

**BRISTOL CITY COUNCIL**

**PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE**

**25TH JUNE 2012**

**Report of:** Commons Registration Authority

**Title:** Application for land known as Okebourne Open Space, Brentry, Bristol to be registered as a town and village green made under the Commons Act 2006

**Ward:** Henbury

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

**Contact Telephone Number:** 0117 922 3424

**RECOMMENDATION**

Before arriving at a final determination of the application to register the land known as Okebourne Open Space, Brentry, Bristol as a town and village green it is recommended that as the land is owned by the Council an independent inspector be appointed to consider representations on the interpretation and legal effect of the objector's evidence. The inspector will then report back to the CRA with recommendations. CRA will then bring the matter back to PROWG.

**Summary**

This report relates to an application for land known as Okebourne Open Space, Brentry, Bristol made under the Commons Act 2006

**The significant issues in the report are:**

Whether the land, the subject of the application, has been used 'by right' or 'as of right'

**1. Policy**

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

## 2. Consultation

- **Internal**

Not applicable

## 3. External

**Not applicable**

### Context

4. The Council as registration authority has received an application to register land known as Okebourne Open Space, Brentry, Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006 from Mr John Rich on behalf of the Friends of Okebourne Open Space dated 16 July 2010.
5. The application was allocated Application No 16. A plan of the site is shown at **Appendix A** to this report.
6. Plan annex to the application shows a large area of parkland leading off Knole Lane and Chakeshill Drive, Brentry.
7. The application was in the prescribed form, Form 44, was verified by a statutory declaration of Mr John Rich, photographs and questionnaires and other supporting evidence. The questionnaires are in a form using the questions broadly similar to the form which is produced by the Open Space Society.
8. The basis of the application and qualifying criteria were specified in Section 4 of the application were on the grounds that the application site has become a town or village green by virtue of the actual use of the land. Section 7 of the application the Applicant summarized the justification for the application as *'The land has been used and enjoyed continuously for generations, by significant numbers of local children and adults for leisure and pastimes, both on an informal and sometimes and more organised basis, without challenge or permission from anyone.....In summary, the Land provides a major asset for local people, and has done so continuously for generations, for significant number of local inhabitants to engage in sports and pastimes, and certainly for more than the past twenty (20) years, as evidence by the supporting information to this application'*.
9. An objection to the registration of the application land has been received from the landowner, Bristol City Council (The Landowner).

## Appropriations

10. The landowner set out the history of the site in connection with both the works carried out and to it and the Council's dealings with it since it was required in 1949 and 1950 by compulsory purchase and the Housing Act 1936 held for housing purposes.
11. The landowner has asserted that the land acquired and subject to 6 different appropriations.

*“.....in trust to allow and with a view to, the enjoyment thereof by the public as an open space within the meaning of the Act and under proper control and regulation for no other purpose. (Section 10(a) 1906 Act)*

12. The Landowner has also submitted that the land was held by the local authority pursuant to Sections 164 Public Health Act 1975 then the same outcome would arise. The position in respect of land held under Section 164 of the Public Health Act 1875 is less clear if one looks at the terms of the section itself; but sections 122 (2B) and 123(2B) of the Local Government Act 1972 expressly envisage that such land is held in trust for the purpose of enjoyment of the public and therefore it is easy to argue that the situation is essentially the same as the land held under the 1906.

## Neighbourhood

13. The landowner stated that in the alternative the application should fail because the area known as Brentry BS10 is neither a neighbourhood nor a locality. It contends that it is a postal code district and is not recognized as a neighbourhood. The landowner has relied upon *R –v- Suffolk County Council ex-parte steed [1995 2 EGLR] Carnwath J held that “whatever the precise limits, [a locality] should connote more than a place with geographical area – rather a distinct and identifiable community, such as might visibly lay claim to a town or village green as of right”*. The landowner has also relied on *R –v- South Gloucestershire DC ex-parte Cheltenham Builders Limited [2004 JPL 975 at para 45]* it contended that a postal area is not an area of land to which its inhabitants owe any allegiance, or which they identify. It is not a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right.

## Significant Number of Habitants

14. The Landowner also stated that whether usage of a town or village green by inhabitants of a “locality or “neighbourhood” to be by a

significant number it must be of an extent that in the context of its usage as a whole signifies the existence of the claimed right. It argues that where, as here, is by public and general but a public right.

### Applicant's response

15. The applicant does not agree with the landowner's submissions. The applicant disputes the appropriation argument. The applicant also says the evidence submitted by him demonstrated that a significant number of local inhabitants had openly used the space for lawful sports and pastimes as if 'as of right' for at least 20 years to the date of his application. This issue can be dealt with at a later stage if the preliminary issue is not determinative (see proposal).
16. The applicant also questioned the impartiality of the CRA and in his view the applicant should be provided with the opportunity to make oral submissions. However, referral to an independent inspector will address the issue of impartiality (see below).

### Assessment of evidence

17. The documentary evidence submitted by the Landowner has been assessed. The report of CRA officer is attached as **Appendix B**. The assessment concludes that on the basis of the documentary evidence the public exercised their rights of recreation, not as trespassers, but because they had an existing right to do so.
18. The Applicant has not disputed the authenticity of the documentary evidence. To that extent it is undisputed evidence.

### **Proposal**

19. PROWG Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made 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.
20. The interpretation and legal effect of the Landowner's evidence should be dealt with as a preliminary issue as it would be determinative of the matter. Based on the officer assessment it would appear that use of the application land cannot have been use "as of right" but rather would have been use which was "by right". On that assessment the application should be rejected on that basis alone and without the need to determine the other objections relating to neighbourhood and significant number of users.

21. However, before arriving at a final determination of the application to register the land known as Okebourne Open Space, Brentry, Bristol as a town and village green it is recommended that as the land is owned by the Council an independent inspector be appointed to consider representations on the interpretation and legal effect of the landowner's evidence. The inspector will then report back to the CRA with recommendations. CRA will then bring the matter back to PROWG.

### **Other Options Considered**

22. The other options considered are:
  - 22.1 Refer the application to an independent inspector for a public inquiry on all the issues;
  - 22.2 Reject the application on the papers.
23. The referral for a full inquiry will put the Council to additional unnecessary expense if the land is held for public open space or recreation.
24. Rejecting the application on the papers without allowing the applicant an opportunity to first make representations to an independent inspector could be considered to be unfair as the Council owns the land and puts the Council at risk of legal challenge.

### **Risk Assessment**

25. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision. There could be questions the fairness of the proceedings. 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**

26. 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. Appointing an independent inspector to consider the representations before determination on the papers in cases where the Council is the landowner will address any suggestion of bias in the decision-making process.

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

### **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– Map of Application Land

Appendix B– Officer assessment of Evidence



## **Local Government (Access to Information ) Act 1985**

### **Background Papers:**

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

Section 15 Commons Act 2006

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

14 June 2012

JD5.435

Okebourne  
Park

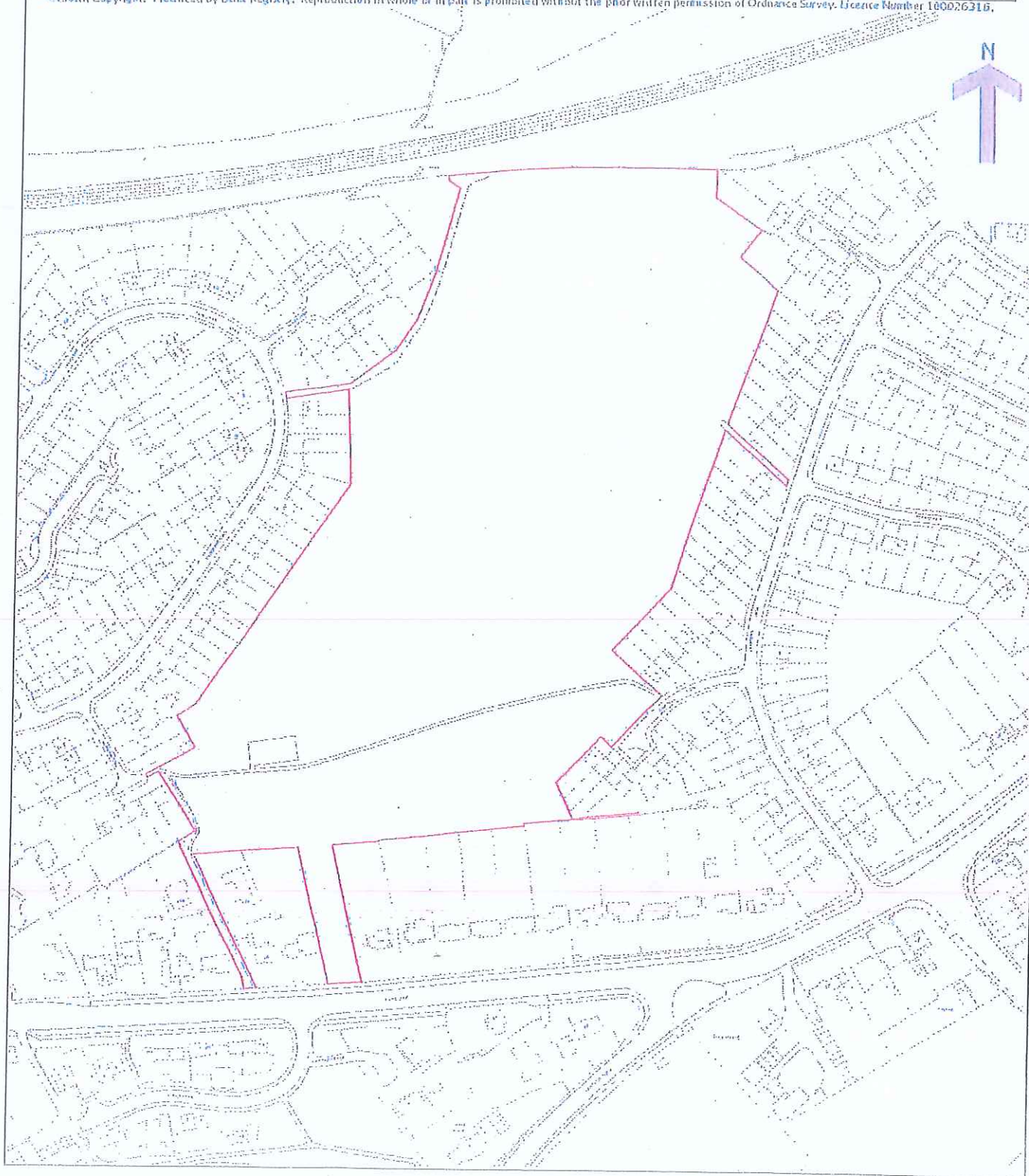
Application no 16

Land Registry  
Official copy of  
title plan

Title number **BL110040**  
Ordnance Survey map reference **ST5879SW**  
Scale **1:2500**  
Administrative area **CITY OF BRISTOL**



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## Officer Assessment of Evidence

1. This relates to an application to register land known as Okebourne Open Space, Brentry, Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006. The application was received from Mr John Rich on behalf of the Friends of Okebourne Open Space and dated 16 July 2010. Bristol City Council (the landowner) is the freehold landowner. The application land is registered at HM Land Registry under Title No: BL110040.
2. The basis of the application and qualifying criteria specified in Section 4 of the application were on the grounds that the application site has become a town or village green by virtue of the actual use of the land. In a rider ‘, **Justification for application to register the land as a town or village green**’, to Section 7 of the application the Applicant summarized the justification for the application as:
 

*‘The land has been used and enjoyed continuously for generations, by significant numbers of local children and adults for leisure and pastimes, both on an informal and sometimes and more organised basis, without challenge or permission from anyone.....In summary, the Land provides a major asset for local people, and has done so continuously for generations, for significant number of local inhabitants to engage in sports and pastimes, and certainly for more than the past twenty (20) years, as evidence by the supporting information to this application’.*
3. In support of the application the applicant has supplied questionnaires. Mrs Barbara Graham in her questionnaire states that she has used Okebourne Open Space from 1953 to 2010 and David Ress Jones has said he has used the Okebourne since 1952 to 2010. The Reverend Belinda Latham said she has used it from 2005 – 2010. E P Garaway said he has used it since 1966 and Mr David Lloyd has said he has used it from 1989 to 2010.
4. However, the Questionnaires from children from Brentry Primary School do not seem to fall within the 20 year user.
5. The landowner has objected to the application on the grounds that usage of the land for “lawful sports and past times” (LSP) has not been “as of right’ within the meaning of the Commons Act 2006.
6. The landowner has asserted that the land acquired and has been subject to 6 different appropriations. The land was initially acquired by it in 1949 and 1950 by Compulsory Purchase Order and held for housing purposes under 1936 Housing Act. The appropriations of parcels of land at Knole, Brentry and Charlton Road and given plan reference A16/1/ and B17/1 respectively. According to the landowner the appropriations occurred

- i) On 13 July 1954 reference of A17/2
  - ii) On 20 January 1964 by the Housing Committee
  - iii) In 1965-66, (reference is B17/12) land appropriated from Planning and Public Works Committee for housing purposes to the Housing Committee.
  - iv) In 1969 0.085 acres of land appropriated in (references A/16/1) for public open space use from the Housing Committee to the Planning and Publics Right Committee
  - v) On 22 June 1972 4.1 acres of land held for allotment purposes references A17/4. Public Works Committee agreed appropriation from allotment purposes for public open space purposes.
  - vi) 30 April 2010 appropriation of land marked B17/1 and B19/19 to open space on from Landlord Services to Environmental and Leisure Services
7. For the land B17/19 comprising of 11 Square yards the landowner has said this land falls within the boundary of 7 Breweton Close and therefore could not have been used for recreational purposes as of right.
  8. The Council's main contention is that the land was appropriated under Section 9 the Public Open Space Act 1906 Act is that the land is held on a statutory trust under Section 10 of the 1906 Act, and when the public exercise the right to recreation they would not be doing so as trespasses but because they had an existing lawful right to do so.
  9. The landowner has also contended that the land was held by the local authority pursuant to Sections 164 of for Public Health Act 1975 then the same outcome would arise. Sections 122 (2B) and 123(2B) of the Local Government Act 1972 expressly envisage that such land is held in trust for the purpose of enjoyment of the public.
  10. The landowner stated that in the alternative the application should fail because the area known as Brentry BS10 is neither a neighbourhood nor a locality. It contends that it is a postal code district and is not recognized as a neighbourhood. The landowner has relied upon *R –v- Suffolk County Council ex-parte steed [1995 2 EGLR]* and on *R –v- South Gloucestershire DC ex-parte Cheltenham Builders Limited [2004 JPL 975 at para 45]*
  11. In accordance with that case the court said that the CRA has to be *satisfied* that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word “neighbourhood” would be stripped of any meaning.
  12. The landowner has stated that usage of the application land has been by the public as a whole, and there has been no significant difference between those inhabitants who live in Brentry, BS10, and those who live

outside it and that there must be shown the existence of the claimed right, but that here there is a public right.

13. However, *in R (on the application of McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC 76* McAlpine Homes argued that although the residents had indulged in LSP for more than 20 years, the use had not been by a “significant” number of them. The Court held that a “significant number” need not mean a majority nor even a large number. It was merely necessary for the land to be used by local people in general rather than by a few specific individuals.

## Conclusions

14. The applicant stated that the appropriation argument had not been decided and referred to the case of *BDW Trading Ltd (Barratt Homes) [2011] The Spooner case EWHC*.
15. However, *the Spooner* case indicates that where the landowner has appropriated land and granted permission to develop, the developer’s rights will override any right to use as a village green, so I do not think it is helpful to the applicant’s argument. The High Court held that where a local authority had appropriated land for planning purposes under Section 122 Local Government Act 1972 or Section 233 Town & Country Planning Act 1990, it could then sell off the land free of any registered Town or Village Green.
16. The applicant says that site had not been originally appropriated for open space and in view of the Council’s proposals to sell the site for residential development, it was not held for use as an open space. In my view the statutory provisions found in sections 122 (2A) & (2B) and 123(2A) & (2B) of the Local Government Act 1972 for appropriation and disposal of open space arising under Section 10 of the Open Spaces Act 1906 envisage that that plans for development can be made, provided the prescribed procedure for advertisement and consideration of objections are followed.
17. The landowners appropriation argument relies on Section 10 of the Open Spaces Act 1906, that as and when the public exercised their rights of recreation, they would not be doing so as trespassers, but because they had an existing right to do so.
18. Section 10 of the Act provides that :

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

*(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and*

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

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

19. Thus, the key purpose of Section 10 is that the open space in question should be held and administered in trust to allow, and with the view to, the enjoyment thereof by the public as an open space and maintained and kept in a good and decent state
20. The landowner also relies on *Rv Sunderland City Council exp Beresford [2004] AC 889*. I consider the dicta in *Beresford*, of Lord Scott at paragraph 30 and of Lord Walker at paragraphs 40 & 42 , supports the view, that use by the public of land which which was subject to the statutory trust under Section 10 of the Act would not be ‘as of right.
23. Based on the above evidence, I believe the use of the application land by the local inhabitants cannot have been “use as of right” but would rather have been use “by right.

1 June 2012  
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