

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

27 APRIL 2009

**APPLICATION FOR REGISTRATION OF LAND KNOWN AS CASTLE
PARK AS A TOWN OR VILLAGE GREEN UNDER THE COMMONS ACT
2006 SECTION 15(2)**

(Report of the Head of Legal Services)

**WARDS: CABOT, LAWRENCE
HILL, ASHLEY**

**APPLICANT: MRS MARY BANNERMAN,
REDCLIFFE COTTAGE, REDCLIFFE PARADE WEST,
BRISTOL, BS1 6SS**

ON BEHALF OF THE CASTLE PARK USERS GROUP

- Objectors:
- (1) Bristol City Council, in its capacity of freeholder of the application site;
 - (2) Deeley Freed Estates Limited, prospective developers of the western end of Castle Park;
 - (3) The Ancient Society of St Stephen's Ringers;
 - (4) Mr W H R Durie;
 - (5) GWE Business West;
 - (6) Aviva on behalf of Norwich Union Life and Pensions Limited;
 - (7) Mr John Hurst, general manager of Broadmead Board Limited;
 - (8) London and Paris Estates Limited, on behalf of Strand Street Properties Limited.

Purpose of Report

1. TO ADVISE REJECTION OF THE APPLICATION

Background

2. The Applicant applied on 14 January 2008 for registration as a town or village green of land known as Castle Park, Bristol

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

The Registration Authority advertised the application during February 2008, and received the eight objections during April 2008.

3. 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. He conducted a Public Inquiry, which opened on 1 December 2008, took place over six days and included an accompanied site view. The Inspector heard a considerable amount of evidence and legal argument and was provided with all available documentation.
4. He then provided the report dated 30 March 2009, to be found at Appendix 2 to this report, in which he advises that the application fails because Castle Park was in 1978 appropriated onto the statutory purposes of Section 164 of the Public Health Act 1875 or Section 10 of the Open Spaces Act 1906 which precluded subsequent recreational uses by local inhabitants "as of right". The Inspector advises that the public had thereafter a legal right to use the land for lawful sports and pastimes, and hence the inhabitants of Bristol were using the application land during the relevant 20 year period "by right" rather than "as of right". Since 1978, the general public have used the land for recreational purposes by right under the statutory trust, not "as of right" within the meaning of the Commons Act 2006.

Conclusion

5. 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 Act 2006.
6. Accordingly the Committee should reject the application for the reasons given by the Inspector in his Report.

Consultation

None.

Appendices

Appendix 1	The Applicants' plan
Appendix 2	The Inspector's Report dated 30 March 2009

Legal Implications

The City Council in its capacity of Commons Registration Authority has responsibility in pursuance of the Commons Act 2006 to determine whether the land should be registered as a green.

For an application to register a green under the 2006 Act to be successful, the applicant must establish that the land in question comes entirely within the following definition of a "town or village green" to be found in Section 15(2) of the Commons Act 2006 which provides as follows:-

- (2) This sub-section 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.

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 for the reasons set out in the Inspector's report dated 30

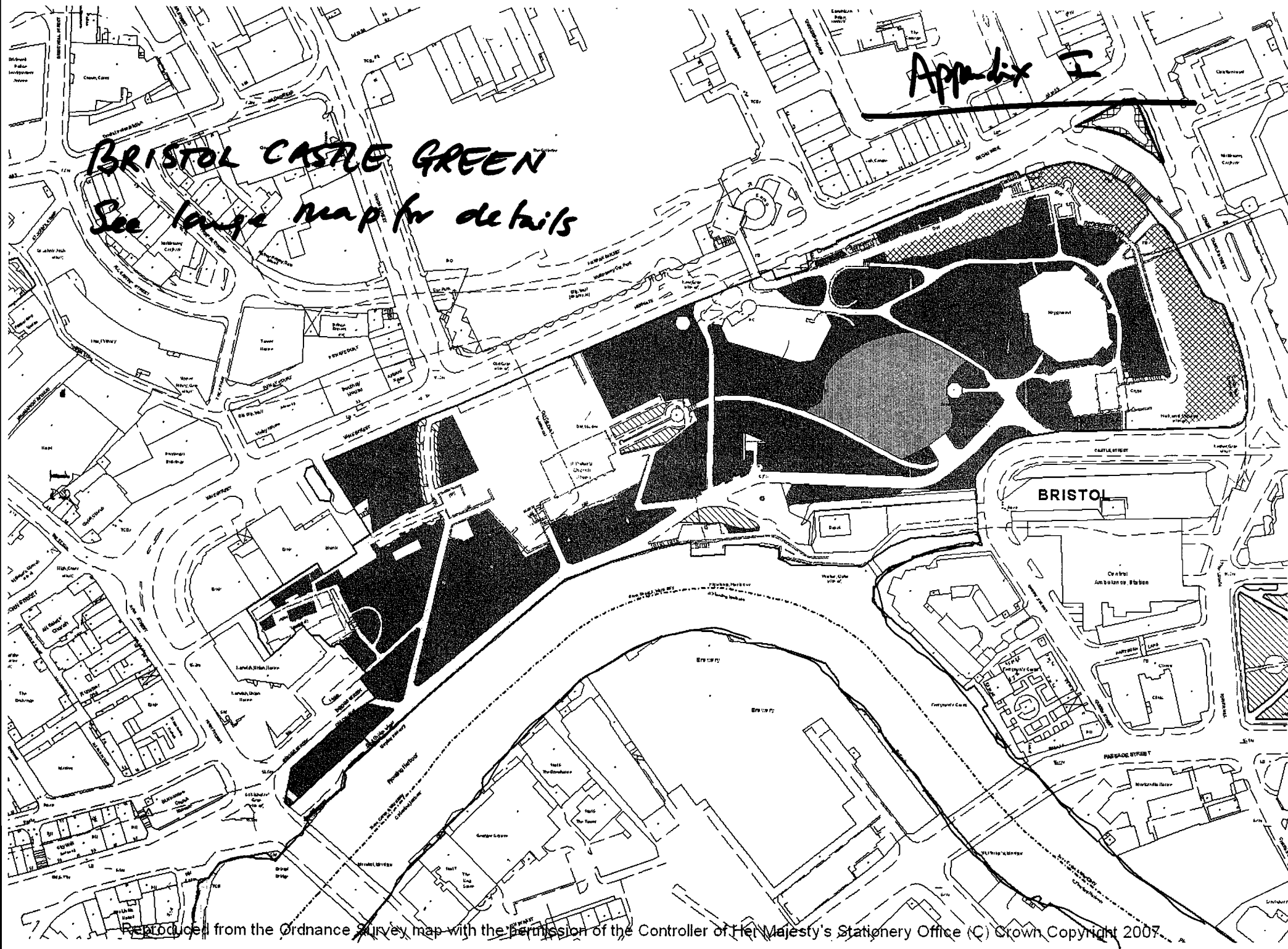
March 2009.

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985
Background Papers – None.

Author: Frances Horner, Senior Solicitor, Legal Division on behalf of the
Acting Director of Resources – Tel. 9222330

Appendix I

BRISTOL CASTLE GREEN
See large map for details



In the Matter of
An Application to Register
Castle Park, Bristol
As a New Town Green

REPORT
of Mr. VIVIAN CHAPMAN Q.C.
30th. March 2009

Bristol City Council
Legal Services
The Council House
Bristol BS99 7PH
Ref LIT/FMH/AG/JD5/360
62903/VRC/09/27/wp/S1/Castle Park Report

In the Matter of
An Application to Register
Castle Park, Bristol
As a New Town Green

REPORT
of Mr. VIVIAN CHAPMAN Q.C.
30th. March 2009

EXECUTIVE SUMMARY

The application fails because Castle Park was in 1978 appropriated onto the statutory purposes of s. 164 PHA 1875 or s. 10 OSA 1906 which precluded subsequent recreational user by local inhabitants “as of right”.

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1. Castle Park

[1] Castle Park is a park in the centre of Bristol. It is about 13 acres in area. It is owned by Bristol City Council. It is bounded by the floating harbour to the south, by Castle Street and Lower Castle Street to the east, by Wine Street, Newgate and Broad Weir to the north and by two 1960s office blocks fronting High Street to the west.

[2] The general character of Castle Park is that of a typical municipal park, with expanses of mown grass, paved walkways and cycle tracks, ornamental trees, some formal flower gardens, a bandstand, a children's play area, a park works depot and the usual park furniture consisting of benches, litter bins and signs. However, the park also incorporates some important historical features. To the west end of the park, almost hidden between the 1960s office blocks, is the ruin of the church of St. Mary-le-Port. In the centre of the park, in an elevated position, stands the ruin of the church of St. Peter. The towers of both churches are still standing. At the east end of the park, there are some remnants of the castle which formerly stood on the site, including the ruins of the keep, some fragments of wall and the Vaulted Chamber¹ (which was part of the entrance to the castle). The perimeter of the park is not fenced and the park is therefore open 24 hours a day, although certain areas within the park, e.g. the Vaulted Chamber, are closed to the public.

2. History

[3] The site of Castle Park was part of the ancient centre of the city of Bristol. It occupied a strategic ridge between the River Avon (now the floating harbour) and the River Frome (now flowing underground). At the eastern end of the site stood Bristol Castle, which was demolished in 1656. Over the centuries, the site developed into the main shopping area of Bristol. An OS map of 1918² shows the site as densely built up with an irregular network of streets.

¹ Photo at B90
² P373

[4] On the night of 24th. November 1940, the area was largely destroyed by an enemy air raid. The devastation was recorded in contemporary photographs³.

[5] On 16th. April 1946, the City Council made the City and County of Bristol (Central Area) Compulsory Purchase Order (No. 1) 1946⁴. Under this order, the City Council acquired a large area of land including the site of what is now Castle Park. Certain parcels of land were excluded from the 1946 CPO and I infer that they were land already owned by the Council. The 1946 CPO was made for the purpose of dealing with war damage pursuant to s. 2(1) of the Town and Country Planning Act 1944. The 1946 CPO was confirmed by the Minister of Town and Country Planning by the City and County of Bristol (Central Area) Compulsory Purchase No. 1 Confirmation Order 1950⁵.

[6] After the war, the Council decided that the main shopping centre of Bristol should be relocated to the Broadmead area. The land acquired under the 1946 CPO was largely cleared and used for car parking until a new permanent use for the land could be decided.

[7] In the 1950s, the Bristol Development Plan (as submitted and approved) envisaged use of the land as a public building and educational precinct interspersed with some public open space⁶.

[8] In the early 1960s, two new office blocks were built under long leases from the Council at the western end of the site, fronting High Street. The southern block was leased to the Norwich Union Life Insurance Society⁷ and the northern block to the Bank of England. These blocks were built around three sides of the ruined church of St. Mary-le-Port.

[9] Also in the early 1960s, the distinguished architect, Sir Hugh Casson, was commissioned by the City Council to produce a master plan for redevelopment of the land as a civic centre. The redevelopment was to include a new museum and art gallery. On 31st March 1968, the Planning and Traffic Committee of the Council appropriated the museum and art

³ P60-66

⁴ B8

⁵ B7

⁶ P110-139

⁷ B186 & 204

gallery site for use as a museum and art gallery and part of the outstanding loan taken out to fund the 1946 CPO was transferred to the Cultural Committee⁸.

[10] In the early 1970s, the plans to develop the land as a new civic centre were abandoned on financial grounds and the Council decided to lay out the land as a park. The Cultural Committee re-appropriated the museum and art gallery site for planning purposes and the residual loan figure was transferred back to the Planning and Traffic Committee⁹.

[11] Sir Hugh Casson was commissioned to produce a plan for the layout of the new park. Work started on laying out the new park. The Casson plan proved too costly, and, in 1977, the City Engineer proposed¹⁰ a simplified scheme to complete the laying out of the park. The proposal was accepted¹¹ by the Land and Administration Committee (which appears to have succeeded to the relevant functions of the Planning and Traffic Committee). The minutes¹² of that committee record that the chairman confirmed that the committee would retain control of the area mentioned in the report of the City Engineer until the works had been completed.

[12] On 24th August 1978, The City Engineer reported to the Land and Administration Committee that the landscaping work was substantially completed and that:

“it would be appropriate to mark its completion by a formal declaration of its availability for the use and enjoyment of the public”.

He therefore proposed an official opening ceremony by the Lord Mayor on 30th September 1978 and that the committee:

“agree to the transfer of the responsibility for Castle Park to the Open Spaces and Amenities Committee with effect from 30th September 1978...”

⁸ B234, 263 & 267

⁹ B267 & 274

¹⁰ B310

¹¹ B317

¹² B317

The recommendation of the City Engineer was accepted by the committee on 24th August 1978¹³ and reported to the Open Spaces and Amenities Committee on 5th. September 1978¹⁴.

[13] The opening ceremony for Castle Park was held on 30th. September 1978 when a stone plaque was unveiled by the Lord Mayor¹⁵. Some photographs¹⁶ of the early 1980s give a good impression of the state of Castle Park in those years.

[14] There is no evidence of any resolution expressly appropriating Castle Park from the statutory purposes under which it was purchased pursuant to the 1946 CPO onto new statutory purposes but Castle Park was treated as from 30th. September 1978 as being under the control of the Open Spaces and Amenities Committee. According to the City Treasurer's Report of 4th December 1979, a liability of £705,170 was to be transferred from the budget of the Land and Administration Committee to the budget of the Open Spaces and Amenities Committee¹⁷. This appears to have represented the relevant balance of the loan which funded the 1946 compulsory purchase.

[15] In 1983, the City Council considered a proposal to construct an underground shopping centre below Castle Park. The proposal was discussed in a Report of the City Valuer¹⁸ in which he pointed out that this would involve the disposal of land laid out as a public garden or used for public recreation and would require public advertisement. He was presumably referring to LGA 1972 s. 123 and its restriction on the disposal of public trust land. This proposal came to nothing.

[16] In 1987, a company called Ladbroke City and County Land Company Limited was intending to build a large covered shopping centre to be known as The Galleries on land to the north of Castle Park. Ladbroke put forward a proposal to the Council under which, if the Council allowed part of Castle

¹³ B382
¹⁴ B389
¹⁵ P79-86
¹⁶ P89-93 & 383
¹⁷ B425-427
¹⁸ B449

Park to be used as a temporary car park, Ladbrokes would contribute a substantial sum to the improvement of the park¹⁹.

[17] The Council agreed to the proposal and from 1988 to 1991 about one quarter of Castle Park was laid out and used as a temporary car park. An aerial photograph²⁰ of September 1990 gives a good impression of the car park.

[18] During this period, the Council was considering redevelopment at the western end of Castle Park. A draft Planning Brief²¹ of June 1991 envisaged the demolition of the Norwich Union building and its replacement by five office blocks, one of them built on open parkland east of St. Mary-le-Port Church.

[19] From 1991 to 1993, the Council carried out substantial improvement works to the park funded by money from Ladbroke. This involved major works in the area of the park immediately to the east of St. Peter's Church. There was considerable re-grading of the surface and reconstruction of the frontage to the floating harbour. An impression of the scale of the works is given by a photograph²² dating from this period.

[20] Castle Park was reopened by the Lord Mayor on 19th. May 1993 and another plaque²³ was unveiled.

[21] Since 1993, Castle Park has remained in use as a municipal park, although the Council has licensed some commercial uses of parts of it, e.g. a tented circus, a Big Wheel, hospitality marquees and tented cabaret shows, which have involved excluding the public from parts of the park.

[22] In 2005, the Council advertised²⁴ as a "mixed use development opportunity" the reversion to the Norwich Union and Bank of England buildings together with that part of Castle Park which lies to the west of the terrace on which St Peter's Church stands. The Council's proposal that a substantial part of the western end of Castle Park should be developed has

¹⁹ B466-473

²⁰ P384

²¹ B745

²² B140

²³ P106

²⁴ P229

generated considerable local opposition and seems to have been the main trigger for the present town green application.

3. The town green application

[23] On 14th. January 2008, Mrs Margaret Mary Bannerman applied under s. 15(2) of the Commons Act 2006 (“CA 2006”) to register Castle Park as a new green. The application was on the prescribed form 44. The application form²⁵ contained the following entries:

- Question 1: the form was addressed to Bristol City Council as commons registration authority
- Question 2: Mrs Bannerman gave her name and address as applicant
- Question 3: left blank as she was not acting through solicitors
- Question 4: the application was based on CA 2006 s. 15(2).
- Question 5: the application land was stated to be usually known as Castle Park. A rather small scale map was attached.
- Question 6: the relevant locality or neighbourhood within a locality was said to be “Bristol or Central Bristol”. A map was attached showing the central area of Bristol although no specific boundaries were identified
- Question 7: the justification for the application was said, in summary, to be recreational use since 1978
- Question 8: identified Bristol City Council as the landowner
- Question 9: was not relevant (dealing with voluntary registration)

²⁵

R1

- Question 10: Mrs Bannerman listed the supporting documentation lodged with the application (which I will consider in more detail below)

[24] The application was publicised by the commons registration authority in accordance with the relevant regulations²⁶. The publicity notice invited objections.

[25] The following objections were received:

- An objection²⁷ dated 10th April 2008 by Deeley Freed Estates Ltd, the prospective developer of the western end of Castle Park
- An objection²⁸ dated 11th April 2008 by Bristol City Council in its capacity as landowner of the application land
- An objection dated 15th April 2008 by the Ancient Society of St Stephen's Ringers
- An objection dated 15th April 2008 by Mr WHR Durie
- An objection dated 16th April 2008 by GWE Business West
- An objection dated 17th April 2008 by Aviva on behalf of Norwich Union Life and Pensions Ltd.
- An objection dated 17th April 2008 from Mr John Hurst, general manager of Broadmead Board Ltd
- An objection dated 18th April 2008 by London and Paris Estates Ltd on behalf of Strand Street Properties Ltd.

[26] The main points taken by the objectors were as follows:

- Castle Park was appropriated to public open space use in the late 1970s so that subsequent recreational use has not been "as of right"
- Recreational use of Castle Park has been by permission of the Council as landowner and thus not "as of right"

²⁶ As to the regulations, see Section 4 below

²⁷ P1

²⁸ B1

- Much of the recreational use of Castle Park has been by city workers rather than local inhabitants
- A large part of Castle Park was used as a car park from 1988-91 and was not available for recreation
- Part of the application land was leased by Norwich Union as a car park from 1979-1994 and was not available for recreation
- The applicant's plan of the application land was poor and its boundaries were ill-defined

[27] Copies of the objection statements were supplied to Mrs Bannerman for her comments. By letter dated 14th May 2008 she accepted that the Norwich Union car park should be excluded from the application but otherwise disputed the various grounds of objection.

[28] I was instructed by the Council (as commons registration authority) to advise. In my Opinion dated 29th May 2008, I advised that the application should be considered at a non statutory public inquiry.

[29] I held a pre-inquiry meeting in Bristol on 31st July 2008, after which I gave written Directions also dated 31st July 2008 dealing with procedure at the public inquiry. These Directions included provision for Mrs Bannerman more clearly to identify the application land, and any locality or neighbourhood within a locality relied upon.

[30] The public inquiry was held in Bristol on 1st to 5th December 2008 and 7th January 2009. I held an accompanied site view as well as viewing the site on several occasions unaccompanied.

[31] Representation at the public inquiry was as follows:

- The applicant, Mrs Bannerman, was represented by Mr Daniel Bennett of counsel acting *pro bono* and directly instructed by the applicant
- Bristol City Council, as objecting landowner, was represented by Mr Leslie Blohm QC instructed by the Council Legal Department

- Deeley Freed Estates Limited was represented by Mr Philip Petchey of counsel instructed by Beachcrofts LLP for certain days of the public inquiry and otherwise by Mrs Tessa Batley solicitor of Beachcrofts LLP
- The other objectors did not take part in the public inquiry.

[32] I would like to thank all the representatives for their very careful and helpful presentations of their respective cases. I would also particularly like to thank Ms. Frances Horner of the commons registration authority who made all the administrative arrangements for the public inquiry with exemplary efficiency.

4. New greens: law and procedure

[33] Section 15(2) of the CA 2006 was brought into force on 6th April 2007 and contains (so far as relevant) the following provision for the registration of new greens:

“Registration of greens

(1) Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2)... applies.

(2) This subsection 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.*

What is a Town or Village Green?

[34] A town or village green is land which is subject to the right of local people to enjoy general recreational activities on it. There is no legal requirement that it should consist mainly of grass, be situated in or in reasonable proximity to a town or village, or be suitable for use by local

inhabitants for traditional recreational activities²⁹. Greens which were not registered by 31st July 1970 ceased in law to be town or village greens and, so long as they remain unregistered, local people have no recreational rights over them³⁰.

What is the Effect of Registration?

[35] The effect of registration can be summarised as follows.

- Land becomes a new green only when it is registered as such³¹.
- Registration as a new green confers general recreational rights over the green on local people³²
- Registration as a new green subjects the land to the protective provisions of s. 12 of the Inclosure Act 1857 and s. 29 of the Commons Act 1876, which in practice preclude development of greens³³

...a significant number...

[36] “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers³⁴.

...of the inhabitants of any locality.....

[37] A “locality” cannot be created by drawing a line on a map³⁵. A “locality” must be some division of the county known to the law, such as a borough, parish or manor³⁶. An ecclesiastical parish can be a “locality”³⁷. It will be seen that the courts have adopted a very narrow construction of

²⁹ *Oxfordshire County Council v Oxford City Council & anor* [2006] 2 AC 674 *per* Lord Hoffmann at paras 3-16, & 37-39, Lord Rodger at para 115 & Lord Walker at paras 124-128 (Lord Scott dissenting at paras 71-83)

³⁰ *Oxfordshire* *per* Lord Hoffmann at para. 18.

³¹ *Oxfordshire* *per* Lord Hoffmann at para 43, Lord Scott at para 110, & Lord Rodger at para 116 (Lady Hale dissenting at para 142 in relation to original definition)

³² *Oxfordshire*

³³ *Oxfordshire*

³⁴ *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) at para. 77

³⁵ *R (Cheltenham Builders Ltd) v South Glos, DC* [2004] 1 EGLR 85 at paras 41-48

³⁶ *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-e, *R (Cheltenham Builders Ltd) v South Glos. DC* at paras 72-84 and see *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] 3 EGLR 69 at para. 133

³⁷ *R (Laing Homes) Ltd v Buckinghamshire CC*

“locality”. The House of Lords in the *Oxfordshire* case recognised and upheld the narrowness of this definition of “locality”. Lord Hoffmann said that it had been decided in the *Sunningwell* case that the narrowness of the definition was qualified only by the fact that it was sufficient if the recreational users of the green came “predominantly” from the relevant locality³⁸. However, I think that it must be borne in mind that that this qualification was applied on consideration of an earlier, and narrower, definition of a prescriptive green under s. 22(1) of the Commons Registration Act 1965 (“CRA 1965”) in the *Sunningwell* case. Under the current definition, the test is not whether the users come predominantly from the relevant locality or neighbourhood, but whether a significant number of the users come from such locality or neighbourhood.

...or of any neighbourhood within a locality...

[38] A “neighbourhood” need not be a recognised administrative unit. A housing estate can be a neighbourhood³⁹. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness⁴⁰. A neighbourhood need not lie wholly within a single locality⁴¹. In the *Oxfordshire* case, Lord Hoffmann pointed out the “*deliberate imprecision*” of the expression. I am inclined to the view that the statutory test is fulfilled if the applicant can prove that a significant number of qualifying users come from any area which can reasonably be called a “neighbourhood” even if significant numbers also come from other neighbourhoods. I do however consider that a neighbourhood must have ascertainable boundaries because only the inhabitants of the relevant neighbourhood have recreational rights over the land: *Oxfordshire* para. 69(i)

...have indulged as of right...

[39] Although the statutory creation of a new green by 20 years’ use does not depend on the inference or presumption of a grant or dedication, the expression “as of right” echoes the requirements of prescription in relation

³⁸ *Oxfordshire* per Lord Hoffmann at para. 25 applying the ruling of the House of Lords in *R v Oxfordshire County Council ex. p. Sunningwell Parish Council*[2000] 1 AC 335.

³⁹ *R (McAlpine) v Staffordshire CC*

⁴⁰ *R (Cheltenham Builders Ltd) v Sth Glos. CC* at para 85

⁴¹ *Oxfordshire* case per Lord Hoffmann at para 27 disapproving *R (Cheltenham Builders Ltd) v Sth. Glos. CC* at para. 88

to easements and public rights of way. In both cases, qualifying user must be “as of right” because the inference or presumption of a grant or dedication depends fundamentally on the long acquiescence of the landowner in the exercise of the right claimed⁴². The landowner cannot be regarded as acquiescing unless the user would appear to the reasonable landowner to be an assertion of the right claimed⁴³. The subjective intentions of the users are irrelevant⁴⁴. User is therefore “as of right” if it would appear to the reasonable landowner to be the assertion of a legal right.

[40] The traditional formulation of the requirement that user must be “as of right” is that the user must be without force, secrecy or permission (or in the time-worn Latin phrase *nec vi, nec clam, nec precario*). If user is by force, is secret or is by permission, it does not have the appearance to the reasonable landowner of the assertion of a legal right to use the land.

[41] “Force” does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest⁴⁵. There is an undecided question whether user which involves ignoring a prohibitory notice such as “Private Keep Out” is user by force⁴⁶.

[42] Use that is secret or by stealth will not be use “as of right” because it would not come to the attention of the landowner.

[43] “Permission” can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner⁴⁷. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

⁴² *Dalton v Angus & Co.* (1881) 6 App. Cas. 740 at 773 as cited by Lord Hoffmann in *Sunningwell* at p. 351B and by Lord Walker in *Beresford* at para. 76

⁴³ *R (Lewis) v Redcar & Cleveland Borough Council* [2009] EWCA Civ 3 at para. 35

⁴⁴ *Sunningwell*

⁴⁵ *Newnham v Willison* (1987) 56 P&CR 8

⁴⁶ See the discussion by Sullivan J at first instance in the *Redcar* case at [2008] EWHC Admin 1813 at paras 11-16

⁴⁷ *R (Beresford) v Sunderland City Council* [2004] 1 AC 889

[44] In the *Sunningwell* case, the House of Lords said that use “as of right” meant use which is without force, stealth or permission. However, I think that it would be wrong to treat *Sunningwell* as if it had amended the statute to substitute “*without force, stealth or permission*” for the words “*as of right*”. In *Sunningwell*, the House was considering the issue whether users had to have a subjective belief that they were exercising the right claimed. In rejecting the requirement for such subjective belief, the House emphasised the objective nature of user “as of right”. The Court of Appeal in the *Redcar* case⁴⁸ stated that user *nec vi nec clam nec precario* is not a sufficient condition for user to be “as of right”. It is still necessary to comply with the overarching requirement that the user must have the appearance to the reasonable landowner of an assertion of the legal right claimed.

[45] Thus, if user is pursuant to a legal right, e.g. under a statutory trust for public recreation under s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906, it is “by right” rather than “as of right”. This point was fully discussed by the House of Lords in the *Beresford* case, and it illustrates the fact that “as of right” does not just mean “without force, stealth or permission”.

[46] There are hints in the speeches of Lord Hoffmann in the *Sunningwell* and *Oxfordshire* cases that the issue whether recreational user has the appearance to the landowner of the exercise of a legal right may be affected by the interaction between the use of the land made by the landowner and by local people. Lord Hoffmann rejected the view expressed in the *Laing Homes*⁴⁹ and *Humphries*⁵⁰ cases that land could not acquire town or village green status if the landowner was using the land for purposes that would be unlawful under IA 1857 s. 12 or CA 1876 s. 29 if the land were a green. In cases where the land is subject to low level use by the landowner, there may be no conflict between the use of the land by the landowner and the recreational use of the land by local people. There must be give and take between the landowner and local recreational users. However, if there is a conflict between the landowner’s use and recreational use by local people, and the use by local people materially

⁴⁸ Paras 37-38

⁴⁹ [2004] P&CR 573

⁵⁰ *Humphreys v Rochdale MBC* (2004) unreported

defers to the use by the landowner, the recreational use will not have the appearance to the landowner of use “as of right”: the *Redcar* case⁵¹.

...in lawful sports and pastimes on the land...

[47] The words “lawful sports and pastimes” form a composite expression which includes informal recreation such as walking, with or without dogs, and children’s play⁵². It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way⁵³.

...for a period of at least twenty years...

[48] In the case of an application under CA 2006 s. 15(2), the period of 20 years is the 20 years immediately before the application (subject to certain exceptions under subsections (6) and (7)).

Procedure

[49] Procedure on applications to register new greens under the CA 2006 is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007⁵⁴. The 2007 Regulations closely follow the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under s. 13 of the Commons Registration Act 1965. Those regulations proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications.

Who can apply?

[50] Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application.

[51] Application is made by submitting to the registration authority a completed application form in Form 44. The House of Lords in the

⁵¹ *R (Lewis) v Redcar & Cleveland BC* [2009] EWCA Civ 3

⁵² *R v Oxfordshire CC ex p. Sunningwell PC* at pp 356F-357E

⁵³ *Oxfordshire CC v Oxford CC* [2004] Ch 253 at paras 96-105

⁵⁴ There are new 2008 Regulations but, at present, they only apply to a small number of pilot authorities, not including Bristol City Council.

Oxfordshire case has emphasised that the procedure is intended to be simple and informal and that applications are not to be defeated by technical objections to the form of applications provided that the applications are handled in a way which is fair to all parties⁵⁵.

Accompanying documents.

[52] Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 3 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In many cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence.

[53] The applicant is only required to produce evidence to support the application if the registration authority reasonably requires him to produce it under reg. 3(2)(d)(ii).

Preliminary consideration.

[54] After the application is submitted, the registration authority gives it preliminary consideration under reg. 5(4). The registration authority can reject the application as not “duly made” at this stage, but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- where Form 44 has not been duly completed in some material respect,
- where the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or
- where the supporting documents disprove the validity of the application

⁵⁵ Lord Hoffmann at paras 60-62, Lord Scott at para 110, Lord Walker at para 124 & Lady Hale at para 144.

Publicity.

[55] If the application is not rejected on preliminary consideration, the registration authority proceeds under reg. 5(1) to publicise the application:

- by notifying the landowner and other people interested in the application land
- by publishing notices in the local area, and
- by erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors.

[56] Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land.

Objection Statement.

[57] Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the registration authority. However, the registration authority has a discretion to admit late objection statements.

Determination of application.

[58] The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the registration authority can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, most recently by the House of Lords in the *Oxfordshire* case, whereby the registration authority appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. In some cases, procedural fairness will make an oral hearing not merely an option but a necessity⁵⁶. In the *Whitney* case⁵⁷, it was held that the procedure by

⁵⁶ *Oxfordshire* case per Lord Hoffmann at para 29 approving Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council*

⁵⁷ [2005] 1 QB 282.

non statutory public inquiry did not infringe art. 6 of the ECHR because any decision of the registration authority is subject to review by the courts.

Procedural issues.

[59] A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be “properly and strictly proved”⁵⁸. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.
- **Defects in Form 44.** The House of Lords has held in the *Oxfordshire* case that an application is not to be defeated by drafting defects in the application form. The issue for the registration authority is whether or not the application land has become a new green
- **Part registration.** The House of Lords also held in the *Oxfordshire* case that the registration authority can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness⁵⁹.

5. Evidence for applicant

[60] I now turn to deal with the evidence presented to the public inquiry on behalf of the applicant. I will first consider the evidence of witnesses who gave oral evidence to the public inquiry. For convenience, I will deal with them in alphabetical order rather than in the order in which they gave evidence.

Mrs. Mary Bannerman

⁵⁸ *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *R (Beresford) v Sunderland* at para. 2

⁵⁹ Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

[61] Mrs. Bannerman is the applicant. She produced a written witness statement⁶⁰ and gave oral evidence. Mrs. Bannerman has lived since 1995 in Redcliffe Parade West, which is in the central Bristol BS1 postal district and about half a mile south of Castle Park. There is little other open space nearby and she walks in the park two or three times a week. She has no regular route within the park. The park is well used in fine weather, especially at lunchtime during the week. At the weekend it is used by families and children. She believed that they came from city centre apartments. The park is used as a short cut by many people but it is also generally used for informal recreation

[62] Some areas of the park have been closed off to the public since 1995:

- Access to the church of St. Mary-le-Port had been closed off before the date of Mrs. Bannerman's application
- St. Peter's Church has not normally been open for public access
- The Vaulted Chamber has been used as a restaurant and then a park ranger's depot and is currently closed
- The paved area to the north and west of St. Peter's Church has been used for various activities licensed by the Council, e.g. an ice rink, a Big Wheel and a German Market
- There was a tethered balloon roughly in the position shown circled yellow on plan P385A and the land beneath the balloon was closed to the public for safety reasons
- Some parts of the western end of the park were fenced off for archeological digs for a short period. There were signs saying that the digs were archeological investigations before proposed building works.

[63] In 2006-2007, Mrs. Bannerman helped in assembling a large petition⁶¹ against the grant of planning permission to build in Castle Park. She had helped gather signatures from users of Castle Park, but did not distinguish between people who were passing through and people who were using the park for more general recreation. She mostly gathered signatures on Sunday mornings. She did not need to persuade anyone to sign the petition. There was also an online version of the same petition⁶². The application to register the park as a new green had not yet been considered at the date of the petition.

⁶⁰ R149

⁶¹ R17-117

⁶² R118-139

Mrs. Julie Boston

[64] Mrs. Boston produced a witness statement⁶³ and evidence questionnaire⁶⁴ and gave oral evidence. She has lived in Bristol since 1988 and now lives in Belmont Road BS6, which is about three quarters of a mile north of Castle Park.

[65] Until 1992, Mrs. Boston was an intermittent user of Castle Park. Since 1992 she has used the park for the following activities:

- Walking or cycling through the park from Broadmead to Temple Meads Railway Station
- Leading walks for Bristol Ramblers starting from or passing through the park
- Attending the annual Workers' Memorial Day held in the park
- Assembling for various marches
- Taking people to see the plaque which has been installed in the park in memory of local people killed in the Spanish Civil War
- She took her grandchildren to the children's playground in the park in 2000 but was put off by broken glass on the ground.

[66] Mrs. Boston has seen people jogging, walking, biking and picnicking in the park.

[67] Mrs. Boston accepted that parts of the park had been closed to the public for some time e.g. for the temporary car park, archeological digs and the tethered balloon. However, these closures did not interfere with her use of the rest of the park.

Mr. Fraser Bridgeford

[68] Mr. Bridgeford produced a written statement⁶⁵ and gave oral evidence. Mr. Bridgeford has lived and worked in Bristol since 2004. He lives in the BS8 postal district. He is chairman of the Bristol Parks Forum and one of the 10 active members of the Castle Park Users Group.

[69] Mr. Bridgeford uses Castle Park for informal recreation such as running, cycling and picnicking. He sees the park being used for a wide

⁶³ R150

⁶⁴ R151

⁶⁵ R154

variety of informal recreation. He agreed that parts of the park were fenced off for archeological digs but he considered that they were only small parts of the park.

Mr. James Dalby

[70] Mr. Dalby produced a written statement⁶⁶ and gave oral evidence. He is an 18 year old student at the University of the West of England in Bristol although he lives with his family outside Bristol.

[71] Mr. Dalby is the organizer of Bristol Parkour. Parkour is an activity which involves running and jumping over or onto obstacles such as walls, fences and railings. Bristol Parkour meets each Saturday in Castle Park and practices its activities in the park. There are about 20 regular attenders of whom Mr. Dalby estimated that about three quarters live in Bristol. Some members also practice Parkour in the park during the week.

[72] When Mr. Dalby is using the park, he sees many other people using the park for informal recreation such as jogging, children's play, picnics and flying kites.

Dr. Rowland Dye

[73] Dr. Dye produced a witness statement⁶⁷, a bundle of photographs with written commentary⁶⁸ and an evidence questionnaire⁶⁹. He gave oral evidence to the public inquiry. Dr. Dye was born in 1952 and was brought up in the St. Paul's area of Bristol. From 1972-1989, he lived and worked away from Bristol although he frequently returned to visit his mother in the family home in St. Paul's. From 1989 to the late 1990s, he lived with his mother. Since then, he has lived in Montpelier and St, Agnes.

[74] As inner city residents, Dr Dye and his mother used Castle Park from 1989 to sit on the grass and picnic. In hot summer weather, the park was crowded with people. He has seen the park used for numerous types of informal recreation such as walking, with or without dogs, children's play and picnicking.

⁶⁶ R156
⁶⁷ R164
⁶⁸ R164A-J
⁶⁹ R165

[75] Dr. Dye became a keen cyclist in the 1980s and has since then taken part in numerous cycling events which have assembled in or otherwise used the park. He took his mother to practice riding a bicycle on the temporary car park when it was quiet because it was a safe place to ride.

[76] Some parts of the park were closed off temporarily, e.g. by Heras fencing for the archeological digs and by fencing around the site of the tethered balloon, but only relatively small areas were out of action at any one time. He had no clear recollection of the works to clear the temporary car park and renovate the park in the early 1990s. There was never a time when some part of Castle Park could not be used for recreation.

Mr. Trevor Houghton

[77] Mr. Houghton produced an evidence questionnaire⁷⁰ and gave oral evidence. He was born in 1954 and has lived in Bristol since 1974, mostly in the Bedminster area, although from 1993-1995 he lived on a narrow boat moored by Bristol Bridge.

[78] Until 1978, the site of Castle Park was derelict and used for car parking. It was then landscaped by Bristol City Council and used as a park. It got a bit shabby by the late 1980s. A temporary car park was placed on part of the park. He did not use the car park for recreation. After the car park was closed, that part of the park was basically a building site as shown in photograph B140. However, other parts of the park remained accessible.

[79] He used the park as a place to relax and to take his children to play as well as a pleasant place to walk or cycle through. He has camped in the park. The park was used for a variety of informal recreational activities and a number of public meetings and festivals. He mentioned “team games” in his evidence questionnaire, but he accepted that this was an exaggeration: there were only informal games of football. On one occasion, with the Council's permission, he organized an exhibition under canvas in Castle Park for the Avon Friends of the Earth.

[80] Some areas within the park are not normally accessible to the public: e.g. the two ruined churches and the Vaulted Chamber. There was temporary use of the park for a tethered balloon and archeological digs but this did not interfere with use of the rest of the park.

⁷⁰

R169

Mrs. Carol Rhodes

[81] Mrs. Rhodes produced a witness statement⁷¹ and an evidence questionnaire⁷² and gave oral evidence. Mrs. Rhodes has lived in Bristol since 1983, until lately in the Horfield area (BS7).

[82] Mrs. Rhodes's use of Castle Park since 1983 falls into four main categories:

- Use for a lunch break when using the main library near Cathedral Square both as a student and as a lecturer
- Use for a lunch break when working near College Green
- Use with her children as a break from weekend shopping in Broadmead
- Use as a meeting point for organized bicycle rides

[83] Mrs. Rhodes has witnessed a variety of informal recreational uses of the park including walking (with or without dogs) and children's play. There was nothing to indicate whether the park users lived in Bristol. Parts of the park were fenced off for the tethered balloon and the archeological digs but this did not affect use of the rest of the park. She does not remember the temporary car park.

Prof. Frank Rhodes

[84] Professor Rhodes is the husband of Mrs. Carol Rhodes. He produced a written statement⁷³ and gave oral evidence. He has lived in Bristol since 1986, until recently in the Horfield area of Bristol (BS7).

[85] Prof. Rhodes is a retired professor of Public Administration and Local Government. His use of Castle Park falls into three periods:

- In the early 1990s he prepared and delivered training courses to BT at their offices in the Queen Charlotte Street area and used to walk to Castle Park at lunchtime to eat his lunch there because his office was smoky
- Over an unspecified period of 15 years, he worked for the Open University in Portwall Lane and used to visit Castle Park

⁷¹ R187

⁷² R188

⁷³ R192

- Since retirement he has visited Castle Park two or three times a month before or after shopping visits to the Broadmead area.

[86] Prof. Rhodes tends to use the western end of the park since the eastern end attracts winos and other undesirables. When he visits the park he frequently observes other people engaged in informal recreation there such as children's play, picnics in good weather, and people sitting reading the paper and eating their lunch.

[87] Prof. Rhodes accepted that Castle Park looked like a municipal park and had been laid out, administered and maintained by Bristol City Council. He remembered that part of Castle Park was used as a temporary car park.

Mrs. Biddy Strong

[88] Mrs. Strong produced a written statement⁷⁴ and gave oral evidence. Mrs. Strong lived in Bristol from 1971 to 1990 and, since 1990, has lived near Bristol. Since 1997, she has worked at various offices in the centre of Bristol. From the time when Castle Park opened in 1978, she and friends have gone to the park at lunchtime for a breath of fresh air. On warm days, they have taken a picnic lunch and eaten it sitting on the grass of Castle Park. The park is widely used for leisure purposes. She estimates that there are many thousands of regular users. The park is crowded with people in fine weather, especially with other office workers at lunchtime.

[89] Mrs. Strong remembers that part of the park was used as a temporary car park and that other parts were temporarily fenced off for archeological excavations. However, the rest of the park was available. She did not recall the extensive works on the park in the early 1990s but she might not have been working in the city centre during this period. Mostly she used the western end of the park but she has walked around the eastern end years ago. She assumed that the park was run by Bristol City Council.

Mr. Harvey Tadman

[90] Mr. Tadman produced an evidence questionnaire⁷⁵ and gave oral evidence. He has lived in Bristol since 1996. For a few months he was

⁷⁴ R193

⁷⁵ R195

homeless and lived in a tent in Castle Park. He now lives in a tower block about 5 minutes walk from the park.

[91] Mr. Tadman goes to the park every one or two weeks for relaxation and leisure. He takes his daughter there to play in the children's playground. He does not stick to the paved paths, even on his bicycle. He sees other people using the park for a variety of informal recreation such as children's play, picnicking and walking with or without dogs. The park was also used as a gathering point for protests, such as Critical Mass (a large cycling protest) and a students' protest against the construction of Cabot Circus (a new shopping centre).

Ms. Helen White

[92] Ms. White produced an evidence questionnaire⁷⁶ and gave oral evidence. Ms. White had lived in Bristol in the 1970s but did not recall much about Castle Park in that decade. From 1979 to 1986, she lived away from Bristol. She returned to live in Bristol in 1986 and now lives in the Eastville area (BS5).

[93] Ms. White has used Castle Park for informal recreation and has seen others doing the same. It is much used by office workers at lunchtime. She mostly used the western end of the park and did not remember the temporary car park of the late 1980s or the reconstruction work on the park of the early 1990s

[94] Ms. White was involved in collecting signatures on the petition against building at the western end of Castle Park. She went to the park about 10 times for periods of about an hour. She approached people and asked them to sign the petition. There was no distinction between people who lived in Bristol and others and no distinction between people who were just passing through the park and those who were using the park for other recreational activities.

Mr. J. Chris White

[95] Mr. White produced a written statement⁷⁷ and an evidence questionnaire⁷⁸ and gave oral evidence. He was born in 1957 and lived in Bristol from 1983-2002. Since 2002, he has lived in Cheddar in Somerset.

⁷⁶ R204

⁷⁷ R199

⁷⁸ R200

[96] In the early 1990s, Mr. White and his friends used to ride BMX bikes on the temporary car park on summer evenings when it was closed to cars. Later, before he moved away from Bristol, he took his children and dogs to the park. The children played in the children's playground and the family picnicked at the eastern end of the park.

[97] He has seen the park used for numerous informal recreational activities. Parts were closed off for a while, e.g. the tethered balloon enclosure and the archeological excavations. But it was always possible to use the rest of the park.

General impression of witnesses in support of application

[98] I bear in mind that the witnesses in support of the application may well have had the ulterior motive of preventing development of Castle Park. However, I found all the witnesses who gave oral evidence in support of the application to be honest and genuine witnesses doing their best to assist the public inquiry. Inevitably there was some haziness about exact dates, unsurprising when trying to recollect events over a long period of time. However, I accept their evidence about their own recreational use of Castle Park and about the recreational use of the park by other people which they had witnessed.

Written evidence in support of application

[99] In addition to the oral evidence given by the witnesses who attended the public inquiry, the applicant also submitted a large body of written statements and evidence questionnaires. I approach this evidence with caution because I have not had the opportunity to see and assess the witnesses and the objectors have not had the opportunity to test it by cross examination. Much of this evidence is vague and imprecise. However I have read and taken due account of all this evidence. This evidence is summarised in the following table:

Name	Postcode	Years of park use	Ref.	Comments
Paddy Bannerman	BS1	1997-date	R212	
Laurie Barth	BS6	1990-date	R214	
Edward	BS3	1970-2006	R218	Claims use

Bayliss				since 1970 although park did not open till 1978
(Mrs.) PR Beale	BS3	“on and off for most of my life”	R222	Says has known park since 1940 although park did not open till 1978
(Mrs.) Bisp	BS6	1946-2002	R225	Claims use from 1946 although park not opened till 1978
John Breton	BS5	1988-2008	R229	
Amanda Brown	BS1	1989-2007	R231	
(Mr. & Mrs.) Bryant	BS16	1960-2006	R235	Claims use since 1960 although park not opened till 1978
R Button	BS15	Early 70s to now	R240	Claims use since early 1970s although park did not open till 1978
Sheila Campbell	BS7	1979-2008	R244	
Sally Caseley	BS2	1963-2006	R246	Claims use since 1963 although park not opened till 1978
Jeremy Clarke	BS7	1986-2007	R250	Only mentions demos in park
Christine	BS16	1990-present	R251	

Coles				
Geoff Collard	BS6	1976-date	R155a	Claims use since 1976 although park not opened till 1978
Simon Collins	BS4	2006-2008	R255	
(Mrs.) S Curtis	BS5	1985-2007	R259	
Jane Dalby	Nailsea	1979-2008	R263	
Debra Dando	BS25	1969-1994	R158	Claims use from 1969 although park not opened till 1978. Most user seems to be before 20 year period
Amanda Daniel	BS4	Last 10 years	R265	
Richard Davoll	BS2	1978-2007	R266	
Wesley Depais	BS2	Not stated	R269	
Deborah Evans	BS6	1985-present day	R272	
Susan Gilpin	BS5	Not stated	R276	Says used for 10 years but does not say which 10 years
Pete Gisborne	BS4	1990-2008	R280	
Peter Graham	BS1	1986-1993 & 2006-2007	R284	
Sarah Harvey	BS6	Not stated	R288	
James Hill	BS6	1989-now	R289	
(Mrs.) L	BS5	1975-now	R293	Claims use

Hiscox				since 1975 although park did not open till 1978. “They dug up the centre”
MFH Hobbs	BS1	Not stated	R297	
Colin Holmes	BS6	1988-2008	R301	
(Mrs.) G Hopton	BS11	Not stated	R306	
David Howard	BS40	1998-2008	R310	
Viv Humphrey	BS5	1975-now	R315	Claims use since 1975 although park did not open till 1978
Alison Ingham	BS34	2006-present	R318	
Philip Insall	BS6	1986/7-date	R173	
Frances Irwin	BS2	1964-2006	R321	Claims use since 1960 although park opened in 1978
Matt Jago	BS7	2005-2008	R325	
Chloe Jakinouski	BS4	1995-2008	R329	
Amie Johns	BS6	Past 4 years	R333	
C Jones	BS6	1988-2008	R334	
Diane Karoui	BS2	1986-date	R178	
Sean Keohane	BS7	1994-2006	R338	
Anthony King	BS3	1990-2008	R342	
Peter Lavecombe	BS2	“10 years”	R344	Does not say which 10 years
Julian Lea-Jones	BS6	Not stated	R348	

Nadine Lee	BS6	2005-now	R352	
(Mr.) AR Low	BS2	1991-present	R356	
John Massey	BS6	1960-2006	R182	Claims use since 1960 although park not opened till 1978
Wendy Massey	BS6	1975-1988	R360	Claims use since 1975 although park opened in 1978
Alex Milne	BS5	1976-2000	R364	Claims use since 1976 although park opened in 1978
PW Morgan	BS13	1960-2006	R368	Claims use since 1960 although park opened in 1978
Alistair Morriss	BS6	2004-2007	R370	
Keir Murphy	BS2	2003-2006	R374	
Phil & Jean Murphy	BS8	1972-2006	R378	Claim use since 1972 although park opened in 1978
Steve Preddy	BS4	1994-2008	R382	
Laurent Pret	BS3	2002-now	R386	
(Mrs.) D Price	BS13	1954-now	R389	Claims use since 1954 although park opened in 1978
Nic Reeves	BS1	"5 years"	R394	Does not state which 5 years

Rosa Richards	BS2	1978-2008	R395	
Graham Scorey	BS5	1960-now	R400	Claims use since 1960 although park opened in 1978
(Mr.) MP Sell	BS14	1980-2006	R404	
Graham Smith	BS2	1985-2006	R407	
(Mrs.) J Solomon	BS5	1950-2007	R411	Claims use since 1950 although park opened in 1978
Shane Stone	BS5	1988-2008	R416	
Katherine Sugg	BS7	2003-present	R420	
Marjorie Tobin	BS5	1972-present	R425	Claims use since 1972 although park opened in 1978
J Tuff	BS4	1984-date	R429	
Linda Tuff	BS4	1982-present day	R432	
Lisa Vaughan	BS2	"birth to present" 44 years	R137	
Sue Walker	BS5	1986-2008	R441	
Lucy Watson	BS7	1997-date	R444	
G Wheller	BS1	1998-day	R445	
Anne White	BS8	Not stated	R198a	
Chris Whitlow	BS8	1986-2008	R450	
Bernice Wicks	BS5	1978-present	R453	
Mireille Wicks	BS8	1988-present	R457	
Rodney Wicks	BS2	1978-present	R462	

[100] I have the following comments about this written evidence:

- Nearly all say that Castle Park has been used by themselves and others for informal recreation
- Many of the witnesses go back to 1988 or earlier
- A surprising number of witnesses mistakenly claim to have used the park before it opened in 1978
- A substantial number of the witnesses say that they used the park while working in central Bristol but many also lived in Bristol.

[101] The applicant also submitted a number of newspaper cuttings, pamphlets, photographs and other documents⁷⁹, all of which I have read and taken into account.

6. Evidence for objectors

[102] The objectors, Bristol City Council (as landowner) and Deeley Freed Estates Ltd., called witnesses to give oral evidence and submitted written evidence. Deeley Freed called Mr. Bailey. All the other witnesses were called by the Council as landowner. I will begin by considering the evidence of the objectors' witnesses who gave oral evidence. Again, for convenience, I will consider the witnesses in alphabetical order rather than in the order in which they gave evidence.

Mr. Martin Bailey

[103] Mr. Bailey produced a written statement⁸⁰ and gave oral evidence. Mr. Bailey is a chartered town planner whose firm is retained by Deeley Freed Estates Ltd in connection with the proposed development of the western end of Castle Park. Mr. Bailey clearly put a vast amount of work into the research for and preparation of his statement which, with appendices, runs to nearly 400 pages. The statement contains a mixture of (a) commentary on assembled historical documents relating to Castle Park, (b) evidence of his own experiences of Castle Park and (c) argument as to whether the application passes the legal test for registration of a new green. In preparing this Report I have re-read and have taken account of the whole of his evidence. However, it is impossible to do full justice to Mr.

⁷⁹ R466-522B

⁸⁰ P4

Bailey's evidence in any summary. I therefore propose to do no more than identify the main themes of his evidence, identifying any specific points of special importance.

[104] Mr. Bailey has lived in central Bristol since 1975 within a few minutes' walk of Castle Park. His places of work have also generally been in Central Bristol. He has therefore known Castle Park personally for many years. He used the park occasionally after the 1978 opening. His recollection is that the park was not then well used. He occasionally parked in the temporary car park of 1988-1991. After the temporary car park closed, there were extensive landscaping and other works⁸¹ carried out to the park. He said⁸² that "it is understood that" the works effectively prevented use of the whole of the application land and that covered the whole of the application land. However, it is clear that Mr. Bailey's understanding on this point was incorrect as it is common ground that much of the western and eastern ends of the park were not affected by the landscaping works. He recalls the 1993 re-opening of the park. He has used the re-opened park on numerous occasions. His impression is that, since re-opening, the park has been well used as a thoroughfare and by office workers sitting in the park in good weather. At the weekend, the park has a more relaxed character.

[105] Mr. Bailey summarized the history of the Castle Park site from medieval times and produced a wealth of interesting historical photographs, maps and other documents. Mr. Bailey also recounted in some detail the planning history of the Castle Park site and produced extracts from many of the planning documents. None of this material is contentious and I have drawn on it in my historical outline above. Mr. Bailey also produced a useful summary chronology⁸³. His view was that the western end of the park has always been considered a potential development site but that precise proposals for development have only been recently formulated.

[106] Mr. Bailey was personally aware of a number of functions held in the park, usually either in St. Peter's Square (the paved area beside St. Peter's Church) or in the "arena" which is a large grassy plateau to the east of St. Peter's Church. He recalled a funfair and German Market and was able to give specific dates for a number of recent events:

- 27th. July 2003: Jazz band in arena

⁸¹ P37 & 42

⁸² P41

⁸³ P108

- 25th. November to 22nd December 2003: Christmas parties on St. Peter's Square
- September 1999 & September 2005: tethered balloon in arena
- 19th. November 2005-8th. January 2006: ice skating rink in St. Peter's Square with associated marquee
- 31st December 2005: New Year's Eve fireworks
- 12th. December 2006-14th. January 2007: Big Wheel on St. Peter's Square
- 6th.-1st. April 2007: Big top circus in arena
- 29th. June & 7th. July 2007: Sustrans 30th anniversary celebrations
- 9th-10th. May 2008: Fairtrade exhibition in Castle Street and St. Peter's Square (60 exhibitors & food market)

There was also a creperie concession west of St. Peter's Square.

[107] Mr. Bailey carried out a useful analysis⁸⁴ of the postcodes given by the 2,421 persons who completed the applicant's questionnaires, on-street petition and on-line petition. It is common ground that postal areas BS1-9, 11 & 13-14 lie wholly within the City of Bristol and that parts of BS10, 15 & 16 also lie within the City. On Mr. Bailey's analysis, 1,733 out of the 2,421 persons (71%) live in postal districts wholly within the City.

[108] Mr. Bailey also produced a very useful plan⁸⁵ showing the boundaries of the application land and his understanding of the position of the various areas to which public access for recreation was at various times prevented or restricted by works, events or other uses. The plan is only diagrammatic, but it helps to give an impression of the areas of the park involved. Mr. Bailey argued that most parts of the park had been closed to the public at one time or another during the relevant 20 year period.

Mr. Keith Chant

[109] Mr. Chant produced a written statement⁸⁶ and gave oral evidence. He was Area Landscape Manager (Central) employed by Bristol City Council from 1996-2003. During most of this time he was responsible for Castle Park.

[110] Mr. Chant described the park and its amenity and historical features, produced numerous photographs of the park and concluded that it was a

⁸⁴ P308
⁸⁵ P385A
⁸⁶ B46

typical municipal park. It has been managed and maintained by Bristol City Council like any other municipal park. It is open to the public on foot and bicycle 24 hours a day. Vehicular access is controlled by telescopic bollards. There are no byelaws and no notices dealing with public access. His impression was that the users were mostly either commuters passing through, office workers or shoppers from Broadmead. There was not much of a local population while he was ALM (Central). He could not say how many users were Bristolians. There had been “quite a lot” of surveys of park users while he was ALM (Central) and he “imagined” that they had asked where users lived. No such surveys were produced to the public inquiry.

[111] During his time as ALM (Central) parts of the park had been closed to the public permanently or temporarily:

- St. Peter’s Square (the paved area beside St. Peter’s Church) was used for Christmas Fun Fairs and a German Market. However, it is not clear whether any admission charge was made.
- Various events were licensed in St. Peter’s Square
- There was a tethered balloon in the arena area for one or two summers and the public were excluded from the vicinity for health and safety reasons
- There were two ice cream concessions and a mobile food concession
- Various parts of the park were closed to the public for safety reasons, e.g. St. Peter’s Church and the Castle Keep
- The children’s playground was fenced but the public had free admission through gates in the fences.

Mr. Peter Floyd

[112] Mr. Floyd produced a written statement⁸⁷ and gave oral evidence. Mr. Floyd is qualified in the fields of architecture, civic design and town planning. He worked for the Bristol City Planning Department from 1964-66 & 1969-72. He is now urban design consultant to GWE Business West and has worked with the Broadmead Board. He has been a leading member of many local professional and amenity societies.

[113] Mr. Floyd’s evidence was largely an overview of the history of the Castle Park site since he was first involved with it in the early 1960s as an architecture student. His impression was that for some years after Castle Park was opened in 1978, the Council had no specific plans for future use

⁸⁷

B91

of the Castle Park other than as a park and that it was only in the 1990s that development of part of the park was seriously considered.

[114] Questioned about the landscaping works effected after closure of the temporary car park, he thought that the works were broadly confined to the car park site and did not extend to the west or south of St. Peter's Church.

Mrs. Stacey Hobbs

[115] Mrs. Hobbs produced a written statement⁸⁸ and gave oral evidence. Mrs. Hobbs has worked for Bristol City Council from March 2005 to October 2007 as Parks Events Officer and since October 2007 as Estate Services Officer. During her employment as Parks Events Officer she was in charge of overseeing the use of Bristol parks and open spaces for events, both events organized by the Council and events organized by outside bodies.

[116] Castle Park is promoted by the Council as a venue for events. The organizer submits a Site Licence Application Form to the Events Team. If the application is successful, a Site Licence is granted.

[117] Mrs. Hobbs produced a list⁸⁹ of the events in Castle Park that had been licensed during her time as Parks Events Officer. Many were charitable or public events open to the public, but a number were events which were in areas fenced off from the public and admission was by fee e.g.:

- Theatre
- Ice rink
- Big Wheel
- Circus
- Beer festival

A number of events were private events to which the public had no admission, even by paid ticket. The events were usually held either on St. Peter's Square (the paved area by St. Peter's Church) or near the bandstand. The events never took up the whole of the park although some involved enclosure of a substantial part of the park, e.g. the 2001 Bristol Children's Festival⁹⁰. Many events lasted only a day or a weekend, but some lasted for several weeks, e.g. the Big Wheel and the ice rink.

⁸⁸ B96
⁸⁹ B100
⁹⁰ B876

[118] Mrs. Hobbs was not instructed by the Council that there was any legal restriction on the licensing of events in Castle Park (or indeed in any other park or open space in Bristol) which had the effect of excluding the public from enjoyment of any part of the park or open space. “We operate on the basis that we can hire out any public park”.

Mr. Robert Jones

[119] Mr. Robert Jones produced a written statement⁹¹ and gave oral evidence. Mr. Jones has been employed by Bristol City Council as City Archeologist since 1992.

[120] Mr. Jones has been involved in the following archeological investigations in Castle Park:

- In February 1998, 5 small evaluation trenches were excavated in connection with a proposal to base a tethered balloon at the eastern end of the park. The works took one day, during which the public were excluded from the work area.
- In August 2004, 3 evaluation trenches were excavated in connection with a proposed skateboard park to the north-east of St. Peter's Church. The trenches were fenced off during the works, which lasted about a month.
- In July/August 2006 24 trenches were excavated at the western end of the park in connection with a proposed development by Deeley Freed Estates Ltd. The trenches and spoil were fenced with Heras fencing, thereby excluding the public from much of the western end of the park. Mr. Jones broadly agreed with Mr. Williams's plan⁹² of the area enclosed although the fencing may have varied from the plan by a metre or so, both larger and smaller..
- There were further excavations in 2007, but they were to the west of the edge of the application land and did not involve encroaching on the parkland

Mr. Paul Manton

[121] Mr. Manton has been employed by Bristol City Council as Community Parks Manager since 2003. He is responsible for day-to-day management and maintenance of Castle Park. The actual work is carried out by contractors, who also lease the park depot. From 2000-2004, there was a

⁹¹ B101

⁹² B143

team of park rangers based on site. Since 2004, the contractor has supplied a year-round full time park keeper for Castle Park and an additional park keeper from June-August. Park security is maintained by (a) police patrols, (b) CCTV cameras and (c) the park keepers who are equipped with personal radios connected to a local security network. As the park is open 24 hours a day, there are problems with rough sleepers, street drinkers and drug users.

[122] There are three main paths through the park, which are heavily used by walkers and cyclists, especially during rush hours and at lunchtime:

- A shared cycle and foot path linking Castle Street and Old Market to Baldwin Street, Victoria Street and High Street at the Bristol Bridge junction
- A path from Union Street to Baldwin Street and Victoria Street
- A path from Newgate to Castle Street or on to Baldwin Street, Victoria Street and High Street.

Mr. Manton produced a plan⁹³ showing these paths.

[123] Some areas of the park are fenced off for health and safety reasons, e.g. the two ruined churches. Other parts are used for events licensed by the Council. There are two main events areas, St. Peter's Square (the paved area around St. Peter's Church) and the arena beside the bandstand. Some events are open to the public at a fee, e.g. the ice skating rink, beer festival and the Big Wheel. There are numerous smaller events held in the park, such as charity and promotional events. Since Mr. Manton has been in post, an ice cream concession and a hot food and drink concession have been licensed in the park, the income being used to fund park maintenance and repairs.

[124] Mr. Manton has never been told that the public have any legal right to use the park or that the Council cannot exclude the public from the park.

Mr. Jon Wheatley

[125] Mr. Wheatley produced a written statement⁹⁴ and gave oral evidence. He joined Bristol City Council in 1974 as Assistant Parks Manager (Technical) and worked for the Council in various capacities connected with parks and leisure for many years. It was not clear from his evidence when he left the Council's employment but it was not earlier than the 1990s.

⁹³ B114

⁹⁴ B117

[126] In the mid 1970s, Castle Park was being laid out in accordance with a scheme devised by Sir Hugh Casson. The scheme involved major engineering works and it was proving too expensive. Mr. Wheatley was involved in a major budget reduction exercise on the park, which involved completing the Casson scheme at the eastern end of the park but laying out the rest of the park to grass. The exercise was implemented and the park was opened in 1978 in its simplified form.

[127] In the mid 1980s, Mr. Wheatley was involved with a scheme to improve Castle Park. He said that, although the intention was that most of the park should remain public open space for the long term, there were certain parts of the park where other uses were considered and which were excluded from the improvement scheme:

- The parks depot and car park off Queen Street
- Most of the park west of St. Peter's Church

The area around the ruined castle keep was also excluded as there was insufficient money to restore the keep.

[128] In the late 1980s, part of the park was used as a temporary car park in order to raise money to carry out the improvement scheme. The scheme was effected in the early 1990s. Mr. Wheatley estimated that about half the park was fenced off in order to implement the scheme⁹⁵ although there was never total exclusion of the public from the park and the eastern and western ends of the park were unaffected by the scheme and remained open to the public. Most of the works were completed in time for the official re-opening of the park in 1993. Certain works were effected later in the 1990s when funds became available, e.g. the creation of the children's playground and the planting of an "urban forest" at the eastern end of the park. Both involved temporary exclusion of the public while works were carried out.

Mr. Peter Wilkinson

[129] Mr. Wilkinson produced a written statement⁹⁶ and gave oral evidence. Mr. Wilkinson has been employed by Bristol City Council in the Bristol Parks Department since 1996. He is now Parks Service Manager.

⁹⁵ I think that this is an overestimate: I would say one third.

⁹⁶ B124

[130] Castle Park has been managed and maintained by the Council as a public park throughout his employment. The park is not enclosed and is open 24 hours a day. There are no byelaws. There are other parks in Bristol which are similarly open at all times and have no byelaws.

[131] Parts of Castle Park have been closed off from time to time, e.g.:

- St. Peter's Square has regularly been used for events such as fun fairs, ice skating and markets
- The central arena has been used for large scale events such as circus and entertainment shows and (for two summers) a tethered balloon. The public were fenced off from the balloon site for health and safety reasons.
- To carry out works, e.g. maintenance works and archeological digs.

[132] Mr. Wilkinson has never been advised that there is any legal constraint on excluding the public from any parts of the park. The question has never arisen.

Mr. Bruce Williams

[133] Mr. Williams produced a written statement⁹⁷ and gave oral evidence. He has been employed as an archeologist by Bristol City Council since 1973 and now holds the position of Manager of the Bristol and Region Archeological Services (BaRAS). BaRAS carries out archeological investigations at the cost of private developers. Mr. Williams gave evidence on three broad topics:

- Archeological features within Castle Park to which the public do not have general access
- The use of the park as a temporary car park, and
- Temporary closures of parts of the park for archeological investigations.

[134] Mr. Williams identified the following historical features as being generally closed to the public:

- The High Street Vaults (but I do not think that they are within the application land as the High Street does not abut any part of the application land)
- The tower of St. Mary-le-Port
- Simon Oliver's Cellar (Mr. Williams did not identify where this is)

⁹⁷

- The Vaulted Chamber
- The Castle Keep (fenced off since 1989)
- St. Peter's Church

[135] Mr. Williams gave evidence that part of Castle Park was used as a temporary car park from May 1988 to September 1990⁹⁸. When the car park closed, the site of the car park was subject to extensive landscaping works from which the public were largely excluded for health and safety reasons except for fenced through routes as shown in photograph B 140, which Mr. Williams himself had taken from a rooftop on the other side of the floating harbour. He had a watching archeological brief over the landscaping works. The public continued to use those parts of the park which were not affected by the landscaping work. His impression was the busiest time for use of the park was lunchtime.

[136] In 2006, BaRAS were instructed by Deeley Freed Estates Ltd to carry out an archeological survey of the western end of Castle Park in connection with its proposed redevelopment. Certain investigations were carried out on land west of the application land and there was a ground probing radar survey which did not necessitate exclusion of the public. However, in July and August 2006, BaRAS carried out a series of investigations involving the excavation of trenches and the making of boreholes. These works were carried out behind 2m high Heras fencing which excluded the public from the site of the works. A series of photographs illustrates this work⁹⁹. Mr. Williams produced a plan¹⁰⁰ showing the areas intended to be fenced off for archeological investigations. He accepted in cross-examination that the fencing actually erected did not always exactly follow the intended plan. However, it is clear that substantial areas of the western end of the park were temporarily fenced off for this purpose. Trenches were backfilled and fencing was removed as soon as archeological work was completed on each trench.

General impression of witnesses for objectors

[137] I am satisfied that all the witnesses who gave oral evidence for the objectors were honest witnesses. Mr. Bailey's statement was partly drafted as an advocate for his client, advancing arguments rather than giving evidence as a witness, but, insofar as he gave evidence as a witness of

⁹⁸ In fact, the car park appears to have been in use until 1991

⁹⁹ B142, 161a-h

¹⁰⁰ B143

fact, I accept him as an honest witness, although he was mistaken about the extent to which the park was closed during the 1991-1993 landscaping works. There was some difference of views between the witnesses as to the extent to which the Council had in mind the potential redevelopment of the western part of the park when the park was opened in 1978 and thereafter. I do not consider that it is a useful exercise to try to unravel this issue as a matter of inconsistent oral evidence. The Council is a corporation and does not have a human mind. The views of different officers and councillors may well have differed on future development prospects for the park. It appears to me that one can only assess the actions of the Council by reference to resolutions that were duly passed and so had some legal effect.

Written evidence for objectors

[138] Bristol City Council, as landowner, produced nearly 1,000 pages of miscellaneous documents in support of its objection, including many resolutions of council committees. However, I think that there is only one document (additional to those already mentioned above) which calls for special mention. It is an undated terrier card¹⁰¹ said to have been found in the Council's records. So far as relevant it provided (in various different handwritings) as follows:

Situation of Property: Castle Green "Castle Park"

Description: Park, St. Peter's Church and car park

Proposed use: Public open space

Outgoings, Covenants and Remarks: All land in this reference on 31/3/80 was transferred to OS&A C'tee. Accounts adjusted by City Treasury with approval of chairmen of L&A and OS&A C'tees

In fact, it seems that the land was transferred from the Land and Administration Committee to the Open Spaces and Amenities Committee as from 30th. September 1978¹⁰² although the accounting adjustment did not take effect until 31st March 1980, i.e. the start of the budget year 1980/81¹⁰³. In view of this error and the unknown source of the writing on the terrier card, I do not place much reliance on this card.

7. Evidence of members of public

¹⁰¹ B1048

¹⁰² B389

¹⁰³ B425-428

[139] Two members of the public gave evidence to the public inquiry

Susan Carter¹⁰⁴

[140] Susan Carter lives in Bishopston, Bristol BS7. She has lived in Bristol since 1968. Originally the site of Castle Park was a bomb site used as a car park. She started using the park for recreation in 1993/1994. She uses it for meeting friends, picnicking, unwinding, picking cherries to make wine and leaves to decorate her house. She has also attended events in the park such as the 1993 Environment Fair and a Sustrans Fun Day. She has used Castle Park as an assembly point when organizing group cycle rides. The park is often quite busy with people sitting around. Susan Carter's evidence was not challenged by any party and I accept it.

Mr. David Lucas

[141] Mr. Lucas has lived in Bristol for 5 years. He now lives in Broad Street, Bristol BS1. He does not generally go to Castle Park for leisure purposes. He avoids the park at night when it is not very pleasant. There are discarded condoms and needles. He attended the public inquiry "to speak against the application for the park to be closed down". Mr. Lucas's evidence was unchallenged and I accept it.

8. Findings of fact

[142] Having considered all the evidence submitted to the public inquiry (whether specifically summarised above or not), I make the following findings of fact.

What use has been made of Castle Park?

[143] I find that there have been three principal uses of Castle Park:

- informal recreation
- passage on foot and by bicycle, and
- attending events and functions licensed by the Council.

[144] I am quite satisfied that Castle Park has been used generally and to a substantial extent for informal recreation such as recreational walking with or without dogs, children's play, relaxing in the sun and picnicking. There was a mass of evidence to that effect from the applicant's witnesses, which

¹⁰⁴ Susan Carter specifically requested not to be described as Mrs. Miss or Ms.

I accept. Indeed, it would be extraordinary if a town centre municipal park were not so used. The only material restriction on such use has been the fact that various parts of the park have been closed to the public for differing periods of time.

[145] I find that there has also been substantial use of the park as a through route for passage on foot and by bicycle, especially along the three routes identified by Mr. Manton.

[146] It is clear from the evidence of the objectors' witnesses, and I find, that numerous events and functions have taken place in the park with the permission of the Council as landowner. Some have been recreational in character, such as the ice rink. Others have been more in the nature of entertainment, such as the circus and the Big Wheel. A few have been private functions.

How long has the park been used for recreation?

[147] I find that the park has been used generally and to a substantial extent for informal recreation since it first opened in 1978. There was ample evidence to that effect from the applicant's witnesses and I accept that evidence. It was suggested by some of the objectors' witnesses that the park was less successful before the 1993 re-opening. This may be so, but I am satisfied that even the pre-1993 recreational user was substantial. Again, it would be extraordinary if a town centre municipal park had not been so used. The only qualification to this finding is that parts of the park have been closed to the public from time to time since 1978.

Who has used the park for recreation?

[148] I find that a substantial number of recreational users of the park have been inhabitants of the City of Bristol. In recent years, more residential accommodation has been built in central Bristol, so that recreational use of the park by residents of central Bristol has increased over the relevant 20 year period. However, I find that there has always been substantial recreational use of the park by shoppers and office workers. It would be very surprising if a substantial number of shoppers and office workers did not live within the City of Bristol, bearing in mind that the park is close to the shop and office centre of Bristol. This view is supported by Mr. Bailey's analysis of the home addresses given by persons who completed evidence questionnaires, or signed the on-site or on-line petitions, which suggests

that over 70% of park users live within the City of Bristol. It is true that the petitions did not distinguish between persons using the park purely for passage and those using the park for recreation. However, I can see no reason why the percentage should vary as between the two classes of user. In his closing submissions, Mr. Bennett said that the petition and evidence questionnaires had been reviewed on behalf of the applicant and that 80% of the persons completing evidence questionnaires or subscribing to the petition were inhabitants of the City of Bristol. However, I do not see that the difference between 70% and 80% is material for present purposes.

Who has managed and maintained the park?

[149] There is no dispute that the park has been maintained and managed as a municipal park by Bristol City Council since it opened in 1978, and I so find.

Have there been any restrictions on recreational use of the park?

[150] I find that, with the exception of parts of the park which have been closed to the public from time to time, there have been no restrictions on public use of the park for recreation. There are no byelaws. There are no notices restricting public access. The park is unenclosed and has at all material times been open 24 hours a day 365 days of the year.

Have any parts of the park been inaccessible for public recreation?

[151] I find that there has never been a time since it opened in 1978 when the whole park has been closed to the public. I consider that Mr. Bailey was mistaken in his assertion that there had been general closure during the 1991-1993 works. Indeed, I find that there has never been a single point in time since the park opened in 1978 when the majority of the park was closed to public recreational use.

[152] I find that certain relatively small parts of the park are and have for all or a substantial part of the relevant 20 years been generally inaccessible for public recreation:

- the ruins of the church of St. Mary-le-Port
- the ruins of St. Peter's Church
- the park works depot
- the ruins of the castle keep
- the Vaulted Chamber

- the public toilets.

[153] In addition, there have been numerous temporary restrictions during the relevant 20 year period on use of parts of the park for public recreation. These restrictions were of varying character and it is necessary to consider separately different classes of restriction.

[154] The first, and to my mind, the most important restriction was the use of a substantial part of the park as a temporary car park from 1988-1991. I estimate that the car park occupied about one quarter of the ground area of Castle Park. The car park was not enclosed and therefore the public still had access to it on foot and bicycle. However, when the car park was in use as a car park it would not in practice have been available for recreational use, although in the evenings and at the weekends it could still be used for limited recreational purposes, such as the cycling use made of the temporary car park by Dr. Dye and Mr. White. However, I find that the recreational use of the temporary car park from 1988-1991 was very little.

[155] The second important restriction was a consequence of the major landscaping works of 1991-1993 which were effected on removal of the temporary car park. It is clear from the contemporary photograph taken by Mr. Williams¹⁰⁵ that these were major works which involved closing a substantial part of the park to the public and confining the public to fenced routes through the works area. However, the eastern and western parts of the park were not affected by these works which were concentrated on the land immediately to the east of St. Peter's Church. I estimate that the works involved closure of about one third of the park.

[156] The third class of restriction involved temporary restrictions on public access while smaller scale improvement works were effected to the park, e.g.

- the construction of the new bandstand beside the arena
- the construction of the children's playground,
- the planting of the "urban forest" at the eastern end of the park.

[157] The fourth class of restriction involved the provision of public entertainment in the park, e.g.

- the tethered balloon which was located in the arena area for at least two summers and which involved fencing the public out of an area

¹⁰⁵

B140

below the balloon for health and safety reasons. The public had to pay to fly in the balloon.

- A circus in the arena area to which the public had admission only on payment
- A Big Wheel in St. Peter's Square to which the public had admission only on payment and involved fencing off part of St. Peter's Square for health and safety reasons
- Christmas markets in St. Peter's Square. Although the public had free admission to the market, the space occupied by the stalls was not available for recreation
- Various entertainments in marquees in St. Peter's Square, such as the Ladyboys of Bangkok, to which the public had admission on payment

[158] The fifth class of restriction involved the fencing off of parts of the park while archeological investigations were effected in connection with proposed development of part of the park. The most significant were the extensive investigations in the western part of the park in July/August 2006.

[159] The sixth class of restriction involved the licensing of private functions in the park, often in marquees, to which the public had no admission

[160] Finally, the Council licensed many other miscellaneous events in the park which, while not necessarily involving closure of any part of the park, must have to some extent restricted use of part of the park for informal recreation.

9. Applying the law to the facts

[161] I now turn to apply the law to the facts of this case. It is convenient to do so by reference to the constituent elements of the statutory requirements of CA 2006 s. 15(2).

...a significant number...

[162] Mr. Blohm argued that Bristol has a population of over 400,000 and that the evidence was inadequate to prove recreational use of Castle Park by a significant number of them. However, it is clear from the *McAlpine* case that user does not have to be by a considerable or substantial number of the relevant inhabitants but such as to signify general use by the local community as opposed to occasional use by individuals as trespassers.

Applying this test, I am quite satisfied that Castle Park has been used for informal recreation by a significant number of the inhabitants of the City of Bristol.

...of the inhabitants of any locality...

[163] In my judgment, Bristol is and has been a “locality” in law throughout the relevant 20 year period.

[164] Mr. Blohm argued that for that part of the relevant 20 year period which lay before 1st April 1996, Bristol was a district within Avon County Council. By the Avon (Structural Change) Order 1995, Bristol became (and remains) an unitary authority. Mr. Blohm accepted that the 1995 Order effected no alteration in the boundaries of Bristol but argued that a “locality” had to be the same legal entity throughout the 20 year period. I do not accept this argument, which seems to me to be unduly technical. In my judgment, a “locality” is a geographical area known to the law. Bristol has been such an area throughout the relevant 20 year period and I see neither authority nor reason to support the proposition that the precise legal character of the area must remain the same throughout the 20 year period.

[165] Mr. Blohm and Mr. Petchey further argued that recreational users of Castle Park had to appear to the landowner to be inhabitants of Bristol rather than office workers or shoppers. It was not enough that a significant number of them were in fact inhabitants of Bristol. I cannot accept this argument either. A landowner cannot tell where a recreational user of the park lives simply by looking at him or her. In my view, the test is whether a significant number of users were in fact inhabitants of Bristol. In any event, it seems to me that any reasonable landowner would infer that a significant number of the recreational users of a municipal park in the centre of Bristol lived in Bristol, even if they happened to be taking a break from shopping or office work.

[166] Mr. Blohm further argued that the statutory test required that those using the park for recreation should do so in their capacity as local inhabitants rather than in their capacity as office workers or shoppers. I do not accept this argument. Inhabitants of Bristol are still inhabitants of Bristol when they are shopping or working in their offices. All that the statutory test requires is that a significant number of users of the park should be inhabitants of Bristol and it seems to me irrelevant and impracticable to consider why they find themselves in the vicinity of the park

...or of any neighbourhood within a locality...

[167] The applicant did not pursue an argument that qualifying user of Castle Park was by a significant number of the inhabitants of any neighbourhood within a locality.

...have indulged...in lawful sports and pastimes...

[168] I consider that the types of informal recreation enjoyed on Castle Park, such as recreational walking with or without dogs, children's play and picnicking are plainly "lawful sports and pastimes" as that expression as construed by the House of Lords in the *Sunningwell* case.

[169] Mr. Blohm argued that use of the park purely as a thoroughfare does not count as lawful sports and pastimes. I accept this argument and have discounted such use in forming my conclusions on the statutory test. In my view there has been ample informal recreational use of the park other than by use as a thoroughfare to satisfy the requirement that a significant number of the inhabitants of Bristol have indulged in lawful sports and pastimes in the park.

[170] Mr. Blohm further argued that it was not a lawful sport and pastime to use the park to eat one's lunch, to "chill", to "shoot the breeze", to "relax" or to take a break from shopping. I agree that taking a break from shopping does not necessarily involve any sport or pastime: it depends how the break is used. The *Sunningwell* case established that it is enough if the qualifying activity is a sport or a pastime. I agree that none of the activities identified by Mr. Blohm are sports. However, I consider that they are all pastimes. If a shopper or office worker or local resident takes an hour out to stroll in the park, to sit on a bench or on the grass to eat a picnic lunch, or just to chat or relax, I cannot see why those activities should not be regarded individually or collectively as pastimes as a matter of ordinary language. Literally, that is how the shopper or office worker or local resident is passing his or her time. If the language of the statute is given a purposive construction, it seems to me that these are precisely the sort of informal recreational activities that one would expect to see on a village green.

...as of right...

[171] Much more difficult issues arise on the question whether use of Castle Park by the inhabitants of Bristol has been “as of right”. It was not suggested that such use was forcible or secret. The objectors put forward a number of legal arguments on this question:

- Such use was not “as of right” but “by right” since the park was in or about 1978 appropriated to the statutory purposes of s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906 under which the public have a legal right to use the park for recreation (the appropriation argument)
- Such use was not “as of right” because it was by implied permission of the Council as landowner (the permission argument)
- Such use was not “as of right” because recreational user by local people deferred to the use of the park by the landowner and hence did not have the appearance to the reasonable landowner of the assertion of a legal right (the *Redcar* argument)
- Such use was not “as of right” because it was not trespassory (the trespass argument)
- Such use of the children’s playground was not “as of right” because there were signs banning dogs from the playground (the playground argument)
- Such use of any part of the application land which is a public highway cannot be use “as of right” (the highway argument)
- Such use of parts of the park which are consecrated ground could not be use “as of right” (the consecrated ground argument).

The appropriation argument

[172] This argument was put forward by Mr. Blohm and supported by Mr. Petchey.

[173] The starting point is that a local authority is a creature of statute and can only hold property pursuant to a statutory power to do so. If it acquires land for one statutory purpose, it can only lawfully use the land for another purpose if it appropriates the land to that other purpose pursuant to a statutory power of appropriation. These propositions are supported by the analysis of the Court of Appeal in *Dowty Boulton Paul Ltd. v Wolverhampton Corporation (No 2)*¹⁰⁶.

[174] At the relevant time in the *Dowty* case, the applicable statutory power of appropriation was to be found in s. 163 of the Local Government Act

¹⁰⁶ [1976] 1 Ch. 13 esp at 24D-26C

1933. Originally, an appropriation required the approval of the Minister but this requirement was later dropped by amendment. The relevant statutory power of appropriation is now (and was in 1978) found in s. 122 of the Local Government Act 1972 which provides, so far as material that:

“a principal council may appropriate for any purpose for which the council are authorized by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation...”

It is to be observed that the section lays down no particular formal requirements for an appropriation.

[175] Clearly, an appropriation can be effected by an express resolution to that effect. However, there is some doubt about what, short of an express resolution to appropriate, can amount to an appropriation. The only case that counsel could find on the point was the unreported case of *Oxy-Electric Ltd. v Zainuddin*¹⁰⁷, a decision of Mr. Terence Cullen QC sitting as a deputy judge of the Chancery Division. One issue in the case was whether land which had been acquired by the London Borough of Ealing under s. 120 of the Town and Country Planning Act 1971 had been appropriated by the Council to the purposes for which it could have been acquired under ss. 112 or 119 of the 1971 Act so as to engage s. 127 of the 1971 Act which had the effect of overriding certain restrictive covenants affecting the land. Mr. Carnwath QC¹⁰⁸, for the defendants, argued that appropriation was not a technical term but simply meant that the Council had in fact applied the land for the new purposes. Mr. Roots QC, for the plaintiff, argued that appropriation must be a conscious decision or an implicit step in a conscious decision. The judge preferred the argument of Mr. Roots, although, on the facts of the case, he considered that there was no appropriation on either argument. He said:

“I am quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation.”

Although these words are not entirely free from ambiguity, on reading the judgment as a whole I consider that what the judge was saying was that if a

¹⁰⁷ 22nd October 1990
¹⁰⁸ Now Lord Justice Carnwath

local authority resolves to use land in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation is implicit in the resolution. I respectfully agree with this approach. If Mr. Carnwath's argument were correct, s. 122 could simply have provided that a local authority could use land for any purpose it wished.

[176] By s. 24(1) of the Town and Country Planning Act 1959, on an appropriation of land by an authority:

“...such adjustment shall be made in the accounts of the authority as may be requisite in the circumstances...”

[177] Accordingly, it appears to me that it is necessary to identify the statutory purpose for which the Castle Park site was purchased by the Council and to ascertain whether the Council subsequently passed any resolution to use the land for a purpose for which it could not lawfully have used the land unless an appropriation to new purposes was implicit in the resolution.

[178] The Castle Park site was purchased by the Council pursuant to the 1946 CPO under powers conferred by s. 2(1) of the Town and Country Planning Act 1944 “for the purposes of dealing with war damage”. It was submitted by Mr. Blohm, and conceded by Mr. Bennett, that although the statutory purpose of s. 2(1) of the 1944 Act would include laying the land out as a park, it would not include the maintenance and management of the park as a public open space after it had been laid out. I think that this concession was rightly made. Once Castle Park had been laid out as a public park by 1978, subsequent use of the land as a park was not use “for the purposes of dealing with war damage”.

[179] On 24th. August 1978, the Land and Administration Committee of the Council resolved¹⁰⁹ to accept the recommendation as set out in the report of the City Engineer. That report¹¹⁰ stated that that the landscaping work was substantially completed and that:

“it would be appropriate to mark its completion by a formal declaration of its availability for the use and enjoyment of the public”.

¹⁰⁹ B382

¹¹⁰ B383

The report therefore proposed an official opening ceremony by the Lord Mayor on 30th September 1978 and recommended:

“that your Committee agree to the transfer of the responsibility for Castle Park to the Open Spaces and Amenities Committee with effect from 30th September 1978, being the date of the official opening of the Park by the Rt. Hon The Lord Mayor of Bristol.”

It appears to me that the effect of the resolution of 24th. August 1978 was that, as from 30th September 1978, the Council, through its Open Spaces and Amenities Committee, was to manage and maintain Castle Park as a park for the use and enjoyment of the public.

[180] If, as is common ground, the Council could not lawfully manage and maintain Castle Park as a public park “for the purposes of dealing with war damage” under the 1944 Act, it appears to me that it must be implicit in the resolution of 24th August 1978 that the land was appropriated to statutory purposes under which it was lawful for the Council to manage and maintain Castle Park as a park for the use and enjoyment of the public. This view is supported by the fact that consequential adjustments were made to the Council’s internal accounts, under which debt charges in relation to the acquisition of Castle Park were transferred as from the year 1980/1 from the Land and Administration Committee to the Open Spaces and Amenities Committee¹¹¹.

[181] There are two statutes which confer relevant powers, the Public Health Act 1875 and the Open Spaces Act 1906:

- Under s. 164 of the Public Health Act 1875 any urban authority may purchase or take on lease, lay out, improve and maintain lands for the purposes of being used as public walks and pleasure grounds. There is authority that the effect of this section is to confer on the public the right to use such land for recreation: *Hall v Beckenham Corporation*¹¹².
- Under s. 9 of the Open Spaces Act 1906, a local authority may acquire and manage land which is “open space” as defined by s. 20.

¹¹¹ B425-428

¹¹² [1949] 1 KB 716

Castle Park was clearly “open space” within this definition as at 30th. September 1978. Under s. 10 of the 1906 Act, such open space is to be held and administered in trust to allow, and with a view to, the enjoyment thereof by the public as an open space and for no other purpose.

[182] It appears to me that the implied appropriation in the resolution of 24th. August 1978 could have been onto the statutory powers conferred by either of these statutes. In either event, the public would, as from the effective date of appropriation, have had a statutory right to use the park for recreation. In accordance with the (admittedly *obiter*) discussion of this issue by the House of Lords in *Beresford*¹¹³, it appears to me that recreational use of the park by members of the public after 30th September 1978 has been “by right” and not “as of right”.

[183] Mr. Bennett argued strenuously against the implication of appropriation. His main arguments can be summarised as follows.

[184] First, he submitted that the narrower Roots test of implication should be preferred to the wider Carnwath test. I accept this submission, but I consider that an implied appropriation was effected on the Roots test.

[185] Second, he argued that the planning policies which applied to the land from time to time cannot be relied upon as evidence of any appropriation. I agree, but I do not rely on planning policies in inferring an appropriation from the resolution of 24th August 1978.

[186] Third, he argued that pre and post 1978 consideration of disposal of parts of the land for alternative development was inconsistent with an appropriation to public recreational use under the 1875 or 1906 Acts. I do not accept this argument. An appropriation of the land to the purposes of the 1875 or 1906 Acts is not a decision that the land will be retained and used for those purposes for ever. It is only a decision to use the land the land for those purposes unless and until the land is disposed of or re-appropriated for different purposes. There is no inconsistency in appropriating land for the purposes of the 1875 or 1906 Acts

¹¹³ See in particular the comments of Lord Walker at para. 87

notwithstanding that use for different purposes has been contemplated in the past or may be contemplated in the future.

[187] Fourth, he argued that the fact that the Council used parts of the park inconsistently with the existence of a public right of access for recreation was evidence that there was no intention to appropriate the land to the statutory purposes of the 1875 or 1906 Acts. Mr. Blohm pointed out that there are some statutory powers¹¹⁴ temporarily to exclude the public from public parks for specified purposes. However, these powers are very limited and would not have justified many of the uses of the park licenced by the Council, such as the use as a car park from 1988-1991. However, it does not appear to me that one can construe the resolution of 24th. August 1978 by reference to what happened after that date. Either that resolution implicitly appropriated the land to the purposes of the 1875 or 1906 Acts or it did not. The implication must be tested as at the date of the resolution. Even if the Council used the land after 1978 in breach of the statutory purposes on which it held the land, that cannot affect the true construction of the 1978 resolution.

[188] Fifth, he argued that, since parts of the park were inaccessible to the public in 1978, e.g. the ruined churches and castle keep, the Council cannot have intended to appropriate the park as a whole to the purposes of the 1875 or 1906 statutes. However, I do not consider that it was impossible to appropriate the park as a whole to the statutory trusts of the 1875 or 1906 Acts simply because certain subsidiary features of the park were inaccessible to the public. For example, I see no difficulty in including a pond to which public access is forbidden for health and safety reasons within a park subject to the statutory trusts for public recreation.

[189] Sixth, he relied on the fact that the Council witnesses were all unaware that the park was held on a statutory trust for public recreation or that the Council's power to exclude the public was in any way limited. Although it may be unfortunate that this is the case, I cannot see how it affects the construction of the 1978 resolution.

[190] Seventh, he argued that the implication of an appropriation in this case would be inconsistent with the decision in *Beresford*. However, there was no evidence to support an implied appropriation in the *Beresford* case¹¹⁵. Appropriation was not argued in that case.

¹¹⁴ Public Health Acts Amendment Act 1890 s. 44 & Public Health Acts Amendment Act 1907 s. 76

¹¹⁵ See Lord Walker at para. 90

[191] Eighth, he argued that it was incumbent upon the Council, as both landowner and commons registration authority, to bring before the public inquiry the evidence of those officers who were involved in the alleged appropriation. I do not accept this submission. First, I do not see that the burden and standard of proof is affected by the fact that the landowner is also the commons registration authority. Second, even if (which was not explored in evidence) such officers were available to give evidence 30 years on, I cannot see how the perceptions of officers can affect the true construction of the resolution of 24th. August 1978.

[192] Ninth, he argued that a finding of implied appropriation would be inconsistent with my Further Opinion dated 6th. September 2007 in the case of South Purdown. That was a case where land had been acquired pursuant to s. 164 PHA 1875 in 1938. I advised that the land remained subject to the statutory trusts of s. 164 except so far as appropriated to other statutory purposes. I cannot see how this advice is in any way inconsistent with a conclusion in the present case that there was an implied appropriation of Castle Park in 1978. I think that this argument was probably a sub-argument against the Carnwath test.

[193] Accordingly, I reject the arguments of the applicant on this issue and conclude that Castle Park was impliedly appropriated by the resolution of 24th August 1978 to the statutory purposes of s. 164 PHA 1875 or s. 10 OSA 1906 with the result that public recreational user since 1978 has been “by right” rather than “as of right”. The application therefore fails on this ground.

The permission argument

[194] Mr. Blohm and Mr. Petchey argued (in the alternative to the appropriation argument) that the fact that the Council maintained and managed Castle Park as a public park gave rise to an inference that recreational user of the park was permissive. This point does not arise on my finding in relation to the appropriation argument.

[195] However, if I were wrong on the appropriation argument, I think that it is clear from the *Beresford* case that, although permission can be implied from the conduct of the landowner, it cannot be implied from conduct on the part of the landowner which amounts to encouragement or facilitation of

recreational use. All the conduct relied upon by Mr. Blohm amounted to acts of encouragement or facilitation of use for public recreation.

[196] Mr. Petchey argued that the temporary exclusion of the public from areas of the park used for licensed events and other activities gave rise to an inference that use of the park as a whole was permissive. In para. 5 of *Beresford* Lord Bingham gave the example of exclusion as giving rise to an inference of permission. I think that Lord Bingham had in mind total closure of the application land rather than closure of parts of the land. However, there is a question whether temporary closures of parts of the land can give rise to an inference that recreational user of the land when open is permissive. It is a difficult question but my view is that there is no inference of permission in the present case. Castle Park has since 1978 been a public municipal park. It seems to me that users would normally and reasonably believe that they had a right to use the park for harmless recreation. If they thought about the point at all, I consider that users would believe that temporary closures were attributable to the fact that the Council had some legal power temporarily to close parts of the park for various purposes rather than that any recreational use of the park was permissive.

[197] Mr. Blohm referred to the fact that the Council granted licenses for certain recreational events in the park and argued that such use was permissive. I agree but I do not see how it affects the vast majority of informal recreation enjoyed in the park which was not permissive.

[198] Mr. Petchey mounted a different argument to establish that recreational use of the park was precarious. He pointed out that, even if the park had not been appropriated to public open space use in 1978, the park was always subject to future appropriation, so that recreational use was necessarily precarious. The difficulty that I find in this argument is that “precarious” has several meanings. Although the core meaning is “by permission” the popular meaning is “uncertain” or “unstable”. I accept that the possibility of future appropriation meant that enjoyment of the park by the public was of uncertain duration. However, I do not see why it should give rise to any inference of permission.

[199] I conclude that, if I were wrong on the appropriation argument, I would not find that the application failed on the ground that recreational user was permissive and hence not “as of right”.

The *Redcar* argument

[200] This again is a point that does not arise on my finding on the appropriation argument. I consider it in case I am wrong on the appropriation argument.

[201] The *Redcar* case established that;

- recreational user of land is not “as of right” if it does not have the appearance to the reasonable landowner of the assertion of a legal right, and
- user does not have such an appearance if it materially defers to the landowner’s own conflicting use of the land.

[202] I think that it is necessary to consider the different classes of activity by the landowner on the park to assess whether and to what extent the *Redcar* principle applies.

[203] First, there was the use of a substantial part of the park as a temporary car park from 1988-1991. It appears to me that this was a use which materially conflicted with use of the car park site for recreation¹¹⁶. It further appears to me that recreational use by local people deferred to use of the car park site as a car park. Thus, in relation to the area used as a temporary car park from 1988-1991, I would have taken the view that recreational user of the car park area by local inhabitants would not have had the appearance to the reasonable landowner of the exercise of a legal right of recreation. The recreational user during this period would not have been “as of right”. Thus, even if I were wrong on the appropriation argument, I would have taken the view that recreational user of the car park area from 1988-1991 was not “as of right” and hence not qualifying user for the purposes of CA 2006 s. 15(2). This period fell within the relevant 20 year period and so would have precluded registration of the car park area as a new green. I would not, however, have regarded deference in relation to the car park site as negating user “as of right” of the rest of the park.

[204] Second, there were the major landscaping works of 1991-1993 which were effected on removal of the temporary car park. I do not regard these works as conflicting with a right of recreation by local inhabitants. On the contrary, the works were designed to improve the park as a place of recreation for local people and others. I do not think that the *Redcar* principle applies.

¹¹⁶ See *A-G v Southampton Corporation* (1969) 21 P&CR 281

[205] Third, there were temporary restrictions on public access while smaller scale improvement works were effected to the park, e.g.

- the construction of the new bandstand beside the arena
- the construction of the children's playground,
- the planting of the "urban forest" at the eastern end of the park.

Again, I do not regard these works as conflicting with a right of recreation by local inhabitants. On the contrary, the works were designed to improve the park as a place of recreation for local people and others. I do not think that the *Redcar* principle applies.

[206] Fourth, there was restriction on access involved in the provision of public entertainment in the park, e.g.

- the tethered balloon which was located in the arena area for at least two summers and which involved fencing the public out of an area below the balloon for health and safety reasons. The public had to pay to fly in the balloon.
- A circus in the arena area to which the public had admission only on payment
- A Big Wheel in St. Peter's Square to which the public had admission only on payment and involved fencing off part of St. Peter's Square for health and safety reasons
- Christmas markets in St. Peter's Square. Although the public had free admission to the market, the space occupied by the stalls was not available for recreation
- Various entertainments in marquees in St. Peter's Square, such as the Ladyboys of Bangkok, to which the public had admission on payment.

I do not regard these activities as materially conflicting with any right of local inhabitants to use the park for lawful sports and pastimes. Any restriction on access to what were relatively small parts of the park was merely an aspect of the provision of public entertainment in the park. The overriding objective of these activities was to supply pastimes to local people. I do not consider that the *Redcar* principle applies.

[207] Sixth, there was the fencing off of parts of the park while archeological investigations were effected in connection with proposed development of part of the park. The most significant were the investigations in the western part of the park in July/August 2006. However, even the 2006 investigations were relatively short term and did not involve closure of the whole of the western part of the park. Bearing in mind that

Castle Park is situated in an area of great historical interest, I would not regard public acquiescence in short term archeological investigations as being inconsistent with the appearance of the assertion of a general right of recreation in the park. It appears to me that it is simply part of the “give and take”¹¹⁷ between landowner and users. I do not consider that the *Redcar* principle applies.

[208] Sixth, there were restrictions involved the licensing of private functions in the park, often in marquees, to which the public had no admission. These were clearly in conflict with the use of the park for recreation by local people. However, these functions seem to have lasted no more than a day or so and occupied small parts of the park. I consider that any conflict with recreational use of the park by local people was *de minimis*. I do not consider that the *Redcar* principle applies.

[209] Finally, the Council licensed many other miscellaneous events in the park which, while not necessarily involving closure of any part of the park, must have restricted use of part of the park for informal recreation. Again, these events seem to have lasted no more than a day or so, and I consider that any conflict with recreational use of the park by local people was *de minimis*. I do not consider that the *Redcar* principle applies.

[210] If I were wrong on the appropriation argument, I would have accepted the argument of the objectors that the *Redcar* principle applied, but only in relation to the site of the temporary car park of 1988-1991.

The trespass argument

[211] This argument was deployed by Mr. Petchey. He argued that qualifying recreational use of Castle Park by local inhabitants had to be trespassory in character. He pointed out that I had advised as much in my Opinion of 29th. May 2008. He further argued that recreational user in the present case, even if not pursuant to a legal right and not with the implied permission of the landowner, could not be regarded as trespassory.

[212] On reconsideration, I think that the remark on this point in my 2008 Opinion was too widely expressed. There can be qualifying user under CA 2006 s. 15(2) which is not trespassory. An example would be user under a permission which was not revocable or time limited. I consider that it would be more accurate simply to say that qualifying user must not be pursuant to

¹¹⁷ *Oxfordshire* para. 51

a legal right. I have sought to set out the law more accurately in the summary of law and procedure earlier in this Report.

[213] I have found that, in the present case, user was pursuant to a legal right conferred by s. 164 PHA 1875 or s. 10 OSA 1906. In my view, this prevents the use from being qualifying use.

The playground argument

[214] It is common ground that, during the relevant 20 year period, there have been four signs at various points on the boundary of the children's playground prohibiting access by dogs. Mr. Petchey based the following argument on these signs:

- It is established by the *Oxfordshire* case that registration as a new green confers upon the local inhabitants the right to use the land for all lawful sports and pastimes,
- If registered, local inhabitants would have the right to walk on the playground with dogs, since dog walking is a lawful sport and pastime
- User cannot be "as of right" if the landowner excludes one of the rights consequent on registration.
- Accordingly, the playground cannot be registered as a new green.

[215] This point does not arise under my finding on the appropriation argument. However, it is an important point since it is very common for applications to be made to register land as a new green which has been subject to some limited restriction on use, e.g. "No Ball Games" signs. As it is not necessary for my recommendation in this case, and was not fully argued at the public inquiry, I prefer not to express a view on the point.

The highway argument

[216] Under cover of the registration authority's letter of 30th. September 2008, all parties were notified that certain small lengths of path at the far eastern end of the park were public highways. Mr. Petchey argued that land which is part of a public highway cannot be registered as a new green because public recreational use of such land is explicable as being the exercise of highway rights: *DPP v Jones*¹¹⁸. I see the force in this argument and, if I had been against the objectors on the appropriation argument, I would in any event have recommended that land which was a public

¹¹⁸ [1999] 2 AC 240

highway should be excluded from registration. However, this involves only a minimal part of the park.

The consecrated ground argument

[217] This argument was put forward by Mr. Petchey. He argued that the two ruined churches are still consecrated ground, and could not be used for any other purpose without a faculty. Accordingly recreational use of consecrated ground was unlawful and could not be relied upon to found a right. This point clearly raises important issues of ecclesiastical law (on which Mr. Petchey is an acknowledged expert) which were not fully argued at the public inquiry. No authorities were cited on the point. In the circumstances, I prefer to express no view on this point as it is not necessary for me to do so in the light of my finding on the appropriation argument. In any event, the applicant did not press for registration of the closed off areas of the churches and the unenclosed consecrated ground seems to have been small in area, although I recall no evidence before the public inquiry which precisely delineated the boundaries of the consecrated land.

Conclusion on “as of right”

[218] I conclude that the applicant has failed to establish that the user relied upon was “as of right” because such user was “by right” under a statutory right of public recreation under s. 164 PHA 1875 or s. 10 OSA 1906 to which the land was impliedly appropriated by the resolution of 24th. August 1978.

...on the land...

[219] Although the plans accompanying the original application were ambiguous about the precise boundaries of the application land, Mrs. Bannerman, pursuant to my Directions, supplied a large scale map which adequately showed the boundaries for which she contended. It was not suggested by the objectors at the public inquiry that these boundaries did not accurately depict the boundaries of the park.

[220] Certain areas within the park were generally inaccessible to the public for recreational use;

- the ruins of the church of St. Mary-le-Port
- the ruins of St. Peter’s Church

- the park works depot
- the ruins of the castle keep
- the Vaulted Chamber
- the public toilets.

It was accepted on behalf of the applicant that these areas should be excluded from registration in any event.

...for a period of at least 20 years...

[221] Generally speaking, Castle Park has been used by local inhabitants for lawful sports and pastimes since the park opened in 1978. However, it is necessary to consider whether and to what extent that user has been interrupted during the relevant 20 year period so that the applicant cannot prove user throughout the relevant 20 year period. Once again, it is necessary to consider the various classes of temporary restriction during the relevant 20 year period on use of parts of the park for public recreation.

[222] The first restriction was the use of a substantial part of the park as a temporary car park from 1988-1991. I consider that this was a material interruption in the qualifying use of this part of the park. In my view, this part of the park has not been subject to qualifying use for a period of at least 20 years.

[223] The second restriction was a consequence of the major landscaping works of 1991-1993 which were effected on removal of the temporary car park. Although this work was effected in order to improve the park as a place of recreation, it seems to me that it constituted a material interruption in the qualifying use of the park. In my view, this part of the park has not been subject to qualifying use for a period of at least 20 years.

[224] The third class of restriction involved temporary restrictions on public access while smaller scale improvement works were effected to the park, e.g.

- the construction of the new bandstand beside the arena
- the construction of the children's playground,
- the planting of the "urban forest" at the eastern end of the park.

These restrictions involved only small parts of the park and lasted only for relatively short periods. I regard these interruptions as *de minimis*.

[225] The fourth class of restriction involved the provision of public entertainment in the park, e.g.

- the tethered balloon which was located in the arena area for at least two summers and which involved fencing the public out of an area below the balloon for health and safety reasons. The public had to pay to fly in the balloon.
- A circus in the arena area to which the public had admission only on payment
- A Big Wheel in St. Peter's Square to which the public had admission only on payment and involved fencing off part of St. Peter's Square for health and safety reasons
- Christmas markets in St. Peter's Square. Although the public had free admission to the market, the space occupied by the stalls was not available for recreation
- Various entertainments in marquees in St. Peter's Square, such as the Ladyboys of Bangkok, to which the public had admission on payment

These restrictions were only incidental to the provision of public entertainment in the park and I do not regard them as involving any material interruption to qualifying user.

[226] The fifth class of restriction involved the fencing off of parts of the park while archeological investigations were effected in connection with proposed development of part of the park. The most significant were the investigations in the western part of the park in July/August 2006. Even these investigations lasted only for a short time and involved only parts of the western end of the park. I do not regard them as a material interruption of qualifying user of the park.

[227] The sixth class of restriction involved the licensing of private functions in the park, often in marquees, to which the public had no admission. This involved closures of small areas for very short periods and I regard them as *de minimis*.

[228] Finally, the Council licensed many other miscellaneous events in the park which, while not necessarily involving closure of any part of the park, must have restricted use of part of the park for informal recreation. Again, I regard any interruption of qualifying use as being *de minimis*.

...and they continue to do so at the time of the application.

[229] Insofar as there was qualifying use of the park, I consider that it was continuing at the date of the application.

10. Conclusion and recommendation

[230] I conclude that the application fails because:

- the application land was in 1978 appropriated onto the statutory purposes of s. 164 PHA 1875 or s. 10 OSA 1906
- the public had thereafter a legal right to use the land for lawful sports and pastimes
- hence the inhabitants of Bristol were using the application land during the relevant 20 year period “by right” rather than “as of right”.

[231] I further conclude that the application would fail in any event in relation to the 1988-1991 car park site and the site of the 1991-1993 landscaping works because qualifying user of those sites was materially interrupted by those uses.

[232] Accordingly, I recommend that the application should be rejected.

[233] Under reg. 9(2) of the 2007 Regulations, the commons registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be “the reasons set out in the Inspector’s Report dated 30th. March 2009”.

Vivian Chapman QC
30th. March 2009
9, Stone Buildings,
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London WC2A 3NN