Herefordshire Council

DEPUTY CHIEF EXECUTIVE'S OFFICE
Dean Taylor

Members of the Regulatory Committee:

JW Hope MBE (Chairman),
PGH Cutter (Vice-Chairman),
CM Bartrum, PGH Cutter (Vice-Chairman), SPA Daniels, JHR Goodwin, JW Hope MBE (Chairman), RC Hunt, Brig P Jones CBE, PJ McCaull, GA Powell and A Seldon

Your Ref: N/A
Our Ref: Tuesday 2 November 2010
Please ask for: Pete Martens, Committee Manager Planning & Regulatory
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25 October 2010

Dear Councillor,

REGULATORY COMMITTEE - SUPPLEMENTARY REPORT

Please find attached a supplementary report that was not included in the printed agenda for the forthcoming meeting (Tuesday 2 November 2010, at 10.30 am).

10. APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN

PLEASE NOTE THAT THIS ITEM WILL BE CONSIDERED AT 2:00 PM

To determine whether land at Argyll Rise, Belmont, Hereford should be registered as a town green.

Ward affected: Belmont

Ward:

Yours sincerely,

P. Martens

Pete Martens, Committee Manager Planning & Regulatory

enc.

cc. Members in receipt of Regulatory Committee papers
cc. Officers in receipt of Regulatory Committee papers

Herefordshire Council

MEETING:	**REGULATORY COMMITTEE**
DATE:	**2 NOVEMBER 2010**
TITLE OF REPORT:	**APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN**
PORTFOLIO AREA	**ENVIRONMENT AND STRATEGIC HOUSING**

CLASSIFICATION: Open

Wards Affected

Belmont

Purpose

To determine whether land at Argyll Rise, Belmont, Hereford ("the Land") should be registered as a town green.

Key Decision

This is not a key decision.

Recommendation(s)

That,subject to the advice to be received from Mr Vivian Chapman QC in the course of the Committee's meeting, Argyll Rise is registered as a town green

Reasons for Recommendation

1. The Council is the registration authority for determining applications to register land as town or village greens.

2. Notwithstanding the advices received from Mr Jones and Mr Petchey described later in the report, officer recommendation is that the Land should be registered as a town green.

Key Points Summary

The Application and the Land.

(a) **The Applications**

1. This is a second application to register the same Land as a town green. For the first application the Council arranged for a public inquiry conducted by a barrister, Mr Timothy Jones, to hear evidence and legal submissions from the Applicants and the only Objector, Herefordshire Housing Limited which owns the Land. The legal submissions presented to the inquiry from the Applicants

and Objector are at Appendices 1 to 6, and Appendix 7 is Mr Jones' inquiry report. Appendices 8 to 9 are requests for further advice from Mr Jones and Appendix 10 is his advice. Appendices 11 to 16 relate to a request for advice from another barrister, Mr Philip Petchey, and his advice.

2. Mr Jones had recommended that the Land should not be registered as a town green for two reasons: (i) it had not been used "as of right" – see section E of this report and (ii) the disposal of the Land to Herefordshire Housing Limited in 2002 under section 123 (2)(A) of the Local Government Act 1972 defeated any town green status - see section F of this report. Mr Petchey agreed with Mr Jones on reason (i) but not on reason (ii) – see section G of this report.

3. The officer's recommendation was, and still is, as set out in section I of this report, namely that the Land (i) had been used "as of right" and (ii) the section 123 disposal did not defeat town green status, and that the Land should be registered as a town green.

4. The first application was heard by the Regulatory Committee on the 12th August 2008 and it decided that the land should not be registered as a town green because it had not been used "as of right". The decision notice is at Appendix 17 of this report.

5. This second application, received on the 16th October 2007, was made in order to overcome the obstacle to registration which Mr Jones saw as resulting from the section 123 disposal to Herefordshire Housing Limited. The Commons Act 2006 allows applications to be made within 5 years in relation to use "as of right" which had ceased before 6th April 2007 (Mr Jones considered that any use as of right would have ended when the land was transferred to Herefordshire Housing Limited on 26th November 2002).

6. For this second application the evidence provided by the Applicants from people who had used the Land is essentially the same as for the first application, except that two pieces of information described in section H of this report have come to light. A sample of 1 out of 30 evidence forms received is at Appendix 19. At Appendix 20 is correspondence from the Applicants and the Objector regarding this second application. The central legal argument still turns on the "as of right" issue and the information in this report is largely the same as for the first application. The recommendation is the same.

(b) The Land

7. The land is a grassed area of approximately 1.5 hectares bounded by Waterfield Road, Argyll Rise, Pixley Walk, Muir Close and Dunoon Mead in the Belmont Ward and is shown coloured green on the plan attached to the application at Appendix 18.

8. The Land is part of a larger area of land purchased for housing purposes in 1959 by the City of Hereford under the Housing Act 1957 and was subsequently laid out as open space as part of the surrounding housing development during the 1970s. On the 26th November 2002 the Land was

one of a number of open spaces included in a transfer of the Council's housing stock to Herefordshire Housing Limited

Community Impact

1. When land is registered as a town or village green the local community have a right to use it for all "lawful sports and pastimes", not just those enjoyed at the time of registration. So if land had only been used for playing football then, following registration, it could also be used for cricket, dog walking and the like, subject to any restrictions which might be lawfully imposed on its use, e.g. by bye-laws.

2. Although the landowner remains the legal owner, registration effectively prevents any development of land that would interfere with recreational use. The court has held that this is not inconsistent with the European Convention on Human Rights when balanced against the purpose of registration which is to preserve open space in the public interest.

Legal Implications

1. An application can be made to register land where "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years"

2 The following tests should be applied:

(a) if there is a relevant "locality" (a legally recognised division of the County such as a ward),
(b) if a significant number of the inhabitants of the locality, or of a neighbourhood (such as a housing estate) within the locality, have used the land,
(c) for lawful sports or pastimes (such as playing games, walking, picnics)
(d) for at least 20 years, and
(e) the use has been "as of right".

Test (e), and the consequences of the section 123 disposal of the Land to Herefordshire Housing Limited, are the issues here.

The Inspector's Recommendation

1. Following the public inquiry Mr Jones' conclusion was that tests (a), (b), (c) and (d) in section C above were met in that a significant number of the people from the Newton Farm neighbourhood in the Belmont Ward had used the Land for lawful sports and pastimes for at least 20 years .

2. However, as regards test (e) Mr Jones considered that, since the Council had laid out the Land as open space for the benefit of local residents in connection with the Housing Act power used to develop the surrounding housing, use of the Land had been by an implied statutory permission rather than "as of right" and so the Land should not be registered as a town green (see section E below).

3. Mr Jones also considered that the statutory procedure followed under section 123 of the Local Government Act 1972 when the Council transferred the Land to Herefordshire Housing Limited would have defeated the application in any event (see section F below).

As Of Right

1. Use "as of right" means use which is;

(a) not by force (such as by breaking down a fence or intimidating the landowner)

(b) not by stealth (such as only using the land when the landowner is away and would not be aware of the use)

(c) not by permission (which might be express or implied)

2. Mr Jones was satisfied that the use had not been by force or stealth but he considered that use had been by permission.

3. Permission to use land is normally given by a landowner by way of a written or verbal consent, or by a formal licence document. However the courts have decided that permission can also be implied from a landowner's conduct, but there needs to be something beyond mere inaction or tolerance on the part of the landowner to give rise to such an implication.

1. In Mr Jones' view, since the Land had been acquired, laid out and maintained under Housing Act powers as an amenity for local residents it followed that its use had been "by right" (i.e. with permission) rather than "as of right" (i.e. as if permission had been given).

2. Mr Jones also felt persuaded to follow a view expressed by Lord Scott in R (Beresford) v City of Sunderland [2003] that the statutory process followed (see section F below) when transferring the Land to HHL would have overridden any public rights of use.

Section 123 (2A) Local Government Act 1972

1. Before disposing of an open space a council is required under section 123 to advertise its intention in a local newspaper for two weeks and consider any objections, which the Council did before transferring the Land to Herefordshire Housing Limited in 2002.

2. In the Sunderland case Lord Scott thought that a disposal of land in accordance with section 123 would override any town or village green status that the land may have. His reason was that, under section 122 of the same Act, if a council holds land for a purpose which is no longer required it can appropriate the land for another purpose. Lord Scott considered that if an appropriation did not override any public rights over the land then it would be ineffective, because the continuance of those rights might prevent the new use for which the land had been appropriated and so the statutory power

would be frustrated. He felt that a disposal under section 123 must have the same consequence, i.e. that it would trump any town green status.

The Second Opinion and Further Advice

1. A second opinion was requested from Mr Petchey on the two key legal issues;

   (i) if use of an open space that has been laid out and maintained under Housing Act powers for use by local residents can amount to use "as of " right; and

   (ii) if a disposal of land in accordance with section 123 overrides rights on which town or village green status could be claimed.

2. The advice requested and Mr Petchey's opinion are at Appendices 11 to 16. Mr Petchey agreed with Mr Jones' recommendation that the Land should not be registered as a town green since it had been acquired, laid out and maintained as open space under Housing Act powers so the use had been "by" right rather than "as of" right, but it differed from Mr Jones' view that a disposal under section 123 would override any town or village green rights.

Additional Information

1. Since the determination of the first application two new pieces of information have come to light: (i) prior to the transfer of the Land to Herefordshire Housng Limited 4 nearby plots of land had been sold-off, 3 to other housing associations and 1 to a private developer, and there are now 1,790 postal addresses within the relevant neighbourhood identified by Mr Jones of which 221 are on the 4 plots; (ii) prior to the disposal of the Land to Herefordshire Housing Limited it is likely that the cost of maintaining it, along with other housing open spaces, had been paid for through contributions from the General Fund and Housing revenue Account. In 2001-2002 the General Fund contributed 38.7% of the cost of maintaining housing open spaces.

2. At Appendix 21 are requests for advice from Mr Petchey on the additional information and his advice note. Mr Petchey's view remains that use was not "as of right"

Key Considerations

1. As Of Right

(i) The advices that the use of the Land had not been "as of right" due to its statutory background can be supported by comments from Lord Walker in the Sunderland case. Where an open space is acquired by a local authority under the Open Spaces Act 1906 then it holds the land on trust for the public's enjoyment, so that people using the land do so "by" right as beneficiaries of a statutory trust, rather than as trespassers using the land "as of" right. Lord Walker felt that the position would be the same where land has been appropriated for public recreation under other statutory powers.

(ii) However, although the comments carry considerable weight they are not binding and the issue still need to be judicially determined.

(iii) The officer's view is that when the courts eventually come to make a binding decision on whether use of open spaces held under Housing Act powers is use "as of" right, rather than "by" right under an implied statutory permission, the following considerations would be relevant:

(a) whether the Council had indicated, either expressly or implicitly, that the right to use land was intended to be permanent or that it could be withdrawn at any time. If for example there had been a notice on the Land that local residents could use it for recreation until such time as the Council required it for other purposes, or that they could use it for certain activities but not for others, this would have signalled that use was by permission. However, there is no evidence of that sort of express notice.

(b) as regards any implicit indication that a right to use could be withdrawn, a witness for Herefordshire Housing Limited said that during the 1980s the Land was one of a number of open spaces owned by Hereford Council where permission to have bonfires on the 5th of November was permitted by advertisement in the Hereford Times. This could be construed as implying that all recreational use was under a permission that could be withdrawn. However the officer considers that this would be taking the possible implication too far and is outweighed by the absence of evidence of indications that the other uses, such as games and picnics, were under a permission that could be withdrawn.

(c) if tenancy agreements had stated that rents included an amount towards the upkeep of the Land for so long as the tenants were allowed to use it, that too would indicate that use was by the Council's licence, as would a similar provision in conveyances to tenants purchasing under the Right to Buy. However, there was no evidence that tenancies or conveyances during the relevant 20 years period included any indication that the right could be withdrawn. The officer's view is that a court might well prefer to draw the opposite inference, i.e. that the right was generally understood to be permanent, albeit without any consideration as to why this was so, particularly in relation to Right to Buy purchasers whom, it seems reasonable to assume, would have regarded the availability of the Land for recreation as one reason for deciding to buy.

(d) a revocable right might also be implied if a person paid for the right, e.g. someone paying their neighbour a periodic fee for a right to use an access way across their property. It is arguable that if the upkeep of the Land was paid for from tenants' rents then that element of their rents could be regarded as a fee for the right to use the Land, meaning that use was not "as of" right but rather in return for the maintenance contribution.

As regards the additional information, at section H of this report, regarding the contributions made by both the General Fund and the Housing Revenue Account towards the upkeep of housing open

spaces, the officer's view is that, since no permission to use the Land was expressed in tenancy agreements, nor any element of rents identified as a contribution towards its upkeep, it would not be reasonable to treat whatever amount of rents went into the pot towards maintaining the Land as a payment for a permission to use it.

(e) with respect to Lord Walker's view that the rights of users of any land held by a local authority for the purpose of public recreation may be the same as those using land held under the Open Spaces Act 1906, in that they enjoy use as beneficiaries of a statutory trust of a public nature, the officer feels that the Land can be distinguished in that it was acquired and laid out in connection with the surrounding housing development, unlike a park which is intended for the use of the public generally. If Parliament had intended that open spaces laid out it connection with housing development should be held on trust it could have legislated in the same terms it did with respect to spaces intended for general public use.

(f) although different legal tests apply when determining town or village green status to those applicable to highway rights, and to those required to assert ownership through adverse possession, there is one common test, which is that the right claimed did not arise from a permission which the landowner communicated, either expressly or by implication, might be withdrawn. The officer considers that the absence of evidence of either an express or implied revocable licence would be likely to sway a court against finding that the Housing Act background of the Land was sufficient to conclude that use had been "by" right rather than "as of" right.

2. Section 123 Disposal

(i) with respect to Mr Jones' advice that the use of section 123 when transferring the Land to Herefordshire Housing Limited in 2002 defeats the claim, in accordance with the view of Lord Scott referred to in Section F above, the officer considers that Mr Petchey's opinion is more likely to be decided as correct by the court. Although Lord Scott's view would carry significant weight when the question eventually comes to be decided, it is not binding since that particular question was not an issue for decision in the case. Mr Petchey's opinion was that a section 123 disposal does not result in town or village green rights being overridden.

(ii) the officer agrees with that opinion for the following reasons;

(a) section 123 requires a local authority intending to dispose of open space to advertise the intention and consider any objections. Provided it does so then the land can be disposed of free from any trust arising solely from any trust arising from it being held for public use under the Open Spaces Act 1906 or the Public Health Act 1875 which enables the provision of pleasure grounds. In the officer's view this releasing provision does not apply to town green rights claimed over the Land because firstly, if Parliament had meant for housing open space intended to be available for local residents rather than the public generally to be held on trust it could have legislated so.

(b) secondly, even if as Lord Walker suggested open spaces not expressly held for the purposes of the Open Spaces Act or the Public Health Act could be deemed to be so held as a result of the actual use of the land, section 123 only frees the land from any trust arising solely by virtue of it being held on trust. The town green rights are claimed, not on the basis that people using the land did so by virtue of a statutory trust, but because they used it as they did in the absence of any such entitlement.

(c) as mentioned in Section F above, Lord Scott's reasoning was that an appropriation under section 122 must override any public rights as otherwise its object, to enable a local authority to change the purpose for which land is held, would be defeated if people could continue to assert rights in respect of the former purpose. However, section 122 provides that, subject to the appropriated land being freed of any trust arising solely by virtue of the Open Spaces Act and the Public Health Act, the appropriation is subject to the rights of other persons in, over and in respect of the land. Although section 123 reflects the freeing from trust provisions of section 122 it does not expressly protect other rights in the way section 122 does. In the officer's view the absence of an express protection of third party rights in section 123 should not be regarded as an intention that such rights are not protected. If that were the intention then the officer considers that it would need to have been clearly stated in section 123, particularly to distinguish it from the consequences of an appropriation under section 122 under which an appropriation is subject to third party rights.

Mr Jones considered that the question of third party rights did not arise in relation to the Land because land can only achieve town or village green status once it is registered, and since the Land is not registered there can be no town green rights. Although the officer agrees with Mr Jones on that, he also considers that the ability to claim town green status through 20 years' use is in itself a right and that, although town green rights had not been established by registration on the date the Land was transferred in 2002, the right to establish village green status through the type of use enjoyed up to the transfer was not extinguished by the section 123 disposal.

To summarise, Mr Petchey's opinion accords with the officer's view in relation to the section 123 disposal to HHL, which is that it does not defeat the application, but this differs from Mr Jones' advice on the point.

However Mr Petchey agrees with Mr Jones that the Land was not used "as of right".

Nevertheless, the officer considers, for the reasons in section I.1 of this report, that use was as of right.

The Committee could refuse the application on either or both of the above points. However, for the reasons set out above, but subject to the advice received from Mr Chapman at the Committee meeting, the officer recommends that the Land should be registered as a town green.

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Risk Management

Either party might seek to have the Committee's decision judicially reviewed and so it is important that the decision is made with regard to the legal considerations described above and not on the basis of any perceived benefits of one outcome over the other. The Applicant's representative has also made a complaint to the Local Government Ombudsman regarding what is perceived as a conflict of interest – the Council is a member and director of Herefordshire Housing Limited and has previously supported a bid for funding to develop the Land for affordable housing.

Financial Implications

The Council could seek a declaration from the courts as to the law on the two key issues. It could also ask another registration authority to deal with the application. However, it is recommended that the Committee makes a determination and leaves it to the dissatisfied party to seek judicial review if it wishes. There may be costs associated with the alternatives

Consultees

People who attended the public inquiry.

Background Papers

As contained in the Appendices

Argyll Rise Town green Application
Index of Appendices to Report to Regulatory Committee 2 November 2010

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

OUTLINE OF LEGAL SUBMISSIONS
on behalf of Herefordshire Housing Ltd.

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1. ISSUES

1.1. These submissions follow the statutory definition and use its elements to define the issues in the case.

2. BURDEN OF PROOF

2.1. The burden of proving that the land has become a TVG lies on the Applicants. All elements of the statutory definition must be established for the whole of the relevant period. S.22 Commons Registration Act 1965, as amended, defines a *"Class C"* green as follows:

> *"land … on which for not less than 20 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*
>
> *(a) continue to do so…"*

(Further parts of the definition are not relevant).

The standard of proof is on the balance of probabilities, but in R (oao Beresford) v Sunderland City Council [2004] 1 AC 889, Lord Bingham observed:[1]

> *"As Pill LJ rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111:*
>
> > *'it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green…'*
>
> *It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."*

2.2. The exercise consists merely of applying the definition to the facts. Planning policy and merits are irrelevant.

3. TWENTY YEARS

3.1. The relevant period consists of the 20 years leading up to the date of the Application: see Oxfordshire County Council v. Oxford City Council [2006]UKHL 25 .[2] The crucial period is, therefore, February 1986 to February 2006. As a matter of evidence, however, it is relevant to consider the history leading up to the 20 year period in order to understand and place in legal context events concerning the land from 1986 onwards.

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1 At paras 44, 109, 115, 143

2 Paragraphs 41-44

4. SIGNIFICANT NUMBER OF THE INHABITANTS OF ANY LOCALITY

4.1. This element of the definition was considered by Sullivan J in R (oao Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76 (Admin). He said (at para 71):

> *"Dealing firstly with the question of a significant number, I do not accept the proposition that significant in the context of section 22(1) as amended means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable or a substantial number. In my judgment the inspector approached the matter correctly in saying that 'significant', although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers."*

4.2. It is well established that a *"locality"* must be an area known to law: MoD v Wiltshire CC [1995] 4 AER 931. At p.937d, Harman J contrasted a qualifying locality with the residents of two streets. Similarly, in R v Suffolk CC ex parte Steed [1995] 70 P&CR 487 Carnwath J (as he then was) said at pp.501-502 *"In the present statutory context"* (i.e. locality) *"I do not think that a piece of land*

used only by the inhabitants of two or three streets would naturally be regarded as a 'town or village green' …"

4.3. The locality specified is Belmont Ward, a large area[3] with a population in 2001 of 9464 and in 2004 a population estimated at 9840.[4] The witness statements and questionnaires in support total 41 individuals from a small collection of streets around the site. This is not a *"significant number of the inhabitants"* of the chosen locality of Belmont Ward. Petitions are not of evidential value since they do not address the relevant statutory questions.

5. LAWFUL SPORTS AND PASTIMES ("LSP")

5.1. In the main, it is accepted that the activities relied on in the Applicants' supporting Witness Statements and questionnaires are LSP. Bonfires, however, were prohibited by Byelaws with effect from at least 24th February 1995 (Byelaw 33) unless licensed by the Council. To the extent that any of the dog walking relied on has resulted in the leaving of canine faeces on the land, such conduct has also been rendered unlawful by Byelaws (Byelaw 3) during at least the same period.

6. AS OF RIGHT

6.1. Bearing in mind the history of the acquisition and management of the Application Site, the Objector submits that user has been either:

(a) of right; or

[3] Exhibit SP34
[4] Philips para 18

(b) by permission.

6.2. The Application Site was acquired on 29th July 1959 by the City of Hereford for housing purposes. The relevant power was contained in ss.93, 96(c) and 97 Housing Act 1957 (Part 5).

6.3. 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.

6.4. No ministerial consents have yet been traced in the Housing Authority's files, but it will be submitted that it may be inferred from subsequent events that such consent was given. Powers to provide and maintain recreation grounds and other land which, in the opinion of the Secretary of State, would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation was provided and to lay out and construct open spaces were continued by means of the Housing Act 1985,

ss.12(1) and 13. S.23(2) of the same Act authorised the making of byelaws with regard to such land.

6.5. The Application Site was laid out as Open Space pursuant to planning permissions for residential development of the site and land adjoining it. In particular, permission was granted by resolution on 1st March 1991 for *"Detailed Landscaping Scheme and Usage as Public Open Space"* for part of the site, then known as Play Area, Waterfield Road.

6.6. Thereafter, the City of Hereford Council made byelaws under s.164 Public Health Act 1875 and ss.12 and 15 Open Spaces Act 1906 on:

24th February 1995

6th February 1997.

Both sets of byelaws revoked earlier sets made in 1975, 1971 and 1961. It has not been possible to trace the earlier sets but clearly they existed and would have regulated the use of the land. It is not known whether they were made under Open Space or Housing powers.

6.7. From at least 1995, therefore, the land was managed by the Council as public open space under the Acts of 1875 and/or 1906. The 1875 Act power applies to <u>public</u> walks or pleasure grounds. The 1906 Act power of management/making of byelaws is wider,

applying to *"open spaces"*, whether acquired under that Act or not. Further or alternatively, the land was managed and maintained under statutory housing powers.

6.8. Recreational use during the period 1986 to 2002 was therefore either:

- by right because the land was held for public open space purposes; or
- by right because the land was held for housing purposes; and/or
- by permission of the Council who regulated the use of the land by means of the byelaws and specific consents/derogations from them: see Witness statements of Geoffrey Tarring and Cyril Davies with regard to bonfires;
- by permission since 2002 of Herefordshire Housing Ltd who have maintained and regulated use of the space: Phillips para 12.

6.9. Whilst it has been clear since R v Oxfordshire CC ex parte Sunningwell PC [1999] 1 AC 335 that the state of mind of users is not determinative, it is noteworthy in this case that many of the Questionnaires assert a general public right to use the land. This accords with the way in which user was regarded by the Council as landowner: Tarring, para 3; White paras 5ff. Nothing has been done to assert a separate, localised right to a TVG.

MORAG ELLIS QC
23. vii. 2007

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

SUPPLEMENTARY LEGAL SUBMISSIONS
on behalf of Herefordshire Housing Ltd.

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1. INTRODUCTION

1.1. As a result of considering the Applicants' Outline Submission:

(i) it was discovered that certain documentation had not reached Herefordshire Housing Limited ("HHL") from Herefordshire County Council ("HCC") due to e-mail failure; this consisted of a copy of the Notice of Intention to dispose of Open Space under s.123(2A) Local Government Act 1972 ("LGA") placed in the Hereford Times in 2002 prior to disposal of, inter alia, the Application Site, to HHL.[1] It is believed that this is the Notice referred to in the Applicants' letter of 23rd July 2007 under the heading "*Section 4"*;

(ii) further researches are in hand in relation to the Byelaws to check the precise areas to which they applied;

[1] See copy notice and e-mail exchanges attached.

(iii) HHL will lead evidence and reserve the right to make submission in the event that the Applicants now put their case on the basis of a neighbourhood within a locality.

1.2. HHL reserves its position with regard to the Byelaws pending the outcome of its further researches.

2. S.123(2A) LOCAL GOVERNMENT ACT 1972

2.1. The provision applies to *"any land consisting or forming part of an open space"*. *"Open space"* is defined[2] in the same way as in the Town and Country Planning Act 1990,[3] viz *"any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground"*.

2.2. In R v Doncaster MBC ex parte Braim [1988] JPEL 35, McCullough J drew a distinction for the purposes of s.123 (2A) between the rights of the public held to apply to the land in that case as *"open space"* and *"rights over town and village greens"* which *"were those not of the public as a whole, but of the local inhabitants, [and they derived from custom].*[4] (Brackets added).

2.3. The fact that s.123 LGA procedures were undertaken on disposal to HHL is therefore a further demonstration that the land was held by

2 S.270 LGA
3 S.336
4 The bracketed words applied in 1988, before Class "C" TVGs had started to be registered, but the local distinction still holds good.

the local authority and regarded by them as open space which the public were entitled to use. Such holding and understanding were inconsistent with recreational user taking place *"as of right"* by a specific class of the public, namely the inhabitants of a locality or a neighbourhood within a locality.

2.4. S.123 LGA was considered by some of their Lordships in Beresford, though obiter: Lord Scott, paras 27-28, 52; Lord Walker 87-88. Lord Scott considered that disposal of open space under s.123 would *"trump any 'TVG' status of the land whether or not it is registered."* [5] Lord Walker's point was the separate one, that it would be *"very difficult to regard those who use"* a *"park or other open space as trespassers (even if that expression is toned down to tolerated trespassers. The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation"*.

2.5. There are two ways of considering the 2002 s.123 process in this case. Either:

(i) as evidence of the way in which the land was held/managed by the former local authority for 16 years of the relevant period (see above); and/or

[5] It should be noted that paras 28 and 52 appear to assume that TVG rights could *"achieve the status of a TVG"* before disposal irrespective of registration. Since then, HL in Oxfordshire have held that land *"does not become a village green until it has been registered"* (paras 43 and 116) and that the relevant date for continuance is to the application. Lord Scott, however, returned to the point at para 89, irrespective of registration.

(ii) as *"trumping"* the continuing acquisition of TVG rights, which, at that stage, were neither registered nor even asserted by way of a s.13 Commons Registration Act 1965 application or otherwise.

Either construction, it is submitted, is fatal to the claim for registration.

MORAG ELLIS QC
26 July 2007

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

OUTLINE OF CLOSING SUBMISSIONS
ON BEHALF OF HEREFORDSHIRE
HOUSING LIMITED

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1. INTRODUCTION

1.1. These submissions should be read alongside the Outline and Supplementary Legal Submissions on behalf of HHL. The same framework as in the Outline is used, and additional points follow in the light of the evidence and Gilleland's email of 30.vii.07, 09.59..

2. BURDEN OF PROOF

2.1. The benefit of any uncertainty should be given to the Objector. Basic facts of user not in dispute, but Applicants' witnesses often very vague about details, e.g. bonfires (eg people, organizers, etc.), preparation/distribution of evidence questionnaires and nature of Newton Farm Town Green Action Group ("NFTGAG").

2.2. The Steed/Beresford observations on burden of proof are also consistent with the principle stated in Gardner -v- Hodgson's Kingston Brewery Co [1903] AC 229, quoted in Whitmey's Statement of Facts on which his would-be objection was based, as follows:-

> "There is certainly no need to resort to the presumption of lost grant when the facts of the case, so far as they are known, suggest a much simpler and more natural explanation."[1]

A similar approach to burden of proof is demonstrated by Lightman J. in Oxfordshire CC -v- Oxford City Council and Robinson [2004] EWHC12, paras [102].

2.3. Here, there is a perfectly simple and natural explanation of recreational user, namely that the land was acquired and developed by the then Housing Authority for housing purposes which included powers to acquire, lay out and manage/maintain areas of ancillary recreation/open space[2]. Since 2002, HHL have continued to maintain the land for similar purposes.

[1] Whitney yellow bundle, Tab A, para 10 (d) and see copy attached.

[2] Phillips, paras 4-8 and exhibits SP3, SP5, SP6, SP7, SP8, SP9, SP10, SP11, SP12, SP13, SP14, SP15. Corroborated by Price, Apps WS12 and oral evidence.

3. SIGNIFICANT NUMBER OF THE INHABITANTS OF:

(a) ANY LOCALITY; OR

(b) ANY NEIGHBOURHOOD WITHIN A LOCALITY

3.1. Lord Hoffmann observed in Oxfordshire that the registration authority has no investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties[3].

3.2. At time of writing, it is not clear whether the pink area on Plan L2 is "an area known to law"[4]. It is now clear from the material produced by HC that the pink area is, in fact, part of a larger ward. It is, therefore, not 'an area known to law' and the appropriate area would be the Belmont ward as a whole. To the extent that the case might rest on locality rather than neighbourhood, the population of 9000 plus should, therefore, be taken.

3.3. Phrase (b) is, according to Lord Hoffmann in Oxfordshire, "obviously drafted with a deliberate imprecision which contrasts with the insistence

[3] Para 61.

[4] MOD -v- Wiltshire CC [1995] 4 AER 931 at 937d Price was not clear and RA's information awaited.

of the old law upon a locality defined by legally significant boundaries"[5]. Sullivan J. made observations about the meaning of the concept in R (Cheltenham Builders Ltd) -v- South Gloucestershire DC [2004] JPL 975 paras 85, albeit obiter. This part of his judgment was not disapproved by Lord Hoffmann in Oxfordshire. Sullivan J. identified a requirement for "a sufficient degree of cohesiveness". On that test, a mere collection of streets still does not suffice, even after the amendments to s.22.

3.4. The Newton Farm Estate, whilst it is not an administrative area known to law, is an obvious candidate as a neighbourhood. The Applicants, however, despite the evidence of several of their witnesses as to the extent of the Estate[6], specify a smaller area for no justified reason[7]. The yellow area on Plan L2 is, in itself, of no community significance and appears arbitrarily drawn. It excludes not only housing which is considered as belonging to NFE, and was developed integrally, but it also excludes the Estate's shops/community housing office at The Oval. . The reason for this apparently random cutting down of the Estate becomes apparent when considering the question of "significant

[5] Para 27.

[6] Exhibit . See also Phillips oral evidence.

[7] No witness would take responsibility for explaining the rationale behind the plan: Mille, Miller, Game, Lynch, Price, Gilleland, who prepared it with J. Kirby did not give evidence. J. Kirby said yellow was NFE, but did not explain boundary.

numbers of the inhabitants of any neighbourhood". The witnesses and questionnaires were, in the main, drawn from a collection of streets around the application site. This is not surprising, especially in the light of the extensive older areas of public open space around the Estate. The evidence, however, does not establish user by a significant number of the inhabitants of the Estate: 41 as against some 4-5000 (Phillips). These statistics should also be viewed in the context of the clear evidence from all the Questionnaires and witnesses, that the land:

(a) is used by people from outside "the area"; and

(b) that outsiders are perfectly entitled so to use it.

Schoffer was a good example. He lives outside both the claimed Neighbourhood and the Newton Farm Estate, but drives over to use the site for recreational walking. This point has linkages with "As of Right", but under this heading, it is submitted that the Applicants have not established (as it is for them alone to do) user predominantly[8] by a significant number of inhabitants of a neighbourhood within a locality. The point as to significance applies with even greater force to the claimed locality[9]

[8] Sunningwell, p.358B.

[9] Assuming that the pink line is known to law, and taking 3700 population from Gilleland e-mail, 30.vii.07, 09.59.

3.5 Even confining the numerical argument to the Yellow Land, the number of witnesses/questionnaires is insignificant: 41 to 2-3000 (Phillips).

4. AS OF RIGHT

4.1. See Outline and Supplementary Submissions. These notes comment on points made in Gilleland's e-mail of 30.vii.07, 09.59.

4.2. Ministerial Consents to Acquisition Under HA 1957

4.2.1. The presumption of regularity applies and the burden of showing otherwise therefore doubly lies on the Applicant. The facts - i.e. development of NFE - invite the opposite conclusion.

4.3. Ministerial Confirmation of Byelaws

4.3.1. Each set is indorsed with the SoSE's confirmation. They are therefore regular on their faces. SP18.6 also rehearses confirmation of earlier sets.

4.4. Geographical Extent of Byelaws

4.4.1. At time of writing, further information is awaited from Herefordshire Council.

4.4.2. The extract from the current HC website, however, is not conclusive because it postdates transfer of the Application Site to HHL.

4.5. Detailed Planning Permission for Waterfield Road Play Area

4.5.1. The point in the e-mail appears to be based on an error. Documentation was obtained from HC Planning Department. Also, there is no dispute that the play area was developed.

4.5.2. Its development corroborates HHL's case on "as of right": Play area was clearly developed and managed as a public park, with provision of substantial built play equipment, litter bin, fencing, gates, etc[10]. Dogs were banned and the sign also sought to regulate age of users[11]. Responsibility for the play

[10] SP21, White, Lynch.

[11] SP21.18.

area continued to be exercised by HHL after 2002. Compensation was sought and, apparently, paid by HHL after an accident[12]. Ultimately, HHL exercised their control over recreational user by removing the equipment etc. All this is consistent with provision and maintenance for housing purposes, rather than a separate, local right.

4.5.2 The claim is not now pursued in relation to this area, and rightly (though, as noted at the time of the concession, HHL wish to have a determination on the area and it is appropriate that they should have one: see Carnwath LJ. in Oxfordshire). However, despite the fact that admittedly more was done physically on this part of the land, the evidence as to its acquisition and holding by the former City Council and HHL is indistinguishable. In particular, the rest of the application site, in common with the play area, was acquired for housing purposes, transferred to HHL and went through the s.123 LGA process. Tarring and White made it clear that the play area and the rest of the land were maintained on an equal footing, by the same staff and using the same machinery as all other open space areas in the City, whether held by the Parks Dept. or the Housing Dept. There were 'overt acts' in the form of such management including mowing, tree planting (some of which was informally to regulate ball games) and the control of bonfires/removal of dangerous objects. The Council's control was overt, because people complained to the Council when they wanted

[12] SP21.4 and Lynch XX.

something done in relation to the land, including the land outside the play area (Tarring).

4.5.3 Whitmey's comparison with the land in Beresford is inapt because that land was acquired for general New Town Development purposes, then simply grassed over/fitted with benches and left: see para.17. It was not held for housing purposes including a specific power to provide recreation grounds/other land for beneficial purposes in connection with housing (or any other statutory function). A further factual point of distinction is that there had been no s.123 process in Beresford: paras. 19, 27-8, 52. In short, the land was held for totally different purposes of a less defined nature and the observations about 'overt acts' and the decision itself cannot simply be 'lifted' over and applied to the facts of this case/

4.6. s.123 LGA Notices

4.6.1. Presumption of regularity applies. There was no judicial review and none is now possible. Applicants have not identified any alleged irregularities.

4.6.2. ME's Supplementary Legal Submissions hold good.

4.6.3. In this case, it is not necessary to rely upon an implied statutory trust under s.164 Public Health Act 1875 (as argued by Whitney), nor upon Lord Scott's "trumping" argument in Beresford.

4.6.4. Lord Walker's second point - land appropriated for the purpose of public recreation - applies here, although no need for appropriation because statutory acquisition and development/ management powers were broad enough to permit pos. use. The fact that s.123 LGA procedure was undertaken corroborates this construction of the facts: see also para.4.5.3 above.

4.7 Byelaws

4.7.1 There are 3 sets to consider. Their evidential relevance is in demonstrating:

(i) that the land was held and treated as pos. which was amenable to the making of byelaws under the 1875 and 1906 Acts

(ii) that the Council was, thereby, exercising control and laying down conditions for user of the land.

4.7.4 Given that their only relevance is a pieces in a jigsaw of evidence (along with the history of the land's acquisition, its physical treatment by the Council and the s.123 process), their consideration is subject to the same evidential standard as the rest of the evidence. Prima facie, the byelaws appear to relate to the land in question and it is for

the Applicants to demonstrate the contrary. Any doubt should be resolved in favour of the Objector. Unfortunately, the only evidence, in the absence of anything further from HC, is that of the documents themselves. 'Newton Farm Open Space', on the face of it, refers to all open space in the ownership of the COUncil on the NFE. This construction is corroborated, in relation to the Application Site, by the fact that it was treated as an open space attracting the s.123 LGA duty just 5 years later. The fact that a defendant in a criminal court might have been able to pick holes in the presentation of a prosecution based on that wording without a map, where the benefit of any doubt should be accorded to him, is not the point. The best evidence before this inquiry is that the 1997 byelaws applied to the Application Site and the 1992 ones applied to the Play Area at Waterfield Road. The position with regard to the 1995 ones is less clear. As to the 1992 ones, where, it is submitted, the evidence is very clear indeed, there is the further point that this demonstrates that the Council did not confine itself to making byelaws for land held by the Parks Dept.; this point supports the natural construction of Sched.1 to the 1997 byelaws.

MORAG ELLIS QC

1.viii.07

COMMONS REGISTRATION ACT 1965 (as amended) - SECTION 13

and-

The Commons Registration (New Land) Regulations 1969

In the matter of Application for the registration of Land at Hereford, known as Argyll Rise, Newton Farm, Hereford HR2 ('the Land'), as a town or village green.

APPLICANTS' CLOSING SUBMISSION

1 The Applicants are grateful for being given time to make their legal submissions on 'as of right'.

2 On our case the matters of fact to be proved concerning the Land (now used excluding the Play Area) in the section 22(1A) definition are:

(a) 'not less than twenty years';

(b) 'a significant number of the inhabitants';

(c) 'a neighbourhood within a locality';

(d) 'indulged in lawful sports and pastimes'

(e) 'as of right';

(f) and 'continue to do so'.

3 'Not less than twenty years'. The wording is not '20 years' and it is relevant to take into account the site's prior history. The Objector set out in it submission dated 23.vii.2007 the issues in the case (Issues). Issues [3] appears not to put the 'crucial period' February 1986 to February 2006 in issue. Our WS's gave evidence of the period.

4 The matter of public footpaths across the site was raised. Historically they show that local inhabitants would have been used to traversing the ground without let or hindrance.

5 'a significant number of the inhabitants'. Issues [4] addresses this with 'locality' (see below). Adopting the test in *McAlpine*: Mr Phillips' expert evidence agreed that the population for the Neighbourhood (L2 yellow area) was roughly 2,000-3,000. In the light of this range of 50% we believe the 2004 figures in 'B' M6 the figure of 2,000 is the more reasonable. The evidence of the WS's and Questionnaires satisfies the test of giving the impression of a significant number.

6 'a neighbourhood within a locality': Issues [4.2] refers to *Wiltshire* and *Steed* about locality. Our case is that the locality is at least the Civil Parish of Hereford if not in Belmont Ward and the neighbourhood is the Newton Farm yellow area in L2.

7 The clear words of Lord Hoffmann in *Oxfordshire* (Trap Grounds) apply in this application:

> 27. "Any neighbourhood within a locality" is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries. I should say at this point that I cannot agree with Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2004] JPL 975 that the neighbourhood must be wholly within a single locality. That would introduce the kind of technicality which the amendment was clearly intended to abolish. The fact that the word "locality" when it first appears in subsection (1A) must mean a single locality is no reason why the context of "neighbourhood within a locality" should not lead to the conclusion that it means "within a locality or localities".
>
> 28. I mention for the sake of completeness that a new Commons Bill which repeals and replaces the 1965 Act is now before Parliament.

7A 'as of right'; from *Beresford* the test on local authority land is that the local inhabitants must be made aware by 'overt acts' that land is used with permission. This case as in *Beresford* concerned the free uninhibited 24/7 access to unfenced land. The land in *Beresford* was in substance if not in form a recreational area.

The Land in this application, as was accepted by the Objector's witnesses, is the remnant of open fields including hedgerows, now grown into tree-lines and crossed by public footpaths: which prior to development had facilitated easy access. The Land, unlike the land opposite 'Treago Grove' carried no sign declaring the Land to be 'Public Open Space'. It is therefore reasonable that the inhabitants had no indication whatsoever that the Land was owned or controlled by the local authority. The law concerning 'as of right' will be dealt with in a separate submission.

8 The Public Notice plain wording of the transfer of the Land under s.123 to the Objector would not have conveyed to the inhabitants that their use of the Land for indulging in lawful sports and pastimes without permission, without force and without secrecy was under any threat from a social landlord.

9 The Land transfer in November 2002 changed the ownership to the Objector. There was no evidence by the Objector nor in cross-examination of overt acts, as understood in *Beresford*, that unequivocally or at all conveyed to the inhabitants needed permission to indulge in lawful sports or pastimes.

10 The fact that the Land appears on the UDP plan as 'Safeguarding Open Space and Allotments' (RST4) is only evidence of the Land belonging to a broad category and not ownership or control: e.g. Hereford Racecourse.

11 It is accepted that bylaws were in force in the local authority area. As Mr Phillips admitted due to the lack of accompanying maps it was not possible know clearly whether they applied to the Land or not. Evidence was given that dog-litter bins with the Play Area were removed with the Play Area. If the bylaws had applied to the Land it would have been expected that such bins and attendant notices would

have remained in place or repositioned.

12 'indulged in lawful sports and pastimes': Issues [5] accepts there were lawful sports and pastimes. Save for bonfires. The evidence submitted by us did not show that the local inhabitants sought or were given any permission for the bonfires they had. The Objector's evidence of Mr Davies showed that rubbish around early November was removed not that local bonfires were stopped. There was no evidence that the inhabitant's dog walking contravened any by-laws: if such were in force on the Land.

13 'continue to do so': it was not in issue that the local inhabitants did not continue user for lawful sports and pastimes until February 2006.

14 It is submitted that the Applicants have met their burden of proof to have the Land registered as a Town Green.

Christopher J Whitmey

1 August 2007

COMMONS REGISTRATION ACT 1965 (as amended) - SECTION 13

-and-

The Commons Registration (New Land) Regulations 1969

In the matter of Application for the registration of Land at Hereford, known as Argyll Rise, Newton Farm, Hereford HR2 ('the Land' excluding the previous play area), as a town or village green.

APPLICANTS' CLOSING SUBMISSION Pt 2
(Numbering continued from Pt.1. In Pt.1 there were two paragraph .7's: the second is referred to as 7A)

Introduction

14 This part is a consideration of the law concerning the phrase 'as of right' in the context of The Commons Registration Act 1965 section 22(1A); its application to the facts in Pt.1 and to the relevant facts on which Hereford Housing Ltd ('HHL') bases its objection to the Applicants' claim of user 'without permission'.

15 In Pt.1 HHL's Outline Submission dated 23.vii.2007 was referred to as 'Issues'. Its Supplementary Legal Submissions dated 26 July 2007 will be referred to as Issues.2 and its Closing Submissions dated 1.viii.07 as Issues.3.

'As of right' in context.

16 The context is '22(1A) Land ... on which **for not less than 20 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** either — (a) **continue to do so**' (**emphasis** added)

17 The genesis of section 22(1A) is accepted as The Rights of Way Act 1932, now Highways Act 1980, which in turn was based on The Prescription Act 1832: see *R v Oxfordshire County Council ex.p. Sunningwell PC* [2000] 1 AC 335 at 353F-354A.

18 It is to be noted that the phrase '**not less than**' in 22(1A) is significantly absent from the 1832 and 1980 Acts and the period of time in both is a finite 20 years. With **emphasis** added the 1832 Act (Capital letters as in original printing) s.2 states, 'That no Claim … to any Way … [which] shall have

been actually enjoyed by any Person claiming Right thereto without Interruption **for the full Period of Twenty Years**,' and s.5 states, 'it shall be sufficient to allege the Enjoyment thereof **as of Right**': the 1980 Act s.31 states, 'Where a way ... has been actually enjoyed by the public **as of right** and without interruption **for a full period of 20 years**'.

19 The effect of the enacted words 'for not less than twenty years' does not appear to have been judicially considered. In *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 consideration was given (see: Issues [3.1] and Note 2) to what date the period 'continued to'. With respect to learned counsel for HHL it did not decide, "The relevant period consists of the 20 years leading up to the date of the Application.".

> "60 ... That particular question [continues to when?] has been resolved by the answer which your Lordships have given to the question of substantive law, namely that the relevant definition was that specified in section 22 as amended in 2000 and that the only period upon which Miss Robinson could have relied was **a period of upwards of 20 years ending with the date of her application**." (**emphasis** added) per Lord Hoffmann.

20 The drafter of the 1965 Act was aware of fixed prescription time periods:

> s.16 **Disregard of certain interruptions in prescriptive claims to rights of common.**
>
> (1) Where during any period a right of common claimed over any land was not exercised, but during the whole or part of that period either—
>
> (a) the land was requisitioned; or
>
> (b) where the right claimed is a right to graze animals, the right could not be or was not exercised for reasons of animal health;
>
> that period or part shall be left out of account, both—
>
> (i) in determining for the purposes of the Prescription Act 1832 whether there was an interruption within the meaning of that Act of the actual enjoyment of the right; and
>
> (ii) in computing the period of thirty or sixty years mentioned in section 1 of that Act.
>
> (2) For the purposes of the said Act any objection under this Act to the registration of a right of common shall be deemed to be such a suit or action as is referred to in section 4 of that Act.

Subsection (2) supports their lordships' conclusion in *Oxfordshire*: 'upwards of 20 years ending with the date of [the] application'.

21 The literal words 'for not less than 20 years ... inhabitants ... have indulged ... and ... continue to do so' are neither ambiguous nor obscure. The legislative intent of enacting them is that:

(a) any period upwards of 20 years of user as of right may be proven by the applicant; and

(b) an inchoate right to use and register the land as a green arises 20 years after the start of the period; and

(c) at any time after 20 years that right may be claimed and registered, usually when the right is challenged by the landowner: e.g. by making a planning application.

22 In this Application the length of the period of user claimed was some 31 years: Jacqueline (Jacky) Kirby (WS7 & an applicant) 'approximately 30 years'; Keith Miller (WS9 & an applicant) 'for thirty one years'; Jackie (Jacqueline) Mills (WS10 & an applicant) 'for the past thirty-one years'. This date of 1976 is consistent with HHL's WS's: Fran White at [5] 'Open space ... late 1970's'; Stephen Phillips at [7] 'On 5th March 1974 outline planning permission ... on land which included the [Application] Site', Ex.SP12; Ex.SP12.5 refers to the land as 'Rough grazing'. Twenty years on from 1976 is 1996. By January 1997 at the latest the local inhabitants had an inchoate right to claim and register the Land as a town or village green by user as of right.

'As of right' — without compulsion (force or contest), without secrecy, without permission.

23 In *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 at 897C Lord Scott observed:

"16 ... It [*Sunningwell*] contains a valuable and scholarly exposition of the historical provenance of the expression "as of right" in the 1965 Act that is as pertinent to this case as to *Sunningwell*. I cannot improve upon and need not repeat what Lord Hoffmann has said (see pp 349-355).

It is accepted that—

" … the words 'as of right' import the absence of any of the three characteristics of compulsion, secrecy or licence—'nec vi, nec clam, nec precario', phraseology borrowed from the law of easements … "(per Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 245 cited by Lord Hoffmann at [2000] 1 AC 335, 355).

17 The issue in the present case is whether the use by the inhabitants was "nec precario". Was there an implied permission given by the landlord? If so, is use pursuant to an implied permission fatal to the contention that the inhabitants' use was "as of right"? How, if at all, does the fact that the Sports Arena was, throughout the period of use, public land held by public authorities for public purposes bear upon the answer to the question whether the use was "as of right". These questions raise some difficult issues."

24 This Application concerns neither compulsion nor secrecy as the Land is an open unfenced field with hedgerow remnants, some 85% of the perimeter the open highway of the housing estate and 24/7 access to it for the inhabitants (see [7A] above). But, as in *Beresford*, the issue is whether or not there is an implied licence or permission for the inhabitants to use local authority land for sports and pastimes. Save in *Beresford* there was no consideration of the effect of (a) any Byelaws; or (b) any Public Notice under the Local Government Act 1972 s.123 which in November 2002 transferred the Land to the HHL: although *Beresford* scouted s.123.

Burden of proof.

25 It is accepted that initially the burden of proof lies with the Applicant. 'Whether anyone ignorant of the background would expect to find these ... negative conditions [without compulsion, without secrecy, without permission] supplying the legal meaning of the positive phrase "as of right" is doubtful. One can only put it down to history.' per F J Bennion *The strange tale of Sunningwell glebe*. 149 NLJ 1296 - New Law Journal, August 20 1999. With respect, it is not possible to conclusively prove a negative. The Applicants having claimed that user was 'without permission' the evidential burden transfers to HHL to show that on the balance of probabilities the Applicants knew or should have known by the landowner's acts that their user was with permission. In *Beresford* such acts are referred to as 'overt acts' or 'overt conduct':

> 76 The authorities contain many references (which can be identified and understood more readily since *Sunningwell*) to the importance of looking at the overt conduct of those involved, including what the landowner said and did from time to time during the period which the court has to examine. If the landowner found that his land was being used as a footpath by his neighbour (in a private right of way case) or by the whole village (in a public right of way case) and he suffered in silence, he would be treated as having acquiesced in what was going on. As Fry J (one of the judges who advised the House of Lords in *Dalton v Henry Angus & Co* (1881) 6 App Cas 740) said in that case, at p 773:
>
> > " … the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest".

per Lord Walker at [76].

26 The phrase 'overt acts' has recently been considered in *Godmanchester Town Council, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28 20th June 2007 (copy enclosed) where it was held that: "Sufficient evidence" under s 31(1) of the Highways Act 1980 that a landowner had had no intention to dedicate a way as a highway required evidence of overt acts demonstrating his lack of intention and coming to the attention of users of the way.

27 Adopting and adapting words in the WLR Daily *Godmanchester* report <http://www.lawreports.co.uk/WLRD/2007/HLPC/jun0.2.htm>:

> "Lord Hoffmann said that "... Intention " meant what the users of the way [land] would ***reasonably have understood the landowner's intention*** to be: would they have understood that the owner was intending to disabuse them of the notion that the way [land] was a public highway [for their indulging in lawful sports and pastimes without

permission] ? The test was objective. ... In the first appeal the inspector had been wrong to hold that a letter from the owners to the local planning authority complaining of trespass on the path was sufficient evidence of lack of intention to dedicate. That would not have come to the attention of users of the path. In the second appeal she had been wrong to take into account a tenancy agreement by which the tenant had covenanted ... not to allow footpaths to be created. That would not have been available to users of the way." (***emphasis*** added)

28 For present purposes, taking *Beresford* and *Godmanchester* into account, the question is: was any act of the various landowners of the Land since 1976 an 'overt act'? I.e. (a) did such act come to the attention of the inhabitants; and (b) should the inhabitants have reasonably understood from such act that the intention of the landowner was to make clear that user of the Land for lawful sports and pastimes was not 'as of right' with the landowner's acquiescence, but with the landowner's permission?

29 An approach to considering evidence of 'overt acts' is set out in Schedule I to this submission.

The landowners' acts.

Statutory Purpose of Land is for Housing .

30 That the Land was acquired for housing (Issues [6.1], [6.2], [6.3], [6.4]: Issues.3 [4.2], [4.5.2], [4.5.3]) is not an 'overt act' that negates 'without permission'. In *Beresford* the local authority land had been acquired and transferred under statutory powers for various purposes, including open spaces, and planning permission obtained for its development but not implemented due to the green application. Also there the 'Sports Arena' had had specific works done to it to facilitate sports and pastimes. The Land is the remnant of rough grazing fields crossed by public footpaths unimproved save for grass cutting and limited 'hedge' planting: [7A] and [22] above. The purpose for which a landowner acquires or uses the land is not determinative of whether or not he acquiesces in user 'as of right' for lawful sport and pastimes.

Byelaws.

31 The Inquiry directed that the canine 'poop scoop' byelaws were irrelevant. The Byelaws (Issues [6.6]: Issues.2 [1.1(ii)]: Issues.3 [4.3], [4.4], [4.7]) on balance are not 'overt acts' that negate 'without permission'. HHL admits that there is a degree of uncertainty about their regularity: see Issues [6.6] 'It is

not known ...'; Issues.2 [1.1(ii)] 'further researches are in hand ...', [1.2] 'HHL reserves its position with regard to the Byelaws pending the outcome of its further researches'; Issues.3 [4.4.1] 'At the time of writing further information is awaited from Herefordshire Council'; [4.7.4] 'Unfortunately, the only evidence, in the absence of anything further from HC, is ... '. It was accepted that there were and had never been any notices on the Land proclaiming the existence and nature of the byelaws nor any maps defining the areas affected. The existence of byelaws is not antithetical to the existence of a green: see *Oxfordshire*:

> "So they [Royal Commission] recommended that if a local authority or parish council formally claimed land as a town or village green, it should be provisionally registered and title should thereupon vest in the local authority. That would enable the local authority immediately to maintain the green as if it had been acquired under the Open Spaces Act 1906 and make by-laws for its management: paragraph 372" per Lord Hoffmann at [16]

32 Like HHL, and in view of the comments in Issue.3 [4.4.1] and [4.7.4], the Applicants were concerned to establish the regularity of the byelaws. On 06 August 2007 the Applicants emailed Herefordshire Council, on notice to HHL and no objection was received. The email and replies are in Schedule II. Doubts over the byelaws' applicability and regularity remain and they fail to meet the criteria for 'overt acts'.

Land management as a public open space.

33 Grass cutting, etc. Issues [6.7]; Issues.3 [2.3 and Note 2]. These do not comprise 'overt acts': see *Beresford* at 889G:

> 'Held: ... The landowner having encouraged an activity on its land did not itself indicate that it took place by virtue of a revocable permission ... neither the cutting of the grass nor the provision of seating were indicative of a revocable licence ...'

34 Bonfires - Issues [5.1]; Issues.3 [4.5.2 (sic) p.8]. HHL witness Cyril Davies in cross-examination agreed that whilst rubbish was removed pre-5 November it was possible that the local inhabitants' bonfire was not disturbed. No evidence was heard from the Applicants' witnesses that they either sought or were granted permission for, or prohibited from having their bonfires.

Local Government Act 1972 s.123(2A)

35 Issues.2 [2]; Issues.3 [4.5.2 p8] and [4.5.2]. It is accepted that in *Beresford* no notices had been issued and the principles were considered *obiter*: however it is to be noted that it was after the House had reserved judgement that counsel (well experienced in village green matters) were invited to make further written and oral submissions on the issue of user relative to local government legislation including s.123(2A).

36 In *Beresford* (as mentioned in Issues.2 [2.4]) it was said:

> "I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion." per Lord Scott at [52]

37 As Issues.2 [2.1] points out 'Open space' is as defined in TCPA 1990 s.336. What was not considered in *Beresford* was the s.336(1) definition '"common" includes any land subject to ... and any town and village green.' . More importantly LGA s.122(2) 'Appropriation' does not appear to have been taken into account:

> (2) ***A principal council may not appropriate*** under subsection (1) above any land which they may be authorised to appropriate under section 229 of the Town and Country Planning Act 1990 (***land forming part of a common,*** etc.) ***unless—***
>
> (a) ***the total of the land appropriated in any particular common***, or fuel or field garden allotment (***giving those expressions the same meanings as in the said section 229***) ***does not in the aggregate exceed 250 square yards***, and
>
> (b) before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them, (***emphasis*** added)

If a council cannot appropriate a common/village green in total then it cannot dispose of one under s.123. The said TCPA s.229 'Appropriation of land forming part of a common etc.' can involve special Parliamentary procedure.

38 S.123(2B) states:

> "the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

There is therefore a presumption that the land is held on trust for the said purposes. Open Spaces Act 1906:

"10. Maintenance of open spaces and burial grounds by local authority. A local authority who have acquired any estate or interest in or control over any open space or burial

ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a) hold and administer the open space or burial ground in trust ..."

39 Herefordshire Council published the s.123(2A) notices in the Hereford Times on 26 September and 03 October 2002. Some 10 years after the inhabitants had acquired by the end of 1996 (see [22] above) an inchoate right to have the land registered as a green. The said notices (although entitled 'intention to dispose of') stated 'intends to **transfer** the open space land listed below to [HHL] in connection with the forthcoming **transfer** of the Council's housing stock.' and not 'intends to dispose of ...'(**emphasis** added). In common parlance (albeit probably not to a lawyer) 'Disposal' implies 'getting rid of' whereas 'Transfer' implies 'pass the existing situation to someone else'. It is to be noted that the statutory purpose was the transfer of statutory housing requiring the Secretary of State's consent: not disposal of land held on trust for public recreation. Adapting Lord Hoffmann's words ([27] above) the inhabitants, from reading the notices, would not ***reasonably have understood the landowner's intention*** was to limit in any way their indulging in sports and pastimes under the landowner's outwardly benevolent acquiescence; let alone to remove from them their inchoate right to register the land as a green. The public notices fail the 'overt act' test.

40 HHL has, correctly, stressed the Land is held for housing and in December 2005 applied for outline planning application which it withdrew in February 2006: chronologically after this Application was made in November 2006 (Phillips WS [13],[14]). It is inconsistent to maintain that on one hand the Land is held for the statutory purpose of housing and on the other that it is held on trust for public recreation: the two are legally incompatible and HHL's charitable purpose is the former. As a former parish clerk the writer is aware that it is a fundamental principle that land may not be appropriated to another purpose from that for which it is acquired without statutory authority and process. However, *Beresford* has shown that this does not prevent the operation of the 1965 Act for land to become a town or village green by the acquiescence of the landowner to user for lawful sports and pastimes. For the above reasons it is submitted that the s.123(2A) notices did not have the lawful effect as claimed by HHL in removing any latent or inchoate rights to indulge in lawful sports and pastimes as a green.

Other matters.

41 Issues.3 [2.2] refers to *Gardner v Hodgson's Kington Brewery*. This case was referred to in *Beresford* at [55], [73] and [74] where it was observed,

> "So to make a charge for entry to land is one way of making clear that entry is not as of right. The paying entrant would be there by licence, " per Lord Walker.

The demand for a payment by the landowner was clearly an overt act showing that user was not without permission and negating a claim as of right.

42 The meaning of 'public': Issues [6.9] acknowledges *Sunningwell* concerning 'state of mind of the users is not determinative' and continues 'it is noteworthy in this case that many of the Questionnaires assert a public right to use the land'. As with 'disposal/transfer' in [39] above, in common parlance (albeit again probably not to a lawyer) the word 'public' is used in distinction to 'private' or to mean 'the community' compared with 'individuals': not always implying all and anyone in the world — not distinguishing between the niceties of adjective 'the public good' and noun 'the public in our neighbourhood'. Even the most eminent can slip into common parlance:

> 'Here [the Sports Arena] the conduct is in any event equivocal: if the land were registered as a town or village green, so enabling ***the public*** to resort to it in exercise of a legal right and without the need for any licence, one would expect the council to mow the grass and provide some facilities for those so resorting, thus encouraging ***public*** use of this valuable local amenity. It is hard to see how the self-same conduct can be treated as indicating that ***the public*** had no legal right to use the land and did so only by virtue of the council's licence.' *Beresford* per Lord Bingham at [7] (***emphasis*** added)

43 The removal of the playground equipment with associated notices and HHL's withdrawal of their planning application (Phillips WS [12], [13]) had the appearance of emphasising the landowner's acquiescence to user 'as of right' and not asserting user only with permission.

Submissions.

44 In the circumstances HHL's request that the Inspector advises the Registration Authority as to whether or not the former playground site became a green is reasonable.

45 The Commons Act 2006 s.15 provides a period of grace after use as of right has been ended by the landowner, during which an application to register land as a green can still be made. This will nor-

mally be two years but as a transitional measure, five years will be allowed where the use ended before 6 April 2007. If this Application is rejected the Applicants could reapply on the basis of user ending at the end of October 2002: i.e. before the Land transfer in November 2002. The period of user could, as in the present application, start in 1976 giving by 1996 20 years user and continuing until 2002. The evidence adduced would repeat that in this Application. In the circumstances and with a view to the Registration Authority potential saving of council tax-payers funds it is reasonable to invite the Inspector to comment on this scenario: as have inspectors in other inquiries.

46 The complexities and nuances surrounding the phrase 'as of right' are many and varied. HHL claim that landowners' acts negate the Applicants' claim of user 'without permission'. From the examination of such acts it is respectfully submitted that none of the pieces of the evidential jig-saw fit the criteria of an 'overt act' from which the inhabitants would have reasonably understood that the landowner's intention was to make clear to the inhabitants that they only enjoyed user with permission.

47 It is submitted that HHL has not made out its case that user was 'with permission' and the Applicants have substantiated their claim of user as of right 'without permission'.

Christopher J Whitmey

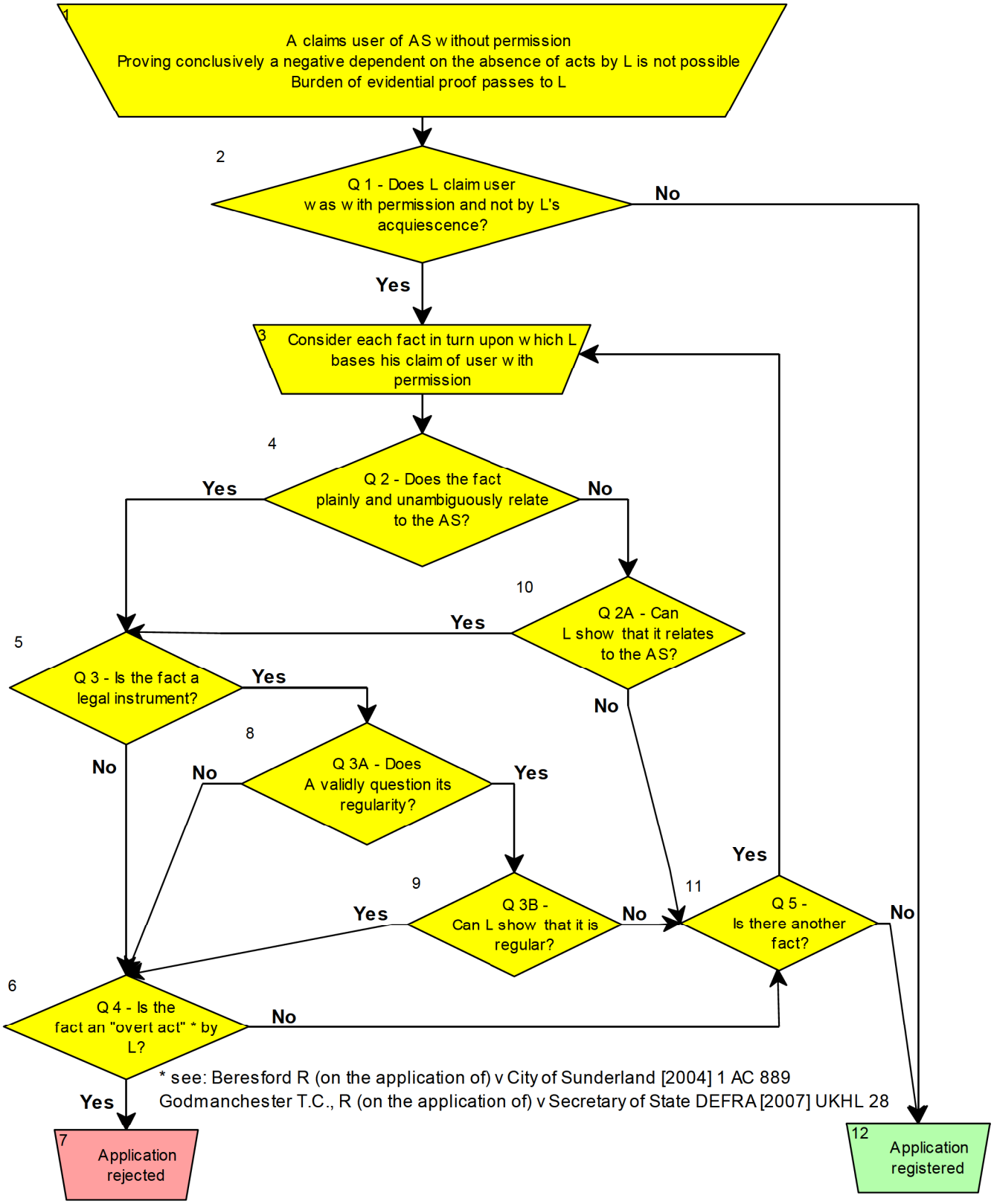
Thursday 16 August 2007

As of Right - the issue of 'Without permission'

An algorithm showing the tests to be applied -

methodology from 'Flow charts, logical trees and algorithms for rules and regulations' Civil Service College Occasional Papers No.2 HMSO

A= Applicant AS= Application Site L= Landowner



* see: Beresford R (on the application of) v City of Sunderland [2004] 1 AC 889
Godmanchester T.C., R (on the application of) v Secretary of State DEFRA [2007] UKHL 28

Christopher Whitmey August 2007

S C H E D U L E II

MEMORANDUM

By email from: cj@whitmey.nildram.co.uk

From: Christopher Whitmey
To: Mr Peter Crilly, Herefordshire Council
c.c. Mr Robert Christie, HHL; Mr Martin Gilleland, NFTGAG
Date 06 August 2007
Subject: Aplcn VG 50 Argyll Rise

Dear Mr Crilly,

I apologise for troubling you further. This morning I received a copy of the Objector's closing submission from Miss Ellis (sending was delayed and no issue arises as to that). You will recall on the last day of the Inquiry a photo was produced of the Herefordshire Council Public Open Space notice ('the Notice') on the Treago Grove land on the other side of the road from the Application Site.

At the time nothing arose from that photograph. I have now been able to examine the Order referred to in the Notice and I have seen in writing the emphasis that Miss Ellis puts on the byelaws. I apologise if my researches have overlooked the obvious answer but please can you answer the following factual questions:

1 Where the Notice says, "by order of HEREFORDSHIRE COUNCIL" is there a date when it was so ordered by the Council?

2 If the answer to 1 is 'Yes' what was that date and the wording of the Council's resolution?

3 If the answer to 1 is 'No' was Herefordshire Council relying on the said byelaw of the City of Hereford Council continuing in force after 1st April 1998 and becoming a byelaw of Herefordshire Council?

4 If the answer to 3 is 'Yes' please can you direct me to the relevant statutory provision that permitted this reliance?

REASONS FOR QUESTIONS.

5 The Notice concludes:

"by order of HEREFORDSHIRE COUNCIL

Byelaws made by Hereford City Council under Section 164 of the Public Health Act 1875, and Sections 10 and 15 of the Open Spaces Act 1906 with respect to to pleasure grounds, public walks and open spaces and administered by the Herefordshire Council by virtue of the Hereford and Worcester (structural boundaries and electoral changes)Order 1996.['the Order'] ".

6 On the plain and unambiguous wording of the Notice an inhabitant may reasonably assume that the byelaws was and continues to be, in operation due to the said Order.

7 It is accepted (see Explanatory Note to the Order) that:
"Article 5 provides for the abolition, on 1st April 1998, of existing local government areas and the councils of those areas...
Article 12 effects a structural change by providing for the transfer, on 1st April 1998, of the functions (other than structure plan functions) of the existing Hereford and Worcester County Council in relation to the new district of Herefordshire to the council of that district. ...
Article 14 makes provision for the purposes of subordinate legislation to be made under the Fire Services Act 1947 in respect of fire services. ...
Article 17 makes provision for the vesting of archives and other collections."

8 It is accepted that Article 2 of the Order states, "“subordinate legislation" has the same meaning as in section 21 of the Interpretation Act 1978 " and that the said section 21 includes ‘byelaws’.

9 It is also accepted that Local Government Changes for England (Property Transfer and Transitional Payments) Regulations 1995 regulation 6(2) "All the property, rights and liabilities of an abolished authority in relation to which there is only one successor authority shall, on the reorganisation date, vest in that successor authority" applies and on 1st April 1998 the Application Site became vested in the Herefordshire Council.

10 The said Order and the said 1995 Regulations make no references whatsoever to byelaws enacted by an abolished authority, and in particular by the non-metropolitan district of the city of Hereford, and whether or not they are deemed to become byelaws of the successor authority. On its plain wording "All the property, rights and liabilities of an abolished authority " means property rights and liabilities: not any byelaws of the abolished authority affecting such property.

11 The said 1995 Regulations state:
"Continuity of matters
12. — (1) All contracts, deeds, bonds, agreements, licences and other instruments subsisting in favour of, or against, and all notices in force which were given, or have effect as if given, by or to, a relevant authority in respect of any transferred matters shall be of full force and effect in favour of, or against, the body to whom such matters are transferred.
(2) Any action or proceeding, or any cause of action or proceeding, pending or existing at the reorganisation date by or against a relevant authority in respect of any transferred matters may be continued, prosecuted and enforced by or against the body to which such matters are transferred.
(3) In this regulation, “transferred matters" means any property, rights or liabilities transferred by virtue of these Regulations or any other relevant instrument."

12 Regulation 12(2) plainly applies to any enforcement proceedings in progress by the City of Hereford Council under its byelaws but is not, on the face of it, adequate to transmogrify the City's byelaws into your Council's byelaws.

Again I apologise if my researches have overlooked the obvious.

Yours sincerely,

Christopher Whitmey
on behalf of NFTGAG

From: "Crilly, Peter" <pcrilly@herefordshire.gov.uk>
To: "Christopher Whitmey" <cj@whitmey.nildram.co.uk>
Subject: RE: TVG aplcn VG50 Argyll Rise
Date sent: Thu, 16 Aug 2007 16:26:45 +0100
Copies to: "Robert Christie" <legalteam@herefordshirehousing.org.uk>, "Martin Gilleland" <megilleland@hotmail.com>

Dear Mr Whitmey
I am looking for any specific resolutions ratifying byelaws and will let you know if any are found
but I still feel that Reg 5, particularly as amended by SI 1996 No.611, would have continued them. I will forward this correspondence to the inspector for his view.
Peter Crilly

-----Original Message-----
From: Christopher Whitmey <cj@whitmey.nildram.co.uk>
To: "Crilly, Peter" <pcrilly@herefordshire.gov.uk>
Subject: RE: TVG aplcn VG50 Argyll Rise
Date sent: Thu, 16 Aug 2007 13:00:05 +0100

Copies to: "Robert Christie" <legalteam@herefordshirehousing.org.uk>, "Martin Gilleland" <megilleland@hotmail.com>

Dear Mr Crilly,

Thank you for your email which I take to be an answer to my Q.4. I have examined the 1994 Regulations (and the Interpretation Act 1978 referred to therein) and I feel that your proposition is not free from doubt. The 1978 Act includes 'byelaws' in the definition of 'enactments'.

However the 1994 Regulations only refer to 'byelaws' in the context of 'Continuity of matters' Reg.4(2)

"(i) the things which may be continued shall include any legal actions or proceedings, any written application, note, direction, objection or representation of any kind, the enforcement of any byelaws (including any regulation, scale of charges, lists of tolls and any table of fees and payments) and any licence or registration effected pursuant to any enactment; and

(ii) anything being done by, to or in relation to a transferor authority shall include anything which is deemed to be being done by that authority, or is treated as being so done."

The wording as a whole would seem to clearly refer to 'matters in progress'.

IF abolished authorities' byelaws were to continue in force as a criminal code I would have expected to see a specific provision: Especially in view of Regs. 7 'Matters not affected' and 8 'Validity of certain matters'.

I note that you have not been able to answer my questions:

1 Where the Notice says, "by order of HEREFORDSHIRE COUNCIL" is there a date when it was so ordered by the Council?

2 If the answer to 1 is 'Yes' what was that date and the wording of the Council's resolution?

I wondered if a specific resolution by your council ratifying and adopting City of Hereford byelaws with or without amendments existed. It seems not. Without such a resolution my view is that the regularity of the byelaws must remain open to question.

Yours sincerely,

Christopher Whitmey
N.R.E.O.R. (No Reply Expected or Required)

On 16 Aug 2007 at 11:42, Crilly, Peter wrote:

> Dear Mr Whitmey
> I think that the byelaw continued under Regulation 5 of The Local Government Changes for England Regulations
> 1994 SI No. 867 Peter Crilly
>
> -----Original Message-----
> From: Christopher Whitmey [mailto:cj@whitmey.nildram.co.uk]
> Sent: 15 August 2007 14:39
> To: Crilly, Peter
> Cc: Robert Christie; Martin Gilleland
> Subject: RE: TVG aplcn VG50 Argyll Rise
>
> Dear Mr Crilly,
>
> I apologise for chasing but as you will recall I have a noon Fri 17 August deadline for my closing submission.
>
> Unless I here to the contrary by noon tomorrow Thu 16 August I will presume you have not been able to find any
> definitive answers to my questions of 06 August.
>
> Please can you acknowledge receipt of this email?
>
> Yours sincerely,
>
> Christopher Whitmey
> for NFTGAG
>

> ------- Forwarded message follows -------
> From: Christopher Whitmey <cj@whitmey.nildram.co.uk>
> To: "Crilly, Peter" <pcrilly@herefordshire.gov.uk>
> Subject: RE: TVG aplcn VG50 Argyll Rise
> Copies to: "Robert Christie" <legalteam@herefordshirehousing.org.uk>, "Martin Gilleland"
> <megilleland@hotmail.com> Date sent: Wed, 08 Aug 2007 16:14:32 +0100
>
> Dear Mr Crilly,
>
> Prompt reply appreciated. Please find attached a copy of the closing submission referred to.
>
> The photograph attached is one that Mr Gilleland took of the same notice and emailed to me at my request as I did
> not pick up a copy of the one at the Inquiry. I know that it is the same notice (I recall seeing the graffiti on the left
> hand side!) as that at the Inquiry (which I thought the Council had taken but may be it was Herefordshire Housing)
> but it contains more of the background.
>
> I look forward to hearing from you.
>
> Yours sincerely,
>
> Christopher Whitmey
>
> On 8 Aug 2007 at 15:39, Crilly, Peter wrote:
>
> > Dear Mr Whitmey,
> > Thank you for the questions in the attachment which I am looking into. I would be grateful for a copy of the written
>> closing submission and a photo of the Notice. Peter Crilly
> >
> > -----Original Message-----
> > From: Christopher Whitmey [mailto:cj@whitmey.nildram.co.uk]
> > Sent: 06 August 2007 19:04
> > To: Crilly, Peter
> > Cc: Robert Christie; Martin Gilleland
> > Subject: TVG aplcn VG50 Argyll Rise
> >
> >
> > Dear Mr Crilly,
> >
> > Please see the attachment.
> >
> > Yours sincerely,
> >
> > Christopher Whitmey
> >
> ------- End of forwarded message -------
>

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

RESPONSE TO MR WHITMEY'S SUBMISSIONS ON 'AS OF RIGHT'

---

1. INTRODUCTION

1.1. This Response is limited to a few short points on new matters of law. It does not comment on evidential matters. Silence should not be construed as agreement, rather as observance of the very limited right of reply at this stage.

1.2. Paragraph headings refer to Mr Whitmey's document.

2. Paragraphs 19, 21, 39 and 45

2.1. HL in Oxfordshire expressly decided that *"the amended Section 22, with the addition of the words 'and ... continue to do so,' plainly*

cannot be satisfied by any period of 20 years. It must be a period continuing until a given date …

… it is unnecessary to decide when the 20 year period under the old law would have expired because the argument that it would have 'become a village green' is a misreading of sections 13 and 22 of the 1965 Act … because the register is conclusive, it does not become a village green until it has been registered". (Lord Hoffman paras 42-43. See also paras 30-34 and 41-44 for context).

2.2. Mr Whitmey's paras 39 and 45 therefore proceed on a misapprehension – namely that there was some kind of unregistered TVG right in October 2002 and/or that the RA has jurisdiction so to decide. In any event, it is unnecessary to decide because the Objector's case is not put on the basis of the s.123 LGA procedure *"trumping"* the Application: see ME Closing Submissions, para 4.6.3.

3. Paragraph 20

3.1. S.16 CRA deals with the wholly separate issue of rights of common. In any event, as explained above, it is unnecessary to decide the point.

4. Paragraph 24, line 3 *"the issue"*, paragraph 30

4.1. One of the issues in this case is permission. Another is *"of right"*. Purpose of holding by a public landowner is relevant to both issues.

5. Paragraphs 25-28

5.1. The determinative state of mind is not that of the Applicants, but of the landowner: Sunningwell. How matters appeared to the landowner is to be judged objectively. One way of making that judgment is by considering evidence of the landowner's conduct.

5.2. As Lord Scott pointed out in Beresford, *"there are differences... between public rights of way on the one hand and TVGs on the other ..."* (para 40 – see whole paragraphs for development of the point). Care should therefore be exercised before *"translating"* a rights of way case into TVG law.

6. Paragraph 38

6.1. There is no such presumption. The statutory words are permissive, not prescriptive: *"any trust arising ..."*

7. Paragraph 40

7.1. The Application was initially sent to the RA in February 2006.

7.2. HHL do not claim that the s.123 procedure *"removed any latent or inchoate rights"*, nor that the land was held on trust for public recreation: see ME Closing Submissions, para 4.6.3. It was, in fact, Mr Whitmey who originally so argued as a would-be Objector. HHL

rely on the process as evidence of the then Landowner dealing with the land other than as subject to any assertion of TVG rights.

MORAG ELLIS QC
20 August 2007

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

RESPONSE TO MR WHITMEY'S SUBMISSIONS ON 'AS OF RIGHT'

ME.1001

COMMONS REGISTRATION ACT 1965

REPORT TO HEREFORDSHIRE COUNCIL FOLLOWING A NON-STATUTORY INQUIRY INTO AN APPLICATION TO REGISTER AS A TOWN GREEN LAND AT ARGYLL RISE, HEREFORD,

Introduction

1. The County of Herefordshire District Council is the registration authority for the purposes of town and village greens. It has appointed me to conduct a non-statutory public inquiry on its behalf to determine an application that land should be registered as a town or village green under section 13(b) of the Commons Registration Act 1965. The question in such an application is whether a statutory test is met. I have no authority to make any determination other than one that is necessary to determine this question. In particular, I have not been appointed to determine the planning merits of any proposed use of the land or any other planning issue. Should any comment of mine appears to be expressing an opinion on any planning matter, this is unintentional.

2. On 6th February 2006 three Hereford residents, Keith Miller, Jacqueline Kirby and Jackie Mills ("the Applicants") applied to register land ("the Application Site") in the Belmont ward of the City of Hereford as a town or village green ("TVG").

3. There is one objector, Herefordshire Housing Limited ("HHL"), the current owner of the Application Site and a registered social landlord.

4. The County of Herefordshire District Council did not support either party at the inquiry and, so far as I am aware, has not adopted a position on this matter. It role in the inquiry was limited to assisting in the running of the inquiry and in preliminary

procedural matters such as circulating my directions and receiving proofs and submissions. I am grateful for this assistance, particularly for the efficient help that I have received from Mr Peter Crilly.

5. The inquiry was held at the Three Counties Hotel, Belmont, on Tuesday 31st July and Wednesday 1st August 2007. I would like to thank all involved, including Miss Morag Ellis QC who appeared for HHL and Mr Christopher Whitmey who assisted the Applicants, for their courtesy and helpfulness.

The Application Site

6. The Application Site concerned is an irregularly shaped parcel of land bounded by Dunoon Mead, Muir Close, Pixley Walk, Treago Grove, Waterfield Road and Argyll Rise. It is mainly mown grass. There are also some trees. It is almost surrounded by housing. Apart from the former play area, to which I shall return, and the planting of some trees, there has been no significant change to the land and its immediate surroundings throughout the period of twenty years prior to the making of the application. Apart from the play area, no part of the application site has been fenced or had any notice placed on it. HHL and its predecessors in title have mown the grass, planted trees and removed rubbish, but have not (outside the play area) carried out any operational development or restricted access to the land.

The Legal Framework

7. The application was made under the Commons Registration Act 1965 section 13 and stated that the land became a TVG "by actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years". The wording of the application has not been amended; but the area covered by it has been in effect amended by the Applicants' concession that the play area was not a TVG.

8. The relevant definition of "town or village green" is contained is the Commons Registration Act 1965 section 22 (1) and (1A) as amended and inserted by the Countryside and Rights of Way Act 2000 section 98, For the purpose of this application, the material words of section 22 provide: –

> (1)… "town or village green" means land… which falls within subsection (1A) of this section.
>
> (1A) Land falls within this subsection if it is 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 either –
>
> (a) continue to do so, or
>
> (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.

9. No regulations have been prescribed under subsection (1A)(b). Its sole relevance is in respect of the date on which the twenty-year period can end.

10. I am not considering the definition that applied before the amendments introduced by Countryside and Rights of Way Act 2000 section 98 took effect; nor am I considering the position under the Commons Act 2006. When considering cases decided under the pre-2000 definition, I have borne in mind the changes in the law effected by section 98.

The Burden and Standard of Proof

11. Each party has made submissions on the burden and standard of proof which in my opinion go to far. The applicants submitted that on the issue of 'as of right' it shifts to the objector; while HHL has submitted that the benefit of any uncertainty should be given to the objector, a proposition that appears to be essentially the same as a criminal standard of proof.

12. My opinion is that the burden of proof lies on the applicants throughout, but that the standard of proof is proof on the balance of probabilities. The latter point does not

mean that the applicants must not prove their case properly and in this respect I have borne in the cautionary words of Pill LJ in *R v Suffolk County Council ex parte Steed* "… it is no trivial matter for a landowner to have land, whether in public or private ownership registered as a town green".[1] I have also borne in mind Lord Bingham's approval of those words and connected observations in *R (Beresford) v Sunderland City Council*.[2]

13. Having said that, I should add that this is not a case where I have had to rely upon the burden of proof or upon any fine points on the standard of proof. Having heard and read a substantial amount of evidence, I have reached conclusions of fact of which I am confident and which are not borderline.

The play-area

14. For much of the twenty-year period a roughly rectangular area in the south-western part of the application site was used as a play area. In the course of the inquiry the applicants conceded that this was not a TVG.

15. HHL has nonetheless requested a determination of the issue. I have no hesitation in stating that the concession was rightly made. The play area was developed and managed as such. It contained play equipment, at least one litter bin, fencing and gates. Dogs were banned. There was a sign regulating the age of users. Ultimately, following an accident for which it paid compensation, HHL removed the whole play area, that is all structures and all artificial surfacing. It would have been abundantly clear to everyone that the use of the play area was with permission. Its use was not "as of right".

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1 75 P&CR 102, CA, 111.

2 [2003] UKHL 60, [2004] 1 AC 889, paragraph 2.

The twenty-year period

16. The applicants submit that the twenty-year period does not have to end with the date of the application. I have no hesitation in rejecting since it is contrary to the opinion of Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[3] (and incidentally also contrary to what I would in any event have considered to be the clear and natural meaning of section 22(1A)(a) and (b)). The relevant twenty-year period ran until to date of the application. In other words it ran for twenty years until 6th February 2006. While the exact date on which the period ended is not, in the light of the evidence, important; it is important to state that it cannot be taken as having ended in or before 2002 when the land was disposed of under section 123 of the Local Government Act 1972.

17. Subject to that point, nothing turns on the twenty-year period requirement. I am satisfied there has been no significant change in the nature of the use of the Application Site throughout the period since it was first brought into use (other than in respect of the play area).

Significant number of the inhabitants

18. As Sullivan J confirmed in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*[4] the word 'significant', although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language.[5] I have no doubt that the application has been used by a significant number of the inhabitants. It is neither necessary nor desirable to attempt to call every person who has

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3 [2006] UKHL 25, [2006] 2 AC 674, paragraph 43.

4 [2002] EWHC 76 (Admin), [2002] 2 PLR 1.

5 Paragraph 71.

used the land, or even as many people as possible. The Applicants' concentration on those whose use has extended throughout the twenty-year period was reasonable. I accept their evidence as to use, which was not in any way shown to be false or inaccurate. That view is reinforced by the nature of the land concerned. It would be surprising if such an obviously useable green space close to a substantial number of houses in a large estate were not used by a significant number of the inhabitants.

19. The test approved by Sullivan J in *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* was whether "the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers." [6] I have reached the firm view that it was the former not the latter.

Any locality, or of any neighbourhood within a locality

20. The Applicants' case is that the locality is the civil parish of the City of Hereford or Belmont Ward (each of which is an area known to law) and the neighbourhood is "the Newton Farm yellow area in L2". They rely upon Lord Hoffman's rejection of the technicality of the previous law.[7] On this latter point I agree with the Applicants. The pre-2000 cases on which HHL relies[8] must be read in the light of the amendment that section 98 introduced and Lord Hoffman's rejection of technicality.

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6 Paragraph 71.

7 *Oxfordshire County Council v Oxford City Council*, paragraph 27.

8 *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931 and *R v Suffolk County Council ex parte Steed* 70 P&CR 487, CA.

21. HHL draws attention to the absence of any obligation on its part to make good the Applicants' case. It also draws attention to Sullivan J's incidental observations about the meaning of the concept in *R (Cheltenham Builders Ltd) -v- South Gloucestershire District Council*[9] and to the fact that the part of his judgment identifying a requirement for "a sufficient degree of cohesiveness" was not disapproved by Lord Hoffmann in *Oxfordshire*.

22. I consider that the proper approach is to ask whether in plain English (devoid of technicality) the area concerned is a locality or of a neighbourhood within a locality. While such an area must have some cohesion, I see no reason to add any phrase to the statutory test, which in the context of this case has not caused me any difficulty.

23. The site lies within a small conurbation composed of the built-up area of the City of Hereford and some residential development in adjoining parishes, particularly the development in the parish of Belmont closest to the application site. A substantial part of the objector's cross-examination was intended to and did establish that people from parts of Hereford other than the Newton Farm Estate used the land. Like most sites that are arguably a TVG, it is used not exclusively by local inhabitants, but also by family members, friends and other visitors. However its location in the far southwest of the City of Hereford is such that there would be little reason for it to attract people from other parts of the City or from further afield other than people visiting friends and family. I have no doubt that the predominant use of the site was by local people and not by the public at large. (I consider the different question of right to use later in this report.) While there was also use by friends and families of local people, I have no reason to believe that this was anything more than would be expected for any TVG, or that parliament intended

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[9] [2003] EWHC 2803, [2004] JPL 975 paras 85-86

such almost inevitable use to render land incapable of being classified as a TVG under section 22(1A).

24. In the case of an urban area, there will almost inevitably be a gradation of use, with the closest houses generally making greatest use of the site concerned and a decrease of use as one moves further from the site. I consider that this explains the differences between witnesses for the Applicants as to exactly what area the Application Site serves. Nonetheless, the Newton Farm Estate is a distinct part of the City of Hereford shown on maps, well known by that name and capable without undue difficulty of definition. It is more than a mere collection of streets and has a substantial degree of cohesion. As with very many borderlines, there may appear to be some artificiality when adjoining locations immediately to one side and immediately to the other of the border are treated differently. Despite this, my firm overall impression is that the Application Site predominantly served the Newton Farm Estate, that is the area of land bounded by the A 465 Belmont Road, the Great Western Way, the Marches railway line, the boundary of the built-up area of the City of Hereford and the parish of Belmont. In reaching this conclusion as to predominant use, I recognise that there may have been some use by residents of nearby urban parts of Belmont parish that was more than minimal.

25. This is a more extensive area than the one put forward by the Applicants. I have therefore considered whether it would be unfair on my part to take a different area without re-opening the inquiry or at least inviting further written submissions. Since the area I consider appropriate, namely Newton Farm as a whole was expressly considered by HHL in its closing submissions, no doubt because it, like I, considered it to be the obvious area, I see no need for this. I also consider that it would be wrong to hold against a party that was not legally represented the selection of an area that I did not consider appropriate when I had ample evidence to reach a conclusion myself and when leading counsel for HHL had expressly considered the larger area that I considered to be relevant.

Lawful sports and pastimes

26. I have no doubt that the bulk of the use of the Application Site was for lawful sports and pastimes. Indeed HHL did not argue to the contrary.[10]

27. It is possible that at some stages some bonfires were without express authority and, at least to the extent that they would have caused some damage to the land, a trespass. I do not consider such occasional limited use of a limited part of the land to be significant.

28. The objector argued that dog-walkers who failed to clear faeces were in breach of a byelaw and hence unlawful. Even if I had considered that the byelaws concerned had applied (which I do not), I would not have considered that this rendered the whole act of dog-walking unlawful.

29. I have no doubt that the predominant use of the land has been for activities that can properly be called lawful sports and pastimes.

As of right

30. The term 'as of right' means a user that was not by force, nor stealth, nor the licence of the owner. It does not mean "of right". Rather its meaning is closer to "as if of right". In this case there is no question of force or stealth. Hence the relevant question on this element of the definition is whether the inhabitants' user was by the licence of the owner. Toleration of a trespass is not enough to defeat a claim, being not inconsistent with user as of right. The mere fact that land is held by a public body for a public purpose is also not enough to defeat a claim.

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[10] HHL's original legal submissions (23rd July 2007), paragraph 5.1.

31. HHL submits that there is a perfectly simple and natural explanation of recreational user, namely that the land was acquired and developed by the then housing authority for housing purposes which included powers to acquire, lay out and manage and maintain areas of ancillary recreational open space. Since 2002 HHL have continued to maintain the land for similar purposes. In respect of the absence of evidence of the appropriate ministerial consents, it relies on the presumption of regularity.

32. Could the users properly be said to be trespassers? I have concluded that they could not. This is not a case of a piece land originally intended for some private purpose, but which was in fact used by the local community; nor is it public land that was originally intended to be subject to controlled entry in specific circumstances. Rather it is land that from the time when this part of the Newton Farm Estate was developed was intended for use by residents of the estate for informal recreation. Users of the application land were never trespassers, not even tolerated trespassers. I have rejected the Applicants' argument that the burden of proof on this point has shifted to the objector; but, even if I had accepted it, I would have been against them. If at some stage in the twenty-year period local residents had been accused of trespassing on the Application Site, they would have been surprised, perhaps astonished. Their likely response would have been that the land was clearly intended to be used by the public.

33. I have some doubt whether judicial statements that implied permission does not negate a claim to use as of right were intended to apply to an implication that arises, not from toleration or mere inaction, but from the original sole intended use of the land. However, there is a degree of uncertainty in the law, with the implication that I am inclined to make falling between that which is not permissible (mere inaction) and that

which is (express exclusion of the public on certain days).[11] It is therefore necessary to consider the statutory provisions that applied to the Application Site.

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.

35. It follows that recreational use was by right on open-space land held for housing purposes. It is clear that both the Council and several members of the public who completed questionnaires considered that there was a general public right to use the land. That is what I would have considered if I had been in their respective positions and it is what I in consider now. A member of the public on the Application Site would not have been a trespasser whether they came from within or from outside the Newton Farm Estate.

36. Herefordshire Council transferred the Application Site and other land to HHL in 2002. Before doing so the Council gave notice of intention to dispose of open space under section 123(2A) of the Local Government Act 1972. This subsection applies to "any land consisting or forming part of an open space". The relevant definition of open

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[11] *R (Beresford) v Sunderland City Council*, *per* Lord Bingham of Cornhill, paragraphs 5 and 6.

space for these purposes[12] is: "any land… used for purposes of public recreation…". Public open spaces are different from town and village greens being land over which the public as a whole, rather than simply local inhabitants have rights.[13]

37. My initial reaction is that the use of section 123[14] is sufficient to defeat a claim to use as of right. That initial reaction is reinforced by comments made incidentally by Lord Scott of Foscote and Lord Walker of Gestingthorpe in *R v City of Sunderland ex parte Beresford* [2003] UKHL 60, namely: –

> "It was, as I understood it, suggested by Mr Laurence that if the "open space" land had achieved the status of a 1965 Act town or village green, then, notwithstanding the disposal of the "open space" land by a principal council, the section 123(2A) procedures having been duly complied with, the land would retain its status as a town or village green under the 1965 Act. Mr Petchey did not contend that this was wrong. Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. 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." [15]
>
> "I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered." [16]
>
> "Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is

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12 Local Government Act 1972 section 270(1) and Town and Country Planning Act 1990 section 336(1).

13 *R v Doncaster Metropolitan Borough Council ex parte Braim* [1988] JPL 35.

14 In circumstances such as the present where there is no suggestion that it was in any way improper or artificial.

15 Lord Scott, paragraph 28.

16 Lord Scott, paragraph 52.

> toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation." [17]

38. As incidental comments these do not bind me. Nonetheless such comments from Law Lords merit very considerable respect. I see no reason to depart from them. On the contrary they correspond with my initial view on the matter.

39. As a result I have no hesitation in concluding that the land was not held as of right.

Byelaws

40. HHL also raised the matter of byelaws. At the inquiry I indicated that I was not persuaded by HHL's arguments in respect of these. In response Miss Ellis stated that these arguments were the "icing on the cake" as far as HHL was concerned. In other words they were not an essential part of HHL's case on the "as of right issue". I agree.

41. The critical issue as far as the byelaws is concerned is whether they applied to the Application Site. The description of the land to which they apply is not clear. Miss Ellis submitted that this meant that the burden of proof lying on the applicants meant that the uncertainty should be interpreted against them. I differ. Burdens of proof apply to matters of evidence, not statutory interpretation. In this case it is clear that nobody treated the byelaws as applying to the Application Site (other than the play area). Evidence from each side shows that there were no notices that referred to the byelaws or the activities they forbade. The situation in the play area and in the land west of Treago Grove was different. I do not believe that a responsible authority would pass bye-laws in respect of land and then give local residents no warning of these and have no hesitation in

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[17] Lord Walker, paragraph 87.

concluding that the byelaws applied to the areas where byelaw notices were erected and did not apply to an area where there was no notice that expressly or impliedly indicated the existence of a byelaw.

Conclusions

42. The relevant test is that contained in subsection 22 (1A) of the Commons Registration Act 1965. I am satisfied that for not less than twenty years prior to the making of the application a significant number of inhabitants of the relevant neighbourhood, the Newton Farm Estate, indulged in lawful sports and pastimes on the Application Site. However I am also satisfied that this use was not as of right but was with permission and that, in any event, Herefordshire Council's use of section 123 of the 1972 Act, defeats a claim to TVG status.

43. It follows that I advise the Council to reject the application and not to register the Application Site (or any part of it) as a town or village green.

Timothy Jones

No 5 Chambers

(Birmingham – London – Bristol)

19th September 2007

- 2007 -

COMMONS REGISTRATION ACT 1965

IN THE MATTER OF AN APPLICATION
TO REGISTER AS A TOWN GREEN LAND
AT ARGYLL RISE, HEREFORD

COUNTY OF HEREFORDSHIRE
DISTRICT COUNCIL

REPORT

Timothy Jones
No 5 Chambers

The County Secretary and Solicitor,
County of Herefordshire District Council,
(F.A.O. Mr Peter Crilly),
'Brockington', 35 Hafod Road,
Hereford, HR1 1SH.
DX: 135296 Hereford 3.

COMMONS REGISTRATION ACT 1965 (as amended) - SECTION 13

-and-

The Commons Registration (New Land) Regulations 1969

In the matter of Application for the registration of Land at Hereford, known as Argyll Rise, Newton Farm, Hereford HR2 ('the Land' excluding the previous play area), as a town or village green.

Introduction

1. The Applicants have been invited by the Herefordshire Council to comment, by no later than Friday 5th October 2007, on the Inspector's Report, dated 19th September 2007 ('the Report'), to the Council as the Commons Registration Authority ('CRA'). The Inspector was asked to establish the facts by holding a non-statutory public inquiry and then advise the CRA on the application of the law to those facts as to whether or not the Land should be registered as a green : he advises that the Application be rejected.

2. References to the Applicant's closing submissions are designated below as ACS[para.no.].

Summary of Comments

3. The Inspector:

   a. found in favour of the Applicants concerning the key factual matters;

   b. relied on comments by two of the judges in *Beresford* to find that user was 'with permission' but in so doing the Inspector may have erred and/or misdirected himself by not correctly applying the law in *Beresford* to the facts found in favour of the Applicants;

   c. held that Herefordshire Council's use of section 123 of the 1972 Act, defeats a claim to TVG status and in so doing failed to give reasons on the Applicants submissions on the point;

   d. declined to give a view as to whether the facts found could support a Commons Act 2006 application.

4. The Applicants, in view of the above, request the CRA to seek a second legal opinion.

Findings of Fact

5. The Report finds that 'the twenty year period' [16]-[17], 'the significant number of inhabitants' [18]-[19], 'the locality or any neighbourhood within a locality' [20]-[25] and user for 'lawful sports and pastimes' [26]-[29], were all proven by the Applicants: '*Having heard and read a substantial amount of evidence, I have reached conclusions of fact of which I am confident and* ***which are not borderline'*** (***emphasis*** added) at [13].

6. The Report states at [16], '*The applicants submit that the twenty-year period does not have to end with the date of the application. [which] I have no hesitation in rejecting*'. The Applicants point was not so. It was that the phrase in section 22 is 'for not less than twenty years ... and must continue to do so'. This means the period can be a period of upwards of 20 years ending with the date of application which could be the end of a thirty year period: see ACS[19] per *Sunningwell*. The Applicants apologise if this point was not made clear. It is noted that the Report concludes at [17], '*I am satisfied there has been no significant change in the nature of the use of the Application Site throughout the period* ***since it was first brought into use***'(***emphasis*** added). The Applicants' unchallenged evidence was that user started around the mid 1970's - some 30 years.

7. Concerning 'as of right', the Applicants accept the Inspector's summary at [30] of the phrase's meaning: in particular that the question is '*whether the inhabitants' user was* ***by the licence of the owner***' (***emphasis*** added). This phrase received detailed examination in the House of Lords in *R v City of Sunderland ex parte Beresford* [2003] UKHL 60 ('*Beresford*'): see ACS[23]-[25]. The Inspector further observes, '*The mere fact that land is held by a public body for a public purpose is also not enough to defeat a claim* [that land is a green].'.

8. At [32] the Inspector poses a question and his answer, '*Could the users properly be said to be trespassers? I have concluded that they could not. ... Users of the application land were never trespassers, not even tolerated trespassers. ... If at some stage in the twenty-year period local residents had been accused of trespassing on the Application Site, they would have been surprised, perhaps astonished. Their likely response would have been that the land was clearly intended to be used by the public.*'. With respect, this last 'finding' of fact is the Inspector's supposition: he gives no evidence of cross-examination of the Applicants' witnesses to support it. If this was a critical matter one would have expected cross-examination on the matter from such an experienced counsel as Miss Morag Ellis QC for HHL. Furthermore it was open to the Inspector to ask such questions: which he did not. Had such questions been asked there would have been re-examination to explore the matter further. The Report also states, '*A member of the public on the Application Site would not have been a trespasser whether they came from within or from outside the Newton Farm Estate*.' at [35].

Beresford

9. At [37] the Inspector quotes parts of *Beresford* and observes, '*As incidental comments these do not bind me. Nonetheless such comments from Law Lords merit very considerable respect.*': the Applicants endorse the observation. Their lordships also considered the matter of 'trespass' and 'implied licence' (**emphasis** added):

    a. 'I am receptive to the submission that the successive owners had impliedly consented to the recreational use of the land by the public. **The users were, in my opinion, certainly not trespassers**. But **this does**

not, in my opinion, **answer the question whether the use was** "as of right" or "**nec precario**"[without permission/licence].' per Lord Scott at [48].

b. 'I would however add that I feel some sympathy for the view taken by the courts below. The City Council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the City Council, and was held by its predecessors, for public law purposes. **A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser** unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in *Hall v Beckenham Corporation* [1949] 1 KB 716, 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions.' per Lord Walker at [86].

10. Other parts of their lordships' opinions are relevant including (**emphasis** added):

a. 'I respectfully differ from both the lower courts. Qualifying user having been found, **there was nothing in the material** before the council **to support the conclusion that such user had been otherwise than as of right** within the meaning of section 22 of the 1965 Act.' per Lord Bingham at [8].

b. 'The council were, accordingly, entitled to refuse Mrs Beresford's application for registration of the area as a town or village green **only if those who used the Sports Arena did so by the revocable will of the owners of the land**, that is to say, by virtue of a licence which the owners had granted in their favour and could have withdrawn at any time. **The grant of such a licence to those using the ground must have comprised a positive act by the owners, as opposed to their mere acquiescence in the use being made of the land.** Prudent landowners will often **indicate expressly, by a notice in appropriate terms or in some other way, when they are licensing or permitting the public to use their land during their pleasure only**. But I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances.' per Lord Rodgers at [59]

c. 'The mere fact that a landowner encourages an activity on his land **does not indicate, however, that it takes place only by virtue of his revocable permission.** In brief, **neither cutting the grass** nor constructing and leaving the seating in place **justifies an inference that the owners of the Sports Arena positively granted a licence to local residents and others, who were then to be regarded as using the land by virtue of that licence, which the owners could withdraw at any time**.' per Lord Rodgers at [60]

d. 'Therefore, **in the absence of any act on the owners' part** to regulate the activities on the land or otherwise **to show that the inhabitants were disporting themselves only by the owners' revocable leave or licence**, **it is proper to infer that the owners had acquiesced in the inhabitants' use of the land as of**

right. The same result follows if the owners are thought to have encouraged the activities.' per Lord Rodgers at [68]

e. 'I cannot agree that there was any **evidence of overt acts (on the part of the City Council or its predecessors) justifying the conclusion of an implied licence** in this case.' per Lord Walker at [83]

f. 'The fact that the City Council and its predecessors were willing for the land to be used as an area for informal sports and games, and provided some minimal facilities (now decaying) in the form of benches and a single hard cricket pitch, cannot be regarded as overt acts communicating permission to enter. Nor could the regular cutting of the grass, which was a natural action for any responsible landowner. **To treat these acts as amounting to an implied licence, permission or consent would involve a fiction**, like the fiction under which the placing or maintaining on land of an 'allurement' was regarded as an implied licence which might lead to a straying child being treated as an 'invitee' rather than a trespasser for the purposes of occupiers' liability' per Lord Walker at [85].

11. Their lordships concluded that an implied licence was not applicable and decided on the facts that the land, owned by a local authority, should be registered as a green as there had been no overt acts brought to the inhabitants' attention that user was by revocable permission.

12. The Report states at [41] '*Evidence from each side shows that there were no notices that referred to the byelaws or the activities they forbade. The situation in the play area and in the land west of Treago Grove was different. I do not believe that a responsible authority would pass bye-laws in respect of land and then give local residents no warning of these and have no hesitation in concluding that the byelaws applied to the areas where byelaw notices were erected and did not apply to an area where there was no notice that expressly or impliedly indicated the existence of a byelaw.*'. The Applicants relied on this lack of notice (or overt act) as evidence that user was without permission. The Report finds no evidence whatsoever of <u>any</u> overt acts of the owners indicating that user by revocable permission came to the attention of the users.

13. With respect, whilst 'incidental comments' do not bind the Inspector the decision in *Beresford* does; unless it can be distinguished. The Applicants argued that the decision in *Beresford*, supported their claim: see ACS[23]-[28]. On the issue of 'without permission/licence' the Report does not distinguish the facts of Applicants' claim from those in *Beresford.* Indeed the Report at [33] states, '*However, there is a degree of uncertainty in the law, with the implication that I am inclined to make* [sic] *falling between that which is not permissible (mere inaction) and that which is (express exclusion of the public on certain days).*'. This seems to imply that *Beresford* might support the Applicants' claim. With respect, the Inspector may have erred and/or misdirected himself in applying the law as set out in *Beresford* to the facts established at the Inquiry.

14. The Report at [33] continues, '*It is therefore necessary to consider the statutory provisions that applied to the Application Site.*'. Reference [34]-[36] is then made to the purpose for which the owners acquired the land - housing. *Beresford* considered the relevance of purpose of acquisition and considered the relevant statutory provisions: e.g. Lord Bingham at [17] 'The Sports Arena is a grass arena of 10 acres or thereabouts. It was acquired by Washington Development Corporation (the "WDC") in the course of its development of Washington New Town pursuant to the New Towns Act 1965. The WDC's Washington New Town Plan 1973 identified the land as "parkland/open space/playing field". In 1974 the WDC, using excavated soil from the development of a shopping centre, laid out and grassed over the area. It would thereby have become recognisable as what is now the Sports Arena.'. Their lordships in *Beresford* were not persuaded that if the purpose of acquisition was for recreation then this 'trumped' any claim 'as of right' for user as a green; unless there had been clear overt acts by the owners unequivocally showing the inhabitants that user was by revocable permission or licence.

15. If the fact that the Land was held for housing was a determining factor in defeating user 'as of right' then the point would have been taken in *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25 ('*Trap Grounds*'): '... But the interest of the city council in these questions is concrete in the most literal sense. They wish to build houses on the land.' at [45]; '... The City Council, the landowner, objected to the application. They want to use the Trap Grounds, or some part, for housing development.' at [91]: see HHL's authorities bundle.

16. The Report at [37] refers to section 123 of the 1972 Act and *Beresford*. The Applicants accepted that in the present application section 123 had been used: this was addressed at ACS[35]-[40]. With respect it does not appear that the Inspector has considered these arguments but merely relied on the 'incidental comments' in *Beresford*. The Applicants maintain that their arguments give an answer to these 'incidental comments' and should have been considered and the CRA given reasoned advice.

17. In *Trap Grounds* this point was further considered: '89. The question whether these statutory powers [section 123] allow a local authority such as the City Council to appropriate open space land for housing use and then to dispose of the land free from any recreational rights of the local inhabitants whether or not the land has been registered as a town or village green remains for judicial decision.'

18. For a CRA to refuse an application on the limited unreasoned advice, '*I see no reason to depart from them.* [the incidental comments from *Beresford*] *On the contrary they correspond with my initial view on the matter.*' would, it is respectfully submitted, be unreasonable in the light of the Applicants submissions involving *Beresford* and the point not having been judicially considered. Especially so when the CRA is a local authority with housing duties with a potential or actual conflict of interest.

19. On the last point the Council is respectfully reminded of its wording in its report:

...

4. The Herefordshire Council has an interest in the land being made available for Social Housing and has backed a bid for funding as part of the proposed future allocation. It would not therefore be pertinent for the Council to determine this application as an interested party. In doing so it might be subjected to a costly legal contest.

...

6. This case is likely to be contentious due to the local opposition and the non clear cut issues involved. The judgement could go either way. An independent determination with recommendations to the Council could be the most cost effective long term solution.

Commons Act 2006

20. The Applicants at ACS[45] gave a reasoned invitation to the Inspector to consider the facts in the light of the Commons Act 2006: he has declined to do so without reasons. Other Inquiries have done so: see the three attached - Oswestry at [173], Coatham at [222]-[223] and Baldock at [122]-[123]. When such a request is made a reasonable CRA should consider the request with a view at least of possible saving future costs.

Applicants' request to the CRA

21. In the light of the above comments, and to ensure fairness, the Applicants request the CRA to submit the Report together with all HHL's and the Applicants' opening and closing submissions and comments on the Report to a second counsel experienced in village green law with a request to:

    a. note the facts in the Report found to be supported by the evidence; and

    b. consider those facts in the light of the law as held in *Beresford* and *Trap Grounds*; and

    c. advise the CRA if it should refuse or register the application; and

    d. if the advice at c. is to refuse whether the facts as found would be likely or not to be successful in supporting an application under the Commons Act 2006 for a period of user ending on or about the 16th October 2002.

Christopher J Whitmey
On behalf of the Applicants.

Date: 4th October 2007

Oldstone Furlong
Fownhope
Hereford
HR1 4PJ

Appended: three reports on other village green applications to other CRA's.

Inquiry Into Application To Register Argyll Rise As a Town Green

Request For Advice From The Inspector On His Report Of The 19th September 2007 To Herefordshire Council

I would be grateful if the Inspector would advise on the following points in his report.

1. In paragraph 35 the Inspector's view is that, the site having been acquired and laid out as open space under statutory housing powers, it follows that recreational use was "by right", rather than as of right. I am not sure if the Inspector considers that use by right was as a direct consequence of the land's statutory background, or as a result of an implied permission arising from that background, or a combination.

   However, whatever the source, if use is said to be "by right" I think that raises the question what are its terms? An important one might be when and in what circumstances is it revocable.

   In Beresford, Lord Scott at paragraph 45 makes what he appears to consider an important distinction between a permission, whether or not express, which may indicate to the public that the permission is temporary only and therefore precatory, and one which may indicate to the public that their right is intended to the permanent. At paragraph 49 Lord Scott again refers to the distinction and concludes that the inhabitants had every reason to believe that they had the right to use the land in question on a permanent basis.

   Half of the people who submitted evidence questionnaires said the open space was the reason why they had moved to the locality and most said they thought they had the right to use the land because it was public open space. I cannot recall any evidence to the effect that people thought, or were told, that the right to use the space was temporary and could be withdrawn. It might be expected that any uncertainty about this would have been of particular concern to people exercising a Right to Buy/Acquire, unless they felt that use was in some way permanent and of right.

   (i) Does the Inspector consider it could be inferred from the evidence heard if the right, whatever its nature, was intended to be permanent or revocable, and if this would affect his recommendation.

   (ii) How does the Inspector interpret Lord Scott's view at paragraph 43 that implied or express permissions are not necessarily incompatible with use as of right. For example, might use be by right in the sense that people entering housing open space would not be trespassers, but that their use of the land was as of right?

2. The Inspector's view that the Council's disposal of the land under section 123 of the Local Government Act 1972 defeats a claim to TVG status is backed up by incidental comments in Beresford by Lord Scott. Lord Scott's reasoning is, "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.

(i) Section 122 (1) provides that an appropriation "..shall be subject to the rights of other persons in, over or in respect of the land concerned." How does the Inspector consider that this fits with Lord Scott's view that an appropriation would plainly override any public rights of use of an open space that had previously existed?

(ii) Section 122(2B) provides for land held for the purposes of section 164 of the Public health Act 1875 or for section 10 of the Open spaces Act 1906 to be freed from any trust arising "solely" by virtue of the land being held in trust for the enjoyment of the public in accordance with section 164 or section 10. At the time of its acquisition the Argyll Rise land was part of a private estate and was subsequently held for housing purposes. However, even it is arguable that the land became subject to section 10 or section 164 along the lines suggested by Lord Scott in paragraph 30 of Beresford, does the Inspector consider that any rights over the Argyll Rise land would have arisen "solely" by virtue of the land being held under the 1875 or 1906 Acts?

(iii) Does the Inspector consider that section 122(2B) should be read as an exception to the provision in section 122 (1) regarding the rights of other persons, and if so, should section 123 be similarly read, even though not expressly referring to third party rights?

3. I asked the parties to let me have their comments on the Inspector's report. The objector considered the Council should accept the recommendation to refuse the application I enclose a copy of Mr Whitmey's comments on behalf of the applicants. I would be grateful for any additional advice, on comments relating to (i) "as of right" and (ii) the effect on third party rights of a disposal under section 123, that the Inspector has not covered by his response to my own queries.

Peter Crilly for Herefordshire Council
16th October 2007

- 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

Timothy Jones

Herefordshire Council,
(FAO Mr Peter Crilly),
Brockington,
35 Hafod Road,
Hereford, HR1 1ZT.
DX 135296 Hereford 3.

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.

TIMOTHY JONES

No. 5 Chambers,
Birmingham - London - Bristol
Tel. 0870 203 5555

9th November 2007.

Instructions To Counsel To Advise on Application To Register Land At Argyll Rise, Hereford As A Town Or Village Green

1. Instructing solicitor is Herefordshire Council's Head of Law and Democratic Services

2. The Council held a non-statutory public inquiry into an application to register land at Argyll Rise, Hereford as a town or village green.

3. Counsel has herewith copies of,

   (i) Inspector's report on the inquiry
   (ii) Council's request to the Inspector for advice on his report
   (iii) Applicants' comments on the report
   (iv) Inspector's opinion on the Council's request for advice and on the Applicants' comments.

4. The Inspector advised against registration because he considered that use had not been as of right, the land having been acquired, laid out and managed as open space under the Housing Act 1957. The land had been included in a transfer of the Council's housing stock in 2002 and the Inspector considered that the use of Section 123 (2A) of LGA 1972 also defeated the application.

5. Counsel is requested to advise,

   (i) if the use of housing act powers to acquire, lay out and manage land as open space for recreational use by local residents means that use is not as of right

   (ii) if a disposal in accordance with Section 123 (2A) of the Local Government Act 1972 defeats a claim for town or village green status.

   Counsel is not being asked to review any particular legal submissions made at the inquiry and these have not been included with his Instructions. Instructing solicitor anticipates being able to apply the general advice requested to the land in question. However, if Counsel considers there is anything in the papers provided that he feels might affect his advice in relation to the application land can he please ask for whatever additional information he would like to have.

6. A second application for the same land under the Commons Act 2006 was received on the 16th October 2007. The evidence submitted is essentially the same as for the first application but the Applicants now say that use as of right

ended on the 17th October 2002. This is the date by which notices published in accordance with Section 123 (2A) requested comments to be sent to the Council. The land was transferred on the 26th November 2002.

7. Counsel is requested to advise,

   (i) if the Applicants are entitled to make a second application on the basis that use, as of right, ended on the 17th October 2002 (or on the date of transfer, 26th November 2002) and are in time under Section 15(4) of the Commons Act 2006

   (ii) even if use had been as of right, would the disposal under Section 123 defeat the second application.

Can Counsel please contact Peter Crilly for any further information needed.
Tel 01432 261853 or email pcrilly@herefordshire.gov.uk

(Instructions sent 4. 12. 2007)

A D V I C E

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

6 February 2008

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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.

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.

PHILIP PETCHEY

Francis Taylor Building
Temple
London EC4Y 9BY

16 June 2008

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.

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[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

25 January 2008

2-3 Gray's Inn Square,
London, WC1R, 5JH.

herefordshire HOUSING

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Dear Mr Crilly,

re: Application to register land at Argyll Rise, Hereford as a Town or Village Green

Thank you for sending me two Advices of Philip Petchey, dated 6th February and 16th June 2008 (the latter amended on 20th June) in relations to the above Application, and an Advice of Richard Ground in relation to land in Coventry. You have kindly offered Herefordshire Housing Limited ('HHL') the opportunity to comment on this additional material.

The Application in question was made as long ago as February 2006, and HHL has made clear its position in regard to the Application throughout. That is that the land should not be registered because the statutory requirements of s.13 Commons Registration Act 1965 (as amended) are not fulfilled. Full legal submissions were made on HHL's behalf at the public inquiry (and subsequently, in response to post inquiry representations made on behalf of the Applicants) by our counsel, Miss Morag Ellis QC. Those submissions have, in substance, been accepted by two very senior independent expert members of the Bar on the facts of the case. We continue to rely upon our legal submissions; reiteration at this stage is not likely to assist the Registration Authority in coming to a decision in a timely fashion.

With regard to the Advice to Coventry City Council by Mr Ground, it should be noted that the facts of that case were materially different, particularly with regard to the landowner's treatment of the site in relation to s.122 Local Government Act 1972. It is also a particular feature of this application before Herefordshire Council that the Inspector found that the neighbourhood would be Newton Farm Estate and that the statutory powers of acquisition and management related to the development of that estate. Such features were absent in the Coventry case. Furthermore, Mr Ground's application of the law to the facts of that case is in no way binding on Herefordshire Council.

Finally I should simply wish to add that the Council as Registration Authority is charged with the duty of determining the Application according to the law as it stands. It has amply discharged its duty of properly informing itself of the law by taking advice from two senior expert practitioners. HHL submit that there is no reason not to follow their advice as to the proper decision on this Application.

Yours sincerely R. Christie

ROBERT CHRISTIE, SOLICITOR
COMPANY SECRETARY
LEGAL & BUSINESS SUPPORT MANAGER
HEREFORDSHIRE HOUSING LIMITED

cc. Martin Gilleland.

Working with communities to provide decent homes

COMMONS REGISTRATION ACT 1965 (as amended) - SECTION 13

-and-

The Commons Registration (New Land) Regulations 1969

COMMONS ACT 2006 - SECTION 15(4)

-and-

The Commons (Registration of Town or Village Greens)

(Interim Arrangements) (England) Regulations 2007

In the matter of the Applications for the registration of Land at Hereford, known as Argyll Rise, Newton Farm, Hereford ('the Land' excluding the previous play area), as a town or village green.

Applicants' Comments on Mr Philip Petchey's Advice of 6th February 2008 ('Advice.1')
and Further Advice of 16th June 2008 ('Advice.2').
Pursuant to the email, 20 June 2008, from Mr Peter Crilly.

Introduction

1 The Applicants are much obliged to the Commons Registration Authority ('CRA') for Herefordshire acceding to the Applicants' request of 4th October 2007:

21. In the light of the above comments, and to ensure fairness, the Applicants request the CRA to submit the Report ... and comments on the Report to a second counsel experienced in village green law with a request to:

a. note the facts in the Report found to be supported by the evidence; and

b. consider those facts in the light of the law as held in Beresford *and* Trap Grounds*; and*

c. advise the CRA if it should refuse or register the application; and

d. if the advice at c. is to refuse whether the facts as found would be likely or not to be successful in supporting an application under the Commons Act 2006 for a period of user ending on or about the 16th October 2002.

2 Having carefully considered Advice.1 and Advice.2 and with the comments set out in the paragraphs below it is respectfully submitted that to meet the needs of natural justice a reasonable CRA should:

A defer a decision on the Applicants' first Application until after considering the Applicants' second Application in the light of the advice on that application after due process; and

B consider the Applicant's second Application in accordance with the regulations and hold a non-statutory inquiry, accepting that a significant number of the inhabitants of a neighbourhood within a locality have indulged in lawful sports and pastimes on the Land for a period of

at least 20 years, to consider the issues of both fact and law including those identified in Advice.1 and Advice.2 ; and

C invite the County of Herefordshire District Council as landowner of the Land at the material time of the second Application to act as the Lead Objector to the second Application.

The first Application.

3 Advice.1 and Advice.2 do not unequivocally endorse the advice of the Inspector, Mr Tim Jones of counsel, "*to reject the application and not to register the Application Site (or any part of it) as a town or village green*.". They raise serious questions of fact and law. See:

16. This all said [about user 'as of right'], *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.* Advice.1

19. The upshot of this discussion [whether user was 'as of right'] *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.* Advice.1

22. ... 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. Advice.1

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***. (***emphasis*** added) Advice 1.

1. ... 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.* (***emphasis*** added) Advice.2

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. Advice.2

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.* (***emphasis*** added) Advice.2

Issues of fact.

4 Advice.1 at [18] note[2] states:

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.

5 With respect, in context 'owners' should be 'tenants'. The Housing Act which gave the 'right to buy' came into force on 3 October 1980. Two of the Applicants have exercised their right to buy; as may a number of those inhabitants indulging in lawful sports and pastimes. Even if it is correct that tenants use the Land 'by right', which is not accepted, this does not automatically apply to owner-occupied property, Factual and legal differences between owner and tenant were not examined in the first Application inquiry and could be critical in both the first and second Applications.

6 Advice.1 at [24] clearly concludes that there is a need to clarify the statutory basis as to how the Land became an open space and how its maintenance was funded. Especially before the matter ends up in court: "*not unlikely ... whatever the outcome.*" in Mr Petchey's view. He also observes, "*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.*"

7 Further, very recently it has come to light that the land in Muir Close adjoining the Land was sold in 1974 by the then City Council of Hereford to Muir (2) Housing Association Limited. Therefore the status of users of the Land from Muir Close (including one of the applicants and witnesses) in relation to the council needs further examination. At the Inquiry held on 31st July and 1st August 2007 the objector Herefordshire Housing Limited ('HHL') witness Mr Stephen Phillips FRICS exhibited SP5 which **appears** to include the Muir Close land as part of the land now owned by HHL. This is clearly not the case: on 27 January 1984 Muir Group Housing Association Limited conveyed the freehold of 35 Muir Close to one of the applicants. With hindsight it is an understandable oversight. However it is a relevant fact and on its own merits the reconvening of the inquiry into the first Application.

The second Application.

8 Advice.1 at [23] states:

> *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***. (***emphasis*** added)

9 The CRA have a mandatory duty to consider the second Application in accordance with the The Commons (Registration of Town or Village Greens)(Interim Arrangements) (England) Regulations 2007.

Conclusion.

10 Under The Commons Registration (New Land) Regulations 1969 an application has to be determined either by rejection or the land registered as a town or village green: there is no provision for it to be withdrawn. It is respectfully submitted the unequivocal advice of Mr Tim Jones of counsel for rejecting the first Application is not accepted in Advice.1 and Advice.2. Issues of fact and/or

law are raised in Advice.1 and Advice.2 which may be clarified if not resolved by considering the second Application on the agreed basis that a significant number of the inhabitants of a neighbourhood within a locality have indulged in lawful sports and pastimes on the Land for a period of at least 20 years, as found as a fact in the first Application and accepted by both the Applicants and Objector.

11 The Applicants accept the reality of Mr Petchey's comment in Advice.1 at [26] "*The simpler and cheaper course is to make a decision and leave it to the appropriate party to seek judicial review, if so advised*"; whilst accepting the fairness of his advice to members in the same paragraph. However this factor could be mitigated if the CRA, as the point of law would be one of public importance, gave an undertaking to the Applicants not to seek costs if an application for judicial review was thought necessary and unsuccessful.

12 Consideration of the second Application would enable both the Applicants and Objector to focus clearly on the relevant facts and points of law in the light of Mr Petchey's advice.

13 In the second Application the material period of at least 20 years is a period before HHL became owners of the Land. All material facts concerning the acquisition and management of the Land are in the possession of the Herefordshire Council. It is respectfully submitted that it would be appropriate and fair for the council to act as Lead Objector — this causes no problem as any person may object[1] — and, as in the Coventry case considered by Mr Petchey, the CRA is often the landowner as well as the lead objector and different officers instruct the Inspector and the Objector's counsel.

14 No discourtesy whatsoever is intended, but it is requested that to meet the needs of natural justice and good administration an inspector who is well experienced in the complex law of town and village greens is appointed to carry out the next inquiry and advise the CRA[2, 3].

15 It is requested that this document is appended to any report to a CRA committee.

Christopher J Whitmey
for the Applicants/Newton Farm Town Green Action Group.
Saturday 5 July 2008

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1 Recently an applicant sought a direction that Mr Whitmey be stopped from objecting to a town and village green (tvg) application in Wiltshire (where the CRA is also lead objector): counsel, well experienced in the law of tvg's, advised the CRA that anyone can object to a tvg application and the direction was denied.

2 *R(Whitmey) v Commons Commissioners* [2005] 1 QB 282 CA: "It will mean that, in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent **expert** to hold a public inquiry, and find the requisite facts, in order to obtain the **proper** advice before registration." at [66] (**emphasis** added).

3 *Clark v Kelly* [2004] 1 AC 681 PC: "Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation." at 702D. With respect, in the circumstances, it is suggested that 'justices' may be replaced by 'CRA' and 'open court' by 'an inquiry' to meet the needs of natural justice.

HEREFORDSHIRE COUNCIL

HEREFORDSHIRE COUNCIL

REGULATORY COMMITTEE DECISION NOTICE
APPLICATION TO REGISTER LAND AT ARGYLL RISE, BELMONT, HEREFORD AS A TOWN GREEN

APPLICANT'S NAME	Newton Farm Town Green Action Group.
APPLICATION TYPE	Register land as a Town Green.
COMMITTEE MEMBERS	Councillor Brig. P Jones (Chairman) Councillor JW Hope (Vice-Chairman) Councillors DJ Benjamin, Mrs ME Cooper, PGH Cutter, Mrs SPA Daniels, Mrs H Davies, JHR Goodwin, R Mills, A Seldon and DC Taylor
DATE OF MEETING	12th August, 2008

Members of the Council's Regulatory Committee considered an application to register land at Argyll Rise, Belmont, Hereford as a Town Green.

At the meeting the officer presented all the details about the application, the relevant legal aspects and the alternatives that were available to the Council, together with a recommendation that the application should be approved.

The circumstances which had led to the application being made to the Council were considered. It was noted that the land was part of a larger area which had been purchased for housing purposes in 1959 by the former Hereford City Council under the powers of the Housing Act 1957 and was subsequently laid out as open space as part of the surrounding housing development during the 1970s. In November 2002 the land was one of a number of open spaces included in a transfer of the Council's housing stock to Herefordshire Housing Limited.

The Council had received two applications from the same Applicants to register the Land.The first application was received on 6 February 2006 and the Council had placed notices for two weeks in the Hereford Times and on the Land stating that the application had been made and requesting any objections to be sent to the Council. An objection was received from Herefordshire Housing Limited. A non-statutory Public Inquiry had been conducted by a barrister (Inspector) to hear evidence and legal arguments from the applicants and Herefordshire Housing Limited. It was noted, that if the land was registered as a Town Green, this would effectively prevent any development which would interfere with recreational use. The view of the Inspector was that the application should be refused.

Mr C Whitmey addressed the Committee on behalf of the Newton Farm Town Green Action Group and Mr A Porten QC on behalf of Herefordshire Housing Limited. They suggested that if the Committee was mindful to grant the application, the matter should be deferred because they felt that there was a need to consider all the issues involved.

The Committee determined the application as follows:

We have heard the submissions made by both Mr Whitmey (for the applicant) and by Mr Porten (Counsel for the objector).

We have considered the officer's report and the various written submissions before us in the bundle.

We have studied the report of the Inspector and the second opinion from Mr Petchey.

The burden of proof in this matter rests with the applicant and it is for the applicant to make its case for registration to the civil standard, namely on the balance it probabilities.

We concur with the Inspector that the land in question has been used by a significant number of local residents for various recreational sporting and leisure purposes for over a 20-year period.

This Committee has however to determine whether that use amounts to use "as of right", within the meaning of law to satisfy the test for the establishment of a Town green.

We find that the land in question was acquired for the use of residents of the new residential development, when the estate was laid out following its acquisition under the Housing Act 1957.

We consider that use of the land during the relevant period has been consistent with a site laid out, managed and maintained under the statutory housing powers.

We consider that the recreational use of land was by reason of it being open space held for housing purposes with the context of the estate.

Use "as of right" in the sense of that required to establish Town Green status has not been made out on the balance of probabilities in this application.

The application to register the land as a Town Green therefore fails.

Signed……Councillor Brig P Jones CBE, Chairman of the Regulatory Committee,

12 August, 2008

FORM 44

Commons Act 2006: Section 15

Application for the registration of land as a Town or Village Green

Official stamp of registration authority indicating valid date of receipt:

Application number:

Register unit No(s):

VG number allocated at registration:

(CRA to complete only if application is successful)

Applicants are advised to read the 'Guidance Notes for the completion of an Application for the Registration of land as a Town or Village Green' and to note the following:

- All applicants should complete questions 1–6 and 10–11.
- Applicants applying for registration under section 15(1) of the 2006 Act should, in addition, complete questions 7–8. Section 15(1) enables any person to apply to register land as a green where the criteria for registration in section 15(2), (3) or (4) apply.
- Applicants applying for voluntary registration under section 15(8) should, in addition, complete question 9.

1. Registration Authority

Note 1
Insert name of registration authority.

To the

HEREFORDSHIRE COUNCIL

2. Name and address of the applicant

Note 2
If there is more than one applicant, list all names. Please use a separate sheet if necessary. State the full title of the organisation if a body corporate or unincorporate.

If question 3 is not completed all correspondence and notices will be sent to the first named applicant.

Name: (A) JACQUELINE KIRBY, (B) KEITH MILLER, (C) JACKIE MILLS

Full postal address:

(A) 35 MUIR CLOSE, HEREFORD HR2 7EX
(B) 25 DUNOON MEAD, HEREFORD HR2 7BL
(C) 2 ARGYLL RISE, HEREFORD HR2 7BN

Postcode

Telephone number: (A) (01432) 353971
(incl. national dialling code)

Fax number: (A) (01432) 353971
(incl. national dialling code)

E-mail address: (A) megilleland@hotmail.com

3. Name and address of solicitor, if any

Note 3
This question should be completed if a solicitor is instructed for the purposes of the application. If so all correspondence and notices will be sent to the person or firm named here.

Name: NONE

Firm:

Full postal address:

Post code

Telephone number:
(incl. national dialling code)

Fax number:
(incl. national dialling code)

E-mail address:

4. Basis of application for registration and qualifying criteria

Note 4
For further advice on the criteria and qualifying dates for registration please see section 4 of the Guidance Notes.

If you are the landowner and are seeking voluntarily to register your land please tick this box and move to question 5.

Application made under **section 15(8)**: ☐

If the application is made under **section 15(1)** of the Act, please **tick one** of the following boxes to indicate which particular subsection and qualifying criterion applies to the case.

Section 15(2) applies: ☐

** Section 15(6) enables any period of statutory closure where access to the land is denied to be disregarded in determining the 20 year period.*

Section 15(3) applies: ☐

Section 15(4) applies: ☒

If **section 15(3) or (4)** applies please indicate the date on which you consider that use as of right ended.

17th OCTOBER 2002

If **section 15(6)*** applies please indicate the period of statutory closure (if any) which needs to be disregarded.

5. Description and particulars of the area of land in respect of which application for registration is made

Note 5
The accompanying map must be at a scale of at least 1:2,500 and show the land by distinctive colouring to enable to it to be clearly identified.

Name by which usually known:

LAND BOUNDED BY ARGYLL RISE, PIXLEY WALK, MUIR CLOSE, DUNDON MEAD AND WATERFIELD ROAD KNOWN LOCALLY BY VARIOUS NAMES EG "THE GREEN"

Location:

NEWTON FARM, HEREFORD IN THE BELMONT WARD OF HEREFORD CITY PARISH

** Only complete if the land is already registered as common land.*

Shown in colour on the map which is marked and attached to the statutory declaration.

Common land register unit number (if relevant) *

Note 6
It may be possible to indicate the locality of the green by reference to an administrative area, such as a parish or electoral ward, or other area sufficiently defined by name (such as a village or street). If this is not possible a map should be provided on which a locality or neighbourhood is marked clearly.

6. Locality or neighbourhood within a locality in respect of which the application is made

Please show the locality or neighbourhood within the locality to which the claimed green relates, either by writing the administrative area or geographical area by name below, or by attaching a map on which the area is clearly marked:

NEWTON FARM ESTATE: THE AREA OF LAND BOUNDED BY THE A465 BELMONT ROAD, THE GREAT WESTERN WAY, THE MARCHES RAILWAY LINE, THE BOUNDARY OF THE BUILT-UP AREA OF THE CITY OF HEREFORD AND THE PARISH OF BELMONT WITHIN THE CIVIL PARISH OF THE CITY OF HEREFORD OR BELMONT WARD

Tick here if map attached: ☒

7. Justification for application to register the land as a town or village green

Note 7
Applicants should provide a summary of the case for registration here and enclose a separate full statement and all other evidence including any witness statements in support of the application.

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

This application is justified because of the results of a two day public inquiry held at the Three Counties Hotel, Belmont, on Tuesday 31st July and Wednesday 1st August 2007 on behalf of the Herefordshire Council and conducted by Mr Timothy Jones, barrister.

Mr Jones having heard and read a substantial amount of evidence reached conclusions of fact of which he was confident and which were not border-line. The facts were included in a report dated 19th September 2007 to the Council ('the Report') and appended to this application.

Mr Jones reached the firm view that:

1. The number of people using the land in question was sufficient to indicate that their use of the land signified that it had been in general use by the local community for informal recreation: the Report [19] - the significant number of inhabitants requirement.

2. The Newton Farm area as a whole was the obvious area in the civil parish of the City of Hereford or Belmont Ward: the Report [20]-[25] - the neighbourhood within a locality requirement.

3. The bulk of the use of the Application Site was for lawful sports and pastimes: the Report [26] - the lawful sports and pastimes requirement.

4. Such use for lawful sports and pastimes had been throughout the period since it was first brought into use: the Report [17]. The site was first brought into use in or about 1976 [see attached evidence forms - the not less than 20 years requirement.

5. There were no notices that referred to byelaws or activities that were forbidden.

6. There was no question of force or stealth: the Report [30] - two parts of the 'as of right' requirement.

7. Herefordshire Council's use of section 123 of the 1972 Act (to transfer the land on 26th November 2002) defeated a claim to TVG status: the Report [42] - the 'without permission' requirement was not met.

At the public inquiry the applicants (the same as in this one) tendered evidence that since use of the site in this application for informal recreation by the inhabitants there had been no overt acts whatsoever by any of the landowners to bring it to the attention of the said inhabitants that user was by revocable permission or licence.

Thirty (30) evidence forms are attached concerning the length of use and lack of the said overt acts.'

Note 8
Please use a separate sheet if necessary.

Where relevant include reference to title numbers in the register of title held by the Land Registry.

If no one has been identified in this section you should write "none"

This information is not needed if a landowner is applying to register the land as a green under section 15(8).

8. Name and address of every person whom the applicant believes to be an owner, lessee, tenant or occupier of any part of the land claimed to be a town or village green

HEREFORDSHIRE HOUSING LIMITED
LEGION WAY
HEREFORD
HR1 1LN

9. Voluntary registration – declarations of consent from 'relevant leaseholder', and of the proprietor of any 'relevant charge' over the land

Note 9
List all such declarations that accompany the application. If none is required, write "none".

This information is not needed if an application is being made to register the land as a green under section 15(1).

NONE

10. Supporting documentation

Note 10
List all supporting documents and maps accompanying the application. If none, write "none"

Please use a separate sheet if necessary.

A REPORT INTO THE MATTER OF AN APPLICATION TO REGISTER AS A TOWN GREEN LAND AT ARGYLL RISE, HEREFORD – TIMOTHY JONES, INSPECTOR, 19th SEPTEMBER 2007

30 EVIDENCE FORMS

"MAP A" AND "MAP B"

Note 11
If there are any other matters which should be brought to the attention of the registration authority (in particular if a person interested in the land is expected to challenge the application for registration). Full details should be given here or on a separate sheet if necessary.

11. Any other information relating to the application

THE DISTRICT COUNCIL OF HEREFORDSHIRE AS A PREVIOUS OWNER.

Note 12
The application must be signed by each individual applicant, or by the authorised officer of an applicant which is a body corporate or unincorporate.

Date: 15th October 2007

Signatures:

REMINDER TO APPLICANT

You are advised to keep a copy of the application and all associated documentation. Applicants should be aware that signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence. The making of a false statement for the purposes of this application may render the maker liable to prosecution.

Data Protection Act 1998

The application and any representations made cannot be treated as confidential. To determine the application it will be necessary for the registration authority to disclose information received from you to others, which may include other local authorities, Government Departments, public bodies, other organisations and members of the public.

Statutory Declaration In Support

To be made by the applicant, or by one of the applicants, or by his or their solicitor, or, if the applicant is a body corporate or unincorporate, by its solicitor, or by the person who signed the application.

[1] *Insert full name (and address if not given in the application form).*

I...K. Miller[1] solemnly and sincerely declare as follows:—

[2] *Delete and adapt as necessary.*

[3] *Insert name if Applicable*

1.[2] I am ((~~the person~~ (one of the persons) who ~~(has)~~ (have) signed the foregoing application)) (~~(the solicitor to (the applicant) (~~[3] ~~one of the applicants~~)).

2. The facts set out in the application form are to the best of my knowledge and belief fully and truly stated and I am not aware of any other fact which should be brought to the attention of the registration authority as likely to affect its decision on this application, nor of any document relating to the matter other than those (if any) mentioned in parts 10 and 11 of the application.

3. The map now produced as part of this declaration is the map referred to in part 5 of the application.

[4] *Complete only in the case of voluntary registration (strike through if this is not relevant)*

4.[4] I hereby apply under section 15(8) of the Commons Act 2006 to register as a green the land indicated on the map and that is in my ownership. I have provided the following necessary declarations of consent:

(i) a declaration of ownership of the land;
(ii) a declaration that all necessary consents from the relevant leaseholder or proprietor of any relevant charge over the land have

Cont/

[4] *Continued*

been received and are exhibited with this declaration; or
(iii) where no such consents are required, a declaration to that effect.

And I make this solemn declaration, conscientiously believing the same to be true, and by virtue of the Statutory Declarations Act 1835.

Declared by the said
KEITH MILLER
at LAMBE Corner Solicitors
36/37 Bridge Street
~~Hereford~~
this 16th day of OCTOBER 2007

K Miller
Signature of Declarant

Before me *

Signature:

Address:

LAMBE CORNER
36/37 BRIDGE STREET
HEREFORD HR4 9DJ

Qualification: SOLICITOR

*** The statutory declaration must be made before a justice of the peace, practising solicitor, commissioner for oaths or notary public.**

Signature of the statutory declaration is a sworn statement of truth in presenting the application and accompanying evidence.

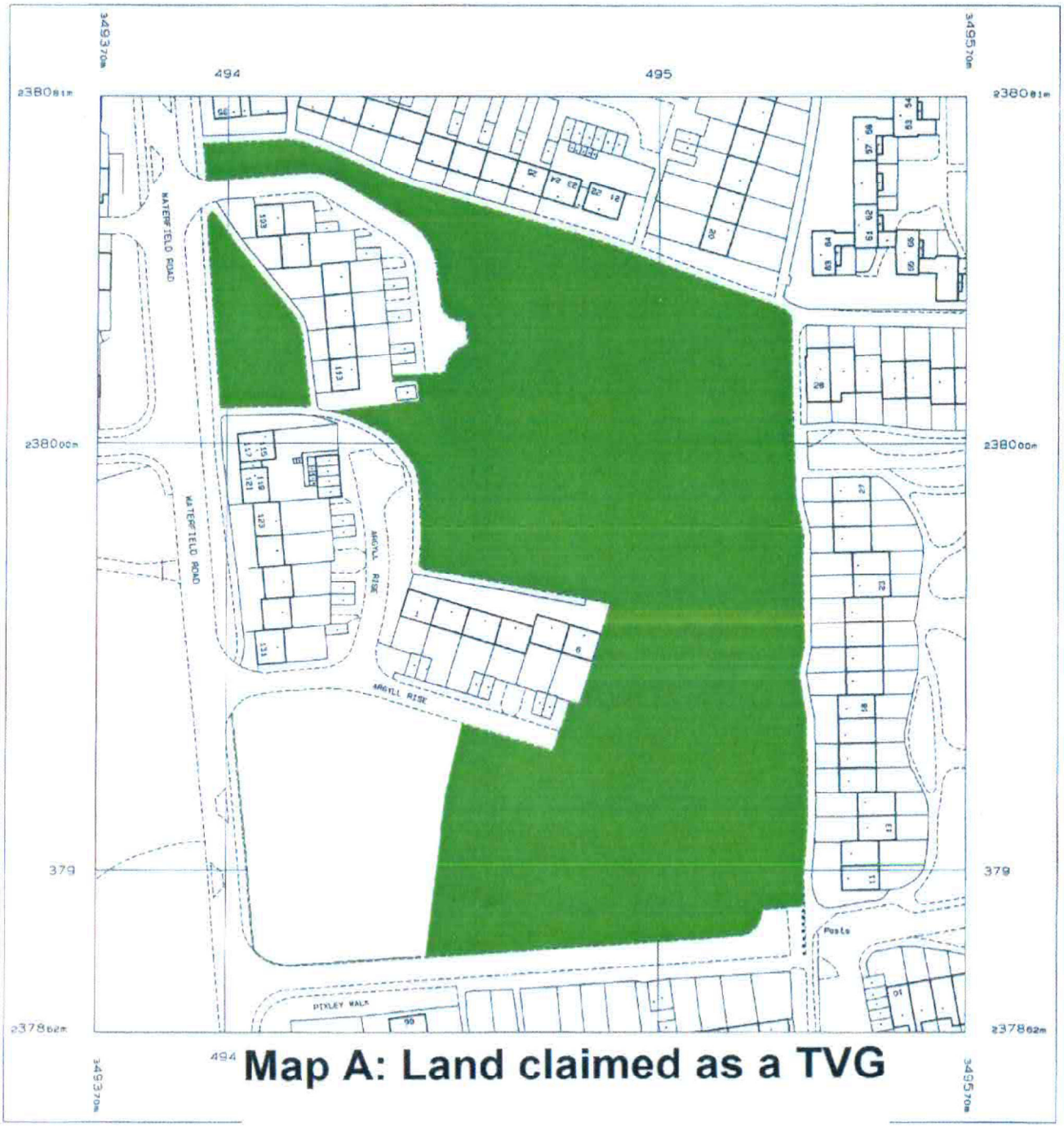
REMINDER TO OFFICER TAKING DECLARATION:

Please initial all alterations and mark any map as an exhibit

---

Ordnance Survey®

Superplan®



Map A: Land claimed as a TVG

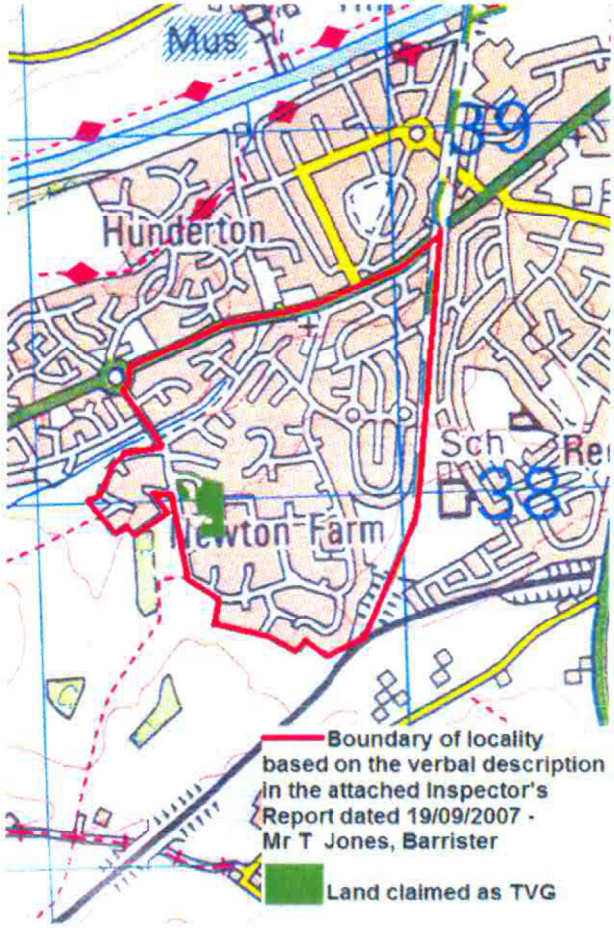
National Grid sheet reference at centre of this Superplan: SO4937NW

The representation of a road, track or path is no evidence of a right of way.

Heights are given in metres above Datum.

The alignment of tunnels is approximate.

Scale 1: 1250



Map B:
The claimed locality

EQ1

EVIDENCE QUESTIONNAIRE IN SUPPORT OF REGISTRATION AS A NEW GREEN (page 1)

Name MRS SUSAN BRUSSAU

Present Address 1 ARGYLL RISE

HEREFORD

Post Code HR2 7BN Telephone 01432 278528

1. Address when you used the land. *(The land in this form means the "claimed land")*

1 ARGYLL RISE

2. Address when you knew the land was used by the local inhabitants.

10 BRONSIL CLOSE, NEWTON FARM, HEREFORD

3. Did you sign the reverse side of "Maps A & B" confirming they relate to this evidence provided by you? Delete as applicable. YES / ~~NO~~.

("Map A" is the map showing the claimed land, and "Map B" the claimed locality which use the land. which should accompany the form and which will subsequently accompany the application. (See Form 44 question 5 and 6)

4. By what name is the land shown on "Map A" known?

THE PARK, THE GREEN, THE FIELDS

5. Has it ever to your knowledge been known by any other name? If so, what name?

6. How many years have you known the land?

From 1964 to 2007

7. Between which years did you use it?

From 1964 to 1970 Then from 1994 to 2007

8. Did you move to this locality for any particular reason? What was the reason?

OPEN SPACE

9. What contact do you have with the people living in your locality?

NEIGHBOURLY, SOCIALLY

10. Do you consider yourself to be a local inhabitant in respect of the land?

YES

11. Where do the people who use this land come from?

NEWTON FARM | BELMONT

12. Whom do you consider to be local inhabitants in respect of this land?

PEOPLE LIVING AROUND THE GREEN + RESIDENTS OF NEWTON FAR

13. What do you consider to be the boundaries of your locality?

BELMONT WARD

14. What recognisable facilities are available to the local inhabitants of your locality? *Please tick facilities that apply and add any OTHER additional matters not covered.*

- ✓ SCHOOL CATACHMENT AREA
- ✓ LOCAL SCHOOL
- ___ RESIDENTS' ASSOCIATION
- ✓ COMMUNITY CENTRE
- ✓ LOCAL CHURCH OR PLACE OF WORSHIP
- ✓ SPORTS FACILITY
- ✓ LOCAL SHOPS
- ✓ AREA POLICEMAN
- ✓ DOCTOR'S SURGERY
- ✓ COMMUNITY ACTIVITIES
- ✓ NEIGHBOURHOOD WATCH
- ✓ A CENTRAL FEATURE
- ___ SCOUT HUT
- ___ OTHER (Please state)

15. To your knowledge are there any public paths crossing the land?

NO

16. Why do you go onto this piece of land?

EXERCISE, DOG WALKING, SOCIAL ACTIVITIES

17. How often did you use the land (apart from the public paths)?

EVERY DAY

18. how often do you use the land?

WEEKENDS

19. What activities did you take part in?

TEAM GAMES, BONFIRE NIGHT + OTHER EVENTS

20. What activities do you take part in?

AS ABOVE

21. Does your immediate family use the land? If so what for?

YES, AS ABOVE

22. Have you seen other people using the land? If so what for?

YES

23. Do you know of any community activities that take place or have taken place on the land? Please list them and state when and for how long they have taken place.

BONFIRE NIGHT ACTIVITIES, AS LONG AS I CAN RECALL

24. Do you participate in any of them?

YES

25. Do any organisations use the land for sports and pastimes?

NO

26. Do any seasonal activities take place on the land?

YES

27. Please tick all the activities that you have seen taking place on the land?

✓ CHILDREN PLAYING	___ PICKING BLACKBERRIES	✓ PICNICKING
✓ ROUNDERS	___ COMMUNTIY CELEBRATIONS	✓ KITE FLYING
___ FISHING	___ FETES	✓ PEOPLE WALKING
___ DRAWING AND PAINTING	✓ FOOTBALL	✓ BONFIRE PARTIES
✓ DOG WALKING	✓ CRICKET	✓ BICYCLE RIDING
✓ TEAM GAMES	✓ BIRD WATCHING	✓ CAROL SINGING
___ OTHER (Please state)		

28. Do people from outside your locality use the land?

YES

29. Do people from outside your locality have the right to use the land?

DON'T KNOW

30. Do you know who is the owner of the land?

HEREFORDSHIRE HOUSING

31. Do you know who is the occupier of the land?

NO

32. Are you his or her employee? ~~YES~~ / NO

33. Are you his or her tenant? ~~YES~~ / NO

34. Has the owner seen you on the land YES / NO. What did he or she say?

DON'T KNOW. NO-ONE HAS EVER APPROACHED ME.

35. Has the occupier seen you on the land YES / NO. What did he or she say?

DON'T KNOW

36. Was permission ever sought by you for activities on the land. If so, from whom?

NO

37. Did anyone ever give you permission to go on the land?

NO

38. Have you ever been prevented from using the land? If yes, when and the reason

NO

39. Has anyone else to your knowledge ever been prevented from using the land? If yes, when and the reason

NO

40. Has any attempt ever been made by notice or fencing or by any other means to prevent or discourage the use being made of the land by the local inhabitants? If yes, give examples.

NO

41. What right did you have to go onto the land?

OPEN SPACE

42. What right did you think you had to go onto the land?

OPEN SPACE

43. Do you have any photographs or any other evidence of use of the land by local inhabitants?

NO

44. Are you willing to lend them to us?

45. If so, have you signed the reverse of each item?

46. Have you made a separate written statement?

NO

If you have knowledge of others who may be in a position to complete an evidence form, would you please write their names and addresses below.

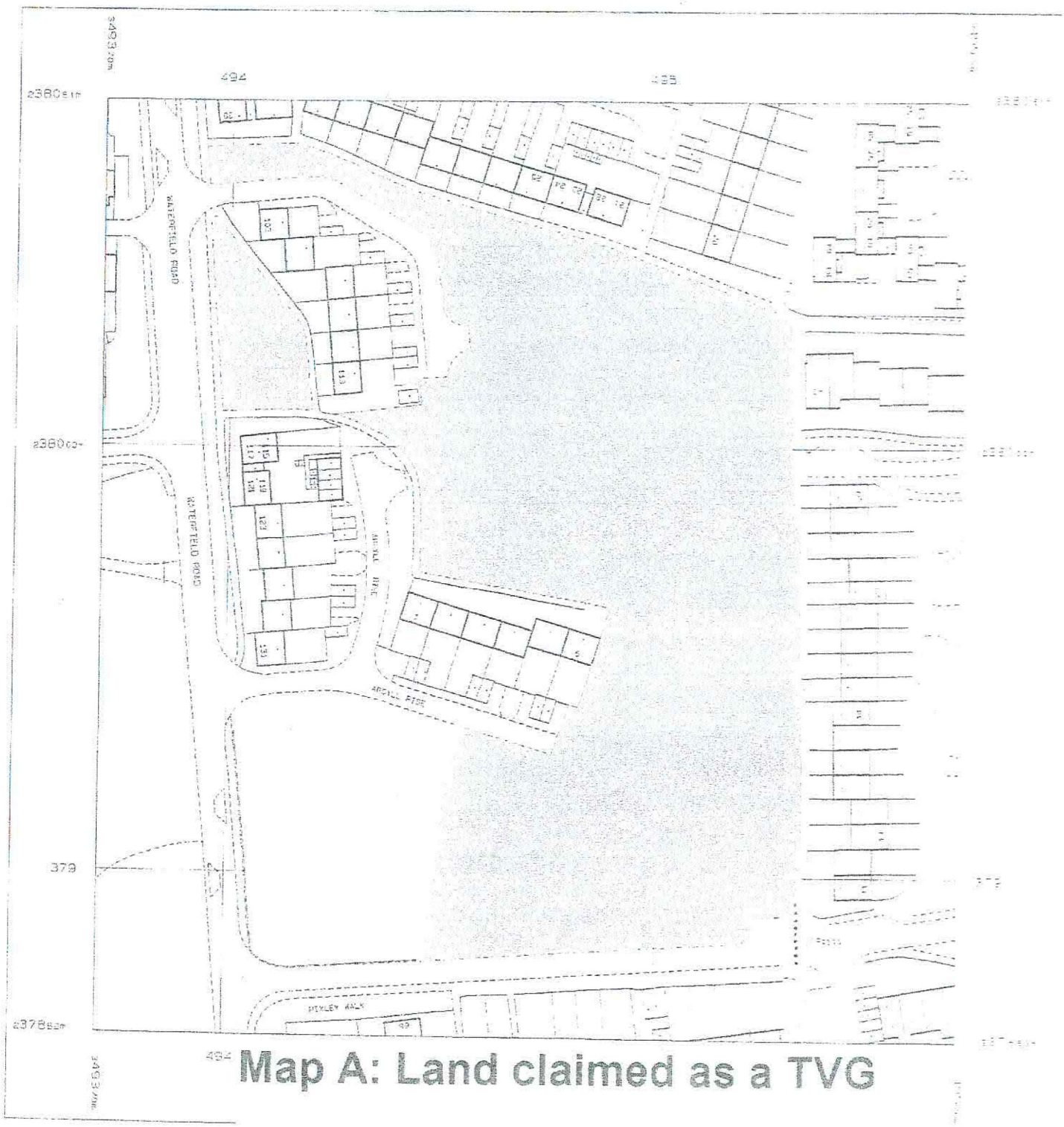
ANN ARMSTRONG
17 GREYFRIARS AVENUE, HEREFORD, HR4 0BE

KERRIE-ANN ARMSTRONG
GREEN BANK, CLEHONGER ROAD, HEREFORD

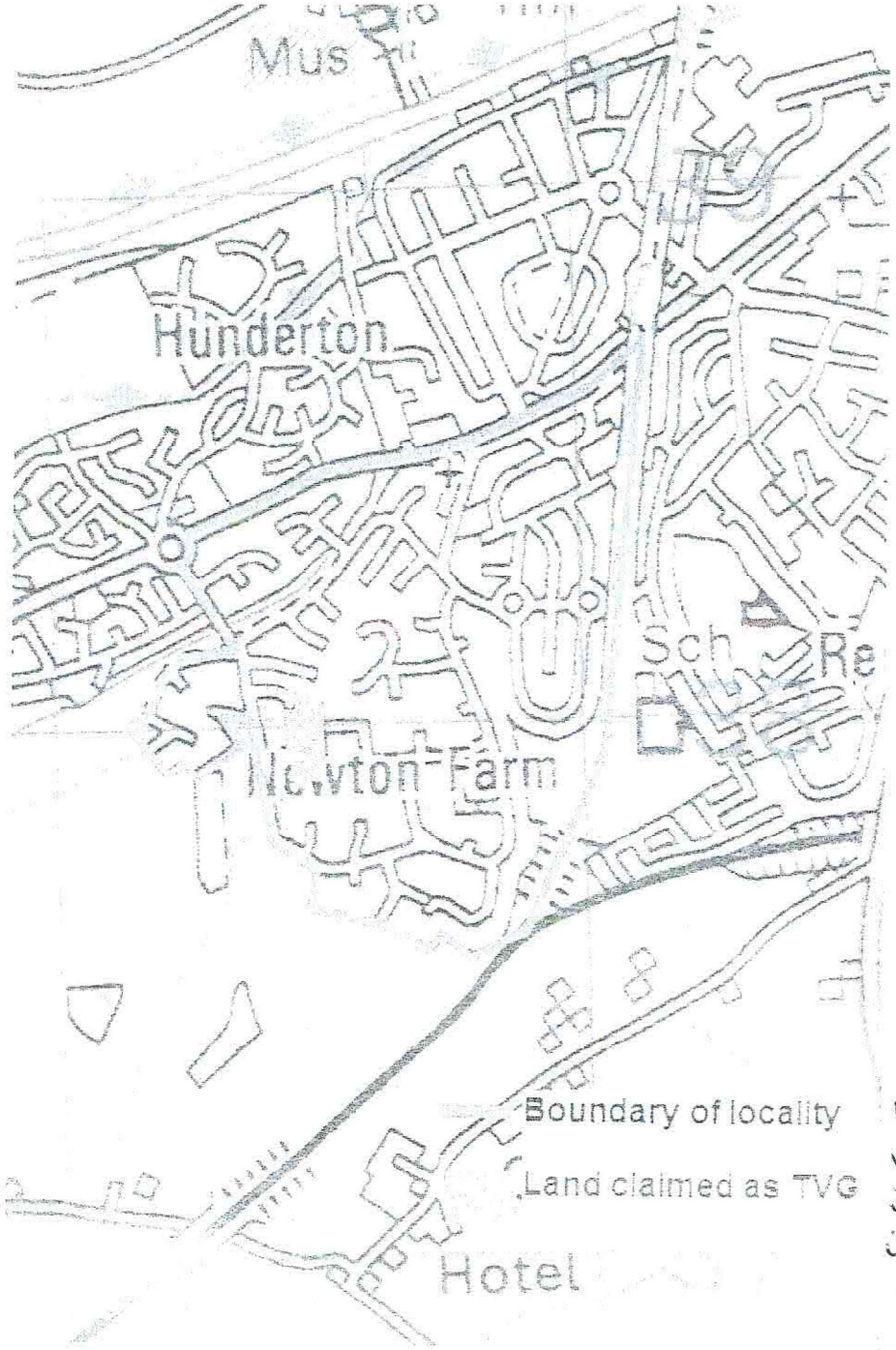
SIGNED S Brassett DATE 11/10/07

Ordnance Survey®

Superplan®



Map A: Land claimed as a TVG



based on the verbal description in the attached inspector's Repo dated 19/09/200 MR T Jones, Barrister

Map B:
The claimed locality

herefordshire HOUSING

www.hhl.org.uk

Legal Team

Peter Crilly
Herefordshire Council
Blackfriars
Blackfriars Street
Hereford
HR2 9ZR

Please ask for: Robert Christie
Direct Line: (01432) 384103
Fax: (01432) 384198
Ref: RC/GP/TOLAAR2
Your ref: TVG52
Date: 19/11/2008

Herefordshire Housing Limited,
Legion Way,
Hereford
Herefordshire HR1 1LN
(Registered Office)

Tel: (01432) 384000
Fax: (01432) 384198
email: rchristie@hhl.org.uk
Registered in England 4221587

Dear Mr. Crilly,

Re: Commons Act 2006 Section 15(1) (ref. TVG 52)
Land bounded by Argyll Rise, Pixley Walk, Muir Close, Dunoon Mead and Waterfield Road, in Newton Farm, Belmont, Hereford.

I write on behalf of Herefordshire Housing Ltd ("HHL") of Legion Way, Hereford HR1 1LN, the freehold owner of the above land in respect of which an application for registration as a town or village green has been made.

I assume that no further material has been received in support of the application other than the copy of the application sent by you to me on 18th October 2007, which comprised the Application Form 44 signed by K. Miller dated 16th October 2007; Maps A and B attached; and 30 evidence questionnaires numbered EQ1 to EQ30. If this is not the case, please let me know and forward me any further material you have received; we would need further time to consider and respond to this.

I am duly authorised and hereby object to the application on behalf of HHL. The principal grounds for objection are summarised as follows:

1. As you are aware, the same Applicants applied for registration of the same area of land (within a slightly larger area of land the rest of which was withdrawn from the application during the public inquiry) by an application dated 6th February 2006 under the Commons Registration Act 1965. A public inquiry was held on 31st July and 1st August 2007 in front of Mr Timothy Jones of Counsel. He heard evidence and submissions on behalf of the Applicants and HHL, following which he recommended rejection of the application in a fully reasoned report. Subsequently he gave further advice, as did another senior barrister, Mr Philip Petchey. After considering the external legal advice, as well as that of its legal officer, on 12th August 2008 the Regulatory Committee decided to reject the application for the reasons set out in the notice appended hereto.

2. The current application is for all relevant purposes the same as the earlier application and supported by evidence which is essentially the same. The Commons Act 2006 has not changed the law on "as of right", so there is no reason for the Registration Authority to reach a different decision.

3. Further, in such circumstances, DEFRA guidance to Commons Registration Authorities in the pilot implementation areas (including Herefordshire) is as follows:

"5.13 Repeated applications

5.13.1 The Secretary of State takes the view that an identical, or near identical, application to one previously made and rejected would entitle the authority to refuse to accept it, on common law grounds of res judicata. The House of Lords has held that the principle applies to non-judicial adjudications in the field of public law notwithstanding that the original adjudication was not made by a court. Moreover, the House has held that 'It will be an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings'. Substitute for 'litigated' the word 'raised' and Defra believes this principle would also apply to non-judicial adjudications in public law."

On behalf of HHL, I reserve the right to amend, expand or finalise this statement of grounds (as already agreed by you in your email of 11th November 2008) by 4th December 2008, or later in the light of any further material submitted by the Applicants or others at any time. I assume that the Registration Authority has access to the evidence submitted on behalf of HHL in relation to the first application, together with the Report and Advices of Messrs Jones and Petchey, as well as the outline of Mr Porten QC's submissions to the Regulatory Committee. (If this is not the case, please let me know and I can supply copies.) HHL relies upon all that material in support of its objection. Given the identical issues and congruity of evidence, even if the Registration Authority does not reject the application on grounds of res judicata, I submit that it would be unnecessary and wasteful to hold an inquiry, when one has been held so recently.

Accordingly, on behalf of Herefordshire Housing Limited, I urge the Registration Authority to reject the application.

Yours sincerely,

RChristie

ROBERT CHRISTIE, SOLICITOR
HEREFORDSHIRE HOUSING LIMITED

MEMORANDUM

By email: cj@whitmey.nildram.co.uk

From: Christopher Whitmey
To: Robert Christie
c.c.: Martin Gilleland, Peter Crilly
Date 21 November 2008
Subject: Argyll Rise application ref: TVG52

Dear Mr Christie,

Request for Further Information about Herefordshire Houisng Ltd's Statement of the Facts on which the objection is based, dated 19 November 2008, in accordance with the public notice dated 2nd October 2008.

I trust that letters by email are acceptable. Without prejudice to my memorandum to Mr Crilly yesterday I should be grateful for further information on your above Statement of Facts. This could help ensure that the applicants NFTGAG fully understand your objection and make an appropriate response under the relevant regulations.

Under paragraph 2. "... The Commons Act 2006 has not changed the law "as of right", ...".

Please state:

1. On which of the three limbs of the term "as of right" (a) without secrecy; and/or (b) without force/contest; and/or (c) without permission does HHL base its objection ?

2 For each of the relevant limbs in 1. what facts does HHL rely on to show that the inhabitants indulged in lawful sports and pastimes either: (a) with secrecy; and/or (b) with force/contest; and/or (c) with permission ?

If convenient it is acceptable to insert the answers underneath each question, initial, date and email back.

Yours sincerely,

Christopher Whitmey
on behalf of NFTGAG

herefordshire HOUSING

www.hhl.org.uk

Legal Team

Christopher Whitmey
Oldstone Furlong,
Fownhope
Herefordshire

Please ask for: Robert Christie
Direct Line: (01432) 384103
Fax: (01432) 384198
Ref: RC/GP/TOLAAR2
Your ref: TVG52
Date: 09/12//2008

Herefordshire Housing Limited,
Legion Way,
Hereford
Herefordshire HR1 1LN
(Registered Office)

Tel: (01432) 384000
Fax: (01432) 384198
email: rchristie@hhl.org.uk
Registered in England 4221587

Dear Mr. Whitmey,

Re: Commons Act 2006 Section 15(1) (ref. TVG 52)
Land bounded by Argyll Rise, Pixley Walk, Muir Close, Dunoon Mead and Waterfield Road, in Newton Farm, Belmont, Hereford.

Thank you for your memorandum in the form of a request for further information regarding Herefordshire Housing Limited's ("HHL's") statement of grounds dated 19th November 2008.

You refer to my paragraph numbered 2 stating '*The Commons Act 2006 has not changed the law on "as of right"*' (not '*the law "as of right*" ' as you state).

HHL's case is that user was 'by right' not 'as of right', the distinction between the two having been explained in R (Beresford) v Sunderland City Council [2004] UKHL 60, particularly at paragraph 4 (per Lord Bingham).

The evidence upon which we rely is the same evidence that was adduced at the inquiry and accepted by Timothy Jones, Philip Petchey and the Regulatory Authority as supporting the above contention.

You appear to be unwilling to accept that this is a correct interpretation of the law, contending instead that one of the three exceptions required in order to negative user 'as of right' enumerated in R v. Oxfordshire County Council ex parte Sunningwell Parish Council ((1999) (H.L(E)) must apply. HHL's objection is more fundamental. Since user has its origin in a legal right, the question of '*as of right*' simply does not arise, a distinction which was recognised in Beresford.

Yours sincerely,

RChristie

ROBERT CHRISTIE, SOLICITOR
HEREFORDSHIRE HOUSING LIMITED

cc Peter Crilly, Herefordshire Council, Blackfriars, Blackfriars Street, Hereford HR2 9ZR.

Working with communities to provide decent homes

THE COMMONS ACT 2006 - SECTION 15(4)

-and-

The Commons Registration (England) Regulations 2008

In the matter of an Application ref: TVG.52 for the registration of Land at Argyll Rise ('the Land') as a new town or village green.

Regulation 26(4): the applicants' response to the representations by Hereford Housing Ltd ('HHL')

Introduction

1 The Applicants, Jacqueline Kirby, Keith Miller and Jackie Mills, represent the Newton Farm Town Green Action Group ('NFTGAG') and submitted a Form 44 ('the Form') claiming user for lawful sport and pastimes for not less than 20 years 'as of right' until 17 October 2002.- see Form Part 4.

2 NFTGAG received HHL's representations from the Commons Registration Authority ('CRA') in accordance with Regulation 26(3) on 11 December 2008.

HHL's 'statement of the facts on which the objection is based': words of the public advertisement.

3 HHL's letter of 19.11.2008 sets out 3 numbered paragraphs. 1 and 2 seem to resolve to the main proposition that the the present application 'is for all relevant purposes the same as the earlier application' and the CRA should therefore reject the present application 'for the reasons set out in the notice [reasons for previous rejection] appended below' — as set out at 7.2-7.5 below.

4 Paragraph 3 is a secondary proposition as a consequence from the first: that repeat identical applications should be rejected at the outset as a matter of public policy.

5 It is noted that the legal factual requirements that "a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged in lawful sports and pastimes on the land for a period of at least 20 years" are not in issue as no mention is made of them by HHL.

Previous application

6 On 12 August 2008 the CRA considered the previous application by the same applicants for the Land to be registered as a town or village green for a period of not less than twenty years ending in February 2006 and rejected the application.

7 The CRA's written decision notice of rejection (also incorporated in the meeting minutes) included:

7.1 We concur with the Inspector that the land in question has been used by a significant number of local residents for various recreational sporting and leisure purposes for over a 20-year period.

7.2 We find that the land in question was acquired for the use of residents of the new residential development, when the estate was laid out following its acquisition under the Housing Act 1957.

7.3 We consider that use of the land during the relevant period has been consistent with a site laid out, managed and maintained under statutory housing powers.

7.4 We consider that the recreational use of land was by reason of it being open space held for housing purposes with [sic] the context of the estate.

7.5 Use "as of right" in the sense of that required to establish Town Green status has not been made out on the balance of probabilities in this application.

8 The CRA's decision notice gave no, or no adequate, reasoning for its above propositions or conclusions. Reasonable inferences from 7.2 - 7.5 above are that the CRA decided that:

8.1 the Land was lawfully laid out and maintained for recreational purposes under the Housing Act 1957 and not under any other Act giving powers to acquire or appropriate land for recreational use by the general public at large: 7.2, 7.3 and 7.4.

8.2 under the 1957 Act the Land was provided for the residents, the council house tenants, for their recreational purposes therefore they had/have a right to so use it and any claim by the said residents for user under the third limb of 'as of right' - without permission - failed: 7.4 and 7.5.

9 It is a matter of conjecture as to what particular facts and/or points law were taken into account and weighed in the CRA's decision as the public were unable to hear what was said when it went into closed session, possibly unlawfully, to consider all the facts and/or take further legal advice and make its decision to reject the application. Further, the applicants and objector were denied any opportunity to comment on any further legal advice given during the closed session[1].

10 The CRA's decision notice unequivocally said (emphasis added), '*It was noted, that if the land was registered as a Town Green, this would effectively prevent any development which would interfere with recreational use. The view of the Inspector was that the application should be refused.*'. On 26 November 2002, Herefordshire Council transferred 5,698 houses, 2174 garages, 31 shops and 165 staff to HHL (incorporated 22/05/2001). HHL's present 12 Directors include 4 Local Authori-

[1] *Clark v Kelly* [2004] 1 AC 681 PC: "Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation." at 702D. With respect, in the circumstances, it is submitted that 'justices' may be replaced by 'CRA' and 'open court' by 'open committee' to meet the needs of natural justice.

ty Board Members appointed by Herefordshire Council who each have Herefordshire Housing properties in their ward. In view of the words underlined there is a serious risk that the CRA in coming to its decision failed to recognise a conflict of duty and interest and/or took into account an irrelevant fact: namely the inability of HHL to develop the Land, it had recently acquired from the council, if the Land was registered as a green.

11 Further it is not known whether or not the CRA's decision was by a majority or even minority vote as the decision was taken in closed meeting.

12 The decision as to whether or not the Land should be registered is solely for the CRA and not for an inspector or officer; whose roles are fact finding and/or legal advice. The minutes of the meeting state, '*We have considered the officer's report* [Which recommended that the Land be registered as a green.] *and the various written submissions before us in the bundle. We have studied the report of the Inspector and the second opinion from Mr Petchey* [20.06.08].'.

13 The undated instructions to Mr Petchey by 'Instructing solicitor is Herefordshire Council's Head of Law and Democratic Services' are to be noted:

6. A second application for the same land under the Commons Act 2006 was received on the 16th October 2007. The evidence submitted is essentially the same as for the first application but the Applicants now say that use as of right ended on the 17th October 2002. This is the date by which notices published in accordance with Section 123 (2A) requested comments to be sent to the Council. The land was transferred on the 26th November 2002.

7. Counsel is requested to advise,

(i) if the Applicants are entitled to make a second application on the basis that use, as of right, ended on the 17th October 2002 (or on the date of transfer, 26th November 2002) and are in time under Section 15(4) of the Commons Act 2006

(ii) even if use had been as of right, would the disposal under Section 123 defeat the second application.

14 Mr Petchey's first advice of 06.02.08.doc, also before the CRA, included (emphasises added): —

6 He [the Inspector] *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****.*

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 [the present application] *made under the new Act.*

Concerning the ***First reason for rejection: use not as of right*** Mr Petchey concluded: *19. The upshot of this discussion* [which considered case law before the Inspector] *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,[2] *and I am currently involved in a case in Coventry where the Inspector (comparatively junior counsel, although experienced in this field*[3]*) 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).*

Concerning the ***Second reason for rejection: section 123 of the Local Government Act 1972*** Mr Petchey concluded: *22. ... 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. ... 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.

Mr Petchey's summary Conclusion included *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.* [4]

15 The clear inference from Mr Petchey's advice in the the extracts above is that the answers to his instructing solicitors questions, reflected in his paragraph 8 above, were:

7. Counsel is requested to advise,

(i) if the Applicants are entitled to make a second application on the basis that use, as of right, ended on the 17th October 2002 (or on the date of transfer, 26th November 2002) and are in time under Section 15(4) of the Commons Act 2006 — Answer: **YES**

(ii) even if use had been as of right, would the disposal under Section 123 defeat the second application.— Answer: **NO**

16 The CRA makes passing reference to Mr Petchey's second advice of 20.06.08 but does not comment on any particular point. The advice included (emphasises added):

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[2] Mr James Goudie QC: see Warwickshire County Council ('WCC') Regulatory Com - 7.12.04.pdf copy attached. N.B. Mr Goudie's opinion confirmed a previous opinion obtained by WCC.

[3] Even if the Inspector was 'comparatively junior counsel' it is to be noted that at the public inquiry the applicant was represented by Mr James Maurici of Counsel, the objector Coventry City Council as Landowner ("CCAL") were represented by Mr Philip Petchey of Counsel and the prospective Developer BKW who was also objecting were represented by Miss Ross Crail of Counsel: see CoventryTVG80221.pdf attached at APPENDIX 1 p.3 at [2]. To Mr Whitmey's personal knowledge both Mr Petchey and Miss Crail are well experienced counsel in this area of the law but they still could not persuade the Inspector not to recommend that the housing land was registered as a green.

[4] In this context Mr Petchey's footnote to paragraph 18 should be kept in mind: note2 states: *I think that council house owners* [tenants if paying rent?] *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* [tenants?]. *However, such owners* [tenants?] *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.*

1. ... 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.

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.

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[3].

Comments on the CRA's grounds for rejection.

17 HHL's statement of facts in objection rely solely on the CRA's grounds for rejecting the first application. It is therefore now relevant to raise questions as to the procedural correctness of that meeting and its decision. NFTGAG submits that:

17.1 there were/are grounds for an application for leave for judicial review of the CRA's decision because of:

17.1.1 the matters referred to at 9 and 10 above; and/or

17.1.2 the CRA failed to find as a fact that the significant number of the inhabitants using the Land for indulging in lawful sports and pastimes were council house tenants despite Mr Petchey's comments (see at 14 and footnote[4] above) and NFTGAG's submission dated 5 July 2008 that included: *5 ... The Housing Act which gave the 'right to buy' came into force on 3 October 1980. Two of the Applicants have exercised their right to buy; as may a number of those inhabitants indulging in lawful sports and pastimes. Even if it is correct that tenants use the Land 'by right', which is not accepted, this does not automatically apply to owner-occupied property, Factual and legal differences between owner and tenant were not examined in the first Application inquiry and could be critical in both the first and second Applications.* AND *7 Further, very recently it has come to light that the land in Muir Close adjoining the Land was sold in 1974 by the then City Council of Hereford to Muir (2) Housing Association Limited. Therefore the status of users of the Land from Muir Close (including one of the applicants and witnesses) in relation to the council needs further examination.*

17.1.3 the CRA failed to give any or adequate consideration to the Stratford upon Avon or Coventry decisions as indicative of the correct approach to the law - see at 16 and footnotes[2,3] above. It is accepted that these decisions do not form a binding precedent However where there is no case law on the point, as Mr Petchey had indicated, they merit being given very careful attention to see if they are indicative of what the law is be-

lieved to be; especially in the Coventry application where it has been subject to argument by counsel experienced in the law of town and village greens.

17.2 as Mr Petchey had advised that the second application was in order (see at 14 and 15 above) and the CRA had accepted and advertised the said application NFTGAG had a legitimate expectation that the matter would be considered afresh and the time and expense for any judicial review application was needless.

18 The CRA's grounds, as set out at 7.1-7.5 above, need to be critically examined to enable any meaningful comment under Regulation 26(4) on HHL's statement of objection and representations.

19 With respect, three of the reasons, 7.2-7.4 above, are variants on the proposition that: the Land was acquired for housing by the council under the Housing Act 1957 and all subsequent use, including recreational, has been by council house tenants by right . This is based on the inferences set out at 8 above.

20 The wording of 7.4, '*We consider that the recreational use of land was by reason of it being open space held for housing purposes with* [within?] *the context of the estate.*', in the context of the application, begs these, and possibly other, relevant questions of fact and/or law:

20.1 In the context of the Housing Act 1957 Part V Provision of Housing Accommodation what is the true construction and meaning of '*open space*'?

20.2 Is there any limit within the housing acts, where the purpose is to provide housing accommodation, as to the amount of land that could be lawfully left as 'open space' for recreational use without such land needing to be appropriated as public open space?

HHL's primary facts in objection to the present application.

21 As HHL's objection relies solely on the CRA's Decision Notice then the facts that:

21.1 the Land was part of the land acquired and developed under the Housing Act 1957 as housing accommodation; and

21.2 the significant number of the inhabitants of the locality, or of the neighbourhood within the locality, who indulged in lawful sports and pastimes on the Land for a period of at least 20 years were council house tenants; and

21.3 the council provided the Land for use of its council house tenants therefore such user for lawful sports and pastimes was 'with permission' and not 'as of right'.

are presumably the primary facts of HHL's objection?

22 HHL's letter of objection said, "On behalf of HHL, I reserve the right to amend, expand or finalise this statement of grounds ... by 4th December or later ...". Regulation 26(2) unequivocally states, "(2) Representations under paragraph (1)— ... (d) must state the grounds on which they are made." To ensure natural justice and to comply with the regulations the applicants are entitled to know the totality of the true primary facts of objection that they have to answer. Regulation 28(4) *The determining authority may, if it thinks it necessary to enable an application or proposal to be determined, invite further written representations about any specified matter from— ... (c) a person who has made representations in accordance with regulation 26.* The CRA is asked to invite HHL to confirm in writing as soon as possible:

22.1 that the facts in paragraph 21 above are the totality of the primary facts of HHL's objection to the present application? and

22.2 if they are not, then to clearly state what are the totality of the primary facts of HHL's objection to the present application.

HHL's objection paragraph 3: DEFRA's *Guidance to commons registration authorities in the pilot implementation areas. July 2008.*

23 Paragraph 5.13.2 *Repeated applications are most likely to occur in relation to the registration of* new greens under Section 15(1). The present application is under Section 15(4).

24 In the present application the relevant guidance is found in paragraph 5.13.4: *Exceptionally, the Secretary of State takes the view that, where an application was made under the 1965 Act, which was determined and refused, it is open to the applicant to make a fresh application for the same purpose under the 2006 Act, if he* [the applicant] *believes that the new application would be successful because the statutory criteria have changed. The registration authority will need to consider whether the new statutory criteria would permit a different outcome when applied to the known facts (as decided upon by any hearing or inquiry held by the registration authority into the previous application). Unless the new application asserts that the facts have materially changed, it should not be necessary for the registration authority to hold a fresh hearing or inquiry into the evidence tested in the original application.*

25 The CRA procedurally failed in considering the 2006 Act application, see at 17.1 above, therefore the grounds of *res judicata* do not apply and the fairest and cost effective way to remedy the matter is to proceed with the present application afresh upon issues of fact and law in dispute.

26 Mr Petchey has advised the CRA that the second application is acceptable and the CRA have accepted it: see at 17.2 above.

.....[signed copy by post].....Christopher Whitmey
On behalf of NFTGAG Friday 2nd January 2009 - Thursday 1st being a Bank Holiday

THE COMMONS ACT 2006 - SECTION 15(4)

-and-

The Commons Registration (England) Regulations 2008

In the matter of an Application ref: TVG.52 for the registration of Land at Argyll Rise ('the Land') as a new town or village green.

Regulation 26(4): the applicants' response to the representations by Hereford Housing Ltd ('HHL')

The Applicants on behalf of NFTGAG
c/o Christopher Whitmey
Oldstone Furlong
Fownhope
Hereford
HR1 4PJ

Tel: 01432 860449
Email:"C Whitmey"<cj@whitmey.nildram.co.uk>
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Service received by email.

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Please ask for: Robert Christie
Direct Line: (01432) 384103
Fax: (01432) 384198
Ref: RC/GP/TOLAAR2
Your ref: TVG52
Date: 03/02/2009

Herefordshire Housing Limited,
Legion Way,
Hereford
Herefordshire HR1 1LN
(Registered Office)

Tel: (01432) 384000
Fax: (01432) 384198
email: rchristie@hhl.org.uk
Registered in England 4221587

Dear Mr. Crilly,

Re: Commons Act 2006 Section 15(1) (ref. TVG 52)
Land bounded by Argyll Rise, Pixley Walk, Muir Close, Dunoon Mead and Waterfield Road, in Newton Farm, Belmont, Hereford.

Thank you for sending me Mr Whitmey's response dated 2nd January 2009 to HHL's representations on the above application. I am also grateful to you for extending the time for making HHL's reply. In the remainder of this letter, paragraph numbers relate to Mr Whitmey's response.

Paragraphs 3, 17, 18 and 21

Mr Whitmey fails in paragraph 3 to summarise HHL's grounds of objection set out in my letter of 18th November 2008 accurately and he goes on to mischaracterise the objection. I made it quite clear in the penultimate paragraph of that letter that HHL relies upon:

- its evidence submitted in relation to the first application
- the Report and Advices of Messrs Jones and Petchey; and
- Mr Porten's submissions to the Regulatory Committee

I did not limit the objection to "*the reasons set out*" in the CRA's notice, as Mr Whitmey suggests in his paragraph 3. The "*primary facts*" on which HHL relies are contained within its evidence submitted in relation to the first application, founding its submissions in Miss Ellis' Outline of Legal Submissions, Supplementary Legal Submissions and Closing Submissions. User was not "*as of right*" but either by right or by permission, for the reasons set out in those documents.

Paragraphs 4, 17.2 and 23-26

The res judicata objection is, indeed, secondary. Paragraph 3 of my letter of 19th November 2008 makes this clear by commencing, "*Further ...*" I drew the CRA's attention to DEFRA's advice on the point which, of course, draws on its understanding of the law and is not simply an expression of policy. As I understand it, however, the application has been accepted as duly made and registered, so this procedural point appears now to be academic. As a matter of fact, however, it is relevant that the Commons Act 2006 has not change the law on "*as of right*".

Working with communities to provide decent homes

Paragraph 5

No admissions are made and the burden of demonstrating that all elements of the definition are established lies on the Applicant. The CRA is obliged to consider these matters in the light of the evidence and submissions. Obviously I accept that, notwithstanding HHL's submissions to Mr Jones on these points, he was satisfied on them[1].

Paragraphs 6-20

It is not for me to comment on the CRA's handling of the first application or its stated reasons for rejection. I note, however, that despite Mr Whitmey's criticisms, the conventional time limit for bringing a challenge by way of judicial review has passed, so the decision stands.

Paragraph 22

As noted above, Mr Whitmey mischaracterises HHL's objection. I have dealt fully with these matters above under 'Paragraphs 3, 17, 18 and 21'.

As to the procedural aspect of Paragraph 22, please see my e-mail of 19th January 2009.

I should add that I have sent to you under separate cover material which has only just come to light (owing to the absence of an officer on maternity leave) in response to queries raised by Mr. Petchey and by you last year concerning the fund out of which the land was maintained. I considered it right to bring this information to your attention since you requested it previously and Mr. Petchey thought it relevant. Clearly, I recognise that Mr. Whitmey might wish to comment on it.

Yours sincerely,

R. Christie

Robert Christie

Herefordshire Housing Limited.

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[1] Report, para 42

Instructions To Counsel – Argyll Rise Town Green second Application

Please see attached copies of the Inspector's report on a first application to register the Land as a town green and Mr Petchey's advices dated 6 February 2008 and 16 June 2008. The application Land is shown coloured blue on enclosed Plan 1 and cross-hatched blue on Plan 2

The Land was laid out as open space in connection with Council housing development during the 1970s (which year is not known). In the course of a second application to register the Land, received on the 16th October 2007, it has come to light that not all of the dwellings within the area, identified in the penultimate sentence of paragraph 24 of the Inspector's report as the relevant area, were built by the Council. The relevant area is shown edged pink on Plan 1.

Prior to a transfer of the Council's housing stock to the objector in 2002 development plots within the relevant area had been sold off:- in 1974, 1975 (two conveyances) and 1991 plots were conveyed to three housing associations and in 1975 a plot was conveyed to a private housing developer. The areas conveyed are shown coloured blue, brown, pink and green on Plan 2 (the orange areas within the pink area show properties over which the Council were granted nominations rights in 1999).

There are 1,790 postal addresses presently within the locality of which 221 are within the plots sold-off (49 on the plot sold in 1974, 87 on the plots sold in 1975 and 85 addresses on the plot sold in 1991). This information was obtained from the Council's GIS MapInfo system which has an address point layer taken from the Local Land and Property Gazeteer.

The cost of maintaining the Land was paid for, as with other Council owned housing open spaces, through contributions from the General Fund and the Housing Revenue account. The proportions were calculated by using the numbers of properties which had been sold-off under RTB as a numerator and the number of properties still owned by the Council + those which had been sold-off as a denominator. An example has been found showing that the General Fund contribution for the year 2001-02 was 38.7% calculated as follows:

$$\frac{3{,}721 \text{ (properties sold-off)}}{9{,}617 \text{ (properties still owned by Council + properties sold-off)}} = 38.7\%$$

Although the calculation only referenced Council properties the General Fund contribution of 38.7% was collected from taxpayers generally, not just from RTB properties.

The Conveyances of the sold-off areas did not confer rights over the Land or provide for contributions towards its maintenance, nor did tenancies granted by the Council or RTB conveyances/leases. However, the objector to the application considers that the above method of calculation indicates the Land was intended to be used by members of the public as well as by Council tenants, and that this is reflected in the Inspector's finding at paragraph 35 of his report, "It is clear that both the Council and several members of the public who completed questionnaires considered that there was a general public right to use the land."

Counsel is asked to advise:

(1) with reference to paragraphs 18 and 24 of his advice of the 6 February 2008, if the additional information affects his view that use of the Land was *as of right*

(2) if he is aware of any legal developments which affect his previous advice

Peter Crilly Tel 01432 261853 25 March 2010

Crilly, Peter

From: Crilly, Peter
Sent: 04 June 2010 12:44
To: 'Philip Petchey'
Subject: RE: Argyll
Attachments: LGHA 1989 Sch 4.pdf; HA 1985, sch 14.pdf; Philip Petchey draft advice 6.2.08.doc; calculation of shared upkeep open spaces.pdf

Dear Philip

The areas of land within the 1974, 1975 and 1991 conveyances were sold to various housing associations and a private developer for housing development, nothing to do with RTB. The four conveyances referred to in the instructions were of land still to be developed and the 221 postal addresses were subsequently built on the plots. None of the four conveyances recite a statutory powers of disposal or any necessary consents, but the agreement for sale to one conveyance states the power as the Housing Act 1957 and that Secretary of State consent was not required for the disposal (I don't know if a general consent was being relied on).

I haven't been able to find out when the General Fund began making contributions towards the upkeep of housing open spaces except it was probably sometime before 1998 when the land was transferred from the City Council to the new District Council - a colleague vaguely recalls a tenant challenging the City Council because the General Fund had not made a contribution (she can't recall if it never had contributed before the challenge or just hadn't for that year). The attached calulation for 2001-02 was provided by a former Council employee who used the method from the mid to late 1990s until her transfer to the current land owner, Herefordshire Housing Limited, in 2002 (she has confirmed that the 37% result was an arithmetical mistake and should be 38.7%).

Under Schedule 14, Part IV of the Housing Act 1985, copy attached, there was a duty to make contributions from the General Fund to the HRA where housing amentities wre shared by the general community. This was repealed by LGHA 1989 and similar provisions contained in section 75 - Schedule 4, Part III, paragragh 3.

The reason I thought the conveyances might be relevant is that there are now 221 postal addresses on the land sold off and the occupiers would not have beeen Council tenants, and all the addresses are within the locality identified by the Inspector. Before having this information it was assumed in paragraph 18 of your attached advice that users of the application land would have essentially been council house owners who would have paid for its upkeep. However, 221 of the 1,790 addresses within the locality (about 12.5%) were not council/ Herefordshire Housing Limited properties. My view had been that the absence of any provision in council tenancies or RTB documents allowing use of the open space weighed against user having been "by right" and think the same a bit more so in relation to the absence of any reference to the open space in the conveyances of the land on which the 221addresses were built. I appreciate the analysis referred to in paragraph 18 that local people had a right to go on to the open space but wondered if you felt that this similarly applied to the 12.5% non-council tenants and, if not, whether 12.5% was a "significant" number of users?

As regards the 38.7% contribution (at least for 2001-02) from the General Fund do you think this would add to a view that non-council tenants' use of the land was as much "by right" as council tenants', or maybe that it weighed against council tenants' use having been "by right", or not add anything either way?

Peter

From: Crilly, Peter
Sent: 15 April 2010 15:58
To: 'Philip Petchey'

Subject: RE: Argyll

Dear Philip

Sorry for forgetting to send your earlier advices and the Inspector's report, attached now. The conveyances referred to in the instructions were nothing to do with the RTB. I am going to away for about a week and will try to find the other information you requested when I am back.

Peter

From: Philip Petchey [mailto:philip.petchey@ftb.eu.com]
Sent: 08 April 2010 15:35
To: Crilly, Peter
Subject: Argyll

Dear Peter

I have found the Inspector's Report, but wld be grateful if you cld email me copies of my two advices.

What you describe is a fairly sophisticated accountancy arrangement.

Do we know when it was first implemented? It should have been not later than 1974 (there cld have been disposals elsewhere before 1974). Was there a report about what was being done to the Council? If the system was not implemented by then, was there a report when it **was** implemented?

The 1974 and 1975 dispositions wld have been nothing to do with right to buy. (Perhaps 1991 was not either, since it relates to a block of 85 houses).

However, whatever the background, was there guidance from the DoE about how payment for open space was to be addressed?

(I have asked these questions of other authorities in the past and never got satisfactory answers – the position usually being that there is no-one left who can remember anything. I –perhaps naively – consider it unlikely that officers made this sort of thing up without guidance from on high).

From a lawyers' point of the question arises as to the power under which the ring fenced housing fund was being in effect topped up from the general fund or, as you describe it, money from both funds was being used to maintain one piece of open space.

Would the accounts for 2001-2 show a figure of £x,xxx (ie the 38.7%) with a description of what the money was being spent on?

I am not aware of any new developments since my last advice. Douglas Edwards has shown me an Inspector's Report where he argued successfully for the view which I hold; on the other hand, Lana Wood, a barrister who does quite a few TVG cases as Inspector, recently rejected my argument (which had been presented to her in writing by a solicitor!) in a Report she prepared for a registration authority recently. Registration in that case might be the subject of legal challenge, although I get the impression not.

Ae

Philip Petchey
Philip Petchey
Francis Taylor Building

NOTE

1. The Inspector's Report proceeded on the basis that land had been laid out under section 93 (1) of the Housing Act 1957, namely a power

   To provide and maintain...in connection with any housing accommodation [provided under Part V of the Act] ...any recreation grounds, or other..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.

2. From *HE Green and Sons v Minister of Health (No 2)*[1] it is clear that it is not a limitation on this power that such land may also serve a beneficial purpose for others apart from those from those for whom the housing accommodation is provided.[2]

3. This position is reflected in the provisions of Schedule 14 of the Housing Act 1985 and Schedule 4 of the Local Government and Housing Act 1989: where there are benefits or amenities arising from the provision of housing land which are shared by the community as a whole, the local authority may make a contribution from its general account to the housing revenue account to reflect those benefits.

4. In this case such a contribution of 37% was latterly being made to reflect the fact that 37% of the houses in the District had been sold off. In fact in the neighbourhood identified by the Inspector, some 12% of the houses had been sold off.[3]

5. The Inspector was unaware of the facts set out in paragraph 4. It is pretty clear that he adopted a broad brush approach, and considered that all those members of the public who used the land did so by virtue of an entitlement under section 93.

6. It is evident that it is arguable that a narrower view is appropriate: to say that the local authority's tenants did not use the land as of right because of their entitlement under section 93, but that the public had no such entitlement, and that therefore their use **was** *as of right.* This does not mean that the land **would be** registrable (was the use sufficient?) but on this basis it **could be** because there was qualifying use (ie use that was *as of right*).

7. It seems to me to be highly artificial to say that the use by the council house tenants **was not** *as of right*, but that the use members of the public other than council house tenants – who were, in practice, Council tax payers in the district, and whose use was envisaged by the section and subject to a contribution by the local authority to the hosing revenue account – **was** *as of right*.[4] It is my view that the use of both categories of users was not *as of right*.

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[1] [1948] 1 KB 34.
[2] See p41.
[3] These are, I think, the broad facts: I may not have captured all the complications of the position.
[4] As a matter of policy, it seems to me a bit unfair that the effect of selling off the Council houses is that the burden of maintaining a proportionate part of the housing act land was imposed on Council tax payers generally rather than those who had bought their council houses. There may not have been any mechanism to impose it on the council house buyers; and it would have been unfair to impose the burden on those who

8. In my Advice dated 6 February 2008, I explained that this was not a straightforward area of law. There is a respectable argument that land made available under section 93 (1)[5] and used by council house tenants is use which is *as of right*. It seems to me that the better argument for registration does not proceed on the basis of the use by non-council house owners (a minority, albeit not insignificant, of all users) being *as of right* but on the basis of all the use (by council house owners and non-council house owners) being *as of right*. For my part, however, I do not regard this argument as correct because I think that the use of both categories of user is by virtue of an entitlement under the Housing Act and not *as of* right.

PNP
3 September 2010

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continued to rent council houses. It seems to me that at the time that council house sales got under way, the Secretary of State should have given some guidance about this. If he did, it has not come to light.

[5] There is a further complication in that the use may have been under section 107 of the Housing Act 1957, by reference to which it is more arguable that use was *as of right*.