

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 Housing 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 in 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.

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