

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

31 MARCH 2014

Report of: Service Director: Legal

Title: Application for land described in the application as “Tackley Green (former Territorial Army land) “Grassland to the rear of (odd) numbers 1-33 Heyford Avenue around OS grid ref ST60707550” to be registered as a town or village green made under the Commons Act 2006

Ward: Eastville

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

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

Refuse the application to register Tackley Green (Grassland to the rear of (odd) numbers 1-33 Heyford Avenue) as a town green for the reasons set out in the Inspector’s Report dated 25 February 2014

Summary

This report relates to an application for land described in the application as “Tackley Green (former Territorial Army land) “Grassland to the rear of (odd) numbers 1-33 Heyford Avenue around OS grid ref ST60707550” (called Tackley Green) to be registered as a town and 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

2. Internal

Not applicable

3. External

The Landowner and the Applicants have been provided with the inspector's report.

Context

4. The Council as registration authority received an application to register land described in the application as "Tackley Green (former Territorial Army land) Grassland to the rear of (odd) numbers 1-33 Heyford Avenue. Around OS grid ref ST60707550" as a town green made under the Commons Act 2006 dated 13 March 2013 and a report was submitted to the Committee on 27 January 2014.
5. The Committee resolved that the matter be referred to an Independent inspector. The Independent Inspector has now provided written recommendations to the Commons Registration Authority.
6. A map of the application land is attached as Appendix A and the Inspector's report is attached as Appendix B.
7. The Inspector recommends that the application to register Tackley Green as a town green should be refused in whole on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right' (paragraph 34(1) of Appendix B).
8. The Report has been circulated to the parties, as recommended by the Inspector (paragraph 35(1) of Appendix B).

Proposal

9. 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.

10. Officers have already assessed the evidence (as set out in the appendix to the report submitted to the Committee on 27 January 2014) and considered that the application should be rejected. This assessment has now been confirmed by the independent inspector.
11. Officers consider that the Committee should accept the Inspector's recommendation and reject the application for the reasons set out in the Inspector's Report dated 25 February 2014.

Other Options Considered

12. No other options have been considered. It is a matter for the Applicants to satisfy the Commons Registration Authority (CRA) that all the elements of the statutory test have been shown. Based on the Inspector's Report the Applicants have not satisfied that test. If the Committee decides not to follow the officer recommendation, it must have sufficient reason for reaching a conclusion different from that of the officers.

Risk Assessment

13. Whilst 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.
- 13 However, 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

- 14 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

- 15 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

- 16 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”

- 17 In addition to the above, the application must meet the test under Section 15(2) of the Act ie. use of land has continued “as of right” until at least the date of the application.

- 18 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.

- 19 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 must be left out.

“As of right”

20 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”

21 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”

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

23 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.

24 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

25 The application has been made under Section 15(2) of the Act 2006. The regulations that govern this procedure are the (Commons Registration of Town or Village Greens) Interim Arrangements (England) Regulations 2007.

26 The Committee must have sufficient reason for reaching a conclusion different from that of the Independent Inspector.

Legal advice provided by: Anne Nugent, Legal Services.

Financial

27 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.

28 Capital

There are no policy implications arising from this report.

Financial advice (Revenue) provided by: Tony Whitlock, Finance

Land

29 There are no policy implications arising from this report.

Financial advice (Land) provided by: Lois Woodcock, Property

Appendices

Appendix A- Map of application land

Appendix B– Inspector's Report

Local Government (Access to Information) Act 1985

Background Papers:

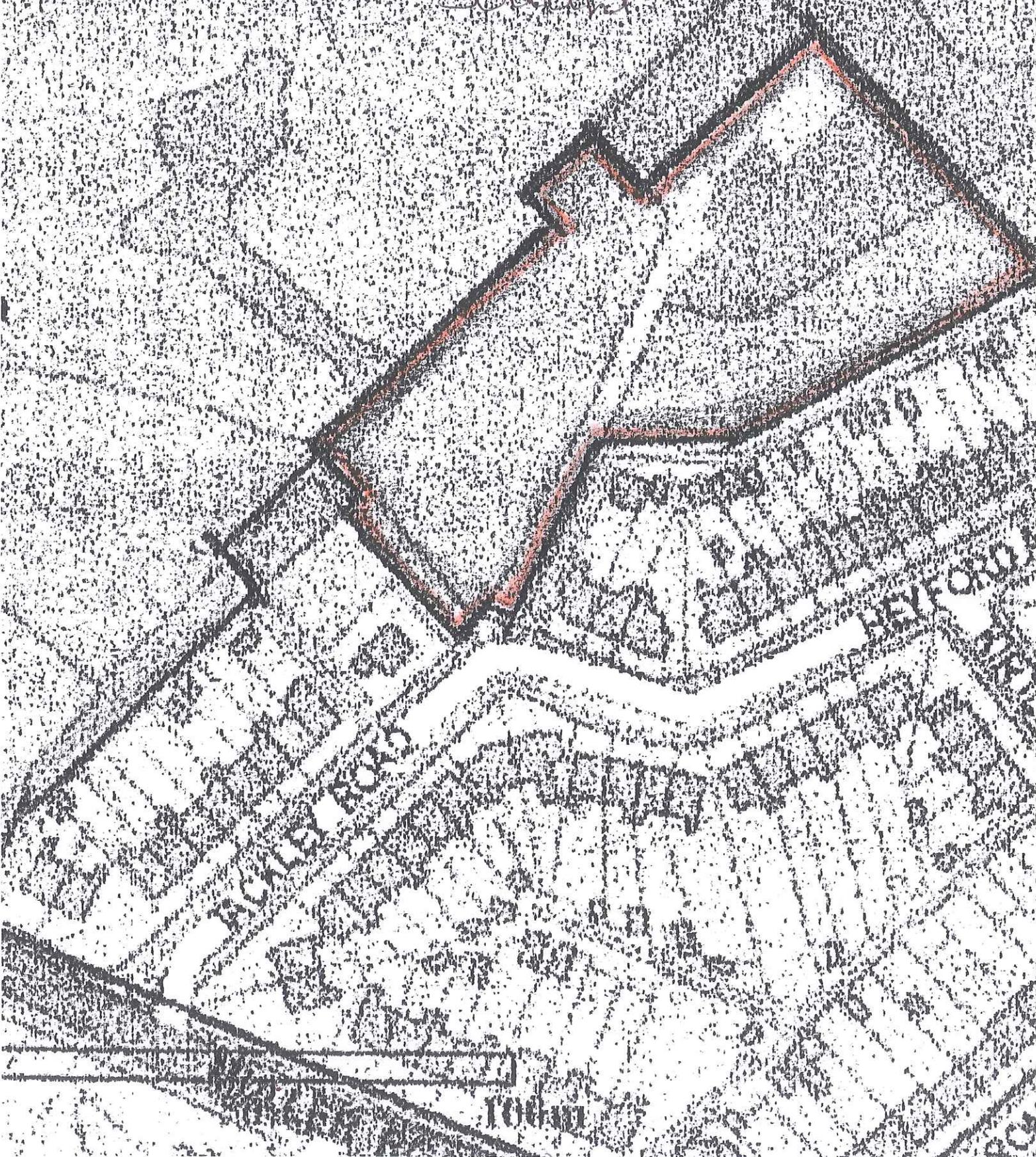
The application papers/ statement of objections/ response are available at the City Hall, College Green.

Section 15 Commons Act 2006

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

**Recreation
Ground**

*Lusan Hart
Bearing
Jim Simpson
d. D. Gibson
Square*



**In the matter of an application to register land known as Tackley Green as a town
or village green**

**INSPECTOR'S REPORT
FOR BRISTOL CITY COUNCIL
25 February 2014**

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Introduction

1. I have been appointed as an independent Inspector by the registration authority, Bristol City Council, and asked to report with recommendations in respect of an application to register land known as Tackley Green, to the rear of odd numbers 1 – 33 Heyford Avenue around Grid Reference ST60707550, 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 bundle of documents provided to me on behalf of the registration authority or, in the case of the documents submitted by the landowner, by enclosure number.
3. The application was made by Mrs Susan Flint, Mrs Ruth Gering and Mrs Ruth Sherbourne (‘the Applicants’) on 3 April 2013 and was registered by the authority on 8 April 2013. It was accompanied by 35 evidence questionnaires from local residents. The Applicant submitted a plan of the land to delineate the boundaries of the land applied to be registered (‘the application land’) with the application which is not entirely clear, but there does not seem to be dispute as to the boundaries and a clear version of the plan is evidence in enclosure 1 of the objection (Plan ref: ‘Tackley Road 1’).
4. The freehold owner of the whole of the application land is Bristol City Council (‘the Objector’) (see Land Registry Title Numbers GR21347 and part of BL114423). The Objector submitted a Statement of Objection which is undated, and was accompanied by 19 enclosures. The Applicant responded to the Notice of Objection.

5. 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).

6. 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.

7. 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 3 April 2013.

8. There one matter in issue in respect of whether the test for registration in s. 15(2) Commons Act 2006 is met, which the Objector regards as a 'knock out blow' to the application:
 - (i) Whether use of the application land has been 'by right' as opposed to 'as of right' by virtue of appropriation to open space purposes.

9. 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.

Whether use of the application land has been ‘by right’ as opposed to ‘as of right’

Factual Background:

10. For these purposes, the land may be seen in two parts as shown on the Objector’s plan ref ‘Tackley Road 4’ (at enclosure 5).

11. The whole of the land was part of a wider area purchased by Bristol City Council on 9 March 1938 (see Objector’s plan ‘Tackley Road 2’). This followed a meeting on 8 June 1937 in which the Members were asked to decide whether they intend to purchase the land for use as a public open space (since the owners were considering an application to build on it at the time) (see minutes at enclosure 6 of the Objector’s evidence). The minutes record on p. 321 that the “Committee have given the matter careful consideration and are of the opinion that the land should be purchased to provide facilities for recreation and the playing of organized games.” The recommendation is “to agree to the purchase of the land as a public open space” (p. 327).

12. On 5 January 1938, the Town Clerk wrote to the Ministry of Health stating that it is proposed to acquire the land under the provision of s. 164 of the Public Health Act 1875 as amended by later enactments (enclosure 7). It is further stated: “Should it be found desirable or necessary to let portions of the grounds to particular clubs or bodies, application will be made at a later date for permission to appropriate the land for these purposes”.

13. The ensuing sale of the land is documented in the conveyance at enclosure 8 of the Objector’s evidence. At p. 4 of the conveyance, the land being acquired is described as:

“All those pieces or parcels of land (being certain land which has been scheduled as a public open space by the Town Planning Committee of the Corporation) containing 33.221 acres etc. ...”

14. After initial purchase, the land must be considered in three separate parts.
 - (i) The rectangular shaped piece of land on the eastern part of the application land; and
 - (ii) The remainder bulk of the application land (1.78 acres); and
 - (iii) Forecourt area

15. The remaining bulk of the land was sold by Bristol City Council to the Territorial Army and Air Force Association of the County of Gloucester. The major part of this land, and all that is within the application land, was subsequently repurchased on 31 October 1967 by the City Council. The decision to re-purchase this land was considered at a meeting of the full Council on 13 July 1965. The Report of the Planning and Public Works Committee to the full Council stated that the Committee “have provisionally agreed to purchase for public open space purposes the freehold interest of approximately 1.4 acres of land at Tackley Road, Eastville...” (enclosure 14). The minutes of the full Council meeting record that the Council approved and adopted that recommendation (see p. 59).

16. The rectangular shaped piece of land remained in the Council’s ownership throughout but was leased by Bristol City Council to the Gloucestershire Territorial and Auxiliary Forces Association on 1 December 1948 for a term of 75 years from 24 June 1949 (enclosures 9 and 10). The lease was terminated on 31 October 1967 at the same time as the re-purchase of the remaining bulk of the land (see Deed of Surrender, enclosure 16).

17. On 13 June 1965, Bristol City Council granted a lease of a small area within the application site comprising of a garage forecourt to the Territorial and

Auxiliary Forces Association for the County of Gloucester for a term of 42 years from 31 October 1967, in conjunction with leasing the garage itself which is outside the application land (enclosure 18). The lease was surrendered on 31 October 1994 (enclosure 19).

Legal Framework:

18. 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).
19. 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]).
20. It was accepted by the parties in *Barkas v North Yorkshire County Council* [2012] EWCA Civ 1373 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’. 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]).

21. The registration authority should note that the Supreme Court has granted permission to appeal the Court of Appeal's decision in *Barkas*, but the hearing has not taken place yet. The registration authority is entitled to determine the application in accordance with the law as it currently stands.

22. 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 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]).
23. 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’.
24. In relation to the evidential test to be applied to whether or not land is held on trust as open space, 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.”

25. Further, whether an appropriation to open space purposes has in fact occurred 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 Report¹).

Application of the Law to the Facts:

The rectangular shaped piece of land on the eastern part of the application land

26. I find that there is overwhelming evidence that the rectangular shaped piece of land was purchased by the Council as part of a wider area on 9 March 1938 for use as a public open space.
27. It appears that the statutory power relied on is s. 164 of the Public Health Act 1875 as amended by later enactments. This gives a local authority power to acquire land or to provide recreation grounds, public walks, pleasure grounds and open spaces and to manage and control them.
28. I consider that this statute properly confers a right on the public to use land for recreational purposes and thus the public’s use of the land was ‘by right’ and not ‘as of right’ (*Barkas* at [26]). Despite the absence of reference to the Public Health Act 1975 in the conveyance, I consider it proper to apply a presumption of regularity that the Council is holding the land lawfully under the 1875 Act in accordance with the minutes of the Committee meeting of 8

¹ See

https://www3.northyorks.gov.uk/n2cabinet_comm/planningandregu_/reports_/20101008_/07heldredalepla/07heldredalepla.pdf (accessed: 28 November 2012)

June 1937 and the Town Clerk's letter to the Ministry of Health of 5 January 1938.

29. The public's right to use the land for recreation ceased when it was leased to the Territorial Army from 24 June 1949 since the land was appropriated to an inconsistent purpose (namely use by a specific group of individuals for army training). However, following surrender of the lease on 31 October 1967, which was more than 20 years before the application to register the land as a town or village green was made, the land reverted to its previous status as a consequence of the continuity of the freehold owner, and thus again was available to the public to use for recreational purposes 'by right'.

The remainder bulk of the application land (1.78 acres)

30. I find that there is overwhelming evidence that the remainder bulk of the application land was purchased by the Council from the Territorial Army on 31 October 1967 for public open space purposes. Despite the lack of reference to a statutory trust under s. 10 Open Spaces Act 1906 or any other enactment in the conveyance, I consider it proper to apply a presumption of regularity that the Council has been holding it for public open space purposes lawfully, in accordance with the recommendation which was accepted by full Council on 13 July 1965.
31. Accordingly, since appropriation to 'open space purposes' or the holding of land for such purposes is sufficient to imply a statutory trust and render any use of the land by the public 'by right' in accordance with *Beresford* at [87] and *Barkas* at [33] – [34] (coupled with the application of s. 164 of the Public Health Act 1875 to the rectangular piece of land), I find that the public's use of the land during the 20 year period is 'by right' and not 'as of right' and the application must fail.

Garage Forecourt

32. That leaves the issue of the garage forecourt which was leased to the Territorial Army until 31 October 1994 i.e. during the first few months of the 20 year period. Following surrender of the lease, that part of the application land reverted to control by its freehold owner, Bristol City Council, and, with that, the application of the public right to use the land for open space purposes. Accordingly, since the applicant must prove use of the land 'as of right' for the whole of the 20 year period and for the majority of that period there has been no lease for an inconsistent purpose, the application must fail in respect of the garage forecourt as well.

33. Accordingly, I find that the application should be rejected in full on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'.

Conclusions and Recommendations

34. My conclusions are:

- (1) The application should be refused in whole on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'.

35. 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 25 February 2014”.

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25 February 2014