Coventry City Council

Public report 9

Report to **4th December 2008**
Planning Committee

Report of
City Planning Manager

Title
Commons Act 2006 - Application to Register Land at Hearsall Common, Coventry as a Town or Village Green (Application VG/2008/001)

Purpose of the Report

1.1 This report deals with an application by Dr Richard Austen-Baker to register the land known as Hearsall Common as a new town or village green under S.15 of the Commons Act 2006. Coventry City Council is the relevant registration authority and the power to determine such applications is given by the Council's Constitution to the Planning Committee.

1.2 The application site is located within Whoberley Ward

2 Recommendations

Planning Committee are recommended: -

2.1 To consider the written Advice given by Ms. Morag Ellis QC (attached as Appendix B) together with the written representations in response from the applicant and objector (attached as appendices C and D) and;

2.2 Reject the application on the basis that use of the application land has not been "as of right" and;

2.3 To accept that the "as of right" point is a complete answer to the application and to not require a local public inquiry in this case.

3 Information/Background

3.1 Dr Austen-Baker applied in February 2008 to register an area of land known as Hearsall Common as a town or village green. The application site is shown on the plan annexed to this report (Appendix A). The site is wholly owned by the Council, who acquired Hearsall Common under a local Act of Parliament in 1927 to be henceforth held and maintained as an open space. The land is currently under the control of Culture, Leisure & Libraries Services.

3.2 The Council in its capacity as landowner objected to the application. In order to address conflict of interest issues, the Council as landowner and the Council as registration authority have sought separate legal advice from different Counsel. As registration authority, the Council has been advised by Ms. Morag Ellis QC. The use of a barrister external to the authority to advise in these types of application is a practice that has been approved by the higher courts. Ms. Ellis is a leading expert on village greens who has previously acted for registration authorities, landowners and applicants. She has only acted once previously for the Council, when she advised the registration authority on a previous application to register a part of Hearsall Common. . She has no other connection with the Council and is considered an independent and unbiased source of advice on this matter.

3.3 In April 2007 the law relating to village greens was altered with the bringing into force of Section 15 of the Commons Act 2006. This permits anyone to apply to have land registered as town or village green where either the land is continuing to be used for lawful sports and pastimes or where such use ceased within a specified period before the application was made. In this particular case it is alleged that the lawful sports and pastimes were ongoing up to the date of the application and therefore the legal test that now applies to this case is that "…a significant number of the inhabitants of any locality or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years and they continue to do so at the time of the application."(S.15 (2) Commons Act 2006). This is substantially the same legal test as which applied under the previous legislation, the Commons Registration Act 1965 (as amended).

3.4 In order to achieve registration, the Applicant is obliged to establish all of the elements required under S.15 (2) of the Commons Act 2006. If the application fails on one element it must fail as a whole. The relevant elements that need to be established before land may be registered as a town or village green are: -

i) that the land has been used as a town or village green by a significant number of the inhabitants of any locality or neighbourhood within a locality? In this case, it is claimed that the relevant locality is the Whoberley electoral ward.
ii) That the land has been used for lawful sports or pastimes? Case – law has established that activities such as dog –walking, kite –flying, fruit-picking, fetes, bird-watching etc can qualify as lawful sports or pastimes.
iii) That the use by inhabitants for lawful sports or pastimes has been for a period of 20 years continuing at the time of application? The 20 year period in issue in this case runs between February 1988 and February 2008.
iv) That the use was as of right? The use must have been taking place without force, stealth or permission.

Elements i) to iii) above are factual matters that would ordinarily be tested by hearing from witnesses in the course of a public inquiry. Element iv) is a point of law and has in this case developed into a legal argument concerning the precise nature of the rights being exercised when the public are using the application land.

3.5 Ms Ellis has considered the application, objection and various subsequent written submissions made by both the applicant and the objector. Correspondence appended to this report includes Ms Ellis's advice (Appendix B) and comments from the applicant (Appendix C) and objector (Appendix D) on that advice.

3.6 Both parties accepted that the key issue in this case is the "as of right" point (element iv) and have not requested a public inquiry to address the other points. Notwithstanding the applicant's comments in Appendix C, he has since confirmed that he is not requesting a public inquiry in this case but is merely putting it forward as an option open to the authority.

In Ms Ellis' view, a public inquiry is not necessary in this case unless your committee does not accept her conclusions on the "as of right point" (element iv) in which case, the application would turn on the evidence supporting (or otherwise) elements i) to iii). Ms Ellis' written advice was received by the registration authority on 11th September 2008 and forms the basis of the recommendations in this report.

3.7 The Committee will recall a previous application from a Mr Hirst to register part of Hearsall Common as a village green. Planning Committee considered that application on 24th July 2008 and the application was refused. That application raised the same "as of right" issue as in this application and was refused on the basis of similar advice from Ms.Ellis. That decision has not been the subject of any further challenge.

4 Proposal and Other Option(s) to be Considered

4.1 The key conclusion in Ms Ellis's advice is that anyone using Hearsall Common between 1988 and 2008 has done so under rights they enjoy under the West Midlands County Council Act 1980 and that this statutory permission is incompatible with using the land 'as of right' as a village green. The conclusion that therefore arises out of Ms. Ellis' advice is to refuse the application.

4.2 The decision on whether to grant or refuse (in whole or part) this village green application rests as a matter of law, with your Committee. In principle, you are entitled to disagree with the advice given by Ms.Ellis. However, a decision whether or not to register a village green is a quasi-judicial decision, which means that any departure from Ms Ellis's advice must be for clear reasons, that are relevant to the statutory criteria governing registration (see 3.3/3.4 above). A decision taken to depart from her advice that is made on any other basis is liable to legal challenge.

5 Other specific implications

5.1 As stated above, this report can only deal with matters that are relevant to the statutory criteria related to the registration of village greens and should not deal with matters which are in those terms, irrelevant. Taking account of irrelevant matters could leave the Council open to legal challenge. For this reason, no specific implications (save for legal implications) have been identified below.

5.2

	Implications (See below)	No Implications
Best Value		√
Children and Young People		√
Climate Change and Sustainable Development		√
Comparable Benchmark Data		√
Corporate Parenting		√
Coventry Community Plan		√
Crime and Disorder		√
Equal Opportunities		√
Finance		√

	Implications (See below)	No Implications
Health and Safety		√
Human Resources		√
Human Rights Act		√
Impact on Partner Organisations		√
Information and Communications Technology		√
Legal Implications	√	
Neighbourhood Management		√
Property Implications		√
Race Equality Scheme		√
Risk Management		√
Trade Union Consultation		√
Voluntary Sector – The Coventry Compact		√

5.3 Legal Implications

(i) Anyone aggrieved by your Committee's decision would have to apply promptly and in any event within 3 months to the High Court for a judicial review on the basis that that the decision was not justifiable in public law terms.

(ii) A village green may only lawfully be used by those residents of the relevant neighbourhood or locality who have 'recreational rights' over it. Nothing may take place on the land that is incompatible with those rights e.g. buildings, enclosures, using vehicles, letting the land for public events such as fairs, exhibitions, sporting competitions, bonfires etc.

6 Monitoring

6.1 Not applicable.

7 Timescale and expected outcomes

7.1 Assuming the recommendations are approved, the Applicant will be formally notified of your decision and any relevant papers submitted by him returned, within 7 – 10 days of this meeting.

	Yes	No
Key Decision		√
Scrutiny Consideration (if yes, which Scrutiny meeting and date)		√
Council Consideration (if yes, date of Council meeting)		√

List of background papers

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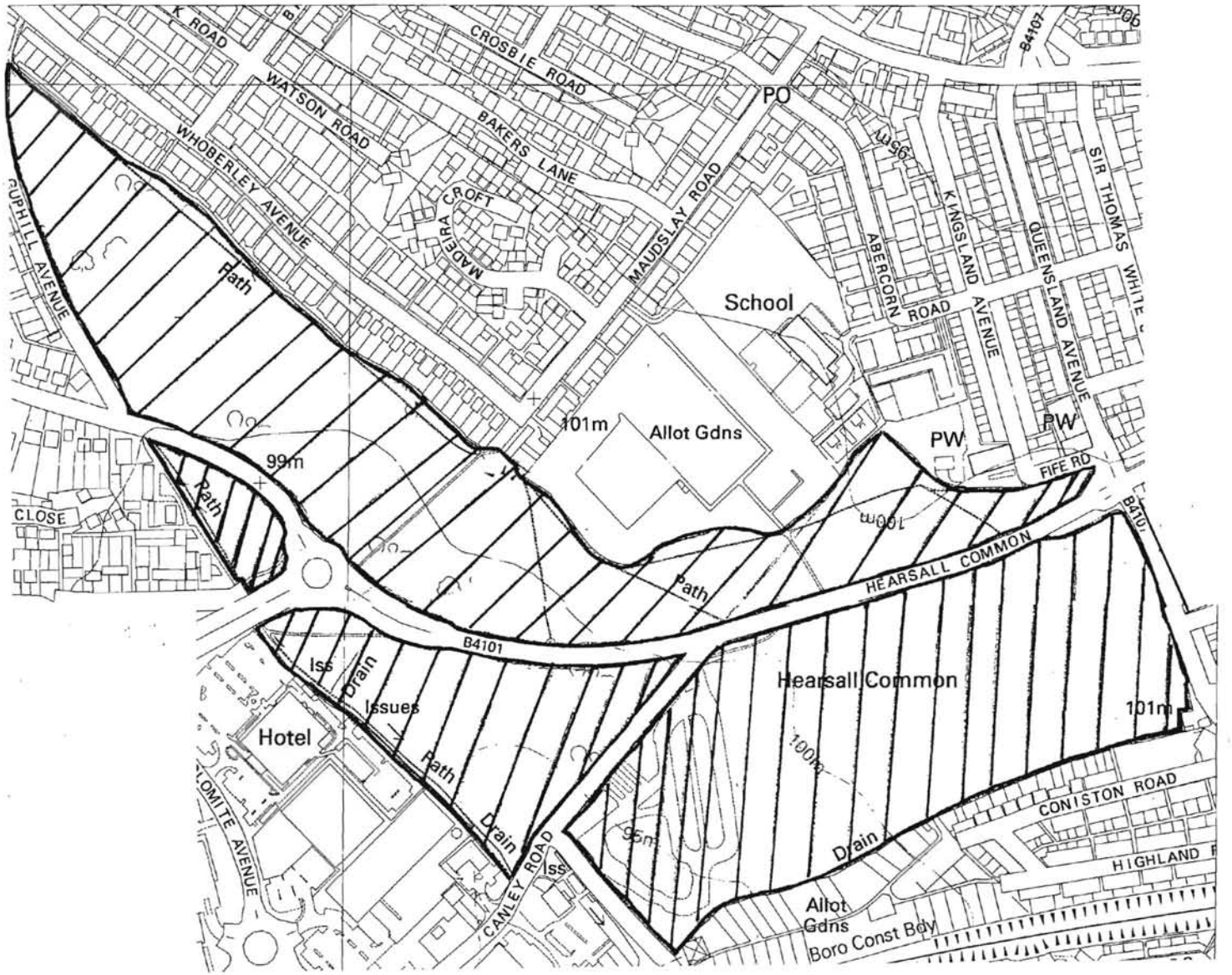
Papers open to Public Inspection

Description of paper	**Location**
Advice from Morag Ellis QC	CC4/2

APPENDIX A

Ordnance Survey®

OS



APPENDIX B

IN THE MATTER OF APPLICATION VG/2008/001
TO REGISTER LAND KNOWN AS HEARSALL COMMON, COVENTRY
AS A TOWN OR VILLAGE GREEN

A D V I C E

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1. INTRODUCTION

1.1. I am instructed by Ms Christine Forde, Head of Legal Services to Coventry City Council ("CCC") to advise the Council in its capacity as Registration Authority for the purposes of the Commons Act 2006 ("CA 2006"). For the rest of this Advice I shall refer to the City Council in its regulatory capacity as "The Registration Authority".

1.2. On 4th February 2008, the Registration Authority accepted receipt of an application to register land known as Hearsall Common as a town or village green ("TVG"). The Applicant is Dr Richard Austen-Baker ("the Applicant") of 131Craven Street, Chapel Fields, Coventry. In Box 8 of the application form, Dr Austen-Baker states his belief that the owner of the land is CCC.

1.3. The Application was notified to the landowner on 7th February 2008 and advertised by notice dated 14th February 2008. It attracted one objection. The Objector is CCC acting in its capacity as landowner. For the remainder of this Advice, when referring to CCC in its landowner capacity, I shall call it "The Objector".[1]

1.4. I am instructed that the function of determining the application has been delegated to the Registration Authority's Planning Committee. I am asked to advise whether the application should be granted or refused. It is also appropriate that I advise the Committee in relation to the procedure that it should adopt in order to carry out its duty.

2. RELEVANT TVG LAW

2.1. Whilst the origins of TVGs, like commons, lie in customary law, they have been subject to considerable statutory intervention, particularly in the last 50 years.

2.2. The Commons Registration Act 1965 ("CRA") initiated a process of registering TVGs, along with common land and rights of common, over a 5 year period, with the object of rationalising and facilitating their management. It was provided (subject to some limited exceptions) that no such areas of land or rights which had not been registered by 31st July 1970 *"shall be deemed to be common land or a TVG"*: s.1(2) CRA and Commons Registration (Time

[1] I note that the objection is signed by four 'acting' joint heads of Legal Services, Finance and Legal Services Directorate of CCC, one of whom is Ms Christine Forde, who is, formally, my Instructing Solicitor. In practice, these Instructions are being handled by Mr Mark smith of the Legal Department who is, I understand, wholly separate, for these purposes, from the solicitor acting for the Objector. This point has been explained to the Applicant, who has not indicated that he objects to my Instruction. I have no connection with Coventry City Council and had never worked for them before receiving my Instructions in the recent TVG application in respect of Hearsall Common by Mr Hirst and, now Dr Austen-Baker's application.

Limits) Order 1970. The effect of section 1(2) was said by Oliver LJ in Corpus Christi College v Gloucestershire County Council [1982] 3 AER 995, 1003 b-c to amount to extinguishment. By s.11(2) the Minister might make an order exempting land from the registration provisions of ss.1-10 where:

(a) the land was regulated by a scheme under the Commons Act 1899 or the Metropolitan Commons Act 1866 to 1898 or was regulated under a local Act or under an Act confirming a provisional Order made under the Commons Act 1876; and

(b) no rights of common had been exercised over the land for at least 30 years and the owner of the land was known.

2.3. S.13 CRA allowed for the registration of any land which subsequently became a TVG (*"new"* or *"Class C TVGs"*). Since the definition of a TVG in s.22 CRA included *"land ... on which the inhabitants of any locality have indulged in*" lawful *"sports and pastimes as of right for not less than twenty years"*,[2] applications became numerous during the 1990s and, in the last ten years, the House of Lords have considered *"new TVGs"* on three occasions. Parliament has also intervened, in the Countryside and Rights of Way Act 2000 ("CROW") and the CA 2006.

2.4. CA 2006 is being brought into force in a piecemeal fashion but since the current application was made after commencement of s.15 *"Registration of Greens",* it falls to be considered under the new Act. S.15 CA provides as follows:

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[2] Conventionally referred to as *"Class C greens"*, to distinguish them from: A – allotments and B – customary greens. The word *"allot"* in CRA 1965 refers to a distribution or setting aside of land by or under an Inclosure Act: Re The Rye, High Wycombe, Buckinghamshire [1977] 3 AER 521. At p.526b-c, Brightman J contrasted allotments with a Local Act deeming land acquired by a local authority to be *"a public park or pleasure ground or land acquired for the purpose of"* a variety of recreations.

*"**15 Registration of greens***

(1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they continue to do so at the time of the application.

(3) This subsection applies where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b).

(4) This subsection applies (subject to subsection (5)) where –

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the commencement of this section; and

(c) the application is made within the period of five years beginning with the cessation referred to in paragraph (b).

(5) Subsection (4) does not apply in relation to any land where –

(a) planning permission was granted before 23 June 2006 in respect of the land;

(b) construction works were commenced before that date in accordance with that planning permission on the land or any other land in respect of which the permission was granted; and

(c) the land –

(i) has by reason of any works carried out in accordance with that planning permission become permanently unusable by members of the public for the purposes of lawful sports and pastimes; or

(ii) will by reason of any works proposed to be carried out in accordance with that planning permission become permanently unusable by members of the public or those purposes.

(6) In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

(7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied –

(a) where persons indulge as of right in lawful sports and pastimes immediately before access to the land is prohibited as specified in subsection (6), those persons are to be regarded as continuing so to indulge; and

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land 'as of right'.

(8) The owner of any land may apply to the commons registration authority to register the land as a town or village green.

(9) An application under subsection (8) may only be made with the consent of any relevant leaseholder of, and the proprietor of any relevant charge over, the land.

(10) In subsection (9) –
'relevant charge' means –

(a) in relation to land which is registered in the register of title, a registered charge within the meaning of the Land Registration Act 2002 (c.9);

(b) in relation to land which is not so registered –

(i) a charge registered under the Land Charges Act 1972 (c.61); or

> *(ii) a legal mortgage, within the meaning of the Law of Property Act 1925 (c.20), which is not registered under the Land Charges Act 1972;*
>
> *'relevant leaseholder' means a leaseholder under a lease for a term of more than seven years from the date on which the lease was granted."*

2.5. Dr Austen-Baker specified in Section 4 of the Application Form that his application is made under s.15(2) CA. There appears to be no dispute as to the applicability of that subsection, rather than ss.(3) or (4), so I shall consider the elements of s.15(2).

2.6. A Significant Number of the Inhabitants of any Locality, or of any Neighbourhood within a Locality

2.6.1. None of the terms in this element of the requirements is defined in CA 2006. The phrase is, however, lifted from CRA, as amended by CROW. A *"locality"* has been interpreted in the caselaw as an area known to law, or some recognised administrative division of the county: see MoD v Wiltshire County Council [1995] 4 AER 931; R (oao Laing Homes Ltd) v Buckinghamshire County Council [2004] JPL 319. In the latter case, Sullivan J expressed the view, obiter, that electoral wards might not be localities (see para 138). In my opinion, however, an electoral ward, which is created by Order pursuant to legislation, and is utilised for one of the most important administrative functions – elections – is plainly *"an area known to law"*.

2.6.2. *"Neighbourhood"* was introduced in the 2000 amendment and its meaning has not yet been definitively considered by the Courts. In Oxfordshire County Council v Oxford City Council [2006] UKHL 25, at para 27, Lord Hoffmann said:

> *" 'Any neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."*

He disapproved part of Sullivan J's judgment in R (oao Cheltenham Builders Ltd) v South Gloucestershire [2003] EWHC 2803 (Admin) in which he had held that a neighbourhood could not lie in two localities, but did not criticise his approach (obiter) to the effect that the registration authority *"has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness"* and could not be *"any area of land that an applicant for registration chooses to delineate on a plan"* (para 85).

2.6.3. *"Significant numbers"*, a phrase which is undefined in the legislation, was considered in R (oao) McAlpine Homes Ltd v Staffordshire County Council [2002] EWHC 76 by Sullivan J. He said (para 71):

> *"... In my judgment the inspector approached the matter correctly in saying that 'significant', although imprecise, is an ordinary word in the English language and little help is to be gained from trying to define it in other language. In addition, the inspector correctly concluded that, whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is provided by Mr Mynors on behalf of the council, when he submits that*

> *what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers."*

2.7. *"Indulged in Lawful Sports and Pastimes"*

2.7.1. *"Lawful Sports and pastimes"* ("LSP") was held by Lord Hoffmann in R v Oxfordshire County Council ex parte Sunningwell Parish Council [2000]

1 AC 335, 356 H, to be a *"single composite class"*. He continued:

> *"Class C is concerned with the creation of TVGs after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J, in R v Suffolk County Council, ex p. Steed (1995) 70 P&CR 487, 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green."*

There are limits to the principle, however. If user is referable to formal or informal paths, it may in some instances not found TVG registration: see Laing, paras 102-110 and Oxfordshire (Lightman J at first instance, [2004] EWHC 12, paras 96-105). It is a question of fact, the decisive factor being how matters would have appeared to the reasonable landowner. If the evidence is equivocal, Lightman J said user should be regarded as being referable to the lesser right – that of passage. This observation is consistent with general principle as set out, for example, in Gardner v Hodgson's Kingston Brewery Co [1903] AC

229.[3] Similarly, I do not consider trips to and from school, work or to conduct other daily business, such as shopping, to constitute LSP.

2.8. "*For a Period of at least 20 Years, and they continue to do so at the Time of the Application*"

2.8.1. In a s.15(2) case, this is a straightforward question of fact. Interruptions, if more than de minimis, may be relevant. The period to focus on is 1987 to the present.

2.9. *"As of Right"*

2.9.1. I have left this element until last because it is, in many ways, the most complicated. In Sunningwell, the House of Lords held that the test for a Class C green equated to that for prescription: user nec vi, nec clam, nec precario – not by force, not by stealth and not by permission. What matters is not the state of mind of the users, but the outward appearance of their user, judged by the yardstick of the reasonable landowner.

2.9.2. It was implicit in the Sunningwell approach that user *"as of right"* was different from user by right. The House of Lords in R (oao Beresford) v Sunderland City Council [2003] UKHL 60 explicitly recognised the point. Lord Bingham said (at para 3):

[3] In particular per Lord Lindley at 239: *"A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference that that it has been as of right in the sense above explained. ... If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established..."*

> *"it is plain that 'as of right' does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired one by user for a stipulated period."*

Later in his speech (at para 9), explaining how the case had come to be re-opened, he said:

> *"... the House became concerned to explore the possibility that, on the special facts of this case, the inhabitants of the locality might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not 'as of right' but pursuant to a statutory right to do so. Such use would be inconsistent with use as of right."*

(emphasis added)

2.9.3. The land in question in Beresford was publicly owned, having originally been acquired for development by the former Commission for New Towns. Accordingly, there was much discussion of the effect of various statutory provisions concerning public open space. In particular, Lords Scott and Walker, obiter, considered the effects of s.10 Open Spaces Act 1906 and ss.122-123 Local Government Act 1972. S.10 of the 1906 Act imposes an express trust on a local authority who have acquired open space under the Act. Lord Scott (at para 30) recorded the concession by Counsel that, had the land been acquired pursuant to the 1906 Act, local inhabitants' user *"would have been a use under the trust ... The use would have been subject to regulation by the council and would not have been a use 'as of right' ..."* Lord Walker (at para 87) said:

> *"Where land is vested in a local authority on a statutory trust under s.10 of the 1906 Act, 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 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"*.
>
> (emphasis added)

It should be noted that Lord Bingham, with whose speech all the other Law Lords agreed, adopted the reasoning of Lords Rodger, Scott and Walker. Lord Rodger agreed with Lord Bingham and Lord Walker and Lord Walker agreed with Lord Bingham and Lord Rodger.

2.9.4. Beresford was actually argued as a case on *"precario"* – licence, the owner's defence being that permission was to be implied from its conduct. All their Lordships were influenced by the fact that the land was publicly owned (albeit not acquired or held under public open space powers). Overturning the High Court and Court of Appeal, they unanimously held that the land had become a TVG, though their individual analyses differed somewhat. Lord Walker, notwithstanding his decision, expressed a little unease, as follows (para 86):

> *"I would however add that I feel some sympathy for the view taken by the courts below. The Council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the Council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let*

him in. (Indeed that is how Finnemore J put the position in Hall v Beckenham Corp [1949] 1 AER 423 at 427 [1949] 1 KB 716 at 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions."

2.9.5. In concluding this brief summary of the relevant legal principles relating to Class C TVGs, it is essential to note that the process of determination involves simply applying the law to the facts; there is no discretion, nor are land use merits material.

2.10. Procedure

2.10.1. Beyond the statutory notice requirements, the legislation is not prescriptive as to procedure. Lord Hoffmann alluded in Oxfordshire to the fact that *"registration authorities in difficult cases tend in practice to engage the services of a member of the Bar to conduct a non-statutory inquiry with a view to advising the authority on the facts and the law ... This procedure is sanctioned by a number of judicial decisions and in R (Cheltenham Builders Ltd) v South Gloucestershire District Council [2004] JPL: 795, 786-987 Sullivan J decided that in some cases fairness would make an oral hearing not merely an option but a necessity"*.

2.10.2. In Cheltenham Builders, the Defendant Registration Authority had registered land without having held an inquiry. The landowner's objection had taken issue with the applicant's supporting statements in several particulars – the state of the land/practicability of user,

presence of paths, *"as of right"* and continuance in the face of fencing (an issue under the law then applicable). Sullivan J dealt comprehensively with procedural fairness, and I shall set out the relevant extract from his judgment in full:

> *"34. One of the many deficiencies in the Act and the regulations is that they do not prescribe any procedure (beyond publicising the application and sending copies of any objections to the applicant) for determining an application. In particular, no provision is made for an oral hearing. In practice, many registration authorities remedy this omission by making arrangements for an independent inspector (normally counsel experienced in this branch of the law) to hold a non-statutory inquiry. This practice was noted with approval by Carnwath J (as he then was) in R v Suffolk County Council ex p Steed [1995] 70 P&CR 487 at pages 500 to 501.*
>
> > *'It is accepted that, if the matter has to be reconsidered by the Council on its merits, then some form of oral hearing will in practice be necessary. Although there is no provision for such procedure in the regulations, I understand that authorities do sometimes organise non-statutory hearings where the written submissions disclose significant conflicts of evidence. This is appropriate. The authority has an implied duty to take reasonable steps to acquaint itself with the relevant information ... (Secretary of State v Tameside Borough Council (1977) AC 1014, 1065). Some oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled, even if the absence of statutory powers makes it a less than ideal procedure."*
>
> *35. In other cases, hearings have been held before the decision making Committee itself, at which the applicants for registration and objectors had been given the opportunity to call and cross-examine witnesses and to make oral submissions. The defendant contends that neither a non-statutory inquiry nor a hearing before the Committee was necessary in the present case. Mr Petchey points to the fact that there was no conflict of evidence as such. The claimant had not placed any evidence*

before the Committee contradicting the completed questionnaires, it had merely relied on submissions in the letters of objection from its solicitors.

36. I accept that registration authorities have a discretion as to the procedure to be adopted (assuming that the limited requirements in the regulations have been complied with), but that discretion is not unfettered. It must be exercised in a manner which is fair to applicants and objectors. What fairness requires by way of procedure will depend upon the circumstances of the particular application. Coupled with the obligation to act fairly, the registration authority is also under an obligation not merely to ask the correct question under the Act, but to 'take reasonable steps to acquaint [itself] with the relevant information' to enable it to correctly answer the question: see Thameside case cited by Carnwath J above.

37. In the present case, the defendant does not appear to have given any, or any serious, consideration as to what fairness required. The approach adopted by the Head of Legal, and Democratic Services when introducing her report appears to have been that it was sufficient for the defendant to comply with the requirements laid down in the Act and the regulations. Where there is a comprehensive statutory code governing the determination of appeals (for example the Town and Country Planning Inquiries Procedure Rules), it may well, be difficult to persuade the courts that fairness requires anything more than compliance with the statutory code. But as noted above, the Act and the regulations do not provide a comprehensive code. In particular, they are silent as to how the registration authority is to set about resolving disputes of fact between applicants and objectors which have emerged as a result of the process of the applicant responding to the objector's response to the information contained in the application.

38. Given the report's findings as to user (see above), this was a case where the application could fairly have been rejected without an oral hearing because the burden of proof had not been discharged by the applicants (see above), but it could not fairly have been accepted without such a hearing, if only to resolve the two questions left unanswered on the written evidence and submissions: which activities,

and therefore, what was the extent of the user; and over how much of the site did they take place for the requisite period?

39. In support of his submission that the defendant was not required to make arrangements for some form of oral hearing, Mr Petchey relied upon the claimant's ability to make an application to the High Court under section 14 of the Act for the amendment of the register. One such an application the High Court would be able to hear oral evidence and submissions. I accept that the existence of the right to apply to the High Court is a factor to be taken into consideration when deciding what fairness requires in any particular case, but section 14 does not absolve the registration authority from the duty to adopt a fair procedure and to take reasonable steps to establish the facts to enable it to answer the statutory question.

40. It is important from the point of view of applicants for registration, as well as objectors, that the registration authority should do its best to resolve disputed questions of fact when deciding whether to accept or reject an application. The registration authority will be able to resolve factual disputes locally in a forum (inquiry or hearing) that will be more convenient for local residents who may support or oppose the application, and will not expose them to the additional expense and the risk of costs that are inherent in High Court proceedings."

2.10.3. Procedural fairness was also considered by the Court of Appeal in R (oao Whitmey) v The Commons Commissioners [2004] EWCA Civ 951. The issues in that case were entirely procedural. Waller LJ said, against the background of considering whether or not the Commons Commissioners had jurisdiction to consider applications to register Class C greens:

"... there should not be any presumption in favour of registration or any presumption against registration ... in any case where there is a serious dispute, a registration authority will almost invariably need to appoint an independent expert to hold a public inquiry, and find the requisite facts, in order to obtain the proper advice before registration."

2.10.4. Arden LJ., considering the three ways in which disputes under the old law could be resolved (declaration, application for de-registration/amendment under s.14 CRA and determination of an application by a registration authority) said:

> *"28. As to the second option, the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by a judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs (as the Commons Commissioners are able to do: section 17(4) of the 1965 Act). However, the registration authority must act reasonably. It also has power under section 111 of the Local Government Act 1972 to do acts which are calculated to facilitate, or are incidental or conducive, as to the discharge of their functions. This power would cover the institution of an inquiry in an appropriate case.*
>
> *29. In order to act reasonably, the registration authority must bear in mind that its decision carries legal consequences. If it accepts the application, amendment of the register may have a significant effect on the owner of the land or indeed on any person who might be held to have caused damage to a green and thus to have incurred a penalty under section 12 of the Inclosure Act 1857. (There may be other similar provisions imposing liability to offences or penalties). Likewise, if it wrongly rejects the application, the rights of the applicant will not receive the protection intended by Parliament. In cases where it is clear to the registration authority that the application or any objection to it has no substance, the course it should take will be plain. If, however, that is not the case, the authority may well properly decide, pursuant to its powers under section 111 of the 1972 Act, to hold an inquiry. We are told that it is the practice for local authorities so to do either by appointing an independent inspector or by holding a hearing in front of a committee. If the dispute is serious in nature, I agree with Waller LJ that if the registration authority has itself to make a decision on the application (c.f. paragraphs 31 and 32 below), it should proceed only after receiving the report of an*

independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry.

30. One advantage of such an inquiry is that the proceedings can take place with some degree of informality and utilising a flexible approach to procedure. Moreover, those conducting the inquiry may be able to take account of evidence which is not strictly admissible (see generally Corpus Christi College v Gloucestershire County Council [1983] 1 QB 360, 366 to 367 and 379). This may be a valuable feature of an inquiry, given the period of time over which actions of local inhabitants may have to be investigated. The authority may indeed consider that it owes an obligation to have an inquiry if the matter is of great local interest. Moreover, if the status of a green confers any rights on persons who are not owners of the land, they are rights which are capable of being enjoyed by a section of the public. In those circumstances, I would adopt the observations of Slade LJ in Re West Anstey Common [1985] Ch 329 at 341 with respect to an inquiry by a Commons Commissioner under section 5 of the 1965 Act, that the public also has an interest in the outcome of the inquiry.

31. On the other hand, if legal proceedings are pending or threatened in which the issue whether land is common land or a green will be determined, the authority may take the view that it is not right for it to proceed to registration and that it should make no decision on the application pending the determination of the court.

32. Likewise, where the registration authority has a conflict of interest because it also owns the land in question (or may acquire it under section 8 of the 1965 Act), it may well be that the right course is to allow any dispute to be determined by the courts. Alternatively, it can appoint an independent legal expert to conduct a non-statutory inquiry into the factual position and make findings.

33. The question arises whether, if the authority were to hold an independent non-statutory inquiry, there would be any violation of the applicant's right of access to court under article 6 of the Convention. I would answer this question in the negative. The procedure for the inquiry is not specifically provided

for by law and the inspector who is appointed by the registration authority would not be regarded as an independent tribunal for the purposes of article 6. However, an inquiry held by a registration authority would not preclude a subsequent application to the court. If the application was refused, the application could be by way of judicial review. This would not be a full review on the merits because it would have to be shown that the registration authority had acted in a way which was irrational or unreasonable or beyond its statutory powers. However, the supervisory role of the court by way of judicial review can for instance be invoked if the treatment by the registration authority, or by the inquiry set up by it, of material evidence was irrational. Moreover, if new evidence emerged, the applicant could make a fresh application to the registration authority; there is no bar on further applications. Fresh evidence would include a declaration obtained in subsequent proceedings brought against a trespasser or an objector. If the application was accepted, the objectors would have a right of access to court under the third option considered below.

34. As I have explained, in judicial review proceedings the review by the court, which is the independent tribunal for the purposes of article 6, is subject to limitations; it is not a full review on the merits. However, in my judgment, it does not follow that article 6 is violated. Parliament has, in my judgment, given registration authorities the power to decide whether to accept applications to amend the register. The court has extensive powers to control the exercise by registration authorities of their powers. In those circumstances, if it were necessary to decide the point, I would hold that the fact that an applicant may only challenge the refusal by the registration authority (having acted in accordance with what I have said above) of an application under section 13 by way of judicial review does not violate article 6 (see generally R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295)."

2.10.5. I should add here that, in my experience, where the registration authority is a council which also owns the land in question, it is usual for a non-statutory inquiry to be held. Having said that, I am aware of

at least one instance[4] where the question of statutory powers/purposes was dealt with as a preliminary issue on paper by a most experienced TVG practitioner, Vivian Chapman QC. As it happened, he advised that the Council as landowner did not have a *"knock-out"* defence to the application on statutory grounds and that an inquiry should be held. I do not know the ultimate outcome.

3. THE APPLICATION

3.1. The Application is duly made on the statutory form, verified before a Justice of the Peace. The Application Site is said to be usually known as *"Hearsall Common"*, located in the Whoberley Ward of the City of Coventry and within/adjacent to Earlsdon, Chapelfields and Whoberley. In answer to Question 6 (*"Locality or neighbourhood within a locality in respect of which the application is made"*), the Applicant states:

> *" Whoberley Ward, City of Coventry – the location is notorious and well known to the landowner and Registration Authority."*

No map of the locality is attached.

3.2. In the section entitled *"Justification for application to register the land as a TVG"*, the Applicant wrote:

> *"The area has been used extensively over many years (considerably exceeding 20 years) as an area for play, walking, exercising dogs and other legitimate sports and pastimes, and continues to be used this way to this day. The historic nature of this use is reflected in, for instance, a plaque on the land alluding to its use for kite flying by the infant Sir Frank Whittle, who later invented the jet engine.*

[4] Application to register Land known as South Purdown, Lockleaze, Bristol.

> *Local people are fond of this land and use it a great deal. As it is entirely open land and formerly a common, the inhabitants use it without force or stealth, and without feeling the need for the landowner's permission, express or implied, and do so in many cases in the knowledge that this has been the custom of the locality beyond living memory.*
>
> *Statements are attached hereto providing evidence of local inhabitants' use of the land".*

3.3. Supporting documentation consists of a map of Hearsall Common and 23 statements of local people. The map shades four areas of land separated by highways. Under *"any other information"*, the Applicant states: *"The landowner is also the Registration Authority"*.

3.4. 13 of the 23 statements are in a standardised form, giving name and address, followed by a short, printed statement:

> *"I believe that Hearsall Common should be designated as a 'Village Green' because of the long period of use by local people for everyday lawful 'sports and pastimes'."*

There is then a small space for *"recollections"*. Most signatories speak here of a range of activities in which they and others have engaged on the land, the majority of which would be capable of qualifying as LSP. Some people cite attendance at fairs and circuses. There is also some mention of walking across the land to get to *"the village"* or to friends' houses. As well as these standard forms, there are 10 brief letters from other individuals. One (Lynda Rowan-Smith) gives an address in Wetherby, though evidently she grew up in the area and still visits family in Coventry, using the land on such occasions. Several writers refer to use of the land both by locals and by people from

other parts of Coventry, particularly, but not exclusively in connection with fairs and circuses.

3.5. Attached to this Advice is a schedule in which I have summarised the contents of these 23 statements. Most of them are not specific as to dates. They all imply, rather than specifically state, that user relates to the whole area claimed; none of the signatories states that they have seen the Application map.

4. THE OBJECTION

4.1. The Objection sets out some history in relation to the Application Site and annexes an extract from the Victoria History of Warwickshire, the City of Coventry and Borough of Warwick. Evidently the land is one of a number of historic commons in and around the City and there was, at one stage, public access by virtue of s.193 Law of Property Act 1925. Rights of common were, however, extinguished by s.95(1) Coventry Corporation Act 1927. S.95(1) further provided that the Corporation should *"henceforth ... for ever hold and enjoy the commons for an estate of inheritance in fee simple in possession freed and discharged from all rights and interests therein and the commons shall subject as in this Act provided for ever be maintained by the Corporation as open spaces so as to secure the full enjoyment of the same as places of public resort and recreation and the provisions of the Public Health Acts relating to parks and pleasure grounds ... shall subject as aforesaid apply to the commons"*. Four provisos followed:

> *"(a) The Corporation shall not let any part of the commons for the purposes of sport or recreation to any club or person for a period of more than one year at a time;*

(b) *The Corporation may by resolution dedicate any part or parts of the commons for the purpose of making or widening any street under the Public Health Acts;*

(c) *The Corporation if they consider such an arrangement is desirable in consequence of changes in the character of the neighbourhood of the commons may enclose the whole or any part of the commons in order to promote the use thereof for public resort and recreation;*

(d) *The Corporation with the consent of the Minister of Agriculture and Fisheries and subject to such conditions as the Corporation may think fit may exchange any part of the commons for other lands within or in the neighbourhood of the city or sell any parts of the commons which are not in the opinion of the Corporation of substantial use for public resort and recreation and any conveyance of the land to be conveyed and any lands received by the Corporation by way of exchange shall for ever thereafter be subject in all respects to the provisions of this Act as if they were part of the commons"*.

The Corporation was also required to pay annuities to the trustees of the freemen and widows of Coventry in consideration for the extinguishment of all rights and interests in and over the commons.

4.2. By s.101, the Corporation were given the power to make, revoke and alter byelaws, amongst other things, *"for regulating the playing of games"* and *"for regulating the use of the parts of the commons upon which persons may play games hold athletic sports and hold meetings and shows and for prohibiting the use for the purposes aforesaid of other parts of the commons."*

4.3. The Coventry Corporation Act 1972 was repealed by the West Midlands County Council Act 1980 but, by virtue of s.96 of the latter Act, the Objector continued to hold the land on the same basis.

4.4. On 19th June 1962, the Lord Mayor, Aldermen and Citizens of the City of Coventry made Byelaws as to Pleasure Grounds in the City of Coventry, including Hearsall Common, under the Public Health Act 1875. The Byelaws regulate activities on the Commons in many ways, including a prohibition *"except in the exercise of any lawful right or privilege, the riding of any bicycle, tricycle or other similar machine in any part of the pleasure ground".* The Byelaws were confirmed by the Secretary of State and came into operation on 1st November 1962. So far as I am aware, they have never been revoked or amended.

4.5. On 6th December 1966, the Minister made an Order exempting Hearsall Common from the provisions of ss.1 to 10 CRA 1965. The Recital sets out, inter alia, that it appeared to the Minister that *"the said lands are regulated statutorily"*.

4.6. The Objection states that the Application Site is currently maintained by City Services Directorate of the City Council on behalf of the Parks Service within the Culture, Leisure and Libraries Division of the Community Services Directorate. Apparently, the land has always been managed under the aegis of the relevant committee responsible for parks, recreation grounds and open space, notwithstanding periodic changes of name. The objection further states that an area in the northernmost parcel of land is laid out as a speedway track and used regularly for cycle speedway events. In the same parcel, it is asserted that there are two areas of impenetrable scrub. The south western area is said to be used periodically for fairs, circuses and other events, by licence for valuable consideration.

4.7. Included with the Objection are documents evidencing the letting of all or part of Hearsall Common for circuses in the years 1958, 1964, 1995, 1997, 2001, 2002, 2003, 2004, 2005, 2006 and 2007. Early correspondence is with Leisure Services and later with the Parks Service/Culture and Leisure Departments. There are a number of licences granting permission to use Hearsall Common for periods of 5 days, on payment of a fee. The licences are in standard form and regulate operation of the circuses in some detail. In turn, the Council agrees *"to permit the licensee peaceably and quietly to hold and enjoy the Site without any interruption or disturbance from or by the Council except in accordance with the terms of this agreement"*. There is no documentary material relating to speedway.

4.8. The objection notes that the application apparently includes pavements and cycleways, though not vehicular carriageways, of the highways known as Hearsall Common and Tile Hill Lane. Tile Hill Lane is not marked on the application plan and the scale of the plan is so large that I cannot form a judgment on these matters. Evidently, the highway Hearsall Common was widened at a point abutting one of the application parcels, pursuant to a stopping up order made on 17th May 1994. Part of the stopped up highway land appears to be included in the south western parcel of the application site.

4.9. The Objector submits that recreational use of the land has been attributable to a statutory trust and/or subject to statutory regulation by byelaws. Reliance is placed on Lord Scott's remarks in Beresford about the Open Spaces Act 1906 ("OSA 1906"), because, it is said, the same principle applies to land held under s.164 Public Health Act 1875 ("PHA 1876"). S.164 provides for an

urban authority to ‘take on lease lay out improve and maintain lands for the purpose of being used as public walks or pleasure grounds’ and to make byelaws ‘for the regulation of any such walk or pleasure ground…’ It is further submitted that ss.122 and 123 Local Government Act 1972 (“LGA 1972”) indicate that Parliament considered that land held under s.164 is held under a trust, in line with the approach of Finnemore J in Hall v Beckenham. Ss. 122 and 123 provide that where land is appropriated or disposed of and it is held under s.164 PHA 1876 or s.10 OSA 1906, then it *“shall be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with”* s.164 or s.10. More generally, it is submitted that if a person has a right to enter land held under s.164, then his use of the land cannot be *“as of right”*.

4.10. The Objector further relies on the licences to hold circuses granted in relation to the western part of the land and speedway events as denoting permissive user and/or deference. The same is said to apply to the speedway track. It is also said that parts of the site to the north west are covered in impenetrable scrub and therefore cannot have been subject to recreational user as a matter of fact. Further parts, consisting of pavement and cycleway, it is said, have throughout the 20 years, been used as highway and not for LSP while the area which was stopped up in 1994, was used as highway, rather than for LSP until 1994.

4.11. Notwithstanding the *“of right point”*, there is also an objection based on failure to identify an appropriate locality, because *“a small part of the application site lies in Earlsdon Ward”*.

4.12. Relying on the statutory trust point, the Objector goes on to submit that a public inquiry is unnecessary and that it would be inappropriate to hold one because the application can be determined on the basis of the legal argument raised. Non TVG matters to do with implementation of a road scheme are also cited as a reason not to hold a public inquiry. Reference is made to an earlier, very similar, application by Mr David Hirst, concerning timing of determination of the two applications. I advised the Registration Authority with regard to that application in writing on 20th May 2008. There are many similarities between the two applications (not least the evidence statements in support, which appear to be identically worded), but there are also important differences. The current application site is larger and the Objectors have made factual points concerning highway land, speedway and scrub, which were not in issue in the earlier application. The current application accordingly requires separate consideration.

5. APPLICANT'S RESPONSE TO LANDOWNER'S OBJECTION

5.1. The basic facts with regard to the history and the statutory basis of holding the land are agreed, though not the contents of the Victoria History extract. Because of this, the Applicant agrees with the Objector *"as to the propriety of instructing appropriate independent counsel to advise on this matter, rather than holding a public inquiry"*. He disagrees with the Objector's view of the importance of the road scheme. I cannot comment as to the facts of the proposal, but I regard it as irrelevant to the determination and means of disposal of the TVG application.

5.2. The Applicant submits that he is under no obligation to demonstrate an appropriate locality. He states that *"since the landowner is also the registration authority, the registration authority is therefore also sufficiently aware"* of the whereabouts of the land on the application plan. He points out that Earlsdon ward is also in the City of Coventry and within the area for which CCC is registration authority.

5.3. With regard to the speedway track, the Applicant relies on Beresford and the fact that construction of the speedway track and partial hardstandings for fairs and circuses are *"trivial acts"* compared with those in Beresford, so incapable of rendering the application site non-regestrable.

5.4. As to funfairs and circuses, the submission is that they are irrelevant because different persons may use the same land on the basis of different rights and permission; it is not clear to me whether it is suggested that informal LSP occurred simultaneously with fairs and other such licensed events. Further, if the land is, indeed, held under s.164 PHA 1875, then such use of the land is alleged to be unlawful.

5.5. Byelaws are said not to impinge upon the Sunningwell definition of *"as of right"* and not to constitute permission. Analogies are drawn with the public's use of Coventry City centre where various byelaws are in force.

5.6. The Applicant submits that s.10 Open Spaces Act 1906 is irrelevant for a number of reasons:

(i) Lord Scott's remark in Beresford was obiter;

(ii) the point was unique to Lord Scott and inconsistent with the "*nec vi, nec clam, nec precario"* test in Sunningwell;

(iii) the 1906 Act is not in issue on the facts and Lord Scott's remark was confined to the implications of that statute;

(iv) Lord Scott did not say that land subject to byelaws necessarily falls within *"land subject to regulation"*, the latter said by the Applicant to be *"traditional parks and gardens, provided under statutory powers and subject to the Council's discretion"*, as opposed to an open space such as Hearsall Common.

5.7. The judgment in Hall v Beckenham Corpn was given on an interlocutory matter and concerned a different area of law. The trusts alluded to were not claimed by Counsel or said by Finnemore J to derive from s.164 PHA 1875.

5.8. *"As of right"* and *"by right"* are not terms of art, the Applicant submits: Sunningwell makes it clear that *"as of right"* should not be given a *"narrow, technical meaning"*. Relying on Lord Scott in Beresford, he submits that two different rights may be exercised over the same land by the same member of the public at the same time.

5.9. The Applicant relies on Oxfordshire to submit that any statutory rights which the public had to use the Common for recreation would have been extinguished by virtue of operation of law by 31st July 1970, due to non-registration.

5.10. On user, the Applicant submits as follows:

(i) use of the speedway track is LSP;

(ii) areas of wood/dense undergrowth form part of the environment which is enjoyed as part of inhabitants' LSP and are, in any event, penetrable by dogs, reliance is also placed on Lord Hoffmann's approach in Oxfordshire.

5.11. With regard to highways, it is confirmed that pavements and cycle paths are included within the application site.[5] The Applicant submits either:

(i) that exercising *"for purposes not merely locomotive"* are LSP; and/or

(ii) that rights can co-exist; and/or

(iii) that the areas can be excluded from registration.

Similar arguments are made with regard to the strip formerly comprising the stopped up highway and/or to *"impute"* user of land taken for the new highway to the location of the old.

6. SUBSEQUENT REPRESENTATIONS

6.1. The Applicant's Response was made available to the Objector and, in turn, the Objector's to the Applicant. I shall summarise these subsequent submissions briefly.

6.2. The Objector's reply is summarised as follows:

(i) it is, indeed for the applicant to prove an appropriate locality; the fact that some users come from Earlsdon Ward may cast doubt on the appropriateness of Whoberley; it is not, in any event, clear that

[5] This point was also clarified after an exchange of e-mails, on 21st February 2008.

electoral wards can be *"localities"* for these purposes; Coventry City may be too big;

(ii) Lord Scott's dictum is entitled to considerable respect and is logical as to regulation; his points apply by analogy to public open space made available to the public and regulated by byelaws; it was not the intention of 1965 or 2006 legislation to make most public open space registrable; Sunningwell does not detract from these points;

(iii) Lord Scott's dictum is applicable, notwithstanding that the land is held neither under the OSA 1906 nor the PHA 1875;

(iv) paragraph 46 of Lord Scott's speech in Beresford is not authority for the Applicant's submission that LSP may be attributable to two legal bases simultaneously;

(v) the application site was not a statutory allotment before 1970 so the argument based on extinguishment fails;

(vi) a highway is not registrable because any assertion of right is inconsistent with the general right of passage;

(vii) the stopped up Beechwood Avenue is accordingly not registrable.

6.3. The Applicant has responded, as follows (in summary, focussing on new points):

(i) locality: unlike litigation, there are no burdens of proof. Residents of 3 wards all within the City of Coventry use the land; in a footnote on *"As of Right"*, the Applicant describes the locality as *"the surrounding areas of Earlsdon, Chapelfields and Whoberley, which are contained within and can fairly be said to be coextensive with the Wards of Earlsdon and Whoberley";*

(ii) "As of Right": Lord Scott's obiter remark is isolated and his phrase *"unregulated"* is undefined; Hearsall Common has the characteristics of a traditional TVG and hence fits in with Lord Scott's underlying objectives;

(iii) it is perverse to argue that residents with an actual legal right are in a worse position than those without one; the only defence, on orthodox Sunningwell/Beresford lines, can be licence; licence is inconsistent with the facts in the instant case;

(iv) there is no legal or practical basis for distinguishing Hearsall Common or other land held under s.164 PHA from a park; land held under s.164 is to be regarded as analogous with that held under OSA and not registrable: Hall v Beckenham;

(v) impenetrable scrub – a question of fact and judgment for the Registration Authority;

(vi) CA 2006 applies to all land in England and Wales (apart from certain named Forests), unlike CRA 1965 which permitted exempting orders to be made (as in the case of Hearsall Common). Local authorities should be in no better position than landowners and Sunningwell, Beresford and Oxfordshire show that *"public open space will usually be registrable"*;

(vii) Hall v Beckenham Corporation predated CRA and should not be applied in this context. *"As of Right"* versus *"of right"* is a *"flimsy"* argument, invented either by Vivian Chapman QC or Philip Petchey, the latter being Counsel for the Objector;

(viii) the rearrangement of highway land associated with the stopping up of Beechwood Avenue was an *"exchange"* so the qualities of people's rights must have been transferred and/or the Objector is *"stopped from going back on the assertion of the protection and continuity of public rights implied by the 'exchange';"*

(ix) and/or the old highway land is de minimis and/or can be severed from the rest of the application land;

(x) logically, the land should be registrable, since it would have been registrable under CRA 1965 but for the exemption, which is now abolished.

7. THE ISSUES

7.1. The representations and evidence raise many interesting questions, both legal and factual. I think that it will be helpful if, at this stage, I set out my advice on the approach which the Registration Authority should take to procedure and the method of determining the application.

7.2. In Beresford, Lord Bingham quoted Pill LJ in R v Suffolk CC ex parte Steed (1996) 75 P&CR 102 at 111:

> *"it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green..."*

continuing:

> *"It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision-makers must consider carefully whether the land in question has been used by the inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."*

Having said that, certain observations of Lord Denning MR in Corpus Christi - although referring to initial CRA registrations and the hearings of Commons Commissioners, and so not directly applicable - are nevertheless apposite. He said[6] that such hearings should be regarded more as an administrative matter, than as a piece of civil litigation.

7.3. It is still necessary, in order to achieve registration under CA 2006, for all the relevant elements to be established. Therefore if an application fails on one element, it must fail overall; where there is a fundamental flaw, a claim cannot be rescued by success in relation to all the other elements. In this case, both the Applicant and the Objector agree that there is a crucial question to be determined concerning the legal basis of user, and that, because the facts pertaining to the Objector's acquisition and holding of the land are clear, this is a legal question which can be adequately canvassed in written submissions. I noted above that both Applicant and Objector have expressly stated that they regard an inquiry as unnecessary. As Lord Denning said, however, this is not a piece of litigation and one of the difficulties about Class C TVG registration procedure is that an applicant's status, vis à vis those who might be entitled to enjoy the benefits of registration, is unclear. Therefore, whilst it is relevant and helpful to know that the Applicant and Objector do not seek an inquiry, the Registration Authority must independently consider whether or not one is necessary, having regard, in particular, to the guidance in Whitmey and Cheltenham Builders.

6 P.1000 e-g

7.4. The guiding principle, as Sullivan J observed, must be fairness. Where issues of fact have to be resolved, he pointed out that local inquiry or hearing is likely to be a fair means of proceeding. Arden LJ's guidance[7] in relation to cases, like the present once, where there is a conflict of interest due to land ownership, is also highly relevant. In suggesting either resolution by the court or the appointment of an independent legal expert to conduct an inquiry into the factual position and make findings, however, she was not being prescriptive. One of the advantages of the lack of procedural regulation in these matters is that the registration authority is able to be flexible and suit the procedure to the particular circumstances of an application.

7.5. How should the Registration Authority proceed in this Instance?

7.5.1. There are several matters which would, in my opinion, be incapable of determination without an inquiry. The application includes no information about the population or other characteristics of Whoberley Ward and/or the other areas which might be claimed as the locality, so it is impossible to decide whether there is evidence of user by a significant number of its inhabitants. It is not clear whether the streets named in answer to Question 6 of the application form are relied on as a neighbourhood within Whoberley Ward, or some other neighbourhood, or none at all. If a neighbourhood is claimed, it would be necessary to hear evidence as to its extent and characteristics in order to advise the Registration Authority as to whether that element of the statutory test was met. For the avoidance of doubt, I do

[7] Whitmey, para 32

consider that it is necessary for an applicant to specify the locality and/or neighbourhood on which he relies: the statutory application form makes provision for it and all the cases which have considered the point have proceeded on this basis. Turning to other matters, it is not clear to me how much of the land was occupied by fairs and circuses when they were held and what the implications were for user during such times. Evidence on these issues would be required in order to reach conclusions on 20 years' user/interruptions/ obstructions and deference on the part of the local inhabitants to such user by the licensees of the Objector. The latter is an important element of the Sunningwell approach, as elucidated by Sullivan J in Laing. A related question requiring exploration would be the degree of user by non locals (however locality and/or neighbourhood were to be defined). There might be other factual issues, such as the nature of the Objector's management, the presence and terms of any signs on the land, and dates and extent of user, since the supporting statements are vague or silent on these points. Questions as to the form and user of the speedway track, and the nature of the allegedly *"impenetrable scrub"* also arise and would need to be the subject of evidence and site inspection. Similarly, a judgment would be required as to the extent of highway land included, any amendment of the application site and as to the legal significance of any evidence of user.

7.5.2. It follows from what I have said in the previous paragraph that it would, in my view, be impossible properly to register the land as a TVG without first holding an inquiry.

7.5.3. The question which has occupied the majority of the written representations, however, is different in nature. It turns upon the relationship of s.95(1) Coventry Corporation act 1927 and s.96 West Midlands County Council Act 1980 ("the Local Acts") to the law relating to the registration of Class C TVGs. There is a further legal question which arises, namely the effect and significance of the Minister's Exemption Order. As I have said, both the Applicant and the Objector have made full submissions on the first question in which they have also alluded to the second

7.5.4. The Judges in Whitmey and Cheltenham Builders were either envisaging or dealing with cases involving factual disputes and matters more akin to those to which I referred in paragraph 7.5.1 above. I do not consider that I would be materially assisted by an inquiry in reaching an opinion on these legal questions. I note that the Applicant and Objector both agree with that assessment of the position although, for reasons which I have explained, their mutual consent does not decide the procedural issue. It would undoubtedly cause delay and expense all round for an inquiry to be held, which would be prejudicial to good administration and fairness if imposed unnecessarily. For all these reasons, I conclude that the Registration Authority could lawfully reject the application without an inquiry if it

found that the Local Acts and/or the Exemption Order operated to prevent user having been *"as of right"*.

8. 'AS OF RIGHT'

8.1. The House of Lords in Sunningwell decided that the basis for establishing a Class C green was prescription, without there being any subjective element required on the part of local inhabitants. What matters is the appearance of their conduct to the landowner, judged objectively. The familiar phrase *"nec vi, nec claim nec precario"* associated with the law of prescription is, unsurprisingly, in fact derived from the Roman law of *"usucapio"* (literally *"I take by usage"*) which, as Lord Hoffmann explained, looked at the question the other way round: see p.349 D-H. Sullivan J in Laing helpfully referred to this passage and applied it at paragraphs 77 to 82. He said:

> *"Under English law the focus is not upon how matters would have appeared to the person seeking to acquire the right by long usage, but upon 'how the matter would have appeared to the owner of the land'....*
>
> *Thus the proper approach is not to examine the extent to which those using the land for recreational purposes were interrupted by the landowner's agricultural activities, but to ask whether those using the fields for recreational purposes were interrupting ... agricultural use of the field in such a manner, or to such an extent that Laings should have been aware that the recreational users believed that they were exercising a public right. If the starting point is, 'how would the matter have appeared to Laings?' it would not be reasonable to expect Laings to resist the recreational use of their fields so long as such use did not interfere with, their licensee's ... use of them ...".*

This enunciation of principle has come to be referred to in TVG matters as *"deference"*.

8.2. In Beresford, therefore,[8] the Law Lords were not placing a gloss on Sunningwell by spelling out that the requisite user in a Class C TVG case is constituted by actions with the appearance of right, rather than conduct based upon a crystallised legal right. In the latter case, the question of assertion or quasi (*"as if"*) right simply does not arise, nor is there any reason why a landowner, viewed objectively, should think that it does. I therefore consider that both of these House of Lords decisions clearly establish that if user is explicable on the basis of a legal right for some or all of the relevant period, then land is not registrable. Nothing in Oxfordshire detracts from this proposition and the phrase *"as of right"* reappears in s.15 CA 2006 without qualification, exactly as it did in CRA 1965 as originally enacted and as amended by CROW. There is no question of the law, or my reasoning above, being based upon a special exception for publicly owned land: the outcome in Beresford makes that clear.

8.3. The fundamental principle of considering matters from the landowner's perspective is the answer to the Applicant's submissions as to user which could be ascribed either to right or to an assertion of right. It is entirely reasonable for the landowner to work on the basis that people are on his land pursuant to any relevant legal right, rather than as trespassers or persons engaged in acquiring new rights. Therefore the many witness statements which refer to attendance at fairs and circuses should be regarded as referring to their presence as licensees of the landowner's contractual

[8] For example, Lord Bingham at para 3, quoted above at paragraph 2.9.2.

licensees: their user was 'precario', and there is no reason to attribute it to the assertion of some other right.[9]

8.4. It therefore follows that if the basis on which the Objector acquired and, in the absence of appropriation, continued to hold, the land in question means that users were entitled to carry out their activities, then no question of user *"as of right"* will have arisen. This was clearly the approach of the entire House of Lords in Beresford, as can be seen from the passages to which I have referred, as well as the process of adjourning to enable research to be undertaken as to the basis on which Sunderland City Council held the land.

8.5. I agree with the Applicant that OSA 1906 is clearly not in issue in this case, but, as I have noted, Lord Walker's reasoning was adopted by the majority in Beresford and he regarded land appropriated to open space purposes in the same light as land held under an express OSA 1906 trust. Whilst this remark was obiter, I regard it as very persuasive.

8.6. It appears that there is no caselaw on the effect of the Local Acts under which the Objector holds the land. Accordingly, I must construe the provisions applying first principles. I consider that it is difficult to reconcile the words *"in fee simple in possession for ever freed and discharged from all rights and interests"* with the imposition of a trust. The relevant sections continue, however, by placing the Corporation/Council under an express statutory duty to maintain the land as *"open spaces so as to secure the full enjoyment of the*

[9] Moreover, the fact that such use would, almost inevitably, have displaced some informal LSP is evidence of deference (see Laing) on which the landowner is likely to be entitled to rely. Without hearing detailed evidence, however, I cannot reach a concluded view as to the facts

same as places of public resort and recreation" – clearly, public open space purposes.

8.7. The statutory duty is qualified by the provisos (a) to (d). Some of these provisos are, in my opinion, incompatible with the establishment of a Class C TVG.

8.8. Proviso (a) assumes that the Corporation/Council can let the land to a particular club or person for the purposes of sport or recreation. Such a letting would grant exclusive possession to the tenant for their own particular sport, which would be inconsistent with TVG prescriptive user because registration would confer rights on a limited section of the public, namely the inhabitants of the locality or neighbourhood, to indulge in all lawful sports and pastimes: this was the view of the majority in Oxfordshire as to the effect of registration. I have considered the *"dual basis"* user point at paragraph 8.3 above.

8.9. Proviso (b) envisages dedication of a highway over the land. Whilst it is generally held that highway and TVG rights are not mutually exclusive, in the event that the Highways Authority were to construct a vehicular route, that would be inconsistent with TVG status by reason of various statutes forbidding construction and other such activities, as well as driving vehicles on greens. In the case of part of the land, it appears that it was in fact subject to vehicular rights of passage for a significant part of the relevant period. I see no legal basis for reckoning user on one part of the land to another part as the Applicant suggests. Similarly, a statutory stopping up order would not found

an estoppel, or even (in contemporary administrative law terms), a legitimate expectation to such an effect.

8.10. This type of incompatibility point was considered in Laing and Oxfordshire. In Laing, Sullivan J held that *"low level agricultural activities"* were, of themselves, automatically inconsistent with TVG rights, since they would become unlawful if land were registered. That conclusion was disapproved in Oxfordshire, Lord Hoffmann observing that he did not see why the fact that a landowner's activities during the period of prescription would have been unlawful if carried out on a registered TVG could *"be relevant to the question whether there has been requisite user..."* (para 57, emphasis added). This remark, however, was made in the context of privately owned land and concerned Sullivan J's approach to user. Where the powers under which a local authority holds land are fundamentally inconsistent with user *"as of right",* I consider that the position is different. I am not here considering the statutory basis for holding and managing the land as part of a deference defence,[10] rather the existence of an inconsistent statutory power. In short, whenever the Objector, through its members and officers, saw people engaging in lawful sports and pastimes (or might reasonably be supposed to have seen them), it would – actually or putatively – have attributed their presence to the statutory purpose, rather than the assertion of an independent, local right. An alternative way of expressing the point is to say that, unlike a case of private, non statutory landholding, where it is only the owner's rights which are potentially restricted by registration, in a case like the

[10] Though this would, as I have said, be an issue of fact to be explored at an inquiry, if the Registration Authority decides to hold one.

present one, registration would effectively override legislation and the rights which it confers on the public. This conclusion is not perverse, as the Applicant suggests, because non registrability does not cut down the rights of the public under the legislation; in fact, registration would benefit a smaller, as yet unidentified, class of persons from the relevant locality or neighbourhood, their relationship with the general public after registration being not entirely clear.

8.11. Proviso (d) establishes a system of exchanging the land for other land which is separate from that introduced by CA 2006 and would have been wholly extraneous to CRA 1965. The points which I made in earlier paragraphs about incompatibility with statutory purpose apply with even greater force to this proviso.

8.12. All the provisos, in my opinion, would also fall within Lord Scott's 'subject to regulation' dictum, the power of exchange being the ultimate expression of such a state of affairs.

8.13. The Local Acts, whilst being inconsistent with establishment of a new TVG for the reasons I have given, provide a full explanation and statutory rationale for indulgence in the lawful sports and pastimes claimed. Although I have little information as to the split of local (whatever that might mean) to *"alien"* users, several statements refer to people coming from other parts of Coventry or even further afield. Such user would have been consistent with the Objector's statutory duty and there would have been nothing to alert it to the assertion of a claim of right: user appears to have and actually had a lawful origin in the

Objector's duty to the public. It would be impossible to describe users as trespassers because they were present and active on the land by virtue of the Objector's statutory duty to them.

8.14. Somewhat curiously, the provisions of the Public Health Acts relating to parks and pleasure grounds are imported into the Local Acts. I consider that s.164 PHA 1875 does not create an express trust and that the caselaw on the point is derived from unrelated fields. The authorities in which the suggestion was first made concerned rateable occupation and they cannot, in my opinion, simply be transferred into the TVG context, nor do ss.122 and 123 LGA 1972 achieve that end in my view. As both Applicant and Objector point out, however, the land is not held under the Public Health Acts and I have concluded that the Local Acts under which it is held create rights, duties and a statutory scheme which are incompatible with the establishment of a Class C green, so it is not necessary to determine the precise effect of s.164 PHA 1875.

8.15. It is relevant, however, that the Objector made byelaws under PHA 1875; as well as enjoying powers of regulation, it actually regulated user. In Beresford, it was said that mowing grass and providing benches was *"equivocal"*, but that was in the context of a piece of land which was not public open space; it had effectively merely been dormant development land for the 20 year period. By contrast, in this case, it seems to me that the making of Byelaws and the agreed position on holding and management of the land are highly relevant. There is evidence of management at all material times by the Leisure Department (under a variety of names) and of lettings which were within the

statutory powers, most particularly Proviso (a), without any assertion of right by local inhabitants to suggest to the Objector that they were there other than as members of the general public. (The road proposal, which, on the face of it would have fallen within Proviso (b), clearly provoked the TVG claim. Therefore it would not be right, as it were, to count that against the application, since it has been challenged by the Applicant and his supporters).

8.16. I do not consider that the Exemption Order or s.1(3) CRA are relevant. The Local Acts were not overridden by CRA, so the rights which they conferred continue to be enjoyed by the public. Repeal of s.11 CRA does not, therefore, assist the Applicant. I cannot now speculate as to what the reasons for seeking and making the Exemption Order would have been, but I note the Objector's suggestion that the land might have been registrable as waste land of a manor not subject to rights of common within s.22(1)(b) CRA. The lands in the Schedule to the Order are all described as waste in the Victoria History extract but I do not regard it as necessary for the Registration Authority to make such a finding.

9. CONCLUSION

9.1. Having identified a point of law on undisputed facts which, in my opinion provides a complete answer to the claim, I must advise that the application should be rejected. It may be that there would be other grounds for rejection, depending on evidence which would need to be received by way of a public inquiry. The Registration Authority should consider carefully the procedural

advice which I have given above, as well as this conclusion on the *"as of right"* point.

9.2. I shall be happy to advise further if necessary.

MORAG ELLIS QC
4 September 2008

2-3 Gray's Inn Square
London WC1R 5JH

SCHEDULE OF USER

Witness	Exercising Dogs	Walking to 'Village'	Festival	Sunday School /Church services	Football	Kite Flying	Guides, brownies , cubs	School sports	Children's bike riding	Rounders	Walking to Friends	Children play	Cricket	Fairs/Circuses	Games Events	Spending time with family/friends	Caribbean Carnival	Donkey Derby	Walk for exercise	Picnics/sitting out	Local Open Space	Blackberrying
1.	✓	✓	✓	✓																		
2.	✓			✓	✓	✓	✓	✓														
3.	✓					✓			✓	✓												
4.	✓										✓	✓										
5.					✓							✓	✓									
6.					✓	✓								✓	✓							
7.																✓						
8.	No user specified: visual amenity																					
9.	✓		✓			✓							✓	✓			✓	✓	✓	✓		
10.									✓			✓								✓		
11.					✓							✓		✓								
12.		✓							✓													
13.																				✓		
14.						✓			✓			✓										
15.	✓											✓										
16.						✓						✓										
17.	No user specified																					
18.	✓		✓		✓	✓							✓	✓			✓	✓	✓	✓		
19.			✓		✓				✓			✓	✓				✓					✓
20.						✓			✓			✓		✓			✓		✓			
21.					✓				✓											✓		
22.	No user specified – *"recreation of both local and wider community"*																					
23.												✓										

Witness:

1. Janet Walters – 106 Earlsdon Avenue South
2. Jean Keenan – 33 Kingston Road
3. John Macateer – 8 Coniston Road
4. Trish Orledge - ?6 Kensington Road
5. Louise Cowley – 25 Kingston Road
6. D Hirst – 44 Earlsdon Avenue North
7. Keith Millage – 3 Caburnam Avenue
8. Christina Macabeer – 18 Coniston Road
9. Derek Benefield – 12 Highland Road
10. West – 135 Prince of Wales Road
11. Mrs R Benefield - ? Highland Road
12. Tracy Jones - ?6 Hartington Crescent
13. A Holland – 43 Hartington Crescent
14. Carol Easson – 15 Ascot Close
15. Stuart Taylor – 2 Marriott Road
16. T di Mascio – 49 Hartington Crescent
17. John Gibberd – 8 Stoneleigh Avenue
18. Unnamed
19. Peggy Thornton – 5 Broad Lane
20. Jacqueline Basu – 103 Broad Lane
21. Linda Rowan-Smith – 20 King's Meadow Grove, Wetherby
22. Clare McArthyr – 41 Hartington Crescent
23. James McArthur – 41 Hartington Crescent
24. A Holland – 43 Hartington Crescent

IN THE MATTER OF APPLICATION VG/2007/001 TO REGISTER LAND KNOWN AS HEARSALL COMMON, COVENTRY AS A TOWN OR VILLAGE GREEN

A D V I C E

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APPENDIX C

Re: Application to Register Hearsall Common as a Town or Village Green

Submission to the Planning Committee of Coventry City Council by the Applicant

Summary: There are three options for the Committee to choose between. One of these carries **ZERO RISK**, one carries a **MEDIUM-HIGH RISK** and one carries a **VERY HIGH RISK**. These are set out in section 3, below. The background and factors contributing to risk are set out first.

1. BACKGROUND

1.1 Council Conflict Situation

This is a case which places the Council in some difficulty, since it is both the landowner, and therefore an interested party, and the Registration Authority, charged with making the determination between the Applicant and the landowner (itself), therefore effectively sitting as judge in its own cause. The Council in this case decided not to ask another Registration Authority to determine the matter independently, but to proceed on the basis of "wearing two hats". It is particularly important in such a case that the Applicant and members of the public (amongst whom there is overwhelming support, with a circa 1300-name petition, gathered over the summer holiday period, recently presented in favour of registration) are not given the impression that the Council is acting in its own interests.

1.2 Role of the Planning Committee

The actual decision on registration has been delegated to this committee on behalf of the Council as Registration Authority.

1.3 Effects of Town or Village Green Registration

Town or Village Green (TVG) status protects land against future development, preserving it as a place of leisure and amenity for the use of local people (and, since TVGs, by their nature are open spaces, incidentally the public at large). Whilst, with the exception of highway schemes (which could do immense damage to the amenity value of the Common), the Council is not permitted to develop the land by the statute under which it retains ownership, it is free to sell the land, free of all development restrictions and trusts, to another party – eg, Tesco to develop a supermarket, or a developer to build housing. If the land is registered as a TVG, that would no longer be possible as the land could not be developed.

1.4 Political Background

Politically, although Cllr Ken Taylor has stated that there is no intention to develop the land and that the controversial (1928-name petition against, 29 people in favour at consultation) highway proposals that initially prompted the application are "dead", it is noteworthy that in the Minutes of Cabinet for 6 November 2007, it was recorded that officials would return with fresh highway proposals, if applications for TVG status were refused, and Cllr Taylor told the Earlsdon Ward Forum on 11 September 2008 that it was his job as a councillor to do whatever officials advised.

The applications for TVG status were first made after the proposed highway works to Hearsall Common were revealed as part of the PrimeLines scheme. However, it should be borne in mind that this was the first time that residents were alerted to the vulnerability of the Common, which many had erroneously assumed still to be common land owned by the Freemen of the City. The proposals related to the "University Corridor" bus showcase route, and two bus lanes were proposed to cut into the Common. These proposals did not come from elected members but were the creation of Council officials working with Centro in the PrimeLines partnership. The proposals were fully drawn up first, without reference to any proper study of the need for them. The Council as Highway Authority then commissioned a feasibility study from Jacobs UK Ltd, engineers. Jacobs established that the bus-using public did not in fact consider there to be a reliability problem on the route but wanted more buses at peak times (since it is often not possible to get on a bus since they go past full). The report also established that the best total saving along the entire route (which they noted was not much used, as the route tends to divide into two sections, city-Earlsdon, and Earlsdon-Warwick University), would be about 1 minute 50 seconds at peak times. The report further found that the only "pinch-points" on the route were between Central Six and Spencer Place and between the last two roundabouts going out towards Sainsbury's. Neither of these two pinch points have any actual or proposed bus priority schemes, which were/are all proposed for places where the engineers did not find them necessary.

However, the scheme was "feasible" and PrimeLines wished to press on regardless, and Council officers have been fervent advocates of the scheme rather than neutral advisers.

The public support for a TVG is independent of the issue of bus priority schemes, however, which merely served to point up the need for protection of the Common, and a *circa* 1300 name petition in favour of registration has been received by the Council.

2. ADVICE OF MORAG ELLIS QC

2.1 Introduction

The Council instructed Ms Morag Ellis QC, a barrister specializing in representing the interests of local authorities, though not specifically in land law matters. This accords with past practice of local authorities in such matters. Her instructions were initially given in the name of the legal department, which in fact represents the Council in its interest as landowner in this case, but she notes in her Advice on this application that she is actually instructed by Mark Smith, a Council solicitor who in this instance is acting for the Council in its capacity as Registration Authority.

2.2 Limits of the Advice

Members should be aware that this Advice is not advice to the Council generally as to whether the land may or may not be registered. It is specifically advice to the Council as Registration Authority as to whether to register the land against the objection of the landowner. It is important to bear in mind that the Council is free to consent to the registration of the land notwithstanding the advice, as the Commons Act 2006 expressly provides for registration by consent of the landowner.

2.3 Problems with the Advice

The giving of legal advice is always closer to an art than to an exact science. Highly qualified expert lawyers, and even judges, frequently disagree as to the correct answers to questions of law (otherwise there would be no civil litigation coming before judges, and no appellate courts to review alleged erroneous holdings of law by other judges). Ms Ellis' advice, though doubtless given in good faith, is open to criticism on a number of grounds, which creates a hazard for the Council if it chooses to rely on the advice.

2.3.1 Reliance on obiter dicta

The decisions of judges form part of the law of England, along with statutes and other legislation. Judges' decisions are given at length and involve two kinds of statement about the law. The first is called the "*ratio decidendi*", meaning "the reason for the decision", and these statements, when made by a judge in the majority, form part of the law. The second are called "*obiter dicta*", "sayings by the way", which are often off-the-cuff views expressed by a judge as to how they might decide a different but related point of law had it arisen. These are not part of the law, though barristers often refer to them in argument where the *ratio decidendi* are unhelpful to their case, but some *obiter dicta* appear to favour their argument. Neither *obiter dicta,* by any judge, nor the *ratio decidendi* of a judge in the minority, or a judge whose decision is overturned on appeal, count as law. Ms Ellis relies on *obiter dicta* for her conclusions on at least six occasions: paragraphs 2.6.1; 2.6.2; 2.9.2; 2.9.3; 8.5; and 8.12. Indeed the key point she makes against registration – statutory usage – relies entirely upon two *obiter dicta*. One of her reliances (at 2.9.3) in fact is entirely irrelevant, since it relates to land held under s.10 of the 1906 Act, which all involved in this case accept is not the case with Hearsall Common. She also relies on overturned decisions (see 2.3.2, below).

2.3.2 Reliance on first instance judgments

There is a strict hierarchy amongst the courts. In the higher courts, before whom such cases are brought, the hierarchy in ascending order of precedence is the High Court (ie, a judge sitting at "first instance"), the Court of Appeal, then the House of Lords (the highest court in the land).

Ms Ellis' advice depends extensively on statements made by judges at first instance. This is because the *ratio decidendi* in all the cases in the House of Lords go against the argument for non-registrability of land like Hearsall Common. The only support for Ms Ellis' advice comes from decisions at first instance and from two isolated *obiter dicta* in the Lords.

Ms Ellis quotes at length (some 4 pages, approximately, of close type) from first instance decisions by Sullivan J in the *McAlpine* and *Laing* cases. She unfortunately neglects to mention that Sullivan J was overturned on appeal, though she does note that Sullivan J's approach in *Cheltenham Build*ers was expressly disapproved by Lord Hoffmann in *Oxfordshire v Oxford*, who held that Sullivan J's approach to TVG cases was wrong. This is a point the Committee will wish to bear in mind in assessing the value of advice heavily based on statements by Sullivan J.

She also relies on a first instance opinion of Lightman J in *Oxfordshire v Oxford* (see para 2.7.1 of Ms Ellis' Advice), a case which subsequently led to a decision by the House of Lords that the land should be registered.

2.3.3 Reliance on implication and unsupported opinion

It is expected that lawyers support their opinions with relevant passages from past judgments of the courts. However, Ms Ellis relies in advising against registration on an alleged "implicit" view of the House of Lords in *Beresford* v *Sunderland* that "as of right" (the term used in the Commons Act) and "by right" are different, even though the passage of Lord Bingham's judgment which she cites only says that for people to use land "as of right" does "not require" that they have an actual legal right. In other words, insofar as Lord Bingham distinguishes between the two ideas, he only means that the public may have an actual right, but do not need to prove this in order to establish that the use was "as of right". In fact, then, the only implication that can be drawn from this is that possession of an actual right (provided it is not an express permission from a landowner who is not obliged to let people use the land) has no effect on registrability one way or the other. Indeed, Lord Bingham by stating that an actual right is "not required" logically indicates that an actual right would not defeat a TVG application, since otherwise he would have said that an actual right was "inconsistent". In 8.2 and 8.9 Ms Ellis makes important statements about the law without citing any court judgments in support of them.

2.3.4 Minor errors of fact

At 3.1, Ms Ellis states that the suggestion by the Applicant that the location of the Common is "notorious and well known to the landowner and Registration Authority" was made in answer to question 6 of the Application. This is not the case: this statement was made in later submissions in response to the quibble by the Council as landowner that a tiny part of the Common fell into Earlsdon Ward, on which grounds the Council wanted the Application to be immediately rejected, since the original Application form described the Common as being physically in Whoberley Ward (which almost all of it is).

Ms Ellis also gives the impression that the supporting statements came from people from all over Coventry and beyond and that this disproved any suggestion that the Common is an amenity especially of residents in Earlsdon, Chapelfields and Whoberley. In fact only one statement came from someone outside Coventry, and that was from a lady in Wetherby who was relating particularly her experience of the Common when she was younger and lived locally and use by herself and friends and family when she visits them in Earlsdon, and only three came from other parts of Coventry (one very close by). The Wetherby statement was included to help demonstrate the long-term use of the Common by residents, but Ms Ellis has used this one statement out of 23 to suggest that the Application is not based on use by local residents.

2.3.5 General

Ms Ellis' advice depends on a very strained reading of the Commons Act 2006. The relevant provisions, which largely mirror those of the Commons Registration Act 1965, require that local residents use the land "as of right" for 20 years or more for "lawful sports and pastimes" (such as football, dog-walking, kite-flying and so on). The House of Lords has unanimously held in three separate cases that "as of right" means that the public use the land without force,

openly, and without permission. Ms Ellis' view, derived from the views of Mr Vivian Chapman QC (whose view on this matter has never been upheld by the courts), is that people using the land under a statutory right (which the public have over open land) are in effect using it with permission. However, this is unsustainable as exercising a statutory right is not acting "with permission" since such permission could only come from the landowner, whose permission logically cannot be required for someone to exercise a statutory right granted by Parliament. (No one needs permission to exercise a stautory right.) The fact that Council officers may have assumed that people using the land were doing so in pursuance of a statutory right is irrelevant to the question of whether they had the Council's permission, and that is the only relevant question in this case. Ms Ellis' reading and advice therefore directly conflict with decisions of the highest court in the land, and it is these court decisions which bind the Council and this committee, not the views of Ms Ellis or of Council officials.

3. OPTIONS AND RISK FACTORS

This section sets out the risk factors for Committee members to consider and explains the three options available to the Committee with the associated risk.

3.1 What is the Risk?

There is now a well-established body of law which has come to be known as "Administrative Law". The important point for Councils is to remember that when a Council makes a decision affecting the public or any member of it, then that decision is open to challenge in the courts. The courts will then decide whether the decision was legally correct. If the courts decide the decision is not legally correct then they will overturn the decision and order the Council to pay both sides' legal costs. This is the case **even if the Council acted in good faith and on expert legal advice.** If the courts happen to disagree with the advice, then the decision is reversed and the Council has to pay the costs.

3.2 How Much is at Risk?

Litigation is uncertain, but it is reasonable to estimate the cost of losing a judicial review of a decision such as the present one as being in the region of £100,000 to £250,000, not including the cost of management or official time spent within the Council. Councillors will be in a better position than the Applicant to estimate how much extra police or PCSO time, how much in the way of library or education facilities, this sum could buy if not spent on trying to avoid registration of Hearsall Common.

3.3 What are the Options and the Risks Attached?

The Committee has three options, as follows.

3.3.1 Refuse registration of Hearsall Common as a TVG

In this case, the Council faces the risk of a judicial review case and of therefore incurring the sort of costs mentioned in 3.2. This option carries a **VERY HIGH RISK** because in all other cases in the courts where an application has been made to register public land (sometimes less obviously a green than Hearsall Common), and this has been turned down by the relevant council on the basis of legal advice citing the same arguments as Ms Ellis, the courts have disagreed with that advice, have overturned the council's decision, ordered registration and ordered the authority in question to pay both sides' legal costs.

3.3.2 Order a public enquiry

Ms Ellis does refer to a number of factors which she believes can only be resolved with a public enquiry. She notes that this is the normal procedure. She also notes that whilst both the Applicant and the Council as landowner agreed to the approach taken (ie, not holding an enquiry), such agreement should not prevent the ordering of an enquiry if the Registration Authority thinks fit. A public enquiry, if held, should be conducted by a retired judge, since previous public enquiries in which barristers specializing in local government work (such as Ms Ellis, Mr Petchey and Mr Chapman), have generally led to litigation afterwards, in which the finding of the enquiry against registration has been overturned at great expense to the council in question, with the **additional cost** of holding the public enquiry in the first place. On the other hand, a public enquiry held by a retired judge (rather than a barrister who makes most of his or her living out of instructions from local government) would be more likely to be seen as fair and unbiased, and thus slightly less liable to result in subsequent court proceedings, though this would still be a possibility. This option is therefore a **MEDIUM-HIGH RISK** approach.

3.3.3 Register Hearsall Common as a town or village green

This would, of course, satisfy the Applicant and other members of the public. It would equally aggrieve the Council as landowner (whose position has been primarily driven by Council officers). However, although the Council "wears two hats" in this case, it is legally one body: Coventry City Council. The Council in its capacity as landowner is not a separate legal entity from the Council as Registration Authority. So, whatever the rights and wrongs of a decision by this committee to register the land, the Council cannot sue itself, and the courts cannot be asked to resolve a question not brought in litigation. Moreover, the decision would be legally sound, not only for the reasons set out by the Applicant in his Application and supporting submissions but also because this would amount to registration by consent, which Ms Ellis was not asked to advise on, and which is undoubtedly lawful under the Commons Act 2006. Therefore, if the Committee decides to register Hearsall Common, there is **no possibility whatever** of the matter coming to court. The matter will be resolved, and there are **no associated costs**. This is therefore a **ZERO RISK** and zero cost option – the only one.

4. CONCLUSION

Registration as a TVG would have no deleterious effects on the Council, unless it wishes to develop the land or sell it for development. The Leader of the Council has stated that this is not the intention of the Council, and councillors and candidates of all parties have also disowned any such intention. Registration can only hurt the Council if, contrary to its public statements, it does indeed wish to despoil the Common in the future, near or distant.

In evaluating official advice to the committee, Councillors are also invited to bear in mind Council officers' sense of "ownership" of the PrimeLines proposal which first led to this Application, and their persistent and virulent opposition to registration, which led the Council's legal department, indeed, to give up drafting objections themselves and to engage a London barrister, Mr Petchey, to draft the landowner's responses, separately from the Council's

instruction (as Registration Authority) of Ms Ellis. This apparent lack of neutrality on the issue of registration may be a factor that members of the committee wish to take into account in evaluating official advice as to their actions. If elected members act automatically on the advice of officials in such circumstances, putting aside their own conclusions, then that, too, could be legally problematic as it may raise the suggestion that such a course of action was unreasonable, ultra vires (because it involves councillors abandoning their own judgment in favour of officials, whereas it is councillors' judgment that is required in this case), and therefore illegal on the principles of *Associated Provincial Picture Houses* v *Wednesbury Corporation*.

Councillors are urged to consider the risks involved in different decisions it can take (set out in section 3, above), and to choose the only risk-free option, ie, to register Hearsall Common as a TVG.

Submitted by the Applicant:
Dr Richard Austen-Baker
LL.B., Ph.D., Barrister

APPENDIX D

FURTHER SUBMISSIONS BY COVENTRY CITY COUNCIL AS LANDOWNER IN RESPECT OF AN APPLICATION DATED 11 JANUARY 2008 BY DR AUSTEN-BAKER TO REGISTER HEARSALL COMMON AS A TOWN OR VILLAGE GREEN

A. SUMMARY

- Hearsall Common is one of a number of historic commons owned by Coventry City Council.

- It is managed by the City Council under the terms of an Act of Parliament which, subject to the terms of the Act, put a duty on the City to maintain the common as “a place of public resort and recreation”.

- Registration of land as a village green has the effect that local people now have a right , which cannot be taken away or restricted, to use the land for recreation. The land also becomes subject to nineteenth century legislation protecting village greens, which severely restrict any development of such land.

- Accordingly, if Hearsall Common were registered as a village green this would impact upon the City Council’s powers to manage the land.

- To be registered as a village green land has to have been used by the inhabitants of a “locality” or “neighbourhood within a locality” for 20 years for lawful sports and pastimes, and such use has to be “as of right”. The phrase "as of right" is a technical term used by property lawyers.

- There is disagreement between the City Council and Dr Austen-Baker as to whether all of Hearsall Common has been used for lawful sports and pastimes and as to whether the use has been by the inhabitants of a locality or neighbourhood within a locality.

- There is also disagreement as to whether the use has been “as of right”.

- Whether the use has or has not been “as of right” is a matter of law.

- Leading counsel — Morag Ellis QC — who is an expert in the law of village greens has advised the City Council that the use has <u>not</u> been “as of right” and that the land should <u>not</u> be registered.

- Miss Ellis' advice is that there is no need for there to be a public inquiry. The City Council's view as Objector is that to hold such an inquiry would be a waste of public money.

- Coventry City Council is not aware of any other commons registration authority which has registered land in comparable circumstances.

B. THE LAW

Introduction

1. Hearsall Common is one of a number of historic commons owned by the City of Coventry.

2. In 1927 the Coventry Corporation Act 1927 was passed. This imposed on the City Council a duty forever to maintain the common as a "place of public resort and recreation".

3. It further provided that the provisions of section 164 of the Public Health Act 1875 – the statutory section under which local authorities hold parks - should apply to Hearsall Common.

4. In 1962 byelaws were made under the Act applying to Hearsall Common.

Registration of new town or village greens

5. Parliament has provided that land which has been used for recreational purposes for 20 years by local people may in certain circumstances be registered as a new town or village green. However use has to be "as of right" (see further below).

The effect of registration of land as a town or village green

6. The effect of registration is that local people gain a right – which cannot be taken away or restricted- to use the land for recreation. The land also becomes subject to the nineteenth century legislation protecting village greens, which severely restrict the development of such land.

7. Obviously by virtue of the Coventry Corporation Act 1927, Hearsall Common does enjoy substantial protection at the moment. However there are certain provisos which are designed to give the City Council a reasonable degree of flexibility. For example:

> *The Corporation may by resolution dedicate any part or parts of the commons for the purpose of making or widening any street under the Public Health Acts.*

8. If Hearsall Common were registered as a town or village green there would be considerable uncertainty as to what the City Council could or could not do by way of management – could the land be let for a fair, for example? Or a children's play area provided on some part of it?

Use has to be "as of right"

Introduction

9. A key requirement is that for recreational use to count towards registration of a new town or village green that use must be **"as of right"**.

10. Unfortunately what precisely "as of right" means is not **absolutely** clear in all circumstances. This said, what is being considered in the present case is land held on the basis that section 164 of the Public Health Act 1875 applies to it (see paragraph 3 above). Section 164 is the statutory provision under which many –perhaps most – parks are held by local authorities. The City Council are aware of no case where a park held under section 164 has been registered as a town or village green. When local people have tried to register parks as town or village greens they have received advice – like the advice of Miss Ellis QC in the present case – that the land is not registrable because use has not been "as of right". It would be extraordinary if it were the case that most parks in England and Wales could be registered as town or village greens, thus becoming subject to the restrictive regime governing town and village greens and ruling out the possibility of their being used for any other purposes. A decision by the Council to register Hearsall Common as a town or village greens would have implications for the all the parks, which it owns.

The meaning of "as of right"

11. This is a requirement that is taken from the law of prescription – the means by which rights of way and similar rights are established. The law of prescription is very ancient and goes back in fact to Roman law. As of right means use which is, in the Latin phrase,

    nec vi nec clam nec precario.

    This is usually translated as meaning

    not by force nor stealth nor the licence of the owner.[1]

12. The particular meaning of the phrase "as of right" in the context of town or village greens is considered in a case decided in 2003 in the House of Lords called *R (Beresford) v Sunderland City Council.*

[1] See per Lord Hoffmannn in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335. This was the famous case decided by the House of Lords which gave the "green light" to applications for the registration of new village greens .

R (Beresford) v Sunderland City Council

13. This case concerned land which the City Council made available for use by local people for recreation. It was grassed, the grass was cut, and a double row of benches to watch games was provided.

14. On the face of it, one might have thought the land was used with the licence of the owner in the sense in which that phrase is used as set out in paragraph 11 above. However there was nothing which **expressly** said that it was.

15. However the City Council decided that there had been an **implied** licence to use the land. The High Court and Court of Appeal agreed with them. However the House of Lords disagreed. They said that there might in an appropriate case be an implied licence but this wasn't it – for there to be such a licence it had to be clear that the landowner had the power to revoke the licence. So one way there might have been such an implied licence would have been if the public had been prevented from using the land on one day each year.

16. So the City Council's argument that there was an implied licence failed.

17. However the House of Lords was very worried that, even though they disagreed with **City Council's** argument, nonetheless for **other reasons** the land was not properly registrable as a village green. Lord Bingham explained

> *After the House had reserved judgment at the conclusion of oral argument, however, the House became concerned to explore the possibility that, on the special facts of this case, the inhabitants of the locality might have indulged in lawful sports and pastimes for the qualifying period not "as of right" but* ***pursuant to a statutory right to do so*** (emphasis supplied).

18. The worry of the House of Lords was that use by local people might not have been "as of right" but "**by right**". If it **had** been by right the land would not have been registrable.

19. In fact, however, local people did **not** have a statutory right to use the land. It was held by the City Council for development purposes – the then current proposal was for a community college.

20. Lord Bingham was clear that none of the statutory provisions under which the land was held

> *can be relied upon to confer on the local inhabitants a legal right to use the land for the indulgence in lawful sports and pastimes.*

If there **had** been such statutory provisions, it is clear that Lord Bingham would have said that use of the land was **not** "as of right" – so that the land would **not**

have been registered as a village green. So although *Beresford* left **some** things undecided, what is clear is that if inhabitants do have a statutory right to use the land for recreation, the land should not be registered as a village green.

Parks

21. On the face of it, council tax payers do have a right to go into a park.

22. Many parks are held under the provisions of section 164 of the Public Health Act 1875.

23. One such park was Blake Recreation Ground in Beckenham.

24. As regards this park, Mr Justice Finnemore in case called Hall v Beckenham Corporation[2] said

> *…I think that the Corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open.*

25. Dr Austen-Baker says that the context in which the judge said this was not an argument about whether use of the park was as of right for the purposes of an Act of Parliament passed nearly 20 years later:

> *…*Hall *has to be read in its own factual and legal matrix*;
>
> it
>
> *is simply a red herring.*

26. The City Council as landowner does not agree. Either Beckenham Corporation was bound to admit to Blake Recreation Ground any citizen who wished to enter it within the times when it is open, or it was not bound.

27. If it was bound, local people entered the Park

> *pursuant to a statutory right to do so*

in Lord Bingham's words.

28. If it were otherwise, lots of parks would be liable to be registered as village greens.

29. The fact that the issue of the right of citizens to enter a park arose in a different context does not mean that what the judge said in that context does not apply

[2] [1949] 1 KB 716., and annex attached

in the present context. An analysis of *Hall* is set out at the Annex, keyed to a copy of the text of the case.

30. Miss Ellis puts it this way:

> *..if the basis on which the Objector acquired and… continued to hold the land in question means that they were entitled to carry out their activities, then no question of user "as of right" will have arisen* (see paragraph 8.4 of her Advice).

Advice to registration authorities

31. Until regulations made recently under the Commons Act 2006 (which provided for the determination of certain applications to planning inspectors), all applications for new village greens were determined by registration authorities – just as this application is being determined by Coventry City Council in its capacity as registration authority. Registration authorities usually seek independent advice – they **always** do so if they are the owners of the land in question.

32. In the present case, the City Council in its capacity as registration authority has obtained independent advice from Morag Ellis QC. That advice is evidently entitled to respect.

33. It should however be emphasised – and Mr Smith will be able to confirm this – that Miss Ellis is not "going out on a limb" in the advice that she is giving to the registration authority. This flows of course from what Lord Bingham said in *Beresford* but it is also borne out by the advice given to other authorities as to registrability of local authority parks. Such applications have been refused in Liverpool, Kent and Devon.

Special features in this case

34. The paragraphs above under the headings Parks and Advice to registration authorities go to the generality of the point whether land held under section 164 is registrable as town or village green.

35. Two specific points arise in relation to Hearsall Common.

36. The first point is this.

37. Hearsall Common is subject to regulation by bye-laws. This is completely incompatible with use of the land being "as of right". Miss Ellis rightly advises that this is a matter which is *highly relevant* because the bye-laws *actually regulated user* of the land (see paragraph 8.15 of her Advice).

38. The second point is also one made by Miss Ellis at paragraph 8.15 of her Advice.

39. The 1927 Act is drafted on the basis that parts of the Common may be let for the purposes of sport or recreation (one puts it in this way because the Act regulates such lettings).[3] A letting of the Common for this purpose – giving the lessee the benefit of exclusive possession of that part of the Common – would be inconsistent with the land being a village green. This is because if the land were a village green, local people would be entitled to go on it any time.

40. Also parts of the common may be dedicated under the 1927 Act for the purpose of making or widening a street. This power, too, is inconsistent with the land being a village green, because, if exercised, it would interfere with the rights of local people.

C. PROCEDURE

41. What Miss Ellis is saying in her Advice as regards **procedure** is that there are factual matters that arise in respect of the application that cannot be determined without a public inquiry. Accordingly she says it would be impossible properly to **register** the land as a town or village green without first holding an inquiry.

42. However she goes on to say that the Council could lawfully **reject** the application without a public inquiry if it could be satisfied that the effect of the local Acts was that use by local people was not "as of right".

43. Further she says:

> *It would undoubtedly cause delay and expense all round for an inquiry to be held, which would be prejudicial to good administration and fairness, if imposed unnecessarily.*

44. Her conclusion as to the **law** is that use by local people has not been "as of right".

45. Accordingly she recommends that the application be rejected, without there being a need for a public inquiry – *It may be that there would be **other** grounds for rejection, depending on evidence which would need to be received by way of a public inquiry* (emphasis supplied).

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[3] It is not clear whether the 1927 Act saw such lettings as within the terms of the 1875 Act, or as an exception to it.
The letting of land in parks is expressly regulated by section 44 of the Public Health Acts Amendment Act 1890, section 76 of the Public Health Acts Amendment Act 1907 and section 52 of the Public Health Act 1961.

46. Putting it shortly the as-of-right point is a “knock out blow” which means there is no need to go into other possible reasons for refusal.

Dated 24th October 2008

Philip Petchey
Francis Taylor Building

Alice Davey
Head of Culture Leisure & Libraries, Community Services Directorate, Coventry City Council, Greyfriars Lane, Coventry, CV1 2GZ.

ANNEX

Hall v Beckenham Corporation

47. Mr Hall lived near the Blake Recreation Ground. Members of the public flew model aeroplanes in the recreation ground, and this made a lot of noise, which Mr Hall claimed was a nuisance in law. Rather than try to sue the individual members of the public, Mr Hall sued the local authority on the basis that they were required so to manage and control their property that no nuisance was created on it. If the land had been owned by a private individual, this argument would have been correct, as the judge expressly held. **A**

48. However, the local authority argued that they were in a special position and were not liable.

49. First of all, they argued that they were not, as one might have thought, occupiers of the recreation ground. In this regard, they referred to the complicated law on rating. The judge agreed that they were in rateable occupation. However he then went on to say that their legal position was the same as if they **were** occupiers. So this initial part of the local authority's argument failed. **B**

50. So the judge said that there would be liability subject to the question of what powers the authority had over the land.

51. He said that

> *[The local authority] has no general right to turn people out because they do not like them, or because they are doing something of which a particular park-keeper may not approve. They can only act against people in the park who offend against their by-laws, or who commit some offence or crime for which criminal action could be taken.* **C**
> *So long as a member of the public behaves himself in the ordinary way, committing no criminal offence and observing the by-laws, the corporation cannot stop his doing what he likes in this recreation ground.* **D**
> *I think that the Corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times that it is open.* **E**

52. Accordingly the local authority was not liable for the members of the public who flew the model aeroplanes.

53. Of course it was possible that the Corporation might have made a new bye-law forbidding the flying of model aeroplanes – apparently one had been proposed. The judge seems to have thought that it was self-evident that there could not

have been liability on the basis of the earlier failure of the authority to promote such a bye-law. **F** However whether he was right or wrong about this, it does not affect his analysis of the legal entitlement of citizens to use the recreation ground.