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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