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

Francis Taylor Buildings
Temple EC4Y 7BY

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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.