

**BRISTOL CITY COUNCIL****PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE****25TH JUNE 2012****Report of:** Commons Registration Authority**Title:** Application to register land known as Higham Street Green, Totterdown, Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006**Ward:** Windmill Hill**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 Higham Street Green, Totterdown 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 to register land known as Higham Street Green Totterdown Bristol as a town or village green pursuant to Section 15(1) of 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'

**Policy**

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

**Consultation**

- **Internal**

2. Not applicable

**External**

3. Not applicable

**Context**

4. The Council as registration authority has received an application to register land known as Higham Street Green Open Space , Totterdown Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006 (the Act) from Mrs Joanne Fisher dated 22 October 2010 .
5. The Applicant's map of the site is shown at **Appendix A** to this report.
6. The application gives the location as Higham Street, Totterdown Bristol BS4 2BJ.
7. The application was in the prescribed form, Form 44, verified by a statutory declaration of Mrs Joanne Fisher, photographs and questionnaires and other supporting evidence.
8. The questionnaires are in a form using the questions broadly similar to the form, which is produced by the Open Space Society.
9. 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. In Section 7 of the application the Applicant summarized the justification for the application as follows:

*“ Higham Street Green has been in constant, regular, unrestricted use since it was created in 1983 in response to Bristol City Council's road widening scheme at Wells Road , Totterdown. It is used by a wide catchment area for various lawful, socially acceptable activities. The green supports a variety of wildlife, both flora and fauna , and has several fruit trees and shrubs growing on it. It is a uniquely attractive and tranquil space which has never suffered from anti-social behaviour. The Green is currently under the threat of 'proposed disposal' and we are seeking to protect it with town green status because the loss of this popular, necessary green space would severely reduce the quality of life for a huge number of people within the community.*

10. An objection has been received from Bristol City Council (the landowner) to the registration of the application land. The landowner has provided a map as **Appendix B**. For ease of reference, the Objection statement has divided the land into four parts, comprising;

### **The Yellow Land - Appendix B**

11. The Objection letter says that the Yellow land comprises property nos. 12, 13, 15, 16 Higham Street, 7 Vernon Street and 1 Wells Road (shaded Yellow, Blue, Orange, Purple, Grey and Brown) and is land currently managed by the Council's Neighbourhood and City Development and used for the purpose of land-verge.
12. The Objection letter says this land was acquired by section 139 of the Town and Country Planning Act 1962 in order to develop the land for use as the outer circuit road, and appropriated and the land was appropriated on 18 February 1974 from the Planning and Traffic Committee to the Housing Committee (other than 1 Wells Road) for the use of the land for housing purposes. In 1980, on reorganisation the Yellow Land was vested to Avon County Council thus changing the use of the land within a County Council's remit which covers highways, transport, education, social services and forward planning and in 1996 on reorganisation the Yellow Land was transferred to Bristol City Council and managed by the Planning Highways and Transport Committee. The use of the land since 1980 being managed as highway land. The residential houses were demolished by the early 1980's and the land was grassed and used as recreation/open space

### **The Green Land Appendix B**

13. The Objection letter says that the Green Land comprises property nos. 14, 17-20 Higham Street (shaded Green and Pink) and is currently managed by Neighbourhoods and City Development, having been used as Open Space since 30 April 2010.
14. The Objection letter says this land was originally acquired by the Housing Committee for use as housing land between 1957 and 1974. In 1992 Bristol City Council licensed the land to Avon County Council to use as a highways site compound. On expiry of the licence the land continued to be managed by Bristol City Council Housing Committee and appropriated on 30 April 2010 from housing use to use as open space.

## **The White Land Appendix B**

15. The Objection letter says White Land (unshaded) comprises Highway Land maintainable at public expense.

## **The Pink Land Appendix B**

16. The Objection Letter says the Pink Land comprises an area of land (hatched pink) and was stopped up via the procedure pursuant to section 116 Highways Act 1980.

17. The Objector has summarised its case as follows

(1 ) that a local authority is a creature of statute and can only hold property pursuant to a statutory power. In this instance one part of the land was acquired for highway land under the Planning Act 1962, the second part of the land was acquired for housing land under the Housing Act 1957, and the third part of the land is existing highway land.

(2) If the land is no longer required for the purpose for which it was acquired then it must be appropriated for a different statutory purpose so that it can lawfully be used for that purpose.

(3) The effect of an appropriation is that the land is treated as if it had been acquired for the new statutory purpose from the date of the material resolution or other decision of the Council.

18. The Objector has asked the Registration Authority to consider the issue as to whether any user of the land has been in particular as to whether the user has been pursuant to statutory authority, as a preliminary issue. In its view this matter could be determined without reference to oral evidence.

19. The Objector has also sent a further letter dated 14 June to the Registration Authority indicating that in its view the recent case law of *Newhaven Port and Properties Ltd v East Sussex County Council* [2012] EWHC 647 is authority for the view that the application should fail as the yellow, white and green land is held for housing and highway purposes and this conflicts with registration.

## **Proposal**

20. 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.

21. The documentary evidence submitted by the landowner has been assessed. The assessment shows that the Council holds the land for various statutory purposes which conflict with the possibility of registration as a town or village green. The report of CRA officer is attached as Appendix C. The Applicant has not disputed the authenticity of the documentary evidence nor made further submissions in response to the landowner's objections, having been given the opportunity to do so. To that extent it is undisputed evidence. However, this matter turns on the interpretation and legal effect of that evidence. It would appear therefore that use of the application land cannot have been use "as of right" but rather would have been use which was "by right" and that the application should be rejected.
22. Before arriving at a final determination of the application to register the land known as Higham Street Green, Totterdown 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.

### **Other Options Considered**

23. The other options considered are:
  - 23.1 Refer the application to an independent inspector for a public inquiry on all the issues;
  - 23.2 Reject the application on the papers.
24. 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.
25. 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**

26. 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**

27. 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**

27 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

28 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”*

29 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.

30 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.*

31 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”

32 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”

33 User “by right” means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used “as if right” for lawful sports and pastimes if user is by right. If land is held on trust for the purpose of recreational use and enjoyment by the general public or a section of the public including the users of the land it has been suggested (although not definitively decided) that the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers. It has also been suggested but not yet decided by the courts that a trust may be implied.

### “Appropriation”

34 A local authority can only lawfully act for the purposes and in the ways

that a particular statute permits it to act.

- 35 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.
- 36 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

- 37 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.

### **38 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**

There are no policy implications arising from this report



## **Personnel**

Nil

## **Appendices**

Appendix A – Applicant’s Map of Application Land

Appendix B – Objector’s Map of the Yellow, Green and White and Pink Land

Appendix C - Officer Assessment of the 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

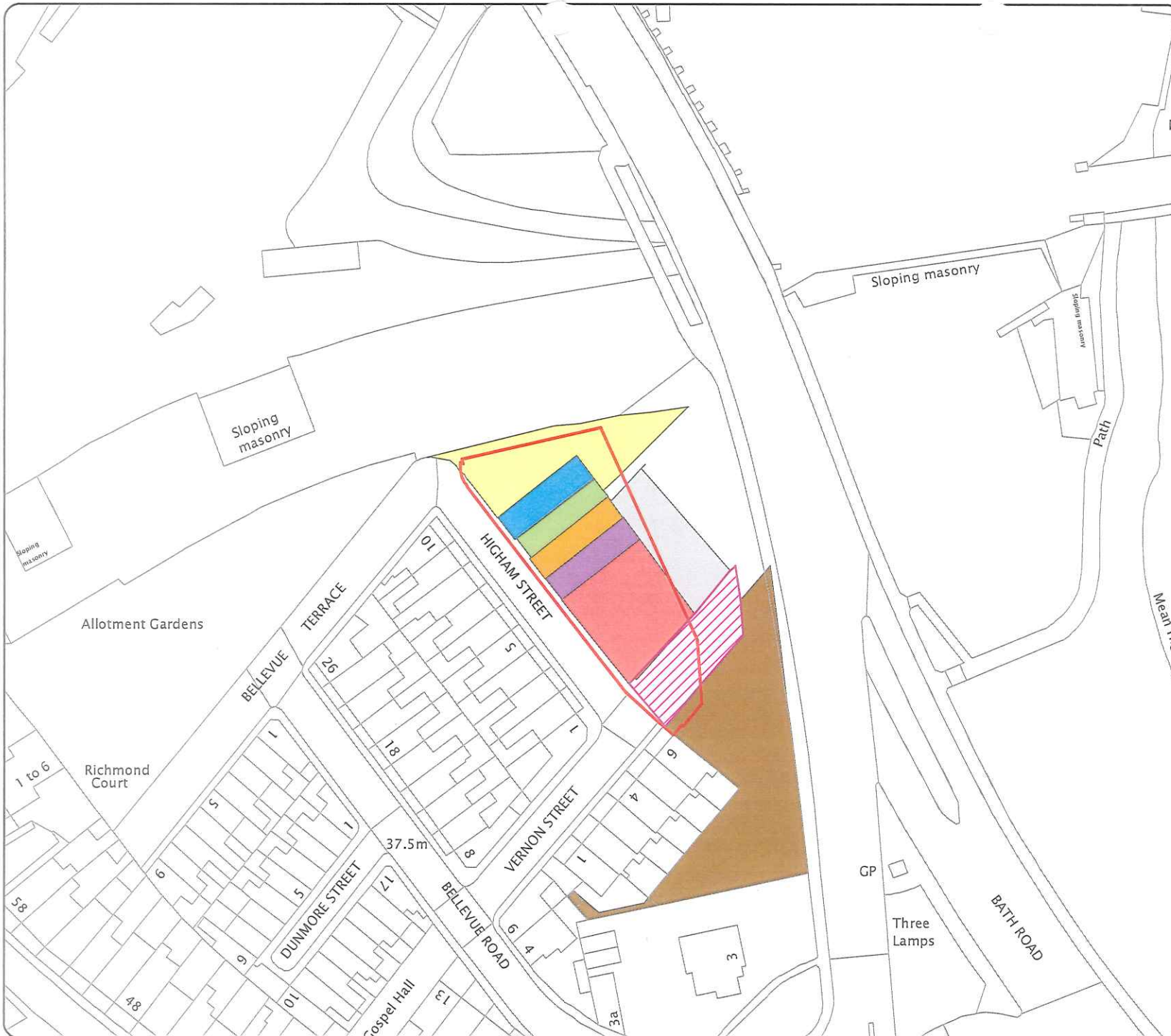
14June 2012

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AREA 2 HA  
SCALE: 1:1250  
CENTRE COORDINATES: 359813 , 171875



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## Land at Higham Street, Bristol

- TVG Application Land
- 12 Higham St, BL22628
- 13 Higham St, BL34536
- 14 Higham St, a/r 26483
- 15 Higham St, BL8509
- 16 Higham St, BL31585
- 17, 18, 19, 20 Higham St, AV536
- 1 Wells Rd, a/r 11091
- 7 Vernon St, BL28291
- Vernon St, stopped up

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SITE PLAN : To ensure boundary accuracy, please refer to deeds.



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Plan No : 2 (enc. 2)  
 Prop ID Ref : n/a  
 Polygon Ref : n/a  
 Scale : 1:1,000  
 Date : 15th Apr 2011



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Will Godfrey, Strategic Director – Corporate Services

**ASSESSMENT OF EVIDENCE – HIGHAM STREET GREEN  
TOWN AND VILLAGE GREEN APPLICATION**

**Applicant's evidence**

1. The full statement is referred to as Higham Street Green, Town and Village Green Application as contained within the application.
2. The full statement asserts that the application is made on the basis that Higham Street Green has been in constant, regular and restricted use since its creation in 1983 in response to Bristol City Council's road widening scheme at Wells Road, Totterdown. The Applicants believe that Higham Street Green has been regularly used by residents from the immediate areas of Totterdown as well New Walls housing estate, Bath Road and Lower and Upper Knowle for a variety of activities. The Applicants believe that Higham Street Green is a unique public space in total 28 witness statements were submitted in support of the application. The Applicants are opposed to the dispose of Higham Street Green and want to preserve it as a green space. They therefore have applied to it to be granted Town Green Status.

**Objector's evidence**

3. The objector, Bristol City Council has asserted that as a starting point is that the Local Authority's is a creature of statute and can only hold property pursuant to a statutory power. One part of the application land was acquired for highway land under the Town and Country Planning Act 1962 the second part of the land was acquired for housing land under the Housing Act 1957, and the third part of the land is existing highway land.
4. It states that if land can no longer be required for purpose for which it was required, then it must be appropriated for a different statutory purpose. The effect of such an appropriation is that the land will be treated as if it had been acquired for the new statutory purpose from the date to the resolution or decision of the Council. For ease of reference the objector has divided the application land into four parts referred to as yellow, green, white and pink land.

**Yellow land (No's 12, 13, 15 16 High Street, 7 Vernon Street and 1 Wells Road)**

5. The objector asserts that the Council acting under Section 139 of the Town and Country Planning Act 1962 acquired the land to develop it for use as an outer circuit road. It asserts that Section 96 of the Housing Act 1957 conferred power on the Local Authority to acquire land proposed to be used for any purpose under Section 93, the power to provide recreation grounds in connection with housing accommodation and Section 107, power to layout and construct Public Open Space.
6. The objector says that, other than No. 1 Wells Road, the land was appropriated for housing purposes on 18 February 1974 from the Planning and Traffic Committee to the Housing Committee. In 1980 on reorganisation the land was vested to Avon County Council and in 1996 transferred to Bristol City Council and managed by the Planning Highways and Transport Committee thus acquiring land for planning purposes. It is asserted that the use of the land has since 1980 been managed as highway land.

7. The objector also says that powers in the 1957 Act were repeated in Part 2 of the Housing Act 1985 at Section 12, the provision of recreation ground with the consent the Secretary of State, by Section 13, laying out open spaces under the 1985 Act, and by Section 19, a Local Authority being empowered to appropriate that purpose of their powers under Part II, the Local Authority having the same powers in relation to the appropriated land as it had to the land acquired by them for the purposes of Part II of the Housing Act 1985.
8. The objector says that whilst neither 1957 or 1985 Acts elaborate on the status of the land laid out as recreation grounds or as open space it is, in any case, public open space which the public has a statutory entitlement to use. That it regards the land as open space which should not be treated any differently to other Public Open Space in terms of its impact on use “as of right”.
9. It is therefore holding and using the land for the purpose Public Open Space automatically conferring on those who use the land as being entitled to use it, “by of right”. It asserts that a mixture of private and Local Authority houses currently have access to the land. It relies on *Green –v- Ministry of Health [1948]* that the beneficial purpose sub-sections in (1)(c) of the Housing Act 1985 is that the land may be shared not only by those in the Local Authority own stock but those in neighbouring areas.
10. It says that this provision gives the objector the right to provide and maintain the land which it says is currently maintained via the Council’s Parks and Estates.
11. The objector also states that even if ministerial approval have been required, the failure to obtain in did not render the decision invalid as are (*on the application Noble Organisation*) –v- *Thanet DC [2005]*. The objector also relies on *R –v- Sunderland City Council Ex Parte Beresford [2004]* where Obiter dicta where a Local Authority has held land as Public Open Space then the user of the land by members of the public would not be “as of right” and in *R –v- Oxfordshire CC Ex Parte Oxfordshire and Buckinghamshire NHS Trust [2010]* is the authority that if the user is entitled to use the land then his use is not “as of right”.

### **The Green Land (14,17 – 20 High Street)**

12. The objectors asserts that the Green Land was originally acquired for use as housing land between 1957 and 1974. In 1992 Bristol City Council licensed the land to Avon County Council to use it as a highway site compound and that on expiry of the licence it was managed by Bristol City Council, the Housing Committee appropriated on the 30 April 2010 from housing use to open space use.
13. The objector asserts that the use of the green land is, “by right” albeit that there was appropriation on the 30 April 2010 from housing use to open space use and that should the CRA be minded to disregard the 2010 appropriation pursuant to Section 17(5)(b) of the Commons Act 2010 the objector will assert that the acquisition of the land has been used “by right” that it has always been lawful for a Local Authority which has acquired land for a statutory purpose to another purpose on an interim basis.

### The White Land (Highway Land)

14. The objector states that the white land comprises highway and maintainable at public expense and therefore its use is “by right”. It relies on the *DPP v Jones 1999*.

### The Pink Land (Stopped up land)

15. The objector asserts that the pink land comprises on area of land that was stopped up by the procedure pursuant to Section 116 Highways Act 1980 and that the effect of stopping up: is “one a highway always a highway” endorsed in the case of *On the application of Smith –v- Land Registry (Peterborough Office) and another 2010* the objectors states the highway can be extinguished with an expressed statutory such as Section 116 Highways Act 1980 where a stopping order effective for the rights of the public to pass and repass on the highway destroyed, it also states that in a report of 27 September 1987 can the Planning, Highways and Transport Committee seek authority to stop up part of the Vernon Street, Totterdown.
16. The Council submits that looked at as a whole the pink land has been used “by right” and has been used as open space and on the principle set out in *AG –v- Teddington UDC*.

### Appropriation history

17. 18 February 1974 Land relating to Nos. 12, 13, 15 and 16 Higham Street and 7 Vernon Street was appropriated from the Planning and Traffic Committee to Housing Committee for Housing Committee for housing purposes.
18. 30 April 2010 Properties 14, 17-20 Higham Street (equating to 0.041367 hectares) was appropriated from housing to public open space use.

### Conclusions

19. The Applicants were invited to comment upon the Council’s statements objection. The Applicants decided not to submit by further submissions nor has it disputed the authenticity of the documentary evidence adduced by the Council in support of the appropriation arguments. To that extent there is undisputed evidence, and the case turns on the interpretation and legal effect of the Council’s evidence.
20. As regards appropriation of the Yellow and Green land, in **BDW trading Ltd ( t/a Barratt Homes) v Spooner [2011]** the High Court held that where a local authority can show that had appropriated land for planning purposes under Section 122 Local Government Act 1972 and it has properly advertised the appropriation, it could sell the land free of any registered village green. and that such use of the application land will be used ‘by right’ rather than ‘as of right’. Further in **R ( Barkas) v North Yorkshire County asnd Scarborough District Council 2011** , it was decided that playing fields maintained as a recreation ground under Section 80 Housing Act 1936 could not be a villiage green as of right. Where land had been appropriated for, in the Barkas case, for planning purposes, the landowner, was nonetheless entitled to use it for any purpose for which planning permission had been granted.
21. As regards the White and Pink land there are no specific words in the the Commons Act 2006 that excludes highway land from being registered as a town or village green. However, there is a fundamental incompatibility between land being both highway and green. The rights cannot be exercised at the same time. **Massey v**

### **Boulton 2003.**

22. The purpose for which land was being used when it was acquired may be continued temporarily, pending the commencement of the purpose which justified the acquisition.
23. In *Objector* refers to **DPP v Jones [1999] 2 AC 240**. This case does support the argument that activities that might amount to lawful sports and pastimes carried out on the highway are no more than the exercise of public rights ie “ *a public highway is a public place which the public may enjoy for any reasonable purpose, provided the activity in question does not amount to a public or private nuisance and does not abstract the highway by reasonably impeding the primary the primary right to pass and repass....*” . A broad class of activities will constitute the lawful use of the highway. This suggests that it may be impossible *in law* for highway land to be registered as a town or village green, irrespective of how the land is used.
24. Based on the above evidence, I consider that the Council's appropriation arguments and highways arguments to be well founded and 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”.

JD5.441 updated 1 June 2012