

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

17 September 2012

Report of: Commons Registration Authority

Title: Application for land known as The Green, Bracey Drive, Downend to be registered as a town or village green Bristol made under the Commons Act 2006

Ward: Frome Vale

Officer Presenting Report: Anne Nugent, Senior Solicitor, Legal Services

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

Accept the advice of the inspector and reject the application to register the land known as The Green, Bracey Drive, Downend as a Town and Village Green.

Summary

This report relates to an application for land known as The Green, Bracey Drive, Downend to be registered as a town or village green made under the Commons Act 2006

The significant issues in the report are:

As set out in the report.

Policy

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

Consultation

Internal

2. Not applicable

External

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

Context

4. This matter has already been before the Committee on 25 June 2012 so a short background will suffice. The Council as registration authority (the CRA) received an application to register land known as The Green, Bracey Drive, Downend (the application land) as a town or village green under the Commons Act 2006.
5. The plan of the application land is set out in Appendix A to this report. In the application the land is referred to as 'a green' bordered by Frenchay Road, Long Close and Bracey Drive BS16 and is described as the former Masson Thrissell Sports Field.
6. The Council, as landowner, objected to the registration.
7. On 25 June 2012 the Committee resolved to appoint an independent inspector to consider representations on the interpretation and legal effect of the objector's evidence.
8. The inspector has now provided written advice to the Commons Registration Authority with recommendations. The inspector's advice is attached as Appendix B.
9. The inspector recommends that as the land has been held as public open space and therefore use is "by right" rather than "as of right" the application should be rejected.
10. Only the Applicant provided a written response to the inspector's advice. Mr Thomas has asked that his email be submitted to the Committee (appendix C).

Proposal

11. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.
12. Officers recommend that the Committee accept the inspector's advice and reject the application.

Other Options Considered

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

Risk Assessment

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

Public Sector Equality Duties

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

- encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
- iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
 - promote understanding.

Legal and Resources Implications

Legal

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

The Law

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

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

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

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

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

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

“As of right”

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

“By right”

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

“Appropriation”

25. Local authorities are creatures of statute. They can only lawfully act for the purposes and in the ways that statute permits them to act.
26. Local authorities have been given powers to appropriate, or re-allocate, land from one statutory purpose to another – see section 163 Local Government Act 1933.
27. The current provisions are those found in section 122 Local Government Act 1972, as amended by the Local Government, Planning and Land Act 1980. The Act gives a local authority power to appropriate land that is no longer required for the purpose for which it was held immediately before the appropriation.

Procedure

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

Legal advice provided by: Anne Nugent, Senior Solicitor, Legal Services.

Financial

29.

(a) Revenue

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

from the central contingency.

(b) Capital

There are no specific policy implications arising from this report.

Financial advice (Revenue) from Tony Whitlock, Corporate Finance

Land

There are no specific policy implications arising from this report.

Personnel

Nil

Appendices

Appendix A – Map of Application Land

Appendix B- Report of Inspector Philip Petchey

Appendix C – Email submission from Applicant

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

Application papers/ statement of objections/ response available at the Council House, College Green.

Section 15 Commons Act 2006

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

06 September 2012
JD5.434



EXHIBIT A



GREEN IN BLUE

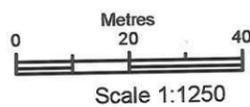
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RE: BRACEY DRIVE, DOWNEND, BRISTOL

A D V I C E

Introduction

1. I am asked to advise Bristol City Council, the commons registration authority, in respect of an application by A Thomas received on 23 December 2010 to register land at Bracey Drive, Downend, Bristol as a town or village green. Bristol City Council in its capacity as landowner has objected to the application by a letter dated 19 August 2011 to which was annexed a number of supporting documents.
2. The land in question is open space owned and maintained by Bristol City Council. The application is supported by more than 25 signed statements speaking to use of the land by local people for recreational purposes for more than 20 years.
3. I do not think that the facts set out in paragraph 2 above are in dispute.

The facts in more detail

4. The houses in or in the vicinity of Bracey Drive date from the mid-eighties, having been built by Tarmac Homes Bristol and West Limited. As a requirement of development, Tarmac Homes evidently had to provide public open space. The way this worked is that Tarmac Homes conveyed the land to Bristol City Council for a consideration of £1, together with a lump sum of £6,000 in respect of future maintenance of the land. The transfer was declared to be:

... for the purposes of the Open Space Act 1906 as amended by the Local Government Planning and Land Act 1980.

5. The relevant section of the Open Space Act 1906 are sections 9 and 10. (These do not in fact appear to have been amended by the 1980 Act). They read as follows:

9. Power of local authority to acquire open space or burial ground.

A local authority may, subject to the provisions of this Act,—

(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and

(b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and

(c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.

10. Maintenance of open spaces and burial grounds by local authority.

A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a) hold and administer the open space or burial ground 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 under proper control and regulation and for no other purpose: and

(b) maintain and keep the open space or burial ground in a good and decent state.

and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them (emphasis supplied).

6. Since the land was conveyed to Bristol City Council it has been maintained by it under section 10 of the Act.

The law

7. It is a requirement for land to be registered as a town or village green on the basis of 20 years use under section 15 of the Commons Act 2006 that the relevant use should be as

of right. Where land is held by a local authority under section 10 of the Open Space Act 1906 it would appear that local people actually do have a right to use the land. In these circumstances, it would appear that use is *by right* and not *as of right* or by virtue of a statutory permission. If this be the correct analysis then it would follow that the land about which I am asked to advise could not properly be registered as a town or village green for reasons which I shall elaborate below.

8. I think that this is the correct view. It is also the view expressed in Gadsen on *Commons and Greens* (2nd edition: 2012)¹. I have so advised registration authorities to this effect on a number of occasions. Further the position is that applications to register new town or village greens are comparatively frequent² and often of land held by local authorities as public open space. I am aware of no authority that has received advice that land held under section 10 of the Open Spaces Act 1906 is registrable as a town or village green.
9. I turn to consider the law in more detail.
10. I start with the judgment of Finnemore J in *Hall v. Beckenham Corporation*³. This was not a case on the Open Spaces Act 1906 but a section 164 of the Public Health Act 1875 which provides as follows:

Any local 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...

¹ See paragraphs 14-43 to 14-45.

² DEFRA suggests that there were 194 applications in 2009, 134 in 2010 and 103 in 2011.

³ [1949] 1 KB 716.

11. Finnemore J analysed the position as follows:

I think that the corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws.⁴

It seems to me that this underscores the significance of land being held under a trust for its use by local people (which land held under section 10 of the 1906 Act undoubtedly is). Of course it does not of itself answer the question as to whether use under such a trust is or is not *as of right*.

12. The question arose in *R (Beresford) v Sunderland City Council*⁵. The facts in that case were that the land in question was held by the City Council neither under the Open Spaces Act 1906 or the Public Health Act 1875⁶. It was nevertheless laid out and maintained as public open space, and the City Council argued that its use was by its implied permission. The majority considered that there was no such implied permission but that, in any event, for a permission to render use *precario* and not *as of right*⁷ it had to be a revocable permission.

13. However in *Beresford* the question had arisen as to what would have been the position if the land had been used by reference to a statutory right. This is explained in the speech of Lord Bingham:

After the House had reserved judgment at the conclusion of oral argument, however, the House became concerned to explore the possibility that, on the special facts of this case, the inhabitants of the locality might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not "as of right" but pursuant to a statutory right to do so. Such use would

⁴ See p. 727.

⁵ [2004] 1 AC 889.

⁶ It was held essentially for future development purposes, being maintained as public open space in the interim: see paragraphs 89 to 90 of the speech of Lord Walker.

⁷ Use which is *as of right* is *nec vi nec claim nec precario*: not by force, not secretly, not by (revocable) permission.

*be inconsistent with use as of right. Counsel were invited to make written submissions on the point, which had not been raised or investigated below, and the House heard further oral argument on it. The House is grateful to counsel for responding so fully to its invitation, and consideration has been given to every statutory provision which appeared to be potentially relevant. In the event, I do not find it necessary to review these provisions in detail since it is to my mind clear that none of them, on the facts found or agreed, can be relied on to confer on the local inhabitants a legal right to use the land for indulgence in lawful sports and pastimes.*⁸

This strongly suggests that if the use had been pursuant to a statutory right, it would not have been *as of right*.

14. At paragraph 30 of his speech, Lord Scott of Foscote said:

It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the 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 section 22(1) of the Commons Registration Act 1965 .

Lord Scott expressed no doubt as to the correctness of what had been agreed by the two parties appearing in *Beresford*⁹.

15. By contrast, Lord Walker identified the situation where use was by reference to a statutory trust as raising *difficult issues*¹⁰.

16. In *R (Barkas) v. North Yorkshire County Council*¹¹ the Inspector had held that use of land that was laid out as playing fields under section 80 of the Housing Act 1936 was

⁸ See paragraph 9 of his speech. There is a passage to similar effect in the speech of Lord Rodger of Earlsferry (see paragraph 62).

⁹ I was counsel for Sunderland City Council; George Laurence QC and Douglas Edwards were counsel for Mrs Beresford. Mr Laurence and Mr Edwards (now Douglas Edwards QC) both have great experience in this field.

¹⁰ See paragraph 88 of his speech.

¹¹ [2011] EWHC 3653 (Admin).

by right and not *as of right*; and that accordingly the land was not registrable as a town or village green. This conclusion, accepted by the registration authority, was challenged by way of judicial review. Counsel for the claimant did not argue that use subject to a statutory right would not be *as of right*; rather he argued that section 80 conferred no statutory right upon users of land. The challenge was rejected. I do not think that *Barkas* would preclude another claimant arguing that use by virtue of statutory right is *as of right*; but of course if counsel for *Barkas* had thought the point a good one he would have argued it. In practice *Barkas* gives significant support to the view that I take¹².

17. There is no further authority of which I am aware.
18. A letter dated 22 November 2011 to the Registration Authority from Davis Wood, Solicitors, responds to the Objection. It takes the point that *Beresford* is not determinative of the issue. However, in my view, although *Beresford* is not determinative, it does indicate the view that the Supreme Court would be likely to take on this issue.
19. It takes the point also that *Beresford* is a case in the meaning of *town or village green* in the context of section 22 of the Commons Registration Act 1965. That definition was re-enacted, with amendments, in section 15 of the Commons Act 2006. Parliament could expressly have excluded land held by a local authority subject to the Open Spaces Act 1906 from the definition: it did not do so.

¹² As I understand it, permission to appeal has been refused by the Court of Appeal but the application is to be renewed orally. This of course does not bear upon the point with which I am concerned.

20. As a generality, I think that there are some difficulties in interpreting a phrase in an Act of Parliament by reference to what Parliament did or did not do when re-enacting a statutory provision which contains the phrase. But more specifically, I do not as a matter of fact derive from what Parliament did not do in enacting the Commons Act 2006 any suggestion that it took the view that use of land that was by reference to the Open Spaces Act 1906 was *as of right*.
21. The third point taken by Davis Wood is that if the land is subject to a statutory trust under the Open Spaces Act 1906 it cannot be developed.
22. This is axiomatic. However, by virtue of section 122 of the Local Government Act 1972 and the procedure therein contained, land may be appropriated from open space to other use, free from the trust. In any event this is not a matter which bears upon the registration of the land as a town or village green.
23. The fourth point is also one which, it seems to me, bears not upon the registrability of the land as a town or village green but upon its developability. I think that it may indeed have been a requirement of planning permission that open space was provided for the use by local people. This may or may not be considered a good factual argument for Bristol City Council to consider in deciding whether the land should be developed (I do not know whether there are any such proposals in the offing) but it does not seem to me to have relevance to the application to register it as a town or village green.

Procedure

24. It is my view, for the reasons explained above, that the land about which I am asked to advise is not properly registrable as a town or village green. Accordingly I think that the application should be rejected. Because the reasons for rejecting the application are clear from the papers, it is not necessary for there to be a non-statutory public inquiry – such an inquiry would be a waste of time and money.

25. It is not necessary in my view for the parties to be given an opportunity to comment on this advice – it represents a determination by me of which of two competing arguments is correct. Nonetheless it may be felt good practice to allow the parties – and in particular, of course, the Applicant – to comment. This enables any unintentional errors to be picked up and corrected. In practical terms, it makes less likely the bringing of judicial review – which Davis Wood have suggested may be brought in this case by the applicant. Davis Wood suggests that their client may obtain counsel's advice. I would be surprised if that advice were to suggest that my Advice is wrong and that a court would be likely to uphold an argument that use in this case has been *as of right*. If this were the advice that they received, it would be helpful for the registration authority to see it, and for me to have the opportunity to comment upon it.

26. If the applicant is to be given the opportunity to comment further, a timetable for such comment should be laid down. If there were to be an exchange of comments, the applicant should always have the last word.

PHILIP PETCHEY

Francis Taylor Buildings
Temple
London EC4Y 7BY

19 June 2011

Dear Ms Nugent

From your earlier e-mail I understand that today the 19th July 2012, is the final date for any comments regarding the Bracey Drive Village Green application.

Can I first of all say thank you for Tom Dunston's e-mail, (13th July) regarding the above responding to my queries, ever helpful. Secondly, thank you for also sending me a copy of Mr Petchey's robust defence against our application for a Town and Village Green for the Bracey Drive Green Space. After taking further considered opinion and advice we appreciate that further arguments are unlikely to prevail, not to mention be prohibitively expensive, and as such our application will fail.

Presumably the Public Rights of Way Committee will make the final decision and it is important that the democratic process continues via this route.

Although legally the defence of the application is strong and likely to sway any argument, the morality of the situation may prevail and the final decision as to whether the application succeeds or otherwise is now in their hands.

Thank you

Anthony Thomas,