

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAY AND GREENS COMMITTEE

20 FEBRUARY 2012

Report of: Strategic Director of Corporate Services

Title: Application to Register Land at Filwood as a Town and Village Green under the Commons Act 2006, Section 15(2)

Ward: Filwood

Officer Presenting Report: Anne Nugent

Contact Telephone Number: (0117) 922 3424

RECOMMENDATION

Reject the application to register the land at Filwood Park as a Town and Village Green in pursuance of the Commons Act 2006.

Summary

This report concerns an application to register a site in Filwood Ward as a Town and Village Green.

The significant issues in the report are:

As set out in the report.

Policy

- There are no specific policy implications arising from this report

Consultation

1. Internal

This report has been prepared in consultation with the Registration Authority's responsible delegated officer (Strategic Director, Corporate

Services) and the Head of Legal Services.

2. External

Mr Vivian Chapman of Counsel was appointed as an independent inspector to advise the City Council as Registration Authority as to how to deal with the application. Mr Chapman conducted a non statutory inquiry which opened on 27 July 2011 and closed on 29 July 2011. The inspector conducted two unaccompanied site views (one before the inquiry opened and one after the inquiry). The inspector heard considerable evidence and legal argument and was provided with documentation. Both applicant and objector were represented by Counsel.

Context

3. The applicant applied on 12 November 2010 for registration as a Town or Village Green of land at Filwood Park, Bristol.
4. The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land should be registered as a green.
5. The Commons Registration Authority received a joint objection from the Council and the HCA.
6. The inspector conducted a non-statutory inquiry which opened on 27 July 2011. The objectors put the applicant to the proof of all the elements of the statutory test and challenged two specific aspects- that Filwood ward is not a locality for the purposes of section 15 of the Commons Act 2006 and also that the land had not been used "as of right" because the public had a legal right to use the park for recreation.
7. It is for the applicant to define the application land and then to show that the statutory test is satisfied in relation to the whole of it.
8. There were two main issues between the parties, the first core issue was whether or not the users comprised or included a significant number of the inhabitants of a locality (para 21 of the August report). After a detailed analysis of the law and the factual evidence the inspector concluded at para 46 of the August report that the applicant had proved that Filwood Park has been used for lawful sports and pastimes (LSP) by a significant number of the inhabitants of the locality of Filwood Ward for more than 20 years before the TVG application.

9. The second main issue was whether or not the use of the open public park was as of right or not. The inspector was satisfied that if land had been acquired under the Open Spaces Act of 1906 then the public had a right under a statutory trust to use the open space for recreation and that use would not be as of right (para 58/59, August report). The inspector accepted that if the land was held for the purposes of s 164 of the Public Health Act 1875 use would not be as of right (para 60-62, August report). The inspector dealt in some detail with the appropriations argument and how a council might evidence either express or implied appropriation from one statutory purpose to another such as public open space purposes (from para 63, August report) and concluded at para 120, August report, that there was no express appropriation to public open space purposes.
10. The objectors submitted that even if there was no express appropriation there might have been an implied appropriation. The inspector accepted that there could have been an implied appropriation of the land to public park purposes if the full council resolved to authorise expenditure to maintain and improve Filwood park as a public park, that is even without an express appropriation (para 139, August report). The inspector was not satisfied on the available evidence that the objectors could prove an implied appropriation.
11. The inspector gave the objector more time to produce evidence on implied appropriation (para 144, 146, August report). The applicant was given time to make submissions on any additional evidence, which it did on 27 October 2011. Very briefly the applicant considers that they have shown that the land was not appropriated by the Council to open space purposes and that the use was as of right. These are considered in some detail by the inspector at paragraphs 22 – 37 of his November report
12. In his report of 24 August 2011 (the August report) the inspector reached several conclusions on the evidence and the law (para 144, August report). The objectors provided further evidence after which the applicant made further submissions on 27 October 2011.
13. Having considered the further evidence from the objectors and the further submissions from the applicant the inspector provided a further report on 19 November 2011 (the November report). In the November report the inspector recommends that the application to register Filwood Park as a Town or Village Green be rejected.

Proposal

14. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act

2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.

15. The recommendation is that the Committee reject the application for the reasons set out in detail in the inspector's reports of 24 August 2011 and 19 November 2011.

Other Options Considered

16. The other option considered is to register the application land.
17. The applicant submitted detailed written submissions and made oral submissions at the conclusion of the hearing. There were two main issues between the parties, the first core issue was whether or not the users comprised or included a significant number of the inhabitants of a locality (para 21 of the August report). After a detailed analysis of the law and the factual evidence the inspector concluded at para 46 of the August report that the applicant had proved that Filwood Park has been used for lawful sports and pastimes (LSP) by a significant number of the inhabitants of the locality of Filwood Ward for more than 20 years before the TVG application. The remaining issue was whether or not the park had been used as of right or by right. As set out more fully above the inspector was not satisfied that the objector was able to show that the land had been expressly appropriated to public open space but he did accept that there could be an implied appropriation to public open space. The inspector was not satisfied on the available evidence that there was an implied appropriation. Further time was given to the objector to produce evidence to this effect. On 27 October 2011 the applicant made further submissions on the additional evidence. Very briefly the applicant considered that they have shown that the land was not appropriated by the Council to open space purposes and that the use was as of right. These are considered in some detail by the inspector at paragraphs 22 – 37 of his November report.
18. The applicant also repeated its concerns about other documents not being disclosed by the council and indicated to the inspector that they considered that this was either deliberate or negligent (para 126, August report). The issue of further documents was further expressed in the 27 October submissions. The inspector dealt with this in his November report (para 38 –41 and remarked that everything turns on documents which are matters of public record).
19. The Committee is not obliged to follow the recommendation of the inspector however it must have sufficient reason for reaching a conclusion different from that of the inspector.

Risk Assessment

20. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision.
21. These risks are mitigated against by the Council's demonstration of a fair and transparent process in its determination of the application and a decision based on detailed consideration by the Registration Authority of the inspector's report.

Public Sector Equality Duties

22. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:
 - i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.
 - ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --
 - remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;
 - take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);
 - encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
 - iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
 - tackle prejudice; and
 - promote understanding.

Legal and Resource Implications

Legal

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

The criteria to be applied for successful registration are provided by the Commons Act 2006. The applicant must establish that the land in question comes entirely within the definition of a town or village green, to be found in Section 15(2) of the Commons Act. The Registration Authority must consider on the balance of probabilities whether or not the applicants have shown that:

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

In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. The Committee must leave out of account wholly irrelevant considerations such as the potential use of the land in the future or the implications of registration, to the landowner. The inspector has recommended that the application be rejected. The Committee must have sufficient reason for reaching a conclusion different from that of the inspector.

“As of right”

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

“By right”

User “by right” means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used “as if right” for lawful sports and pastimes if user is by right. If land is held on trust for the purpose of recreational use and enjoyment by the general public or a section of the public including the users of the land it has been suggested (although not definitively decided)

that the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. It has also been suggested but not yet decided by the courts that a trust may be implied.

“Appropriation”

A local authority is a creature of statute and must hold land for a purpose. It became apparent over time that a local authority might no longer require the land for the purpose for which it was acquired. Parliament conferred on local authorities a power of appropriation, originally exercisable only with the consent of a minister, whereby land that had been acquired for one statutory purpose, but was no longer required for that purpose, could be appropriated to a new statutory purpose for which the land could have been acquired. The current general statutory power of appropriation is to be found in s. 122 LGA 1972. An express recorded decision may be referred to as an express appropriation.

Implied Appropriation

A local authority may not have expressly recorded its decision to use land for another purpose. Case law suggests that if a local authority has dealt with land in such a manner that it can only lawfully have been dealt with had it made an appropriation then an express appropriation might not be required to show that the land is now held for a different purpose. Each case will be determined on its own facts.

Legal advice provided by Anne Nugent, Senior Solicitor

Financial

(a) Revenue

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

(b) Capital

Registering Land as a Town and Village Green prevents development opportunities and therefore potential loss of a Capital Receipt.

(Financial advice provided by Principal Accountants Tony Whitlock, and Jon Clayton)

Land

Use of the council's property holding needs to be flexible if it is to support initiatives such as major regeneration, housing and employment programmes. Registration as a TVG would have a substantial impact on the ability of land to contribute to these initiatives, both current and future. Registration as a TVG substantially reduces the value of land, including financial value. All alternative use value is wiped out and the land in

effect becomes a liability and therefore financially valueless.

(Land advice provided by Richard Fletcher (Parks) and Jeremy Screen (Corporate Property))

Personnel

Not applicable

Appendices:

Appendix 1 – The Application land map

Appendix 2 – The Inspector's Report dated 24 August 2011

Appendix 3 – The Inspector's supplementary report dated 19 November 2011

LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

Background Papers:

Applicant and objector's evidence bundles and written submissions

Inspector's opinion dated 2 September 2010 (on question of paper consideration of application)

Inspector's opinion dated 23 December 2010 (on question of paper consideration of application)

JD5.428

APPENDIX (6) 1

Filwood Park



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CORPORATE PROPERTY

Plan No : 1
Prop ID Ref : n/a
Polygon Ref : n/a
Scale : 1:2,500
Date : 16th Dec 2009



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In the Matter
of an Application to Register
Filwood Park, Bristol
As a New Town Green

REPORT
of Mr. VIVIAN CHAPMAN Q.C.
24th August 2011

Bristol City Council,
Legal Services,
PO Box 2156, The Council House,
Bristol BS99 7PH
Ref Anne Nugent
67463/VRC/11/79/wp/S4/Filwood Report

In the Matter
of an Application to Register
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As a New Town Green

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1. Filwood Park

[1] Filwood Park is a park of about 11 acres in the southern suburbs of Bristol. It is roughly triangular in shape. It contains large areas of mown grass, some flat and some mounded. The park is crossed by several tarmac paths. The grassy areas are broken up by belts and clumps of trees. There is a partly enclosed area with a serpentine path, a pond and a rockery. This area is rather neglected: the pond appears to be dry and the rockery is overgrown with weeds. There are several worn metal seats and a litter bin. There is a large skateboard park with a tarmac surface and metal ramps and jumps. The general impression is of a municipal park lightly maintained as a fairly low-key informal recreational area.

[2] The park is not completely fenced and is open 24 hours a day. The boundaries of the park are as follows:

- The southern boundary abuts a busy dual carriageway road which forms part of the A4174 Bristol Ring Road. At this point, the ring road is called Hengrove Way. There is a fence along this boundary consisting of low metal posts with a rail about 18” high, obviously meant to keep vehicles out. There is a formal pedestrian entrance at the western end of this boundary but the park can be accessed at any point along this boundary simply by stepping over the low metal fence.
- The western boundary is a metal palisade fence between Filwood Park and some extensive playing fields. There is a purpose-made gap in this fence towards the northern end giving access to and from the playing fields.
- The north-eastern boundary is largely formed by the fences or the backs of buildings along the rear of houses in Creswicke Road. There are one or two gates in these fences. At the north end of this boundary is the main entrance to the park opposite Filwood Broadway. The entrance is through an ungated chicane in a metal palisade fence. At the southern end of this boundary the houses stop and there is a stretch of low metal post and rail fencing, similar to that along Hengrove Way, with a locked metal gate affording vehicular access to the park. Access here is by squeezing beside the gate or stepping over the metal fencing. Near the gate there is a sign saying “Filwood Park Open Space”.

[3] To the north of the park there is a large built-up area, consisting mostly of former local authority housing of varying ages and architectural styles. According to OS and A-Z maps, there are a number of subsidiary areas within this built up area with different names, such as Filwood Park, Inns Court, Lower Knowle and Nover’s Park, but there is nothing on the ground to define any boundaries between these areas.

[4] Filwood Park was created in the mid 1970s out of former school playing fields owned by Bristol City Council (BCC). Ever since then, it has been a park open to the public maintained by BCC. In 2008, it was sold to English Partnerships, now called the Homes and Communities Agency (HCA) for redevelopment. BCC continues to maintain the park as a public park under a management agreement until redevelopment. HCA has an option to sell the park back to BCC if it cannot be developed.

2. The town green application

[5] On 29th October 2009, Ms. Mil Lusk applied¹ to BCC, as commons registration authority (CRA), to register Filwood Park as a new town green under s. 15(2) of the Commons Act 2006 (CA 2006). The application was stamped as received on 12th November 2009.

[6] BCC and HCA served a joint notice of objection² to the application.

[7] I was instructed by BCC (as CRA) to advise whether the application could properly be dealt with on paper consideration. I advised in an Opinion dated 2nd September 2010 and a Further Opinion dated 23rd December 2010. I concluded that the application could not be dealt with on paper consideration and that a non statutory public inquiry should be held.

[8] I gave written directions for the public inquiry on 25th May 2011.

[9] The public inquiry was held in Bristol on 27th, 28th and 29th July 2011. The applicant was represented by Mr. Daniel Bennett of counsel. The objectors were represented by Mr. Leslie Blohm QC. I heard extensive oral evidence and legal submissions. A great deal of evidence was put before me that was not available to me when I wrote my two written Opinions. I am very grateful to Mr. Bennett and Mr. Blohm for their helpful submissions, both written and oral. I must also express my thanks to Ms. Anne Nugent and her predecessor, Ms. Frances Horner, of BCC (as CRA) for organising the public inquiry with great efficiency.

[10] Neither side required an accompanied site view. However, I viewed the park and the surrounding areas unaccompanied both before the public inquiry on the afternoon of Tuesday 26th July and also (at the request of the objectors) after the public inquiry on the morning of Sunday 31st July 2011.

[11] At the public inquiry, the objectors put the applicant to proof of all elements of her case. However, the objectors took two positive points:

- The objectors argued that the users of the park did not constitute a significant number of the inhabitants of any relevant “locality” or “neighbourhood” for the purposes of CA 2006 s. 15.
- The objectors also argued that use of the park for recreation by local people was not “as of right” for the purposes of CA 2006 s. 15 because the public had a legal right to use the park for recreation.

I will have to consider these points of law in detail in this report.

3. New greens: law and procedure

¹ RI (i.e. red bundle page 1)

² B/1/1 (i.e. blue bundle part 1 page 1)

[12] It is convenient at this stage to summarise the law and procedure governing the registration of new greens.

[13] Town and village greens are areas of land over which local people have a legal right of recreation. In origin, they form part of the law of custom, i.e. a local law which applies only in a particular part of the country. The general public cannot acquire by long use the right of access to land for recreational purposes: *A-G v Antrobus*³. Two of the requirements of a custom are that:

- user must be proved since time immemorial (1189 in legal theory), and
- the user must be proved to be by the inhabitants of a particular locality rather than by the general public.

It follows that, under the law of custom, it is not possible to establish a new green by user, however long, if user can be shown to have started after 1189.

[14] The Commons Registration Act 1965 (CRA 1965) provided for the registration of town or village greens. It introduced for the first time the concept of a new green created by long modern use. CRA 1965 s. 22(1) defined a town or village green as meaning:

“land (a) which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or (b) on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or (c) on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.”

I have added the letters (a), (b) and (c) for the purposes of exposition as has been done in many of the decided cases. It will be seen that the s. 22(1) definition had three alternative limbs:

- A class (a) green, a statutory green, of which the typical example is a recreational allotment made under an inclosure act,
- A class (b) green, the existing customary green, and
- A class (c) green, a new class of prescriptive green based on 20 years' user rather than user since time immemorial.

The 20 year period was clearly based on the analogies of (a) the prescriptive acquisition of an easement by 20 years' user under the Prescription Act 1832 or under the doctrine of lost modern grant and (b) the prescriptive creation of a highway by 20 years' user under Highways Act 1980 s. 31(1). CRA 1965 s. 13 authorised the making of regulations providing for the amendment of the register when any land became a town or village green. Regulations were duly made implementing s. 13.

[15] The word “locality” in the CRA 1965 definition of a prescriptive green was narrowly construed by the courts, and created difficulties in cases where claimed greens were in large urban areas. According the definition of a prescriptive green was replaced by a new definition

³ [1905] 2 Ch 188

introduced by s. 98 of the Countryside and Rights of Way Act 2000 (CRoW Act 2000). The 2000 Act definition of a prescriptive green was contained in a new subsection (1A) of CRA 1965 s. 22:

“(1A) Land falls within this subsection if it is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either –

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

No regulations were ever made implementing para. (b). There were three new elements of the definition of a prescriptive green:

- The introduction of the new concept of a “neighbourhood within a locality”
- The replacement of the requirement that user should be “by the inhabitants” of a locality by the requirement that user should be by “ a significant number” of the inhabitants of the relevant locality or neighbourhood, and
- The introduction of a requirement that user should be continuing.

[16] This amended definition of a new prescriptive green was itself replaced by CA 2006 s. 15, which was brought into force on 6th April 2007, and contains the following provisions 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), (3) or (4) 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.*

(3) This subsection applies where –

- (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

(b) *they ceased to do so before the time of the application but after the commencement of this section; and*

(c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b).*

(4) *This subsection applies where –*

(a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*

(b) *they ceased to do so before the commencement of this section; and*

(c) *the application is made within the period of five years beginning with the cessation referred to in paragraph (b).*

[17] The new provision adopts the definition of a new green in s. 22(1) of the CRA 1965 as amended by the CRoW Act 2000 but:

- clarifies the date at which the user must be continuing, i.e. normally, as at the date of the application, and
- introduces a 2 year and 5 year breathing space for the making of applications after user has ceased, depending on whether user ceased before or after the commencement of the CA 2006.

[18] In most of England, including Bristol, 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 2007. 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 CRA 1965. In a small number of pilot authorities⁴, the Commons Registration (England) Regulations 2008 apply.

[19] The prescribed procedure is fairly simple:

- anyone can apply without fee to the relevant CRA in prescribed form 44 to register any land within the CRA area as a new green (reg. 3)

⁴ Blackburn with Darwen Borough Council, Cornwall County Council, Devon County Council, County of Herefordshire District Council, Hertfordshire County Council, Kent County Council & Lancashire County Council

- unless the CRA rejects the application on preliminary consideration on the ground that it is not “duly made”, the CRA proceeds to publicise the application in prescribed form 45 inviting objections (reg. 5)
- anyone can submit a statement in objection to the application,
- the CRA then proceeds to “further consideration” of the application and any objections and decides whether to grant or reject the application (reg. 6).

[20] 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 CRA can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly approved by the courts, whereby, in an appropriate case, the CRA appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. A non statutory public inquiry has no power to summon witnesses, order disclosure of documents or award costs. The CRA is not bound by the inspector’s recommendation.

4. The locality/neighbourhood issue

[21] The evidence and legal arguments at the public inquiry fell into two distinct parts:

- First, there were the evidence and legal arguments relating to the question whether a significant number of the inhabitants of a locality or neighbourhood within a locality had indulged in lawful sports and pastimes (LSP) in Filwood Park for twenty years before the date of the application (12th November 2009). Although the objectors put the applicant to proof of all these matters, there was, in truth, little doubt that Filwood Park had been used for LSP by a significant number of members of the public since the 1970s. It was, after all, an open public park. The core issue was whether the users comprised or included a significant number of the inhabitants of a locality or neighbourhood for the purposes of CA 2006 s. 15.
- Second, there were the evidence and legal arguments relating to the question whether user of the park for LSP was “as of right” or whether such user was “by right” in the sense that the public had a legal right to use the park for LSP under Public Health Act 1875 (PHA 1875) s. 164 or Open Spaces Act 1906 (OSA 1906) s. 10

In the circumstances, I consider that it would be clearer if I were to deal with these two issues separately. I propose to start with the locality/neighbourhood issue.

[22] Question 6 of the form 44 application asked the applicant to identify the locality or neighbourhood within a locality in respect of which the application was made. The applicant

answered “Filwood Ward”⁵ and attached a map of the ward⁶. The form did not require the applicant to state whether Filwood Ward was relied upon as a “locality” or as a “neighbourhood within a locality”. After most of his witnesses had given evidence, Mr. Bennett applied for permission to amend the application to rely in the alternative on the localities or neighbourhoods of Knowle, Knowle West, Lower Knowle, Nover’s Park, Filwood Park and Inns Court. The application was opposed by Mr. Blohm but I said that I would recommend that the CRA should allow the amendment. Mr. Blohm had cross examined the applicant’s witnesses in some detail on these alternative areas and I considered that the amendment would cause no procedural unfairness to the objectors.

[23] The rival submissions on the locality/neighbourhood point, as developed during the course of the public inquiry, can be summarized as follows:

- Mr. Bennett, for the applicant, submitted that Filwood Ward is a “locality” for the purposes of CA 2006 s. 15 since it is an area known to the law with legally defined boundaries and that the park had been used for LSP by a significant number of the inhabitants of the ward for more than 20 years before the date of the TVG application. In the alternative, he argued that Filwood, Knowle, Knowle West, Filwood Park, Lower Knowle, Nover’s Park and Inns Court are all “neighbourhoods” for the purposes of s. 15 and that the park has been used for LSP by a significant number of the inhabitants of one or more of those neighbourhoods for more than 20 years before the date of the TVG application. Mr. Bennett did not spell out the identity of the “locality” within which the “neighbourhoods” were situated but I infer that he relies upon either upon Filwood Ward or (in the case of the larger areas) Bristol as the appropriate “locality” for this purpose.
- Mr. Blohm, for the objectors, argued that Filwood Ward is not a “locality” for the purposes of s. 15 since (a) an electoral ward in itself is not a locality and (b) a “locality” has to be not only an area known to the law with legally defined boundaries but also an area that is sufficiently cohesive as to lay claim to a TVG. He accepted that Filwood Ward was an area known to the law with legally defined boundaries but denied that the applicant had proved that it was sufficiently cohesive as to lay claim to a TVG. As for the “neighbourhoods” relied upon, he argued that they are areas incapable of sufficiently precise definition to constitute “neighbourhoods”. In any event, he put the applicant to proof that use of the park for LSP was by a significant number of the inhabitants of Filwood Ward or of any of these claimed “neighbourhoods”.

Locality/Neighbourhood: the law

[24] One might think that “locality” and “neighbourhood” are fairly ordinary words in the English language and would present little difficulty in application to the facts of any particular

⁵ R4
⁶ R15

case. However, one would be quite wrong. A body of case law has built up concerning the meaning of these words. It is necessary to consider those cases.

[25] I first consider the position before the CRA 1965 under the law of custom. There are innumerable reported cases on the law of custom but I was not referred to any case in which it was suggested that there was a requirement that the locality enjoying the custom had not only to be an area known to the law but also an area sufficiently cohesive as to lay claim to the customary right in question. I have looked at some of the well-known cases on the law of custom in relation to recreational rights and I can find no reference to any such requirement:

- In *Abbot v Weekly*⁷ an action in trespass was defended on the basis of a prescriptive right for all the inhabitants of a vill to dance on the land at all times of year for their recreation. It was held that the claim should have been pleaded as a custom but, in the absence of a demurrer, the defence succeeded. It was unclear whether the vill was an area known to the law. However, it was not suggested that there was any requirement that the vill should be sufficiently cohesive as to lay claim to a custom.
- In *Fitch v Rawling*⁸ an action in trespass was defended by pleas of custom, first, a custom for the inhabitants of the parish of Steeple Bumstead to play all kinds of lawful games, sports and pastimes on the land at all seasonable times of the year, and, second, the same custom for all persons for the time being in the parish. The plaintiff took numerous points on a rule to arrest judgment. The court held that the first custom was good but that the second custom was bad because it was in effect a claim to a custom vested in the general public rather than the inhabitants of the parish. It was not suggested that the first custom was bad for failure to plead or prove that the parish was sufficiently cohesive to lay claim to a custom.
- In *Mounsey v Ismay*⁹ an action in trespass was defended by pleading a custom for the freemen and citizens of the city of Carlisle to enter the plaintiff's close on Ascension Day to hold horse races. The plaintiff demurred to the defendant's pleas. Although the plaintiff took a number of technical points on the pleas, it was not suggested that the defendant should have pleaded more about the locality than that it was the city of Carlisle.
- In *Hall v Nottingham*¹⁰ there was an action in trespass. The defendants pleaded a custom for the parishioners of Ashford Carbonell in the county of Salop to erect a maypole on the ground, and to dance round and about the same and otherwise enjoy any lawful and innocent recreation at any times in the year. The claimed custom was held to be good. It

⁷ (1665) 1 Lev 177

⁸ (1795) 2 H Bl 393

⁹ (1863) 1 H & C 729, (1865) 3 H & C 486

¹⁰ [1875] 1 Ex D 1

was not suggested that the defendants had to plead that the parish was sufficiently cohesive as to lay claim to the custom.

- In *Hammerton v Honey*¹¹ the plaintiffs, as inhabitants of Stockwell, in the parish of Lambeth, sought a declaration that the plaintiffs and other inhabitants of the vill of Stockwell had a customary right to use Stockwell Green as a place of recreation. The claim failed on the facts but Jessel MR summarized the principles of the law of custom. It was unclear whether the vill of Stockwell was an area known to the law although it appears that there was a manor of Stockwell. However, it does not seem to have been suggested that it was necessary for the plaintiffs to plead or prove that Stockwell was sufficiently cohesive as to lay claim to the customary right of recreation on Stockwell Green.
- In *Lancashire v Hunt*¹² the lord of the manor of Stockbridge brought two actions in trespass in respect of Stockbridge Common Down. The second action was defended on the basis of a custom for the inhabitants of the borough of Stockbridge to play cricket and other games on the down and generally to use the down as a recreation ground. The custom was held to be good. There was no suggestion that the defendants had to plead or prove that Stockbridge was not only a borough but also that it had sufficient cohesive qualities as to lay claim to the custom.
- In *Edwards v Jenkins*¹³ the defendants to an action for trespass on land in the parish of Beddington pleaded a custom for the inhabitants of the parishes of Beddington, Carshalton and Mitcham to use the land for recreation. Kekewich J. held that the custom was bad. A custom must be vested in the inhabitants of a single “district”, meaning a division of the county known to the law, such as a parish, in which the land is situated. A custom could not be vested in the inhabitants of more than one parish. Although the decision was very restrictive, Kekewich J. did not suggest that there was some further test that needed to be applied, i.e. whether the district in which the land was situated was sufficiently cohesive as to lay claim to the custom.

It might be said that it could well be that the issue whether the relevant locality was sufficiently cohesive did not arise on the facts in any of these cases, but I think that would be to look back at these old cases through modern legal eyes. Most of these cases date from the era when pleadings were of supreme importance and failure to plead a relevant fact required to make out a case was generally fatal.

[26] I now turn to the cases on the unamended definition of TVG in s. 22(1) of the CRA 1965:

¹¹ (1876) 24 WR 603

¹² (1894) 10 TLR 310, (1894) 11 TLR 49

¹³ [1896] 1 Ch 308

- In *New Windsor Corporation v Mellor*¹⁴ the corporation appealed against a decision by a commons commissioner confirming the registration of Bachelor's Acre as a new TVG. The commons commissioner found that there was a customary right of recreation on Bachelor's Acre vested in the inhabitants of the borough of New Windsor. Counsel for the appellant borough did not argue that that the borough had to have sufficient cohesive qualities as to lay claim to a TVG. He argued that the claimed customary right must be "exercisable by a recognizable and identifiable class of persons" (page 382F). Lord Denning MR doubted *Edwards v Jenkins*. "So long as the locality is certain, that is enough." Browne LJ agreed. Brightman J reserved his opinion on *Edwards v Jenkins* but said that he found it difficult to understand why a customary right could not exist over land in one locality for the benefit of the inhabitants of that and one or more other localities. There was no suggestion that there was any further test to apply in establishing a locality other than that it should be certain.
- In *Ministry of Defence v Wiltshire County Council*¹⁵ the ministry applied to the court under CRA 1965 s. 14(b) to rectify the register of TVGs by deleting the entry of a new prescriptive TVG that had been made by the CRA under s. 13 on the basis that user was by the inhabitants of one or two streets adjoining the application land. Harman J allowed the application on a number of grounds. He accepted the argument of the ministry that it was impossible for a TVG to be created by the exercise of rights save on behalf of some recognisable unit of the country known to the law, such as a parish (civil or ecclesiastical) or manor. It was not suggested that there was any further test for a locality than that it should be an area known to the law.
- In *R v Suffolk County Council ex parte Steed*¹⁶ the applicants applied for judicial review of a decision by the CRA to reject an application to register Harp's Close Meadow, Sudbury as a new prescriptive TVG. The application was made on the basis that the "locality" was the borough of Sudbury but the evidence was that the users of the application land came not from the whole town of Sudbury but from the immediate area surrounding the application land. At first instance, Carnwath J considered the meaning of "locality" in the unamended CRA 1965 in some detail. Carnwath J said that a TVG was generally understood to be an adjunct of a town or village as contrasted with a public recreation ground maintained under the OSA 1906, school playing fields or squares and gardens for use by inhabitants of a London square or private development. In a passage strongly relied upon by Mr. Blohm, Carnwath J said: "*The statutory word "locality" should be read with this in mind. Whatever its precise limits, it should connote something more than a place or geographical area – rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right.*" He then said

¹⁴ [1975] 1 Ch 380

¹⁵ [1995] 4 All ER 931

¹⁶ (1995) 70 P&CR 487, (1996) 75 P&CR 102

that Sudbury was the only available “locality” (page 501). He considered that one or two streets could not amount to a “locality”. He then said that the word “locality” in the 1965 Act seemed intended to bear the same connotation as the word “district” in *Edwards v Jenkins*, i.e. some division of the county defined and known to the law (page 502). I do not read the quoted words of Carnwath J as intended to lay down some legal test. Rather, I read those words as part of the preparatory reasoning which leads him to the conclusion that a “locality” could not be one or two streets but must be some area known to the law, such as the borough of Sudbury. His final conclusion is that “locality” means the same thing as “district” in *Edwards v Jenkins*. The case went to the Court of Appeal where Pill LJ quoted the above words of Carnwath J in connection with a submission by counsel for the appellants that what constitutes a “locality” was a question of fact in every case subject only to the requirement that the extent of the locality is ascertainable (page 110). However, Pill LJ said that the application had to be treated as an application of a new green for the town of Sudbury (page 111). Pill LJ said that he agreed with the judge’s comments on “locality” (page 112). He dismissed the appeal on the basis that the applicant had failed to prove that the users believed that they were exercising a right vested in the inhabitants of Sudbury (page 111). The other members of the court agreed with Pill LJ. The requirement for such a subjective belief was subsequently overruled by the House of Lords in *R v Oxfordshire County Council ex parte Sunningwell Parish Council*¹⁷. I do not read the judgment of Pill LJ as laying down any further requirement for a “locality” than that it should be some area known to the law. He agreed with the comments of Carnwath J. on the meaning of “locality” and Carnwath J.’s ultimate conclusion was that the word “locality” in the 1965 Act seemed intended to bear the same connotation as the word “district” in *Edwards v Jenkins*, i.e. some division of the county defined and known to the law (page 502).

- In *R (Laing Homes Ltd) v Buckinghamshire County Council*¹⁸ the landowner sought judicial review of a decision to register his land as a new TVG. One of the grounds of challenge was that the application form appeared to identify the relevant “locality” as two parish wards. At the public inquiry, the applicants relied in the alternative upon an ecclesiastical parish. The parties were agreed that a “locality” had to be an area recognized by the law. The judge held that an ecclesiastical parish was a “locality” as an entity known to the law with defined boundaries (para 151). In para. 138, the judge commented that if the applicant had relied only upon the two parish wards the landowner would have had a good prospect of persuading the inspector that there was no qualifying locality, either because electoral wards are not localities or, if they are, because the wards constituted two localities and the inhabitants of one could not be inhabitants of the other. This is clearly a remark favouring Mr. Blohm’s argument that an electoral ward cannot be a locality although it is fair to say that the remark was *obiter* and unreasoned.

¹⁷ [2000] 1 AC 335

¹⁸ [2004] 1 P&CR 36

[27] Finally, I turn to the cases decided on the law applicable after the amendment of the CRA 1965 by CRow Act 2000:

- In *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council*¹⁹ the landowner sought judicial review of a decision of the CRA to register a new prescriptive TVG after a public inquiry. The inspector recommended registration on the alternative bases that user had been by a significant number of the inhabitants of the “locality” of Leek (which was an administrative area known to the law) or of the “neighbourhood” of the Ladydale Estate (a local housing estate). It was not argued that Leek was not a “locality” or that the Ladydale Estate was not a neighbourhood.
- In *R (Cheltenham Builders Ltd.) v South Gloucestershire District Council*²⁰ the claimant landowner applied for judicial review of the decision by the defendant CRA to register land as a new prescriptive TVG. The registration was made on the basis of a “locality” that was just a line on a map which did not represent an area known to the law and did not, for the most part, correspond with any feature on the ground. The claimant argued that the claimed “locality” was neither a “locality” nor “neighbourhood” in law. The judge (Sullivan J) considered the words of Carnwath J quoted above which, he said, captured the essential characteristics of a locality”. He said that a “locality” could not be an arbitrary line on a map. At the very least “*there has to be...a sufficiently cohesive entity that is capable of definition*” (paras. 41-48). Mr. Blohm relied strongly on this passage from the judgment of Sullivan J. However, Sullivan J reverted to the topic of “locality” at paras 72—84 where he accepted the claimant’s submission that a “locality” was some legally recognized administrative division of the county. As with the words of Carnwath J in *Steed* I do not read Sullivan J as laying down a two-fold test for “locality” i.e. that it must be both (a) an area known to the law and (b) “a sufficiently cohesive entity” or “a distinct and identifiable community such as might reasonably lay claim to a TVG as of right”. I think that his remarks about cohesiveness and community were simply part of his reasoning in dismissing the proposition that a “locality” could be any line on a map. Sullivan J also briefly considered the meaning of “neighbourhood” at para 85. He said that a neighbourhood also could not be any line on a map. There was no requirement that it should be a recognized administrative are but it must have a sufficient degree of cohesiveness. A housing estate could be a “neighbourhood”.
- In *Oxfordshire County Council v Oxford City Council*²¹ the county council sought directions from the court on various issues arising out of an application to register the Trap Grounds as a new TVG. Lord Hoffmann, at paras 26-27, discussed the amendment of CRA 1965 by the CRow Act 2000 to introduce the concept of a “neighbourhood

¹⁹ [2002] 2 PLR 1

²⁰ [2004] 1 EGLR 85

²¹ [2006] 2 AC 674

within a locality”. He referred to the debates in the House of Lords on the bill which became the CRoW Act 2000 in which Baroness Miller described the need for “*the users to be predominantly from the local community, defined by reference to a recognized ecclesiastical or local government area*” as a “*loophole*” which “*allowed greens to be destroyed*”. The government was sympathetic and introduced what became s. 98 of the CRoW Act 2000. He remarked that “*Any neighbourhood within a locality is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*”. I do not read Lord Hoffmann’s comments as doing more than drawing a contrast between a “locality” which must be some legally defined area and a “neighbourhood” which need not.

- In *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council*²² the NHS Trusts sought judicial review of a decision of the CRA to register Warneford Meadow as a new TVG. The Meadow had been registered on the basis of user by a significant number of the inhabitants of the Hill Top Road neighbourhood and so the meaning of “locality” was not in issue. However, at para. 69, the judge remarked that “*it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward.*” This passage tends to support the applicant’s case in that the judge thought that a local government ward could be a locality, although the point was not argued. At para. 79, the judge rejected an argument that a “neighbourhood within a locality” simply meant “local people”. He said that a neighbourhood must have a degree of (pre-existing) cohesiveness and must be capable of meaningful description in some way.
- In *Leeds Group plc v Leeds City Council*²³ the claimant landowner challenged a decision of the CRA to register Yeadon Banks as a new TVG. The challenge was both by way of judicial review and under CRA 1965 s. 14(b). There had been a public inquiry after which the inspector had recommended registration of Yeadon Banks as a new TVG on the basis of user by a significant number of the inhabitants of the neighbourhood of The Haws/Banksfield within the locality of Yeadon. Legal arguments ranged far and wide. One argument was that The Haws and Banksfield were not neighbourhoods whether considered individually or collectively. The judge rejected the proposition that they constituted a collective neighbourhood (paras. 106-7). However, he found that they were separate neighbourhoods. He declined to define neighbourhood (para. 103) but found sufficient cohesiveness in the street names, street layout and architectural styles (para. 104). Another argument was that Yeadon was not a locality since it was not a recognisable administrative authority. The claimant considered the alternative locality of the electoral ward of Aireborough and submitted that an electoral ward cannot be a locality. The judge held that Yeadon was a locality for the purposes of the expression

²² [2010] EWHC 530 (Admin)

²³ [2010] EWHC 810 Ch., [2010] EWCA Civ 1438

“neighbourhood within a locality” since it had been an administrative area before 1937. If he was wrong on that, he considered that the ecclesiastical parish of St. Andrews was an appropriate locality. He said that he preferred the submissions of the defendant on the locality point, one of which was that a locality in the expression “neighbourhood within a locality” could be an electoral ward. The decision was upheld by the Court of Appeal subject to a retrospectivity point on which further argument is to be heard. The appellant accepted that The Haws and Banksfield were neighbourhoods. It was not necessary to consider the meaning of “locality” on the appeal since it was accepted by the appellant that the neighbourhoods of The Haws and Banksfield lay within the locality of the ecclesiastical parish of St. Andrews. It seems to me that one can draw these points from the *Leeds* case. First, a neighbourhood must have some degree of cohesiveness but it need not be very strong. Second, a local authority ward was thought by the judge to be a locality, at least in the context of the expression “neighbourhood within a locality”. It seems to me that it would be very odd if the word “locality” meant different things in the same section.

- Finally, there is the case of *Paddico (267) Ltd. v Kirklees Metropolitan Council*²⁴. This was an application under CRA 1965 s. 14(b) to rectify the register of TVGs by removing a registration made in 1997. Accordingly, the relevant law under which the original registration was made was the unamended CRA 1965 but the judge (Vos J.) considered whether the land was registrable under the amended law in deciding whether it was just to amend the register. The land had been registered on the basis of user by the inhabitants of the locality of Edgerton/Birkby. The claimant argued that Edgerton/Birkby was not a locality in law because it was not a legally recognized administrative district. The defendants argued that, even if (which they denied) the 1997 registration was incorrect, the land would now be registrable on the basis of user by a significant number of the inhabitants of any locality or neighbourhood within a locality so that it would not be just to rectify the register. The judge carried out an exhaustive analysis of the authorities. He concluded that the effect of the authorities (so far as now relevant) was as follows. A “locality” is to be understood in the legislation, before and after amendment, as meaning an administrative district or an area within legally significant boundaries. The term “neighbourhood” is to be understood as being a cohesive area and must be capable of meaningful description in some way. It followed that Edgerton/Birkby was not a locality and the 1997 registration had been incorrect. The judge considered that there was, on the facts, no chance that a subsequent application for registration would have been successful because of opposition by the landowner. Therefore it was just to rectify the register.

[28] It appears to me that the net effect of all these authorities is that the current law is that a “locality” must be an area with legally significant boundaries. In substance, the view expressed in *Edwards v Jenkins* has been carried forward into the legislation dealing with the registration of

²⁴ [2011] EWHC 1606 (Ch)

TVGs. It does not appear to me that the authorities justify the imposition of a further test that a “locality” must have sufficiently cohesive elements or amount to a community such as could claim a green. The comments of Carnwath J in *Steed* and of Sullivan J in *Cheltenham Builders* relied upon by Mr. Blohm have to be read in the context of the whole of the judgments in those cases in which both judges conclude that a locality is an area with legally significant boundaries. The ordinary English meaning of “locality” has already been greatly narrowed by judicial construction. I see no reason why it should be narrowed yet further.

[29] The judges have expressed differing views as to whether a local authority electoral ward can be a “locality”. All these views have been *obiter*. I was not referred to the legislation governing the fixing of the boundaries of local authority wards and my own tentative researches show that it is a complicated topic in which a number of matters are taken into consideration including “local ties”. It would be wrong to assume that an electoral ward is simply some arbitrary line drawn on a map for electoral purposes. However, it seems to me that an electoral ward is clearly an area known to the law with legally defined boundaries. I therefore conclude that Filwood Ward is a “locality” for the purposes of CA 2006 s. 15.

[30] As for “neighbourhood, I consider that the applicable test under the current law is that a neighbourhood must be an area with pre-existing cohesive qualities and capable of meaningful description in some way. This is a pretty vague test but I must do my best with it. I think that I can legitimately take account of what I understand to be the ordinary common-sense meaning of a neighbourhood. As to the various “neighbourhoods” relied upon by the applicant, it seems to me that it is a matter of fact in each case whether each area constitutes a neighbourhood.

Neighbourhood/locality: the evidence

[31] I therefore now turn to the evidence concerning recreational use of Filwood Park by local people. I propose first to consider the oral evidence on the topic and then the written evidence. All this was evidence adduced by the applicant and the objectors did not put in any evidence on this issue, contenting themselves with cross examination. For convenience, I will deal with the witnesses in alphabetical order rather than in the order in which they gave evidence. What follows is not a transcript of the witnesses’ evidence but a brief summary of salient points.

Mrs. Jo Andrews

[32] Mrs. Andrews produced a Land User Statement dated 11th July 2011²⁵ and gave oral evidence to the public inquiry. She has lived in Erin Walk, which is in Filwood Ward about a quarter of a mile north-west of the park since 1974. Mrs. Andrews said that she had used the park for the last 20 years for walking to work (which is not a LSP) and taking her grandchildren to play football etc. She had not selected one of the alternative options in the Land User Statement and so it was not clear how often she visited the park. She had seen many other people using the

²⁵ R128

park for recreation. Asked about local place names, she said that Knowle West covered all Filwood. Knowle West and Filwood were the same to her. Although her user evidence was rather vague, she was not cross examined and I accept that she has used the park for recreation and seen other people do the same for 20 years. I also accept that her evidence about place names represented her genuine perception.

Mr. David Butt

[33] Mr. Butt produced a Land User Statement dated 14th June 2011²⁶ and a letter dated 10th July 2011²⁷. He gave oral evidence to the public inquiry. He has lived in Redcatch Road since 1955. Redcatch Road appears to be mostly outside the boundary of Filwood Ward but Mr. Butt said that he had always voted in Filwood Ward and so he must live in the part of the road which is within the ward. In his Land User Statement, he said that he had used Filwood Park once, twice or three times a week for the last 56 years. However, it appeared that his principal interest was in football. When the site of the present Filwood Park was playing fields, he had used those fields regularly. Since the construction of the park, he had used the adjacent playing fields and was the voluntary manager of those playing fields until two years ago. He calls the playing fields “Filwood Park Playing Fields”. I was not satisfied that Mr. Butt’s evidence clearly distinguished between the present Filwood Park as opposed to the adjacent playing fields. In his letter, Mr. Butt gave his address as “Knowle”. He said that he lived in Knowle and always called himself a “Knowle Wester”. Mr. Butt was an honest witness but I found that he did not clearly distinguish between the application land and the adjacent playing fields, both of which he called Filwood Park.

Miss Karen Cox

[34] Miss Cox produced a written statement dated 16th July 2011²⁸ and gave oral evidence to the public inquiry. Miss Cox was born in 1959 and has lived all her life in Creswicke Road, backing onto Filwood Park. Her grandparents were the first tenants of the house and she produced a group photograph taken in what is now the park at the time of the Queen’s Coronation²⁹. The group included her grandmother and two of her daughters. Miss Cox now lives in the house with her mother. She has used the park for informal recreation such as walking, picnicking and watching nature all her life and still does. She walks in the park nearly every day. Her brother and sister have done the same. She takes her niece and nephew to the park to play. She recalled a time when the park had gates which were locked at night but that was back in the 1970s. Creswicke Road is within Filwood Ward. Questioned about the map of Filwood Ward at R15 and the fact that she had given her address as “Knowle” in her statement, she explained that she could describe herself as living in Knowle, Knowle West, Filwood or

²⁶ R159a

²⁷ R129a

²⁸ R130

²⁹ R130aa. This was before Filwood Park was laid out as a park in the 1970s

Filwood Park. Knowle was the largest area, extending east of Filwood Ward and to Donegal Road towards the NW boundary of Filwood Ward. Knowle West was part of Knowle. Filwood Park was an area within the ward. She would not call Nover's Park "Filwood". I found Miss Cox to be a truthful and genuine witness. I accept her evidence about use of the park. I regard her evidence about the areas covered by local place names to be her honest perception on the topic.

Mrs. Clare Irwin

[35] Mrs. Irwin produced an evidence questionnaire³⁰, an undated statement³¹ and a Land User Statement dated 5th July 2011³². She gave oral evidence to the public inquiry. Mrs. Irwin has lived in Toynbee Road (in Filwood Ward about a quarter of a mile north of the park) since February 2009. She has used the park about three times a month to play with her young children. When using the park, she sees other people using it for recreation. Asked about place names, she said that she regarded herself as living in Filwood with a postal address of Knowle. The only area of which she knew the boundaries was Filwood because that was Filwood Ward. She could not say what were the boundaries of Knowle West. Some people are embarrassed to say that they live in Knowle West because it is a deprived area. Knowle is more extensive than Filwood ward: it includes most of the postal area BS4. She thought that people would say that they lived in Inns Court. She did not know whether Nover's Park was a distinct area of housing. She had never heard anyone say that they lived in Lower Knowle. Most people just say "I live in Knowle". I accept Mrs. Irwin's evidence about user of the park and I accept that her evidence about place names represents her genuine perception.

Mr. Philip Lawrence

[36] Mr. Lawrence produced a written statement dated 16th July 2011³³ and gave oral evidence to the public inquiry. He has lived in Kenmare Road (within Filwood Ward about 10 minutes walk north of the park) for about 6 months. He previously lived in Upper Knowle. He does not know of anyone from Upper Knowle who used Filwood Park. He has recently discovered the park. He uses the park for recreation as do many other local residents. He gave some evidence about the history of the park, but it was not clear on what this evidence was based and some of it was clearly wrong. i.e. that the park was left to the people of Knowle by Lady Smyth. He considered that he lived in Knowle West which he regarded as all the land within Filwood Ward other than Lower Knowle. Filwood lies in the southern part of Knowle West and he thought that Filwood Park was used by the residents of Filwood. I accept Mr. Lawrence's evidence about user of Filwood Park and I accept that his evidence on local place names represented his genuine perception on the subject.

Ms. Mil Lusk

³⁰ R48a (my copy ends at page 4)

³¹ R48e

³² R131

³³ R131a

[37] Ms. Lusk is the applicant. She produced (a) an undated statement³⁴, (b) an evidence questionnaire dated 2nd October 2009³⁵ and (c) a letter dated 16th July 2011³⁶. She gave oral evidence to the public inquiry. Ms. Lusk has lived in Throgmorton Avenue since 1977. Since 1997, she and her family have often used the park for recreation such as children's play and dog walking. During that period, she has seen many other people using the park for a large variety of recreation. The park has never been fenced or locked and there have never been any notices restricting entry. Asked about place names, she said that she considered her neighbourhood to be Filwood and that it was the same as Filwood Ward. The area names on the ward map at R15 do not correspond with how the community describes the areas. There is an area called Inns Court and people in Inns Court believe that they live in Filwood. Nover's Park describes an area of which only part is in Filwood Ward. I accept Ms. Lusk's evidence about use of the park and that her evidence about place names was her honest perception.

Mr. Graham Pring

[38] Mr. Pring produced a letter dated 5th July 2011 and gave oral evidence to the public inquiry. He has lived all his life in Filwood Ward, first living in Hartcliffe Road, then Ilminster Road and moving to Creswicke Road in the mid 1980s. His present house backs onto the park. Until the 1970s the land was part of school playing fields but he played there as a child in the 1960s. His children, who were born in the mid 1980s, played in the park. The house had a gate directly onto the park in those days although it was blocked up about 4 years ago. For the last 15 years he and his wife have walked their dogs in the park. Mr. Pring gave his address as "Knowle West" in his letter. Questioned about local place names, he said that people see "Knowle West" in different ways. He regarded himself as born and brought up in Knowle West. Filwood was part of Knowle West. Inns Court is the other end of the playing fields. I accept Mr. Pring's evidence about use of the park and accept that his evidence about place names represents his honest perception.

Mrs. Nicola Pring

[39] Mrs. Pring produced a letter dated 5th July 2011³⁷ and gave oral evidence to the public inquiry. Mrs. Pring is the wife of the witness, Mr. Graham Pring, and has lived in Creswicke Road (in Filwood Ward backing onto the park) for 26 years. Her children are now aged 21 and 24. They played in the park as children. The family used the park for recreation. They still use it to walk the dog. Football has been played in the park at the back of her house for so long as she has lived there. Asked about place names, she said that Filwood was the heart of Knowle West. She regarded herself as living in Knowle West. Knowle West included Inns Court, Nover's Park

³⁴ R10

³⁵ R11 (I only have the odd numbered pages)

³⁶ R226aa

³⁷ R134

and Filwood Broadway. I accept Mrs. Pring's evidence about user of the park and I accept that her evidence about place names represented her genuine perception.

Mrs. Anne White

[40] Mrs. White produced letters dated 7th December 2010³⁸ and 10th July 2011³⁹ and gave oral evidence to the public inquiry. Most of her evidence concerned the "as of right" issue and I will consider it in more detail below. Mrs. White lives in Clifton (on the other side of Bristol) and does not claim to have used Filwood Park for recreation herself. However, she was a BCC councillor from 1998 to 2007 and has a special interest in parks. She was questioned about local place names. She said that Knowle was the name of a ward adjacent to Filwood Ward. People who live in the BS4 postal area put "Knowle" in their address. The name "Knowle West" grew up to distinguish an area of deprivation from Knowle. It is an area with problems. It has never been geographically defined. No one could define the boundaries. Knowle means Knowle Ward. Also people who live in Filwood Ward say they live in Knowle. The names are interchangeable. "Knowle West" has been used as an expression of despair. The only official reference to "Knowle West" of which she was aware was in relation to the Knowle West Regeneration Project mentioned in an undated Project Initiation Document⁴⁰ and an extract from an unidentified document⁴¹. This was a project for urban regeneration of an area perceived as very deprived. The boundary of the project was shown on a plan⁴². The regeneration boundary includes Filwood Ward and also parts of adjoining Knowle and Windmill Hill wards. I accept that Mrs. White was doing her best to describe her perception of the areas named.

Written witness evidence

[41] In addition to the witnesses who gave oral evidence the applicant submitted a very large body of written witness evidence as to user of the park. I approach such evidence with some caution for a number of reasons. First, I have not seen the witnesses. Second, the objectors have had no opportunity to test the evidence by cross examination. Third, much of the evidence is very vague and imprecise. Fourth, the evidence in standard form evidence questionnaires and Land User Statements is partly in answer to blatantly leading questions. Fifth, many of the standard evidence forms are carelessly and incompletely filled in. However, since Filwood Park is and was a public park, the evidence that local people used the park for recreation and saw other people doing the same is inherently credible. I also bear in mind that the objectors do not positively challenge the user evidence and that the evidence is consistent with and supportive of the evidence of the witnesses who did give oral evidence. In these circumstances, I consider that I can give real weight to this evidence. I summarise the written evidence in the schedule below. I have, for the sake of completeness, included the written evidence of witnesses who also gave

³⁸ R/6/16
³⁹ R136
⁴⁰ R137hh
⁴¹ R137qq
⁴² R137rr

oral evidence. I supplied the parties with a copy of the draft schedule at the beginning of the public inquiry and asked the applicant to complete column 3 and correct any spelling errors (the handwriting of some witnesses was hard to read). I supplied a copy of the completed and corrected schedule to the objectors, who have not notified any errors to me. I have myself corrected some obvious errors in the completed schedule. I apologise to anyone whose name or address is still misspelt.

1. Name	2. Address	3. Within Filwood Ward? Y/N	4. Evidence	5. Claimed user period	6. Ref
Sonja Amesbury	12, Spring Gardens	N	Land User Statement	Past 15 years	R138
Mr. D Andrews	5, Erin Walk	Y	Letter	From 2002	R139
Jo Andrews	5, Erin Walk	Y	Land User Statement	Past 20 years	R128
Shirley Andrews	12, Spring Gardens	N	Land User Statement	Past 36 years	R140
Jade Bailey	7, Leinster Avenue	Y	Land User Statement	Past 24 years	R147
Joan Baker	65, Creswicke Road	Y	EQ	From 1960	R142
Roxanne Bartlett	Flat 1, Priory Court, Priory Road, BS4	N	EQ	From 2007	R113a
Bat Conservation Trust	London	N	Letter	No claimed use	R130o
Mrs. Betty Bedford	61, Bideford Crescent, BS4	Y	EQ	Since 1944	R23
Sharon Beldhall	16, Wallingford Road	Y	Land User Statement	Past 35 years	R148
Lesley Belgium	Camberley Road, BS4	Y	Land User Statement	Past 46 years	R129
Steve M Belgium	52, Camberley Road	Y	Land User Statement	Past 30 years	R149
Christopher Barton Bennett	65, Bideford Crescent, BS4	Y	EQ	From 1999	R18
Shane Boulton	69B, Creswicke Road, BS4	Y	EQ	From 1999	R150
Richard Bowey	57, Creswicke Road	Y	Land User Statement	Past 18 years	R156
Andrew Brain	94, Ilminster Avenue, BS4	Y	Letter	For about 20 years	R149a

Colin Bream	41, Nover's Road	Y	Land User Statement	?	R157
Tracey Britt	28, Bideford Crescent	Y	Land User Statement	Past 10 years	R158
Donna Brown	33, Hartcliffe Road, BS4	Y	EQ	From 2003	R28
Julie Burnell	114, Creswicke Road	Y	Letter	Last 60 years	R158a
Richard Burston	9, Willington Road	Y	Land User Statement	Since 1999	R159
David Butt	25, Redcatch Road, BS4	Y	1. Letter 2. Land User Statement	Past 56 years	1. R129a 2. R159a
Patricia Butt	25, Redcatch Road, BS4	Y	Land User Statement	Past 50 years	R159b
Arthur Caddick	22, Creswicke Road	Y	Letter	?	R160
Shane Chappell	24, Caron Walk	?	Land User Statement	Past 8 years	R176
J Charles	84, Padstow Road	Y	Land User Statement	Past 40 years	R180
Ruth Chikhosi	75, Creswicke Road	Y	Land User Statement	Past 5 years	R175
Joan Churchley	24, Hartcliffe Road	Y	Land User Statement	Past 15 years	R177
Ms. V Cleverley	4, Throgmorton Road, BS4	Y	Letter	50 years or more	R161
J Clifford	Glyn Vale	Y	Land User Statement	Past 6 years	R181
Maureen Cole	198, Creswicke Road, BS4	Y	EQ	Since 1972	R163
Mrs. P Cole	102, Willinton Road, BS4	Y	Letter	?	R177a
Mrs. Eunice Cox	43, Creswicke Road, BS4	Y	1. EQ 2. Letter	Since 1939	1. R169 2. R182
Miss Karen Cox	43, Creswicke Road, BS4	Y	Letter	?	R130
Fiona Crawford	5, Hartcliffe Walk	Y	Land User Statement	Past 3 years	R178
Mrs. R Criddle	9, Camberly Road	Y	Land User Statement	Past 60 years	R184
Mrs. BG Critchley	20, Creswicke Road	Y	Letter	?	R174
Kirsty Curtis	77, Creswicke	Y	Land User	Past 2 years	R179

			Statement		
Josie Dingle	Creswicke Road	Y	Land User Statement	Past 8 years	R186
Stephen Dorrington	Berners Close Inns Court	Y	Land User Statement	Past 20 years	R187
Claire Dougherty	21, Dunster Road	N	Land User Statement	Past 5 years	R189
Lauren Doughty	Throgmorton Road	Y	Land User Statement	Past 15 years	R188
Rita Dowling	Butterworth Court, BS4	Y	Land User Statement	Past 12 years	R191
Katy Dowse	3a Exford Mews Hengrove	N	Land User Statement	Since Feb. 2011	R190
Mrs. B Dyer	128, Salcombe Road, BS4	N	Letter	?	R191
Jamie Errington	14 Alard Road, BS4	Y	Land User Statement	Past 5 years	R192
Penny Evans (Knowle West Media Centre)	Leinster Avenue BS4 (address of Media Centre)	Y	Letter	?	R193
Kayleigh Fletcher	66, Barnstable Road	Y	Land User Statement	Past 14 years	R194
Katie Gardiner	43, Gerrard Close	Y	Letter	? (aged 13)	R197
Maurice L Garrett	85, Creswicke Road, BS4	Y	1. EQ 2. letter	From 1950	1. R33 2. R198
P & J Gevyther	63, Bideford Crescent BS4	Y	Letter	?	R210a
Salari Giuseppe	21, Home Mead, BS4	Y	Letter	?	R202
L Grandfield	103, Creswicke Road, BS4	Y	Letter	?	R201
C Griffin	26, Kerry Road	Y	Land User Statement	Past year (2011 LUS)	R210
S Griffin	65, Connaught Road	Y	Land User Statement	5 years	R209
Gail Griffiths	105, Creswicke Road	Y	EQ	Since 1971	R203
M Hamnett	11, Butterworth Court, BS4	Y	Letter	?	R210b
Charlotte Hampson	26, Torrington Avenue BS4	Y	Land User Statement	Past 3 years	R211
Lucy Harris	28, Hartcliffe Road, BS4	Y	EQ	Since 1991	R38
M Harris	68, Hartcliffe Road	Y	Land User Statement	Past 40 years	R216
Mr. M Hartrey	67, Creswicke Road,	Y	EQ	Since 1945	R43

	BS4				
Mrs. C Harvey	68, Hartcliffe Road	Y	Land User Statement	Past 26 years	R212
Mrs. B Henning	5, Colchester Crescent	Y	Land User Statement	Past 11 years	R213
Mrs. J Hicks	18, Hartcliffe Road	Y	Letter	Last 12 years	R213a
J Hill	68, Kenmore Road	Y	Land User Statement	Past 15 years	R217
Richard Hill	11, Hurst Walk	Y	Land User Statement	Past 10 years	R214
Jason Hodge	5, Kildare Road	Y	Land User Statement	Past 8 years	R215
L Hodge-Dean	5, Kildare Road	Y	Land User Statement	Past 8 years	R185
R Hodges	23, Creswicke Road	Y	Letter	?	R214a
Robert Hopkins	18, Wardour Road	Y	Land User Statement	Past 20 years	R219
Clare Irwin	17, Toynbee Road, BS4	Y	1. EQ 2. Land User Statement	From February 2009	1. R48a 2. R131
Mrs. B James	100, Willinton Road, BS4	Y	Letter	?	R218
Mrs. T Johns	70, Novers Park Road BS4	Y	Letter	Since 1973	R221
Trudy Jones	60, Newquay Road	Y	Land User Statement	Past 13 years	R223
Alison Kane	46, Bantry Road	Y	Land User Statement	35 years	R223a
Maeve Kelly	2, Filwood Broadway, BS4	Y	EQ	Since 2004	R49
Danny Kennedy	Inns Court	Y	Land User Statement	Past 25 years	R224
Mr. JD Knucky	106, Willinton Road, BS4	Y	EQ	From 1999	R54
Philip Lawrence	147, Kenmare Road, BS4	Y	Statement	Not before application	R131a
Mrs. P Leacey	96, Throgmorton Road, BS4	Y	EQ	?	R64
Shannon Leacey	6, Melvin Square, BS4	Y	EQ	?	R59
Mrs. Sheila Lee	65, Throgmorton Street	Y	Letter	?	R224a
J Le...?	142, Newquay Road	Y	Letter	?	R224b
Peter Lewis	31 Salcombe Road	N	Land User Statement	Past 40 years	R225

Clive Llewellyn	40, Chepstow Road BS4	Y	Land User Statement	?	R225a
Carmen Lord	Wallingford Road	Y	Land User Statement	Past 10 years	R226
Jeff Lovell	Not stated	N	Flyer	No claim to use	R130p
Mil Isabella Lusk	98, Throgmorton Road, BS4	Y	1. Statement 2. EQ 3. Letter	Since 1996	1.R10 2. R11 3. R226aa
John Marsh	56, Wallingford Road	Y	Land User Statement	Past 8 years	R227
June Massey	85, Westerleigh Park, BS14	N	Letter	?	R226a
Kayleigh McKay	Inns Court	Y	Land User Statement	Past 7 years	R229
CA McKechnie	15, Crediton Crescent	Y	Letter	“for years”	R228
Nimo Michalski	118, Willinton Road	Y	Land User Statement	Past 2 years	R232
Piotr Michalski	118, Willinton Road	Y	Land User Statement	Past 2 years	R132
Linda Mills	21, Creswicke Road, BS4	Y	EQ	Since 1975	R69
Peter Millward	92, Barnstable Road	Y	Land User Statement	Past 8 years	R231
Rebekah Millward	92, Barnstable Road	Y	Land User Statement	Past 8 years	R230
Mrs. K Mogg	12, Throgmorton Road BS4	Y	Letter	?	R233
Sarah Morgan	7, Donegal Road BS4	Y	Land User Statement	Past 4 years	R235
Mrs. Morris	49, Newquay Road	Y	Land User Statement	Past 40 years	R236
Christina Ann Mulligan	85, Creswicke Road, BS4	Y	EQ	Since 1970	R74
Alan Murch	64, Lisburn Road	Y	Land User Statement	Past 10 years	R234
George Nash	114, Creswicke Road	Y	Land User Statement	?	R237
Anthony Nelson	13, Padstow Road	Y	Land User Statement	Past 20 years	R238
Sandie Noble	26, Toynbee Road	Y	Land User Statement	Past 15 years	R239
Maura O’Loughlin	2, Filwood Broadway BS4	Y	Letter	?	R239a
Emma O’Reilly	20, Carlow Road	Y	Land User	Past 20	R242

			Statement	years	
Pauline O'Reilly	10, Carlow Road	Y	Land User Statement	Past 30 years	R241
Martin O'Riley	65, Dowcroft Road	Y	Land User Statement	Past 5 years	R240
S Oxenham	55, Queensdale Crescent	N	Letter	?	R242a
Paula Paddick	55, Creswicke Road, BS4	Y	EQ	Since 1981	R79
Mrs. S Parsons	6, Instow Walk	Y	Land User Statement	?	R243
Adam Patman	70, Cossington Road, BS4	Y	Land User Statement	Use after application	R244
AR Pearce	125, Ilminster Avenue	Y	Land User Statement	Past 50 years	R245
Sarah Pearce	4, Rowberrow, BS14	N	Land User Statement	Past 3 years	R256
Julie Pickford	35, Hartcliffe Road	Y	Land User Statement	Past 12 years	R257
Sonia E Povey	3, Holst Gardens	Y	Land User Statement	Past 30 years	R260
Graham Pring	35, Creswicke Road, BS4	Y	Letter	Since 1963	R133
Miss Jodie Pring	35, Creswicke Road, BS4	Y	Letter	?	R259
Mrs. Nicola Pring	35, Creswicke Road, BS4	Y	Letter	Past 24 years	R134
Terence Pring	112, Allerton Road, BS14	N	Letter	Since 1950s	R258
Jason Pylle	17, Wallingford Road	Y	Land User Statement	Past 12 years	R261
Edna Quick	4, Barnstable Road	Y	Land User Statement	Past 35 years	R282
Marie Radford	66, Wedmore Vale	Y	Land User Statement	Past 12 years	R262
M Rawlings	174, Newquay Road	Y	Letter	?	R263
Mrs. P Read	9, Hurston Road BS4	Y	Letter	Since mid 1970s	R263a
Viktoria Recsei	32, Toynbee Road BS4	Y	Land User Statement	Past 3 years	R265
Miss Sherri Rees	14, Campian Walk BS4	Y	Letter	Since early 1970s	R264
Shirley Rees	13, Campian Walk BS4	Y	Letter	?	R264a
Kirstie Richardson	24, Tavistock Road	Y	Land User Statement	Use after application	R266

J Roberts	120, Willinton Road	Y	Land User Statement	Since 1976	R267
Mr S. Robson	63, Creswicke Road, BS4	Y	EQ	Since 1965	R84
Mrs. Barbara M Scott	10, Hurst Road, BS4	Y	EQ	1939-1954 1969-2009	R89
Mrs. Selway	73, Creswicke Road	Y	EQ	Since 1939	R104
Paula Sennington	87, Creswicke Road, BS4	Y	EQ	Since 1999	R94
Lou Shepherd	8B, Filwood Broadway	Y	Land User Statement	Past 37 years	R134a
Emily Smith	18, Bantry Road	Y	Land User Statement	Past 39 years	R268
Linda Smith	154, Creswicke Road	Y	Land User Statement	Past 13 years	R269
Mrs. Mary Smith OBE	18, Colchester Crest	Y	Land User Statement	?	R271
Catherine Steadman	45, Creswicke Road, BS4	Y	EQ	Since 2005	R99
Paul Stone	9, Showering Close	N	Land User Statement	Past 20 years	R270
Angelina Swales	7, Delius Grove	Y	Land User Statement	Use after application	R272
Mr. Conor Symes	6, Poole Street	N	Letter	Since 1990s	R272d
Lauren Symes	6, Poole Street BS11	N	Letter	?	R272c
Mrs. T Symes	6, Poole Street BS11	N	Letter	?	R272a
TA Taylor	53, Connaught Road	Y	Land User Statement	Past 10 years	R273
AF Thomas	48, St. Whytes Road BS4	Y	Letter	?	R274
Colin Towas	64, Connaught Road	Y	Land User Statement	Past 20 years	R276
Julia Tutton	31, Martock Crescent	N	Land User Statement	Past 20 years	R275
Annette Tyler	200 Creswicke Road BS4	Y	EQ	1970s-1984 1990-now	R277
Mrs. Janet Tyson	99, Novers Hill BS4	Y	Letter	?	R281a
Stacey Vear	2, Hurst Road, BS4	Y	EQ	Since 2003	R109
Victoria Venles	47, Bantry Road	Y	Land User Statement	Past 9 years	R285
Mike Vine	45, Leinster Avenue BS4	Y	Letter	Since 1950s	R283
Adam Vizer	13, Creswicke Road, BS4	Y	EQ	Since 1986	R118

Bianka Vowles	Inns Court	Y	Land User Statement	Since 2009	R284
Claire Webber	57, Gerrard Close	Y	Land User Statement	Past 5 years	R291
Kevin Webber	57, Gerrard Close	Y	Land User Statement	Past 3 years	R135
CB Wells	4, Alard Road BS4	Y	Letter	?	R292a
Charmaine Wheatley	273 Cavan Walk	Y	Land User Statement	Past 27 years	R294
Councillor Anne White	5, Richmond Hill, BS8	N	1. Letter 2. Letter	Non user	1. R136 2. R/6/16
G Williams	7, Fanshawe Road BS14	N	Letter	?	R292
Natasha Williams	42, Torrington Avenue	Y	Land User Statement	?	R293
Mrs. R Williams	49, Creswicke Road,	Y	EQ	Since 1985	R123
Jenny Young	1, Bantock Close	Y	Land User Statement	Past 6 years	R295

[42] The applicant also supplied the public inquiry with a variety of documents referring to Filwood:

- A 2008 ward profile of Filwood⁴³
- A document relating to the Neighbourhood Partnership of the three wards of Filwood, Knowle and Windmill Hill⁴⁴
- A page downloaded from the Avon and Somerset Constabulary website from which it appears that there is a beat called the Filwood beat. The diagram suggests that the beat covers Filwood Ward although the verbal description says that the beat comprises Inns Court, Nover's Park, Filwood Park and part of Lower Knowle.
- A page downloaded from the internet relating to Filwood Park Library which is described as being in Filwood Park Broadway (although all other evidence refers to the road as Filwood Broadway)
- A page downloaded from the "We are Knowle West" website relating to Filwood Community Centre in Barnstable Road (which is in Filwood Ward just north of the park)

⁴³ R336i

⁴⁴ R442a

- A page downloaded from the internet relating to the Filwood Hope Centre which says that the purpose of the centre is to secure the community of Knowle West
- Some pages downloaded from the internet dealing with the shops and other facilities in Filwood Broadway
- A page downloaded from the internet dealing with the Filwood Swimming Pool which used to stand in Filwood Broadway but was demolished some years ago
- A page downloaded from the internet dealing with the Filwood Catholic Club.

I did not find any of this material very helpful since it does little more than to show that there are facilities within Filwood Ward which bear the name Filwood, which is hardly surprising.

Findings of fact

[43] I now turn to make findings of fact based on the evidence submitted to the public inquiry on the locality/neighbourhood issue.

[44] The first finding that I have to make is whether Filwood Park has been used for LSP by a significant number of the inhabitants of the locality of Filwood Ward for at least 20 years before the date of the application. In making this finding of fact, I bear in mind the guidance of Sullivan J in para. 71 of the *McAlpine* case to the effect that “significant” does not mean considerable or substantial. The number of people using the land 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 trespassers. I also bear in mind the guidance of the House of Lords in the *Sunningwell* case⁴⁵ that LSP includes informal recreation such as walking, with or without dogs, and children’s play. I have no hesitation in finding that Filwood Park has been used for LSP by a significant number of the inhabitants of Filwood Ward since the 1970s, and so for much longer than the required 20 years. The evidence of the oral witnesses coupled with the mass of written evidence from local witnesses, mostly resident in Filwood Ward, was to my mind overwhelming proof of this proposition. This finding also accords with common sense since Filwood Park has been run since the 1970s as a public park and Filwood Ward includes the residential areas immediately adjacent to the north of the park. Of course, more users came from the parts of the ward closer to the park than from the parts of the ward further from the park but that is inevitable and does not, to my mind, negative compliance with statutory test. I see no reason to think that there is be a requirement that users should be spread evenly over the whole of the relevant locality⁴⁶.

[45] In case I am wrong in that finding, the second finding that I have to make is whether the various claimed neighbourhoods of Knowle, Knowle West, Lower Knowle, Nover's Park.

⁴⁵ *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335

⁴⁶ See the comments of Vos J. in the *Paddico* case at para. 106(i)

Filwood Park and Inns Court are “neighbourhoods” for the purpose of CA 2006 s. 15. I have found that the applicable test is that a neighbourhood must be an area with pre-existing cohesive qualities and capable of meaningful description in some way. I started the public inquiry with the provisional view that these were all place names to be found on the maps and that, bearing in mind Lord Hoffmann’s comment about “deliberate imprecision”, they were all likely to be neighbourhoods. However, as the evidence unfolded it became clear that many of the witnesses could not define the areas at all and that those who attempted to do so had wildly conflicting views. At the end of the public inquiry, I feel unable to identify the pre-existing cohesive qualities of any of these areas or to give any of them any meaningful description other than names. Certainly, it seems to me that the areas were not sufficiently defined by the evidence I heard in order rationally to apply the significant number test. It appears to me that the only area to which I can securely apply the significant number test is Filwood Ward.

[46] My conclusion on the locality/neighbourhood issue is that the applicant has satisfactorily proved that Filwood Park has been used for LSP by a significant number of the inhabitants of the locality of Filwood Ward for more than 20 years before the date of the TVG application. Everything therefore turns on the “as of right” point to which I now turn.

5. The “as of right” issue

[47] The starting point is the decision of the House of Lords in the *Sunningwell* case that user “as of right” means user without force, secrecy or permission (or in the time-worn Latin expression *nec vi nec clam nec precario*).

[48] Force does not just mean physical force but includes user that is contentious, i.e. where the landowner makes it clear by words or deeds that he does not acquiesce in the user⁴⁷. There is no question of force (even in the extended sense) in the present case. The park has been at all material times open to the public for recreational use and BCC as owner (and more recently manager) of the park has encouraged and facilitated recreational use.

[49] Nor is there any question of secrecy in the present case. The park has been used at all material times openly by the public for recreation.

[50] As for permission, there is no question of express permission. There was no suggestion in the evidence that BCC has ever granted express permission either orally or in writing to individual users of the park or by displaying signs expressly granting permission to the public to use the park. Nor does it seem to me that there is any question of implied permission. The topic of implied permission was at the centre of the decision of the House of Lords in *R (Beresford) v Sunderland City Council*⁴⁸. In that case, a new town development corporation created a town plan that identified an area of land as “parkland/open space/playing field”. The land was laid out

⁴⁷ For a modern statement of this principle see Lord Rodger in *R (Lewis) v Redcar & Cleveland Borough Council (No. 2)* [2010] 2 AC 70 at paras. 87-90.

⁴⁸ [2004] 1 AC 889

as a public recreational area with mown grass, a hard surface cricket pitch and seating for spectators. There were no signs setting out the basis of public recreational use. The land was subsequently vested in the Commissioner for New Towns and then Sunderland City Council. An application to register the land as a new TVG was refused by the CRA on the ground that the landowner had impliedly granted permission for recreational use of the land. On an application for judicial review of the decision of the CRA the judge and the Court of Appeal upheld the decision of the CRA. However, an appeal to the House of Lords was successful. It was argued that there could never be implied permission, but the House of Lords rejected that argument and held that implied permission was possible in principle. However, the House held that permission could not be implied from acts which encouraged and facilitated public recreational use. See Lord Bingham at para. 7, Lord Rodger at para. 60 and Lord Walker at para. 85. Lord Scott emphasized that, in order to negative user as of right, any permission has to be revocable or time-limited. He pointed out that one could not infer revocable or time-limited permission from acts of encouragement or facilitation: such acts were equally consistent with being dedicatory. On the authority of *Beresford* it seems to me impossible to find that BCC, by laying out and maintaining Filwood Park were thereby impliedly granting permission to the public for its use and so negating user as of right. Indeed, Mr. Blohm did not argue that recreational user of Filwood Park was permissive.

[51] One might therefore think that recreational user of Filwood Park was without force, secrecy or permission and was thus “as of right”. However, Mr. Blohm argued that this was not the case. He submitted that:

- user is not “as of right” if it is pursuant to a legal right and hence “by right”
- where land is held by a local authority under the PHA 1875 s. 164 or the OSA 1906 s. 10 the public have a statutory right to use the land for recreation
- Filwood Park was held at all material times under one or other of those sections because (a) it had been expressly appropriated to one or other of those sections, alternatively (b) it had been impliedly appropriated to one or other of those sections, alternatively, (c) it was held on one or other of those sections temporarily pending use for the purpose to which it had been appropriated.

These submissions raise interesting and difficult points of law. I propose to consider the underlying legal issues before turning to consider the evidence on the “as of right” issue and then to apply the law to the facts of this case.

The “by right/as of right” dichotomy

[52] The proposition that user is not “as of right” if it is pursuant to a legal right and thus is user “by right” or “of right” is also founded in the decision of the House of Lords in the *Beresford* case. The principal point argued in the *Beresford* case was the implied permission

point discussed above. However, after the case had been first argued, the House invited further argument on the question whether user of the application land was pursuant to some statutory right and hence “by right” rather than “as of right”. Counsel for the respondent in effect declined to take the point and therefore the comments of the House on the point are *obiter dicta*. However, although not binding, the comments are plainly of great persuasive force.

[53] Before looking at the comments of the law lords, it is necessary to summarise the relevant facts, which are largely set out in the speeches of Lord Scott at paras. 17-19, Lord Rodger at para. 53 and Lord Walker at para. 89:

- In the early 1970s, the application land was acquired by the Washington Development Corporation (WDC) under powers in the New Towns Act 1965. Under that Act the WDC did not acquire the land for any specific purpose and was not obliged to appropriate it for any specific purpose.
- The 1973 Washington New Town Plan envisaged that the land should be used for a sports complex including facilities for which an entry fee would be payable.
- In 1974, the WDC, using excavated soil from another project, laid out and grassed over the land as a sports arena.
- In 1977, the WDC installed a double row of wooden benches around most of the perimeters of the land, sufficient to accommodate 1,100 people. This was to provide seating for the public on the occasion of a royal visit.
- The land was never fenced and from at least 1977 onwards the public used the land for various recreational activities. The landowner for the time being has always mowed the grass on the land.
- In 1979, the WDC installed a hard cricket pitch on the land.
- In 1989, the WDC transferred the land to the Commission for the New Towns (CNT) as part of a general disposal of the WDC’s assets.
- In 1991, the CNT retained the land when other assets were transferred to the city council because it was regarded as having development potential.
- In 1996, the CNT transferred the land to the city council subject to a covenant restricting its use to magistrates’ court and/or community health facilities and/or community leisure/recreation and/or other similar community related uses and developments.
- In 1998, the city council granted planning permission for the erection of a college of further education on the land.

- There was no evidence of any formal appropriation of the land as recreational open space by the city council or its predecessors.
- The TVG application was made in 1999.

[54] The members of the House of Lords dealt with the point as follows:

- Lord Bingham said at para. 3 that it was plain that “as of right” does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question was whether a party who lacks a legal right has acquired one by user for a stipulated period. At para. 9 he referred to the further argument heard by the House as to whether user was pursuant to a statutory right to do so. Lord Bingham said that such use would be inconsistent with use as of right.
- Lord Hutton agreed with the reasons of Lord Walker, Lord Bingham and Lord Rodger for allowing the appeal (para. 11). This must, I think, refer only to the implied permission point.
- Lord Scott said at para. 30 that it was accepted that if the council had acquired the sports arena under the OSA 1906 the local inhabitants’ use of the land for recreation would have been under the trust imposed by s. 10 of the 1906 Act. The use would have been subject to regulation by the council and would not have been a use “as of right” for the purposes of class (c) of CRA 1965 s. 22(1). I do not think that Lord Scott meant that use would not be “as of right” because it was subject to regulation but rather that the imposition of the statutory trust had two consequences, first, that user was subject to regulation and, second, that it was not user “as of right”.
- Lord Rodger said at para. 62 that the resumed hearing was to consider whether any statute had conferred on the local residents and others a right to use the sports arena with the result that their use would be “of right” as opposed to being “as of right” in terms of CRA 1965 s. 22(1). He said that, on the evidence, there was no such statute.
- Lord Walker said at para. 71 that “as of right” does not mean “of right”. It has sometimes been suggested that its meaning is closed to “as if of right”. At para. 87 he said that where land is vested in a local authority on a statutory trust under OSA 1906 s. 10, it would be difficult to regard users as trespassers. At para. 88, he said that this was a difficult issue which did not have to be decided in the appeal.

[55] Thus four members of the House in *Beresford* expressed, with varying degrees of conviction, the *obiter* view that recreational use of a park pursuant to a statutory right is not use “as of right” for the purpose of establishing a prescriptive green. So far as I am aware, the point has not been considered in any other decided case. Although not strictly binding on the CRA in the present case, it seems to me that these views, emanating from the highest authority, ought to

be followed. Further, it seems to me that the views are right in principle. The class (c) TVG is clearly envisaged by the legislation as based on some sort of prescription. The whole point of prescription is to create a legal basis for a user that has been enjoyed for a long time without any existing legal basis. If user is already under a legal right there is no scope for the operation of prescription.

[56] Accordingly, I accept Mr. Blohm's submission that, if users of Filwood Park had a statutory legal right to use the park for recreation, their use will not have been "as of right" for the purposes of CA 2006 s. 15.

Open Spaces Act 1906

[57] The Open Spaces Act 1906 is an act designed to facilitate the provision of public open spaces by local authorities. "Open space" is defined by s. 20 of the 1906 Act. So far as material for present purposes it means land which is not built on and is used for recreation. Section 7 gives power to any landowner to sell any land (whether already an open space or not) to a local authority for use as a public open space. Section 9 gives power to a local authority to acquire any existing open space. Section 10 provides that a local authority that has acquired open space under the 1906 Act should:

"...hold and administer the open space...in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act...and for no other purpose..."

Section 15 empowers a local authority which owns open space to make byelaws for its regulation.

[58] Thus, the clear effect of the 1906 Act is that where a local authority has acquired an open space under the Act, the public has a right under a statutory trust to use the open space for recreation subject to any applicable byelaws. In the *Beresford* case, Lord Scott was clearly of the view that if a local authority held land under the 1906 Act, the land would be held on a statutory trust by virtue of s. 10 and the public would not be using the land "as of right" for the purposes of the legislation relating to the registration of new TVGs (paras.29-30). Lord Walker said the same at para. 87. As originally passed, s. 122 of the LGA 1972 defined land held in accordance with s. 10 of the OSA 1906 as "public trust" land and provided that the statutory trusts could be overridden by an appropriation of the land to new purposes provided that the proposed appropriation was publicised and objections considered. The LGA 1972 was amended by the Local Government, Planning and Land Act 1980 but provisions to similar effect are now to be found in the amended s. 122(2A). Although an Act of Parliament can no doubt be passed under a misapprehension as to the existing law, LGA 1972 s. 122 (both in its original and amended form) lends comfort to the view that land held in accordance with s. 10 of the OSA 1906 is held on a statutory trust under which the public have a legal right of access for recreation (subject to byelaws).

[59] I therefore accept Mr. Blohm’s submission that if Filwood Park was held at any point during the relevant 20 year period under s. 10 of the OSA 1906, use for recreation by members of the public (local or not) would be “by right” and not “as of right” for the purposes of the legislation relating to the registration of new greens.

Public Health Act 1875 s. 164

[60] Section 164 of the PHA 1875 provides that:

“Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.”

The section goes on to authorize the local authority to make byelaws for the regulation of any such public walk or pleasure ground. The power conferred by s. 164 was extended to all local authorities by LGA 1972 Sched. 14 Part II para. 27.

[61] The 1875 Act does not contain an express statutory trust such as OSA 1906 s. 10, but the courts have construed s. 164 as conferring on the public a statutory right of access for recreation to land held under s. 164:

- *A-G v Loughborough Local Board* The Times 31st May 1881
- *Hall v Beckenham Corporation* [1949] 1 KB 716
- *Sheffield Corporation v Tranter* [1957] 1 WLR 843
- *Blake v Hendon Corporation* [1962] 1 QB 283

The section was not mentioned in the speeches in *Beresford* although *Hall v Beckenham Corporation* was cited in argument (page 892H). LGA 1972 s. 122 (in both its original and amended forms) assumes that land held for the purposes of s. 164 of the PHA 1875 is held on a statutory trust equivalent to that under s. 10 of the OSA 1906.

[62] Accordingly, I accept Mr. Blohm’s submission that if Filwood Park was held for the purposes of s. 164 of the PHA 1875 at any point during the relevant 20 year period, user would during that period not be “as of right” for the purposes of the legislation relating to the registration of new TVGs.

Appropriation

[63] Appropriation is a rather esoteric concept of local government law. The origin of it was helpfully explained by Russell LJ in *Dowty v Wolverhampton Corporation*⁴⁹. The underlying rationale is that a local authority is a creature of statute⁵⁰ and can only act in accordance with powers conferred upon it by statute. Thus, in *A-G v Hamwell UDC*⁵¹ a local authority compulsorily acquired land for sewage purposes under powers conferred by PHA 1875 s. 175. Some of the land proved unsuitable for sewage use and the local authority wished to use it as a site for an isolation hospital. The court held that a local authority had no power to use land permanently for a purpose inconsistent with that for which it had originally been acquired. As Russell LJ explained, this was inconvenient since it meant that the land had to be sold and re-acquired for the new purpose. Therefore parliament conferred on local authorities a power of appropriation, originally exercisable only with the consent of a minister, whereby land that had been acquired for one statutory purpose, but was no longer required for that purpose, could be appropriated to a new statutory purpose for which the land could have been acquired. The current general statutory power of appropriation is to be found in s. 122 LGA 1972 (formerly LGA 1933 s. 163). It includes re-appropriation of land that has already been appropriated to a new purpose.

[64] There have not, so far as I am aware, been many decided cases on appropriation:

- In the *Dowty* case, it was held that a local authority acting in good faith was the sole judge of fact of whether land could be appropriated under LGA 1933 s. 163.
- In *Third Greytown Properties Ltd. v Peterborough Corporation*⁵² it was held that land held for the purposes of the OSA 1906 could be appropriated under s. 121(1) of the Town and Country Planning Act 1971 to planning purposes notwithstanding that the land had already been developed. Land remained held for the purpose for which it was acquired unless and until it was appropriated to a new purpose.
- In *Thames Water Authority v Elmbridge Borough Council*⁵³ it was held that land could not validly be appropriated under LGA 1933 s. 163 to a new statutory purpose if it was still in use for the purpose for which it was held. It could not be said in those circumstances that it was not required for that purpose.
- In *Oxy-Electric Ltd. v Zainuddin*⁵⁴ it was accepted by the judge that, in some circumstances (which did not in fact apply in that case), land could impliedly be appropriated from one statutory purpose to another.

⁴⁹ [1976] 1 Ch 13 at page 24D

⁵⁰ It is not necessary for present purposes to consider creation by charter.

⁵¹ [1900] 2 Ch 377

⁵² [1973] 3 All ER 731

⁵³ [1983] 1 All ER 836

⁵⁴ 22nd October 1990 (unreported)

[65] An appropriation is itself the exercise of a statutory power conferred upon a local authority and thus *prima facie* requires to be exercised by some resolution of the local authority or pursuant to some valid delegation by the local authority of statutory powers. However the *Oxy-Electric* case envisages that there can be an implied appropriation. In that case, the judge was faced with two rival arguments. Mr. Carnwath QC (as he then was) argued that appropriation was not a technical term. It merely means that the council applies the land for that purpose. Mr. Roots QC argued that, as an appropriation could only be carried out under a statutory power, it must be a conscious decision or an implicit step in a conscious decision. The judge said that he was “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”. On the facts, the judge held that there was no appropriation on any basis. The words of the judge are not free from ambiguity but I read his words as saying that there must be a resolution but that the resolution need not expressly record the appropriation if the resolution would only be lawful if it embodied an implied appropriation. If the argument of Mr. Carnwath were right, it would make a nonsense of the concept of appropriation since a local authority could always use land for any statutory purpose without any formal appropriation. In effect, a local authority’s land holding powers would become unlimited.

[66] Lord Walker touched upon appropriation in paras. 87-88 of *Beresford*. I think that one must be cautious in putting too much weight on his remarks on appropriation since (a) his remarks were *obiter*, (b) he said that the situations raised difficult issues better left for another occasion and (c) the House was not referred to any authorities on appropriation. However, one can draw two points from his remarks:

- First, he thought that appropriation could be implied as well as express since he said that the evidence did not give grounds for inferring an appropriation of the land as recreational open space
- Second, he thought that there could be a valid appropriation although the precise statutory holding power was not spelt out. He thought it enough if the land were appropriated “for the purpose of public recreation”.

Temporary use

[67] It was held in *A-G v Teddington UDC*⁵⁵ that land which had been acquired by a local authority for a statutory purpose could be used temporarily for another statutory purpose until it was ready to be used for the primary purpose for which it was acquired. In that case, land was acquired by Teddington UDC under PHA 1875 for sewage purposes. Part of the land was used for sewage purposes. Part was not immediately required but the UDC wanted to hold it for future sewage use as the local population increased. Meanwhile, the UDC used the land as a public pleasure ground, a use which did not interfere with use for sewage purposes when required. The

⁵⁵ [1898] 1 Ch 66

court held that the UDC was acting lawfully. This was a pre-appropriation case and so the UDC was otherwise faced with the choice of not using the land at all or selling it. Even if statutory appropriation had been theoretically available it could not have been used since the land was still required for sewage purposes.

[68] There is now a statutory basis for such temporary use in the case of land that has been acquired by a local authority: LGA 1972 s. 120(2). However, there is no equivalent statutory provision for land that has been appropriated to one purpose to be used temporarily for another purpose.

[69] Mr. Blohm argued that the principle in the *Teddington* case applies equally to land that has been appropriated for a particular purpose as to land that has been acquired for a particular purpose. However, I am not persuaded by that argument. I can see that it may be advantageous to acquire land for a future purpose, e.g. land may come on the market that is ideally situated for necessary future expansion of the town hall. However, it does not seem to me that it is ever necessary to appropriate land to a future purpose. If it is proposed to use land already held by a local authority for one purpose for a period and then for another purpose, it can be appropriated to the first purpose and then re-appropriated in due course to the second purpose. It also seems to me significant that the statutory power of temporary use is limited to land that has been acquired rather than appropriated. This suggests that the legislature did not see the need for temporary use in the case of appropriation.

[70] This view makes it unnecessary for me to consider what seems to me to be a difficult issue, i.e. if land is acquired for non recreational use, does temporary use for public open space purposes mean that the public have a right to use the land under PHA 1875 s. 164 or OSA 1906 s. 10 during the period of temporary use?

[71] I should also add that, as will become apparent when I consider the evidence, there does not seem to be a factual basis for the proposition that the use of Filwood Park as a park was ever perceived as a temporary use pending some other use to which it had been appropriated.

Delegation, committees and departments

[72] By s. 101 of the Local Government Act 1972, a local authority can delegate its functions to committees. BCC did indeed have committees to which it delegated many of its functions. At some stage in the early years of this century, BCC adopted a cabinet structure and many of the matters previously dealt with by committees were dealt with by newly formed departments which were perceived as successors of the relevant committees. I understand that this was pursuant to the LGA 2000 but I was not taken to any of the statutory provisions in the 2000 Act. I think that this was because BCC, as landowner, accepted that, unless it could prove that Filwood Park was appropriated, either expressly or impliedly, to public open space purposes before the 2000 Act, it did not argue that it had been so appropriated at a more recent date.

[73] It was the practice in BCC (and I have come across it with other local authorities) to regard committees and departments as “owning” land. However, this is a metaphorical use of “ownership”. All council land is owned by the council. What the metaphor means, as I understand it, is that the statutory functions of the local authority in relation to that land are principally exercised under delegated powers by that committee or department. Thus a park might be regarded as “owned” by a parks committee because it is that committee to which the council’s statutory functions in relation to parks has been delegated.

[74] Where land is appropriated from one statutory purpose to another under LGA 1972 s. 122, it will often be the case that the council’s statutory functions in relation to that land cease principally to be exercised by one committee and are thereafter exercised by another committee. Applying the metaphor, the “ownership” of the land has been transferred from one committee to another. However, this will not always be the case. For example, there might be an appropriation of land from public open space use to use as a public swimming pool. However “ownership” would be retained by a parks and baths committee whose delegated functions cover both parks and swimming pools. Equally, there might be a transfer of “ownership” of land from one committee to another without any appropriation under LGA 1972 s. 122 in circumstances where the remit of different committees was reorganised so that the statutory functions exercised by one committee were transferred to another committee. Historically, some officers of BCC used the word “appropriation” to refer not only to appropriation under LGA 1972 s. 122 but also to the transfer of “ownership” of land from one committee to another. Thus, in considering the documentary evidence, one comes across examples where it is said that land has been “appropriated” by one committee from another. I think that it will be important to distinguish between these two uses of the word “appropriation”.

The evidence on appropriation

[75] After that lengthy preamble, I now turn to consider the evidence presented to the public inquiry relevant to the issue of appropriation. I will begin with the witness evidence and then turn to the documentary evidence. Since it was the objectors who sought to make out a positive case that Filwood Park was appropriated, expressly or impliedly, to s. 164 of the PHA 1875 or s. 10 of the OSA 1906 it is convenient to deal first with the two witnesses called on behalf of the objectors, Mrs. Comer and Mr. Hammond. I will then deal with the applicant’s witness on this topic, Mrs. White.

Mrs. Susan Comer

[76] Mrs. Comer produced a written statement dated 18th July 2011⁵⁶. That statement exhibited two documents prepared by her line manager, Mr. David Cheesley, firstly, an undated memorandum on the recording of appropriations (1948-1996)⁵⁷, and, secondly, a statement dated

⁵⁶ B/2/1

⁵⁷ B/2/3

21st May 2009 made by Mr. Cheesley in another TVG public inquiry⁵⁸. That statement itself referred to a flow chart prepared by Mr. Cheesley on 1st May 2009 showing the devolution of various delegated functions as between committees and departments⁵⁹. Mrs. Comer gave oral evidence to the public inquiry.

[77] Mrs. Comer has been employed by BCC as an Estates Information Officer since 2000. Her job is to provide information about BCC landholdings. Her primary source of information is a computerised data system. She produced a current print-out of the data relating to Filwood Park held on the system⁶⁰. Basically, the data held on the system is information that was previously held on a terrier card system updated by the inputting of data relating to relevant events that have happened since computerisation. She referred to the relevant terrier cards and associated maps⁶¹ which are still retained by BCC. There are two relevant terrier cards, V19/1 and V20/15.

[78] V19/1 related to the larger area of school playing fields part of which was used to create Filwood Park in the 1970s. There is a manuscript note on this card which reads: "*11 acres approp. by P&T see V20/15*". This means that 11 acres of the land comprised in V19/1 was "appropriated" by the Planning and Traffic Committee and was transferred to a new terrier card V20/15.

[79] V20/15 related to Filwood Park. The relevant entries were:

- Situation of Property: Filwood Park
- Description: Part of playing field
- Area: 11 acres
- Purchase Price: formerly part of V19/1
- Proposed use: Redevelopment
- Extraordinary Covenants and Remarks: Approp. by P&T 6-3-74 from Educ. 30-3-74. P&T receiving this land plus £60,000 in exchange for 24.7 acres of land (V19/5)
- Plan ref: V20/15
- File no. (partly illegible)
- Committee: P&T (crossed out) L&A (crossed out) L&GP.

⁵⁸ B/2/5
⁵⁹ B/4/G/1
⁶⁰ B/4/A/105
⁶¹ B/4/A/101-102 & B/G/24-34

This means that the site of Filwood Park was “appropriated” in 1974 by the Planning and Traffic Committee from the Education Committee, was successively “owned” by the Planning and Traffic Committee, the Land and Administration Committee and the Land and General Purposes Committee and was held for redevelopment purposes.

[80] According to the print-out of the computerised database, the only subsequent relevant events were the sale, management agreement and put option of 2008 and a variation of the put option in 2011. In particular, there was no evidence of any appropriation of Filwood Park after 1974.

[81] According to the flow chart of committee and department functions prepared by Mr. Cheesley, property and development functions devolved as follows:

- Planning & Traffic Committee 1968-1973
- Finance and Land Committee 1973-1974
- Land & Administration Committee 1974-1986
- Land & General Purposes Committee 1986-1991
- Land and Buildings Committee 1991-1996
- Policy and Resources Committee 1996-2000
- Central Support Services Department 2000-2008
- Resources Department 2008-

and open spaces functions devolved as follows:

- Public Works Committee 1968-1973
- Open Spaces and Amenities Committee 1973-1986
- Leisure Services Committee 1986-2000
- Environment Transport and Leisure Department 2000-2005
- Culture and Leisure Services Department 2005-2008
- Neighbourhoods (Parks Landscape Heritage Estates) Department 2008-

Some of these dates appear to be wrong. For example, it appears from the minutes that the Planning and Traffic Committee was still operating in 1974.

[82] According to Mr. Cheesley's memorandum on appropriation, an appropriation was effected by the approval by the full council of a joint report of the transferring and receiving committees. The relevant terrier card was then amended accordingly. The use of this procedure does not seem to be borne out by the minutes which I will have to examine in due course. Also the memorandum does not appear to distinguish very clearly between appropriation in the statutory sense and the transfer of "ownership" between committees.

[83] Finally, Mrs. Comer said that she had found some papers in the archives which suggested that Filwood Park was the responsibility of the Parks and Open Spaces Committee between 1973 and 1986.

[84] Although I have some doubts about the accuracy of some of Mr. Cheesley's evidence produced by Mrs. Comer, I found Mrs. Comer herself to be a frank and truthful witness and I fully accept that part of her evidence which concerns her own researches.

Mr. Christopher Hammond

[85] Mr. Hammond produced a statement dated 28th July 2011⁶² and gave oral evidence. He is employed by BCC as an Area Parks Manager. He has worked for BCC in one capacity or another since 1994 and has known Filwood Park since 1994. Since he has known it, it has always been known as Filwood Park and has been maintained by BCC as a public park with grass cutting, litter picking etc. Improvements have been effected involving capital expenditure such as the skate board park. The Leisure Services Department of BCC (in its various forms) has treated it like any other park in Bristol. Mr. Hammond's evidence was not challenged and I accept it.

Mrs. Anne White

[86] I have already dealt with Mrs. White's evidence on locality/neighbourhood. However, the main part of her evidence dealt with the "as of right" issue. Although, Mrs. White was questioned at some length by both counsel (and I make no complaint about that as she dealt with difficult issues) I think that her evidence boils down to this:

- In 1974, Filwood Park was "appropriated" by the Planning and Traffic Committee
- There was no further "appropriation" of Filwood Park before it was sold in 2008
- Filwood Park was therefore held by BCC at all material times for development purposes and not open space purposes, because the Planning and Traffic Committee and its successors were responsible for development and not parks
- BCC cannot therefore have held Filwood Park on the statutory trusts of PHA 1875 s. 164 or OSA 1906 s. 10 after 1974.

⁶² B/2/9

In support of her arguments, she referred to a BCC department land utilisation map of 2005⁶³ which showed the park as used by Central Support Services (the successor department of the Planning and Traffic Committee). She relied on the fact that, in 2008, the cabinet agreed to sell the park on the basis of a report from the Director of Central Support Services⁶⁴ and not the Director of Culture and Leisure Services.

[87] It seemed to me that Mrs. White was an entirely straightforward, genuine and articulate witness. I entirely accept all that she said based upon her own personal knowledge. However, on the “as of right” point, she was not really giving evidence as a witness of fact but arguing about the legal effect of the documents. Her arguments were very interesting and thought-provoking but she did not clearly distinguish between the concepts of statutory appropriation and the “ownership” of land by committees. It appears to me that I now have to consider all the relevant documentary evidence.

The documentary evidence

Conveyance 28th July 1929

[88] By a Conveyance⁶⁵ dated 26th July 1929 and made between (1) AV Hall and (2) Bristol Corporation, Mr Hall conveyed some 88 acres of land at Fillwood Farm⁶⁶ to the corporation. The 1929 Conveyance does not identify the statutory power under which the land was purchased or the purposes for which it was acquired. There is a plan for identification purposes, but the plan bound up with my copy of the 1929 Conveyance is not the original plan. I infer that the land is that shown coloured pink on the plan⁶⁷ at enclosure 2 to the objection statement (Archive ref. 07980). The objection statement⁶⁸ says that this land was purchased for the purposes of developing an airport. It is unclear on what evidence this proposition is based. However, it is not suggested that any part of this land was acquired for public open space purposes.

Conveyance 22nd December 1932

[89] By a Conveyance⁶⁹ dated 22nd December 1932 and made between (1) AV Hall and (2) Bristol Corporation, Mr. Hall conveyed to the corporation some 6 acres of land known as Rodford’s Ground. An attached plan shows the land conveyed. The immediately adjoining land is marked “Airport” on the plan. The Conveyance was expressed to be made by the corporation pursuant to the Public Health Acts 1875-1925 although the particular purpose for the purchase was not specified. It appears that the corporation intended to construct a new road (shown edged

⁶³ R/6/17A which showed the park as utilised by Central Support Services

⁶⁴ R/137o

⁶⁵ B/4/A/22

⁶⁶ Fillwood Farm seems to have been spelt with two “l”s although Filwood Park and Filwood Ward are now spelt with one “l”.

⁶⁷ B/2/A/7

⁶⁸ B/1/3

⁶⁹ B/4/A/26

red on the plan) across the land conveyed. The vendor was to have the right of access to that road by a new road shown edged blue on the plan. The new road appears to be in the position of the present Airport Road, which is now the part of the Bristol Ring Road immediately to the east of Hengrove Way. I was told at the public inquiry that it was originally the access road to the former airport. I infer that the land subject to the 1932 Conveyance is the land shown coloured yellow on the plan⁷⁰ at enclosure 2 to the objection statement (Archive ref. 229). It is not entirely clear from the objection statement for what specific purpose it was contended that this land was acquired. However, it has not been suggested that this land was acquired for public open space purposes.

Compulsory purchase order 11th December 1934

[90] The City and County of Bristol (Knowle Housing Estate Extension) Compulsory Purchase Order 1934⁷¹ was made for the purposes of Part III of the Housing Act 1925, i.e. the provision of housing for the working classes. It authorised the council to acquire a large area of land specified in a schedule and shown on an attached plan. Parcels 60-75 were owned by Mr. AV Hall of Fillwood Farm, Novers Hill and parcels 76-83 were owned by Mr. Murphy of Hengrove House, Knowle.

Conveyance 25th March 1936

[91] It appears from entry no 2 in the charges register for title no. BL100372⁷² that the land coloured green on the plan⁷³ at enclosure 2 to the objection statement (Archive ref. 4627/388) was conveyed by Mr. AV Hall to Bristol Corporation by a Conveyance dated 25th March 1936. This forms the largest part of the application land. I do not have a copy of the 1936 Conveyance, but it appears to comprise part of the land owned by Mr. Hall which was subject to the 1934 CPO. I infer, therefore, that it was acquired for housing purposes. It was not suggested at the public inquiry that it was purchased for public open space purposes.

Conveyance 24th June 1937

[92] By a Conveyance⁷⁴ dated 24th June 1937 and made between (1) JB Murphy and (2) Bristol Corporation, Mr. Murphy conveyed to the corporation some 40 acres of land at Hengrove House, Bristol comprising parcels 76-83 in the 1934 CPO. It appears both from the recitals and from the annotation on the conveyance plan (a) that the land had been subject to the 1934 CPO, (b) that the CPO had been confirmed in 1935, (c) that the land was acquired for the purposes of an extension to the Knowle Housing Estate and (d) that the land was acquired for housing purposes under the Housing Act 1936. I infer that the land was acquired for the provision of

⁷⁰ B/2/A/7
⁷¹ B/4/A/31
⁷² B/4/A/2
⁷³ B/4/A/7
⁷⁴ B/4/A/17

housing to the working classes under Part V of the HA 1936, which consolidated Part III of the HA 1925. I infer that the land is the land shown coloured blue on the plan⁷⁵ at enclosure 2 to the objection statement (Archive ref. 229).

[93] It therefore appears that none of the land now comprised in Filwood Park was purchased by BCC for the purposes of use as public open space. Most of it was purchased for housing purposes and it seems to be reasonable to suppose that the rest was purchased for airport purposes.

Appropriation to Education Purposes 1937

[94] The objection statement⁷⁶ says that in 1937, the corporation resolved to appropriate some 24 acres of land held for housing purposes to educational purposes and that ministerial consent to that appropriation was given on 7th March 1939. The objection statement does not actually say whether the 24 acres included some or all of the application land although I think that it is implicit from the heading “Change of Use of the Land” that it did. The evidence relied upon in support of this proposition in the objection statement is as follows.

[95] First, there is a minute⁷⁷ of the Housing Committee of 26th July 1937 in which there is a section headed “Knowle Estate Extension – Appropriation by Other Committees”. In 1937, there was not only a general power of appropriation with ministerial consent under LGA 1933 s. 163 but also a special power of appropriation with the consent of the Minister of Health to educational purposes under Education Act 1921 s. 113. It appears from the minute that the City Valuer recommended that there should be the following appropriations by the Education Committee of 31.47 acres of land forming part of the Knowle Estate Extension:

7.02 acres: site for school: £1,755

12.18 acres: elementary school playing fields: £3,045

12.27 acres: secondary school playing fields: £3,045

The figures were described as “price” but seem to be the required adjustments of accounts on appropriation. The wording of the City Valuer’s report is clearly influenced by the idea that one committee “appropriated” land from another. It was resolved to recommend the council to approve the appropriations subject to the approval of the DV and the Education Committee. There is nothing in the minute to identify the land to be appropriated save that it formed part of the Knowle Estate Extension. Part of the application land was within the Knowle Estate Extension, i.e. the blue and green land on the plan in enclosure 2 to the objection statement, but

⁷⁵ B/4/A/7
⁷⁶ B/1/3
⁷⁷ B/4/A/38

part was not, i.e. the yellow and pink land on that plan. Further, as appears from the plan to the 1934 CPO, the Knowle Estate Extension included much land outside the application land.

[96] Second, there is a minute⁷⁸ of a meeting of the full council on 12th October 1937. The council read a report from the chairman of the housing committee dated 30th September 1937 in which it was recommended that ministerial consent should be sought to various proposed appropriations specified in the second schedule to the report and indicated by a plan to be exhibited in the council chamber. There is no copy of the plan but the second schedule included the above appropriations with a slightly adjusted valuation for the secondary school playing fields. The second schedule more accurately referred to the appropriations as being from housing purposes to school site and school playing field purposes. The council resolved to apply for ministerial consent to the appropriations.

[97] Third, there is a consent⁷⁹ of the Minister of Health dated 7th March 1939 under s. 113 of the Education Act 1921 to the appropriation of two parcels of land fronting Creswicke Road, one of 19.2 acres and one of 16.2 acres, for the purposes of the 1921 Act. The land was shown on an annexed plan but no copy of the plan has been supplied. The total area to be appropriated was 35.2 acres, which is more than the land referred to in the 1937 minutes. The application land lies close to Creswicke Road and adjoins it in two places. However, given the discrepancy in acreages and the lack of the 1939 order plan, it is not possible to be sure whether the 1939 order relates to some or all of the application land.

[98] It appears to me that the evidence that the application land was appropriated to education purposes in 1937 is rather weak:

- No evidence of a resolution of the full council making any actual appropriation pursuant to the 1939 consent has been produced.
- The 1937 minutes and 1939 order are inconsistent as to the acreage of the land to be appropriated
- There is no evidence to prove whether the 1937 minutes or the 1939 order related to some or all of the application land.

[99] However, whether or not there was a valid appropriation of some or all of the application land to educational purposes in the late 1930s, it seems clear that none of the application land was held for public open spaces purposes.

Laying out of playing fields

⁷⁸ B/4/A/40

⁷⁹ B/4/A/46

[100] The objection statement⁸⁰ says that, in 1957, the new Bristol Airport opened and flying ceased at Whitchurch. The objection goes on to say that the application land, together with other land, was laid out as playing fields and that a pavilion and changing rooms were built in about 1963. The objection statement does not say exactly when the application land was laid out as playing fields but I infer that it was between 1957 and 1963. None of this material is proved by any evidence. Some of the applicant's witnesses in their written evidence claim to have used the application land for recreation since the 1930s and 1940s and it is unclear what the application land was used for before it was laid out as playing fields. It is said in the objection statement⁸¹ that, after being laid out as playing fields, the application land was used as school playing fields for local schools. This is not proved by any evidence.

Full council minutes 23rd May 1967

[101] The full council minutes of 23rd May 1967⁸² are the earliest evidence I have of the delegation of statutory functions to committees. It was the annual meeting of the council and it appointed committees and delegated functions to them with effect until the next annual meeting. Among the committees appointed were:

- An Education Committee to carry out the functions of the council under the statutes relating to education, and
- A Planning and Public Works Committee to carry out *inter alia* the functions of the council in relation to town and country planning, parks and open spaces.

There was no delegation to a committee of the statutory power of appropriation.

Full council minutes 9th January 1968

[102] The full council minutes of 9th January 1968⁸³ record that the council read a report from the Selection Committee recommending a revision of the committee structure. In effect, it recommended that the functions delegated to the Planning and Public Works Committee should be split between a Public Works Committee which would take over the functions relating *inter alia* to parks and open spaces and a Planning and Traffic Committee which would retain all the functions of the Planning and Public Works Committee which were not hived off to the Public Works Committee, including planning. The Planning and Traffic Committee would also assume the functions relating to the redevelopment of the corporate estate formerly delegated to the Estates Committee which would be discharged from office. The proposals did not include any specific delegation of the power of statutory appropriation. I have no minutes of the council

⁸⁰ B/1/3
⁸¹ B/1/4
⁸² B/4/B/1
⁸³ B/4/B/21

implementing that report, but it appears from Mr. Cheesley's flow chart⁸⁴ that it was implemented in 1968.

Planning and Traffic Committee minutes 18th June 1969

Public Works Committee minutes 22nd July 1969

Planning and Traffic Committee minutes 17th December 1969

Planning and Traffic Committee minutes 7th January 1970

Buildings and Equipment Committee minutes 17th February 1970

[103] These five sets of minutes⁸⁵ can conveniently be considered together. It seems that, in connection with the re-alignment of the Ring Road and other alterations, it was proposed that the zoning in the development plan should be revised. In particular, it was proposed that the existing Filwood Park playing fields should be increased from 35 to 50 acres. It was proposed that land which was to be rezoned should be "appropriated" to the Planning and Traffic Committee and then in due course "re-appropriated" to the relevant committee. There is no evidence that these proposals affected the application land (which were school playing fields and were intended at the time to remain as school playing fields) and it is not suggested that the resolutions of these committees effected any appropriation in the statutory sense, let alone an appropriation to public open space purposes. However, the minutes are interesting in that they show that there was within the council a notion of "appropriation" to the Planning and Traffic Committee with a view to "re-appropriation" to the committee seen as ultimately having "ownership" of the land.

1970 Proposals to use Filwood Park Playing Fields as public open space

[104] The last of the above minutes also mentions that the Filwood and District Youth Council had written to the council proposing that the Filwood Park school playing fields should become a public open space. This seems to be the first mention of such a proposal. However, the proposal seems to have rapidly caught the local imagination.

- The minutes of the Education Committee of 30th July 1970⁸⁶ mention a petition from local organisations and a petition from the children of Knowle for the provision of park and open space for Knowle West.
- The minutes of the Buildings and Equipment Committee of 15th September 1970⁸⁷ refer to the petitions and say that the committee would agree to part of the Filwood Park playing field being appropriated for public park purposes on condition that the pavilion

⁸⁴ B/4/G/1

⁸⁵ B/4/A/48, B/4/C/1, B/4/A/59, B/4/A/71 & B/4/E/1

⁸⁶ B/4/E/5 item 236

⁸⁷ B/4/E/8 item 304

was relocated and that there would be no appropriation until the new area taken into the playing fields was available for use.

- Item 20 of the report of the City Engineer and Planning Officer to the Planning and Traffic Committee on 16th September 1970⁸⁸ referred to the petitions, said that a new park was needed in the district and could feasibly be created out of the school playing fields, although a pavilion would need to be re-sited. The public park proposal was part of a larger scheme prepared by the officer for adjusting the land use allocation north of the Ring Road. The scheme was shown in detail on Plan F75/50/1 (which is no longer available). The officer recommended that the proposals should be referred to the Public Works, Education and Housing Committees for their observations. The committee approved and adopted the recommendation⁸⁹.
- Item 10 of the report of the City Engineer and Planning Officer to the Public Works Committee on 29th September 1970⁹⁰ was to similar effect. It said that it would be necessary, in order to implement the park proposal, to carry out some works on the land to be added to the school playing fields at an estimated cost of £15,000 at the cost of the Public Works Committee. Development of the public park should begin in 1972/73. The officer recommended that the committee should accept the proposals indicated on Plan F75/50/1 and that *“the City Estates Surveyor and Valuer be authorised to make the necessary appropriations subject to the agreement of the Committees involved”*. The Committee approved and adopted the recommendations⁹¹.
- At a meeting of the Buildings and Equipment Committee on 17th November 1970⁹² it was resolved to inform the Planning and Traffic Committee that the Buildings and Equipment Committee would agree to the appropriation of an area of 12 acres of the existing Filwood Park Playing Fields for use as public open space on the conditions specified at the meeting of 15th September 1970.

It therefore appears that, during 1970, there was general acceptance by the various committees of a proposal by local organisations to use part of the Filwood Park Playing Fields to create a new public park as part of a larger scheme to adjust land uses in the area north of the Ring Road. There was no suggestion that the use as a park was to be only a temporary use pending some different future use although it was envisaged that it would be necessary to relocate the existing pavilion and carry out works on new land to be incorporated into the school playing fields before the new park could be laid out. It was envisaged that the implementation of the scheme would involve “appropriations” although the terminology varied, most of the minutes referring to

⁸⁸ B/4/A/82 NB a critical page of this report which was attached to the objection statement has been omitted from the inquiry bundle

⁸⁹ B/4/A/80 item 71

⁹⁰ B/4/C/14

⁹¹ B/4/C/10 item 53

⁹² B/4/E/16 item 522

appropriation as between committees but one referring to an appropriation for use as a public open space.

Progress in 1971

[105] The scheme seems to have progressed slowly in 1971:

- At the Buildings and Equipment Committee meeting on 21st September 1971⁹³ it was said that at the meeting of 17th November 1970, the committee had agreed in principle proposals for about 12 acres of the existing Filwood Park Playing Field to be transferred to the Public Works Committee to provide a public park. The implementation of the proposals required appropriations between the Planning and Traffic, Housing and Education Committees. The first phase of appropriations between committees was agreed although these seem to have been small pieces of land and not the site of the proposed park. It is curious that, although the 12 acres was to be “transferred” to the Public Works Committee, it does not seem to have been envisaged that that committee would be involved in any “appropriation” as between committees.
- At a meeting of the Public Works Committee on 28th September 1971, the committee approved⁹⁴ a recommendation of the City Engineer and Planning Officer⁹⁵ that the Finance and General Purpose Committee be asked to authorise the expenditure of £8,000 on the construction of the new playing fields at Filwood Park (i.e. the extension to the existing playing fields to enable the creation of the new park)

1972 Committees

[106] The applicant produced what appear to be extracts⁹⁶ from the minutes of a full council meeting of 16th May 1972 dealing with the delegation of functions to committees. It appears from the extract that the Planning and Traffic Committee was still to deal with planning and redevelopment areas and that the Public Works Committee was still to deal with parks and open spaces. The extract contains no delegation of the power of making statutory appropriations.

Progress in 1972

[107] Progress on the creation of the new park can be traced through the minutes of various committees in 1972:

- It appears from the report of the Acting City Engineer and Surveyor to the Public Works Committee meeting on 25th July 1972⁹⁷ that £8,000 had already been spent on the

⁹³ B/4/E/21 item BE77

⁹⁴ B/4/C/21 item 54

⁹⁵ B/4/C/25 item 20

⁹⁶ R/137h

⁹⁷ B/4/C/34 item 4

development of new playing fields to compensate for the area to be displaced by the new park. The officer proposed to spend £3,000 on tree planting on the park site during the winter of 1972/73 and that expenditure of £24,000 on the full laying out of the park should be deferred until 1974/75. The committee accepted the recommendation for expenditure of £3,000 but decided that the proposals for further expenditure should be subject to further consideration⁹⁸.

- In September 1972, the Public Works Committee reported to the full council recommending that the council should approve the expenditure of £3,000⁹⁹.
- The minutes of the Buildings and Equipment Committee of 20th September 1972¹⁰⁰ contains an interesting account of what was said by the Chief Education Officer to the committee: *“The Chief Education Officer reminded the committee of their agreement of 17th November 1970 that part of the playing field (about 12 acres) should be appropriated by the Planning and Traffic and Public Works Committees for the purpose of providing a public park, on the understanding that the appropriation would not be effected until the new area taken into the school playing field was available for use”*. Such an agreement does not appear in the minutes of 17th November 1970¹⁰¹. What the Chief Education Officer seems to have envisaged was that the site of the park should be transferred into the joint “ownership” of the Planning and Traffic Committee and Public Works Committee, possibly on the footing that the former committee would deal with the construction of the new park and the latter with its use as a park.
- A report of the Acting City Engineer and Surveyor to the Public Works Committee meeting of 26th September 1972¹⁰² mentions that works were currently in progress on the construction of replacement playing fields for those to be taken by the park. Item 34 of that report contains a rather interesting discussion of a different area of land on the site of the former Whitchurch Airport. The report says that the land was zoned for public open space and, as such, administered by the Public Works Committee. However, the land was “owned” by the former Planning and Public Works Committee and although only part of it had been specifically appropriated it was all taken to be under the control of the Planning and Traffic Committee. The item is interesting in showing that officers of the council did sometimes distinguish between “ownership” of land by one committee and its administration by another committee.

⁹⁸ B/4/C/28 item 29

⁹⁹ B/4/C/36 item VII

¹⁰⁰ B/4/E/24 item BE333

¹⁰¹ B/4/C/16 item 522

¹⁰² B/4/C/44 at page 47

- A report of the Acting City Engineer and Surveyor to the Public Works Committee meeting of 24th October 1972¹⁰³ stated that the new playing fields would not be ready until April 1974. . It seems that the works on the new playing field were more expensive than expected and he recommended a further contribution of £3,000. The report also said that the Public Works Committee would need to spend £18,000 on the new pavilion since it was a condition of the appropriation of the Filwood Park Playing Field that a contribution towards the cost of re-building the changing accommodation on a new site would be made by the Public Works Committee
- A report¹⁰⁴ of the Public Works Committee to the full council meeting on 12th December 1972 recommended approval of the expenditure of £3,000.

It appears, therefore, that progress in 1972 was largely limited to work on the replacement playing fields which were proposed to compensate for the land to be used for a new park. Work on the park site itself was confined to some tree planting in the winter of 1972/73

1972 Local Plan

[108] On 29th November 1972 BCC made a 5th Amendment to the Town Map¹⁰⁵. This showed the site of Filwood Park as an area held for public open space. However, it seems to me that this was purely a zoning for planning purposes since the land was proposed to be used as a public park and it throws no light on the statutory powers under which the land was currently held.

Progress until November 1973

[109] The history of the development of the park in 1973 can again be traced through the council minutes:

- In a report¹⁰⁶ to the Public Works Committee meeting on 26th June 1973, the Acting City Engineer put forward and recommended a scheme for laying out the new park at an estimated cost of £24,000. The committee approved and adopted the recommendation¹⁰⁷.
- The Public Works Committee then reported¹⁰⁸ to the Finance and General Purposes Committee recommending approval of the scheme.
- The Finance and General Purposes Committee at its meeting on 3rd September 1973¹⁰⁹ considered the report of the Public Works Committee and recommended to the full

¹⁰³ B/4/C/58 item 16

¹⁰⁴ B/4/C/61 item III

¹⁰⁵ B/G/4/20

¹⁰⁶ B/4/C/79 item 30

¹⁰⁷ B/4/C/77 item 35

¹⁰⁸ B/4/F/10

¹⁰⁹ B/4/F/1 item 28

council that the expenditure on the layout of Filwood Park be met from the allocation for locally determined schemes.

- The Public Works Committee reported¹¹⁰ to the full council meeting on 11th September 1973 recommending that the scheme be authorised
- On 11th September 1973 the full council¹¹¹ approved and adopted the scheme.
- On 23rd October 1973, the Acting City Engineer reported¹¹² to the Public Works Committee that the Chief Education Officer had indicated that the park site would be released by the Education Committee in November 1973 but the pavilion would have to be used till February 1974 when the new pavilion would be completed. The report was for information purposes only.

1973 revision of committee structure

[110] On local government reorganisation under the LGA 1972, Bristol became a District Council although it was soon afterwards granted borough and city status. The opportunity was taken to reorganise the committee structure.

[111] At a meeting of the full council on 1st November 1973¹¹³, the full council approved and adopted the report of an ad hoc Selection Committee recommending the appointment and terms of reference of committees. It was intended that the terms of reference should be set out in general terms and amplified at the annual council meeting in April 1974. However, it appears that the new committee structure and terms of reference were intended to have immediate effect. The new committee structure included the following committees:

- A Finance and Land Committee which was to be responsible for the appropriation of any land or premises vested in the council from one statutory purpose to another, subject to any necessary ministerial consents
- A Planning and Traffic Committee which was to be responsible for planning and development control
- An Open Spaces and Amenities Committee which was to be responsible for the functions of the council relating to parks and open spaces.

The responsibility for the redevelopment of the council estate was no longer specifically allocated to any committee

¹¹⁰ B/4/C/85 item II

¹¹¹ B/4/A/88

¹¹² B/4/C/94 item 11

¹¹³ B/4/B/79

[112] This new committee structure was adopted with immaterial amendments at the full council meeting on 9th April 1974¹¹⁴. There does not appear to have been any time limit put on the committee structure and so presumably it was intended that it should continue unless and until altered by further council resolution.

[113] It therefore appears that, as from 1st November 1973, statutory appropriation had to be carried out either under delegated powers by the Finance and Land Committee or by the full council.

Progress after 1973 committee reorganisation

[114] The first meeting of the Open Spaces and Amenities Committee after the reorganisation of the committee structure was on 20th November 1973¹¹⁵. The Committee “noted” a capital expenditure programme submitted by the Acting City engineer under which it was proposed that there should be capital expenditure on Filwood Park Phase 2 of £42,000, to be spent as to ££10,000 in 1973/74, £30,000 in 1975/75 and £2,000 in 1975/76. The expenditure was said to have been approved by the council by its November 1973 meeting. In fact, the full council appears to have met twice in November 1973 but I cannot trace the approval of the capital expenditure scheme either in the minutes of the full council of 1st November 1973¹¹⁶ or in the minutes of the full council on 13th November 1973¹¹⁷.

1974 appropriation

[115] I now come to the critical period in the documentation. The objectors submit that, in 1974, there was an express appropriation of Filwood Park to public park purposes so that it was thereafter held for the purposes of PHA 1875 s. 164 or OSA 1906 s. 10. I need to examine the contemporaneous documentation in detail to see if that submission is made out.

[116] The City Clerk, City Treasurer and City Valuer made a joint report to the Finance and Land Committee meeting on 17th January 1974. This arose from the need to divide the assets of the corporation of Bristol between Avon County Council and Bristol District Council pursuant to the LGA 1972. In substance, the officers recommended that where land was held for purposes which were not clearly district or county purposes, they should, where possible, be appropriated to district purposes so as to be retained by Bristol District Council. The committee accepted the report but did not effect any specific appropriations¹¹⁸.

[117] The City Estates Surveyor and Valuer reported to the Planning and Traffic Committee meeting on 6th March 1974¹¹⁹. The report stated that the committee had agreed at their meeting

¹¹⁴ B/4/B/121

¹¹⁵ B/4/D/1

¹¹⁶ B/4/B/79

¹¹⁷ B/4/B/95

¹¹⁸ B/4/F/13

¹¹⁹ B/4/A/95 item 6

on 18th November 1970 to certain re-zonings in the Filwood Park area, which involved the surrender by the Education Committee of part of their playing fields in order to provide for a public park and for the transfer to the Education Committee, by way of replacement, of land held by the Planning and Traffic Committee between the playing fields and the ring road. The transfers were conditional upon the laying out of the new areas and the transfer of the existing pavilions, which had been resolved between the Education and Public Works Committee. The report continued with the following words:

“Your City Valuer therefore suggests that the land verged brown on the plan exhibited (25.6 acres approx.) be appropriated for Education purposes in exchange for the land verged green (11 acres) to be appropriated for general planning and public park purposes; the Education Committee making an equality payment of £60,000.”

The report recommended that the committee approve. The committee resolved to approve and adopt this item of the report subject to the area of land being changed from 25.6 acres to 24.7 acres. It is not easy to understand exactly what the report envisaged, as (a) it did not clearly distinguish between (i) zoning for planning purposes, (ii) statutory appropriation and (iii) the transfer of the “ownership” of land between committees and (b) it is hard to understand how land could be appropriated both for general planning purposes and for open spaces purposes.

[118] Although no copy of the relevant minutes was produced to the public inquiry, it appears from the terrier card V20/15¹²⁰ that there was also a resolution of the Education Committee on 20th March 1974 purporting to effect or approve an appropriation of the 11 acres “by the Planning and Traffic Committee from the Education Committee”. The terrier card does not suggest that there was any other committee resolution or resolution of the full council relating to the appropriation.

[119] The objectors also produced a manuscript schedule¹²¹ from the council records which appears to be a contemporaneous record of “land appropriated”. There is an item for Filwood Park under the heading “land appropriated”. It records that 11 acres were appropriated to the Planning and Traffic Committee (committee date 6th March 1974) from the Education Committee (committee date 20th March 1974). There are columns for “Council” and “Mins Con” (i.e. ministerial consent) but both columns have a dash sign indicating that there was nothing to record.

[120] It does seem to me to be clear that neither the Planning and Traffic Committee nor the Education Committee had authority (individually or collectively) to effect a statutory appropriation of the Filwood Park site since that power was delegated only to the Finance and Land Committee. There is no evidence that there was (a) any resolution by the Finance and Land Committee effecting an appropriation of the Filwood Park site to public open space purposes or

¹²⁰ B/4/A/102

¹²¹ B/4/A/103

(b) any joint report to the full council by the Planning and Traffic and Education Committees recommending approval of any such appropriation as envisaged by Mr. Cheesley or (c) any resolution of the full council effecting or approving such an appropriation. It was not suggested by the objectors that there were any other documents effecting an express appropriation. The inevitable conclusion is that there was never any express statutory appropriation of Filwood Park to public open space purposes.

Implied appropriation

[121] I now turn to consider the evidence on implied appropriation. I was shown a selection of minutes of committees, minutes of the full council and other documents dating after the purported appropriation effected by the Planning and Traffic Committee and Education Committee, but (subject to one item in a report of the Parks Manager dated 4th June 1985 which I discuss in more detail below) I was unable to identify any resolution of the full council or of a committee with delegated power to make a statutory appropriation which would only be lawful if it contained an implied appropriation of Filwood Park to public open space purposes. The most that one can get out of these minutes and other documents was (a) that Filwood Park was being managed, as one might expect, by the committee which dealt with the management of parks and open spaces, (b) the council expended money on the maintenance and improvement of the park and (c) there was no suggestion that Filwood Park was being used as a park for a temporary period pending some proposed future use:

- The minutes of the Buildings and Equipment Committee meeting of 20th March 1974¹²² referred to 11 acres of Filwood Park Playing Field having been transferred to the Planning and Traffic Committee in exchange for 24.7 acres of land which had been transferred to the Education Committee with an equality payment of £16,000.
- The minutes of the Finance and Land Committee meeting on 25th July 1974¹²³ did not deal with Filwood Park
- The minutes of the Open Spaces and Amenities Committee meeting of 3rd September 1974¹²⁴ approved the budget aspirations 1975/76 set out in a report of the City Engineer subject to certain amendments. One of the budget aspirations was the expenditure of £10,000 on Filwood Park Phase II.
- The City Engineer's report to the Open Spaces and Amenities Committee meeting on 6th May 1975¹²⁵ recommended a programme of improvements to children's playgrounds,

¹²² B/4/E/40 item BE759

¹²³ B/4/F/22

¹²⁴ B/4/D/8

¹²⁵ B/4/D/18 item 3

including a new climbing frame at Filwood Park. I have an extract from the minutes of the committee meeting¹²⁶ in which the recommendation was approved and adopted.

- The City Engineer's report to the Open Spaces and Amenities Committee meeting of 4th November 1975¹²⁷ recommended that the disused pavilion on the Filwood Park site should be partly demolished and partly boarded up as it had suffered from vandalism. The committee approved and adopted the recommendation¹²⁸.
- On 19th November 1975 the Open Spaces and Amenities Committee visited Filwood Park and decided (a) that the pavilion was so heavily vandalised that it should be demolished and (b) that the condition of the children's playground should be kept under review.
- The City Engineer's report to the Open Spaces and Amenities Committee meeting of 6th April 1976¹²⁹ recommended new swings at Filwood Park and the recommendation was approved by the committee¹³⁰ although concern was expressed about their siting in view of the history of vandalism.
- The City Engineer's report to the Open Spaces and Amenities Committee meeting of 6th July 1976¹³¹ recommended an application to the Sports Council for grant aid to construct a hard surface sports pitch at Filwood Park which he described as "*Public Open Space controlled by the Open Spaces and Amenities Committee*". It appears from the report that the only works effected at Filwood Park had been tree planting and the construction of an adventure playground. The committee approved the recommendation¹³².
- The City Engineer's report to the Open Spaces and Amenities Committee meeting of 7th December 1976¹³³ contained a projects budget including Filwood Park Phase II: the budget was expenditure of £65,000 spread over the years 1978/79, 1979/80 and later. The committee did not specifically mention Filwood Park but requested a further report on the budget¹³⁴.
- The City Engineer's report to the Open Spaces and Amenities Committee meeting of 5th April 1977¹³⁵ recommended acceptance of an offer of £6,000 grant aid from the Sports Council towards the construction of an all weather pitch at Filwood Park. The committee

126 B/4/D/15
127 B/4/D/24 item 12
128 B/4/D/23
129 B/4/D/36 item 3
130 B/4/D/34
131 B/4/D/41
132 B/4/D/40
133 B/4/D/49 item 1
134 B/4/D/43 item 57
135 B/4/D/55 item 8

approved and adopted the recommendation¹³⁶. No such pitch seems to have been constructed.

- The minutes of a meeting of the Open Spaces and Amenities Committee on 5th July 1977¹³⁷ records that a member expressed concern about damage caused by children to Filwood Park.
- The minutes of a meeting of the Open Spaces and Amenities Committee on 6th September 1977¹³⁸ noted a report from the Parks Manager to the effect that the adventure playground was to be cleared and a hard surfaces play area laid down.
- The minutes of a meeting of the Public Works Committee on 24th January 1978¹³⁹ were produced to the public inquiry but I could not find anything in them relating to Filwood Park.
- On 1st May 1979, the Open Spaces and Amenities Committee approved the recommendation of the Parks Manager that a pitch on Filwood Park should be made available to the Filwood Catholic Men's Club on Sundays¹⁴⁰.
- A similar recommendation was approved by a meeting of the same committee on 5th May 1981¹⁴¹
- The report of the Parks Manager to the Open Spaces and Amenities Committee meeting of 4th June 1985¹⁴² said that Filwood Park, which was formerly part of the site of Whitchurch Airport and subsequently part of school playing fields, was acquired for a park development in 1972. He said that, at present, it was a bleak and windswept area of open land with a football pitch and that it required laying out as a park. He envisaged that the new park would include the existing park, but would be extended westwards to incorporate land surplus to school playing field requirements. He recommended expenditure of £20,000 from the committee's capital budget to develop the park. He said that the Planning and Traffic Committee was also being recommended to contribute a further £20,000 from its budget for the environmental improvement programme. The report mentioned that the allocation of £20,000 within the Open Spaces and Amenities Committee Capital Programme 1985/86 had been approved by the council at their meeting on 14th May 1985. I do not have a copy of the minutes of the full council meeting of 14th May 1985. but I can see that the full council approval could arguably

136 B/4/D/54

137 B/4/A/97 & B/4/D/ 57 item 36

138 B/4/A/99 & B/4/D/59 item 46(iii)

139 B/4/C/96

140 B/4/D/61

141 B/4/D/66 item 359

142 B/4/D/73 item 3

constitute an implied appropriation by the full council of Filwood Park to public open space purposes. The committee approved the Park Manager's proposal¹⁴³.

- The report of the Parks Manager to the Open Spaces and Amenities Committee meeting on 5th November 1985¹⁴⁴ outlined the proposals for Phase I of Filwood Park, involving fencing at Creswicke Road (although apparently not all round the park), mounding and tree planting. The committee approved the proposals subject to consultation¹⁴⁵.
- The report of the Parks Manager to the Open Spaces and Amenities Committee meeting on 3rd December 1985¹⁴⁶ contained a schedule of capital programme aspirations including expenditure of £50,000 on Filwood Park Phase II. The committee identified the Filwood Park project as a capital aspiration for the 1986/87 capital budget¹⁴⁷.
- At a meeting of the full council on 20th May 1986¹⁴⁸, a report of the Resources and Co-ordination Committee recommending the appointment and terms of reference of committees for the ensuing year was approved. The Land and Administration Committee was delegated the power of statutory appropriation. The Open Spaces and Amenities Committee was delegated powers over parks and open spaces. The Planning and Traffic Committee was delegated powers over planning.
- According to Mr. Cheesley's schedule¹⁴⁹ the Leisure Services Committee took over the functions of dealing with parks and open spaces in 1986 although I do not have any minutes of a council meeting effecting that alteration.
- At a meeting of the Leisure Services Committee on 10th July 1986¹⁵⁰ the committee approved expenditure of £50,000 on Filwood Park Phase II.
- At a meeting of the Policy and Resources Committee on 31st July 1986¹⁵¹ the committee approved expenditure of £50,000 by the Parks Department on Filwood Park Phase II
- At a meeting of the full council on 19th May 1987¹⁵² the council approved a report of the Policy and Resources Committee dealing with the appointment and terms of reference of committees. The Land and General Resources Committee was to deal with statutory appropriation, the Leisure Services Committee with parks and open spaces and the Planning and Traffic Committee with planning.

143 B/4/D/70 item 45
144 B/4/D/79 item 5
145 B/4/D/77 item 222
146 B/4/D/85
147 B/4/D/82
148 B/4/B/149
149 B/4/G/1
150 B/4/D/87 item 73
151 B/4/G/35 item 67
152 B/4/B/189

- At a meeting of the Leisure Services Committee on 12th December 1991¹⁵³ the committee approved a joint report of the Parks Manager and Recreation Manager proposing improvements to Filwood Park.
- The 1996 Local Plan¹⁵⁴ zoned Filwood Park as open space/playing fields & recreation grounds and as a wildlife network site. However, I do not see that this has anything to do with statutory appropriation.
- An aerial photograph of 1999¹⁵⁵ showed Filwood Park laid out much as it is today. The markings of a football pitch can be seen in the park.
- At the annual meeting of the full council on 9th May 2000¹⁵⁶, the council adopted a new executive structure. The Director of Central Support Services was authorised to deal with property services (corporate strategy and commercial estate). The Director of Environment, Transport and Leisure was authorised to deal with planning and parks. There was no specific delegation of the power to make statutory appropriations (so far as appears from the extract from the minutes that I have)
- An aerial photograph of 2004¹⁵⁷ shows much the same scene as the aerial photograph of 1999
- At a cabinet meeting on 27th July 2004¹⁵⁸ it was decided to split the Environment, Transport and Leisure Department into two parts, a Strategic Planning and Transportation Department and a Culture and Leisure Services Department. I infer that the first dealt with planning and the second with parks and open spaces
- At a meeting of the full council on 17th May 2005¹⁵⁹ adopted a scheme of delegation under which property services (corporate strategy and commercial estate) was delegated to the Department of Central Support Services, parks to the Department of Cultural and Leisure Services and planning to the Department of Planning Transport and Sustainable Development. There was no express delegation of the power of statutory appropriation.

[122] It appears to me that the only evidence of any resolution which might amount to an implied appropriation to public open space purposes is the resolution of the full council on 14th May 1985 referred to in the report of the Parks Manager of 4th June 1985.

Sale of Filwood Park

153 B/4/D/90 item 193
 154 B/4/G/22
 155 B/4/G/14
 156 B/4/B/226
 157 B/4/G/15
 158 B/4/B/276
 159 B/4/B/281

[123] The first documentary mention of the sale of Filwood Park is in a report of the Director of Central Support Services¹⁶⁰ to the cabinet meeting of 21st February 2008. This says it was proposed to sell the park to English Partnerships with completion in March 2008.

[124] The park was transferred to the Urban Regeneration Agency on 31st March 2008 and the Agency was registered as proprietors on 29th April 2008¹⁶¹.

[125] A Project Initiation Document¹⁶² relating to the Filwood Broadway Corridor project (undated but dating from before September 2008 on internal evidence) referred to the risk of a successful TVG application as being of medium impact and probability.

Other documents

[126] At the opening of the public inquiry, Mr. Bennett submitted forcefully that the BCC had not disclosed all relevant documents and suggested that non-disclosure was either negligent or deliberate. He repeated this submission on several occasions during the public inquiry. Mrs. White also complained that there had not been full disclosure. I do not doubt that this is the genuinely held view of the applicant and her supporters. Mr. Blohm, on the other hand, submitted that BCC had disclosed all relevant documents that were not privileged or matters of public record.

[127] It was clear that the applicant and her supporters take the view that the sale of Filwood Park was rushed through by BCC without proper consultation. However, that is not an issue on which I have to report and I express no view on it.

[128] Further, the applicant complained that access to council minutes was difficult. The minutes are kept in the archives in bound volumes. Only one volume can be studied at a time. The archives do not allow conventional photocopying but only digital photography. Although I can sympathise with the difficulties, it seems to me that the fact remains that the minutes are available to the public. The applicant cannot legitimately complain that BCC has not disclosed documents that are publicly available. In effect the applicant is complaining that the objectors did not do the applicant's research for her.

[129] The nub of the applicant's complaint arose from an email dated 3rd February 2011 from Mr. Bennett in which he sought disclosure of three classes of document:

- (a) All further evidence of transfer and/or appropriation of the land leading up to its eventual sale.
- (b) All documents concerning the plans for building houses on the land

¹⁶⁰ R/137o

¹⁶¹ B/4/A/1

¹⁶² R137hh

(c) The documents created by the sale of the land to English Partnerships

In my directions, I pointed out that as a non statutory inspector I have no power to order disclosure of documents. However, I requested the objectors to consider the request and disclose any document falling within those three classes which they considered relevant to the issues before the public inquiry. As I mentioned above, Mr. Blohm told me that the objectors had disclosed all documents that they considered relevant to the issues before the public inquiry, other than privileged documents and publicly available documents. I can see no reason not to accept what Mr. Blohm told me. Indeed, it is hard to see what further documents there might be to help the applicant's case. I specifically asked Mrs. White and Mr. Bennett whether they could identify the missing documents or class of documents that they had in mind, but neither were really able to do so.

[130] Looking at the three classes of document requested by Mr. Bennett:

(a) If "transfer" means transfer of the legal title, there was no transfer until the 2008 transfer to the Urban Regeneration Agency. If it means transfer of "ownership" between committees, that must be apparent from the minutes. On the view that I take, appropriation involves some resolution of the full council or a committee or department and these are all matters of public record.

(b) I cannot see how plans for building houses on the land can affect the question whether the land was held by BCC under PHA 1875 s. 164 or OSA 1906 s. 10

(c) I cannot see how the land sale documents on the 2008 sale can affect that question. It appears that BCC took advice on the risk of a successful TVG application but that was privileged legal advice and the taking of such advice does not imply the existence of any relevant document that was not disclosed to the public inquiry.

[131] I conclude that there is no evidence that the objectors have failed to disclose any relevant document which they properly ought to have disclosed.

Findings of fact

[132] Having considered the evidence of the witnesses and the documentary evidence on the "by right/as of right" issue I find the following facts:

- The only purported express appropriations of Filwood Park was by the Planning and Traffic Committee on 6th March 1974 "for general planning and public park purposes" and (according to secondary evidence) by the Education Committee on 20th March 1974 but neither committee had any delegated power to make statutory appropriations.

- Filwood Park was at all material times from 1974 to 2008 regarded as “owned” by the Planning and Traffic Committee and its various successors including eventually the Department of Central Support Services.
- From the mid 1970s onwards, Filwood Park was physically a park open to the public for recreation.
- From the mid 1970s onwards, the park was maintained and improved as a public park primarily by the Public Works Committee and its various successors as the committee or department with responsibility for parks and open spaces.
- Use of Filwood Park as a public park was never envisaged as a temporary use of the land pending development for some other purpose. The first evidence of any intention to develop it was in 2008
- Since sale in 2008, Filwood Park has managed the park under a management agreement with the HCA and is subject to a put option enabling the HCA to sell the park back to BCC if it cannot be developed.

The arguments of the applicant

[133] As I understood it, the applicant ran two alternative arguments.

[134] The first argument was essentially the argument put forward by Mrs. White, i.e.

- In 1974, Filwood Park was “appropriated” by the Planning and Traffic Committee
- There was no further “appropriation” of Filwood Park before it was sold in 2008
- Filwood Park was therefore held by BCC at all material times for development purposes and not open space purposes, because the Planning and Traffic Committee and its successors were responsible for development and not parks
- BCC cannot therefore have held Filwood Park on the statutory trusts of PHA 1875 s. 164 or OSA 1906 s. 10 after 1974.

It seems to me that this argument is flawed because it confuses statutory appropriation with “ownership” of land by committees. Although it is true that Filwood Park was treated at all material times from 1974 to 2008 as being in the “ownership” of the Planning and Traffic Committee and its successors, that is not the same as statutory appropriation. It is an understandable confusion because officers of BCC repeatedly referred to the “appropriation” of land by one committee from another.

[135] The alternative argument, developed in Mr. Bennett’s closing submissions, was that the land was held in 1974 for educational purposes (as the objectors themselves accepted) and that it

was never validly appropriated to any other purpose. It seems to me that there is much more force in that submission. It has the factual basis that there was no valid statutory appropriation in 1974 because the committees which purported to appropriate had no authority to do so.

The arguments of the objectors

[136] Initially, the primary argument of the objectors was that the land had been expressly appropriated to public park use in 1974. However, this argument had faded by the time of closing submissions. It seems to me that this is an impossible argument because the committees which purported expressly to appropriate the land in 1974 had no authority to do so and there is no evidence of any resolution of the full council approving or effecting an express appropriation. This fortunately makes it unnecessary to grapple with the meaning and effect of an appropriation “for general planning and public park purposes”.

[137] The argument placed by Mr. Blohm at the forefront of his closing submissions was that there was an implied appropriation to the purposes of a public park. This argument was presented in two ways, a wider and a narrower submission.

[138] The wider submission was that, since the mid 1970s, BCC has in fact run Filwood Park as a public park. It would be absurd to consider that the public using the park were trespassers. BCC must have impliedly have appropriated the land to public park purposes. I cannot accept this submission:

- Effectively it is a repetition of the Carnwath submission in *Oxy-Electric* that appropriation simply means that the council uses the land for a new purpose. That would deprive the concept of statutory appropriation of any meaning since a council could use land for any purpose it chose without bothering with any express appropriation.
- It also appears to me that it is inconsistent with the decision of the House of Lords in *Beresford* since, in that case, although the council undoubtedly laid out and maintained the sports arena as a public recreational facility, the House of Lords rejected the view that there had been any implied appropriation
- Such an argument also seems to me to be inconsistent with the decision In *Third Greytown Properties Ltd. v Peterborough Corporation*¹⁶³ where it was held that land held for the purposes of the OSA 1906 could be appropriated under s. 121(1) of the Town and Country Planning Act 1971 to planning purposes notwithstanding that the land had already been developed. Land remained held for the purpose for which it was acquired unless and until it was appropriated to a new purpose. If the objectors’ argument were right, there would have been an implied appropriation to planning purposes in the *Third Greytown* case.

¹⁶³ [1973] 3 All ER 731

[139] The narrower submission was that there was an implied appropriation to public park purposes when the full council resolved to authorise the expenditure of council money on the maintenance and improvement of Filwood Park in the knowledge that it was being run as a public park. I accept this submission as a matter of principle. The council would be acting outside its statutory powers in authorising expenditure on Filwood Park as a public park unless it impliedly appropriated the land to public park purposes. The full council had power to make such a statutory appropriation. However, it seems to me that the difficulty faced by the objectors in making good this submission is that they have not in fact produced to the public inquiry any minutes of the full council, dating from after the laying out of the park, in which the full council has authorised expenditure on the maintenance or improvement of Filwood Park as a public park. The nearest that can be found in the papers is the reference to the full council meeting of 14th May 1985 in the Report of the Parks Manager to the Open Spaces and Amenities Committee meeting on 4th June 1985¹⁶⁴. This report may or may not be accurate. Nor is it clear from the report whether the full council was aware that the capital programme which it approved included money specifically earmarked for the development of Filwood Park as a public park. The meeting of 14th May 1985 is mentioned in a written Chronology produced by Mr. Blohm as part of his submissions although, according to my notes, he did not expressly discuss it in his closing submissions. I do not consider that it would be safe to infer a statutory appropriation from a resolution of the full council that I have not seen, of which I have only secondary evidence and which, being a matter of public record, clearly could have been produced to the public inquiry. I did not appreciate the importance of the meeting of 14th May 1985 until I re-read all the papers in order to prepare this report. Understandably, the point was not picked up by Mr. Bennett in his closing submissions.

[140] This raises the question of how I am to deal with a point which seems to me to be good in law but inadequately supported by the evidence and barely argued at the public inquiry. I can see that the applicant might well argue with some justification that BCC has already had three opportunities to produce satisfactory evidence on the “as of right” point and that there must be some finality. The applicants might well argue that, if the objectors have not properly made out their case on the “as of right” issue at the public inquiry, that case must be rejected. This argument would, I think, have almost irresistible force if I were the decision-maker. However, the fact remains that I am not the decision-maker but have to submit a report for the consideration of the CRA in due course. If I say in my report that the objectors have raised a point which seems to me to be good in law but which is not supported by satisfactory evidence, it will be inevitable that the objectors will carry out research into the evidential issue before the final decision is made by the CRA. At the very least, the objectors will produce the minutes of the full council meeting of 14th May 1985. The CRA will be obliged to reconsider my recommendation in the light of that new evidence. In these circumstances, it appears to me that

¹⁶⁴

B/4/D/73 item 3

the only practical course is for me to give the objectors time to produce further evidence on this point. I propose to give directions accordingly.

[141] The final argument put forward by Mr. Blohm was the temporary use argument based upon the *Teddington* case. I have already expressed my view that the *Teddington* principle does not apply to appropriation as opposed to acquisition of land. However, it seems to me that, even if it did, the factual basis for the application of the *Teddington* principle has not been made out. There is no evidence that Filwood Park was ever appropriated to one statutory purpose but used temporarily for another. The evidence is that (a) the site was held either for housing, airport or educational purposes (probably the latter), (b) the site was never expressly appropriated to any other purposes and (c) that it was decided to use the land as a public park. There is no evidence that use as a public park was ever regarded as a temporary use until the site was sold in 2008.

[142] It seems to me that the objectors can succeed on the implied appropriation argument or not at all.

User “as of right” after 2008

[143] It has occurred to me that different considerations might apply after the park was sold in 2008, since when BCC has managed the park under a management agreement and without any proprietary interest in the park. Appropriation would no longer have been relevant. It might be arguable that BCC managed the park under the management powers conferred by PHA 1875 s. 164 and that it is implicit in s. 164 that the public have a right of access to land managed as a public park under statutory powers. However, the objectors did not take this point and, in any event, the applicant could get round it by relying on CA 2006 s. 15(3). I therefore do not consider the point further.

6. General conclusions and recommendation

[144] I therefore reach the following conclusions:

- First, a local authority ward is a “locality” for the purposes of CA 2006 s. 15.
- Second, the applicant has satisfactorily proved that a significant number of the inhabitants of the locality of Filwood Ward have indulged without force, secrecy or permission in LSP on Filwood Park for a period of at least 20 years and continued to do so at the time of the application.
- Third, if the park was appropriated to public park purposes for any part of the relevant 20 year period, user by local people for LSP would then be “by right” and not “as of right” for the purposes of CA 2006 s. 15.
- Fourth, there has been no express appropriation of Filwood Park to public park purposes.

- Fifth, the application of the *Teddington* principle (temporary use) is not made out on the law or the facts.
- Sixth, the fact that BCC has run Filwood Park as a public park for many years does not of itself amount to an implied appropriation of the park to public park purposes.
- Seventh, the objectors may well be right that there has been an implied appropriation to public park purposes by a resolution of the full council to approve council expenditure on the park as a public park but the evidence before the public inquiry is unsatisfactory to determine the matter one way or the other.
- Eighth, it is desirable that the evidence on implied appropriation should be more fully explored and considered and that I should therefore give directions to achieve that object.

[145] I recommend that the applicant should be permitted to amend her application to rely in the alternative on user by a significant number of the inhabitants of the neighbourhoods of Knowle, Knowle West, Lower Knowle, Nover's Park, Filwood Park and Inns Court, although I do not think that this alternative case is made out on the evidence.

[146] I direct as follows:

- The objectors shall by 4pm on Friday 9th September 2011 serve upon the applicant, the inspector and the CRA at their respective service addresses (a) copies of all minutes of the full council relied upon by the objectors as constituting, by the approval of expenditure on Filwood Park as a public park, an implied appropriation of Filwood Park by the full council to public park purposes and (b) (if so advised) any written commentary or submissions on the minutes
- The applicant shall by 4pm Friday 23rd September 2011 (if so advised) serve upon the lead objector, the inspector and the CRA at their respective service addresses written submissions on the further documents served by the objectors.
- I will prepare a further written report after 23rd September 2011.

[147] I recommend that the CRA defers further consideration of the application until after my further report.

Vivian Chapman QC
24th August 2011
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN

In the Matter
of an Application to Register
Filwood Park, Bristol
As a New Town Green

SECOND REPORT
of Mr. VIVIAN CHAPMAN Q.C.
19th November 2011

Bristol City Council,
Legal Services,
PO Box 2156, The Council House,
Bristol BS99 7PH
Ref. Anne Nugent

67463/VRC/11/91/wp/S4/Filwood Second Report v2

In the Matter
of an Application to Register
Filwood Park, Bristol
As a New Town Green

SECOND REPORT
of Mr. VIVIAN CHAPMAN Q.C.
19th November 2011

1. Introduction

[1] In my report dated 24th August 2011, I directed that the objectors should have a further opportunity to adduce documents and make submissions on the implied appropriation issue and that the applicant should be given an opportunity to make submissions on the further documents.

[2] There was some slippage on the times that I laid down in my directions:

- The objectors delivered 6 lever arch files of documents and a Further Statement of Case on 9th September 2011 and some further documents on 13th September 2011
- The applicant, after requesting and being granted two extensions of time, served written Further Submissions on 27th October 2011

[3] I propose:

- First, to review the new documentary evidence,
- Second, to consider the further legal arguments submitted by the objectors and by the applicant, and
- Third, to state my conclusions and recommendations.

2. The new documentary evidence

Open Spaces & Amenities Committee 3rd January 1984

[4] At a meeting of the Open Spaces and Amenities Committee held on 3rd January 1984, the committee was presented with a draft green paper on sport and recreation prepared by

officers at the previous request of the committee¹. The draft green paper drew a distinction between district parks and neighbourhood parks. The latter served a smaller built-up area and had fewer facilities. It referred to Filwood Park as an existing neighbourhood park of lower standard. It commented that there was an opportunity to use open space at Filwood as a new district park. Although it is not entirely clear from the draft green paper that this comment related to the existing Filwood Park it seems a reasonable inference that it did.

Open Spaces & Amenities Committee 4th September 1984

[5] At a meeting of the Open Spaces and Amenities Committee held on 4th September 1984, the committee received a draft joint report of the Parks Manager and the City Planning Officer entitled “Open Space in Bristol”². The report identified Filwood Park as a lower standard neighbourhood park which was a possible location for a district park. The report put forward proposed works to Filwood Park as aspirations for a 10 year programme of capital and revenue expenditure. The works were surface preparation, fencing, path construction and additional landscaping.

Open Spaces & Amenities Committee 2nd October 1984

[6] At a meeting of the Open Spaces and Amenities Committee held on 2nd October 1984, the committee received and noted a draft statement on sport and recreation in Bristol³. This was a revised version of the green paper mentioned above. It repeated the proposal that existing open space at Filwood should be used as an opportunity to create a new district park.

Joint meeting of Open Spaces & Amenity and Planning and Traffic Committees 9th November 1984

[7] At a joint meeting of the Open Spaces & Amenities Committee and the Planning and Traffic Committee held on 9th November 1984, the meeting received a slightly revised version of the report “Open Space in Bristol”⁴. The revisions did not specifically relate to Filwood Park and Filwood Park was not mentioned in the minutes.

Open Spaces & Amenities Committee 4th December 1984

[8] At a meeting of the Open Spaces & Amenities Committee held on 4th December 1984, the committee received a report of the Parks Manager summarising capital expenditure aspirations for parks and open spaces relating to proposals made in the report “Open Space in Bristol”. One item of expenditure was £50,000 on Filwood Park Phase I. The report comments:

¹ OA/1/11 (i.e. Objectors’ Additional Evidence Bundle volume 1 page 11)

² OA/1/65

³ OA/1/165

⁴ OA/1/212

“The land intended for the development of Filwood Park was acquired over ten years ago in response to a well supported petition. Since that time no monies have been made available to provide facilities for the Knowle West community. A proper neighbourhood park is seen as a priority in the draft report on “Open Space in Bristol”. Local consultation will be undertaken and the work would be phased over two years.”

I am not sure that this comment fairly represents the proposals in the report “Open Space in Bristol” which sees Filwood Park as an existing neighbourhood park which could be improved to become a district park. After considerable discussion, the committee accepted the estimates in the Park Manager’s report (and certain other reports) subject to confirmation about funding for maintenance of open space⁵.

Open Spaces & Amenities Committee 4th January 1985

[9] At the meeting of the Open Spaces and Amenities Committee held on 4th January 1985, the committee approved and adopted the wording of a preamble to the Civic Budget 1985/86 proposed in a joint report to the committee of the Recreation Manager, Parks Manager and Manager, Crematoria and Cemeteries⁶. This introduction was in general terms and did not deal specifically with Filwood Park.

Resources and Co-Ordination Committee 31st January 1985

[10] At a meeting of the Resources and Co-Ordination committee held on 31st January 1985, the committee considered a report of the City Treasurer into the Civic Budget 1985/86. In that report the capital aspirations for Open Spaces and Amenities - Parks Department included £50,000 in respect of Filwood Park.

Woodland Management Consultative Panel 8th March 1985

[11] At a meeting of the Woodland Management Consultative Panel (which appears to have been a panel consisting of some members of the Open Spaces and Amenities Committee and some outside members with relevant interests) held on 8th March 1985, the panel endorsed in general the proposals in the draft report “Open Space in Bristol”⁷.

Full Council 19th March 1985

[12] The full council met on 19th March 1985 to consider a report of the Resources and Co-Ordination Committee relating to the Civic Budget 1985/86⁸. The report is not easy to follow since only some of the appendices have been copied. However, as I read para. 8, the

⁵ Item 251.12/84

⁶ OA/2/2

⁷ OA/2/29

⁸ OA/2/40

aspirations for capital expenditure exceeded the capital available and the committee intended to consider priorities and report further. It was resolved that the estimates of the Open Spaces and Amenities Committee be approved and accepted, but the only estimates appearing in the report relate to a revenue budget. I do not think that the full council approved any capital expenditure aspirations.

Resources and Co-Ordination Committee 28th March 1985

[13] At a meeting of the Resources and Co-ordination Committee held on 28th March 1985⁹, the committee considered a report of the City Treasurer on the Capital Programme 1985/86. In the appendix to that report, under the heading “Open Spaces and Amenities: Parks Department”, there was a capital aspiration of £50,000 allocated to Filwood Park. The City Treasurer’s report pointed out that the total cost of funding the aspirations far exceeded the resources available. It appears that a list setting out the proposed capital programme for 1985/86 was circulated to the meeting. It seems that this list represented a selection and/or scaling down of the capital aspirations itemised in the City Treasurer’s report to meet the resources available. It was resolved that the circulated proposed capital programme for 1985/86 should be submitted to the City Council for approval at their next meeting. No copy of the list is attached to the minutes. However, a copy of the list appears as Appendix A to the Report of the Resources and Co-ordination Committee to the full council on 14th May 1985¹⁰. The list did not include any expenditure on Filwood Park. It therefore appears that none of the proposed capital expenditure on Filwood Park was to be put forward to the City Council.

Full Council 16th April 1985

[14] At a meeting of the full council on 16th April 1985¹¹, the council considered the report of the Resources and Co-ordination Committee. Part V of that report dealt with the Capital Programme 1985/86. Para. 11 of the report said that attached to the Council agenda was a copy of the City Treasurer’s report setting out the resources available for capital aspirations and a list of the capital aspirations submitted by the Programme Area Committees. Para. 12 of the report said that also attached as an appendix was a list of aspirations which had been provisionally approved by the Resources and Co-ordination Committee. This is clearly the list circulated at the meeting of the Resources and Co-ordination Committee. My copy of the minutes of the full council include yet another copy of the City Treasurer’s report but does not include a copy of the relevant list. However, as noted above, it appears that the list did not include expenditure on Filwood Park. Para. 12 of the report recommended the Council to approve the list of schemes as set out in the appendix. This must be the provisionally approved list which did not contain capital expenditure on Filwood Park.

⁹ OA/2/83

¹⁰ OA/2/115Va

¹¹ OA/2/98B

[15] The Council resolved to accept Part V of the report of the Resources and Co-ordination Committee and that the recommendations as set out therein be approved and adopted.

Resources and Co-ordination Committee 25th April 1985

[16] At a meeting of the Resources and Co-ordination Committee held on 25th April 1985¹² the committee considered a report of the City Treasurer on the Capital Programme 1985-86. The report contained a list of capital aspirations considered at the last meeting showing which aspirations had been approved. It appears from this list that none of the proposed £50,000 expenditure on Filwood Park had been approved. The report identified certain items where capital expenditure had been approved but which was now unlikely to be effected in 1985-86. These totalled £690,000 and the City Treasurer identified additional proposed schemes for capital expenditure in 1985-86 to utilise the resources no longer required. These included expenditure of £20,000 on Filwood Park. The committee resolved to submit the additional projects to the City Council for approval.

Full Council 14th May 1985

[17] At a meeting of the full council on 14th May 1985¹³ the council considered a report of the Resources and Co-ordination Committee. Part V of that report recommended additional proposed schemes for inclusion in the Capital Programme for 1985/86. Appendix B to the report listed the schemes which included £20,000 expenditure on Filwood Park. The full council resolved to accept Part V of the report and to approve and adopt the recommendations. It therefore appears that on 14th May 1985 the full council approved capital expenditure of £20,000 on Filwood Park to improve it as a park.

[18] It appears to me that this resolution must have effected an implied appropriation of Filwood Park to public park purposes under s. 164 of the PHA 1875 for the reasons explained in para. 139 of my earlier report. It follows that recreational use of Filwood Park after 1985 was not “as of right” but “by right”. This is fatal to the town green application.

Subsequent minutes

[19] I have been provided with a substantial quantity of subsequent minutes up to 1988. However, I do not think that it is necessary to review them in detail. All are consistent with continued use, maintenance and improvement of Filwood Park as a public park and none can be construed as containing an implied appropriation away from public park purposes.

3. The further legal arguments

¹² OA/2/100

¹³ OA/2/115A

[20] The objectors' further statement of case settled by Mr. Blohm Q.C. and dated 9th September 2011 essentially submitted that the approval by the full council of capital expenditure on the improvement of Filwood Park as a park must have involved an implied appropriation of Filwood Park to public open space use. That is an argument that I have already accepted in principle in para. 139 of my earlier report. Attached to the objectors' further statement of case is a detailed analysis of most of the minutes produced. I do not entirely agree with every part of that analysis but I have set out above my own analysis of what seem to me to be the relevant minutes. That analysis does, in my view, support the objectors' submissions.

[21] The applicant served further submissions settled by Mr. Bennett dated 27th October 2011. The submissions did not involve any detailed examination of the minutes, but rather made a number of general submissions, which I will now turn to consider. I will divide up my consideration by reference to the various sub-headings in the submissions.

No illegality

[22] It appears to me that there are several interwoven threads in the submissions under the sub-heading "No illegality".

[23] The first thread is a submission that there would be no illegality in the full council's authorising expenditure on Filwood Park as a public park without appropriating the land to open space purposes. I do not accept this submission. If the site of Filwood Park was held for education (or airport or housing) purposes, it seems to me that the council would be acting outside its statutory powers in authorising capital expenditure on Filwood Park as a public park. If a council holds land for one statutory purpose, I consider that its duty is to spend council money on the land for that purpose and for no other purposes.

[24] The second thread is a submission that land can be developed and redeveloped and can still remain held for redevelopment purposes "or for that matter educational purposes". The authority cited in support of this proposition is *R v City of London Council ex parte Master Governors and Commonality of the Mystery of Barbers of London* [1996] 2 EGLR 128. In this case, the council acquired certain land for planning purposes in the 1950s and built an office block on it called Shelley House. In the 1960s, the council transferred some adjoining land to the Barbers' Company for their Hall and covenanted not to interfere with light or air passing through the windows of the Hall. In the 1990s, the council proposed to redevelop Shelley House and claimed that it could breach the covenant with impunity by virtue of TCPA 1990 s. 237(1). This section authorises breach of covenant if land is held for planning purposes and developed in accordance with planning permission. The judge held that the Shelley House site remained held for planning purposes although it had been developed after acquisition. Section 237(1) therefore still applied. Certainly, it seems to me that the case is authority for the proposition that land can still be held for planning purposes if it is developed. The planning purposes includes redevelopment of land that has already been developed. However, I do not see that the case is authority for the proposition that land held for educational purposes can properly be developed for public park purposes without being

appropriated to the new purposes. If there were no appropriation the land would remain held for educational purposes and the council would be acting outside its powers in spending capital on it as a public park. That is why I consider that a resolution of the full council to spend capital on Filwood Park as a public park carries an implied appropriation to public park purposes.

[25] The third thread is a submission that there is simply no evidence whether the use of Filwood Park as a park was perceived by the council as temporary or permanent. I am not sure that the dichotomy between “temporary” and “permanent” is a true one. Few things in life are permanent. I think that the true dichotomy is between “temporary” and “indefinite”. In addressing the argument of Mr. Blohm that the *Teddington* principle applied, I pointed out in my earlier report that there was no evidence that use of Filwood Park as a public park was ever regarded as a temporary use until the site was sold in 2008 (report para. 141). That seems to me to be right. There was no evidence that use of the park as a park was regarded as temporary as opposed to indefinite. I cannot see any evidential basis for refusing to infer an appropriation to public park purposes on the ground that the proposed use as a public park was temporary.

[26] Finally, the applicant submits that the only clear evidence of the Council’s long term intention for the land was the documentation (terrier cards, computer data base and computer mapping) which indicated that it to be held long term for redevelopment purposes. However, all that documentary material derives from the invalid appropriation of 1974. The council is a legal and not a natural entity and it seems to me that its intentions can only be manifested by its valid legal actions.

No authorisation by full council to create public park

[27] The applicant argues that, although there is evidence that the full council approved capital expenditure of £20,000 on Filwood Park, there is no evidence that it knew that the expenditure was for public park purposes. In support of that argument, the applicant points out that knowledge that the expenditure was to be made by the Parks Department was not equivalent to knowledge that the expenditure was on a public park, since the Parks Department maintained land held for various purposes other than public parks, such as school playing fields. I cannot accept this submission for two reasons. First, the full council on 14th May 1985 had before it material which was not just limited to information that the money was to be expended by the Parks Department: the full council had before it both the original and additional list of capital expenditure submitted by the Resources and Co-ordination Committee. It was apparent from the material before the full council at that meeting that the £20,000 capital expenditure was on Filwood Park as a capital aspiration under the heading “Open Spaces and Amenities: Parks Department”. Second, it appears to me that the full council must be taken to have notice of the material recorded in the minutes of its committees, and it was abundantly clear from that material that the proposed capital expenditure was on the improvement of Filwood Park as a public park.

No implication to open space purposes

[28] The applicant submits that if a statutory appropriation can be implied as opposed to expressed, it would lead to great uncertainty in ascertaining under what statutory powers land was held at any one time and virtually dispense with the need for any formal express appropriation. If land was held for one statutory purpose, the council could effect an implied appropriation simply by spending money on the land for another statutory purpose. I accept that this is a powerful argument.

[29] However, it seems to me that the authorities are against this submission. The late Mr. Cullen QC (the judge in *Oxy-Electric*) thought that there could be an implied appropriation, as did Lord Walker in *Beresford* (see paras 64-66 of my earlier report). It is true that the views of Mr. Cullen and Lord Walker were *obiter dicta* and not binding on the CRA in the present case. However, it seems to me that these views (especially those of Lord Walker as a judge of the highest court in the land) are entitled to great respect and ought to be followed in the absence of some compelling reason to the contrary.

[30] If, as I think, there can be an implied appropriation, this strikes me as a strong case for an implied appropriation. Filwood Park has been set out, used and maintained as a public park since the 1970s. If it was held for education (or airport or housing) purposes but never expressly appropriated to a new purpose, the decision of the full council to authorise substantial capital expenditure on the improvement of the park as a public park appears to me to give rise to a powerful case for implied appropriation to public park purposes.

[31] The applicant refers to the *Castle Park* case and submits that the inspector found that use of a park for commercial purposes did not amount to an implied appropriation to commercial purposes. I was the inspector in *Castle Park* and I have looked back at my report dated 30th March 2009. However, I cannot see any reference in the report to an argument that use of the park for commercial purposes amounted to an implied appropriation and I cannot recall any such argument. As far as I can see I never considered the point.

[32] The applicant refers to the *South Purdown* case. I take this to be another inspector's report on a TVG application. However, I am not familiar with the case and was not supplied by the applicant with a copy of the report. I cannot usefully comment on it.

[33] The applicant says that the minutes of the OSA committee cannot give rise to evidence to support an implied appropriation. I agree that the OSA committee had no power to effect an appropriation, express or implied. However, as explained above, I do think that minutes of committees can be taken into account in deciding whether the full council knew that it was authorising expenditure on a public park.

The only possible implication must be appropriation to redevelopment purposes

[34] The applicant argues that, if appropriation can be implied, there was an implied appropriation to redevelopment purposes. The council carried out virtually all appropriations without full council approval. The applicant points, in particular, to the following matters:

- Filwood Park was transferred from the Education Committee to the Planning and Traffic Committee in 1974, which committee had responsibility for development land but not open space land.
- The terrier card V20/15 records the proposed use of the land as redevelopment
- The council computerised database records the statutory purpose of the land as redevelopment
- The council's maps showed the land coloured purple as development land
- The sale of Filwood Park was handled by Central Support Services

[35] The applicant further submitted that there was no confusion on the part of Mrs. White or Mr. Bennett between appropriation and the "ownership" of land by committees. The transfer of responsibility for the land to the Planning and Traffic Committee was evidence of an implied appropriation to redevelopment purposes.

[36] The difficulty that I have with these submissions is that it appears to me that a statutory appropriation requires a resolution (express or implied) to appropriate by the full council or by the committee with delegated power to effect a statutory appropriation. I cannot see that any of the matters relied upon by the applicant are evidence of such a resolution.

[37] The applicant refers to the *Cotswold Road* case. I take this to be another inspector's report on a TVG application. However, I am not familiar with the case and was not supplied by the applicant with a copy of the report. I cannot usefully comment on it.

Missing documents

[38] The applicant repeats her submission that there are documents not disclosed by the council which would support her case. I have already dealt with this point in my report. It appears to me that this case turns on implied appropriation. This must be found in some resolution of the full council or of a committee with delegated power to appropriate. All such resolutions are matters of public record and I cannot understand what other documents might exist which are relevant.

[39] It seems to me that there are only two factual situations which would assist the applicant.

[40] The first is that there never was any appropriation, express or implied, after the 1930s and that the land has remained ever since held for educational (or possibly housing or airport) purposes. I accept that this would be the correct analysis on the evidence in the absence of my finding of an implied appropriation in the full council resolution of 14th May 1985. I cannot see how any further documents can throw any light on the question whether there was an implied appropriation on 14th May 1985. All turns on the legal effect of documents which are matters of public record.

[41] The second is that there was an express or implied appropriation of Filwood Park to redevelopment purposes after the 1930s. It seems clear that there was no express appropriation. The purported appropriation of 1974 to “general planning and public park purposes” (whatever that means) was invalid because it was purportedly effected by committees with no power to effect an appropriation. Nor is there any evidence of a resolution by the full council or by a committee with delegated powers of appropriation to appropriate Filwood Park to redevelopment purposes. Again, everything turns on the documents which are matters of public record.

4. Conclusion and recommendation

[42] I conclude that the objector is right in submitting that there was an implied appropriation of Filwood Park to public park purposes in 1985 and that it follows that recreational use of the park by the public during the relevant 20 year period was “by right” and not “as of right”. The applicant has therefore failed to make out a case for registration of Filwood Park as a new green

[43] I therefore recommend to the council as CRA that it should reject the application.

[44] The 2007 Regulations require the CRA to give written reasons for rejecting the application. I recommend that such reasons are stated to be “the reasons set out in the inspector’s reports of 24th August and 19th November 2011”.

Vivian Chapman QC

19th November 2011

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