APPLICATION BY MR DAVID MAYER TO REGISTER LAND KNOWN AS STOKE LODGE PLAYING FIELD, SHIREHAMPTON ROAD, BRISTOL AS A NEW TOWN OR VILLAGE GREEN

FURTHER DIRECTIONS

In this matter, I prepared a report which is dated 22 May 2013. This sets out the background in some detail.

In my Report, I recommended that the land known as Stoke Lodge Playing Field should be registered as a town or village green. This was because I considered that the use had been *as of right*; and that an objection based on statutory incompatibility of registration with the statutory purposes for which the land was held fell away in the light of the decision of the Court of Appeal in *R (Newhaven Port and Properties Limited) v East Sussex County Council*.

I suggested that it would be appropriate to give the parties the opportunity to comment on my Report before it was submitted to Committee, and all have taken the opportunity to do so.

In this Supplementary Report, I consider the points that have been raised.

Involvement in the process of Cotham School

The School suggest that they did not agree to the matter being determined on the basis of written representations nor were aware of the site visit.

Bristol City Council as landowner (apparently on the School's behalf) agreed to the matter being dealt with by written representations and the e mail record indicates that the school were notified of the site visit.

In the light of the City Council's further representations I consider that a public inquiry may be necessary in respect of certain factual matters; it is likely that in this connection a further site visit will be appropriate. In the circumstances I think that any prejudice which the School may feel that they have suffered (as to which I make no finding) will be addressed[1].

Whether there should be an (oral) non-statutory public inquiry

As I explained[2], the initial position of the City Council in its capacity as landowner was that there needed to be non-statutory public inquiry. It subsequently modified that position. It considered that the issue as to which there was some factual dispute – namely as to the posting of signs – would not be determinative of the application and accordingly withdrew its objection based on the posting signs.

[1] And see footnote 5 below. If for whatever reason I consider a further site inspection was not necessary I would invite the School to indicate whether they were content that there should not be such an inspection.
[2] See paragraphs 2 – 5 of my Report dated 22 May 2013.

As I further explained[3], the fact that the City Council in its capacity as landowner took no point on notices did not mean that I did not have to consider the effect of any signs that there may have been in my Report to the City as registration authority; but it did mean that in the absence of factual dispute about the signs it was not necessary for there to be a non-statutory public inquiry. This of course meant a saving for the City Council of money which otherwise it would have to have spent.

My conclusion as to the signs was that I agreed with the City Council in its capacity as landowner that they were not determinative of the application; on the material before me I considered that they did not operate to render use of the land by local people not *as of right.*

Obviously my conclusion as to the signs would not have come as a surprise to the City Council in its capacity as landowner. However it would have been disappointed that its other arguments did not prevail and that I had recommended registration of the playing field as a town or village green.

Against that background, it sought the advice of Leslie Blohm QC, who is a senior barrister who specialises in this area of law. He has drafted further submissions on its behalf. The City Council now wish to rely on the signs as rendering use by local people not *as of right.*

I should here emphasise – because this Report will be read by lay people to whom the distinction will not be obvious – that what Mr Blohm has drafted are **submissions** and that I have not seen any written advice which he may have given to the City. His submissions may or may not be congruent with his legal advice.

The City in its capacity as landowner now says that there should be a non-statutory inquiry:

The existence of a licence by implication, and the knowledge of a sign forbidding access, are both highly disputed matters of fact. If it is the case that the Registration Authority would otherwise consider allowing the application in whole or in part, it should not do so if it is possible that the hearing of such evidence from those who can give it, and their cross-examination, might have an effect on its decision. In that case it should direct the holding of an oral inquiry.

The first question that arises in considering the submission that there should be a non-statutory public inquiry is whether the Council can change its position at this late stage as to the effect of signs. (This is relevant because if the Council cannot change its position, it cannot lead evidence in respect of ts changed position or otherwise seek to assert its changed position).

It seems to me that as a matter of law, it can so change its position i.e. there is nothing to stop it now asserting a case different to the one it advanced earlier.

[3] See paragraph 6 of my Report dated 22 May 2013.

There is further and different question as to whether any discretion in me or in the registration authority to decline to receive any changed submissions – essentially on the basis that it is too late to do so.

I would not wish to say that there are no circumstances where, acting reasonably a registration authority could not decline to accept changed submissions; I do not think that absent some express delegation it would be appropriate for someone advising a registration authority to assert such a power. I can however advise the registration authority as to what I think it should do, and this I propose to do in this case.

It seems to me that it is appropriate for the City Council in its capacity as registration authority to receive the changed submissions. This is because it seems to me that the public interest in achieving the right result – in the correct answer being given to the question of whether this land should be registered – overrides the inconvenience caused by the late change of view.

This being so, I need to go on to consider whether there ought to be a non-statutory public inquiry in order to consider, among other things, evidence as to signs.

The first reason asserted as to the need for a non-statutory public inquiry has nothing to do with the changed of position of the City. It is that

[t]he existence of a licence by implication ... [is a] highly disputed matter of fact.

I rather doubt this. I think that there may be a dispute as to the extent to which the land was used for organised sport, but I do not think that this goes to the heart of the point. Although I can see that the more the land is used for organised sport the stronger the argument that a licence is to be implied (and the less it is, the weaker that argument), it seems to me that, good or bad, the argument does not depend on the precise extent of the use of the land for organised sport. This said, a decision maker needs to be as well informed as possible about the facts of the case and if it now be suggested that the description of the extent of the use in the relevant 20 year period set out in paragraph 14 of my Report dated 22 May 2013 is not typical of use in the relevant 20 year period, then that could be the subject of evidence at a public inquiry.

I should add here that I think the recently submitted schedules supplied by the City Council and Cotham School as to the extent of the use for organised sport are in respect of post-application use and do not go this issue: I am concerned with the 20 year period down to March 2011.

The second reason for holding a public inquiry is that

... the knowledge of a sign forbidding access [is a] highly disputed [matters of fact].

It seems to me that the knowledge of the signs which were put up in 1985/86 is not likely to be highly disputed. Mr Hoskins now speaks about the posting of two additional signs that

have disappeared, although he does not say when they disappeared. It is possible that Mr Mayer does dispute the posting of those additional signs, but I do not think that would make any difference to my conclusion as to the effect of the signs put up in 1985/86 that initially there had been two additional signs in different locations.

However Mr Blohm on behalf of the City Council places considerable weight on the sign referred to at paragraph 13 of my Report:

The notice erected subsequently is even more unequivocal terms. It plainly applies to Stoke Park; the reference to "these grounds" can only sensibly apply to Stoke Park[4] *itself.*

Although it may be the case that a number of members of the public would not have gained access via that sign's location, that does not determine its effect. It is submitted that the sign would be sufficiently known if it came to the notice of a significant number of inhabitants, such as to make it known that the landowner was not acquiescing in the use made of the land (the basis of prescription being acquiescence – see Sunningwell *per Lord Hoffmann at 354G. The notices would indicate to the public that their usage was not being acquiesced in.*

In my Report I noted that there was a factual dispute as to this sign. This relates to its orientation – and has implications for its meaning. It is Mr Mayer's case that it refers to the grounds of the adult learning centre.

Thus potentially a public inquiry would be concerned about the circumstances of the erection of this sign, its orientation and whether a significant number of inhabitants knew about it.

Conclusion about whether there should be a public inquiry

It is not clear to me that what is set out in my report about use of the land for organised sport is wrong or inadequate. However if this is now said to be the case, I think –albeit at this late stage - the objectors should have the opportunity of saying so. It seems to me that, as regards the extent of the use of the land for organised sport, the objectors should put together statements which as clearly as possible set out their understanding of what the use was over the relevant period; Mr Mayer should then have the opportunity to respond. It occurs to me that it might then emerge that there was **not** a dispute which required there to be public inquiry. Alternatively, if there were a dispute that required consideration at a public inquiry, the issue would be a narrowly defined one.

As regard the sign, this too is on the face of it is a narrow issue, and I could envisage that there might be a hearing that would take, perhaps, up to a day about it. I do not know how the objectors would seek to demonstrate that a significant number of inhabitants knew about the sign – this might indicate more extensive evidence – but if it require more extensive evidence, it would be appropriate to hear it.

[4] I think Mr Blohm is referring to Stoke Lodge – at any rate to the application site.

It does occur to however that it may not be necessary to hear evidence about this sign. I think that the first stage is for the objectors (essentially in this regard the City Council) to prepare a statement or statements about the point. When was the sign erected? Why was erected? What was its orientation? Did that orientation ever change? If so, what were the circumstances? Why did Bristol City Council not put up other signs at that time at any of the other entrances to the application site?

Accordingly what I suggest happens is that the objectors prepare the additional statements that I have indicated as appropriate within, say, 42 days and that Mr Mayer should have the same length of time to respond. If the objectors think that there are any **other** matters which they think should be the subject of public inquiry this would be the moment to identify them.

I would then make a recommendation to the City Council as registration authority as to whether there should be a public inquiry[5].

Newhaven

The unsuccessful landowners in the Newhaven case have applied to the Supreme Court to appeal on (inter alia) the statutory incompatibility point. It is to be expected that the Supreme Court will decide whether or not to permit the appeal in the course of the forthcoming legal term.

I do not think that I understand the factual basis for a "Newhaven" submission since the application site specifically excludes the part of the fields that have been proposed for new changing rooms and play equipment; but this, no doubt, could be made clear. It will helpful to have the City Council's detailed submissions on this point in due course.

It might be appropriate to defer any public inquiry until after the statutory incompatibility point has been ruled upon by the Supreme Court (either by the refusal of permission or by its determination of the point substantively on appeal). However I do not think that the further statements about the use of the land and notices need wait upon this.

Concluding remarks

I think that I have dealt with all outstanding matters but no doubt I shall be prompted if there is anything else that I need to address at this stage.

It is no trivial matter for a landowner to have land registered as a town or village green, as Pill LJ famously remarked in the *Steed* case[6]. It may be said to be particularly important

[5] In their latest submissions, Cotham School reject the suggestion that the land has been used for lawful sports and pastimes [by local people]. In the context of the clear facts as explained in my Report, this does not seem to be a credible submission. Bristol City Council have expressly accepted as landowner that it has been so used. There would be no point in having a public inquiry at which a succession of local people spoke about walking their dogs on the land and using it generally for recreation. I understand of course that the School have a point about the legal compatibility of their use and that of others for organised games with the use of the land by local people, but that is a separate matter.

[6] *R v Suffolk County Council, ex parte Steed* (1996) 75 P & CR 102 (CA).

where the case is one of competing public interests: as represented by those seeking registration to facilitate and preserve public recreation and those resisting it on the basis that registration will inhibit the way the land can be used for public purposes. In responding to the comments on my report I have tried to be fair to everybody and to bear in mind the overriding public interest that the application should be properly determined according to law.

I have some sympathy for the Mr Mayer who might have hoped that, once my Report was received, the matter would – with the concurrence of all parties - be finally determined without more ado. I hope however that it may be possible to avoid a public inquiry or, if it is not, that such an inquiry may be in respect of narrow issues. Although a process which involves multiple exchange of representations is cumbersome and, to a degree, drawn out it does in my judgment lead to a definition of issues and assists the minimisation of costs.

PHILIP PETCHEY
11 September 2013