Appendix 10

In the Matter of

An Application to Register

Land at Argyll Rise, Hereford

As a New Town or Village Green

PRELIMINARY NOTE

of Mr. VIVIAN CHAPMAN Q.C.

re Meeting of Regulatory Committee on 2nd November 2010 @ 2pm

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Herefordshire Council,

Legal Services,

Blackfriars,

Blackfriars Street,

Hereford HR4 9ZR

Ref. PC/NMG

67651/VRC/10/146/wp/S4/Argyll Rise Note

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Introduction

[1] I am instructed to advise the Regulatory Committee of the City of Herefordshire District Council[1] at 2pm on Tuesday 2nd November 2010 in relation to a second application to register land at Argyll Rise, Hereford as a new town or village green[2]. I understand that the format of the meeting will be that the representatives of the parties will have 30 minutes to make oral submissions, that they will answer any questions from members of the committee or from me and that I will then advise the committee. It may assist my instructing solicitor to have this preliminary note of my present thoughts on the second application. The contents of this note are subject, of course, to any arguments, further evidence or other developments before or at the committee meeting.

The first application

[2] On 6th February 2006, 3 residents of Hereford applied to the Council as commons registration authority[3] to register the land at Argyll Rise as a new TVG. The application was made under s. 13(b) of the Commons Registration Act 1965[4]. The application was based on CRA 1965 s. 22(1A) as being:

"...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...continue to do so..."

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1 "the Council"
2 "TVG"
3 "CRA"
4 "CRA 1965"

An objection to the application was made by Herefordshire Housing Limited[5] which is a registered social landlord and the owner of the application land. The land was transferred to HHHL by the Council on 26th November 2002 together with a number of local council houses as part of a transfer of its housing stock. The Council is a member and director of HHL and has previously supported a bid for funding to develop the application land for affordable housing. However, the Council, as CRA, has taken no stance for or against the application.

[3] I have not seen the first application or the evidence adduced in support of or in opposition to the application. However, a non statutory public inquiry was held on the instructions of the Council by Mr. Timothy Jones of counsel in 2007 and I have copies of written submissions made to the public inquiry by Mr. Whitmey on behalf of the applicants and by Miss Morag Ellis QC on behalf of HHL and of the inspector's report dated 19th September 2007.

[4] The inspector did not recite the evidence that he had heard but he set out his findings. He found that the application land was an unenclosed irregularly shaped parcel of land consisting mainly of mown grass with some trees. For most of the 20 years before the application there had been a children's play area on part of the land with play equipment, fences and signs to keep out dogs and to restrict the age of users. After an accident, the play area had been removed from the application land. The application land lies within a small conurbation composed of the built up area of the City of Hereford and some residential development in adjoining parishes. I infer from the report that the application land lies within the former council estate known as the Newton Farm Estate.

[5] The inspector found that the application land had been used by a significant number of the inhabitants of the neighbourhood of the Newton Farm Estate for LSP throughout the 20 year period before the making of the application. The inspector does not make an express finding as to the locality within which the neighbourhood lies but it appears from para. 20 of his report that the Estate lay both within the civil parish of the City of Hereford and Belmont Ward, both of which he regarded as being capable of being a "locality" as an area known to the law.

[6] However, the inspector recommended the rejection of the application on three grounds.

[7] First, he found that the application land had been acquired and laid out as a recreation ground or open space under Part V of the Housing Act 1957 with the result that local people had a right to use the land for LSP. It followed that recreational use by local people was not "as of right" but "by right" (which the inspector equated with use by permission).

[8] Second, he found that the application land had been transferred in November 2002 by the Council to HHL pursuant to s. 123 of the Local Government Act 1972 (as amended) and that the effect of s. 123 was to trump any claim to TVG status.

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5 "HHL"

[9] Third, in relation to the former play area, he found that use by local people was permissive and not "as of right" because of the way in which it was managed by the Council. The applicants conceded this point during the public inquiry.

[10] A further point raised by HHL was that the application land was subject to byelaws made in 1995 and 1997 under s. 164 of the Public Health Act 1875[6] and under the Open Spaces Act 1906. Earlier byelaws of 1975, 1971 and 1981 had not been traced. The inspector held that the byelaws did not apply to the application land other than to the play area. I have not seen the byelaws. I understand from the submissions of the parties that the maps intended to accompany the byelaws could not be traced and that there was no evidence that the byelaws had been displayed on the application land.

[11] After the inspector delivered his report, the applicants were invited to comment and submitted written comments dated 4th October 2007 arguing that the inspector was wrong on two legal points (a) in finding that user was not "as of right" because held for open space purposes under the Housing legislation and (b) in finding that disposal under LGA 1972 s. 123 trumped TVG rights.

[12] On 16th October 2007, the inspector was invited to reconsider his advice on those two legal points.

[13] Mr. Jones advised further in an Opinion dated 9th November 2007. He reaffirmed the advice given in his report.

[14] On 4th December 2007, the council sought a second opinion from Mr. Philip Petchey of counsel on the two legal points.

[15] Mr. Petchey advised in an Opinion dated 6th February 2008. He advised that, although the law was uncertain on the point, he agreed with Mr. Jones that a recreation ground or open space held under housing powers was not used "as of right". However, he disagreed with Mr. Jones's advice on LGA 1972 s. 123 and considered that a disposal under LGA s. 123 would not trump a TVG application.

[16] Meanwhile, Mr. Richard Ground had delivered an Additional Report dated 25th January 2008 on another TVG application in Coventry. He advised that there was no public right of access to open space laid out under the housing legislation, with the consequence that recreational use of such land by local people was "as of right".

[17] In the light of Mr. Ground's additional Report, Mr. Petchey wrote a Further Advice dated 16th June 2008 disagreeing with Mr. Ground and re-affirming his advice that recreational use of

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6 "PHA 1875"

land laid out as a recreation ground or as an open space under the housing legislation was not "as of right".

[18] The parties were given the opportunity to comment on Mr. Petchey's Opinion and Further Advice. On behalf of the applicant, Mr. Whitmey pointed out that it had recently emerged that land in Muir Close adjoining the application land had been sold by the Council to Muir (2) Housing Association Ltd. in 1974 and asking for the public inquiry to be reconvened.

[19] The Assistant Chief Executive prepared a report for the meeting of the Regulatory Committee on 12th August 2008. The report recommended that the Council should accede to the application. The report disagreed with the advice of Mr. Jones and Mr. Petchey that recreational use of land laid out as a recreation ground or as an open space under housing legislation was not "as of right". However, the report agreed with the advice of Mr. Petchey (contrary to the advice of Mr. Jones) that the TVG application was not trumped by the disposal under LGA 1972 s. 123. The report did not deal with Mr. Whitmey's point about the Muir Close land.

[20] On 12th August 2008, the Regulatory Committee resolved to reject the application on the ground that the application land was laid out under the housing acts and was therefore not used for LSP by local people "as of right".

[21] I infer that there was no challenge to that decision by judicial review.

The second application

[22] On 16th October 2007[7], and before the first application had been decided, the applicants made a second application to register the application land (but now excluding the former play area) as a new TVG. I have a copy of this application. The application was made under CA 2006 s. 15(4) on the footing that qualifying user ceased on 17th October 2002. The obvious intention was to deal with possible failure of the first application by virtue of the 2002 disposal under LGA 1972 s. 123. The accompanying Map A showed the 2006 application land less the former play area. The accompanying Map B was expressed to show the "locality" but it is clear from the answer to question 6 in the Form 44 that the intention was to rely on use by the inhabitants of the Newton Farm Estate within the locality of the civil parish of the City of Hereford or Belmont ward. The application was supported by numerous evidence questionnaires. I have a sample evidence questionnaire which seems to be in a form based on one of the standard OSS forms. I also have a summary of the second application evidence forms at page 45 of Mr. Whitmey's bundle. It appears that they amount to evidence of at least 20 years' recreational use of the application land by inhabitants of the Newton Farm Estate before 2002.

[7] I am instructed that it was received on that day although there is no date of receipt stamp on page 1 of my copy of the Form 44.

[23] There was an objection statement by HHL dated 19th November 2008. It took three points:

- The second application was bound to fail on the "as of right" point in accordance with the report of Mr. Jones and advice of Mr. Petchey
- The second application should be rejected on the grounds of *res judicata*
- Generally HHL relied on all other points taken against the first application.

[24] Mr. Whitmey responded in detail on behalf of the applicants on 2nd January 2009. In essence, he argued that the CRA was wrong to reject the first application on the "as of right" point and that it was therefore not precluded by *res judicata* from giving full consideration to the facts and law relating to the second application.

[25] HHL replied on 3rd February 2009. HHL appeared to accept that, since the second application had been accepted, the *res judicata* point had become academic. However, HHL maintained its opposition to the application on all other points of fact and law.

[26] There was then an exchange of emails between the CRA and Mr. Petchey between March and September 2010. It had been discovered that, of the 1,790 postal addresses within the Newton Farm Estate "neighbourhood" relied upon by the inspector in relation to the 2006 application, 221 had been disposed of by the Council to private developers or housing associations before the 2002 disposal to HHL:

49 in 1974
87 in 1975
85 in 1991.

The cost of maintenance of the application land, as part of the cost of maintenance of open spaces within council estates, has been shared by the General Fund (funded by council tax payers generally) and the Housing Revenue Fund (funded out of council house rents). The proportions have been calculated by reference to the proportion of council houses which have been sold under the RTB scheme (i.e. not by reference to the properties disposed of to private developers or housing associations). It is unknown when the General Fund began to contribute to the cost of maintenance, save that it was probably before 1998 when the land was transferred from the then Hereford City Council to the Council. Mr. Petchey was asked whether this affected his advice. He advised that it did not, because he regarded all users of open space laid out under the housing legislation as using the land "by right" rather than "as of right".

[27] I have a copy of the proposed officer report to the Regulatory Committee to be held on 2nd November 2010. It recommends that the CRA should accede to the application, essentially on the same grounds as in the report on the first application. The report notes the discovery of the 1974-1991 property disposals. The report also notes that the applicants have complained to the

Local Government Ombudsman about the perceived conflict of interest of the Council as being a member and director of HHL and having previously supported a bid for funding to develop the application land for affordable housing.

Written submissions

[28] I have copies of written submissions to the Regulatory Committee:

- First, I have written submissions by Mr. Whitmey on behalf of the applicants. They are dated 20th October 2010 with an addendum dated 28th October 2010. I received these submissions as part of a bundle received by post from Mr. Whitmey this morning (Saturday 30th October 2010). I had received parts of the bundle previously by email.

- Second, I have a written Skeleton Argument by Miss Morag Ellis QC (with a bundle of supporting documents) on behalf of the objector. I received these by email yesterday (Friday 29th October 2010)

[29] Mr. Whitmey's submissions can be summarised as follows:

- The application land was laid out as "open space" under HA 1957 s. 107 and not as a recreation ground under HA 1957 s. 93.

- "Open space" for the purposes of s. 107 means open spaces for aesthetic purposes and not for recreation.

- There were no overt acts by the council amounting to communication of permission to users of the application land.

- If the Newton Farm Estate cannot be the relevant neighbourhood because it was predominantly occupied by council tenants, the applicants' neighbourhood should be reduced to Muir Close.

[30] Miss Ellis QC makes the following submissions:

- It is not disputed that the application land was used for LSP by a significant number of the inhabitants of the Newton Farm "neighbourhood" within the "locality" of Hereford for the relevant 20 year period

- It is submitted that the use of the application land for LSP before disposal in 2002 was "of right" rather than "as of right" because the application land was laid out as a public recreation ground or open space under HA 1957 ss. 93 and/or 107 of the 1957 Act

- It is submitted in the alternative that user of the application land for LSP was impliedly permissive because the land was laid out, maintained and managed as a public open space by the Council.

- A claim to TVG status was, in any event, defeated by the 2002 disposal pursuant to LGA 1972 s. 123.

The issues

[31] I see the following issues arising (or potentially arising) before the Regulatory Committee:

- Can the Regulatory Committee properly decide the application at all in view of the alleged conflict of interest?

- Is the Regulatory Committee bound by its previous decision on the first application by virtue of *res judicata*?

- Was use of the application land for LSP "as of right" if it was laid out as a recreation ground or open space under housing legislation?

- Was use of the application land permissive in all the circumstances?

- Did the 2002 disposal under LGA 1972 s. 123 defeat an application for registration as a TVG?

- What is the effect of the discovery that part of the Newton Farm Estate "neighbourhood" had been disposed of by the Council before or during the relevant 20 year period?

- What is the relevance of the byelaws?

- In the light of the above, what decision should the Regulatory Committee be recommended to make?

The conflict of interest issue

[32] It seems to me that there is clearly a conflict of interest, or perhaps more accurately, an appearance of bias (i.e. being a judge in its own cause). The Council is a member and director of the objector and has supported an application for funding for the development of the application land. If the application land is registered as a new green it will be sterilised from development and become worthless. As CRA, the Council is deciding whether to accept or reject the application in a quasi-judicial capacity. In the determination of the second TVG application, the committee can only take account of matters which go to the legal issue whether the application

land has become registrable as a new green. The merits of retaining the application land as an open space or of developing it for affordable housing are equally irrelevant.

[33] However, it is the fact that there have been numerous cases in which the CRA has also been landowner and has decided the application without challenge on the ground of apparent bias. For example, the CRA was also the landowner in the recent *Redcar* case in the Supreme Court. However, so far as I am aware, they are all cases where the CRA has appointed an independent lawyer to hold a public inquiry (or at least to advise) and has acted on his or her recommendation. Nor am I aware that the apparent bias point has been taken in any decided case in relation to a TVG application.

[34] The Council is a pilot authority to which the Commons Registration (England) Regulations 2008 apply. The general rule is that the application must be decided by the CRA to which it is made (reg. 27(1)(a)). It is unclear whether this is intended to override (or indeed is capable of overriding) the power to delegate functions to other local authorities under LGA 1972 s. 101(1)(b). I think probably that the 2008 Regulations do not prevent delegation under s. 101 since such purported restriction on delegation would not be statutory but by delegated legislation. However, by reg. 27(2), certain cases have to be referred to the Planning Inspectorate. One of these cases is where the CRA has an interest in the outcome of the application such that there is unlikely to be confidence in the authority's ability impartially to determine it (reg. 27(3)(a)). However, by reg. 55, reg. 27(3)(a) does not apply to an application made before 1st October 2008.

[35] I consider that the net result is that the CRA can decide the second application without referring the application to the Planning Inspectorate. It must decide the application on relevant legal principles. Where it has referred the matter to a non statutory inquiry, it cannot differ from the recommendation of the inspector without good reason: *R (Chaston) v Devon CC* [2007] EWHC 1209 (Admin). In the present case, of course, the second application has not been referred to a non statutory inquiry. However, the first application, which raised many of the same issues as the second application, was referred to a non statutory inquiry. In these circumstances, I think that the CRA could not properly differ from the advice of the inspector on identical issues arising in the second application without good reason to do so. I think that it would be a good reason if the CRA were satisfied, on legal advice, that the inspector had made a mistake of law.

The *res judicata* issue

[36] The CRA refused the first application on the ground that the application land was not used "as of right" for LSP by local people because it was held under housing powers. Precisely the same point arises in relation to the second application. The question arises whether it is open to the CRA to reach a different conclusion on this point or whether the principle of *res judicata*

applies to prevent the CRA from doing so. The objector does not now pursue this point, but the Regulatory Committee clearly has to satisfy itself as to legal scope of its powers.

[37] In *Thoday v Thoday*[8] Diplock LJ said that the generic term *estoppel per rem judicatam* includes two species (i) "cause of action estoppel" which prevents a party to an action asserting or denying as against the other party the existence of a particular cause of action and (ii) "issue estoppel" which arises where the establishing of a cause of action requires proof of several conditions and one of these has been determined between the parties in prior litigation before a competent court.

[38] In *Brisbane City Council v A-G for Queensland*[9] Lord Wilberforce pointed out that an issue estoppel included an issue which could and should have been raised in previous proceedings between the parties.

[39] In *Crown Estate Commissioners v Dorset County Council*[10] it was held that a decision of a commons commissioner refusing to confirm the registration of certain verges as common land on the ground that they formed part of the highway gave rise to an issue estoppel precluding a party to the hearing before the commons commissioner from re-opening the highway issue in subsequent litigation between the same parties.

[40] In *Thrasyvoulou v Secretary of State for the Environment*[11] the question was whether the principle of issue estoppel applies to appeals against planning decisions or enforcement notices. It was held by the House of Lords that where a statute created a specific jurisdiction for the determination of an issue which established the existence of a legal right, there was a presumption that the principle or *res judicata* applied to give finality to that determination unless an intention to exclude the principle could properly be inferred as a matter of construction of the relevant statutory provisions.

[41] In *Arnold v National Westminster Bank plc*[12] it was held that there was an exception to the doctrine of *res judicata* in the case of an issue estoppel where there became available to a party further material which was relevant to the correct determination of the point involved in the earlier determination but which could not by reasonable diligence have been adduced in those proceedings. It was further held that such further material included a change in the law.

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8 [1964] P 181
9 [1979] AC 411
10 [1990] 1 All ER 19
11 [1990] 2 AC 273
12 [1991] 3 All ER 41

[42] In *R v East Sussex Council ex parte Reprotech (Pebsham) Ltd.*[13] it was held by the House of Lords that the doctrine of *res judicata* had no general application in planning law because of the public interest in planning decisions.

[43] In *R (Whitmey) v Commons Commissioners*[14] Waller LJ thought (at para. 59) that a decision whether to register a new green was akin to a planning decision for the purposes of art. 6 of the ECHR.

[44] In *R (East Hertfordshire District Council) v The First Secretary of State*[15] it was accepted that the *Thrasyvoulou* principle still applied to appeals against planning enforcement notices.

[45] In *Betterment Properties (Weymouth) Ltd v Dorset County Council*[16] there was a very passing reference to the possible application of *res judicata* to an application under CRA 1965 s. 13 at para 39 of the judgment of Lloyd LJ. At para. 41, Lloyd LJ doubted the analogy with a planning decision drawn by Waller LJ in the *Whitmey* case.

[46] I have also read the Report of Mr. Gerard Ryan QC dated 3rd. May 2000 relating to an application to register Spring Common, Huntingdon as a new green. Mr. Ryan said that he would have applied the principles in *Thrasyvoulou* and *Arnold* to the application although it was not necessary to do so on the particular facts of that case.

[47] I find the arguments for and against the application of the doctrine of *res judicata* to applications to register new greens quite evenly balanced.

[48] In favour of the application of the doctrine there are powerful arguments:

- The provisions for the registration of new greens under s. 13 of the CRA 1965 and 15 of the CA 2006 creates a specific statutory jurisdiction to be administered by the CRA in a quasi-judicial fashion
- The exercise of that jurisdiction creates legal rights, i.e. the legal right of recreation on the green, such right being vested in the inhabitants of the relevant locality or neighbourhood
- It would be oppressive to landowners if they could be subject to repeated applications to register their land as a new green on the same factual and legal basis.

[49] In opposition to the application of the doctrine there is the powerful argument that the non-registration of a new green affects not just the parties to the application but also the inhabitants of the relevant locality or neighbourhood. It would be unjust if their rights were lost

13 [2002] 4 All ER 58, [2002] UKHL 8
14 [2005] QB 282, [2004] EWCA Civ 951
15 [2007] EWHC 834 (Admin)
16 [2008] 3 All ER 736

by the fact that the particular applicant overlooked some relevant evidence or issue or the CRA made a mistake in dealing with the application. Repeated applications on the same factual and legal basis could be summarily dismissed by the CRA without involving the landowner in much expense.

[50] I have considered whether it could be argued that the doctrine of *res judicata* applies to applications to register new greens but only where the applicant and objector are the same. However, I think that this would be an artificial distinction since the legislation places no restriction on who can apply for or object to the registration of a new green. Such a rule could easily be circumvented by fielding a new applicant or objector.

[51] It seems to me that *res judicata* cannot be a one-way doctrine, i.e. one which affects one side only. If the doctrine applies, it must apply to both sides. If it does not apply, it applies to neither side.

[52] I have, on balance, come to the conclusion that the arguments against the application of the doctrine of *res judicata* to a second application to register a new green are the stronger arguments. An application to register a new green is not private law litigation. It affects the rights of all the inhabitants of the relevant locality or neighbourhood. It is not just and fair that these rights could be prejudiced by the way in which a particular application is conducted and determined as between a particular applicant and objector.

[53] I therefore conclude that there is no legal reason based on the doctrine of *res judicata* to prevent the CRA from reconsidering the "as of right" point in the second application.

Application of housing legislation

[54] In my view, the critical issue in this case is whether recreational user of the application land by local people was "by right" or "as of right". The application of this issue to recreational land provided under the housing legislation raises difficult legal issues which have not yet been considered by the courts. No doubt they will be litigated in due course, perhaps in this case.

[55] Although the discussion of the point was *obiter*, there is strong guidance from the House of Lords in *Beresford* that user which is under a legal right is not user "as of right"

Lord Bingham paras 3 & 9
Lord Hutton para 11
Lord Scott paras 29-30
Lord Rodger para 62
Lord Walker paras 72, 87 & 88

The comments of Lord Walker at para. 87 are particularly pertinent. He considered that it would be difficult to regard recreational users as trespassers acting as of right not only where there was a statutory trust under s. 10 of the Open Spaces Act 1906 but also where land had been

appropriated for the purposes of public recreation. Under s. 122 of the Local Government Act 1972 (as amended) a local authority can appropriate land from one statutory purpose to another. I understand Lord Walker to be remarking that if a local authority holds land for a statutory purpose which involves public recreational use of the land (albeit without an express statutory trust in favour of the public) use of that land for public recreation would not be "as of right".

[56] I think that it is important to note that this point is a separate point from the main point considered by the House of Lords in *Beresford* which was whether permission for use of the application land for LSP could be inferred in the circumstances of the case. As I read *Beresford*, the House of Lords were not saying that user under a statutory right is permissive. The House was saying that user pursuant to a statutory right is not user "as of right" but rather user "by right" or "of right". I respectfully disagree with the way in which the inspector in the present case equated user pursuant to a statutory right with user with permission (see para. 42 of his report). I prefer the approach of Mr. Petchey, who asked himself the question whether users of the application land were doing so pursuant to a statutory right.

[57] The inspector found that the application land had been acquired with other land in 1959 for housing purposes pursuant to Part V of the Housing Act 1957. Part V dealt with the provision of housing accommodation. It appears to me that the land must have been acquired pursuant to s. 96 of the 1957 Act which authorized a local authority to acquire land as a site for the erection of houses for the working classes and other related purposes. Section 92(1)(a) authorized the local authority to provide housing accommodation by the erection of houses on any land acquired by them. Section 93(1) empowered a local authority to provide and maintain in connection with any such housing accommodation, and with the consent of the Minister, recreation grounds or other lands 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 is provided. Further, a local authority had power to lay out public streets or roads and open spaces on land acquired for housing purposes under s. 107 without ministerial consent. Provided that the application land benefited the council tenants (which it clearly did), it did not matter that it also benefited other people within the local community: *HE Green & Sons v The Minister of Health (No. 2)* [1948]. There is no evidence, one way or the other, as to whether the Minister gave his consent to the laying out of the application land. The 1957 Act contains no definition of "recreation ground" or "open space" for the purposes of these sections. It seems to me that the application land must be either a "recreation ground" to which ministerial consent could be inferred under the usual presumption of regularity or an "open space" which did not require ministerial consent.

[58] All these provisions in the Housing Act 1957 were subsequently consolidated without material amendment in the Housing Act 1985 Part II ss. 9, 12, 13 & 17.

[59] The question that arises is whether local people had a legal right to use a recreation ground or open space which was set out under Part V of the 1957 Act and (during the relevant 20 year period) maintained under Part V of the 1957 Act and then Part II of the 1985 Act as a recreation ground or open space open to the public.

[60] The Open Spaces Act 1906 created by s. 10 an express statutory trust for public recreation. However, there is authority that where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it. This point has been explored in relation to Public Health Act 1875 s. 164 (which contains no express trust for public recreation) in a series of cases:

A-G v Loughborough Local Board The Times 31st May 1881
Hall v Beckenham Corporation [1949] 1 KB 716
Sheffield Corporation v Tranter [1957] 1 WLR 843
Blake v Hendon Corporation [1962] 1 QB 283

It seems to me that the same principle must apply to a recreation ground or open space laid out under statute as an area for public recreation on a council estate. Council tenants, who are the primary objects for the provision of recreation must have had a legal right to use the land for harmless recreation. It would be absurd to think of them as trespassers unless they first obtained the permission of the council to use the land for harmless recreation. Where the recreation ground or open space, as in the present case, is laid out and maintained as a recreation ground or open space open to the public pursuant to statutory powers, it seems to me that the public must similarly have a legal right to use the land for harmless recreation. Again, it would be absurd to regard them as trespassers. This view is supported by the *obiter* comments of Lord Walker in para. 87 of *Beresford*. I therefore consider that until 2002, when the application land was transferred to HHL, recreational use of the application land by local people was by right and not as of right. They were not trespassers but were using a public recreational facility provided by the council under housing legislation.

[61] It follows, therefore, that, although I acknowledge that it is a legally difficult issue, I agree with the advice of Mr. Jones and Mr. Petchey that user of the application land before transfer to HHL in 2002 was not "as of right". It follows, in my view, that the second application must fail on that ground.

[62] I am conscious that I am disagreeing with the advice of Mr. Ground in the Coventry case. However, I think that it is fair to say that Mr. Ground did not consider the cases on s. 164 of the PHA 1875 which support the view that the public have a legal right to use land laid out under s. 164 despite the lack of any express provision conferring such a right. Although it is not a critical point, I am also unconvinced by Mr. Ground's argument that, in s. 107 of the 1957 Act, the word "public" cannot qualify "open spaces" as a matter of syntax. I think that the "or" between "streets" and "roads" could equally reflect the fact that land cannot be both a road and a street.

[63] I have considered Mr. Whitmey's argument that "open space" in HA 1957 s. 107 must mean land that is laid out as an open space for aesthetic rather than recreational purposes. He contrasts the requirement for ministerial consent in s. 93 with the lack of any such requirement in s. 107. I agree that the draftsman must have perceived there to be a distinction between a recreation ground and an open space. Perhaps the former carries the connotation of use for organized sports. However, I cannot see any justification for giving so restricted a construction to "open space" as Mr. Whitmey does. It is clear in the present case that the application land was not laid out for aesthetic purposes only but rather for recreational use by local people (council tenants or not).

[64] I have naturally considered very carefully indeed the points made under the heading "Key Considerations 1. As of Right" in the officer report to the Regulatory Committee meeting of 2nd November 2010. Six arguments are advanced, lettered (a) to (f):

- Argument (a): This argument raises the issue whether the Council had indicated to users that the right to use the land was permanent or could be withdrawn. However, I think that this is a point which goes to the issue of permission and not to the issue of whether user was "by right". It is clear from *Beresford* that permission must be time-limited or revocable. An indefinite permission is no different from dedication. I agree that user in this case was not permissive. However, on the issue whether user was "by right", it seems to me that the only question is whether the statute conferred on the users a legal right to use the land.

- Argument (b): This argument turns on the question whether it was possible to infer from a Council advertisement of the 1980s relating to bonfires that user of the application land for LSP was under a permission that could be withdrawn. I agree that it is hard to infer from such an advertisement a revocable permission to indulge in other LSP. However, I do not think that the "by right" point is a point depending on an inference of permission. It is a separate point depending on whether the users had a statutory right to use the application land for LSP.

- Argument (c): This argument turns on the fact that neither council house tenancy agreements nor RTB conveyances contained a revocable permission to use the application land for LSP. Again, it appears to me that this goes to the issue of permission rather than the issue of user "by right". Further, there seems to be no evidence that either tenancy agreements or RTB conveyances purported to grant any right to use the Application Land, whether permanent or temporary. It seems to me that the tenancy agreements and RTB conveyances are neutral evidence on the "by right" issue.

- Argument (d): This argument is that it cannot be inferred that permission to use the land was granted to council tenants simply from the fact that part of the cost of maintaining

the application land was funded out of Housing Revenue account. I agree. However, again, it seems to me that this point goes to permission rather than whether user was "by right".

- Argument (e): This argument is that land laid out for public recreational use under housing powers lacks the express trust for public use to be found in OSA 1906 s. 10. I agree that the core issue is whether a statutory right of public use can be inferred in relation to a recreation ground or open space laid out for public use under the housing legislation. The courts have been prepared to infer such a right in relation to land held under PHA 1875 s. 164. In para. 87 of *Beresford*, Lord Walker seemed prepared to infer a statutory right of recreation in the absence of an express statutory trust in the case of an appropriation to public recreational purposes. However, Lord Walker's comments were *obiter* and he recognized that they raised difficult legal issues for another day. I recognize the force of argument (e) but I consider that the arguments to the contrary are stronger. Time will no doubt tell who turns out to be right.

- Argument (f): This argument turns on the lack of evidence of express or implied permission. However, I consider that the issue here is not permission but whether user was "by right" under a legal right conferred by statute.

Permission

[65] There is no evidence that the Council before the 2002 disposal, or HHL after the 2002 disposal, ever expressly gave permission to local people to use the application land for LSP. Nor, in the light of the *Beresford* case, do I think that the conduct of the Council in laying out and maintaining and managing the application land amounted to an implied grant of permission. Its conduct simply amounted to facilitation and encouragement of recreational use and, according to *Beresford*, that does not amount to implied permission. I agree with arguments (a), (b), (c), (d) & (f) in the officer report that this is not a case where permission can be inferred.

LGA 1972 s. 123

[66] LGA 1972 s. 123 (as amended) authorizes a principal council to dispose of land held by them. Section 123(2A) requires prior advertisement and consideration of objections before disposing of open space land. "Open space" is defined by s. 336 TCPA 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". By s. 123 (2B) a disposal by virtue of s. 123(2A) frees the land from any trust arising under PHA 1875 s. 164 or OSA 1906 s. 10. I can see nothing in the section which affects registration of the land as a new TVG. In *Beresford* Lord Scott expressed the view at para. 52 that a s. 123 disposal would trump TVG status, whether or not the land was registered. However, the point was not argued before the House of Lords, Lord Scott's views were *obiter* and the other law lords studiously avoided expressing any view on the point. Although Lord Scott's views are

entitled to great respect, I cannot agree with them for the reasons put forward by Mr. Petchey. I also respectfully disagree with the advice of Mr. Jones on this point. The officer report also agrees with Mr. Petchey and disagrees with Mr. Jones on this point.

New evidence on "neighbourhood"

[67] It now appears that substantial parts of the Newton Farm Estate had been disposed of by the council before and during the relevant 20 year period. However, I do not see that this affects the disposal of the second application if Mr. Jones, Mr. Petchey and I are right about the "as of right" point. If the fact that the application land was laid out and maintained as a public recreation ground or open space under housing powers conferred a right on the public to use the land for LSP it does not matter whether the users were council tenants or not.

[68] If I were wrong about the "as of right" point then it seems that neither the council tenants nor the private householders would have a legal right to use the application land for LSP and, again, it would be irrelevant whether the users were council tenants or not.

[69] Neither side argue that the effect of the housing legislation was to confer a right to use the application land for LSP only on council tenants. Only in this situation would the new evidence be of relevance because it might be possible to identify a pocket of private housing as being a relevant "neighbourhood". However, it does not seem to me that this point arises.

The byelaws

[70] As noted above, I have not seen the byelaws but understand that they were made under s. 164 PHA 1875 and ss. 12 & 15 OSA 1906 rather than under HA 1985 s. 23(2). If they applied to the application land, this raises the intriguing possibility that the council perceived the application land as not being a recreation ground governed by HA 1985 s. 12 (to which the s. 23 byelaw-making power applied) but as being an open space laid out under HA 1985 s. 13 or its statutory predecessor HA 1957 s. 107 (to which the s. 23 byelaw-making powers did not apply) and have, by making the byelaws, impliedly appropriated the application land to s. 164 PHA 1875 or s. 10 OSA 1906. In *Oxy-Electric Ltd. v Zainuddin*[17] it was accepted by the judge that, in certain circumstances (which did not in fact apply in that case) land could impliedly be appropriated from one statutory purpose to another.

[71] However, the inspector found that the byelaws did not apply to the present application land, and this finding does not seem to be challenged by either side in the present application.

Recommendation

[17] 22nd October 1990 (unreported)

[72] On present information (and subject, of course, to further evidence and arguments raised before or at the meeting of the Regulatory Committee) I would recommend the Regulatory Committee to reject the application on the ground that user of the application land for LSP during the relevant 20 year period (i.e. broadly the 20 years before the 2002 disposal to HHL) was "by right" and not "as of right". This is essentially the same ground as that on which the first application was rejected.

[73] Under reg. 37 of the 2008 Regulations, the Regulatory Committee must give written reasons for rejecting the application. I recommend the following reasons:

"The application is rejected because the Regulatory Committee is not satisfied that use of the application land during the 20 year period relied upon was "as of right". The Committee considers that the application land was a "recreation ground" and/or an "open space" laid out and maintained for public use under HA 1957 ss. 93 and/or 107and HA 1985 ss 12 and/or 13 to which the users had a statutory right of access. Use for LSP was therefore "by right" or "of right" rather than "as of right".

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30th October 2010
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