

# COMMONS REGISTRATION ACT 1965

## OPEN LAND AT ARGYLL RISE

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### 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.<sup>1</sup> It is believed that this is the Notice referred to in the Applicants' letter of 23<sup>rd</sup> 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;

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<sup>1</sup> 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<sup>2</sup> in the same way as in the Town and Country Planning Act 1990,<sup>3</sup> 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].”*<sup>4</sup> (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

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<sup>2</sup> S.270 LGA

<sup>3</sup> S.336

<sup>4</sup> 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.*”<sup>5</sup> 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

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<sup>5</sup> 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