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. <u>s.123 LGA Notices</u>

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.

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1.viii.07