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.

---

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

---

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-

---

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

---

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

---

[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

---

[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]

---

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

---

[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.