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

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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circumstances, whether or not it is express, indicate to the public that the permission is temporary only, may be withdrawn, and is therefore precatory, or may indicate to the public that their right of use is intended to be permanent."*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.

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