

COMMONS REGISTRATION ACT 1965

OPEN LAND AT ARGYLL RISE

OUTLINE OF LEGAL SUBMISSIONS on behalf of Herefordshire Housing Ltd.

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.

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 area³ 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 public 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