AGENDA ITEM NO. 5

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

14 January 2013

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

Accept the advice of the inspector and reject the application to register the land known as Arnall Drive Open Space, Henbury, Bristol as a town and village green.

Summary

This report relates to an application for land known as Arnall Drive Open Space, Henbury 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

2 Internal

Not applicable

3. External

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

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. To support it's objection the Objector submitted that the land was acquired by the Council and was subsequently appropriated to public open space.

6. 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.

7. On 17 September 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 A.

9. The recommendation is that the application should be refused in whole on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'. As a secondary reason, the application should be refused in whole on the basis that the Applicant has failed to establish on the balance of probabilities that the use of the application land has been by inhabitants of a qualifying 'locality' or 'neighbourhood within a locality', although the inspector has expressed reservation about rejecting the application on this basis without further submissions, were the statutory test otherwise met.

10. The inspector's report has been made available to the Applicant and to the Objector to enable them to comment before the Committee determines the application. They have been informed that this meeting does not present an opportunity for the parties to re-state their cases or seek to put in further evidence, unless truly exceptional circumstances are made out.

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 on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'.

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 15.1 or 15.2 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. There could be questions about the fairness of the proceedings. 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

16. 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

25 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

26 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"

27 In addition to the above, the application must meet the test under Section 15(2) of the Act ie. use of land has continued "as of right" until at least the date of the application.

28 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.

29 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"

30 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"

31 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 of 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"

32 A local authority can only lawfully act for the purposes and in the ways that a particular statute permits it to act.

33 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.

34 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

35 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. 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. Once the inspector has reported on the matter his recommendations should not be rejected without reasons.

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

36 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.

Land

37 There are no policy implications arising from this report.

Appendices

Appendix A– Inspectors' Report

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

09 November 2012
JD5.435

In the matter of an application to register land known as Arnall Drive Open Space as a town or village green

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INSPECTOR'S REPORT
FOR BRISTOL CITY COUNCIL
29 November 2012

Annabel Graham Paul
Francis Taylor Building
Inner Temple
EC4Y 7BY

Mr Stephen McNamara
Head of Legal Services
Bristol City Council
The Council House
Bristol
BS99 7PH

Introduction

1. I have been appointed as an independent Inspector by the registration authority, Bristol City Council, and asked to report with recommendations in respect of an application to register land known as Arnall Drive Open Space in Henbury, Bristol as a new town or village green. Strictly were the site to be registered it would be a 'town green' rather than a 'village green' in my view, but the requirements for registration and the legal incidents of town and village greens are identical, and in this Report I shall simply refer to 'town and village green' or 'TVG'.

2. Where documents are referred to in this Report, they are identified by tab number in accordance with the bundle of documents provided to me on behalf of the registration authority or, in the case of the documents submitted by the landowner on 19 January 2012, by enclosure number.

3. The application was made by Mrs Marilyn June Tiley ('the Applicant') on 25 January 2011 and was registered by the authority on 31 January 2011. It was accompanied by 29 evidence questionnaires from local residents. The Applicant submitted an amended map sworn to delineate the boundaries of the land applied to be registered ('the application land') on 11 August 2011 and I confirm that the application is amended to substitute the map submitted on 11 August 2011 (tab 3) for that submitted on 25 January 2011 (tab 1).

4. The freehold owner of the whole of the application land is Bristol City Council ('the Objector') (see Land Registry Title Numbers BL110542 and BL110548). The Objector submitted a Statement of Objection on 19 January 2012 accompanied by 19 enclosures. The Applicant responded on 8 February 2012, the Objector made further written submissions on 2 March 2012, and the Applicant made further written submissions on 16 March 2012.

5. Section 15(1) of the Commons Act 2006 ('CA 2006') provides that any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies. The parties agree that the relevant subsection in the context of this application is (2).

6. Section 15(2) 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.

7. The Applicant must prove that the statutory test is met on the balance of probabilities and the relevant period of at least 20 years runs backwards from 25 January 2011.

8. There are three matters in issue in respect of whether the test for registration in s. 15(2) Commons Act 2006 is met:

   (i) Whether use of the application land has been 'by right' as opposed to 'as of right' by virtue of appropriation to open space purposes;
   (ii) Whether the Applicant has identified a qualifying 'locality' or 'neighbourhood within a locality';
   (iii) Whether use has been by 'a significant number' of the inhabitants of the 'locality' or 'neighbourhood within a locality'.

9. Given the nature of the matters in issue, I consider that the registration authority is in a position to determine the application on the papers, and it is not necessary to hold a non-statutory public inquiry to hear oral evidence.

Neither do I consider it necessary for me to make a site visit to the application land.

Issue 1: Whether use of the application land has been 'by right' as opposed to 'as of right'

Factual Background:

10. The application land was purchased by Bristol City Council ('BCC') in two tranches on 8 February 1950 (enclosure 3, northern part of the site) and 20 December 1950 (enclosure 4, bulk of the site and other land to the east) by virtue of the City and County of Bristol (Henbury No 1) Compulsory Purchase Order 1947 and Bristol (Henbury No 1) Housing Confirmation Order 1948 for the purposes of Part V Housing Act 1936.

11. BCC allocated the bulk of the land plan reference C14/1 (known as 'Henbury Road') and the northern part plan reference C14/2 (known as 'The Manor House Estate', enclosure 4).

12. For the purposes of considering whether the application land was subsequently appropriated for purposes other than housing, the land can be split into three parts:

    (1) The eastern part of C14/1 which, after 1958, was given the reference C14/10 and known as 'Arnall Drive Henbury' (enclosure 7)
    (2) The western part of C14/1 and the whole of C14/2 which, after 1973, was given the reference C14/13 and known as 'Henbury Road Henbury' (enclosure 14)
    (3) Two small triangles of land to the north east of C14/1 which were subject to appropriation on 30 April 2010 (enclosure 19).

13. The following summarises the documentary evidence in relation to the three parts of the application land.

C14/10 (Arnall Drive Henbury)

27 May 1957 (enclosure 8): BCC's Housing Committee resolve that the appropriation of land shown coloured pink constituting 6.9 acres of what was C14/1 (and became C14/10) from housing to public open space purposes be approved in principle (minute 646).

12 June 1957 (enclosure 9): BCC's Planning and Public Works (Works Sub) Committee recommend that arrangements for the appropriation to open space purposes of the land in question be proceeded with (item 2).

18 June 1958 (enclosure 10): BCC's Planning and Public Works Committee resolve that, provided the Housing Committee agree, the Council be recommended to appropriate the above land for public open space purposes at a valuation of £3,300, subject to the consent of the Minister of Housing and Local Government (minute 66).

30 June 1958 (enclosure 11): BCC's Housing Committee resolve that the Council be recommended to agree to the appropriation of the land referred to in the report of the City Valuer by the Planning and Public Works Committee for open space purposes at the valuation of £3,300 subject to the consent of the Minister of Housing and Local Government (minute 719).

8 July 1958 (enclosure 12): BCC's Full Council resolve to approve and adopt Part IV of the Report which contains the recommendation to appropriate the above land for public open space purposes at a valuation of £3,300, subject to the consent of the Minister of Housing and Local Government, and to authorise the adjustment of the accounts of the Corporation accordingly.

3 December 1958 (enclosure 13): The Minister of Housing and Local Government, in pursuance of s. 163 Local Government Act 1933, approves the purpose, namely public open space, for which the Council wish to appropriate certain land comprising an area of approximately 6.9 acres situated at Arnall Drive and vesting in the Council for housing purposes (the land being shown on an attached plan coloured pink).

C14/13 (Henbury Road, Henbury)

14 September 1970 (enclosure 15): BCC's Housing Committee at a meeting on 18 June 1973 refer back to minute 157 of a meeting on 14 September 1970 whereby the Committee agreed to the appropriation of "land zoned for public open space purposes and also that along the line of the proposed Henbury By-Pass, the latter area to be the subject of a subsequent appropriation to the Planning and Traffic Committee as and when details and timing of the By-Pass are agreed".

8 June 1971 (tab 10, attached to the objector's submissions of 2 March 2012): BCC's Public Works Committee note and approve a Report of the City Engineer and Planning Officer which provides (on p 6) that the proposed Henbury By-Pass is not included in a formal road programme and it is unlikely that work will start for some time. To enable the site to be maintained in the meantime it would be advisable for the land to be included with that zoned for Public Open Space and it is therefore considered that the appropriation from the Housing Committee should include both the land reserved for the Henbury By-Pass and the land to be rezoned for Public Open Space. When details and timing of Henbury By-Pass are agreed it will be possible subsequently to appropriate the necessary land to the Planning and Traffic Committee.

18 June 1973 (enclosure 15): BCC's Housing Committee consider that a fair appropriation figure for the above appropriation to open space purposes is £21,000 and the accounts of the Corporation should be adjusted accordingly.

26 June 1973 (enclosure 16): BCC's Public Works Committee record a resolution at an earlier meeting on 8 June 1971 whereby approximately 10.9 acres of land was to be appropriated for use as public open space in connection with the Henbury Conservation Area. It is considered that a fair appropriation value would be £21,000 to which the Housing Committee have already agreed. It is recommended that the Committee approve and the accounts of the Corporation be adjusted accordingly, subject to the necessary approvals.

11 September 1973 (enclosure 17): BCC's Full Council resolve to approve and adopt Part I of the Report which contains the recommendation to appropriate 10.9 acres of land at Henbury from housing to public open space purposes at a transfer value of £21,000, subject to the approval of the Secretary of State for the Environment, and to authorise the adjustment of the accounts of the Corporation accordingly.

31 March 1974 (enclosure 18): The accounts (ref 196) show the appropriation by Parks from Housing of Henbury Conservation Area (10.9 acres) at a sum of £21,000.

The terrier card C14/13 (enclosure 14) states that the Department for the Environment gave approval for the appropriation of the 10.9 acres on 4 October 1973, although there is no direct documentary evidence of this.

The Henbury By-Pass scheme has been formally abandoned by BCC (see extract from Bristol Local Plan, December 1997 attached to the Objector's submissions of 2 March 2012, tab 10, which states at Policy M24 that the schemes for Henbury bypass has been abandoned). There is no evidence of the land along the line of the proposed Henbury By-Pass having been appropriated to the Planning and Traffic Committee at any time, as envisaged.

The Two Small Triangles of Land

30 April 2010 (enclosure 19): Under delegated powers, BCC's Resources Directorate approved the appropriation of land shown on an attached plan (including two triangles of land forming part of BL110548 and the application land) which is used for housing purposes (including open space) under Part II of the Housing Act 1985 for the purpose of providing public open space in accordance with the Open Spaces Act 1906 s. 10 to be managed by the Service Director for Environmental and Leisure Services. The appropriation is to take place under s. 122 Local Government Act 1972.

Legal Framework:

14. Although the discussion was *obiter*, the House of Lords gave strong guidance in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 that user which is under a legal right is not user 'as of right' for the purposes of s. 15(2) CA 2006 (see [3] & [9] per Lord Bingham; [11] per Lord Hutton; [29] – [30] per Lord Scott; [62] per Lord Rodger; and [72], [87] – [88] per Lord Walker).

15. Lord Bingham set out the position as follows:

> "In this context it is 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 is whether a party who lacks a legal right has acquired one by user for a stipulated period." (at [3])
> "Such use [pursuant to a statutory right to do so] would be inconsistent with use as of right" (at [9]).

16. It was accepted by the parties in *Barkas v North Yorkshire County Council* [2012] EWCA Civ 1373 that *Beresford* is authority for the proposition that there is a

distinction between a use of land 'by right' and a use of land 'as of right'. The Court of Appeal dismissed the submission that there is no additional requirement that the user must not be 'by right' in the *nec vi, nec clam, nec precario* definition of 'as of right' (at [38] per Sullivan LJ). Rather, if local inhabitants are indulging in lawful sports and pastimes on land 'by right' and not 'as of right' an application to register that land as a TVG will fail (see [42] – [45] per Sullivan LJ and see also *R (on the application of Malpass) v The County Council of Durham* [2012] EWHC 1934 (Admin) at [41]).

17. There are a number of circumstances where land potentially may be used 'by right' as opposed to 'as of right'. The following are of relevance to this case:

(1) Where land is held under an express statutory trust under s. 10 Open Spaces Act 1906. Land may so be held if it is either acquired under s. 9 Open Spaces Act 1906 or is appropriated for the purposes of s. 10 Open Spaces Act 1906 under the general power now contained in s. 122(1) Local Government 1972 (formerly s. 163 Local Government Act 1933). Where there is an express appropriation for the purposes of s. 10 Open Spaces Act 1906 so that the land is held in trust to allow its enjoyment by the public as an open space, it appears settled that the land is used 'by right' and not 'as of right': see *Beresford* at [30] per Lord Scott and [87] per Lord Walker and *Barkas* at [27] per Sullivan LJ.

(2) Where land is not held under a statutory trust in the strict sense, but land has been appropriated for the purpose of public recreation or open space. This circumstance finds form in [87] of Lord Walker's opinion in *Beresford*. It is *obiter*, but as stated by Sullivan LJ in *Barkas* (at [33] – [34]): "Lord Walker clearly regarded "appropriation" for the purpose of public recreation as being of critical importance. He emphasised that the undisputed evidence in Beresford did not establish, or give grounds for inferring "any statutory trust of the land or any appropriation of the land

as open space" (emphasis added): see paragraphs 88, 89(a) and 90 of his opinion … While they are not binding … Lord Walker's observations are highly persuasive, and I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment." Sullivan LJ went on to hold that there is no practical distinction between land which is initially acquired for open space purposes and land which has been appropriated for open space purposes from some other use. Thus, it appears settled that land that is appropriated for public recreation or as open space under an enactment other than the Open Spaces Act 1906 will also be used 'by right' and not 'as of right'.

(3) Where land is held under a statute other than the Open Spaces Act 1906, if the statute properly construed confers a right on the public to use land for recreational purposes. In such circumstances, it appears settled that, subject to the interpretation of the particular statute in question, the public's use of that land will be 'by right' and not 'as of right' (see *Barkas* at [26] and in relation to interpretation of particular statutes, [35] – [37]).

18. It follows from the foregoing that, in the case of open space land, if a subsequent appropriation to an inconsistent purpose occurs, the land will no longer be held for the public's benefit as an open space and subsequent user will not necessarily be 'by right'.

19. In relation to the evidential test to be applied to whether or not land is held on trust as open space, the following principles may be summarised. Local authorities are creatures of statute and their powers to acquire, hold and use land are governed by statute. Thus, as was common ground in the recent High Court case of *R (on the application of Stephen Malpass) v The County Council of Durham* [2012] EWHC 1934 (Admin) (at [41]), even if there is no unequivocal evidence spelling out under what authority land is held, it is

proper to assume that the holding of it is lawful provided that the use to which the land is put is permitted by some appropriate enabling legislation (and see, for example, *Attorney-General v Poole Corporation* [1938] Ch 23 cited by Lord Scott in *Beresford* at [30]). What was said by Lord Scott in *Beresford* at [30] is as follows:

> "Is it necessary in order for open space land to have been acquired under the Act [the Open Spaces Act 1906], for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney-General v Poole Corporation [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation
>
> "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use."
>
> There was no express reference in the Conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were used for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case."

20. Further, whether an appropriation to open space purposes has in fact occurred will be a matter to consider on the balance of probability having regard to all the evidence (see *Malpass* at [45]). The presumption of regularity applies where there is no evidence one way or the other as to whether part of the formal process of appropriation in fact took place, so that if a particular document is 'missing' from the evidence base, it will be presumed to have existed, unless rebutted by a party: see e.g. comments of Vivian Chapman QC

acting as independent Inspector reporting on the land that formed the *Barkas* challenge (at [122] of his Report[1]).

Application of the Law to the Facts:

The South and Eastern Part of the Application Land encompassed by C14/10

21. I find that there is overwhelming evidence that C14/10 was appropriated for public open space purposes at a value of £3,300 as of 3 December 1958 when the Minister of Housing and Local Government gave his approval for the Council's appropriation.

22. Although no reference is made in the 1950s documentary evidence to the Open Spaces Act 1906 or any other enactment under which the open space land was to be held, I consider it is proper to assume that BCC has since been lawfully holding the land as open space for the benefit of the public under s. 10 Open Spaces Act 1906, since that is the appropriate enabling legislation for the use to which it has been put (in accordance with *Beresford* at [30] and *Malpass* at [41] citing *Attorney-General v Poole Corporation*). Thus, any use of that part of the application land by the public for lawful sports and pastimes since c 1960 would be 'by right' and not 'as of right'.

23. Even if I am wrong, and the land has not been held under s. 10 Open Spaces Act 1906, I consider that appropriation to 'open space purposes' is sufficient to imply a statutory trust and render any use of the land by the public 'by right' in any event, in accordance with *Beresford* at [87] and *Barkas* at [33] – [34].

[1] See https://www3.northyorks.gov.uk/n2cabinet_comm/planningandregu_/reports_/20101008_/07heldredalepla/07heldredalepla.pdf (accessed: 28 November 2012)

24. There is no suggestion from the Applicant or any other party that this part of the application land has subsequently been appropriated for any other inconsistent purpose.

25. Accordingly, I find that the part of the application land which overlaps with that coloured pink on the plan attached to C14/10 (enclosure 7) has not been used 'as of right' by local inhabitants during the relevant period, and the application in respect of that part of the land must fail.

The West and Northern Part of the Application Land contained within C14/13

26. I find that there is overwhelming evidence that C14/13 was appropriated from housing to public open space purposes at a value of £21,000 as of 4 October 1973, when it is recorded on the terrier card that the Department for the Environment gave approval for the appropriation. I consider that, notwithstanding the absence of direct evidence of the Secretary of State's approval, the presumption of regularity applies and there is nothing to rebut the record on the terrier card that the necessary consent was given on that date. I note also that the accounts record the corresponding financial adjustment.

27. As with C14/10, I consider it proper to assume that BCC has, since then, been holding C14/13 on a statutory trust under s. 10 Open Spaces Act 1906. However, even if I am wrong, appropriation to 'open space purposes' is sufficient to render any subsequent user 'by right' and not 'as of right' (see paragraphs 22 and 23 above for the relevant legal authorities).

28. The Applicant argues that it is unclear whether part of this land which runs along the line of the former proposed Henbury By-Pass may in fact have been either held at that time or subsequently appropriated for highway purposes in connection with the construction of the Henbury By-Pass. I do not consider

that there is any 'fog of uncertainty', as the Applicant's representative puts it in the letter of 16 March 2012 (tab 11). On the contrary, I find that the documentary evidence is clear that the part of C14/13 along the proposed Henbury By-Pass was appropriated to open space purposes, along with the rest of C14/13, in 1973. However, it was noted that, *if and when* the proposed Henbury By-Pass plans came to fruition, it would be possible subsequently to appropriate the land running along the route for highway purposes. The By-Pass plans never came to fruition; no subsequent appropriation therefore took place; and the By-Pass scheme has now been abandoned in the 1997 adopted Local Plan. Thus, in my view there is nothing to cast doubt on the fact that the whole of C14/13 has been held by BCC for open space purposes throughout the relevant period.

29. I also do not consider that the letter from the Parks Manager dated 5 July 1989 provided by the Applicant with her submission of 8 February 2012 (tab 9) is of any relevance. It states only that play equipment cannot be replaced due to a lack of funds and that, as soon as any funding becomes available, the Parks Manager will endeavour to provide new equipment at Arnall Drive. I do not consider it has any bearing on how C14/13 or any other part of the application land was held by the Objector.

30. Accordingly, I find that the part of the application land which overlaps with that coloured yellow on the plan attached to C14/13 (enclosure 14) has not been used 'as of right' by local inhabitants during the relevant period, and the application in respect of that part of the land must fail.

<u>The Two Small Triangles of Land</u>

31. The appropriation of the part of the application land consisting of two small triangles to the east under delegated powers on 30 April 2010 was made with express reference to the Open Spaces Act 1906. The Applicant does not

question the validity of this appropriation and the fact that these two triangles have, as of 30 April 2010, been held under s. 10 Open Spaces Act 1906 on trust for the public as open space (see third full paragraph of p 2 of the Applicant's letter of 8 February 2012, tab 9). Thus, since 30 April 2010, any use of these triangles for lawful sports and pastimes will have been 'by right' and not 'as of right'.

32. Since the Applicant must show that the application land has been used for lawful sports and pastimes for the whole of the 20-year period ending on 25 January 2011, I find that the application must also fail in respect of these parts of the land since they have not been used 'as of right' for the whole of the relevant period.

33. Accordingly, I find that the application should be rejected in full on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'. In the circumstances, it is unnecessary for me to go on to consider the two further issues relating to 'locality' or 'neighbourhood with a locality' and 'significant number' of users but I do so in any event for the sake of completeness.

Issue 2: Whether the Applicant has identified a qualifying 'locality' or 'neighbourhood within a locality'

Factual Background:

34. The Applicant stated in Box 6 of the application form (tab 1) that the locality or neighbourhood within a locality in respect of which the application is made is 'Arnall Drive / Henbury Road, Henbury, Bristol'. No map was provided to set out the boundaries of these areas. Further submissions made on behalf of the Applicant have clarified that the properties in 'Arnall Drive and along Henbury Road' are relied on as a 'locality' or in the alternative a

'neighbourhood within a locality', in which case, presumably (although it is not expressly stated), 'Henbury' is relied on as a 'locality', or possibly even 'Bristol' (see letter of 8 February 2012, section 2, tab 9).

35. It is for the Applicant, as is made clear in the application form, to identify the locality or neighbourhood which is relied upon, and it is not for the registration authority to reformulate the Applicant's case in this (or any other) respect (*Oxford City Council v Oxfordshire County Council* [2006] 2 AC 674 per Lord Hoffmann at [61]). The task of the registration authority is to deal with the application and the evidence as presented by the parties. Absent a formal amendment, and an opportunity for the objectors to comment, it is not open to the registration authority to determine the case on the basis of any alternative. I therefore propose to take the Applicant's case as it appears most logically from the application form: that 'Arnall Drive / Henbury Road' is relied on as a neighbourhood within the locality of 'Henbury'.

Legal Framework:

36. The Court of Appeal has confirmed in *Adamson v Paddico (267) Ltd* [2012] [2012] 2 P & CR 1; EWCA Civ 262 that the words 'any locality' do not simply mean 'any sufficiently identifiable area or areas', since otherwise Parliament would have legislated in vain in introducing the less strict 'neighbourhood' limb (at [27] per Sullivan LJ). Rather, they upheld Vos J's position at first instance that the land in question could not be registered on the basis of user by the inhabitants of the two areas known as 'Edgerton' and 'Birkby' (at [28]).

37. Vos J had summarised the position at first instance ([2011] EWHC 1606 (Ch) as follows (at [97](i)):

> "A "locality" is understood in all the legislation (before and after the amendment) as meaning an administrative district or an area within legally significant boundaries (Lord Hoffmann at paragraph 27 in the

> Oxfordshire case; Sullivan J at paragraphs 133-4 in the Laing case; Sullivan J at paragraph 81 in the Cheltenham case; Harman J at page 937 in the Ministry of Defence case; Carnwath J at page 502 in the Steed case)."

38. Although the Court of Appeal expressed the view in *Paddico* that, were they starting with a 'clean slate', they may have concluded otherwise (at [22]), the requirement for an area within legally significant boundaries remains good law (see [26] – [28]).

39. Indeed, the Court of Appeal took a restrictive view to a conservation area being a locality because, despite being legally significant, its boundaries were "defined by reference to its characteristics as an area of special architectural or historic interest … rather than by reference to any community of interest on the part of the inhabitants" (at [29]).

40. The word 'neighbourhood' in s. 15(2) was drafted with deliberate imprecision (*Oxfordshire* [2006] 2 AC 674 at [27] per Lord Hoffmann). Notwithstanding this, in an urban context, a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which have been 'cobbled together' just for the purposes of making a TVG application (*R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) at [85]).

41. A common sense approach should be adopted on the ordinary meaning of the word (*Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch) at [103]). Factors which may in any particular case point to a particular neighbourhood being an area distinct from those adjoining it include the existence of community facilities and shops, estate agents selling properties by reference to the area, streets being named by reference to the neighbourhood, the existence of connecting streets, the style and date of the housing within the area (*Leeds*

Group plc at [104]). When *Leeds Group plc* was heard in the Court of Appeal ([2011] 2 WLR 1010) there was no challenge to the Judge's finding at first instance that the areas in question were properly to be regarded as neighbourhoods, and thus the above guidance should continue to apply (see [16] and [19]), although any particular neighbourhood need not necessarily contain all or any of the features identified in *Leeds Group plc.* What matters is whether, looking at all the factors, it can sensible be said that the claimed area has a sufficient degree of cohesiveness to give it its own distinct identity.

Application of the Law to the Facts:

42. The Applicant's submissions do not address how 'Henbury' or 'Henbury, Bristol' meets the requirements of a 'locality', other than to say that the comments in *Oxfordshire & Buckinghamshire MHT* are obiter and not a definitive statement of the law and there is no statutory requirement for a locality to be defined as an ecclesiastical ward or parish (letter of 8 February 2012, section 2, tab 9). While there is no statutory definition of 'locality', I disagree insofar as I consider all the authorities point to the fact that the Applicant must prove that the 'locality' relied on forms an administrative district or an area within legally significant boundaries. The Applicant has failed to prove on the balance of probabilities that 'Henbury' or 'Henbury, Bristol' is such an area. While I note that the Objector has queried whether Henbury is to be referenced to the boundary of the electoral ward (see letter of 19 January 2012 p 5, tab 8), I do not consider that the registration authority is in a position to make such an assumption.

43. Although the Applicant has been legally represented throughout, were I not otherwise of the view that the application should fail, I would be minded to recommend that the opportunity be given for further submissions on this matter before determination in the interests of fairness, particularly since I am not entirely clear what 'locality' is being relied on in the application form;

however, since the application fails in full on other grounds (see above in relation to 'as of right'), I do not consider that is necessary.

44. In relation to the 'neighbourhood' claimed (Arnall Drive / Henbury Road), the Applicant contends that there is a sufficient degree of cohesiveness because the properties in those Arnall Drive and Henbury Road:
    (a) have a common uniting feature in that they are clustered around and overlook the area of open space in question. The green area is the central focus of the neighbourhood; and
    (b) house residents who have shown ready willingness to unite to produce evidence in support of the Commons Act 2006 section 15 application (see letter of 8 February 2012, section 2, tab 9).

45. I do not find, as a matter of judgement and impression, that these factors are sufficient to establish on the balance of probabilities that Arnall Drive / Henbury Road is a 'neighbourhood' with a distinct and identifiable community. Other than their proximity to the application land, no evidence has been provided to demonstrate how these particular roads might be distinguished for any other roads in the immediate area, and I note that there are a number of other roads bordering or very close to the application land, such as Trymwood Close, Didsbury Close, Lorain Walk etc. which have not been included without explanation. Furthermore, a number of evidence questionnaires relied on are from residents of roads other than Arnall Drive and Henbury Road (nos. 21, 22, 23, 24, 28, 29, tab 1), which would suggest that use of the land is by a wider section of the public than the residents of Arnall Drive and Henbury Road.

46. Accordingly, I find that the application also fails on the basis that the Applicant has failed to prove on the balance of probabilities that use of the application land has been by inhabitants of a 'locality' or 'neighbourhood within a locality' for the purposes of s. 15(2) CA 2006.

Issue 3: Whether use has been by 'a significant number' of the inhabitants of the 'locality' or 'neighbourhood within a locality'

Legal Framework:

47. Irrespective of whether the 'locality' or 'neighbourhood' identified is adequate to meet the statutory test, the Applicant must show that the use of the land has been by a 'significant number' of qualifying local inhabitants as opposed to use by merely a small and insignificant number, indicative of merely use by some households: *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] 2 PLR 1.

48. In *Alfred McAlpine*, Sullivan J held that whether the use had been by a significant number of local inhabitants is very much a matter of impression. The number might not be so great as to be properly described as considerable or substantial; rather he held that 'a significant number' meant a number that was anything more than de minimis and sufficient to indicate that the land is in general use by the local community rather than occasional use by individuals as trespassers (at [71]).

49. Although Sullivan J stressed that there was no 'absolute numbers' test for significance, he accepted on the facts of *Alfred McAlpine* that if the six witnesses who attested to carrying out lawful sports and pastimes on the land throughout the relevant period had not seen others on the land, then it would be difficult to see how six out of 20,000 (the population of the locality in that case) or one out of 200 could be said to be significant (at [72]).

50. This statement appears to imply (although the matter is not addressed directly) that significance is relevant in the context of the overall population of the locality or neighbourhood within a locality claimed. The registration

authority has not been appraised of an estimate of the population of 'Arnall Drive / Henbury Road'. Notwithstanding this, I consider that the real issue to be determined is whether, as a matter of impression, a reasonable landowner would have appreciated that the land was in general use by the community rather than occasional use by individuals as trespassers.

Application of the Law to the Facts:

51. Twenty-nine evidence questionnaires were submitted with the application and the Objector has not queried their truthfulness or that the land has been used by those people for lawful sports and pastimes during the relevant 20-year period. In the circumstances, I find that the use has been by a significant number of local inhabitants i.e. that is a reasonable number to alert the landowner that the land was in general use by the community. The objection is in fact put in terms of the evidence of user being concentrated on a limited part of Arnall Drive / Henbury Road, rather than being insignificant in absolute terms (see Objector's letter of 19 January 2012, p 6, tab 8). However, as Vos J held in *Paddico* [2011] EWHC 1606 (which was not doubted by the Court of Appeal), there is no need for the distribution of users to be spread adequately over the claimed neighbourhood / locality (at [106](i)).

52. Thus, were I not otherwise bound to recommend that the registration authority refuse the application in full, I would *not* recommend that the application fail in respect of Issue 3.

Conclusions and Recommendations

53. My conclusions are:

(1) The application should be refused in whole on the basis that the use of the application land during the relevant period has been 'by right' and not 'as of right'.

(2) As a secondary reason, the application should be refused in whole on the basis that the Applicant has failed to establish on the balance of probabilities that the use of the application land has been by inhabitants of a qualifying 'locality' or 'neighbourhood within a locality', although I have expressed my reservation about rejecting the application on this basis without further submissions, were the statutory test otherwise met.

54. My recommendations are:

(1) That my Report should be made available to the Applicant and to the Objector, together with final confirmation of the date of the meeting at which the registration authority will reach its decision. The Applicant and Objector should be informed that this meeting does not present an opportunity for the parties to re-state their cases or seek to put in further evidence, unless truly exceptional circumstances are made out.

(2) That the decision on the application is for the registration authority which must exercise its own discretion, save that it must not take into account issues relating to any balance of advantage or disadvantage flowing from registration or non-registration of the land as a TVG.

(3) That in reaching its decision on the application it can properly have regard to my overall conclusions and reasoning, as well as any advice from officers.

(4) That subject to that advice and any late representations received, the application should be refused in respect of the entire site and for the reasons set out in this Report and summarised in my Conclusions above.

(5) This application is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (since the registration authority is not one participating in the pilot scheme). Under Regulation 9(2), the registration authority is required to give written reasons for the rejection of an application. If the registration authority accepts my recommendations and reasons, its reasons should be stated to be "the reasons set out in the Independent Inspector's Report of 29 November 2012".

ANNABEL GRAHAM PAUL

Francis Taylor Building
Inner Temple
EC4Y 7BY

29 November 2012