AGENDA ITEM NO 5

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

***Date* 14 October 2013**

Report of: Commons Registration Authority

Title: Application for land known as Crow Lane Open Space, Brentry, Bristol to be registered as a town or village green made under the Commons Act 2006

Ward: Henbury

Officer Presenting Report: Anne Nugent, Team Leader, Legal Services

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

Reject the application to register the land known as Crow Lane Open Space, Brentry, Bristol as a town or village green made under the Commons Act 2006 for the reasons set out in the Independent Inspector's Report of 8 July 2013.

Summary

This report relates to an application for land known as Crow Lane Open Space, Brentry, Bristol to be registered as a town or village green made under the Commons Act 2006

The significant issues in the report are:

As set out in the report.

Policy

1. There are no specific policy implications arising from this report.

Consultation

Internal

2. Not applicable

External

3. The Landowner and the Applicants have been provided with, and asked to respond to, the inspector's advice (see below).

Context

4. This matter has already been before the Committee on 08 April 2013 so a short background will suffice. The Council as registration authority (the CRA) received an application to register land known as Crow Lane Open Space, Brentry, Bristol to be registered as a town or village green made under the Commons Act 2006.

5. The plan of the application land is set out in Appendix A to this report. In the application the land is referred to as Crow Lane Open Space.

6. The Council, as landowner, objected to the registration.

7. On 8 April 2013 the Committee resolved to appoint an independent inspector to be appointed to confirm the officer assessment to reject the application on the papers.

8. The inspector has now provided written advice to the Commons Registration Authority with recommendations. The inspector's advice is attached as Appendix B.

9. The inspector recommends that the application should be refused in whole on the basis that the use of the part of the application land shown green and the southern most part shown pink on the plan submitted by the Objector (enclosure 1(b)(Appendix C) during the relevant period has been 'by right' and not 'as of right', and the remaining parts of the land applied to be registered are *de minimis* and too small to be registered independently (Appendix B para 40).

10. As recommended by the inspector her report has been circulated to the parties. At the date of writing no submissions have been received.

Proposal

11. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.

12. Officers recommend that the Committee accept the inspector's advice and reject the application for the reasons set out in the Independent Inspector's Report of 8 July 2013.

Other Options Considered

13. The other options considered are:
    13.1 Register the application land.
    13.2 Refer the matter to inquiry

14. It is a matter for the applicant to satisfy the CRA that all the elements of the statutory test have been shown. Based on the objector's evidence they have been unable to show that the land was being used as if of right. Although the Committee may decide to follow option 13.1 or 13.2 it must have sufficient reason for reaching a conclusion different from that of the inspector.

Risk Assessment

15. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision.

16. These risks are mitigated against by the Council's demonstration of a fair and transparent process in its determination of the application and a decision based on a detailed consideration of the evidence.

Public Sector Equality Duties

17. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:

    i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.

    ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --

        - remove or minimise disadvantage suffered by persons who share

a relevant protected characteristic;

- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);

- encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
- promote understanding.

Legal and Resources Implications

Legal

18. The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as a green.

The Law

19. Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority (CRA) to register land as a town or village where it can be shown that:

    "A significant number of inhabitants of any locality, or any neighbour within the locality, having indulged as of right in law sports and past times on the land for a period of at least 20 years"

20. In addition to the above, the application must meet the test under Section 15(2) of the Act in particular that use of land has continued "as of right" until at least the date of the application.

21. The applicant must establish that the land in question comes entirely within the definition of a town or village green, in Section 15(2) of the Act. The Registration Authority must consider on the balance of probabilities whether or not the applicants have shown that:

    a significant number of inhabitants of the locality or neighbourhood indulged in lawful sports and pastimes as of right on the land for a period of at least twenty years; and they continue to do so at the

time of the application.

22. In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. Wholly irrelevant considerations such as the potential use of the land in the future must be left out.

"As of right"

23. User "as of right" means user without force, secrecy or permission (*nec vi nec clam nec precario*). User as of right is sometimes referred to "as if by right" and must be contrasted with use "by right".

"By right"

24. User "by right" means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used "as if right" for lawful sports and pastimes if user is by right. If land is held on trust for the purpose of recreational use and enjoyment by the general public or a section of the public including the users of the land it has been suggested (although not definitively decided) that the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. The case law is discussed by the inspector in her written advice.

"Appropriation"

25. Local authorities are creatures of statute. They can only lawfully act for the purposes and in the ways that statute permits them to act.

26. Local authorities have been given powers to appropriate, or re-allocate, land from one statutory purpose to another – see section 163 Local Government Act 1933.

27. The current provisions are those found in section 122 Local Government Act 1972, as amended by the Local Government, Planning and Land Act 1980. The Act gives a local authority power to appropriate land that is no longer required for the purpose for which it was held immediately before the appropriation.

Procedure

28. The application has been made under Section 15(2) of the Act 2006. The regulations that govern the procedure are the (Commons Registration of Town or Village Greens) Interim Arrangements (England) Regulations 2007. The Committee must have sufficient reason for reaching a conclusion different from that of the inspector.

Legal advice provided by: Anne Nugent, Team Leader, Legal Services.

Financial

29.

(a) Revenue

In the event of any subsequent legal challenge any costs over and above those normally met from existing revenue budgets can be met from the central contingency.

(b) Capital

There are no specific policy implications arising from this report.

Financial advice (Revenue) from Tony Whitlock, Corporate Finance

Land

There are no specific policy implications arising from this report.

Land advice from Lois Woodcock

Personnel

Nil

Appendices

Appendix A – Map of Application Land
Appendix B- Report of Inspector Annabel Paul
Appendix C- Objector's enclosure 1(b)

Local Government (Access to Information) Act 1985
Background Papers:

Application papers/ statement of objections/ response available at the City Hall College Green.

Section 15 Commons Act 2006

Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

APPENDIX 1

3. Exhibit A

Mapping sourced from Ordnance Survey

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Overview Map

0 60 120 180

Scale 1:2500

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Save our green spaces

APPENDIX 2

In the matter of an application to register land known as Crow Lane Open Space as a town or village green

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INSPECTOR'S REPORT
FOR BRISTOL CITY COUNCIL
8 July 2013

Annabel Graham Paul
Francis Taylor Building
Inner Temple
EC4Y 7BY

Mr Liam Nevin
Director of Legal Services
Bristol City Council
The Council House
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BS99 7PH

Introduction:

1. I have been appointed as an independent Inspector by the registration authority, Bristol City Council, and asked to report with recommendations on in respect of an application to register land known as Crow Lane Open Space in Henbury, Bristol as a new town or village green. Strictly were the site to be registered it would be a 'town green' rather than a 'village green' in my view, but the requirements for registration and the legal incidents of town and village greens are identical, and in this Report I shall simply refer to 'town and village green' or 'TVG'.

2. Where documents are referred to in this Report, they are identified by tab number in accordance with the two bundles of documents provided to me on behalf of the registration authority and, in the case of the documents attached to the Objector's objection, enclosure number.

3. The application was made by Revd Dr Sue Parfitt on behalf of the Friends of Crow Lane Open Space ('the Applicant') on 10 November 2011 and was registered by the authority on 23 November 2011. It was accompanied by a number of maps, 44 witness statements, 4 evidence questionnaires and photographs from local residents.

4. The freehold owner of the vast majority of the application land is Bristol City Council ('the Objector') (see Land Registry Title Numbers BL 110529, BL 110492, BL 110456 and BL 110503) which comprises the Crow Lane Open Space and Henbury Conservation Area and part of Henbury Housing Estate. The Objector submitted a Statement of Objection on 24 May 2012 accompanied by 18 enclosures. The Applicant responded on 24 July 2012.

5. I have also had regard to a further email of clarification from the Objector sent on 2 May 2013 at 11:33 with regard to the holding of title number BL 110503.

6. There is a very small sliver of land at the south of the application land which is not in the Objector's ownership and is shown hatched black on the plan at enclosure 1(b). I have not been informed who owns this land, if they are indeed known.

7. Section 15(1) of the Commons Act 2006 ('CA 2006') provides that any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies. The parties agree that the relevant subsection in the context of this application is (2).

8. Section 15(2) applies where:

   (a) 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; and

   (b) they continue to do so at the time of the application.

9. The Applicant must prove that the statutory test is met on the balance of probabilities and the relevant period of at least 20 years runs backwards from 10 November 2011.

10. There is a single matter in issue in respect of this recommendation: whether any user of the land has been 'as of right', and in particular whether user has been pursuant to statutory authority.

11. Given the nature of the matter in issue, I consider that the registration authority is in a position to determine the application on the papers, and it is not necessary to hold a non-statutory public inquiry to hear oral evidence. Neither do I consider it necessary for me to make a site visit to the application land.

Factual Background:

12. The application land (minus the sliver of land to the south referred to in paragraph 5 above) was purchased by Bristol City Council ('BCC') in two tranches:

    (a) On 8 February 1950, 193.561 acres was purchased by virtue of the Bristol (Henbury No 1) Housing Confirmation Order 1948 and the Housing Act 1936 "and all other powers statutory or otherwise them enabling in that behalf"

    (b) On 7 November 1951, 25.281 acres was purchased by virtue of the City and County of Bristol (Henbury No 1) Compulsory Purchase Order 1947 for the purposes of Part V of the Housing Act 1936.

13. For the purposes of considering whether that land was subsequently appropriate for purposes other than housing, the land can be split into six parts as shown on the plan at enclosure 1(b):

    (a) On 8 December 1954, 9.18 acres of land situated at the rear of Station Road, Henbury was appropriated to education purposes (Terrier Card B13/11 and Ministerial consent dated 8 December 1954 A/R C733 at enclosure 4(i)) to create a site for the Henbury Court Primary School (Minute 340 of the Buildings and Equipment Committee, 20 July 1954, Minute 1039 of the Housing Committee 16 August 1954 and Full Council

meeting of 12 October 1954). Of this, a thin sliver of land on the west of the application land marked blue on the plan at enclosure 1(b), is a part.

(b) On 1 April 1963, 22.65 acres of land between Crow Lane and Tormarton Crescent (including Hazel Brook) was appropriated to public open space purposes (Terrier Card B14/8, note of ministerial consent 25 May 1964, terrier plan and Council minutes at enclosure 4(ii)(a)). This corresponds to the vast majority of the large area marked green on the plan at enclosure 1(b).

(c) On 13 June 1969, 2.1 acres of land at Crow Lane was appropriated to public open space purposes (Terrier Card B14/14 and plan, committee minutes and ministerial consent A/R C1766 of 13 August 1969 at enclosure 4(ii)(b)). This is also part of the area marked green on the plan at enclosure 1(b).

(d) On 16 June 1969, 0.4 acres at Bickerton Close was appropriated to public open space purposes (Terrier Card B14/13 and plan and ministerial consent of 16 June 1979 at enclosure 4(ii)(c)). This is also part of the area marked green on the plan at enclosure 1(b).

(e) On 4 October 1973, 10.9 acres of land at Henbury Road (including land known as Henbury Conservation area) was appropriated to public open space purposes (Terrier Card C14/13, record of ministerial consent dated 4 October 1973 and plan, committee minutes, schedule of appropriations at enclosure 4(ii)(d)). This is also part of the area marked green on the plan at enclosure 1(b).

(f) On 30 April 2010, 0.19017 hectares of land at Henbury Open Space was appropriated to public open space purposes in accordance with the Open Spaces Act 1906 Section 10 under Section 122 of the Local Government

Act 1972 (under delegated powers, see enclosure 4(ii)(e) in my documents, although stated to be 4(ii)(d) in the Objector's objection). This is also part of the area marked green on the plan at enclosure 1(b).

14. The remainder of the land owned by BCC is marked pink on the plan at enclosure 1(b) and remains housing land pursuant to the Housing Act 1936.

15. The plan also shows a tiny parcel of land on the west of the application land in yellow which is marked 'Highway Asset Management'. The Objector does not state in its objection what the status of this part of the land is, although I consider it so minute that it is *de minimus* in the context of the application (see paragraph 38 below).

16. For the purposes of determining the issue of whether any user has been 'as of right' by virtue of the appropriations, I consider the land can be divided into three categories:

    (i) Land appropriated to public open space (the green land)
    (ii) Housing land (the pink land)
    (iii) Land appropriated to education purposes, possible highway land and land not owned by the Objector (the blue, yellow and black hatched land).

Legal Framework:

17. Although the discussion was *obiter*, the House of Lords gave strong guidance in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 that user which is under a legal right is not user 'as of right' for the purposes of s. 15(2) CA 2006 (see [3] & [9] per Lord Bingham; [11] per Lord Hutton; [29] – [30] per Lord Scott; [62] per Lord Rodger; and [72], [87] – [88] per Lord Walker).

18. Lord Bingham set out the position as follows:

> "In this context it is plain that 'as of right' does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period." (at [3])
> "Such use [pursuant to a statutory right to do so] would be inconsistent with use as of right" (at [9]).

19. It was accepted by the parties in *Barkas v North Yorkshire County Council* [2012] EWCA Civ 1373; [2013] 1 WLR 1521 that *Beresford* is authority for the proposition that there is a distinction between a use of land 'by right' and a use of land 'as of right'.[1] The Court of Appeal dismissed the submission that there is no additional requirement that the user must not be 'by right' in the *nec vi, nec clam, nec precario* definition of 'as of right' (at [38] per Sullivan LJ). Rather, if local inhabitants are indulging in lawful sports and pastimes on land 'by right' and not 'as of right' an application to register that land as a TVG will fail (see [42] – [45] per Sullivan LJ and see also *R (on the application of Malpass) v The County Council of Durham* [2012] EWHC 1934 (Admin) at [41]).

20. There are a number of circumstances where land potentially may be used 'by right' as opposed to 'as of right'. The following are of relevance to this case:

    (1) Where land is held under an express statutory trust under s. 10 Open Spaces Act 1906. Land may so be held if it is either acquired under s. 9 Open Spaces Act 1906 or is appropriated for the purposes of s. 10 Open Spaces Act 1906 under the general power now contained in s. 122(1) Local Government 1972 (formerly s. 163 Local Government Act 1933). Where there is an express appropriation for the purposes of s. 10 Open Spaces Act 1906 so that the land is held in trust to allow its enjoyment by the public as an open space, it appears settled that the land is used 'by

[1] It should be noted that the Supreme Court has granted permission to appeal in *Barkas*, but no appeal has been heard yet.

right' and not 'as of right': see *Beresford* at [30] per Lord Scott and [87] per Lord Walker and *Barkas* at [27] per Sullivan LJ.

(2) Where land is not held under a statutory trust in the strict sense, but land has been appropriated for the purpose of public recreation or open space. This circumstance finds form in [87] of Lord Walker's opinion in *Beresford*. It is *obiter*, but as stated by Sullivan LJ in *Barkas* (at [33] – [34]): "Lord Walker clearly regarded "appropriation" for the purpose of public recreation as being of critical importance. He emphasised that the undisputed evidence in Beresford did not establish, or give grounds for inferring "any statutory trust of the land or any appropriation of the land as open space" (emphasis added): see paragraphs 88, 89(a) and 90 of his opinion … While they are not binding … Lord Walker's observations are highly persuasive, and I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment." Sullivan LJ went on to hold that there is no practical distinction between land which is initially acquired for open space purposes and land which has been appropriated for open space purposes from some other use. Thus, it appears settled that land that is appropriated for public recreation or as open space under an enactment other than the Open Spaces Act 1906 will also be used 'by right' and not 'as of right'.

(3) Where land is held under a statute other than the Open Spaces Act 1906, if the statute properly construed confers a right on the public to use land for recreational purposes. In such circumstances, it appears settled that, subject to the interpretation of the particular statute in question, the public's use of that land will be 'by right' and not 'as of right' (see *Barkas* at [26] and in relation to interpretation of particular statutes, [35] – [37]). In particular, in *Barkas*, the land in question was a recreation ground provided in connection with housing and maintained under an express

statutory power under s. 12(1) Housing Act 1925 which provides that "a local housing authority may, with the consent of the Secretary of State, provide and maintain in connection with housing accommodation provided by them under this part … recreation grounds".

21. It follows from the foregoing that, in the case of open space land, if a subsequent appropriation to an inconsistent purpose occurs, the land will no longer be held for the public's benefit as an open space and subsequent user will not necessarily be 'by right'.

22. In relation to the evidential test to be applied to whether or not land is held on trust as open space or as a recreation ground, the following principles may be summarised. Local authorities are creatures of statute and their powers to acquire, hold and use land are governed by statute. Thus, as was common ground in the recent High Court case of *R (on the application of Stephen Malpass) v The County Council of Durham* [2012] EWHC 1934 (Admin) (at [41]), even if there is no unequivocal evidence spelling out under what authority land is held, it is proper to assume that the holding of it is lawful provided that the use to which the land is put is permitted by some appropriate enabling legislation (and see, for example, *Attorney-General v Poole Corporation* [1938] Ch 23 cited by Lord Scott in *Beresford* at [30]). What was said by Lord Scott in *Beresford* at [30] is as follows:

> "Is it necessary in order for open space land to have been acquired under the Act [the Open Spaces Act 1906], for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney-General v Poole Corporation [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation
>
> "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use."
>
> There was no express reference in the Conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on

both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were used for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case."

23. Further, whether an appropriation to open space purposes has in fact occurred, or whether land is laid out as a recreation ground, will be a matter to consider on the balance of probability having regard to all the evidence (see *Malpass* at [45]). The presumption of regularity applies where there is no evidence one way or the other as to whether part of the formal process of appropriation in fact took place, so that if a particular document is 'missing' from the evidence base, it will be presumed to have existed, unless rebutted by a party: see e.g. comments of Vivian Chapman QC acting as independent Inspector reporting on the land that formed the *Barkas* challenge (at [122] of his Report[2]).

Application of the Law to the Facts:

The Green Land

24. With the exception of the most recent 30 April 2010 appropriation, none of the appropriations of the green land or the supporting documents refer expressly to the Open Spaces Act 1906 or any other enactment under which the land was to be held.

[2] See https://www3.northyorks.gov.uk/n2cabinet_comm/planningandregu_/reports_/20101008_/07heldredalepla/07heldredalepla.pdf (accessed: 8 July 2013)

25. Nevertheless, I consider it is proper to assume that BCC has since been lawfully holding the whole of the green land as open space for the benefit of the public under s. 10 Open Spaces Act 1906, since that is the appropriate enabling legislation for the use to which it has been put (in accordance with *Beresford* at [30] and *Malpass* at [41] citing *Attorney-General v Poole Corporation*). Thus, any use of that part of the application land by the public for lawful sports and pastimes would be 'by right' and not 'as of right'.

26. Even if I am wrong, and only the land appropriated in 2010 has been held under s. 10 Open Spaces Act 1906, I consider that appropriation of the remainder to 'open space purposes' is sufficient to imply a statutory trust and render any use of the land by the public 'by right' in any event, in accordance with *Beresford* at [87] and *Barkas* at [33] – [34].

27. The Applicant has suggested in her response to the Objection dated 24 July 2012 that the fact that BCC has stated an intention to sell the open space land for housing development calls into question its original appropriation. I do not consider that the original appropriation is invalidated by any such statements. Were BCC subsequently to appropriate the application land for any purpose inconsistent with use as an open space, the land would no longer be held for the public's benefit as an open space and subsequent user would not necessarily be 'by right'. However, I have seen no evidence that BCC did in fact subsequently appropriate the land to another purpose.

28. Accordingly, I find that the part of the application land coloured green on the plan at enclosure 1(b) has not been used 'as of right' by local inhabitants for the whole of the relevant period, and the application in respect of that part of the land must fail (which constitutes the vast majority of the application land).

The Pink Land

29. The pink land was acquired on 8 February 1950 for the purposes of the Housing Act 1936 and subsequently held for the purposes of successive Housing Acts, through to the Housing Act 1985. The Objector states that, during the relevant 20 year period, this land served and continues to serve a beneficial purpose as a recreation ground in connection with the requirements of the persons for whom the housing accommodation is provided, in accordance with s. 12 Housing Act 1985 (originally s. 80 Housing Act 1936), following the 1950s conveyance.

30. In *R (Barkas) v North Yorkshire County Council* [2013] 1 WLR 1521, the Court of Appeal held that, where land had been laid out and maintained as a recreation ground under s. 80 Housing Act 1936 or s. 12 Housing Act 1985, the public had a right to use it for recreational purposes and thus the public recreational use of such would not be 'as of right' for the purposes of the statutory definition (at [37] per Sullivan LJ, with whom McFarlane and Richards LLJ agreed).

31. The Applicant has correctly pointed to the fact that in the case of the housing land at Crow Land Open Space, BCC has provided no documentary evidence of the consent of the Secretary of State ever being obtained for the provision of a recreation ground in association with the residential accommodation provided, which is a requirement of s. 12(1) Housing Act 1985. The lack of documentary evidence of consent was also a feature in *Barkas*.

32. There, the Inspector Vivian Chapman QC stated (at [122] of his report):

> "It appears to me to be a reasonable inference that the Field was set out and maintained as a recreation ground pursuant to s. 80 of the 1936 Act. Provided that the Field benefited the council tenants (which it clearly did), it did not matter that it also benefited other people within the local community … Accordingly, it was within the power of Whitby UDC under s. 80 to set out and maintain a public recreation

> ground provided that it benefited its tenants. It is true that there is no evidence, one way or the other, as to whether the Minister gave his consent. However, I consider that I am entitled to apply the usual presumption of regularity".

33. I consider that the same reasoning can apply in this case in principle. However, the Applicant states that the site circumstances are different at Henbury. From the evidence I have seen, I consider this may be arguable in relation to the two more northern parts of housing land: land to the rear of 68-76 Marmion Crescent which appears to be a concrete area for the use of nearby properties (see photos 1, 2, 3 and 4 taken by the Objector on 16 April 2012 at enclosure 2(a)) and land between Modecombe Grove / Lowlis Close which is physically separated by a fence from the remainder of the land and extremely overgrown (see photos 8, 9 and 10 taken by the Objector on 16 April 2012 at enclosure 2(a)). The physical characteristics of these areas weigh against a presumption of the land being laid out and maintained as a recreation ground during the 20 year period, in my view.

34. However, the most southern of the three areas of housing land (which contains a pond) appears to be part and parcel of the Crow Lane Open Space and is confirmed by the Objector to be accessible (email from Objector of 2 May 2013). As such, I see no reason not to presume that this area of housing land has been laid out and maintained as a recreational ground in accordance with s. 12 Housing Act 1985 during the relevant period.

35. I note that the Supreme Court has given permission to appeal the decision in *Barkas*, but unless and until the decision is overruled, I consider that the southern triangle of the pink land, which I find is laid out and maintained as a recreation ground under s. 12 Housing Act 1985, cannot be registered as a TVG.

36. In relation to the northern two areas of pink land, the Objector has put forward other reasons why they should not be registered (in particular, that they are inaccessible and any user would be by force). I do not consider it is necessary for the registration authority to consider these arguments, since I am of the view that the two remaining areas of housing land fall to be considered at this stage in the same way as the blue, yellow and black hatched areas, as set out in paragraph 38 below. Nevertheless, for the avoidance of doubt, I consider from the photographs that the land is indeed inaccessible and would require some force to enter and use it.

The Blue, Yellow, Black Hatched and Northern Two Pink Areas of Land

37. In relation to the blue land which was appropriated on 8 December 1954 to education purposes, the Objector relies on *R (Newhaven Port & Properties Ltd) v East Sussex County Council* [2012] EWHC 647 where the High Court declined to register a beach as a TVG since the statutory purpose for which it was held conflicted with TVG registration. That decision has however subsequently been overruled by the Court of Appeal ([2013] EWCA Civ 276; [2013] 2 P & CR 8), where it was decided that the Judge was wrong to hold that any supposed incompatibility with the landowner's functions as a port authority was a valid basis for not registering the beach as a TVG.

38. Were the registration authority examining significant areas of land in the case of the blue education land, yellow highway land and black hatched land not in the Objector's ownership, I would advise that the claim should not fail on the basis of the information before me and further investigation of the use of those parts of the application land should proceed. Notwithstanding this, I consider that these three parcels of land, and the two northern areas of housing land, are so small and peripheral that they are *de minimis* in the context of the application.

39. Although the registration authority has the power to register a smaller area than is applied for (*Oxford City Council v Oxfordshire County Council* [2006] 2 AC 674 at [62]), in my view it would be contrary to common sense to consider registering such small areas of land in isolation. Indeed, their 'sliver' forms would make it near-impossible to define their boundaries and establish what user had taken place on them. Thus, I am not of the view that, given the failure of the vast majority of the site to meet the statutory test, the registration authority has any further duty to consider these small areas.

Conclusions and Recommendations:

40. My conclusions are:

(1) The application should be refused in whole on the basis that the use of the part of the application land shown green and the southern most part shown pink on the plan at enclosure 1(b) during the relevant period has been 'by right' and not 'as of right', and the remaining parts of the land applied to be registered are *de minimis* and too small to be registered independently.

41. My recommendations are:

(1) That my Report should be made available to the Applicant and to the Objector, together with final confirmation of the date of the meeting at which the registration authority will reach its decision. The Applicant and Objector should be informed that this meeting does not present an opportunity for the parties to re-state their cases or seek to put in further evidence, unless truly exceptional circumstances are made out.

(2) That the decision on the application is for the registration authority which must exercise its own discretion, save that it must not take into account

issues relating to any balance of advantage or disadvantage flowing from registration or non-registration of the land as a TVG.

(3) That in reaching its decision on the application it can properly have regard to my overall conclusions and reasoning, as well as any advice from officers.

(4) That subject to that advice and any late representations received, the application should be refused in respect of the entire site and for the reasons set out in this Report and summarised in my Conclusions above.

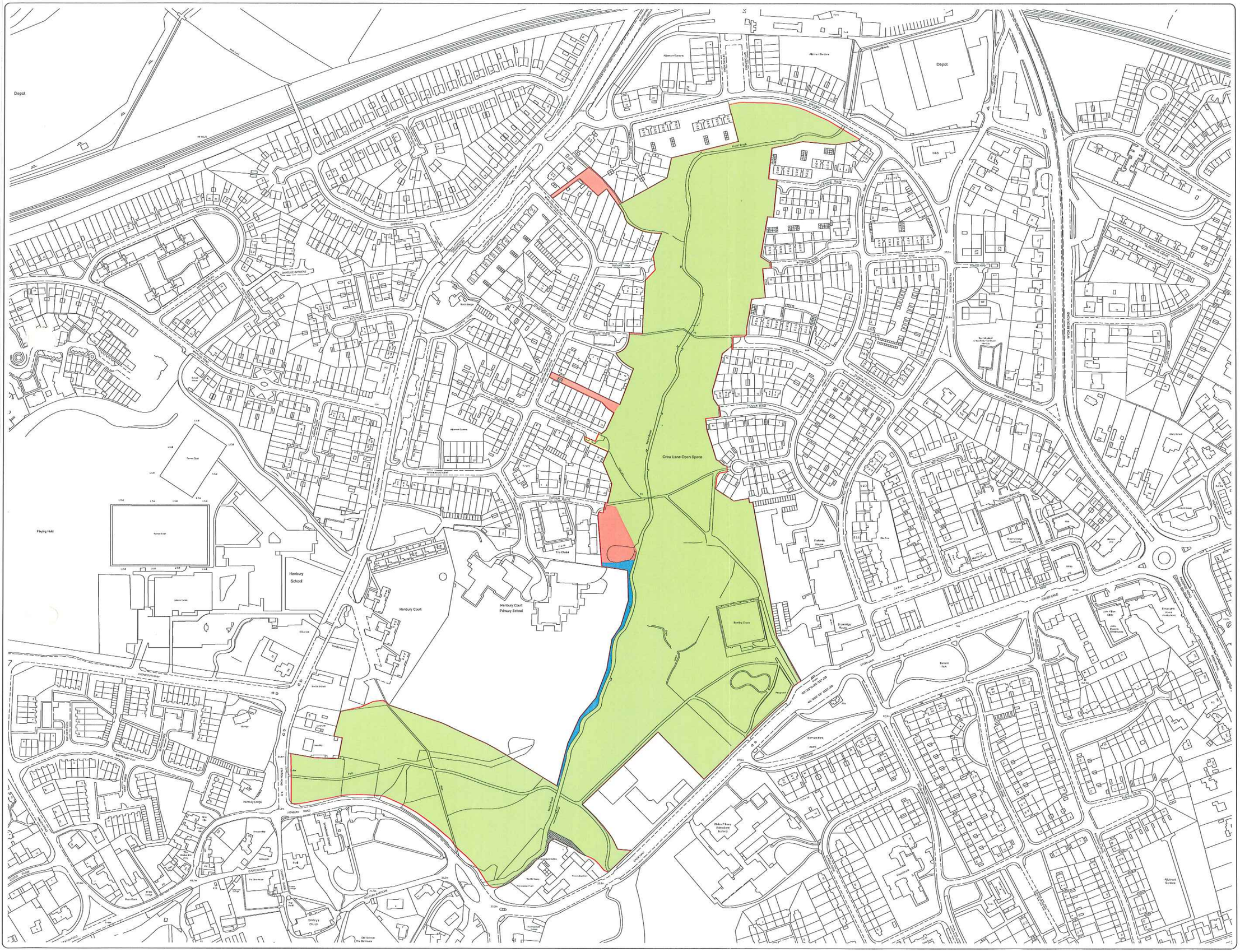
(5) This application is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (since the registration authority is not one participating in the pilot scheme). Under Regulation 9(2), the registration authority is required to give written reasons for the rejection of an application. If the registration authority accepts my recommendations and reasons, its reasons should be stated to be "the reasons set out in the Independent Inspector's Report of 8 July 2013".

ANNABEL GRAHAM PAUL

Francis Taylor Building
Inner Temple
EC4Y 7BY

8 July 2013

APPENDIX 3



TVG application site,
Crow Lane Open Space,
Henbury.

- TVG application site
- NH – Parks Landscape Heritage Estates
- NH – Housing HRA Land
- CYPS – Primary School
- CD – Highway Asset Management
- Not in Council ownership

SITE PLAN : To ensure boundary accuracy, please refer to deeds.

N

CORPORATE PROPERTY

Plan No	:	N6062c
Prop ID Ref	:	
Polygon Ref	:	
Scale	:	1:2,500 @ A2
Date	:	21 May 2012

BRISTOL CITY COUNCIL

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