

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

14 JANUARY 2013

Report of: Commons Registration Authority

Title: Application to register land known as Elderberry Walk, Southmead Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006

Ward: Southmead

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 Elderberry Walk, Southmead Bristol as a town and village green.

Summary

This report relates to an application to register land known as Elderberry Walk, Southmead Bristol as a town or village green pursuant to Section 15(1) of 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

External

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

Context

4. The Council as registration authority has received an application to register land known as Elderberry Walk, Southmead Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006 (the Act) from Mrs Alison Edith Devonshire dated 10 January 2011.
5. An objection to the registration of the application land has been received from the landowner, Bristol City Council (the Objector). The Objector has contended that the land was originally acquired for housing purposes and was later appropriated for use as Public Open Space and therefore should not be registered as a town or village green.
6. In April 2012 the Committee resolved to appoint an independent inspector to consider representations on the interpretation and legal effect of the objector's evidence.
7. The inspector gave written advice in June (Appendix A). Thereafter the parties made further submissions and these have been submitted to the inspector.
8. The inspector has now provided further written advice to the Commons Registration Authority with recommendations (attached as Appendix B).

Proposal

7. 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.
8. Officers recommend that the Committee accept the inspector's advice and reject the application for the reasons set out in the Inspector's further advice of 3 December 2012.

Other Options Considered

9. The other options considered are:
 - 9.1 Register the application land.
 - 9.2 Refer the matter to inquiry

10. 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 9.1 or 9.2 it must have sufficient reason for reaching a conclusion different from that of the inspector.

Risk Assessment

11. 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

12. 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.

“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–Inspector’s Advice June 2012

Appendix B– Inspector’s further advice December 2012

Local Government (Access to Information) Act 1985

Background Papers:

Application papers/ statement of objections/ response and other written representations from both parties available at the City Hall, College Green.

Section 15 Commons Act 2006

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

AN/JD5.446

RE: ELDERBERRY WALK OPEN SPACE, 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 dated 10 January 2011 by Mrs Alison Devonshire to register land known as Elderberry Walk Open Space as a town or village green. Bristol City Council, in its capacity as landowner, objects to the registration of the land and has submitted to the Registration Authority a detailed written objection supported by extensive documentary material.
2. It appears that the entirety of the application site is open space that is owned and maintained by the Objector and has been used for a period in excess of 20 years for recreation by local people.
3. I should say at the outset that I do not think that I am in a position to give concluded advice at this stage. This Advice explains why; raises further questions which I consider that the parties should have the opportunity to address; sets out the procedure which I consider should be adopted for the determination of the application.

The facts in detail

4. The application site is approximately 10.78 acres¹ in size. It was acquired by virtue of four conveyances of larger areas of land as follows:

27 July 1921	5.64 acres (out of a conveyance of 7.07 acres)
17 April 1929	1.19 acres (out of a conveyance of 298 acres)
17 April 1929	1.45 acres (out of a conveyance of 123.20 acres)
21 September 1950	2.28 acres (out of a conveyance of 2.41 acres)

5. The relevant areas are illustrated on the plan Enclosure 2 to the Objection and which I annex to this Advice. It will be seen that Enclosure 2 shows two uncoloured areas within the application site. The larger of these (more or less in the middle, reading west to east) is, I think, land to which Bristol City Council does not have paper title, although it is now the registered owner of it. The other uncoloured area is, as I understand it, land which, from its records, the City Council considers that it did formally acquire, but in respect of which it no longer has the details.
6. I do not have material which indicates the statutory basis for the acquisition of the 5.64 acres. It was evidently held by the Planning Works and Maintenance Committee. In 1946 some of the land was to be appropriated for housing purposes², so it evidently was not acquired in 1921 for housing purposes as such. It seems to me that it is likely to have been acquired for planning or development purposes. For the purposes of my analysis of the position, what is most significant is the fact that the land was **not** acquired as public open space. The remainder of the application site – 4.92 acres – was

¹ The dimensions referred to in the documentation is generally Imperial measures reflecting their historical origins. I do not think that it will assist clarity by supplying metric conversions.

² See paragraph 7 below.

evidently acquired for housing: the conveyance refer to the Housing Acts and the land was subsequently managed by the Housing Committee³.

7. By a resolution dated 21 January 1946, the Housing Committee authorised the transfer of 2.85 acres of land from the Public Works Maintenance Committee to the Housing Committee for the provision of temporary housing. Of the 2.85 acres, 1.46 acres were within the application site. The resolution does not use the words “appropriate” or “appropriation” but it appears to me that what occurred in 1946 was an appropriation to housing purposes. This is because this would have been appropriate in the circumstances, and also because there is an express reference to a valuation – something that would have been appropriate if the land was being appropriated. I do not have a copy of matching resolution by the Public Works Maintenance Committee, although I imagine that there would have been one.
8. The position following the 1946 appropriation was that the Public Works and Maintenance Committee held 4.67 acres of the application site and the Housing Committee 6.11 acres.
9. The temporary housing which was provided on Elderberry Close can be seen on some of the OS maps included with the Objection. I think that at some stage it has been demolished or removed, although the details do not appear anywhere in the material before me.

³ The objection at one place refers to the area of land being held at this point by the Planning Works and Maintenance Committee as being 6.13 acres and that by the Housing Committee as 4.65 acres. I am not quite sure how these figures have been arrived at. There may be discrepancies between the conveyance and the land measured “on the ground”; as has been seen there are also uncoloured areas, and I am not sure how they have been accounted for. Discrepancies like this keep occurring (at least when I do the arithmetic). At this stage, I doubt that they are important: “the bigger picture” which I set out below is clear.

10. The City Treasurer and City Valuer prepared a Joint Report for the Works and General Purposes Sub-Committee of the Planning and Public Works Committee held on 27 November 1963. Among a number of things, it recommended appropriating 663.27 acres from Housing to the Planning and Public Works Committee *for open space*. The total appropriation figure was £154,839. Of the 663.27 acres, 1.44 acres formed part of the application site⁴ with an appropriation figure of £1,195. The City Treasurer and City Valuer informed the Committee that:

The financial effect of this transaction would be to charge the General Rate Fund (for open spaces) and relieve the Housing Revenue account loan charges of approximately £8,000 per annum.

11. I think that the effect of the transfer of the 1.44 acres would have been to relieve the Housing Revenue account loan charge of approximately £17.37 per annum.

12. The appropriation proposal was approved by the Works and General Purposes Sub-Committee on 27 November 1963, by the Housing Committee on 20 January 1964 and by the Council on 11 February 1964.

13. The position following the 1964 appropriation was that the Planning and Public Works Committee held 6.11 acres of the application site and the Housing Committee held 4.67 acres. Of the 6.11 acres held by the Planning and Public Works Committee, 1.44 acres were specifically held *for open space*.

⁴ It was described as Pen Park Road.

14. On 5 June 1985 an Inner City Working Group reported to the Planning and Transport Committee. It identified by reference to a plan the application site for environmental improvements estimated to cost £10,000. It described the application site and the proposal as follows:

This scheme aims to develop an area of Public Open Space previously blighted in part by a road improvement line. The area is at present grassed with some recent tree planting. It is well placed to serve as recreational facility for the north east corner of Southmead as well as new homes in the Charlton Road and Knowle Lane area. The provision of a play area will further develop the potential of this open space ...

15. The ownership of the land was described as follows:

Bristol City Council part Housing Committee, part Open Spaces and Amenities Committee.

The report indicates that the application site was *de facto* open space. The environmental improvements were approved by the Committee.

16. On 22 July 1985, as a follow up to the Environmental Improvement Programme, the Housing Committee declared the land at a number of sites surplus to requirements and requested that the Open Spaces and Amenities Committee to assume control of them. Among the sites so declared surplus to requirements was:

(vi) Land at Charlton Road/Elderberry Walk, Southmead.

17. On 17 March 1986, the Housing Committee received a Report from the City Valuer in respect of 84 sites totalling 141.554 acres in area. These included Site No. 24 which was identified as being *Adj Wootton House, Pen Park Road, Southmead* and 4.65 acres in size. The recommendation, which was adopted by the Committee was that:

The Committee agree to declare the 84 sites listed in Appendix A surplus to requirements and invite the Land and Administration Committee to appropriate the site from Housing Purposes to either Open Spaces purposes or to be held for the Benefit, Improvement and Development of the City Council's area as necessary subject to the approval of the Open Spaces and Amenities Committee.

The Report did not in fact identify any land which was not to be appropriated to open space.

18. On 20 March 1986, the Land and Administration Committee received a Report from the City Valuer. This proposed in respect of a number of sites that, after improvements had been carried out, they should be appropriated from Housing purposes to Open Space purposes. The Committee resolved that the reports [sic] be accepted and the recommendations set out there be approved and adopted subject to the approval of the Council where necessary. The land thus appropriated included:

vi) Land at Charlton Road/Elderberry Walk, Southmead

The total area of the sites was 123 acres. The City Valuer put an appropriation figure on the land of £245,620. He observed that this would result in debt charges of £27,000 p.a being transferred from the Housing Revenue Account to the General Rate Fund to be borne by the Open Space and Amenities Committee. The Report does not – at least in the pages which I have seen – identify the size of the land at Charlton Road/Elderberry Walk being appropriated, but a plan (vi) annexed to the Report identifies essentially the entirety of the application site.

19. On 4 April 1986, the Open Spaces and Amenities Committee received a Report from the Chief Valuer. It identified the same 84 sites that had been identified to the Housing Committee on 17 April 1986 and which included Site No. 24 identified in the same way

and as being of the same size. The 84 sites now however were 178.106 acres in total. The discrepancy of 36.552 acres arises from the fact that to the Housing Committee Site No. 296 (Adj City Boundary at Hartcliffe and Withywood) was identified as being 12.548 acres in size and to the Open Spaces and Amenities Committee it was identified as being 49.1 acres in size. The Open Spaces and Amenities Committee resolution was as follows:

... that this Committee agree to accept responsibility for the 84 sites listed in Appendix A to the report and advise the Land and Administration Committee there is no objection to the site being appropriated from Housing purposes to either Open Space purposes or to be held for the Benefit, Improvement and Development of the Council's area as necessary, subject to the Resources and Co-ordination Committee making the necessary funds available to cover both Capital and Revenue implications, and that the Resources and Co-ordination Committee agree to the transfer of existing funds.

20. It is not easy to try to work out from the material exactly what was going on and, in particular, the fact that on 17 March 1986 the total area of the 84 sites appears to be 141.554 acres, that on 20 March 1986 the area of land being appropriated was 123 acres and that on 4 April 1986 the total area of the 1984 site appears to be 178.106⁵. There is a further discrepancy in that the terrier card identifies 5.45 acres as being appropriated on 20 March 1986 from Housing to Open Space (i.e not 4.65 acres). The Objector's Statement considers this latter discrepancy as a mistake. For present purposes it is important to note that the Objector does not argue that more than 4.56 acres were appropriated in 1986.
21. The position following the 1986 appropriation was, on the face of it, that the Housing Committee now only held 0.20 acres (4.67 acres less 4.65 acres). 4.65 acres were held

⁵ As regards the discrepancy between 141.554 acres and 178.101 I have of course explained the immediate reason for the discrepancy but I do not understand what the underlying reason is.

by the Open Spaces and Amenities Committee. On the face of it, 6.11 acres were held by the Land and Administration Committee, 1.44 acres of which being specifically held for Open Space⁶.

22. On 30 April 2010, the Services Manager Corporate Property, acting under delegated powers authorised the appropriation of a large number of small parcels of land from housing to public open space in accordance with section 10 of the Open Spaces Act 1906. The site included 0.0101 hectares (0.024 acres) at Elderberry Walk O/S. This land represents **part** of the 0.20 acres of land held by Housing Committee at this time. The land was valued at £100.

23. From the facts set out above one can see how parts of the site originally held for housing purposes have been appropriated as public open space. In summary, this has occurred as follows:

1964	1.44 acres
1986	4.65 acres
2010	0.24 acres

However this still leaves 4.67 acres which were originally acquired in 1921 and which have not, as far as I can see, ever been appropriated as public open space.

24. The first thing to say about this is that it seems to me that it is possible that the 4.67 acres was part of the 123 acres which was appropriated by the Land and Administration Committee in 1968. In the light of my analysis, it may be possible that further light can

⁶ The Land and Administration Committee had by this time succeeded the Planning and Public Works Committee. On the face of it, I would have expected the 1.44 acres to be held by or at least managed by the Open Space and Amenities Committee. I raised questions about what happened after the dissolution of Planning and Public Works Committee at paragraph 30 below.

be shed on what was done in 1968 or, at any rate, it can conclusively be ascertained whether the 123 acres included the 4.67.

25. The second observation that one may make is that there is potentially an explanation as to why the 4.67 acres were never appropriated (if they were not) as public open space. This is because they were maintained out of the general rate fund and not the housing finance account. If housing land was not in fact being used for housing purposes but was being used for other purposes of the Council, those other purposes would have been funded from a separate fund. This would not have been appropriate. The same consideration would not have applied in respect of planning or development land which was held as open space.
26. The third observation is that if the 4.67 acres were never appropriated as public open space, the simplest analysis to present itself is that this land is registrable as a town or village green, although that part of the application site that has been appropriated as public open space is not: see *R (Beresford) v Sunderland City Council*⁷.
27. The fourth observation is that if there has not been an **express** appropriation of the 4.67 acres, it may be arguable that there has been an **implied** appropriation. This is not a possibility that the City Council as objector has addressed. It may wish to do so.
28. The fifth observation is that the rating records could be relevant. Has the land been treated as public open space for rating purposes and, if so, since when?

⁷ [2004] 1 AC 889. See paragraphs 34 - 35 below.

29. The sixth observation is that the parties might like to address the potential argument identified by Lord Scott at paragraph 30 of *Beresford*, namely that land might be held under the Open Spaces Act 1906 by operation of law.
30. Seventhly, I can observe that the Objector has focused on the documentary material. This could, it seems to me, have been decisive in showing that use of the land could not have been *as of right*. In the event, the material which I have seen has not had this effect. It seems to me that it might be helpful to understand something more of how the land has been used, if that knowledge is available. Did the land that was acquired in 1921 have a distinct identity? (Did it have any beneficial use? Was it fenced?) It came to be used as public open space. When did this come about? Further in 1964, when 1.44 acres were appropriated for open space, the appropriate Committee for holding open space would have been the Planning and Public Works Committee, which would also have been the appropriate Committee at that time to hold public open spaces. This might have led to some confusion as to the basis on which it was holding land. Is there any resolution of the Planning and Public Works Committee when it decided that the 4.67 acres which had been seemingly acquired in 1921 for planning or development purposes should be laid out or maintained as public open space? (It might also be helpful to understand from the maintenance records when maintenance of the land as open space began, although I guess that those records may not go back so far). The final matter that occurs to me is that until 1968 Planning and Public Works Committee would have been responsible for both planning and development land and for open spaces. Planning and Development land was held by the Planning and Transport Committee after 1968 and Open Spaces by the Public Works Committee. Is there any

record which shows the identification of land as under the PCT Committee and some under the PW Committee (and, if there is, under which Committee was the 4.67 acres)?

31. Eighthly, the Objector has not specifically addressed the very small piece of land that is currently held by the Housing Committee. It would be helpful to know why the view is taken that this piece of land is not registrable as a town or village green.

32. Finally, I can observe that although the Objector has gone to considerable lengths clearly to explain the history of land (e.g by reference to a very helpful sequence of maps produced for the purpose), the matter is complicated. It is possible that I may have misunderstood something, in which case the Objector will want to put me right. More particularly, the terrier cards are not intrinsically easy to understand and further not easy to understand without seeing the terrier map. I wonder whether it might be possible for the relevant part of the map to be reproduced and for some text to be supplied explaining the alteration to it with reference to the terrier cards.

Conclusion

33. It will be helpful if I seek to draw the threads together.

34. In law, it seems that land which is public open space is not registrable as a town or village green. This is because use of it has not been *as of right* but *by right*⁸. Although the contrary position is not beyond argument, the proposition to have started is strongly supported by the approach of the House of Lords in *Beresford* and one which has been I

⁸ See per Lord Bingham of Cornhill at paragraph 9 of his speech in *Beresford*.

think one universally applied by those advising registration authorities. It also seems to me to be correct in principle and to accord with common sense.

35. Against this background, in cases like the present, the focus is generally on whether the land in question actually **is** public open space. In *Beresford* the land in question was *de facto* public open space – laid out and maintained as such, but never appropriated for open space from development purposes. It **was** registrable as a town or village green.

36. It will be seen that on the material before me, I am not satisfied that the 4.67 acres is not *de facto* open space as in *Beresford*. However it will also be seen that a considerable number of questions arise as to the facts.

37. I am entirely clear that it would be wrong – become unfair – for the registration authority on the material before it either to reject or to accept the application in whole or in part. Both parties need to have the opportunity to address the points that I have made by way of the production of any additional information on which they might wish to rely and by the submission of further representations. The Applicant needs to have the opportunity to comment on any further material produced by the Objector, and to have the last word. It is always possible that some further questions might arise but I think that following such further submissions, it ought to be possible for me to advise that the land should or should not be registered as a town or village green (or that part should be registered and that part should not). It does not appear to me that a non-statutory public inquiry will be necessary, although I might take a different view of this after the submission of further representations.

38. A timetable should be set for the production of further information and representations.

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19 June 2012

RE: ELDERBERRY WALK OPEN SPACE, BRISTOL

FURTHER ADVICE

Introduction

1. I am asked further to advise Bristol City Council, the Commons Registration Authority, in respect of this matter. It concerns an application dated 10 January 2011 by Mrs Alison Devonshire to register land known as Elderberry Walk Open Space as a town or village green. Bristol City Council, in its capacity as landowner, objects to the registration of the land. It has submitted to the Registration Authority a detailed written objection supported by extensive documentary material and, in response to my advice dated 19 June 2012, further detailed material.
2. This advice should be read together with my previous advice dated 19 June 2012. On re-reading that advice, I think that I may have summarised the position too briefly; and that paragraph 8 might imply that the whole of the application site was owned by the City County in 1946. In fact, as I think would be clear to someone reading the Advice with the documentation in hand, there is an area of 2.28 acres forming part of

the application site which was not acquired until 1950. Paragraph 8 is thus correct, but only as to the position after 1950.

Further consideration of the factual position

3. It will be helpful for the reader once again to have before him the map which is enclosure 2 to the objection.

The north western part of the application site (i e that coloured brown on enclosure 20)

4. The purchase of 7.375 acres was from the Teign Valley Granite Company. It is clear from the minutes of the Council now supplied to me that it was acquired in 1921 as a working quarry, to supply limestone for road building. It was placed under the responsibility of the Sanitary Improvement Committee; which subsequently¹ was renamed the Planning and Public Works Committee, and later still the Public Works and Maintenance Committee.
5. It was envisaged that the supply of stone *would last for a great many years*. However this may be, it seems from an account of the history of the site prepared for a Committee in 1949 that at the end of the 1920s the quarrying use had come to an end and it was used for tipping. This use continued until 1935, when tipping was temporarily switched to another site, but the resumed in 1939. The land was requisitioned during the war and used by the military authorities for the dumping of sub-soil; before tipping proper started again in 1944. Although the record of the

¹ In 1933.

transfer does not exist, during the time that it was used for tipping it was evidently the responsibility of the Transport and Cleansing Committee.

6. In 1946 the western part of the land (2.85 acres) was appropriated for housing.
7. At a meeting on 25 March 1953, the Public Works and Maintenance Committee recorded that tipping operations had been completed and that from 1 April 1953 the control of the land (i.e. the 4.5 acres that had not been appropriated for housing) would revert to the Public Works and Maintenance Committee. The Committee resolved that
 - the ground be made available for general recreation;
 - approximately £80 be expended on mowing;
 - that approximately £50 be expended annually on the provision of soil.
8. It is evident from the Council's records that hereafter the land became known as Charlton Road Open Space. It was counted as public open space in the First Quinquennial Review of the Development Plan in 1962. In 1968 capital expenditure on it of £3,500 was approved as part of a programme of capital expenditure on parks and open spaces. There is no record to say whether this money was ultimately spent (the authorisation was for the period after 31 March 1971).
9. In 1986, there was an appropriation of land from housing to open space. It is not easy from the relevant resolutions to work out what land was appropriated, but it seems from the terrier card (see enclosure 24) that the land which forms part of the application site that had been appropriated to housing (but which by this time was apparently open space), was appropriated as open space.

10. The above is subject to the point that there is a small triangle of land at the west end of the site that was not appropriated to open space until 2010.

The south western part of the application site (i e that coloured yellow on enclosure 2)

11. This was originally acquired for housing in 1929.
12. As explained above the extent of the 1986 appropriation is not clear from the resolutions, but it appears from the terrier cards (enclosures 10 and 39) that the remainder of the site was appropriated as open space in 1986.

The south eastern part of the site (i e that coloured green on enclosure 2)

13. This was originally acquired for housing in 1929.
14. As explained above the extent of the 1986 appropriation is not clear from the resolutions, but It appears from the terrier cards (enclosures 7 and 39) that the remainder of the site was appropriated as open space in 1986.

The north eastern part of the site (i e that coloured blue on enclosure 2)

15. This was originally acquired for housing in 1950.
16. In 1963 it is clear that 1.44 acres of this land, essentially forming the western part of the site were appropriated as open space.
17. As explained above the extent of the 1986 appropriation is not clear from the resolutions, but It appears from the terrier card (enclosure 30) that the remainder of the site was appropriated as open space in 1986.

Further consideration of the legal position

18. I think that it helps exposition to start with the south western, south eastern and north eastern parts of the application site.
19. One can be clear that 1.44 acres of the north eastern part of the application site were appropriated as open space in 1963. I think that it is also reasonably clear that the remainder of the south western, south eastern and north eastern parts of the application site were appropriated as open space in 1986. One looks at the 1986 material as a whole, and I think that it is therefore legitimate to use the terrier cards to interpret what was being done. The terrier cards are not intrinsically the clearest of documents to read and interpret and the copies I have are not completely legible, but I get the clear impression that that all the application site apart from the 1.44 acres (already appropriated) and the north western part of the application site (considered as already held as open space – see below) was appropriated to open space in 1986. On the material before me it is in my judgment appropriate so to conclude. I would add two points:
 - I think that my remaining reservations about the position would be dispelled if someone “took me through” the terrier cards and the terrier map; this could of course be organised were it considered necessary;
 - I will suggest that the applicant has the opportunity to comment on this further advice; if she considers that I have overlooked something, she will have the opportunity to say so.
20. It seems to me that if land has been appropriated to use as open space, use of it by local people will have been *by right* and not *as of right*: see per Lord Bingham at

paragraph 9 of *R (Beresford) v Sunderland City Council*² and the judgment of Sullivan LJ in *R (Barkas) v North Yorkshire County Council*³. Note that I elaborate below on the judgment in *Barkas*; in the light of that judgment I do not think that there is any realistic prospect of the Applicant successfully arguing that the use of the land by local people which had been appropriated to open space was use that was as of right and not by right. In these circumstances, the south western, south eastern and north eastern parts of the application site do not fall to be registered as a town or village green.

21. I turn to a consideration of the north western part of the application site.
22. Apart from the land used for a time as housing and the small piece of land appropriated in 2010, it is evident that there was not a formal appropriation of the land from land for the purposes of quarrying to land for the purposes of recreational open space. The word appropriation is not used and the consent of the Minister (required for an appropriation of land under section 163 of the Local Government Act 1933) was not obtained. Yet the Council are evidently well aware of the legal requirement for appropriation – witness the 1946 appropriation to housing.
23. Obviously one explanation is that the need for appropriation was overlooked; the result of which would be that, in 2013, the land would still be formally held for the purposes of quarrying, despite the facts that
 - quarrying had ceased in 1935
 - the land had been filled with waste

² [2004] 1 AC 889 (HL).

³ [2012] EWCA Civ 1373 (CA).

- the land had been laid out as open space in or about 1953 and maintained as open space ever since.
24. This conceivably is the law, but it would hardly be sensible. It seems to me more likely that the view was taken, for whatever reason, that there was no need to appropriate the land to recreational open space in 1953. It seems to me that there is some scope for the presumption of regularity in this context i e the idea that lawful processes have been gone through and that the Council did not proceed unlawfully. At any rate, it is worth in considering the position to start from a position that there ought to be an explanation for what might at first sight seem to be a wrong way of proceeding (i e not appropriating the land).
25. The context is set by the fact that the land was evidently appropriately held by the same Committee (albeit one which enjoyed a different name at different times). Speaking generally one may observe that this may have provided background to the view that appropriation was not required; more particularly – and importantly – I think that the fact that land was held by the same Committee whether as quarrying land or as recreational open space is likely to have had the legal consequence that when the use of the land was changed from quarrying to recreational open space, no adjustment in the accounts of the City would have been called for under section 163 (3) of the Local Government Act 1933.
26. These observations are preliminary to a consideration of the power under which the City Corporation would have acquired the land for purposes of quarrying. I think that it may be significant that no express power is identified in the minutes of the Corporation or the conveyance. I cannot rule out the possibility of there being an express power; nonetheless I have not found one in my examination of the Municipal

Reform Acts passed before 1921 or the many local Acts under which the Corporation obtained many special powers in the years before 1921. I would not claim that my search has been exhaustive, and of course it is always hard to prove a negative. If I could find no power at all that enabled the Corporation to acquire the Quarry, I would assume that there was such a power because it is very hard to imagine the Corporation with the sanction of the Ministry of Health acquiring land in circumstances in which they had no power to do so.

27. However if there were no express power to acquire land for the purpose of quarrying (as I think is likely to have been the position), then the Corporation would have had power to acquire the land under the terms of section 107 (1) of the Municipal Corporations Act 1882 (as amended⁴). This provided that:

Where a municipal corporation has not power to purchase or acquire land ... the council may, with the approval of the Local Government board ... purchase or acquire any land in such manner and on such terms and conditions as the Local Government Board approve, and the same may be conveyed to and held by the corporation accordingly.

28. It seems to me that it is likely that the land was acquired under this power.⁵ If this be so, then one can say that specifically it was acquired for the purposes of quarrying; but, more generally, for the purposes of the Sanitary and Improvement Committee. I do not have the terms of reference of this Committee but having become the Planning and Public Works and Improvement Committee in 1933 with the addition of planning responsibilities - at which point it did have open space responsibilities – it seems reasonable to assume that it had those responsibilities in 1921. In any event,

⁴ I.e. by section 72 of the Municipal Corporations Act 1888.

⁵ Note that by section 3 of the Ministry of Health Act 1919, approval of the acquisition would have been by the Minister of Health to whom the powers of the Local Government Board were by that section transferred.

it seems to me that it is arguable that if land was acquired under section 107 of the 1882 Act, appropriation to a specific purpose for which the council did have powers to acquire land would not have required appropriation.

29. In the light of this I am unconvinced that the Corporation needed to appropriate the land open space when it was laid out as open space in about 1953. It was physically turned into public open space, was subsequently maintained as public open space and counted by the Corporation as public open space, with no-one suggesting that this was unlawful. The alternative is to view the land as being held for quarrying purposes, a use which had ceased by 1935.
30. However this may be, I am clear that, following *Barkas*, the argument that the use of the land was *as of right* and not *by right* would fail if argued before a Court, even were the Court to accept that the land was, in legal terms, land held for the purposes of a quarry.
31. In *Barkas*, the relevant land was housing land, albeit it had been laid out under a specific power as a recreation ground. This evidently was not formal appropriation as land as public open space, but Sullivan LJ held that it had been “appropriated for the purposes of public recreation” in the sense in which Lord Walker referred to appropriation in paragraph 87 of *Beresford*.⁶ This is what Lord Walker said in that paragraph:

Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated

⁶ See paragraph 37 of his judgment.

trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation.

32. Accordingly, I do not think that the north western part of the application site falls to be registered as a town or village green.

White land

33. Enclosure 2 shows two areas of white land, one (very small) to the west and one broadly in the middle of the application site: the first of which is still formally appropriated to housing use. It may be fenced off from the rest of the application site; in any event, it would not be sensible to register it by itself as a town or village green.

34. The other piece clearly had an existence historically as a distinct piece of land (see the 1921 conveyance map; which I am confident would be reflected in a contemporary OS map.) I guess that although formally never acquired by the City Council it got thrown into the larger site and treated as part of the area of open space. On this basis it has been registered as the City Council's land. Again it would not be sensible to register this small piece of land by itself as a town or village green.

Conclusion

35. It seems to me that none of the land within the application site is registrable for the reasons set out above.
36. As regards the land forming the north western part of the site, my opinion is fortified by the Court of Appeal's judgment in *Barkas*, but would not be different in the

absence of the judgment. It is possible that a successful appeal in *Barkas* could affect my conclusion but would not necessarily do so.

37. I think that the applicant should have the opportunity to comment on this advice. Although her approach thus far has been essentially to leave the matter to me, I have now gone into the matter in considerable detail and it does seem to me appropriate to give her the opportunity to comment. Similarly the City Council as landowner should have the opportunity to comment
38. One possible submission is that the Council's determination of the matter should be postponed until after the judgment of the Supreme Court in *Barkas* (if permission to appeal be given) or until after permission to appeal is refused. If the matter were not so postponed, the Applicant would have to bring judicial review proceedings (if so advised) if the Council had agreed with this further advice and declined to register the land. In the absence of any intrinsic urgency in the matter, postponement may be a good idea. If there is some urgency attaching to a determination, then a balancing judgment needs to be made. I could advise further on this in the light of representations on this specific matter if required to do so.

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3 December 2012