

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

17 September 2012

Report of: Commons Registration Authority

Title: Application for land known as Arnall Drive Open Space Henbury Bristol to be registered as a town or village green Bristol made under the Commons Act 2006

Ward: Henbury

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

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

It is recommended that (a) the consideration of the objector's documentary evidence be dealt with as a preliminary issue on the papers, and (b) as the land is owned by the Council an independent inspector be appointed to advise the CRA if the objector's evidence is sufficient to justify a rejection of the application.

Summary

This report relates to an application for land known as Arnall Drive Open Space Henbury Bristol 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. Not applicable

Context

4. On 31 January 2011 the Council, as registration authority, received an application dated 25 January 2011 to register land known as Arnall Drive Open Space Henbury Bristol (the application land) to be registered as a town or village green made under the Commons Act 2006.
5. The plan of the application land is set out in Appendix A to this report.
6. The application in the prescribed form, Form 44, was verified by a statutory declaration of Mrs Marilyn Tiley dated 25 January 2011. An amended statutory declaration dated 11 August 2011 was received on 17 August 2011. The application includes a bundle of signed witness statements and photographs from members of the public relating to the use of the land.
7. In Section 7 of the application the Applicant summarized the justification for the application as follows:

'Arnall Drive Open space has been an area of recreational use for several decades and we feel should be designated as a town green for present and future residents.

Somewhere for children to play safely and residents of the local area to gather as a right not a luxury, being able to just go for a walk is essential for a persons well being especially older residents who are probably not so mobile'.

8. An objection to the registration of the application land has been received from the landowner, Bristol City Council (the Objector). The grounds of objection are :
 - (1) *That the usage of the land by the public for 'lawful sports and pastimes' has not been 'as of right', as required by section 15(2) Commons Act 2006;*
 - (2) *That Arnall Drive/Henbury Road, Henbury, Bristol which is identified in paragraph 6 of the Application as the locality or neighbourhood in respect of which the application is made, is not a*

neighbourhood or a 'locality' within the meaning of section 15(2) of the Commons Act 2006

(3) *That usage has not been by 'a significant number' of the inhabitants of Arnall Drive/Henbury Road, Henbury, Bristol.*

9. To support its objection the Objector submitted that the land was acquired by the Council and was subsequently appropriated to public open space. The documentary evidence submitted by the Objector has been assessed. The officer assessment is attached as Appendix B.
10. Over a period from February until March this year the parties have made further submissions. The Applicants dispute whether evidence submitted by the Objector demonstrates the application land has been properly and clearly appropriated as open space as the land cannot be both open space and highway. The Applicants have submitted that the continued use of the land since the 1970s for lawful sports and pastimes has been in spite of the designation for highway purposes.

Proposal

11. PROWG Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made there under 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. The officer assessment (Appendix B) considers that on the documentary evidence provided the land has been appropriated to public open space. If the officer assessment is correct this would be determinative of the application without the need for an inquiry and/or consideration of the other objections to registration. It is recommended therefore that consideration of the evidence of appropriation to public open space be dealt with as a preliminary issue on the papers.
13. It is recommended that as the land is owned by the Council an independent inspector be appointed to advise the CRA if the objector's evidence is sufficient to justify a rejection of the application. The inspector will then report back to the Commons Registration Authority with recommendations. CRA will then bring the matter back to PROWG.

Other Options Considered

26. The other options considered are:
 - (a) Refer the application to an independent inspector for a public inquiry on all the issues;

(b) Reject the application on the papers.

27. The referral for a full inquiry will put the Council to additional unnecessary expense if the statutory purpose for which the Council owns the land is for public open space or recreation.
28. Rejecting the application on the papers reference to an independent inspector could be considered to be unfair as the Council owns the land which puts the Council at risk of legal challenge.

Risk Assessment

29. 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. There could be questions the fairness of the proceedings.
30. 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 of the evidence.

Public Sector Equality Duties

31. 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

26. 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

27. 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”

28. 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.

29. 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.

30. 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”

31. 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”

32. 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”

33. Local authorities are creatures of statute. They can only lawfully act for the purposes and in the ways that statute permits them to act.
34. 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.
35. 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

36. 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 has recently approved a written procedure which provides that where the Council is the landowner an independent inspector will automatically be appointed to conduct the inquiry. Appointing an independent inspector to consider the representations before determination on the papers in cases where the Council is the landowner will address any suggestion of bias in the decision-making process.

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

37. 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

If the Land is registered as Town and Village Green, this will prevent a development opportunity and therefore a potential loss of a Capital Receipt.

Financial advice (Revenue) from Tony Whitlock, Corporate Finance
Financial advice (Capital) from Jon Clayton, Corporate Finance.

50. Land

There are no specific policy implications arising from this report.

51. Personnel

Nil

Appendices

Appendix A – Map of Application Land
Appendix B- Officer Assessment of evidence

**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

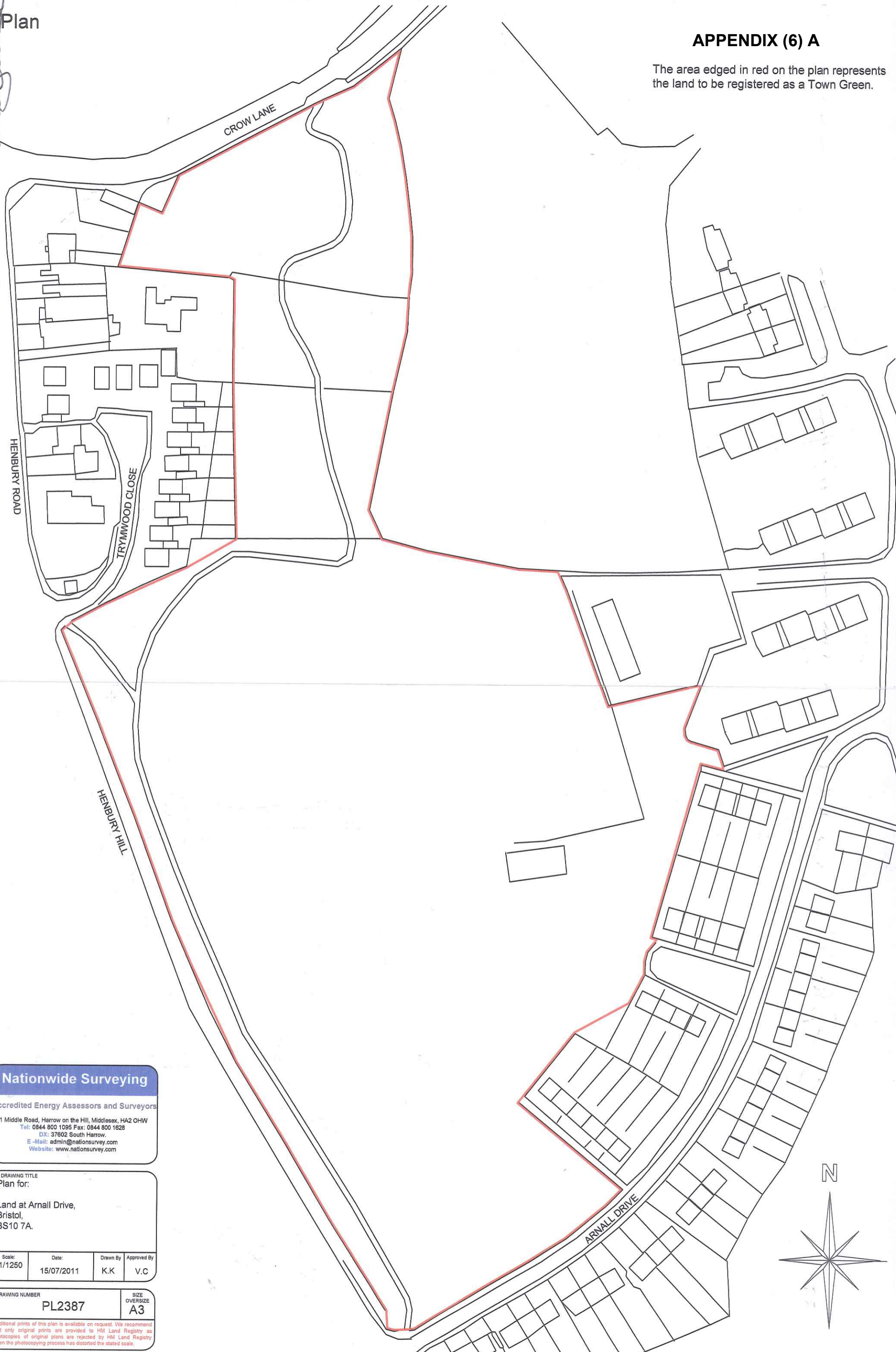
EXHIBIT A

THIS IS THE MAP REFERRED TO IN PART 5 OF THE APPLICATION. DECLARED BEFORE ME ON THE 11TH DAY OF AUGUST 2011

Plan

APPENDIX (6) A

The area edged in red on the plan represents the land to be registered as a Town Green.



Nationwide Surveying
 Accredited Energy Assessors and Surveyors
 21 Middle Road, Harrow on the Hill, Middlesex, HA2 0HW
 Tel: 0844 800 1095 Fax: 0844 800 1628
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 E-Mail: admin@nationsurvey.com
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DRAWING TITLE
 Plan for:
 Land at Arnall Drive,
 Bristol,
 BS10 7A.

Scale: 1/1250	Date: 15/07/2011	Drawn By: K.K	Approved By: V.C
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DRAWING NUMBER PL2387	SIZE OVERSIZE A3
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Additional prints of this plan is available on request. We recommend that only original prints are provided to HM Land Registry as photocopies of original plans are rejected by HM Land Registry when the photocopying process has distorted the stated scale.

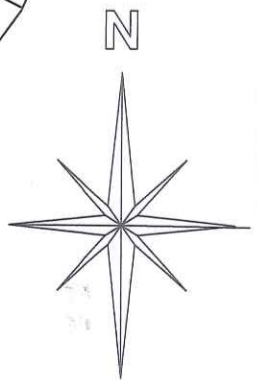
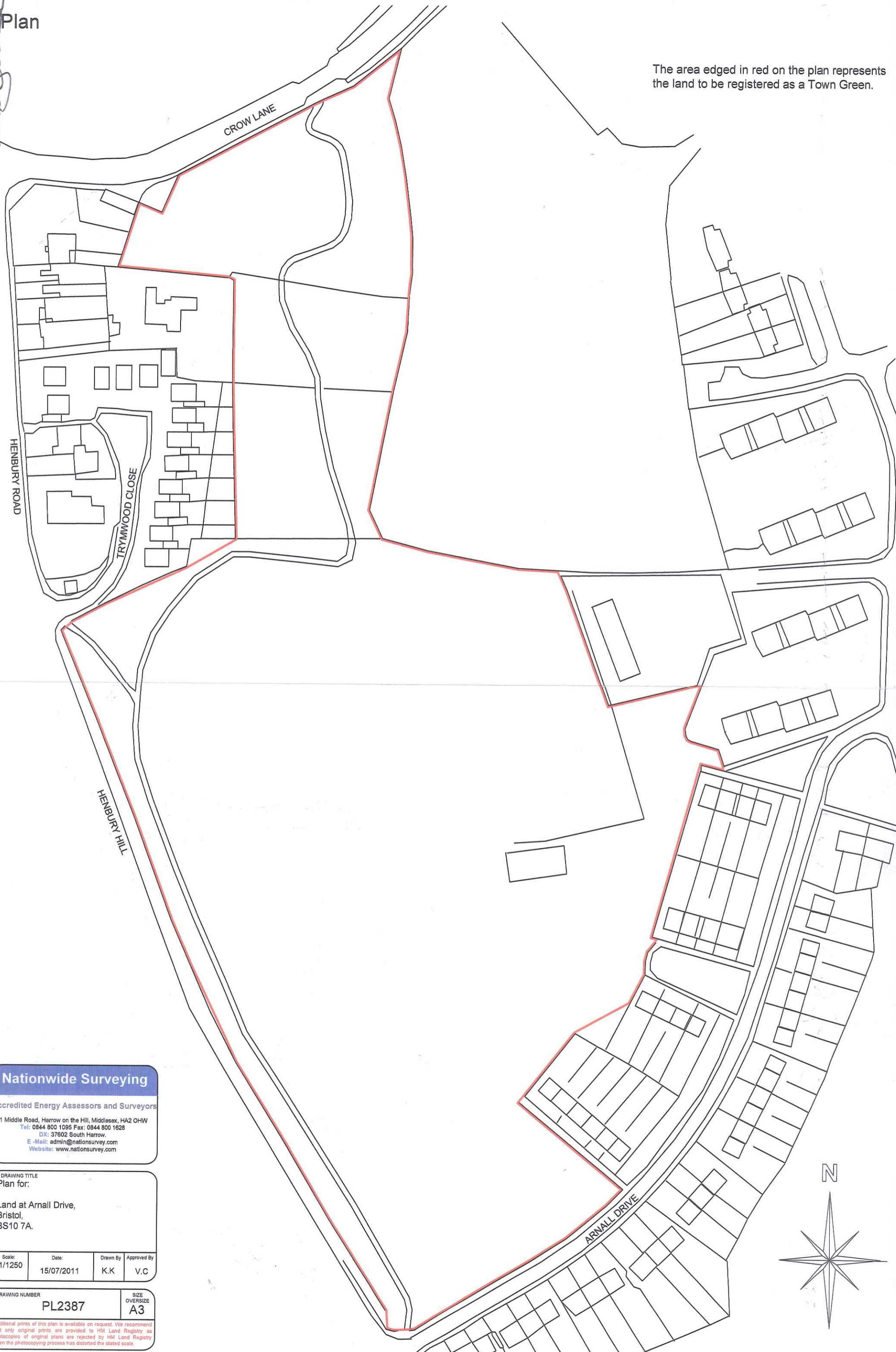


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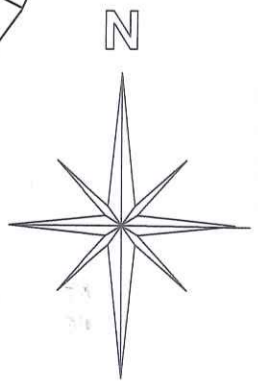
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Officer Assessment of Evidence – Arnall Drive Open SpaceApplicant's evidence

1. The Application dated 25 January 2011, is made on the basis that the land has been used by a significant number of local inhabitants for leisure activities such as ball games, picnicking, playing with children, walks, dog walking and relaxation for a period of more than 20 years. The Applicant asserts that such use has been 'as of right'. In total 29 evidence statements were submitted with the application.

The Objector's evidence

2. For ease of reference the documents referred in the Statement of Objections to will be referred to as "objector enclosure" followed by the number of that enclosure.
3. The Objector has asserted that (1) the usage of the land by the public for 'lawful sports and pastimes' (LSP) has not been '*as of right*', as required by section 15(2) Commons Act 2006; (2) Arnall Drive/Henbury Road, Henbury, Bristol identified in the Application as the locality or neighbourhood in respect of which the application is made, is not a neighbourhood or a 'locality' within the meaning of section 15(2) of the Commons Act 2006 (3) That usage has not been by 'a significant number' of the inhabitants of Arnall Drive/Henbury Road, Henbury, Bristol.

Acquisition of land

4. To support it's Objection the Objector has submitted that the land was acquired in 1950 by virtue of Compulsory Purchase Order 1947 and Bristol (Henbury No 1) Housing Confirmation Order 1948 for the purposes of Part V Housing Act 1936. (objector enclosure 7)
5. The first tranche of land was acquired from the Executors of N F E G Sampson-Way on 8 February 1950 and comprised of 193.561 acres at Henbury, Bristol (objector enclosure 3). This forms part of the northern part of the application land .
6. The second tranche of land was acquired from H S Gunn on 20 December 1950 and comprised of approximately 38.676 acres of land at Henbury Road (objector enclosure 4). This forms the bulk of the application site and other land to the East.
7. Parcels of land were known as The Manor House Estate and Henbury Road and were given plan references of C14/1 and C14/2 respectively (objector enclosure 5).
8. Further the land acquired had been subject to subsequent appropriations below.

Appropriation I - Arnall Drive Henbury (C14/10)

9. Appropriation of 6.9 acres of land situated at Arnall Drive, Henbury forming part of C14/1 . Subsequently given a reference of C14/10 and forms part of the southern part of the application land.
10. **27 May 1957** the Housing Committee approved in principle the appropriation of an area of land at the junction of Arnall Drive and Henbury Hill together with two adjoining fields held for housing purposes to open space purposes, subject to a report to the Planning and Public Works Committee.

11. **12 June 1957** The Planning and Public Works Sub-Committee resolved to appropriate for public open space purposes land at the junction of Arnall Drive and Henbury Hill together with two adjoining fields.
12. **18 June 1958** the Planning and Public Works Committee resolved to appropriate 6.9 acres of land at Arnall Drive, Henbury for public open space purposes at a valuation of £3,300 subject to the agreement of the Housing Committee and consent of the Minister for Housing and Local Government.
13. **30 June 1958** Housing Committee approved the appropriation (objector enclosure 11)
14. **8 July 1958** Full Council approval (objector enclosure 12)
15. **3 December 1958** The ministerial consent to appropriation (objector enclosure 13).

Appropriation II Henbury Road, Henbury (C14/13)

16. 9 acres of land forming part of C14/1 and C14/2 which was subsequently given a reference of C14/13 and forms the remainder (other than two small pieces of triangular land referred to below) of the application land (objector enclosure 14). In support of this the Objectors referred to following minutes endorse this.
17. **14 September 1970** minute (19) the Housing Committee agreed to the appropriation of land zoned for public space purposes for a figure of £21,000 and also that along the line of the proposed Henbury By-Pass. (objector enclosure 15)
18. **8 June 1971** the Public Works Committee resolved to appropriate 10.9 acres of land at Henbury Conservation Area '*for use as public open space*' with an appropriation value of £21,000 in connection with the Henbury Conservation Area. (objector enclosure 16)
19. **11 September 1973** re Henbury Conservation Area - Full Council approved the appropriation '*from housing to public open spaces purposes at a transfer value of £21,000*'. (objector enclosure 17)
20. Schedule of Accounts – '*Appropriation of Land*' 1973/74 accounting period state Henbury Conservation Area 10.9 acre' By Parks From Housing £21, 000.

Appropriation III - Two Small Triangular Areas of Land at Arnall Drive

21. **30 April 2010**, Resources Directorate Authority to act under delegated powers two small triangular areas of land at Arnall Drive (equating to 0.29800 hectares) situated at the eastern part of the application land was appropriated from housing use to open space use. (objector enclosure 19).

Applicant's response to Council's objections

22. The Applicants response to the Council Objections are summarised as follows - Whilst the Applicants accepted that the bulk of the land had been appropriated, they query that the appropriations referred to in the objections had been '*selective*'. And the land had been subject to appropriations for highway purposes since 1970.

23. The Applicants stated that the fact the land had been designated for potential highway purposes since 1970 and used 'as of right' pending construction of the new Henbury By-Pass, is supported by the Objectors attitude to the children's play area and in turn does not support the Objectors argument that that land had been designated open space under the Open Spaces Act 1906 or Public Health Act 1875. The Applicants appended a copy of a letter dated 5 July 1989 from the Parks Manager to Councillor Jenny Smith, which the Applicants considered showed a *'clear intention to abandon the play equipment'*.
24. The Applicants consider that the two triangles of land are peripheral and de minimis in relation to the main area of open space.
25. The Applicants did not accept the Objectors argument as to locality, neighbourhood or significant number of inhabitants. They state that the properties in Arnall Drive and along Henbury Road do form a locality or neighbourhood within a locality with a *'common uniting feature that they are clustered around and overlook the area of open space in question'*.
26. The Applicants considered that evidence submitted shows a significant number ' *by any reasonable measurement'*.

The Objectors further submissions

27. The Objector further submits that it's claim to designation as public open space was based on historical evidence. The Objectors argue that there is no ambiguity within their documents. The original acquisition documents of the land being acquired for Housing purposes, the Terrier records and plans and the Council Minutes all document the processes of subsequent appropriation to public open space purposes that have occurred.
28. In synopsis the Objectors further submissions are :
- 28.1 Minute 157 of the meeting of the Housing Committee on 14 September 1970 resolved to agree to the appropriation of land zoned for public space purposes for a figure of £21,000 and also that along the line of the proposed Henbury By-Pass.
- 28.2 On 8 June 1971 the Public Works Committee resolved to appropriate the aforementioned 10.9 acres of land at Henbury for use as public open space purposes for a figure of £21,000 in connection with the Henbury Conservation Area. (see objector enclosure 16) This appropriation of 10.9 acres of land is further corroborated by Full Council on 11 September 1973 (see objector enclosure 17 above).
- 28.3 The Accounts dated 31st March 1974 is evidence of such transfer and the current purpose of this land (see objector enclosure 18 above)
- 28.4 Objectors comments as regard to the letter dated 5 July 1989 from the Parks Manager to Councillor Jenny Smith as appended by the Applicants was that in their view it clearly indicated that all Children's' play equipment across the City Council was subject to the same austerity (at that time) and the closing comments within the letter confirmed that as soon as any funding becomes available the Parks Manager will endeavour to provide new equipment at Arnall Drive

Applicants Further Submissions

29 The Applicants further submissions were that:

- 29.1 The minute 157 only reinforced their point, that the same land could not be designated both for public open space and allocated for highways purposes at the same time. Therefore the applicants are entitled to assume that it user was 'as of right' and not 'by right'.
- 29.2 The minutes of the meeting of the Public Works Committee on 8 June 1971 only compounded the confusion as to the status extent of the land in question and user cannot be safely be considered be considered 'by right' but must be regarded as 'as of right' . The Applicant's submission is the ambiguity proves their point both on the balance of probabilities and beyond reasonable doubt
- 29.3 No evidence, ie a meeting minute record, has been adduced specifying a policy to abandon the scheme for the Henbury Bypass having been implemented by the Council. The applicants consider that the letter dated 5 July 1989 is '*aspirational not probative*' and does not advance the Objector's arguments

30 The Applicants also state that '*no other parties in the area have sought to object. The only objector has a clear vested interest in resisting the application as it stands to benefit from the land being reclassified as available for housing development*'

Conclusions

31 I consider the Applicants have not disputed the authenticity of the evidence which has been submitted by the Objector. To that extent it is undisputed evidence.

32 I consider that it is clear from the documentary evidence that:

- 6.9 acres (C14/10) was appropriated in 1957.
- 10.9 acres was appropriated in 1970.
- the two small triangular areas of land were appropriated in 2010.

33 All three parcels have been expressly appropriated for public open space. This is also reflected in the accounts.

34 As regards the suggestion by the Applicants that Minute 157 of the Housing Committee of 14 September 1970, "allocated" the land for highways purposes, in my view, this was not the case. The Minute 157 is expressing an intention to appropriate land to the Planning and Traffic Committee at some future time, that is, once the details and timing of the By-Pass have been agreed. There is no evidence to show that that an appropriation to the Planning and Traffic Committee has ever taken place.

35 It is also worth noting that even if the Applicants are right, although I do not consider that they are, activities that might amount to lawful sports and pastimes carried out on the highway are no more than the exercise of public rights ie "*a public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in questione does not amount to a public or private nuisance and does not obstruct the highway by reasonably impeding the primary the primary right to pass and repass....*" **DPP v Jones [1999] 2 AC 240**

36 I consider that following the appropriations referred to above, the land was thereafter held on the statutory purposes of public open space and the usage made of the land by the local inhabitants was not 'as of right'.