

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND TO THE
WEST OF FRIERN BARNET ROAD, FRIERN BARNET, LONDON N11
AS A NEW TOWN OR VILLAGE GREEN**

- APPLICATION REFERENCE B/1/11/VG -

**INSPECTOR'S REPORT AND RECOMMENDATION TO THE
REGISTRATION AUTHORITY – LONDON BOROUGH OF BARNET**

Introduction

1. I am instructed by the London Borough of Barnet (acting by Poonam Rajput of their Planning and Regeneration Team) in their capacity as the commons registration authority ('the registration authority') to advise on an application to register a small parcel of land to the west of Friern Barnet Library on Friern Barnet Road, London N11 ('the application land') as a new town green under the provisions of section 15(2) of the Commons Act 2006 ('the CA 2006') in so far as qualifying user was claimed to be continuing at the time of the application. A scaled down version of the plan of the application land which accompanied the application to register will be found at Appendix 1 ('App/1') together with photos (aerial and street view) at Appendix 2 which I have taken from Google earth as I was not provided with photos.
2. The application in Form 44 was made by Friern Barnet and Whetstone Residents' Association and Friern Village Residents' Association and is dated 22/11/2011. It was accompanied by completed evidence questionnaires from over 60 local inhabitants living within a locality or neighbourhood which included Friern Barnet and part of North Finchley. Put shortly, the grounds on which such application was made were that local inhabitants had used the

application land for informal recreation for a period of at least 20 years before the application was made.

3. The application was duly publicised by the registration authority in accordance with the regulations (The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007). The publicity notice invited objections and a single objection was received from the London Borough of Barnet (acting by their Property Services Department) in whom the freehold of the application land is vested ('LBB').
4. After being instructed by the registration authority I gave directions on 30/07/2013 dealing with the procedure at a public inquiry on 28/10/2013 at Hendon Town Hall where it was intended that all the elements of the definition of a new town green would be considered.
5. However, there followed a debate between the registration authority and solicitors acting on behalf of the applicants (Public Law Solicitors of Birmingham) who took the view that there was no necessity for a public inquiry in that the only contentious issue concerned whether use of the application land had been 'as of right'. It was suggested that there could be a determination on paper with a view to saving costs.
6. In the event, the registration authority took the view (on my advice) that it was (a) simply too late to cancel the public inquiry even though this is what the parties evidently wanted, and (b) there was a clear public interest in the inquiry process proceeding as planned and it could not be left to the parties to choose whether to have an inquiry or not.
7. On 11/10/2013 the registration authority circulated amended directions drafted by me for the public inquiry which were limited to the preliminary issue of whether or not the claimed use of the application land for lawful sports and pastimes qualified as use 'as of right' within the meaning of section 15(2) CA 2006. These directions were designed to ensure that the public inquiry could proceed as planned on 28/10/2013 and the bundle service date was put back to 4pm on 24/10/2013 to allow the parties sufficient time to prepare their cases and assemble their evidence on the preliminary issue.

8. I should perhaps add that LBB were requested to deal as fully as they could with the history of the application land and they were specifically directed (at para 4) to *'provide copies of any relevant transfers or minutes or decisions of the authority and any other relevant documentation which they consider affords evidence of the purpose for which the Application Land has been held during the relevant qualifying period or any part of such period'*.
9. The public inquiry took place on 28/10/2013 at Hendon Town Hall. Representation at the public inquiry was as follows: Paul Wilmshurst acted for the applicants and Zack Simons acted for LBB. In the event, only limited disclosure was made and only then by the applicants who produced a batch of Middlesex County Council ('MCC') records (minutes of meetings of the county Highways and Education Committees) for the period 1928-33. For its part, LBB produced only their documents of title having evidently made no effort at all to inquire into the history of decision-making in so far as it concerned the application land from the date of acquisition by the predecessor authority, namely Friern Barnet Urban District Council ('FBUDC'), in 1931.
10. For the record, LBB is the statutory successor of FBUDC. The new Borough was established under the London Government Act 1963 and all property and liabilities of FBUDC vested in LBB under the London Authorities (Property etc.) Order 1964: Art 16 and Sched 4.
11. The inquiry nonetheless went ahead on 28/10/2013 and I heard submissions (written and oral) from both counsel. However, it troubled me that the registration authority was being asked to arrive at a decision on the basis of what had been wholly inadequate investigation on the part of LBB of its own and/or its predecessor's internal records. It seemed to me to be likely that documents were available which had the potential to provide a complete answer to the application. So it was that on 29/10/2013 the registration authority circulated a note in which I expressed my concern at the fact that there had been no comprehensive trawl of the available records. I noted that LBB's counsel had invited me, in effect, to look at matters in the round and to determine whether there must have been, on the balance of probabilities, a

history of decision-making which led to the laying out and management of the application land as formal open space whereas, in my view, the evidential basis for such an approach was questionable.

12. It seemed to me that a registration authority should not be reluctant to acquaint itself with relevant material otherwise there is a serious risk that it might arrive at an erroneous decision which would be open to challenge. In the result, I directed that LBB should be given a further opportunity to adduce documents and make further submissions with the applicants being afforded the opportunity of responding to such documents and submissions. Furthermore, and in the interests of clarity in the light of Mr Simons' submissions at the inquiry, LBB was also asked to clarify (a) whether it was being contended that the application land was acquired for purposes which included those within the meaning of section 164 of the Public Health Act ('PHA 1875'); alternatively (b) was it being alleged that there had been a later appropriation onto these statutory purposes and, if so, what decision or decisions of FBUDC were being relied on for such purposes?
13. These directions were questioned by Mr Wilmshurst who reminded me of the well-known dictum of Lord Hoffmann in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 647 at [61] who noted that the registration authority had no investigative duty which required it to find evidence or reformulate the applicant's case and that it was 'entitled' to deal with the application and evidence as presented by the parties. Plainly a registration authority would be open to criticism if it unfairly assisted one party in the formulation of its case to the detriment of the other. However, because LBB had evidently failed to investigate the historical documentary material which really ought to have been adduced at the public inquiry, it seemed to me that there was a real risk that any determination by the registration authority on the preliminary issue would be made on a flawed basis and it can scarcely be imagined that this state of affairs fell within the embrace of Lord Hoffmann's dictum in *Oxfordshire*. In these circumstances, it seemed to me that it was open to the registration authority to direct that further researches were required in order to resolve the 'as of right' issue if it was to consider the application fairly, impartially and in accordance with the law.

14. This approach was also consistent with that of Vivian Chapman QC in his report on the *Filton Park* application dated 2/09/2010 at [43] - [46] where he took the view that further investigations were required in order to satisfactorily resolve the 'as of right' issue. In that case Mr Chapman gave the parties 8 weeks in order that they might carry out further research into the documents on the issue of appropriation and make further submissions on the point. In *Filton Park* there had been a joint objection by the current owner of the land, namely the Homes and Communities Agency, and by Bristol City Council as former owner with contingent liabilities. The same authority was also the registration authority. One of the heads of objection in that case was that any recreational user of the park since 1974 had not been 'as of right' since the public had had the use of the park for recreation since the park was appropriated on 6/03/1974 onto statutory powers which gave rise to trusts for public recreation under section 164 of the Public Health Act 1875 ('PHA 1875') or under section 10 of the open Spaces Act 1906 ('OSA 1906'). Mr Chapman had been asked by the registration authority to advise on the merits of the 'as of right' point and whether the application could be disposed of on that point without the need for a public inquiry. The view he took was that he did not at that stage consider that the application could be rejected on a paper consideration of the 'as of right' issue, nor did he consider that it would be necessary to convene a non statutory public inquiry. However, as indicated, he did think that further researches were required in order to resolve the 'as of right' issue since the fact that the land had been maintained as a public park for many years did suggest to him that at some stage it may have been expressly or impliedly appropriated to public park use. The same possibility occurred to me in the case of the application land upon reflection of the evidence disclosed and submissions made on 28/10/2012.
15. In the event, I received further submissions dated 13/11/2013 and historical documentation from Mr Simons along with further written submissions from Mr Wilmshurst dated 26/11/2013 who again reminded me of Lord Hoffmann's dictum in *Oxfordshire* at [61]. Suffice to say, that he opposed my decision to re-open the inquiry and to direct further disclosure although it is unclear whether it is the applicants' case that even if the further documentation gave

rise to a complete answer in law to the correct determination of the application, I should still ignore it in light of Lord Hoffmann's dictum in *Oxfordshire*.

16. On 9/12/2013 LBB sent me an extract from the OS map on which the boundaries of the application land and the land included within 5 conveyances had been identified by reference to the colouring and particulars shown in the legend. As this plan is so helpful I am including at Appendix 3 (the 'App/3 plan'). It should, however, be noted that in the case of the green land, the conveyance between Brown and FBUDC was in fact dated 20/08/1931 and not 30/08/1931 as is stated in the legend.

Legal framework

17. Section 15(1) of the CA 2006 enables any person to apply to register land as a new town green in a case where subsections 2, 3 or 4 applies.
18. Section 15(2) 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;*
 - (b) they continue to do so at the time of the application.*
19. It is only necessary to consider the 'as of right' requirement at this stage.
20. Although a new green by 20 years' use does not depend on the inference or presumption of a grant or dedication, the expression 'as of right' echoes the requirements of prescription in relation to easements and public rights of way. In both cases, qualifying use must be 'as of right' because the existence of the right enjoyed by local people depends on the long acquiescence of the landowner in the exercise of the right claimed.
21. The traditional formulation of the requirement that user must be 'as of right' is that the user must be without force, secrecy or permission.

22. 'Force' does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Prohibitory signs render use contentious and so not 'as of right'.
23. Use that is secret or by stealth will not be use 'as of right' because it would not come to the attention of the landowner.
24. 'Permission' can be express eg by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied but not by inaction or by acts of encouragement by the landowner. It was held in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 that permission must be revocable or time limited. Permission that is unlimited and irrevocable amounts to acquiescence.
25. A local authority is a creature of statute. It can only acquire land under some statutory power. If the instrument by which the land is acquired does not specify the statutory power under which the land is acquired, the relevant statutory power must be inferred from the contents of the conveyance and the surrounding circumstances: *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 (per Lord Scott at para 30) and *R (Malpass) v Durham County Council* [2012] EWHC 1934 (Admin).
26. 'As of right' means 'as if by right'. If use is in fact pursuant to a legal right eg under a statutory right of public recreation under the PHA 1875 (s.164) or the OSA 1906 (s.10) then use is 'by right' or 'of right' rather than 'as of right'. This point was discussed by the House of Lords in *Beresford* and confirmed by the Court of Appeal in *(R (Barkas) v North Yorkshire County Council* [2012] EWCA Civ 1373.
27. This principle arising from *Barkas* is that where land is made available and maintained as public open space by the exercise of statutory powers then it is used by the public 'by right' and not 'as of right'. In other words, having exercised their power to make the land available to the public for recreation, the authority is under a public law duty to use the land for those purposes until such time as the land has been formally appropriated to some other statutory purpose under section 122 of the Local Government Act 1972.

28. The position in *Barkas* is that land was laid out as amenity open space in connection with the provision of public housing under what in that case was section 80 of the Housing Act 1936 ('HA 1936'). It was held that local people had a right to use the land whether or not it was actually laid out for the housing in which they lived. This being the case the rights engaged mirror those arising under the PHA 1875 (s.164) or OSA 1906 (s.10) with the result that their user was non-qualifying for the purposes of the CA 2006. Sullivan L.J took the view that there was no sensible reason for drawing a distinction between land held under the PHA 1875/OSA 1906 and land which had been appropriated for recreational purposes under any other statute. The land in question continued to be held for housing purposes. It is just that the exercise of the enabling power within HA 1936 to lay out land as amenity open space gave rise in law to an appropriation of such land for public recreation and there was no practical distinction between land which had initially been acquired as public open space under the OSA 1906 and land which had been appropriated for open space purposes from some other use. In both cases the public's informal user of the land will not be 'as of right'.
29. I should also mention appropriation which may be express or may arise by implication from a decision or decisions of a local authority which necessarily indicates an intention to hold the land for a purpose other than the purpose for which it was acquired: *Oxy-Electric v Zainuddin* [1990] (unrep) per T Cullen QC.
30. *Oxy-Electric* and the issue of implied appropriation was addressed by Vivian Chapman QC in his advisory report dated 30/03/2009 for Bristol City Council ('BCC') in the application to register *Castle Park* in Bristol as a new town green (see paras [172] – [193]). Mr Chapman said that, as a creature of statute, a local authority can only hold property pursuant to a statutory power to do so. If it acquires land for one purpose it can only lawfully use the land for another purpose if it appropriates the land to that other purpose pursuant to a statutory power of appropriation. He said that these propositions were supported by the analysis of the Court of Appeal in *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No.2)* [1976] 1 Ch, esp at 24D-26C. He then analysed the decision in *Oxy-Electric* which he said determined that if a local

authority resolved to use lands in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation is implicit in the appropriation.

31. It follows (see [177] in *Castle Park*) that one has first to identify the statutory purpose for which the relevant land is acquired and if it did not engage a public right of recreation then one has to see whether the authority passed any resolution to use the land for a purpose for which it could not lawfully have used the land unless an appropriation to new purposes was implicit in the resolution.
32. In *Castle Park* the land had been compulsorily acquired by BCC in 1946 under section 2(1) of the Town and Country Planning Act 1944 for the purpose of dealing with war damage. It was accepted that this enabling power did not include the maintenance and management of the Park as a public open space after it had been laid out.
33. On 24/08/1978 the Land & Administration Committee of BCC resolved to accept the recommendation of the report of the City Engineer in which he stated that the landscaping work in the Park was substantially completed and that: *'it would be appropriate to mark its completion by a formal declaration of its availability for the use and enjoyment of the public'*.
34. The same report went on to propose an official opening ceremony by the Lord Mayor on 30/09/1978 and recommended: *'that your committee agree to the transfer of the responsibility for Castle Park to the Open Spaces and Amenities Committee with effect from 30th September 1978, being the official opening of the Park by the Rt. Hon The Lord Mayor of Bristol'*.
35. It was Mr Chapman's view that the effect of the resolution of 24/08/1978 was that, as from 30/09/1978, BCC, through its Open Spaces and Amenities Committee, was to manage and maintain *Castle Park* as a park for the use and enjoyment of the public. He said that because BCC were unable to lawfully manage and maintain Castle Park as a public park under the 1944 Act, it was implicit in the resolution of 24/08/1978 that the land was appropriated to statutory purposes under which it was lawful for BCC to

manage and maintain *Castle Park* as a park for the use and enjoyment of the public. Having identified the PHA 1875/OSA 1906 as the enactments which conferred the relevant powers, it was Mr Chapman's view that the implied appropriation in the resolution of 24/08/1978 could have been onto the statutory powers conferred by either of these statutes from which, in his view, it followed that recreational use of *Castle Park* by the public after 30/09/1978 had been 'by right' and not 'as of right' and the application to register failed on this ground.

36. The issue of implied appropriation has been raised in other decisions of non-statutory inspectors. For instance, in his report in the *Filwood Park* application (2010) Vivian Chapman QC said at [30] that an appropriation could be implied in that case as the land had '*been set out, used and maintained as a public park since the 1970s. If it was held for education (or airport or housing) purposes but never expressly appropriated to a new purpose, the decision of the council to authorise substantial capital expenditure on the improvement of the park as a public park appears to me to give rise to a powerful case for implied appropriation to public park purposes*'. His finding at [42] was that the recreational use of the park by the public was non-qualifying.
37. In his report in the *Port Solent* application (20/11/2012) Vivian Chapman QC again addressed the issue of appropriation at [93]. He reiterated his earlier view (citing *Oxy-Electric*) that where '*a local authority passes a resolution to do something that would only be valid if there were a statutory appropriation of the land to a new purpose, such an appropriation can be inferred from the resolution*'. He also went on to explain *Barkas* on this basis: '*where a local authority held land for a widely expressed statutory purpose which allowed the land to be used in various ways, the decision of the local authority to use the land in one of the authorised ways could also be regarded as a type of appropriation*'.
38. In the *Westfield Playing Fields* application (report of Anthony Booth dated 26/02/2013) the objector contended that the passing of byelaws under the OSA 1906 constituted evidence of the fact that the relevant land should be taken as having at that time been appropriated to use for open space

purposes if prior to that time the land had been held on any other basis. The inspector accepted this submission citing *Oxy-Electric* – see paras [70-78].

39. In the *Brewery Field* application (report dated 14/05/2013) Mr Wilmshurst (the non-statutory inspector retained by Somerset County Council to advise on the application involving a parcel of land in Bridgewater) concluded that the grant of byelaws under PHA 1874 (s.164) constituted evidence of an implied appropriation of the land onto the purposes of that Act. Mr Wilmshurst said that it was implicit in the *Oxy-Electric* case that in imposing byelaws the land would be held henceforth under the provisions of the PHA 1875 as it expressed the clear will of the members – see paras [246]-[249].

Procedural issues

40. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.
41. In *Regina (Whitmey) v Commons Commissioners* [2004] EWCA Civ 951 Waller L.J suggested (at para 62) that where there is a serious dispute, the procedure of ‘conducting a non-statutory public inquiry through an independent expert’ should be followed ‘almost invariably’. However the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by 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. However, the registration authority must act impartially and fairly and with an open mind.
42. It was said at first instance by Carnwath J (as he then was) in *R v Suffolk County Council ex parte Steed* [1995] 70 P&CR 102, 487 (at pp.500/501) that an authority has an implied duty to take reasonable steps to acquaint itself with the relevant information to enable it to correctly answer the correct

question under the Act – as it was put by Carnwath J: *‘Some oral procedure seems essential if a fair view is to be reached where conflicting recollections need to be reconciled’.*

43. Having said that, however, the registration authority does have a discretion as to the procedure to be adopted but that discretion is not unfettered and it must be exercised in a manner which is not unfair to applicants or objectors.
44. The role of the expert inspector is thus to provide a report and to make a recommendation to the registration authority on whether the application should be accepted or not. His job is to hear the facts and make findings in circumstances where the facts are in dispute and then apply the facts to the relevant law. Inspectors have no power to decide anything and provided they act lawfully, the registration authority is free to accept or reject the recommendations of their inspector and would also be free to seek further advice from another person as to the content of their inspector’s report before deciding whether to accept its recommendation. However, having said that, it is still the case that the registration authority should still have a very good reason for not following their inspector’s recommendation.
45. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the AL as a new town or village green on account of the fact that the land has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area or because it is a beautiful habitat teeming with wildlife.
46. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.
47. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007 Regulations follow closely the scheme of The Commons Registration (New

Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a number of small pilot authorities The Commons Registration (England) Regulations 2008 apply. In Wales the regulations are different but they are very similar to the 2007 regulations.

48. The prescribed procedure is very simple: (a) anyone can apply without fee; (b) unless the registration authority rejects the application on the basis that it is not 'duly made', it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.
49. I should make two further points under this head: (a) it should be emphasised that it is no trivial matter for a landowner to have land registered as a green and all the elements required to establish a new green must be '*properly and strictly proved*' (*R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111 per Pill LJ*, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2*); and (b) the reforms in this branch of the law contained in the Growth and Infrastructure Act 2013 do not apply to this application.

Consequences of registration

50. Registration gives rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the application land.
51. The owner is not excluded altogether from his land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. In practice, however, there is a massive mismatch between what an applicant has to do to obtain registration and the practical and financial consequences of this upon the landowner.
52. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.

53. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede *'the use or enjoyment thereof as a place for exercise and recreation'*.
54. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any *'disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green'*.
55. Under both Acts development is prevented and the land is effectively blighted. In most cases, its value will be massively reduced. These reasons explain why these cases are extremely contentious.

Description of the AL

56. As will be seen from the photos at Appendix B, we are dealing with a small parcel of landscaped open space adjoining Friern Barnet public library. The central area is grassed on which there are two mature trees. There is a made-up path on the north and eastern sides behind which there are raised borders with the border on the eastern side, where abutting the library building, being quite wide and comprising trees, shrubs and the like. In the photos at Appendix/2 there are 4 bench seats on the path running on the northern side although I gather from the App/3 plan that there is now only one seat closest to the library building.
57. The application land adjoins the pavement on its south side which fronts onto what seems to be a service road running alongside Friern Barnet Road. On its western side, the application land abuts the pavement running on the eastern side of Ramsden Road. To the east, there is the library (beyond which there is MacDonald Road) and on the north, behind a run of panel fencing, there is a block of 4 flats and a service road leading to garages. This is Ramsden Court. I have also included a photo of the junction of Macdonald Road and Friern Barnet Road showing a telephone kiosk and pillar box in the foreground. This area of open space belongs to LBB but is not material to the application to

register. It is, I think, helpful to those reading this report to see how the library appears on its eastern side.

58. I have not visited the application land but the photos I have are quite adequate for my purposes seeing as the preliminary issue is essentially one of law from the documents. At any rate, I have not the slightest doubt from what I have heard and seen from the photos that the application land is a valuable local amenity.

Land History

59. The documents that are material to the application comprise the conveyancing history and the minutes of committees of MCC and FBUDC which have been disclosed to the inquiry. I will deal with these documents in date order.
60. At the meeting of FBUDC's General Purposes Committee on 30/12/1927 the authority's Engineer and Surveyor reported that MCC had approved the intended widening of Friern Barnet Road between Macdonald Road and Ramsden Road ('the road widening scheme') to which they would contribute.
61. At the meeting of MCC's Highways Committee on 26/01/1928 reference is made to the intended acquisition of land for the road widening scheme to the cost of which MCC, FBUDC and the Ministry of Transport would be contributing in unequal shares.
62. Further mention of the road widening scheme is made at a later meeting of MCC's Highways Committee held on 6/06/1928 when the committee approved of the proposal to acquire land for such purposes. The report of the committee noted that MCC had agreed to contribute to the proposed road widening scheme in 1925 and the committee resolved to approve the acquisition of the necessary land (by FBUDC) to the cost of which MCC would be making a contribution. Evidently the intention was to widen the road (from 50ft) to 80ft with a 10ft building line to accommodate development on land fronting this section of the widened road.

63. At a meeting of the full council on 6/06/1929, MCC gave their approval to FBUDC acquiring land for the road widening scheme (albeit subject to recoupment) and also agreed to contribute one-half of the estimated cost (namely £2,450) subject to the Ministry of Transport meeting the balance.
64. MCC's approval to the acquisition of the land required for the road widening scheme was noted in the minutes of FBUDC's Housing and Town Planning Committee meeting on 13/06/1929.
65. At the meeting of FBUDC's Highways and Public Works Committee on 14/06/1929 the committee recommended that MCC be informed that FBUDC were willing to proceed with the road widening scheme provided MCC undertook to be responsible for the whole of the cost of the scheme once it had become a publicly maintainable highway for which they assumed responsibility.
66. At a meeting of MCC's Highways Committee on 15/10/1930 a resolution was made to the effect that the MCC's Education Committee be notified of land which was going to be surplus to requirements which was going to be reserved for the site for a library.
67. At a meeting of MCC's Sites and Buildings Sub-Committee on 13/01/1931 the committee recommended the purchase of land for the erection of a library, such land to be purchased at the same time as the land required for the foregoing road-widening scheme.
68. The report of the County Engineer was read at a meeting of MCC's Highways Committee on 14/01/1931 who noted that once the road widening scheme had been carried out there would *'remain a piece of surplus land having a frontage of 294ft and an average depth of 59ft, and the District Valuer has reported that this surplus should realise £1,400 if the buildings are allowed to be brought out to the frontage, and £1,000 if buildings have to be set back to the Town Planning Building Line, viz 10ft ... With regard to the surplus land, the Elementary Education Committee have asked the Highways Committee to reserve a part of this land for the purposes of the erection of a library ...'* The Highways Committee duly resolved to refer the matter to the District Valuer so

that the land required *'for the widening of Friern Barnet Road including back land'* (ie the surplus land earmarked for the new library and potential development) could be acquired despite the fact that by that stage the Ministry of Transport had not given approval to their grant to the road-widening scheme.

69. At a meeting of FBUDC's Highways and Public Works Committee on 20/03/1931 the clerk to the authority reported that the District Valuer had come to terms with the two vendors of the land required for the road widening scheme.
70. At their meeting on 28/05/1931 MCC's Education Committee recommended that MCC acquire land on the proposed new frontage line of the proposed road widening scheme for the purpose of the erection of a new public library.
71. The minutes of the meeting of MCC's Education Committee on 30/07/1931 noted that MCC had at its meeting on 28/05/1931 decided to purchase land on the proposed new frontage line of Friern Barnet Road for the erection of a new public library and the committee resolved to recommend the acceptance of a tender from a builder for its construction and other ancillary matters.
72. By a deed dated 20/08/1931 and made between George Sweetland (as vendor) and FBUDC all that land shown coloured blue on the App/3 plan was conveyed to FBUDC. The second recital to the deed stated that the land was *'required by the Council for the purposes of the Public Health Act 1925 and the Acts incorporated therewith'*.
73. By a further deed dated 20/08/1931 and made between Charles Brown (as vendor) and FBUDC all that land coloured green on the App/3 plan was conveyed to FBUDC. The second recital to the deed again also stated that the land was *'required by the Council for the purposes of the Public Health Act 1925 and the Acts incorporated therewith'*.
74. It should be mentioned that the layout of the proposed road widening scheme is shown on the plans to both conveyances to FBUDC. The revised frontage is described as the 'Town Planning Widening Line' and the new road was

intended to be between 83ft – 90ft wide and was going to lead to much wider visibility splays at the junctions of Macdonald Road and Ramsden Road.

75. By a deed dated 13/09/1931 and made between Barclays Bank Ltd and MCC all that land shown edged blue on the App/3 plan was conveyed to MCC (I have not seen this deed but I shall accept its existence seeing as it is noted on the App/3 plan).
76. By a further deed dated 30/09/1931 and made between Barclays Bank Ltd and MCC all that land shown coloured pink on the App/3 plan was conveyed to MCC for (per recital 2) the purposes of the Public Libraries Acts 1892-1919.
77. The minutes of the meeting of FBUDC's Highways and Public Works Committee on 23/10/1931 noted that the purchases of the land required for the road widening scheme had been completed and that the authority had secured vacant possession of all bar one parcel of land where the purchase had been subject to a tenancy between the vendor (Brown) and Kruse Ltd on which there was a hoarding which needed to be re-sited along the road widening line. The committee recommended that such tenancy could continue subject to termination on 3 months notice.
78. The minutes of FBUDC's full council on 6/11/1931 noted that the tenancy mentioned in (77) would only continue until the land was required by the authority for other purposes and since the road widening scheme was due to take place in the near future the rental was only nominal.
79. The minutes of MCC's Highways Committee on 26/11/1931 resolved to recommend that FBUDC be reimbursed the sum of £2,875 13s. 7d (later adjusted to £2,887 13s) which had been incurred in connection with the acquisition of land for the road widening scheme (as per the resolution of MCC on 6/06/1929) and there is no reason to suppose that FBUDC did not recoup such sum from MCC. The minutes also noted that it was *'anticipated that considerable recoupment will be obtained by the re-sale of the back land, although a part of the back land is proposed to be placed at the disposal of the Education Committee through the erection of a Library'*.

80. The minutes (and report) of MCC's Education Committee meeting on 25/05/1933 noted that MCC had, at its meeting on 30/07/1931, accepted a tender for the erection of new library buildings but despite the approval of a loan for such expenditure the matter was reviewed in light of the 'national financial crisis'. However with the prospect of the levying of a local library rate by FBUDC and a further grant from the Trustees of the Carnegie United Kingdom Trust towards the outlay on the new library, MCC had approved in principle the provision of new library buildings and authorised the Education Committee to invite tenders for the necessary building works and at the meeting the committee resolved to accept the lowest tender and also made other ancillary recommendations in relation to such development.
81. In the report and recommendations of the meeting of FBUDC's Parks Committee at their meeting on 14/01/1937, the committee noted the history surrounding the acquisition of land for road improvement and the erection of a new public library on land fronting Friern Barnet Road and the fact that there would *'be a certain amount of land surplus to requirements'*. The minutes go on to say this:

'The piece between Ramsden Road and the Library is very shallow and unsuitable for development and the Committee suggest that the County Council may be willing to dedicate this piece of land to the Public as a Public Garden providing this Council will bear the cost of laying it out and maintaining it.

The Committee recommend that the observations of the County Council be invited.'

The piece of land on the other side of the Library, adjoining Macdonald Road, is probably suitable for a small development and the County Council might be reluctant to dedicate this piece as well, although such dedication is desirable and would considerably enhance the appearance of and the surroundings to the Public Library'.

The suggestion of a dedication by MCC is confusing since virtually all the land to the west of the library already belonged to FBUDC with the exception of the

small parcel of pink land which is identified on the App/3 plan (I might add that no one has suggested that the library land – which was thought to be a couple of metres wide or thereabouts at the inquiry but is a good deal narrower than this in light of what one sees on the App/3 plan – has been used any differently to the adjoining land to the west). These minutes obviously deal with such land as was vested in MCC. At any rate, the aspirations of FBUDC in the case of those parcels which they hoped would not be developed are plain.

82. In the report and recommendations of the meeting of FBUDC's Parks Committee at their meeting on 15/07/1937, it was noted that the committee had received a letter from MCC stating:

'that the Education Committee would be pleased if the plots of land on each side of the Public Library in Friern Barnet Road could be laid out and maintained by the Council as ornamental gardens and the Committee recommend that the Engineer and Surveyor be instructed to submit a proposed layout of these gardens to the next meeting of the Committee, such work to be carried out at the same time as the widening of the road at this point.'

83. In the report and recommendations of the meeting of FBUDC's Parks Committee on 9/12/1937 the following is noted at item (7):

- '7. LAND ADJOINING THE LIBRARY. *The Committee had before them several proposed schemes for the layout of the two pieces of land adjoining the library and recommend the Council to authorise the Engineer & Surveyor to proceed on the following lines:-*

Both pieces of land to be laid out with turf with a shrubbery at the rear and sides. The turf to be divided from the shrubbery by pathways laid in colourcrete and suitable seats to be inset into the shrubbery. Small shrubs to be planted and post and chain fencing to be erected along the Friern Barnet Road and Macdonald Road frontages.

The total estimated cost of the works is £300.'

84. By a further deed dated 31/12/1937 and made between MCC and FBUDC all that land shown coloured yellow on the App/3 plan was conveyed to FBUDC. MCC. I have not seen this deed either but I shall accept its existence seeing as it is noted on the App/3 plan. The yellow land is not relevant to the application to register.

85. In the report and recommendations of the meeting of FBUDC's Parks Committee on 12/05/1938 the following is again noted at item (7):

'7. FRIERN BARNET LIBRARY. *A communication has been received from the Middlesex County Council intimating that the Sites and Building Committee of the County Council are prepared to recommend that permission be granted to this Council extending the ornamental gardens across part of the passageway on each side of the Library building providing a passageway of from 5' to 6' wide is left on each side to enable access to be obtained to the rear of the building.*

The Engineer & Surveyor reports that the provision of passageways with flank fences on either side of the Library would mar parts of the scheme as a whole. The improvement desired is to do away with the side passageways altogether and to merge the library into the layout of gardens, but the proposals outlined by the County Council would have the reverse effect.

The Committee understand that the Local Library Committee is in favour of this Council's proposals and has notified the County Library Committee accordingly and this Committee suggest that members of the County Council be invited to inspect the site with a view to this Council's suggested scheme receiving further consideration.'

86. In the report and recommendations of the meeting of FBUDC's Parks Committee on 15/07/1938 the following is again noted at item (8):

'8. COUNTY LIBRARY, Gardens. *Further to Minute No.9 (it should in fact be a reference to No.7) of the report and recommendations of this Committee of May last, the Sites Visiting Sub-Committee of the County Council have now made an inspection in connection with the layout of the gardens adjoining the County Library in Friern Barnet Road and have recommended agreement to*

this Council's proposals in regard thereto. The proposals have been submitted to the County Council for confirmation.'

87. In the report and recommendations of the meeting of FBUDC's Parks Committee on 15/09/1938 the following is again noted at item (7):

'7. FRIERN BARNET LIBRARY, Ornamental Gardens. A communication has been received from the Middlesex County Council relating to the layout of the small areas of land surrounding and forming part of the Public Library and intimating that the County Council has approved of the same being laid out and maintained by this Council as part of the adjoining ornamental gardens subject to:-

- (a) any necessary approval of the Board of Education.
- (b) the details of the arrangements being approved by the Chairman of the Education Committee.
- (c) this Council entering into an arrangement containing terms as may be considered necessary in the interests of the County Council.

The County Council have been provided with a plan showing the works proposed to be carried out and the draft of the proposed agreement is awaited.

It will be remembered that the larger areas of land adjoining (excluding Library site) which were paid for by the County Council are surplus to road widening requirements and the County Council have given instructions for the District Valuer's valuation to be obtained with a view to the disposal of the land or reimbursement to the County Council by this Council of the ascertained value.

When the District Valuer's valuation has been received this Committee will give further consideration to the question as to whether the Council's proposals to use the land as an ornamental garden should be proceeded with'.

88. In the report and recommendations of the meeting of FBUDC's Parks Committee on 8/06/1939 the following is noted at item (9):

- ‘9. LIBRARY GARDENS. *The Engineer & Surveyor reported that a Sub-Committee of the Middlesex County Education Committee had visited Friern Barnett to inspect the vacant land on either side of the County Library and that he had been informed that the Sub-Committee had decided to recommend that the land on the west side of the Library be leased to this Council at a nominal rental, and that the land on the east be reserved by the County Council for possible library extensions but that this Council be given permission to lay out the land as ornamental gardens, until such time as it was required for the extension of the Library.*

A further report will be submitted to the committee in due course.’

Obviously only a small parcel or parcels of land would have to be leased to FBUDC. At any rate, it was intended that such land would be laid out as ornamental gardens.

89. In the report and recommendations of the meeting of FBUDC’s Parks Committee on 13/01/1947 the following is noted at item 10(g):

- ‘(g) Library Gardens, Friern Barnet Road. *The Sub-Committee recommended that the scheme approved by the Council some years ago for the layout of this land as a pleasure garden be proceeded with when circumstances permit.*

The Committee are of the opinion that this work could be carried out at the present time and recommend that the Clerk be directed to enquire of the Middlesex County Council whether they would be prepared to cooperate with the Council in arranging for the layout of the site as a garden.’

90. In the report and recommendations of the meeting of FBUDC’s Parks Committee on 12/05/1947 the following is noted at item 12:

- ‘12. *Provision has been made in the estimates for the coming year of £150.0.0d for the improvement of the Library Gardens in Friern Barnet Road, and the Engineer & Surveyor reported that at the present time it would only be possible to carry out improvements to the land on the western side of the Library, as the land on the eastern side had been let by the Council as a war time allotment’.*

91. In the report and recommendations of the meeting of FBUDC's Parks Committee on 9/06/1947 the following is noted at item 13:

'13. LIBRARY GARDENS, FRIERN PARK ROAD. With reference to Minute No.12 of this Committee on 12th May, 1947, the Engineer & Surveyor reported that as this site might possibly be required for the provision of a Community Centre for the District, the work of improvement to the gardens would not be commenced until a final decision on the matter had been received from the Middlesex County Council.'

92. In the report and recommendations of the meeting of FBUDC's Parks Committee on 7/09/1948 the following is noted at item 9:

'9. ORNAMENTAL GARDENS.

(a) Library Gardens. The Engineer and Surveyor reported the completion of the work on the lay-out and grass seeding of this site. Three trees will be planted in the lawn in the Autumn.

(b) Proposals for Future Planting. The Committee have referred the question of the carrying out of the work on the remaining selected sites to the Ornamental Gardens Sub-Committee.'

93. In the report and recommendations of the meeting of FBUDC's Parks Committee on 1/06/1950 the following is noted at item 11(d):

'(d) Library site, Friern Barnet Road. With reference to Minute No.8(a) of the Report of this Committee dated the 8th September, 1949, it was reported that the Middlesex County Council has now re-aligned the boundary fences on either side of the library so as to permit the extension of the roadside garden layouts up to the building. An estimate of the cost of including these additional areas in the garden layouts was submitted to and approved by the County Valuer and the necessary work has been put in hand.'

94. In the report and recommendations of the meeting of FBUDC's Parks Committee on 6/07/1950 the following is noted at item 9:

- ‘9. ROADSIDE GARDENS – LIBRARY SITE, FRIERN BARNET ROAD. With reference to Minute No.11(d) of the Report of this Committee dated the 1st June 1950, the additional areas of land added to this site on either side of the Library have now been cleared, prepared and planted with Summer bedding plants.’
95. In light of the foregoing records, the whole of the application land is likely to have been laid out as an ornamental garden as long ago as 1950.
96. I should perhaps add that the land acquired in 1931 is now registered in the name of LBB under a single consolidated title, namely AGL266015. It is also worthy of note that the undeveloped land to the east of the library at the junction of Macdonald road and Friern Barnet Road is also vested in LBB under title number P33021 (at least it was in 2003).
97. Before closing on the land history, I should deal with the recitals in the 1931 conveyances whereby the blue and green parcels on the App/3 plan were noted to be held by FBUDC ‘for the purposes of the Public Health Act 1925 (‘PHA 1925’) and Acts incorporated therewith’ seeing as this was an explicit declaration of the original acquisition purpose.
98. As the land in question was required for the purposes of a road widening scheme it seems probable that FBUDC must have intended to rely on the enabling power contained in PHA 1925 (s.33) under which a local authority has power to acquire land for widening a street up to what is termed in section 33(1) as ‘the improvement line’ but which, in this instance, on the plans attached to the 1931 conveyances, is described as the ‘Town Planning Widening Line’. There is no evidence that any plan showing the proposed improvement line was ever deposited for inspection by the public and/or whether any objections were raised thereto but section 33(8) enables land to be acquired by an authority which lies between the improvement line and the boundary of the existing street which is being widened to which such land would be added under section 33(9).
99. On the face of it, section 33(8) does not authorise an authority to acquire more land than is actually needed for the road widening and although the

recitals in both conveyances state that the parcels were required for the ‘*purposes*’ (and Mr Simons invites me to place emphasis on the plural – in the sense that it was capable of covering more than just a single statutory purpose) ‘*of the PHA 1925 (and the Acts incorporated therewith)*’ this was only partially correct. I suppose it might be argued, that is, if it was only authorised to act under PHA 1925 (s.33(8)) that the surplus land was acquired by FBUDC in excess of its powers (unless, perhaps, as Mr Wilmshurst argued, there must be an implied power to acquire more land which is outside the boundary of the road widening line in order to bring about the proposed road improvement) but I cannot see that anything turns on this in this instance in view of (a) the power arising under the PHA 1875 (s.154) which is raised by Mr Wilmshurst in his recent submissions, and (b) the principle that administrative acts are valid unless and until quashed by the court – see for instance, *R (oao The Noble Organisation Ltd) v Thanet District Council & ors* [2005] EWCA Civ 782 at [42] – [43].

100. Another candidate section in the PHA 1925 is section 69 under which a local authority is given power to purchase and lay out land for the purpose of cricket, football or other games and recreations (the objector did not rely on this section). I should not overlook section 56 either which adds to the raft of powers available under section 76 of the Public Health Acts Amendment Act 1907 (‘PHAAA 1907’) which concern the management or control of recreation grounds but as there is no evidence that it was ever FBUDC’s intention to acquire the application land for public recreation I fail to see the relevance of these enactments.
101. Put shortly, the application land was acquired for the purposes of the road widening scheme. There was no suggestion that the land was being acquired by FBUDC for public recreation.

Submissions of Counsel (outline only)

Those by Mr Simons on behalf of LBB – his written submissions are those dated 24/10/2013 and 13/11/2013

102. In his initial submissions it was contended by Mr Simons that the application land was acquired under an express statutory power (ie the PHA 1925 and the Acts incorporated therewith) to provide and thereafter maintain it as a place of public recreation the effect of which in law (in consequence of the decision of the Court of Appeal in *Barkas*) would be to preclude such land from being registrable as a new town green.
103. It was argued that the effect of the recitals mentioned in paras 72/73 above and section 1(3) PHA 1925 (which stipulates that sections 1-84 are to be construed as one with the Public Health Acts 1975 to 1907) is to engage, by express reference, the PHA 1875 (s.164) the effect of which is to entitle local inhabitants to use the application land for public recreation rendering use 'by right' and not 'as of right'. This would undoubtedly be true if the application land had been acquired for the purposes of PHA 1875 (s.164) but this was never the intention of FBUDC in 1931.
104. Mr Simons cites at length from *Barkas* in the Court of Appeal which, as I have already indicated, has confirmed what was only discussed in *Beresford* in the House of Lords, namely that user pursuant to a legal right, eg under a statutory right of public recreation under the PHA 1875 (s.164) or the OSA 1906 (s.10), will not qualify for registration.
105. It was Mr Simons' primary case that the application land had, in light of the recitals contained in the 1931 conveyances, been acquired for the purpose of public recreation although he says that the position would be just the same if the application land had been appropriated for the purpose of public recreation which was the finding in *Barkas* arising from the authority's exercise of statutory powers which enabled them to lay out and maintain land as a recreation ground under the Housing Acts 1936-85.
106. In his recent submissions (which I am invited to read alongside his earlier submissions) Mr Simons contends that the recent disclosure substantiates

LBB's case as put forward at the inquiry. It seems to be his case that the purpose for which the application land was acquired and thereafter held authorised the laying out of such land as an ornamental garden.

107. Although Mr Simons refers to '*a clear history of decision-making which leads to the application land's holding and maintenance by the Council as an ornamental garden since, at the latest, 1949*', he is not evidently saying (at least as I understand his case) that even if the application land had not been acquired for purposes which authorised such work and holding (ie in the event that the PHA 1875 (s.164) was not been engaged at the time of acquisition), it would nonetheless still have been within the scope of a later (express or implied) appropriation of land (which included the application land) onto the statutory purposes of this enactment (which Mr Simons says '*was plainly the power engaged in this case*').
108. The difficulty I face is that Mr Simons appears to predicate his entire case on the basis that the scope of the recitals in the 1931 conveyances were such as to incorporate an acquisition purpose which included the powers of an authority to lay out and maintain land for the purpose of being used as public walks and pleasure grounds under PHA 1875 (s.164).

The submissions of Mr Wilmshurst on behalf of the applicants – his written submissions are those dated 23/10/2013 26/11/2013

109. In his initial submissions Mr Wilmshurst did not accept that the application land had been held pursuant to the PHA 1925 or that use had been 'by right' and not 'as of right'.
110. Mr Wilmshurst poses, as it seems to me, the core issue which (as I understand his submission) is whether the application land was ever held by LBB (either at the time of acquisition or by virtue of later decision-making) for a purpose which entitled it to make it available for public recreation?
111. I think Mr Wilmshurst is saying that in order to rely upon the PHA 1925, and thereby satisfy the above question, Mr Simons would have to show that section 69 was engaged. Under this section it will be recalled that a local authority is given power to purchase and lay out land for the purpose of

cricket, football or other games and recreations. This section was repealed and replaced by section 4(5) of the Physical Training and Recreation Act 1937 which itself was replaced by section 19 of the Local Government (Miscellaneous Provisions) Act 1976.

112. There is an unresolved issue as to whether section 19 (under which an authority is given a discretion as to whom to make any facilities provided by it available for use, either with or without payment) confers an entitlement on members of the public to use the relevant land on which the recreational facilities are located. Mr Simons contends that a power to charge is not inconsistent with use 'by right' and he cites the fact that the PHA 1875 (s.164) power is subject to regulation (by the making of byelaws) whereas Mr Wilmshurst said it would be and he relies on the view about this of Vivian Chapman QC in the application to register land at *The Triangle* in Gosport (2010) with which decision I am familiar. However, other inspectors have determined that land held under the 1937/1976 Acts is used 'by right' and not 'as of right' (see report of Richard Honey in the application to register land at *Nottingham Road Recreation Ground* in Ripley (2013) at paras [28] to [34]).
113. Mr Wilmshurst rightly submits that *Barkas* is not authority for the proposition that whenever land is used for recreation it is automatically held for the purposes of a recreational statute or applied for those purposes. I agree with him when he says that the authority must make a decision on how the land is to be held or applied.
114. Arising out of the recent disclosure, Mr Wilmshurst submits that the evidence discloses that the application land was purchased for road widening purposes in accordance with the powers that were available to FBUDC for this purpose and he cites PHA 1875 (s.154) and PHA 1925 (s.33) to which reference has already been made.
115. Section 154 briefly provides that '*Any urban authority may purchase any premises for the purposes of widening opening enlarging or otherwise improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street*'. This section was repealed by

Schedule 25 of the Highways Act 1959 and thus would have been in play in 1931.

116. It necessarily follows, and as Mr Wilmshurst rightly submits, that these provisions dealing with street improvements are obviously not wide enough to encompass recreation with the result that the reasoning in *Barkas* on appropriation is not engaged.
117. If Mr Wilmshurst is right then it must also follow that, subject to any formal statutory appropriation having taken place under either section 163 of the Local Government Act 1933 ('LGA 1933') (for which ministerial approval was required – although Section 23 of the Town and Country Planning Act 1959 removed the requirement for ministerial consent except in certain specified classes of land, including open space) or section 122 of the Local Government Act 1972, the application land will still be held for street improvements.
118. In *Barkas* the laying out and maintenance of the recreation ground under the Housing Acts was merely a form of appropriation for the purpose of public recreation and the land continued to be held by the authority for housing purposes. In my view, Mr Wilmshurst is right when he submits that *Barkas* does not set down any principle that local inhabitants will enjoy a legal right to use land for recreation whenever they factually use it for this purpose. One only has to look at the outcome in *Beresford* to see that this is not the case.
119. Under section 122(2A) of the Local Government Act 1972 (in common with disposals of land under section 123), appropriations cannot occur in the case of land consisting or forming part of an open space unless the council has first advertised their intention to do so in a local newspaper and have considered any objections to the proposed appropriation which may be made to them. Section 122(2A) was, however, inserted by the Local Government, Planning and Land Act 1980.
120. It will also be recalled from the earlier citation from *R (on the application of the Noble Organisation) v Thanet DC* [2005] EWCA Civ 782 that it now seems probable that a local authority's failure to refer a decision for ministerial

approval will not render that decision void unless and until the decision itself is quashed.

121. Mr Wilmshurst invites me to consider whether, in light of the recently disclosed minutes, the application land had in fact been the subject of a statutory appropriation which, in practice, could only sensibly involve the statutory purposes of PHA 1875 (s.164) or OSA 1906 (s.10).
122. Mr Wilmshurst encourages me to attach weight to the decision *R (Malpass) v Durham County Council* [2012] EWHC 1934 (Admin) where he says that the judge appeared to accept the submission that the formalities for an appropriation under section 163 LGA 1933 needed to be complied with in order to apply the provisions of the OSA 1906. Consistently with this, Mr Wilmshurst submits that it must accordingly be shown that the authority effected a formal statutory appropriation (by which he presumably means an express decision of the authority duly recorded in the minutes and supported by the required ministerial approval) in the case of the application land and he says that the evidence establishes no such thing. He contends that the authority never applied its mind to the issue of appropriation and the laying out of the application land as an ornamental garden in the absence of a formal appropriation would not in law suffice to alter the purpose for which the land was acquired, namely for street improvements.
123. I might add that Mr Wilmshurst also cites *Third Greytown Properties Ltd v Peterborough Corporation* [1973] 3 All ER 731 where land was found to be held for the purposes of an open space even though it had in fact been built on. At pp.735g-j and 736a Templeman J said that the factual position is irrelevant if the land was held in trust under section 10 of the OSA 1906.
124. I should also mention for the sake of completeness that it was, as I understand it, Mr Wilmshurst's case that even if the preliminary issue went against the applicants in relation to the FBUDC parcels on the western side of the library building, he still asserted that a claim to registration existed in relation to the library land between the eastern edge of these parcels and the western flank wall of the library building. We are dealing here with the very small triangle of land shown coloured pink on the App/3 plan. In my view, a

claim to register so small a parcel of land would be absurd and should not be entertained.

Discussion

125. I think this is a convenient point to deal more fully with *Malpass*. My view about this case is that the decision turned on its own facts in view of the inspector's treatment of the Deed of Dedication dated 4/02/1964. Of greater importance perhaps is the fact that the decision in the *Oxy-Electric v Zainuddin* case (see para 28) was not evidently cited in *Malpass* nor were any of the decisions of inspectors dealing with these cases in which an appropriation onto the purposes of the PHA 1875/OSA 1906 had either been implied from decisions of the authority or where the circumstances were such that an appropriation for such purposes could be inferred.
126. *Malpass* was a case where it was evidently unclear what the acquisition purpose of the land had been. However in 1964 the above-mentioned Deed had been executed by the authority (the former Consett UDC) which purported to make clear for what purpose the land was held. It was accepted on both sides that the references in the Deed to 'Open Spaces' and 'Public Walks, Parks and Pleasure Grounds' reflected the language of section 164 PHA 1875/section 10 OSA 1906 yet the judge still refused to consider that the Deed gave rise to an appropriation in law and the decision not to register was quashed and the matter remitted for further review by the registration authority which had refused to register the land (on the advice of its non-statutory inspector) on the basis that it had been appropriated onto the statutory purposes of one or other of the foregoing enactments such that user was 'by right' and thus non-qualifying.
127. It was alleged that the inspector's decision was flawed and vitiated the decision of the registration authority not to register the land. It was argued that the court was unable to substitute its own decision or its own reasons for that of the registration authority and that the decision not to register ought to be quashed and the matter remitted for re-consideration and review of evidence (fresh minutes) which had not been presented to the inspector. In the event, this is the course which was taken by the court.

128. It appears that the judge rejected the argument that the Deed ‘was tantamount to a record of a decision by the local authority to hold the land on the statutory trust for public recreation’. It seems clear that the judge accepted the submissions of the landowner that it was necessary to comply with the statutory formalities to effect an appropriation whereas, in light of what was said in *Barkas* and elsewhere, it seems clear that an appropriation does not need to be express and may be inferred although *Barkas* did not contain a detailed consideration as to the nature of the evidence which would give rise to such an inference.
129. Sullivan L.J did though say that he did not agree with the decision of the House of Lords in *Beresford* and as to why the statutory approval of the Corporation’s New Town Plan 1973 by the Minister, which had the effect of granting planning permission for the development of the land in that case as ‘parkland/open space/playing field’, when coupled with the subsequent laying out and grassing over of the land, would not have been sufficient to amount to an appropriation of the land as recreation open space sufficient to render use of the land ‘by right’. However, the House of Lords ruled against any appropriation on the facts in *Beresford*. For instance, Lord Rodger said that the designation of the land as open space in the New Town Plan did not confer any right to use the land as a sports arena. Lord Walker also emphasised the fact that the land had not been acquired for any particular purpose, nor was the Corporation under any obligation to appropriate the land for any specific purpose such as housing, public buildings or open space.
130. It is also noteworthy that Sullivan LJ did say that the land in *Barkas* would continue to be held under Housing Act powers until a ‘formal decision is taken that it shall be used for some other housing purpose’ [42]. Later on, he also said this at [43]: ‘A local authority holding land for a particular statutory purpose may not use it for any purpose unless it has been formally appropriated to that purpose ...’, which, as it seems to me, implies at least a decision to appropriate or at least evidence from which this may be inferred from another express decision of the authority.

131. Whilst I accept that the decision in *Malpass* cannot be put to one side, it is, as I have already explained, evident that the only reported first instance decision involving appropriation (ie before *Barkas*), namely that of *Oxy-Electric Ltd v Zainuddin [1990]* (a decision well known to practitioners in this field) was not apparently cited. The decision is clearly of importance and was very helpfully explained by Vivian Chapman QC in the *Castle Park* application whose view it was that if a local authority resolved to use land in a way that would only be lawful if there were an appropriation to a new statutory purpose, an appropriation is implicit in the appropriation.
132. In my view, *Malpass* turned on its own facts. Speaking for myself, it is difficult to see why the 1964 Deed did not evidence a clear intention on the part of the authority to hold the land as recreation open space sufficient to preclude its registration as a new town green.
133. In my view, in the absence of an express resolution to appropriate where the records are complete, the correct approach is to identify the statutory purpose for which the land is held by the authority by (a) identifying the purpose for which it was purchased, and (b) any purpose for which it was subsequently expressly appropriated, and then (c) to ascertain whether the authority subsequently passed any resolution or resolutions to use the land for a purpose for which it could not lawfully have used the land unless an appropriation to new purposes was implicit in the resolution. Put another way, is it possible to infer a decision to appropriate from another decision or decisions of the authority? I accept that where there is no such decision an appropriation cannot, without more, be inferred merely from the use to which the land is put if that use would be lawful according to the statutory power under which the land is for the time being held.
134. Accordingly, I take the view that it is perfectly legitimate to imply or infer a decision to appropriate (thereby indicating an intention to hold the land for a purpose other than the purpose for which it was acquired) from other decisions of the authority and that the law does not require an appropriation to be express. For instance, in *Beresford* at [88-90] Lord Walker said that the evidence did not establish, or give grounds for inferring any appropriation of

the land as open space. These observations are highly persuasive although he did not elaborate on the circumstances in which this might happen. Although the views of Lord Walker were *obiter dicta* they are entitled to great respect and ought to be followed in the absence of some compelling reason to the contrary.

135. The first question is to identify the purpose for which the application land was acquired. In my view, the answer to this is plain and obvious, namely that the land was required for road widening or street improvements. It seems plain enough that PHA 1875 (s.154) and PHA 1925 (s.33) would have applied to authorise the acquisition of the land required for the road widening scheme and there was no challenge to this at the time. Mr Wilmshurst is also right when he says that these provisions were obviously not wide enough to encompass recreation.
136. On an analysis of the minutes it is plain that it was understood by MCC/FBUDC that there would be land which was going to be surplus to the requirements of road widening scheme which in part would be earmarked for a new library. FBUDC were reimbursed their outlay by MCC following their acquisition of the material parcels in 1931. This evidently entitled MCC to a say in how the surplus land would be utilised since mention was made in the minutes of MCC's Highways Committee on 26/11/1931 that it was '*anticipated that considerable recoupment will be obtained by the re-sale of the back land, although a part of the back land is proposed to be placed at the disposal of the Education Committee through the erection of a Library*'.
137. By 1937 FBUDC realised that the land on the west of the library site was unsuitable for development (as it was too narrow) and they were thinking in terms of laying it out as a public garden, albeit with the concurrence of MCC as owner of the library land on the eastern side. In the event, MCC were content to see their land on either side of the library laid out and maintained by FBUDC as ornamental gardens and, at their meeting on 9/12/1937, FBUDC's Parks Committee resolved to recommend to the authority that both pieces of land be laid out in the manner described in the minutes. This work did not evidently proceed at that time and the minutes of the same committee

for the meeting on 12/05/1928 disclose that discussions were still ongoing with MCC in relation to the details of the intended works on land belonging to both MCC and FBUDC.

138. It seems that by the time of the same committee's meeting on 15/09/1938 agreement in principle had in fact been reached with MCC *'relating to the layout of the small areas of land surrounding and forming part of the Public Library (ie referring to those small areas which were vested in MCC) and intimating that the County Council has approved of the same being laid out and maintained by this Council as part of the adjoining ornamental gardens subject to .. etc'*. However, it appears from the minutes of this meeting that FBUDC were still considering (at MCC's prompting) whether the larger areas of land on either side of the library should be disposed of (with MCC being duly reimbursed the value of such land) and it seems that the District Valuer was asked to consider this possibility. As the same minute explains: *'When the District Valuer's valuation has been received this Committee will give further consideration to the question as to whether the Council's proposals to use the land as an ornamental garden should be proceeded with'*.
139. By the time of the meeting of FBUDC's Parks Committee on 8/06/1939 it seems that any possibility of disposing of the surplus land held by FBUDC was no longer on the cards. One sees that at this meeting it was noted that MCC were agreeable in principle to lease such land on the west side of the library as belonged to them to FBUDC, albeit at a nominal rental. It also appears that FBUDC were being given permission to lay out land on the east side of the library as ornamental gardens until such time as it was required by MCC for the extension of the library on this side of the building.
140. The war then supervened. Much later on, at the meeting of FBUDC's Parks Committee on 13/01/1947, the committee noted that the Sub-Committee of MCC's Education Committee had recommended that the scheme approved by FBUDC some years previously for the laying out of what was described as the 'Library Gardens' as a pleasure garden could be proceeded with when circumstances permitted. It was the view of the committee that this work could be carried out at that time and they recommended that the Clerk be directed

to enquire of MCC whether the latter would be prepared to cooperate with FBUDC in arranging for the layout of the site as a garden.

141. Matters proceeded quite quickly after this and, as has already been noted, at the meeting of FBUDC's Parks Committee on 12/05/1947 the committee noted that provision had been made in the estimates of *'the coming year ... for the improvement of the Library Gardens in Friern Barnet Road, and the Engineer & Surveyor reported that at the present time it would only be possible to carry out improvements to the land on the western side of the Library, as the land on the eastern side had been let by the Council as a war time allotment'*.
142. However, at the next meeting of FBUDC's Parks Committee on 9/06/1947, the proposed public garden was placed on hold as it was noted that the site may be required for a Community Centre. This proposal seems to have gone nowhere as by the time of the meeting of the same committee on 7/09/1948 one notes (against the heading *'Library Gardens'*) that FBUDC's Engineer and Surveyor reported the completion of the work on the lay-out and grass seeding of the site and also stated that three trees would be planted in the lawn in the Autumn.
143. By the time of the meeting of FBUDC's Parks Committee on 1/06/1950 the minutes note that MCC had re-aligned the boundary fences on either side of the library so as to permit the extension of the roadside garden layouts up to the building. By the time we get to the meeting of the same committee on 6/07/1950 one sees (under the heading: *'Roadside Gardens - Library Site, Friern Barnet Road'*) the following noted in the minutes: *' ... the additional areas of land added to this site on either side of the Library have now been cleared, prepared and planted with Summer bedding plants'*.
144. In light of the foregoing records, it is, in my view, plain and obvious that by 1950 at the latest, FBUDC had decided to hold the application land site for the purposes of public recreation. There had, I think, been a clear history of decision-making over a number of years relating to the intended use of the land as an ornamental garden (which was made available, without restriction,

for public use) which would have been wholly incompatible with the purpose for which such land had been acquired.

145. It is, I think, clear that FBUDC, as the relevant authority, had done something which was only valid if there had been a statutory appropriation of such land to a new purpose. The decisions outlined above resulted in the outlay of expenditure on the improvement of the land which was set out, used and maintained for public recreation over the years and (as one might have expected) was evidently also managed by FBUDC's Parks Committee. These factors appear to me to have given rise to a strong evidential basis from which to infer a decision to appropriate such land onto the statutory purposes of the PHA 1875 (s.164) or the OSA 1906 (s.10) with the result that public recreational user since at least 1950 has been 'by right' rather than 'as of right'. In the result, the application to register fails on this ground.

Recommendation

146. In light of the above discussion, I recommend that the application to register the application land (being application reference B/1/11/VG) should be rejected.
147. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *'the reasons set out in the inspector's report dated 10th January 2014'*.

William Webster
12 College Place
Southampton

Inspector

10th January 2014

APPENDIX 1



APPENDIX 2





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51°36'48.95" N 0°09'13.26" W elev 68 m eye alt 71 m



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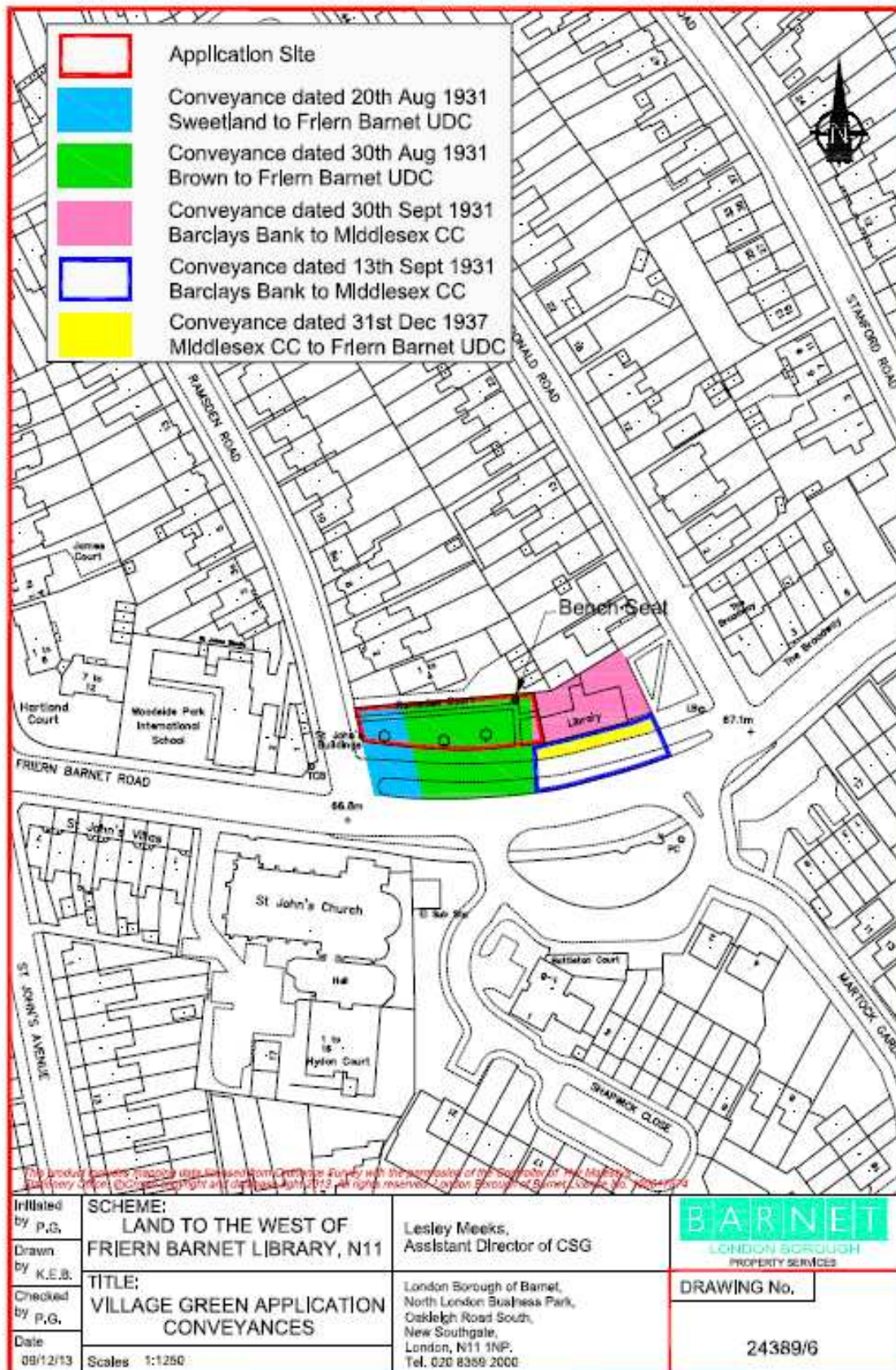
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APPENDIX 3



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by P.G.
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by K.E.B.
Checked
by P.G.
Date
09/12/13

SCHEME:
LAND TO THE WEST OF
FRIERN BARNET LIBRARY, N11

TITLE:
VILLAGE GREEN APPLICATION
CONVEYANCES

Scales 1:1250

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