

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

29 OCTOBER 2007

**APPLICATION FOR REGISTRATION OF LAND AT SOUTH PURDOWN
LOCKLEAZE AS A TOWN OR VILLAGE GREEN UNDER THE COMMONS
REGISTRATION ACT 1965 AS AMENDED BY THE COUNTRYSIDE AND
RIGHTS OF WAY ACT 2000**

(Report of the Head of Legal Services)

(WARD: LOCKLEAZE)

**APPLICANTS: SUSAN FLINT, C/O 12 TACKLEY ROAD,
BRISTOL BS5 6UQ**

**MICHAEL YORK SMITH, 20 DORMER ROAD,
BRISTOL BS5 6XQ**

**JUNE SHERBORNE, 12 TACKLEY ROAD,
BRISTOL BS5 6UQ**

**RUTH GEARING, 21 SOUTH HAYES,
BRISTOL BS5 6UB**

Objector: (1) Bristol City Council, **in its capacity of freeholder of the
application site;**

Purpose of Report

1. TO ADVISE REJECTION OF THE APPLICATION

Background

2. The Applicants, on behalf of the Friends of South Purdown, applied on the 19 of July 2006 for registration as a town or village green of land located at South Purdown off Muller Road in Lockleaze. The application was advertised during August, with a deadline for objections of 6 October 2006.

The application is accompanied by a plan showing the subject land, to be found at Appendix 1 to this report.

3. The freehold of the land is owned by the City Council whose Director of Children's and Young People's Services lodged a formal objection to the application on the 15th of September 2006. In essence, the City Council

(in its capacity of land-owner) is of the opinion that because the land is held as public open space under a statutory trust it cannot be registered as a green.

4. In accordance with this Committee's decision of 9 October 2006, (min. PROWG 17.10/06) Mr Vivian Chapman QC was appointed as an independent Inspector to advise the City Council as Registration Authority as to how to dispose of the application.
5. The Inspector was asked by the Registration Authority whether it was necessary to hold a full Non Statutory Inquiry, or whether, as the objector contended, the land was incapable of registration by virtue of being held by the City Council under a statutory trust, and therefore no Inquiry was needed. The Inspector originally advised that as there was insufficient evidence at that stage of the existence of a trust, a full Inquiry should take place.
6. However, on the 27th July 2007 the Objector lodged a Supplementary Objection Statement, to be found at Appendix 2 concerning further evidence from the Council's records of a statutory trust, and the Inspector was asked to reconsider his original advice in the light of this. The Applicants were also asked for their views in relation to the additional evidence, which they provided by their letter of 30th August.
7. However, the Inspector has now advised the Registration Authority (see Appendices 3 and 4), in the light of all the available evidence and legal submissions, to reject the application. This is on the basis that the Objector has now established that the land was held under a statutory trust as public open space during the relevant period. As such it is not registerable as a town or village green, as use by the public has been by right by virtue of the trust, and thus cannot have been "as of right", which would have involved trespass. A crucial element of the statutory definition of a town or village green, which is set out in full below, is that use of the land by local people for recreational purposes for at least the previous twenty years, must have been "as of right". It is therefore impossible to register South Purdown as a green. (Any issue relating to appropriation of the land to different statutory purposes is a separate matter, and decisions in relation to this are not within this committee's terms of reference.)

Conclusion

8. This committee on behalf of the Council (**as registration authority**) has a statutory duty to determine objectively whether or not the land in question should be registered as a town or village green, within the meaning of the Commons Registration Act 1965.

9. Accordingly the Committee should reject the application for the reasons given by the Inspector.

Consultation

None.

Appendices

Appendix 1	The Applicants' plan.
Appendix 2	Supplementary Objection Statement dated 27 July 2007
Appendix 3	The Inspector's Further Opinion dated 6 th September 2007
Appendix 4	The Inspector's Third Further opinion dated 14 October 2007

Legal Implications

The City Council **in its capacity of Commons Registration Authority** has a statutory duty under the Commons Registration Act 1965 to determine in accordance with the rules of natural justice whether the land should be registered as a green.

For an application to register a green under the 1965 Act to be successful, the applicants must prove on the balance of probabilities that that land in question comes entirely within the following definition of a "town or village green" to be found in Section 22(1) of the Commons Registration Act 1965, as amended by Section 98 of the Countryside and Rights of Way Act 2000:-

"(1A) Land falls within this subsection if it is land on which for not less than twenty 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 either –

- (a) continue to do so, or
- (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

(NB No period has been prescribed in pursuance of sub-section 1A(b)).

In its capacity of 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.

Resource Implications

Financial: None.

Land: The City Council is freeholder of the application land.

Personnel: None.

Recommended - that the committee reject the application on the following basis:

The Application is rejected in relation to all the land comprised within the current application (save for the Muller Road embankment) for the reasons given in the Further Opinion dated 6 September 2007, and the Third Further Opinion dated 14 October 2007, of Mr Vivian Chapman QC

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985 Background Papers

Application documents with evidence in support;

Original Objection of 15 September 2006;

Mr Vivian Chapman Q.C.'s Opinion dated 27 November 2006;

Documents appended to the Supplementary Objection Statement dated 27 July 2007;

The Applicants' letter of 30 August 2007 enclosing their submission in response to the Supplementary Objection;

Mr Vivian Chapman Q.C.'s second Further Opinion dated 16 September 2007.

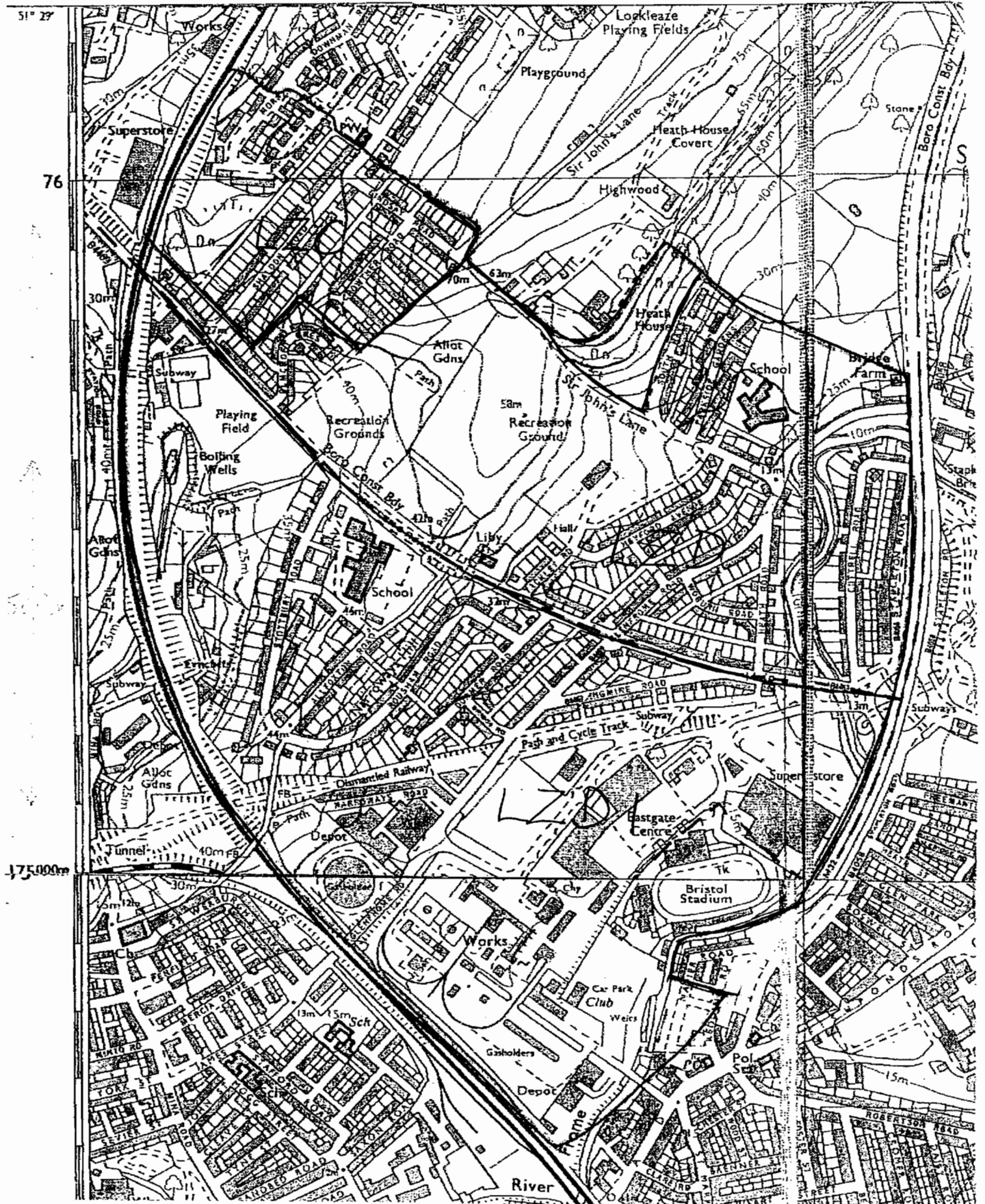
Author: Frances Horner, Senior Solicitor, Legal Division on behalf of the Director of Central Support Services, Tel: 9222330.

PLEASE NOTE:

Some of the following Appendices are unavailable electronically and have therefore been scanned onto the system. If you require a hard copy of this document please contact the report author direct whose name and telephone number is displayed on the front page of the report.

Map A

Red Boundary



BY HAND

Ms Frances Horner
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our ref: CAE/RMJ/AB/GC9/79
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Dear Sir,

In the Matter of An Application to Register land Known as South Purdown, Lockleaze, Bristol, as a New Town or Village Green

We write to you on behalf of the Director of Children and Young People's Services of Bristol City Council (hereafter simply 'the Council') in connection with the above application. As you are aware, the Council as Registration Authority under the Commons Registration Act 1965 has resolved to hold an ad hoc non-statutory inquiry into the merits of the application, and to this end have obtained the opinion dated 27th. November 2006 of Mr. Vivian Chapman Q.C.. Mr. Chapman advised the Registration Authority that it was not possible to determine the application on the papers submitted to the Authority, and recommended that the application go forward to a full inquiry. He further advised that it was open to the Council to apply to the High Court for a declaration that the application land was not subject to registration under the provisions of section 13 of the Commons Registration Act 1965, citing the decision of the Court of Appeal in R

(Whitmey) v. Commons Commissioners. It was the Council's view that, having obtained further information, it would have been appropriate for such an application to be made, and the Council wrote to the Registration Authority making that intention clear. However, since then the decision of HHJ Pelling QC in

McLaren v. Kubiak [2007] EWHC 1065 which held that the decision in Whitney was incorrect, has been delivered. Although the Council has been advised that the decision in McLaren v. Kubiak may well not be correct, the risk of proceeding by way of Court application is, in the view of the Council, too great, and therefore not likely to lead to an efficient resolution of the dispute. The matter therefore has to be dealt with by way of the non-statutory enquiry.

It is for the Registration Authority to consider the appropriate means of determining the application. Given that the Registration Authority has already taken advice from an experienced independent leading counsel, we assume that it will be the Authority's view that the matter should be determined by the holding of a non-statutory inquiry before, we would assume, Mr. Chapman Q.C. We would suggest that the Registration Authority considers the issue as to whether any user of the land has been 'as of right', and in particular as to whether the user has been pursuant to statutory authority, as a preliminary issue. In the Council's view this matter could be determined without reference to oral evidence, and we would ask the Registration Authority to consider dealing with the application in such a manner for reasons of speed and cost. To this end we propose to set out in this letter the Council's submissions on this part of the case. However, in summary, it is that:

- (1) The application land was acquired by the Council for the purpose of holding it as a public open space, more specifically as land for the use as public walks or pleasure grounds within section 164 Public Health Act 1875.
- (2) The application land has not been appropriated for any other purpose;
- (3) User by the public (whether as inhabitants of a locality, or a neighbourhood, or otherwise) has not been on the basis of the exercise of a right pursuant to the existence of a Town or Village Green.

Documentation

As we have indicated above, the Council has been able to research its archives in order to discover material relevant to the acquisition and

appropriation of the land at South Purdown. The documentation we refer to below we have included in the file that is supplied with this letter, and we have numbered the documents in accordance with the Schedule annexed to this letter. We do however make this point at the outset. Since 1938 local government in Bristol has passed through two major re-organisations. In 1974 the functions of Bristol Corporation passed to Bristol City Council. In 1996 Bristol City Council became a unitary authority on the demise of Avon County Council. The consequence of these transfers, and of the other internal reorganisations that have taken place from time to time (which are detailed below), is that some documentation that relates to the use of the application land may not be available. If the Authority or the Applicants wish to make enquiries as to the existence of any other documentation that may be available, the Council would of course be willing to assist so far as it is able. The Council has sought to obtain and put before the Inquiry copies of all relevant documentation in its possession, whether supporting or contrary to the Council's case.

Acquisition and Appropriation

We consider first the statutory power under which the application land was acquired in 1938.

The terms of the 1938 conveyance.

The land the subject to the 1938 conveyance (the '1938 conveyance land') was acquired by the Corporation by a conveyance dated 9th. March 1938 (enclosure 1 to this letter). Recital (7) to that conveyance stated that :

“... the Vendor has agreed to sell, and the Corporation pursuant to the powers conferred upon them by the Local Government Act 1933 and of all other powers statutory or otherwise enabling them in that behalf have agreed to purchase [the land] etc. ...”

The reference to the Local Government Act 1933 appears to be a reference to section 157 of the Act, which gave a local authority power to buy land 'for the purpose of any of their functions under this or any other public general Act'. This provision therefore enables the local authority to buy land, but only for the purpose of a function under the Local Government Act 1933, or arising under another public general Act. The 1933 Act does contain provisions entitling a local

authority to acquire land for the purpose of a function at some time in the future (see section 158(2) *ibid*). However, that power would only be exercisable with the consent of the Minister (see section 158(1)) *ibid*). There is no evidence that ministerial consent to such a deferment was sought or obtained.

Where land is acquired by a local authority, it must be held according to a statutory function of the holder. The only alternative would be that the local authority held the property by way of a charitable trust¹. Given that the conveyance was expressed to be by way of statutory power to purchase: that no reference to the land being vested on trust in this sense was made; and that the conveyance was made for significant consideration, that is not a possibility in the present case. It is a question of fact as to the statutory function and purpose for which the land was acquired.

Although the 1938 conveyance does not expressly state the particular statutory function under which the land was acquired, it does state in the parcels clause that the land has been scheduled as a public open space by the Town Planning Committee of the Corporation. Such a decision is some evidence that the land was intended by the Council to be used as a public open space, within the provisions of the then relevant legislation, namely the Town and Country Planning Act 1932.

Documents relating to the acquisition of the 1938 conveyance land.

A report from the Planning and Public Works Committee of the Corporation dated 27th. May 1937 was laid before the Council on 8th. June 1937 (encl. [2]). Item 3 of the Report related to 'Public Open Space – Muller Road', which is the application land. It appeared that the freehold owners, the Cottrell Dormer Estate, had threatened to develop the land if the Council did not purchase it, and the Committee dealt with this as follows:

“Your 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 organised games. The land

¹ See BANES v. Att.-Gen [2002] EWHC 1623. at [23] (Hart J.)

forms part of Purdown and affords fine views in every direction, and it is felt that the existing amenities should be preserved."

The Committee recommended the purchase of the land as public open space, and an application to the Minister of Health for sanction to borrow *inter alia* the purchase price.

On 8th. June 1937 the Council resolved to purchase the land at Muller Road 'for the purpose of a public open space.', and that application be made to the Minister of Health for sanction to borrow the purchase price plus expenses – see encl. [3].

The District Valuer produced a report on the land intended to be purchased and dated 16th. October 1937 (encl. [4]). That described the land as being 'Proposed Open Space', and gave a report for use in connection with an application to the Ministry of Health for the sanction of a loan in connection with the proposed purchase. It described the land as being mainly grassed, with some tennis courts, and crossed by fences. The only building was an old, small Lodge, the site being of 33.221 acres approx. Part of the property (27.292 acres) was subject to an agricultural tenancy determinable on three months' notice; there were reported to be several public rights of way across the land.

On 22nd. October 1937 the Town Clerk, Mr. Josiah Green, wrote to the Ministry of Health seeking such consent – see encl. [5]. The clerk pointed out that the land was reserved in a planning scheme as a public open space; and repeated the views of the Planning and Public Works Committee set out above.

On 19th. November 1937 the Secretary of the Ministry of Health responded, enclosing a pro-forma questionnaire seeking amongst other things particulars of the powers under which the Corporation sought to acquire the land – see encl. [6].

By a letter dated 22nd. November 1937 Mr. Green wrote to Mr. Webb, the City Engineer, asking for assistance with the Ministry's request – see encl.[7]. Mr. Webb responded on 23rd. December 1937, making out the case for the acquisition – see

encl. [8]. He stressed that the site was eminently suitable for a public pleasure ground, and noted that part of the land could well be laid out for organised games. He enclosed a schedule of the Parks and Open Spaces within the area of the Corporation.

Mr. Green then responded to the Ministry of Health by letter dated 5th. January 1938 (encl. [9]), to which was annexed a schedule summarising Mr. Webb's letter of 23rd. December 1937. By his letter Mr. Green said that the land would be appropriated under the provisions of Section 164 Public Health Act 1875 (as amended), and that if necessary permission would be sought to let any part of the land to particular clubs and bodies. Mr. Green indicated that the land had been used for some time past for the playing of organised games, and that it was the Corporation's intention to ensure the open space was preserved.

The Minister gave his consent to the loan by a document dated 24th. January 1938 under cover of a letter to the Corporation of the same date (encl. [10]). The consent stated that the purchase of land was for the purposes of public walks and pleasure grounds being purposes authorised by the Public Health Act 1875. Mr. Green copied the Minister's letter, and sanction, to Mr. Webb the city engineer and Mr. E. M. Tapson the City Treasurer on 27th. January 1938.

It is the Council's case that this documentation establishes that the Council acquired the 1938 conveyance land for the purpose provided for by section 164 Public Health Act 1875.

Subsequent use of the 1938 land.

Our research into the use and appropriation of the land conveyed by the 1938 conveyance has necessitated an attempt to follow the identity of the relevant committees that would have had responsibility for dealing with this land. In summary, we understand them to be as follows:

Bristol Corporation:

From 11th. July 1933 – Planning and Public Works Committee

From 8th. December 1942 – Public Works and Maintenance Committee

From 19th. May 1953 - Planning and Public Works Committee

Bristol City Council:

From 9th. April 1974 – Open Space and Amenities Committee

From 20th. May 1986 – Leisure Services Committee

From 9th. May 2000 – Responsibility devolved to department headed by executive

From 27 July 2004 – Culture and Leisure Services Department.

Planning

As we have noted the 1938 conveyance described the land conveyed as being 'certain land which has been scheduled as a public open space by the Town Planning Committee of the Corporation'. We have not been able to trace the documentation showing the scheme that was passed by Bristol Corporation under the Town & Country Planning Act 1932. However there is reference to it in correspondence with Captain Cottrell Dormer's agents in 1932, and I enclose that documentation as encl. [11].

I attach as enclosure [12] a plan from the archives described as 'Land Use Changes 1951-1962'. The location of the land is shown circled in red. The plan does not indicate a change of use between those dates.

A local development plan was formulated in 1972, and I enclose (at encl. [13]) a digital photograph of part of the 'Sealed Copy of Amendment (n.5) to Bristol Development Plan 1972'. That plan shows to intended use of the application land, shaded dark blue, as 'POS', which stands for 'Public Open Space'. The blue hatched land to the North is an allotment area, marked 'O/SA', or 'Statutory Allotments'. The plan also shows the Territorial Army centre marked to the South East of the land, and the public library shown coloured red to the South.

The application land is presently recorded on the Council's records as public open space. I enclose at encl. [14] a print-out of the relevant Council file showing the same. As can be seen, the user is stated to be Leisure and Recreation. The path shows this parcel of land (marked 5172) shaded green. The parcel excludes the library, the hut, the TA centre and a rectangular parcel referred to as 4752

which is shaded blue. This parcel is open land. It was shaded blue for the Council's internal purposes, being the subject of an inter-committee agreement within the Council when the public works committee allowed the allotments committee to have use of the site. The agreement was in existence in 1998 but was terminated in 2000. Our records do not show whether the site was ever in fact let out for allotments. The plan also excludes the allotments to the North of the land, which are likewise omitted from the application land.

For completeness, the Council's records show that a wayleave in respect of an underground electricity cable has been in existence over the North-eastern boundary of the land (running from Heath Cottages to Cottisford Road) since 1959, in favour of SWEB and more latterly Western Power Development. We enclose copies of the file as encl. [15]. We can supply the original wayleave if required. There is also a gas main running from Frampton Cotterell to Stapleton Road which passes under the land, and underground communications cables vested in Torch Communications Limited.

Land appropriated for other purposes

In 1950 the City Council applied to the Ministry of Health for consent to appropriate an area of 0.354 acre for use as a public library, pursuant to section 12(2) Public Libraries Act 1892. I enclose as encl. [16] a copy of the consent of the Minister dated 24th. April 1950. That consent describes the land as 'vesting in the said Council for open space purposes'. The Minister also, by letter dated 25th. April 1950, directed the City Council to adjust its accounts in accordance with the District Valuer's valuation. The Library was subsequently constructed on the site. This is good evidence that that part of the land was vested in the Council as open space until 1950; and supports the Council's case that with the exception of specific appropriations, the land has always remained vested in the Council for that purpose.

Having considered the Council's records with the assistance of the Council's archivist, there is no record of any part of the application land having been appropriated for any use other than that of a public open space. The Applicant has adduced evidence some of which indicates that the farm situate on the

application land continued in existence for some years; in part that may not have been surprising – during the war years it would have been far more productive for such land to be used for agricultural rather than recreational purposes, and indeed rationing continued until 1952. That may be the case – we have been unable to trace correspondence dealing with the termination of this tenancy. Since the cessation of such user, the Council has used the application land for the purpose of a public open space.

Consequence of acquisition under section 164 Public Health Act 1875 and user

Where a local authority holds land for use as public open space, use of the land by the public for the purposes of recreation will be taken to be referable to such the exercise of the right conferred on the public by the manner in which the land is held. A member of the public who exercises such a right is not a trespasser, even though he has no formal property right vested in him permitting him to be on the land. He is a licensee. The license is not an express license, it is an implied license which extends to all members of the public subject only to the regulation of the user of the land by the public through by-laws and such like. But in using such land, members of the public are implied statutory licensees. The position of the local authority, for its part, is that it is obliged to permit members of the public who wish to, to use it for recreation – see Hall v. Beckenham Corpn. [1949] 1 KB 716 at 728 per Finemore J. Members of the public who exercise such a right do so by reason of a correlative license.

Section 22(1) Commons Registration Act 1965 requires the period of user relied upon to be user 'as of right'. User is only 'as of right' if there is no other reasonable explanation for the use of the land by those entitled to the right – see Gardner v. Hodgson's Kingston Brewery [1903] AC 229 according to Lord Lindley at p. 239, and see also the opinion of Mr. Vivian Chapman Q.C. in this matter dated 27th. November 2006 at para. [18]. Given that the Council were obliged to permit recreational user, there is a reasonable alternative explanation for the user claimed by the Applicant in this case.

The point was considered by the House of Lords in R v. Sunderland City Council ex. p. Beresford [2004] AC 889. Although the factual basis for a finding was not made out in that case (according to Lord Walker of Gestingthorpe, at [88]), Lord Walker suggested that the above analysis might be the true analysis (at [86], citing Hall v. Beckenham Corpn.), noting that it would be very difficult to regard users of land held subject to a statutory trust under section 10 of the Open Spaces Act 1906 as trespassers, and that the position would be the same if the land had been appropriated for the purpose of public recreation (at [87]). It is accepted that the matter was left open for final legal decision, but it is suggested that the analysis of Lord Walker is accurate, consistent with principle, of significant weight, and ought to be followed by the Registration Authority.

We would therefore ask the Registration Authority to consider the further matters set out in this letter and its enclosures and annexures; make any appropriate directions; and dismiss the application.

If the Registration Authority requires any further information, or any clarification, from the Council, we will of course do our best to ensure that any such request is complied with as speedily as possible.

Yours faithfully

Rachel Johnson
Solicitor
For Head of Legal Services

Schedule

<u>Enclosure</u>	<u>Description</u>
1.	Conveyance 9 th . March 1938 Cottrell-Dormer to Bristol Corporation.
2.	Report from the Planning and Public Works Committee of the Corporation dated 27 th . May 1937.
3.	8 th . June 1937 - Council resolution.
4.	District Valuer's report dated 16 th . October 1937
5	Letter from the Town Clerk, Mr. Josiah Green, to the Ministry of Health dated 22 nd . October 1937.
6.	Letter dated 19 th . November 1937 from the Secretary of the Ministry of Health to the Town Clerk of Bristol Corporation, enclosing a pro-forma questionnaire
7.	Letter dated 22 nd . November 1937 from the Town Clerk to Mr. Webb, the City Engineer.
8.	Letter from City Engineer to Town Clerk dated 23 rd . December 1937.
9.	letter from Town Clerk to the Ministry of Health dated 5 th . January 1938.
10.	Consent dated 24 th . January 1938 of the Minister of Health to the loan and covering letter of the same date.
11.	Correspondence by Corporation with Captain Cottrell Dormer's agents in 1932.
12.	Plan headed 'Land Use Changes 1951-1962'

13. Digital photograph of part of the 'Sealed Copy of Amendment (n.5) to Bristol Development Plan 1972'
14. Print-out of the relevant Council records showing its land holding.
15. Print-out of relevant Council records showing wayleaves over the application land.
16. Consent of the Minister dated 24th. April 1950 to appropriate an area of 0.354 acre for use as a public library, pursuant to section 12(2) Public Libraries Act 1892.

In the Matter of
An Application to Register
Land Known as South Purdown, Lockleaze, Bristol
As a New Town Green

FURTHER OPINION
of Mr. VIVIAN CHAPMAN Q.C.
6th. September 2007

Bristol City Council,
Legal Services,
PO Box 2156,
The Council House,
Bristol BS99 7PH

Ref LIT/FMH/AB/JD5/332

59323/VRC/07/180/wp/252/South Purdown Further Opinion

In the Matter of
An Application to Register
Land Known as South Purdown, Lockleaze, Bristol
As a New Town Green

FURTHER OPINION
of Mr. VIVIAN CHAPMAN Q.C.
6th. September 2007

Introductory

[1] In my Opinion of 27th November 2006, I advised on two points taken by the objector in its objection statement:

- that the application land was used by local people “by right” rather than “as of right” because the land was at all material times held on the statutory trusts of s. 10 of the OSA 1906, and
- that the status of the land as a green could be overridden by an appropriation to other statutory purposes under LGA 1972 s. 172.

[2] I advised that neither point provided an immediate knock-out blow to the application and that the application should be considered at a non-statutory public inquiry.

[3] By a lengthy letter dated 27th July 2007 (which is in effect a supplementary objection statement) the objector has raised a new point which it contends to be fatal to the application, i.e. that the application land was used by local people “by right” rather than “as of right” because the public had at all material times a right to use the application land for recreation under PHA 1875 s. 164.

[4] The applicants were given an opportunity to comment on the supplementary objection statement and produced a detailed Response dated 30th August 2007.

[5] I am instructed to advise on the new point.

PHA 1875 s 164

[6] By s. 164 of the PHA 1875:

“Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds...”

[7] Bristol Corporation was, in my view, an urban district, as defined by s. 6 of the 1875 Act.

[8] It was decided in *Hall v Beckenham Corporation* [1949] 1 All ER 423 that a public park acquired by a local authority under PHA 1875 s. 164 was dedicated to public use and not beneficially occupied by the local authority so as to ground an action in nuisance against the local authority for the noise of model aircraft flown by the public in the park. The judge said (at p 427E):

“I think that the Beckenham Corporation are the trustees and the guardians of this park, and I think that they are bound to admit to that park any citizen who wants to enter within the times that it is open”

[9] *Hall v Beckenham Council* was cited with approval by Lord Walker in *R (Beresford) v Sunderland City Council* [2004] 1 All ER 160 at para 86.

[10] Accordingly, if South Purdown was acquired by Bristol Corporation under s. 164 of the PHA 1875 (and not subsequently appropriated to any other purpose), it seems to me that recreational use of the land by local people would be “by right” under s. 164 and not “as of right” which involves use as a trespasser.

[11] The 1938 conveyance of the application land to Bristol Corporation did not mention PHA 1875 s. 164. It is therefore necessary to look with some care at the evidence now submitted by the objector to see whether it establishes that the 1938 conveyance was an acquisition under PHA 1875 s. 164.

Pre-Conveyance Documentation

[12] A Report of the Chairman of the Planning and Public Works Committee of the Corporation dated 27th May 1937 stated that the committee considered that an area of about 33 ½ acres at Purdown off Muller Road should be purchased from the Cottrell Dormer Estate “to provide facilities for recreation and the playing of organised games”. The value of the land was provisionally agreed at £13,735 and it was recommended that an application be made to the Minister for consent to borrow the purchase price and ancillary expenses. The consent of the Minister was required for a local authority to borrow money to acquire land by virtue of LGA 1933 s. 195.

[13] A Report of the Finance Committee dated 31st May 1937 estimated that the annual loan charges would be £551 over a 60 year term.

[14] On 8th June 1937 the Council resolved:

"That approximately 33 ½ acres of land at Purdown, off Muller Road, be purchased from the Cottrell Dormer estate for the sum of £13,735; and that application be made to the Minister of Health for sanction to borrow the said sum of £13,735 together with expenses incurred in connection with the acquisition"

[15] Bristol Corporation requested a valuation from the District Valuer by letters dated 29th June and 18th September 1937 (not produced but mentioned in the DV's Report). The DV advised on value in a Report dated 16th October 1937. He advised that the value was £13,735. The Report states that it was

"for use in connection with the application to the Ministry of Health for sanction to a loan in connection with the proposed purchase of the property described below by your Council under powers conferred by the Local Government Act 1933 and the Town and Country Planning Act 1932."

Presumably the missing letters of 29th June and 18th September 1937 had said that the proposed purchase was under those statutory powers.

[16] The TCPA 1932 provided for the making of Planning Schemes to control the development of land. Section 26 of the 1932 Act conferred powers upon a county borough to purchase land for the purposes of public open space or a playing field.

[17] Section 157 of the LGA 1933 conferred on a local authority (other than a parish council) power to acquire land for the purposes of any of their functions under that or any other public act. By s. 158, a local authority could, with the consent of the Minister, acquire land not immediately required for such purposes.

[18] This evidence suggests that Bristol Corporation was intending to purchase the land under the combined provisions of s. 26 of the 1932 Act and s. 157 or 158 of the 1933 Act, i.e. for planning purposes.

[19] On 22nd October 1937 the Town Clerk of Bristol wrote to the Ministry of Health requesting consent to a borrowing of £13,735 for the purchase of the land at South Purdown. The letter states:

"The land was reserved in a planning scheme as a public open space... It is very desirable that the land in question should be acquired for the purposes of a public open space in order that facilities may be provided for recreation including the playing of organised games."

The wording is consistent with an intention to purchase the land for planning purposes under the combined provisions of s. 26 of the 1932 Act and s. 157 or 158 of the 1933 Act.

[20] On 10th November 1937, the Ministry replied enclosing a questionnaire. Question 2 asked for information as to the statutory authority under which the

application was made. PHA 1875 s 164 was mentioned as a possible statutory authority.

[21] On 5th January 1938, the Town Clerk replied to the Ministry stating that:

"It is proposed in the first instance to acquire the land under the provisions of Section 164 of the Public Health Act 1875..."

The letter went on to say that if it was intended to let parts of the land to particular clubs or bodies, application would be made at a later date for permission to appropriate the land for those purposes. No doubt, this was a reference to appropriation under LGA 1933 s. 163.

[22] On 24th January 1938, the Ministry wrote to the Town Clerk of Bristol enclosing formal consent to the proposed borrowing: He wrote:

"The Minister of Health, on the application of the Council of the City of Bristol and in pursuance of his powers under the Local Government Act 1933 hereby consents to the borrowing by the said Council of the sum of Fourteen thousands one hundred and ninety pounds for the purchase of land for the purposes of public walks and pleasure grounds being purposes authorised by the Public Health Act 1875"

[23] It therefore appears that Bristol Corporation originally intended to purchase South Purdown for planning purposes under TCPA 1932 but subsequently decided to purchase the land under PHA 1875 s. 164 and obtained ministerial consent to borrow the purchase price on that basis.

1938 Conveyance

[24] Recital (7) of the 1938 Conveyance states that the land was purchased under powers conferred by the LGA 1933. The TCPA 1932 is not mentioned although there is reference in clause 1 to the land's planning status as public open space. Nor is there any mention of the PHA 1875. However, it seems to me clear, in the light of the pre-conveyance evidence that the purchase was intended to be made under the power conferred by s. 157 of the LGA 1933 to acquire land for the purposes of its functions under any other public general act, i.e. s. 164 of the PHA 1875. It seems to me inconceivable that the Council, having obtained ministerial consent to borrow money for the purchase of the land on the basis that it was being acquired under PHA 1875 s. 164, would then have proceeded to purchase it under a different statutory power.

[25] As explained in my 2006 Opinion, a large part of the land was subject to an agricultural tenancy in favour of a third party, and it seems that some of the land was never brought into recreational use. The question arises whether the acquisition required the consent of the Minister under LGA 1933 s. 158 on the ground that the land was not immediately required for the purposes of public walks and pleasure grounds. There is no evidence that any such consent was given (as opposed to consent to borrowing under LGA 1933 s. 195). On reading the pre-conveyance evidence, it appears to me that the purchase proceeded on the basis that the land was immediately required for public recreational purposes although the precise lay-out scheme had not been decided. The test in s. 158 is not whether the land can immediately be used for

recreational purposes but whether it is immediately required for such purposes. Thus, I do not think that s. 158 is triggered merely because land is purchased subject to an existing tenancy. Nor can it be relevant what actually happens after the purchase. No doubt, the plans for recreational use of the land were affected by WW2. I therefore conclude that consent under s. 158 was not required.

[26] In my opinion, the new evidence adduced by the objector shows, on the balance of probabilities, that the 1938 Conveyance land was purchased under the combined powers of LGA 1933 s 157 and PHA 1875 s. 164.

Post-Conveyance Events

[27] If I am right in thinking that the 1938 Conveyance was effected under the combined powers of LGA 1933 s. 157 and PHA 1875 s. 164, it seems to me that the only events after the 1938 Conveyance which could be relevant to the present issue are events which deprived the land conveyed by the 1938 Conveyance of its legal status as land subject to the right of public recreation under PHA 1875 s. 164. In my view, the only such event appearing in the evidence is the 1950 appropriation of part of the land for library purposes. Insofar as the Council used the land for non-recreational purposes without an appropriation to such purposes, I do not see how the right of the public to use the land under PHA 1875 s. 164 could have been displaced.

[28] It therefore follows that, at all material times since the 1938 Conveyance, any use by members of the public (including local people) for recreational purposes of the land acquired under the 1938 Conveyance (with the exception of the library land appropriated for other purposes in 1950) has been use "by right" rather than "as of right". The library land is not included in the application land.

Conclusion on New Evidence

[29] I conclude that recreational use of the 1938 Conveyance land during the relevant 20 year period immediately before the date of the application was not "as of right" and that the application must fail on that ground in relation to land deriving from the 1938 Conveyance.

Applicants' Response

[30] I have carefully considered the applicants' Response to the supplementary objection statement. It is a densely argued document, but I think that it makes the following principal points.

[31] The first point made by the applicants is that, even if the pre-conveyance evidence showed an intention to acquire the land under PHA 1875 s 164, in fact the 1938 Conveyance was simply expressed to be under LGA 1933, and that this must be construed as a reference to the general power to acquire land under that section. I think that the answer to this point is as follows. LGA 1933 s 157 confers on a local authority power to acquire land for two types of purpose, first, for the purpose of any of their functions under the 1933 Act and, second, for the purpose of any of their functions under any other public general act. On looking through the 1933 Act, I cannot identify any statutory function laid down by that act for the purpose of which

the land was acquired. The land must therefore have been acquired for the purpose of a function under another public general act. The extrinsic evidence is clear that the land was purchased for the purposes of the Council's functions under PHA 1875 s. 164. I acknowledge that this is a more sophisticated analysis than I applied in my 2006 Opinion, but, on reconsideration, I think that it is the right analysis.

[32] The second point made by the applicants is that the Council have made extensive use of the 1938 Conveyance land for purposes other than public walks or pleasure grounds without any appropriation to new purposes (except for the 1950 appropriation). The applicants argue that this is evidence that the land was acquired in 1938 for the general purposes of the Council rather than for the purposes of PHA 1875 s. 164. Factually it seems correct that, without any appropriation, the Council has used the land for purposes other than the purposes of PHA 1875 s. 164. However, I do not see how the post-1938 Conveyance evidence can detract from the clear pre-1938 Conveyance evidence that the Council intended to acquire the land under PHA 1875 s. 164. The Council may have acted *ultra vires* after the 1938 Conveyance but this cannot affect the true meaning of the 1938 Conveyance or take away the public rights conferred by the 1938 Conveyance. Further, contrary to the view expressed in my 2006 Opinion, I do not think that LGA 1933 s. 157 authorises the acquisition of land for the general purposes of the Council. Rather, as analysed above, it authorised acquisition for two types of purpose, first, for the purpose of any of their functions under the 1933 Act and, second, for the purpose of any of their functions under any other public general act.

[33] The third point made by the applicants is that it is not permissible for the objector to argue that user is by right merely because the 1938 Conveyance **might** be construed as being made under PHA 1875 s. 164. It is necessary to construe the 1938 Conveyance to ascertain the statutory power under which it is made. I respectfully agree with this point. However, I do consider that, on its proper construction, the 1938 Conveyance was made under LGA 1933 s. 157 and PHA 1875 s. 164.

[34] The fourth point made by the applicants is that tolerated recreational use and, in some circumstances, even permissive recreational use (e.g. where permission is not expressed to be revocable) is not inconsistent with user as of right. I accept this point but I do not think that it addresses the current issue, i.e. whether recreational user was pursuant to a statutory right created by PHA 1875 s 164.

[35] The fifth point made by the applicants is that, if the application land is subject to PHA 1875 s 164, the land is registrable as a statutory recreational allotment under the first limb of the definition of "town or village green" in CRA 1965 s. 22(1). However, if the land is a statutory recreational allotment (and I do not think it clear that it is), it become one in 1938 and has lost its status for non-registration before 30th July 1970 under CRA 1965 s 1(2)(a). There is an interesting question whether an application could be made to rectify the register under CA 2006 s. 22 and Schedule 2 para 3 when those provisions are brought into force, but this does not affect the present application.

[36] Accordingly, I do not think that the Response overcomes the submissions in the supplementary objection statement.

Extent of Application Land

[37] The copy of the plan to the 1938 Conveyance as originally supplied was incorrectly coloured so that it appeared that the land conveyed did not include OS 2265. I have been supplied with a corrected plan which shows OS 2265 as included within the land conveyed. However, I notice that there is still some uncertainty whether the whole of the application land falls within the 1938 Conveyance land. The 1938 Conveyance did not include the embankment on the north side of Muller Road. Map A attached to the application does show the embankment coloured yellow as part of the application land. Map B attached to the application shows the application land edged green and as excluding the embankment. The application itself is somewhat ambiguously worded, although the better reading seems to be that it is Map B which is intended to define the application land.

[38] It seems improbable that the applicants intended to include the Muller Road embankment as part of the application land but, if they did, it appears to me that it was not subject to the 1938 Conveyance and that therefore the objector's "by right" point does not apply to it.

[39] However, it seems to me that it is necessary to give the applicants the opportunity to explain whether they intended to include the Muller Road embankment within the application land. If so, the whole application does not fail on the "by right" point.

Action

[40] I think that fairness requires that the applicants should be supplied with a copy of this Further Opinion and given a reasonable opportunity to comment on it pursuant to Commons Registration (New Land) Regulations 1969 reg 6(3)

[41] Subject to the comments of the applicants, I consider that (other than in relation to the Muller Road embankment if that is indeed intended to form part of the application land):

- the objector has established that recreational user of the application land was by right rather than as of right
- no non statutory public inquiry is necessary, and
- the application can be rejected

[42] Under reg 8(1) of the 1969 Regulations, written reasons for the rejection of an application must be given. However, it is premature to advise on the wording of the written reasons before the applicants have an opportunity to comment on this Further Opinion.

[43] If the applicants do wish to pursue an application to register the Muller Road embankment:

- the applicants will need to apply to amend their application to make it clear that the Muller Road embankment is included: see *Oxfordshire County Council v Oxford City Council & Robinson* [2006] 4 All ER 817 at para. 61

- if possible, the owner of the embankment will need to be identified and notified of the amended application. It may well be that Bristol City Council is owner as highway authority
- I do not see any reason why the registration authority should not reject the application in relation to the 1938 Conveyance land and proceed to consider the application only in relation to the Muller Road embankment.

A handwritten signature in black ink, appearing to read 'Vivian Chapman', written over a diagonal line that extends from the bottom left towards the top right.

Vivian Chapman QC
6th September 2007
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN

In the Matter of
An Application to Register
Land Known as South Purdown, Lockleaze, Bristol
As a New Town Green

THIRD FURTHER OPINION

of Mr. VIVIAN CHAPMAN Q.C.

14th. October 2007

Bristol City Council,

Legal Services,

PO Box 2156,

The Council House,

Bristol BS99 7PH

Ref LIT/FMH/AB/JD5/332

59323/VRC/07/199/wp/254/South Purdown Third Further Opinion

In the Matter of
An Application to Register
Land Known as South Purdown, Lockleaze, Bristol
As a New Town Green

THIRD FURTHER OPINION
of Mr. VIVIAN CHAPMAN Q.C.
14th October 2007

Response to Further Opinion

[1] I have carefully read the Response to Further Opinion submitted under cover of the Friends of South Purdown's letter dated 8th. October 2007. The Response takes two central points

- that officers of the City Council had no authority to alter the statutory basis on which the City Council resolved to purchase the land, and
- that the subsequent conduct of the City Council was inconsistent with an intention to purchase under PHA 1875 s. 164.

[2] As for the first point, it appears to me that the resolution of 8th June 1937 did not specify the statutory power under which the land was to be purchased. I would therefore construe the resolution as a decision to purchase the land under any available statutory power. It appears that the original intention was to purchase under powers conferred by LGA 1933 and TCPA 1932. However, subsequently that intention was changed to a purchase under LGA 1933 and PHA 1875 s. 164. The intention at the date of the 1938 Conveyance was to purchase under LGA 1933 and PHA 1975 s. 164. In my view, such a purchase was authorised by the resolution of 8th. June 1937.

[3] As for the second point, it is argued that the City Council did not act after the 1938 Conveyance as if the land had been acquired under PHA 1875 s. 164, and that this is a guide to the statutory power under which the land was purchased. However, it seems to me that subsequent events cannot override the force of the letter of 5th. January 1938 and the fact that the City Council borrowed money for the purchase expressly on the basis of a purchase under PHA 1875 s. 164.

[4] I therefore adhere to the view expressed in my Further Opinion of 6th. September 2007.

Muller Road Embankment

[5] I note from the Friends' letter of 8th October 2007 that the applicants wish to amend their application to include the Muller Road embankment. It seems to me that it would be reasonable to allow them to do so as their application was ambiguous on whether or not this embankment was intended to be included. However, in fairness, the objector ought to be given an opportunity to comment before a decision is made.

Territorial Army Land

[6] I further note from the Friends' letter of 8th. October 2007 that the applicants wish to amend the application to include the further area of land shown edged brown on an enclosed plan. Although adjacent to the application land, it seems to me that it is a substantial discrete area of land which was deliberately omitted from the original application. I think it doubtful whether the power to amend an application (which is entirely court created) extends this far. In my view, the most convenient course would be for this area of land to be subject to a separate application under CA 2006 s. 15. However, again, the objector should, in fairness, be given an opportunity to comment before a decision is made.

Letters

[7] I have read all the letters attached to my Instructing Solicitors' letters of 24th September and 10th. October 2007. None of them address the issues discussed in my Further Opinion of 6th September 2007 and they do not affect my advice.

Action

[8] In these circumstances, I recommend the following course of action to the registration authority.

[9] In relation to the land comprised within the present application, I consider that the registration authority can and should reject the application save in relation to the Muller Road embankment.

[10] I recommend that the following written reasons are given:

“The application is rejected in relation to all the land comprised within the current application (save for the Muller Road embankment) for the reasons given in the Further Opinion dated 6th. September 2007 and Third Further Opinion dated 14th October 2007 of Mr. Vivian Chapman QC”.

[11] Subject to the comments of the objector, I recommend that the applicants are given permission to amend their application to make it clear that the Muller Road embankment is included in the application land. The applicants and objectors should be invited within a reasonable time (say 2 months) to submit any evidence and legal

arguments in relation to the application to register the Muller Road embankment as a new green. The status of the Muller Road embankment can then be further considered and a decision made as to whether a public inquiry is necessary.

[12] Subject to the comments of the objector, I recommend that the application to amend the present application to include the Territorial Army Land should be rejected. This will of course be without prejudice to the right of the applicants (or anyone else) to make an application in relation to that land under CA 2006 s. 15.

Vivian Chapman QC
14th. October 2007
9, Stone Buildings,
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