held by them. Section 123(2A) requires prior advertisement and consideration of objections before disposing of open space land. "Open space" is defined by s. 336 TCPA 1990 as "any land laid out as a public garden or used for the purposes of public recreation, or land which is a disused burial ground". By s. 123 (2B) a disposal by virtue of s. 123(2A) frees the land from any trust arising under PHA 1875 s. 164 or OSA 1906 s. 10. I can see nothing in the section which affects registration of the land as a new TVG. In *Beresford* Lord Scott expressed the view at para. 52 that a s. 123 disposal would trump TVG status, whether or not the land was registered. However, the point was not argued before the House of Lords, Lord Scott's views were *obiter* and the other law lords studiously avoided expressing any view on the point. Although Lord Scott's views are

entitled to great respect, I cannot agree with them for the reasons put forward by Mr. Petchey. I also respectfully disagree with the advice of Mr. Jones on this point. The officer report also agrees with Mr. Petchey and disagrees with Mr. Jones on this point.

New evidence on "neighbourhood"

[67] It now appears that substantial parts of the Newton Farm Estate had been disposed of by the council before and during the relevant 20 year period. However, I do not see that this affects the disposal of the second application if Mr. Jones, Mr. Petchey and I are right about the "as of right" point. If the fact that the application land was laid out and maintained as a public recreation ground or open space under housing powers conferred a right on the public to use the land for LSP it does not matter whether the users were council tenants or not.

[68] If I were wrong about the "as of right" point then it seems that neither the council tenants nor the private householders would have a legal right to use the application land for LSP and, again, it would be irrelevant whether the users were council tenants or not.

[69] Neither side argue that the effect of the housing legislation was to confer a right to use the application land for LSP only on council tenants. Only in this situation would the new evidence be of relevance because it might be possible to identify a pocket of private housing as being a relevant "neighbourhood". However, it does not seem to me that this point arises.

The byelaws

[70] As noted above, I have not seen the byelaws but understand that they were made under s. 164 PHA 1875 and ss. 12 & 15 OSA 1906 rather than under HA 1985 s. 23(2). If they applied to the application land, this raises the intriguing possibility that the council perceived the application land as not being a recreation ground governed by HA 1985 s. 12 (to which the s. 23 byelaw-making power applied) but as being an open space laid out under HA 1985 s. 13 or its statutory predecessor HA 1957 s. 107 (to which the s. 23 byelaw-making powers did not apply) and have, by making the byelaws, impliedly appropriated the application land to s. 164 PHA 1875 or s. 10 OSA 1906. In *Oxy-Electric Ltd. v Zainuddin*[17] it was accepted by the judge that, in certain circumstances (which did not in fact apply in that case) land could impliedly be appropriated from one statutory purpose to another.

[71] However, the inspector found that the byelaws did not apply to the present application land, and this finding does not seem to be challenged by either side in the present application.

Recommendation

[17] 22nd October 1990 (unreported)

[72] On present information (and subject, of course, to further evidence and arguments raised before or at the meeting of the Regulatory Committee) I would recommend the Regulatory Committee to reject the application on the ground that user of the application land for LSP during the relevant 20 year period (i.e. broadly the 20 years before the 2002 disposal to HHL) was "by right" and not "as of right". This is essentially the same ground as that on which the first application was rejected.

[73] Under reg. 37 of the 2008 Regulations, the Regulatory Committee must give written reasons for rejecting the application. I recommend the following reasons:

"The application is rejected because the Regulatory Committee is not satisfied that use of the application land during the 20 year period relied upon was "as of right". The Committee considers that the application land was a "recreation ground" and/or an "open space" laid out and maintained for public use under HA 1957 ss. 93 and/or 107and HA 1985 ss 12 and/or 13 to which the users had a statutory right of access. Use for LSP was therefore "by right" or "of right" rather than "as of right".

Vivian Chapman QC
30th October 2010
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN

Appendix 11

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE No. 2

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 11th January 2011 @ 1000am

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Herefordshire Council,

Legal Services,

Blackfriars,

Blackfriars Street,

Hereford HR4 9ZR

Ref. PC/NMG

67651/VRC/10/151/wp/S4/Argyll Rise Note No 2

In the Matter of

An Application to Register

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As a New Town or Village Green

PRELIMINARY NOTE No. 2

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 11th January 2011 @ 1000am

Introduction

[1] This Note is written to address the thoughtful comments dated 9th November 2010 of Mr. Peter Crilly of Herefordshire Council Legal Services. It appears to me that there are three points to consider, in increasing order of difficulty:

- The playground point
- The permission point
- The statutory right point

As before, the views expressed in this Note are purely provisional and this Note is subject to any evidence and arguments that may emerge before or during the adjourned meeting of the Regulatory Committee.

The playground point

[2] I think that this point arises from unclear language in my Preliminary Note, for which I apologise. There are four distinct events here:

- First, the play equipment was physically removed from the land which was subsequently comprised in the first application as a result of an accident suffered by a child on the equipment.
- Second, the area in which the play equipment had been situated was included within the land subject to the first application.
- Third, the applicants subsequently notified the inspector that they did not pursue registration of the former play equipment area as a new TVG.

- Fourth, the applicants did not include the former play equipment area in the second application.

[3] The practical consequence is that it is not necessary to consider the former play equipment area in relation to the second application.

The permission point

[4] The point here is whether there is a difference between (a) permission to use land and (b) a statutory right to use land in deciding whether user was "as of right" within CA 2006 s. 15. Looking at the point in principle, it seems to me that there is a conceptual difference. Permission is a voluntary act of the landowner. He is free to grant or withhold permission as he wishes. The right to use the land arises directly from the voluntary act of the landowner. By contrast, a statutory right to use land arises from the statute and not from the voluntary act of the landowner. It is true that the statutory right may be triggered by the voluntary act of the landowner. So, for example, if a landowner applies to register his own land as a new TVG under CA 2006 s.15(8), local people gain a right of access to the land. However, it seems to me that the right of access arises by an implied provision of the CA 2006 (in accordance with the reasoning in the *Trap Grounds* case[1]) and not by permission of the landowner, although it was the voluntary act of the landowner that triggered registration.

[5] I ought to draw attention to the case of *R v Secretary of State for the Environment ex parte Billson*[2]. An issue in that case was whether members of the public were using land "as of right" for the purposes of HA 1980 s. 31 in circumstances where the landowner had applied LPA 1925 s. 193 to the land by revocable deed. In this pre-*Beresford* case, the judge held that they were not using the land "as of right" because they were using the land by licence of the landowner. But that raises the difficult notion of a licence unknown to the licencee, since the users were unaware of the revocable deed. I would prefer to say that they were not using the land as of right because they were using it pursuant to a statutory right, i.e. LPA 1925 s. 193. If they had a statutory right to use the land, knowledge of the revocable deed would be irrelevant. I would respectfully say that the judge was right but for the wrong reason. The *Billson* case was overruled by the House of Lords in the *Godmanchester* case[3], but not on this point which was not in issue and was not considered by the House.

[6] It is now necessary to look at the *Beresford* case to see if the members of the House of Lords equated (a) a statutory right of access and (b) permission.

[7] It seems to me that Lord Bingham clearly distinguished between permission and statutory right. At para. 3, he commented that persons using land pursuant to a legal right are not using the

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1 *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674

2 [1998] 2 All ER 587

3 *R (Godmanchester Town Council) v Sec. of State for Environment* [2008] 1 AC 221

land “as of right”. He then went on to discuss whether user was by permission on the facts of case (paras. 4-8). Then, at para.9, he discussed the new point (raised after the first hearing of the appeal) whether user was pursuant to a statutory right, and concluded that it was not. It seems to me clear that he did not equate a statutory right with permission. In para. 9, he was clearly discussing a separate issue from that of permission, and the words “permission” or “licence” does not appear in para. 9.

[8] Lord Hutton did not deliver a reasoned speech and simply agreed with the speeches of Lords Walker, Bingham and Rodger.

[9] Lord Scott discussed the question of user pursuant to a statutory right in the most detail. In para. 16, Lord Scott identified the issue in *Beresford* as being whether user was *nec precario*. He then discussed the statutory background to the acquisition of the land in question in that case and a number of issues on which he made no ruling, bearing in mind counsel’s reluctance to argue them. In para. 30, he discussed land held under s. 10 of the OSA 1906. He was clear that user would not be “as of right” but it is not entirely clear whether it was because of the statutory trust imposed by s. 10 or because the land was subject to regulation by the council/landowner. However, he did not say that user under s. 10 OSA 1906 is user with the permission of the landowner or under licence from the landowner. At para. 32, Lord Scott turned to the question whether user was with permission. The discussion at paras. 46-51 mentioned by Mr. Crilly was, to my mind, solely directed to the question of permission. He explained that permission must be revocable or time limited and that acts of facilitation or encouragement cannot amount to implied permission. I see nothing in this discussion which bears on the issue whether user is “as of right” if it is pursuant to a statutory right. So, for example, it seems to me that Lord Scott would have regarded user pursuant to a permission that was indefinite, in the sense that it was not expressed to be revocable or time-limited, to be user “as of right” but that he would have regarded user pursuant to a similarly indefinite statutory right as not being “as of right”.

[10] In paras. 53-61, Lord Rodger considered whether user was *precario* and concluded that it was not. In para. 62, he turned to consider whether user was “of right” as opposed to “as of right” because it was pursuant to some statutory right and concluded that it was not. It seems to me clear that Lord Rodger was not treating user pursuant to a statutory right as being equivalent to user which was *precario*. Indeed, at paras. 57-58, he discussed the history of the concept of *precarium* back to Roman law and characterised it as the grant of a temporary right over land by the landowner.

[11] In paras. 70-86, Lord Walker discussed the distinction between acquiescence and permission. Then, at para. 87, he turned to the issue whether use was under a statutory right. He said that the consequence would be the same if land were appropriated for the purposes of public recreation. He found that, on the facts of that case, there was neither a statutory right nor an

appropriation for the purposes of public recreation. I see nothing in Lord Walker's speech which can be read as treating user pursuant to a statutory right as equivalent to user by permission.

[12] I conclude that there is nothing in the *Beresford* case which equates user pursuant to a statutory right with user by permission. User is "as of right" if it is user *nec vi nec clam nec precario*. But user is not "as of right" if it is user "by right" or "of right", i.e. pursuant to a legal right conferred by statute. It seems to me that issues turning on (a) the distinction between acquiescence and permission or (b) whether permission has to be revocable or time-limited or (c) whether permission has to be communicated to the user simply do not apply if the user is pursuant to a right conferred by statute.

The statutory right point

[13] This takes me to what I see as the central issue in this case, i.e. whether local people were using the application land pursuant to a legal right with the result that they were using the application land "of right" or "by right" rather than "as of right". I do not pretend that it is an easy point or that I am wholly confident that the answer that I prefer is the right one.

[14] There can be no doubt that statute can grant people a statutory right to use land for recreation. Thus, if land is acquired under the OSA 1906, the landowner holds the land on a statutory trust for public recreation under s. 10 of the 1906 Act. The public have a right of access to the land for recreation, subject to regulation by byelaws made under s. 15.

[15] There is the same result if statute does not contain an express trust for public recreation but states that the land is held for the purpose of public recreation. Thus in the *Brockwell Park* case[4], the LCC acquired Brockwell Park under the London Council (General Powers) Act 1890. The 1890 Act provided that the LCC should hold and maintain Brockwell Park as a park for the perpetual use thereof by the public for exercise and recreation. The issue was whether the LCC was in occupation of the park for rating purposes. It was held that it was not, being merely "custodians and trustees for the public" and bound to "allow the public the free and unrestricted use of it".

[16] The same principle has been held to apply to land held under s. 164 of the PHA 1875 "for the purpose of being used as public walks and pleasure grounds". In *Hall v Beckenham Corporation*[5] the issue was whether the Corporation was in occupation of a park held under s. 164 PHA 1875 for the purposes of liability in the tort of nuisance. Section 164 contains power to make byelaws for the regulation of the park, including power to remove people infringing the byelaws. The park was closed at certain times during which the public had no access. The court held that the Corporation was not in occupation of the park. The Corporation was "the trustees

4 *The Churchwardens & Overseers of Lambeth Parish v LCC* [1897] AC 625

5 [1949] 1 All ER 423

and guardians of the park…bound to admit to that park any citizen who wants to enter within the times that it is open."

[17] Even where the statute does not spell out the purpose for which the land is held, the court may infer that it is intended that there should be a public right of access. Thus, in the *Trap Grounds* case, the House of Lords held that registration of a new green under s. 13 of the CRA 1965 (the predecessor of CA 2006 s. 15) conferred on local inhabitants the right to use the land generally for sports and pastimes. See Lord Hoffmann at paras. 45-53. There is nothing in the statute which expressly explains the consequence of registration as a new green. The right was inferred as a matter of statutory interpretation.

[18] In the present case, the inspector found that the application land had been acquired by the council in 1959 under Part V of the Housing Act 1957. Part V of the HA 1957 conferred power upon the local authority to provide housing accommodation within its district. By s. 96, the local authority had power to acquire land for the purposes of Part V. By s. 93(1), the local authority had power, with the consent of the Minister, to provide "in connection with any such housing accommodation any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided." By s. 107, "a local authority may lay out and construct public streets or roads and open spaces on land acquired by them for the purposes of this Part of this Act…" Ministerial consent was not required under s. 107. Section 9 of the Local Government (Miscellaneous Provisions) Act 1976 empowered a local authority to make byelaws in relation to land held under HA 1957 s. 93. These provisions were consolidated in the Housing Act 1985. HA 1957 s. 93(1) was repeated in HA 1985 s. 12(1). HA 1957 s. 107 was repeated in HA 1985 s. 13(1). LG(MP)A 1976 s. 9 was repeated in HA 1985 s. 23 (2).

[19] It was established in the case of *HE Green v Minister of Health*[6] that the power conferred by HA 1957 s. 93[7] authorised the provision of a facility that benefitted other people as well as the class of persons who were the primary beneficiaries. Thus, so it seems to me, a local authority can establish a recreation ground open to the public under housing powers if that benefits the council tenants.

[20] In the present case there was no evidence of ministerial consent but the inspector (who mistakenly thought that such consent was required both under HA 1957 s. 93 and s. 107) inferred that such consent had been granted.

[21] The first question that arises is whether it is implicit in HA1957 s. 93 that local people have a right to use a recreation ground provided by a local authority for recreation. The

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6 [1948] 1 KB 34

7 The case concerned HA 1936 s. 80 which was the direct predecessor of HA 1957 s. 93.

expression "recreation ground" is not defined by the statute. The dictionary definition of a recreation ground is "a public ground with facilities for games etc."[8]. We all have a concept of a typical urban recreation ground. It is usually an enclosed expanse of grass on which local children play. There is usually an area with swings and slides. It is type of public park. Local children go to play in "the park" or "the rec." The whole point of a recreation ground is that local people can use it for recreation. I have never heard of a recreation ground that is not open to local people for recreation. It seems to me implicit in the concept of a recreation ground that local people have a right of access to it for recreational purposes. The park in *Liverpool Corporation v West Derby Union*[9] was described in the case stated as "a public park or recreation ground". The PHA 1875 s. 164 park in *Hall v Beckenham Corporation*[10] was called "The Blake Recreation Ground".

[22] It is true that s. 93 authorises a local authority to provide other facilities, such as shops, to which the local people clearly have no legal right of access. However, I do not see why that logically means that local people have no right of access to a recreation ground provided under that section. The section authorizes the provision of different sorts of facilities. It seems to me that one must examine each facility individually to decide whether it is implicit that local people have a right of access to it. Say for example that a section authorized a local authority to provide a variety of facilities including (a) an abattoir and (b) a public park. No one would claim a right of access to the abattoir but surely the public would have a right of access to the public park? The same reasoning applies to the council's power to provide housing. No one would suggest that the public have a right of access to the housing, but it does not follow that the public have no right of access to a different facility which the local housing authority are empowered to provide by statute in connection with the provision of housing.

[23] The next question is whether local people have a right of access to an "open space" laid out under HA 1957 s. 107. "Open space" is not defined for the purposes of Part V of the HA 1957. However, as Mr. Whitmey points out, it is defined for the purposes of HA 1957 s. 150 as "any land laid out as a public garden or used for the purposes of public recreation and any disused burial ground". This is the definition used for planning purposes: see TCPA 1990 s. 336(1) repeating a definition going back at least as far as the TCPA 1947. Although differently defined by s. 20 of the OSA 1906, open space held under that Act is held by virtue of s. 10 on trust for public recreation. I would read the word "public" in s. 107 as qualifying "open space" as well as "streets or roads". However, even if I were wrong about that, it seems to me that, in the context of the HA 1957, "open space" carries with it the connotation of unenclosed land to be used for public recreation. So, for example, Paul Clayden's book on "The Law of Parks and Open Spaces" is so entitled because "open space" is understood to mean unenclosed public

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8 SOED

9 [1908] 2 KB 647

10 [1949] 1 All ER 423

recreational land. I would therefore construe s. 107 as authorizing a local housing authority to lay out open unenclosed areas for public recreation as part of council estates. If the statute authorizes the laying out of land for public recreation, it seems to me implicit that the public have a right of access for recreation. It would be very odd if what the draftsman had in mind in HA 1957 s. 107 was that the local housing authority should be empowered to lay out vacant land to which the local people had no right of access.

[24] The side note to s. 107 reads "Powers relating to the development of land". I do not find this to be inconsistent with my construction of the section. In building council housing estates ("development") the local housing authority has "power" to lay out "open spaces". The laying out of open spaces was ancillary to the development of land as a council housing estate. In any event, the House of Lords have held that sidenotes are of very little weight in construing a statute: *DPP v Schildkamp*[11]

[25] Mr. Crilley suggests that this construction of ss. 93 and 107 would involve "an implication upon an implication". However, I do not see that there are two stages of implication. The only questions are whether one can infer a public right of access from the power to lay out "recreation grounds" and "[public] open spaces"

[26] Mr. Crilley discusses the meaning of the last sentence of para. 87 of Lord Walker's speech in *Beresford*. I find that Lord Walker's remarks are complex but my understanding of what he said in para. 87 is as follows. First, he says that if land is held on the express statutory trusts of s. 10 OSA 1906, the inhabitants of the locality have a statutory right of access to the land, they are not trespassers and they are using the land "of right" or "by right" and not "as of right". Then he says that the position would be the same if "land had been appropriated for the purposes of public recreation". Now Lord Walker must have been aware that land can only be appropriated under LGA 1972 s. 122 to some specific statutory purpose for which the land could have been acquired. I know of no statute which expressly authorizes land to be acquired "for the purposes of public recreation". I think therefore that what Lord Walker meant was that if land is appropriated to a statutory purpose which is implicitly for public recreation, it would have the same consequence (so far as user "as of right" is concerned) as an appropriation to the purposes of the OSA 1906. An example might be an appropriation to PHA 1875 s. 164. I would say that Lord Walker's remarks would apply to an appropriation to the purposes of a recreation ground under HA 1957 s. 93 or to the purposes of "open space" under HA 1957 s. 107. This is what I meant by referring to holding land for a purpose which involves public recreational use of the land. In the present case, there is (so far) no evidence that the land was appropriated to any purpose. Nor is there evidence that the application land was specifically earmarked as a site for a recreation ground or open space when it was acquired. The land was acquired for housing purposes and then laid out and held as a recreation ground or open space pursuant to housing

[11] [1969] 3 All ER 1640

powers. What I draw from Lord Walker's remarks is that if land is held by a local authority for a statutory purpose which impliedly confers on local people a right of access to that land, the use of the land is "of right" or "by right" and not "as of right".

[27] Then Mr. Crilly discusses the rating cases of *Sheffield Corporation v Tranter* and *Blake v Hendon Corporation.* The actual issue in those cases was whether the local authority landowner was in rateable "occupation" of a park held under s. 164 of the PHA 1875. There were two threads in the judgments which call for comment:

- The court spoke of the park's being in the "beneficial ownership" of the public. But this was just a metaphor because, of course, "the public" is not a legal entity and cannot own land legally or beneficially. The underlying basis for the metaphor is the proposition that the public have a right of access to the land and that the landowner can only use the land for purposes ancillary to the public right. The cases are therefore authority for the proposition that the public have a right of access to a park laid out for public use under PHA 1875 s. 164. I agree with Mr. Crilly that the question of "beneficial ownership" is not directly relevant in the present case.

- Then there was a discussion in *Blake* as to whether it made any difference whether the land was held for the purposes of PHA 1875 s. 164 for ever or indefinitely. The court held that it made no difference to the question whether the landowner was in rateable occupation. Equally, it seems to me that it makes no difference to the question whether use by the public was "as of right". If and so long as the public use the land pursuant to a statutory right they are using the land "by right" or "of right" and not "as of right". Indeed, I do not see that it would make any difference to the "as of right" point if the statute conferred a right to use the land for a limited period only. For that period the public would not be using the land "as of right"

[28] Nor does the implication of a public right of access to a recreation ground or open space create difficulties with management of the land as a place for public recreation. The public cannot assert their right of access to overcome proper management of the land as a place for public recreation:

- In *Liverpool Corporation v West Derby Union*[12] a public park was held not to be in the rateable occupation of the corporation although there were byelaws which entitled the corporation to close the park and charge for admission on a limited number of days a year. The right to close the park periodically did not prevent the public from having a right of access when it was open.

[12] [1908] 2 KB 647

- In *Hall v Beckenham Corporation*, the park was closed at night and on certain days (presumably for management purpose) but that did not stop the judge from finding that there was a public right of access when it was open.

- In *Burnell v Downham Market UDC*[13] a public park was held under the OSA 1906. It was held that the public had free and unrestricted use of the park notwithstanding that it could be closed periodically in the interests of good management and that the council landowner allowed parts of it to be used by football, cricket and tennis clubs.

- In *Blake v Hendon Corporation*[14] the earlier cases were discussed and approved. The public had a right to free and unrestricted access to a park held under PHA 1875 s. 164 and that right was not affected by the ancillary powers of the council landowner to manage the park

[29] It seems to me that one always comes back to one simple issue, i.e. whether the public have an implied statutory right of access to a recreation ground laid out and maintained under HA 1957 s. 93 or a [public] open space laid out under HA 1957 s. 107. My view is that they do have such a right because it is implicit in the nature of a recreation ground or open space (just as in the nature of a TVG under s. 13 of the CRA 1965 or s. 15 CA 2006 or of public walks and pleasure grounds under s. 164 PHA 1875) that the public should have a right of access. But, clearly, informed views can differ on that point.

Action

[30] I consider that Herefordshire Council has three possible courses of action.

[31] The first course of action would be to accept the advice of Mr. Crilly and to register the application land as a new green. But that would involve rejecting the legal advice of the inspector, Mr. Petchey and me. Of course, the council is not bound by that advice but it seems to me that it would be a very unusual course of action to go against the advice of the three counsel who have been instructed to advise in the case. I advise against this course of action.

[32] The second course of action would be to seek the directions of the court before making a decision. In the *Trap Grounds* case the House of Lords was unenthusiastic about applications for directions by commons registration authorities. Generally, the commons registration authority should decide the application and leave it to the parties to challenge the decision by judicial review. However, the House of Lords did recognize the propriety of an application for declaratory relief where (a) a difficult question of law had to be decided which is relevant to the decision to be made and (b) where the commons registration authority had a personal interest in the outcome of the case. See Lord Scott at paras. 91-103 and Baroness Hale at paras. 131-138. In

[13] [1952] 1 All ER 601
[14] [1961] 3 All ER 601

the present case, both circumstances apply. There is clearly a difficult question of law which is fundamental to the decision whether to accept or reject the application. Also, Herefordshire Council is a member and director of the objector. I consider that an application to the court for directions is a possible course of action in this case.

[33] The third course of action would be to accept the legal advice of the inspector, Mr. Petchey and me and to reject the application. This is the course of action that I would prefer. The applicant can then challenge the decision by judicial review and the point of law can be decided in the judicial review proceedings. The objector will be represented as an interested party and the applicant and objector can put their rival arguments to the court.

[34] Once again, I emphasis that my advice is provisional and is subject to such further evidence and arguments as emerge before or during the meeting of the Regulatory Committee.

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23rd November 2010
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