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