Re Application to Register Land at Luscombe Road Fields, Henley Green, Coventry as a Town or Village Green

ADDITIONAL REPORT

INTRODUCTION

1. The prospective developer BKW after the report dated 18 October 2007 was made available and just before it was taken to the Planning Committee of Coventry City Council wrote a letter dated 29 November 2007 in which they indicated that the Report I prepared dated 18 October 2007 ("the Report") did not deal with one of the principal arguments of the Objectors. The other parties were given an opportunity which they took to deal with BKW's submissions and this additional report is prepared to deal with those points. I have further submissions from Mr Petchey on behalf of Coventry City Council as landowner ("CCAL") dated 21 December 2007 and from the Applicant dated 17 January 2008. I am grateful to all parties for their prompt submissions.

2. The essential point made by BKW is that so far as Area D is concerned when it was held under the Housing Act 1985 and its predecessor Section 107 of the Housing Act 1957[1] that recreational use of it "could not have counted as 'as of right use' for the purposes of section 22 of the Commons Registration Act 1965".

[1] In fact 1857 is said in the letter I assume that to be a misprint.

3. These points are expanded upon by the City Council as Landowner. I will deal with one of their expansions of the point to begin with namely that the further submissions "have implications for Area C".

AREA C

4. On the basis considered in the Report this point does not have a direct effect on Area C.

5. In brief that is because on the basis of the facts and analysis that I reported the appropriation of Area C was made to the City Development and Property Management Committee for the purposes of Section 10 of the Coventry Corporation Act 1920 and became effective on 13 April 1978. It was not void for the reasons that I expanded upon in the Report in paragraphs 118 and 119. The land in Area C was thus held under a very similar statutory provision to the land in ***Regina*** (***Beresford) v Sunderland City Council*** [2004] 1 AC 889 so its use was not 'by right' but 'as of right'.

6. BKW do not in their letter suggest that their submissions on this point should cover Area C. I agree with the submissions of the applicant that the issues sought to be raised only relate to Area D.

AREA D

7. The recommendations in the Report were based on the decision in ***Regina*** (***Beresford) v Sunderland City Council*** [2004] 1 AC 889 to the effect that if there is a legal right to use the land either by a statutory trust or by an appropriation for the purposes of public recreation then the use would be "by right" and could not be "as of right" use necessary to create a village green. This is dealt with at paragraphs 88 to 96 in the generality and then specifically in relation to Area D at

paragraphs 121 to 132. There was no appropriation to public recreational space and the land was not held under a statutory trust and so the use was not "by right".

8. In the light of the further submissions it is perhaps helpful to expand upon why land which is laid out under the Housing Acts does not convey a public recreational right to use the land for recreation in the same way as a statutory trust does so as to make recreational use "by right".

9. The land in Area D was appropriated to Housing purposes in the early 1950s under appropriation sheet 1123/18 together with Area C[2]. The dates of the appropriation on that sheet are various dates in 1951 and 1952. The evidence of Mr Morris and Mr Marriot was to the effect that Area D was laid out in the 1960s with a football pitch.

The Housing Acts

10. When the land was appropriated for housing purposes it was held under s. 79 of the Housing Act 1936. This provided as follows:

> *"79 (1) Where a local authority have acquired or appropriated any land for the purposes of this Part of this Act, then, without prejudice to any of their other powers under this Act, the authority may -*
> *(a) lay out and construct public streets or roads and open spaces on the land…"*

11. When the land was laid out it was held under Section 107 of the Housing Act 1957 which was in very similar terms. It provided that:

> *107. 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 this Act they may contribute towards the expenses of the development of the land and the laying out*

[2] See AB9

and construction of streets thereon, subject to the condition that the streets are dedicated to the public.

12. Section 13 (1) of the Housing Act 1985 is in materially the same terms.

13. The first point that is taken by the objectors is that when in these statutes "open space" is mentioned it must be public open space and the word public which precedes streets governs "open spaces". It is said that being grouped with highways in the same section shows it is intended to be public open space.

14. I do not agree for two reasons. First the wording of the various sections dealing with the laying out of such land provides that there is a power to create open space and not public open space and secondly that the Housing Acts do not create a right to use such space in any way akin to the rights under the 1906 Act.

15. I will deal firstly with the wording of the sections. The words of subs. S 79(1) Housing Act 1936 and its successors mean that the adjective "public" applies only to "streets or roads" but not to "open spaces". Had Parliament intended otherwise it would not have included the "or" i.e. the syntax would have been "construct public streets roads and open spaces". As such, s. 13(1) merely empowers the local authority to lay out "open spaces". A power to lay out land for "open space" does not confer a right to the public to use it for open space. The use of such land is then within the discretion of the local authority. There is no definition of open space within the statute that would displace this construction.

16. There is no provision in the Housing Acts that creates a right to use such land. In fact the Housing Acts all contain powers for authorities to build on land acquired by them or appropriated by them. This is provided for example under section 72 Housing Act 1936 and section 92 Housing Act 1957. Thus at any time without an appropriation Area D could in fact have been used for the construction of houses or gardens, subject to obtaining planning permission. The land would not enjoy the protection of section 122 (2A) Local Government Act 1972 not only because it was

open space and not public open space but also because it was already appropriated to Housing on the facts of this case. It was not appropriated to public open space purposes. I do not regard the Housing Acts as providing any right to use the land set out for open space by the public. If it does it is entirely precarious and not one that would meet the test required of it in the words of Lord Bingham at paragraph 9 of ***Beresford***. In that paragraph he spoke of provisions which:

> *"Can be relied upon to confer on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes."*

17. It does not come close to a "right" arising by holding the land under section 10 of the Open Spaces Act 1906.

18. It cannot thus be said that laying out land for open space which is administered by the Housing Committee and which is retained for the proposed use of Housing creates a right by the people at large to use it for recreation by reason of the Housing Act.

The factual position and the alleged right to use the land in the period before the appropriation in around 2000

19. It is worth looking at the factual position during the time that the land was held by the Housing Committee to see if properly considered there can be a right to use Area D such as to make the use for recreation 'by right' even if the Housing Acts themselves do not create such a right.

20. The appropriation sheet dated in the early 1950s at AB9 sets out clearly that Area D was being held by the "Housing Committee" for the proposed use "Housing Bell Green No 5". Area D was not at any point appropriated to use as public open space. This is powerful evidence that when the land was being held by the Council under the Housing Acts it was not held as public open space. This is in stark contrast to land in Area A which was appropriated for the proposed use of "public open space purposes". Thus Area D was under the control of the Housing

Committee and held for the purposes of housing. This is strong evidence that applying the reasoning of Lord Walker at paragraph 87 of ***Beresford*** that its use for recreation was not 'by right'.

21. This is in my view strengthened by the fact that the authority indeed treated Area D as open space but not public open space in the appropriation that occurred after it transferred its housing stock to Whitefriars Housing Group on 25 September 2000. This is covered in paragraphs 122 and following in the Report. Indeed at paragraphs 126 to 128 I dealt with the evidence of Mr Clews that it was accepted that Area D was not treated as public open space by the City Council at that time and was not treated as being subject to s 122 Local Government Act 1972. This evidence is consistent with the lack of any appropriation to public open space purposes when it was being held under the Housing Acts. It is said on behalf of CCAL by Mr Petchey that:

> *"As regards the **second** point (identified at paragraph 8 above), although the way the matter was approached in 2000 is obviously a relevant matter by way of background, it cannot be determinative of the status of the land. Just as **now** the Inspector has to address the status of the land at this point so **then** officers had to address it. That status is and was a matter of law for the Inspector to address in his Report."*

22. However the position is clear that prior to 2000 there was not an appropriation to public open space but rather Area D was held for housing purposes. There is no suggestion that this land was held under a statutory trust under section 10 of the 1906 Act or any other statute conferring a trust. In addition the Housing Acts under which this land was set out merely referred to "open space". Thus whilst the land was held under the Housing Acts there was not a right for the member of public to go onto the land such as to make the use by right. This is entirely consistent with the Council treating the land as not being public open space following the 2000 transfer to the Whitefriars Housing Group.

23. The further point that is made by CCAL was that the housing land open space was paid for by the housing tenants in a ring fenced housing budget. It is said that all Council house tenants paid a proportion of the costs of maintaining all the housing land open space in the City of Coventry. From this the submission is made that such Council house tenants must have had an entitlement to go on to the land. This point does not assist CCAL. The matters that the Council tenants are entitled to by reason of renting from the Council are likely to be found in their respective leases. There is no evidence of any lease that gives a legal right to enter on to Area D. The housing budget is no doubt responsible for paying for many repairs of the housing stock some of which have public access and some of which do not. A repair done to the exterior of a council house for example if it were paid from the housing budget would not give a right to other council tenants to go into that house or garden. It simply does not follow that because the upkeep of Area D came from the housing fund budget that all tenants have some right to go onto the land.

24. CCAL make the point that they do not know of any example of a registration of a village green on land laid out under the Housing Acts certainly not one following a determination by the Commons Commissioner. From this it is submitted it should properly give pause for thought. However the fact that there is not a decision either way on land laid out for housing by the Commons Commissioners is not strong evidence that such land cannot become a village green. The judgments in the ***Trap Grounds***[3] case are to the effect that the wide nature of the definition of village greens did not become apparent until ***Sunningwell***[4]. Much land that was not thought to be able to be able to be registered as a village green before ***Sunningwell*** has now been registered. It is said in the same paragraph by Mr Petchey that there is no ruling by the courts as to whether land set out under the Housing Acts as open space can become village green land. The lack of any ruling on this issue by the Commissioners or the Courts is not overly persuasive that such land cannot be registered as a village green.

[3] ***Oxfordshire County Council v Oxford City Council and another*** [2006] 2 AC 674
[4] ***Regina v Oxfordshire County Council and another Ex parte Sunningwell Parish Council*** [2000] 1AC 335

25. Mr Petchey at paragraph 25 of his additional submissions specifically requests a ruling on whether people used the land as trespassers and suggests that it would be unsatisfactory not to address such an issue. This is in the context of submissions on Area D. It is worthy of note that the House of Lords in the closest case factually and legally to this case in ***Beresford*** did not provide that it was a requirement for registration under this head to decide that the users were trespassers. The position in this case is factually very similar to ***Beresford*** in that the authority clearly acquiesced and in fact in some way positively assisted recreation for example by mowing and putting up a football goal in the relevant period.

26. My analysis though is consistent with the users being trespassers in that they did not have an enforceable right to be on the land. I fully accept that the authority acquiesced in their use and that it may not have been in the minds of the users that they were trespassers. However the House of Lords in ***Sunningwell*** has made it clear that the subjective state of mind of the users is not the relevant question. The reason why I come to this view is that I find no enforceable right for members of the public to use Area D in the relevant Housing Acts. There is no evidence of any enforceable right by reason of any of the users' tenancies and there was no express or implied permission. I am also not surprised by this result since Area D was after all being held by the authority before 2000 for housing purposes by the Housing Committee. If they had chosen to build houses upon it there was no recreational right or any step that would have to be gone through nor was there a need to go through the hurdles under section 122(2A) Local Government Act. Thus if the authority had chosen to fence the land off there would not have been a remedy open to the users. I take the view that the position on Area A was different and it being appropriated as public open space there would have at least been the protections available under section 122 Local Government Act 1972 so that the authority could not appropriate it to another purpose without going through a certain procedure. That is why Lord Walker's analysis in ***Beresford*** that there needs to be land either held under a statutory trust or land which is appropriated for the purpose of public recreation works so well.

CONCLUSION

27. For these reasons I would not make any change to the recommendations in the Report which are to grant the application to register Area D and Area C to the west of the Black Pad up to the centre line of the path. I would recommend that the application is refused on Area A and that it is not so registered.

Richard Ground

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