

# ***BERESFORD*: DID LORD SCOTT IDENTIFY A WAY AROUND THE DIFFICULTY FOR LOCAL AUTHORITIES?**

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## **Introduction**

1. Although in *Beresford* Lord Scott robustly rejected the concept of implied licence, he thought, in the circumstances that arose in the case, that the land might, nonetheless, not be a town or village green. This paper examines the reasons why this might be so.

## **The interrelation between public open space and the registration of land as a town or village green**

2. Anyone reading *R (Beresford) v Sunderland City Council* for the first time will ask himself why it is that every park owned by a local authority in England and Wales is not now potentially subject to an application that it be registered as a town or village green. Of course if such a park is fenced and is closed at night the use by local people will be neither continuous nor (when it does take place) will it be *as of right*; but what about other local authority parks – which may be open and may not even have signs posted upon them saying that they are parks?

3. The answer will be that if they are held for open space purposes there will be an entitlement in local residents to go on to the land: and use which is by right is not as of right.

4. Thus land held by local authorities under the Open Spaces Act 1906 is held

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

5. The position in respect of land held under section 164 of the Public Health Act 1875 is less clear if one looks at the terms of the section itself; but sections 122(2B) and 123(2B) of the Local Government Act 1972 expressly envisage that such land is held in trust for the enjoyment of the public - thus it is easy to argue that the situation is essentially the same as land held under the Open Spaces Act 1906. This leaves land held for recreational purposes under section 19 of the Local Government (Miscellaneous Provisions) Act 1976. By virtue of this section, local authorities may have a wide range of recreational facilities with or without charge, but it is likely that the provisions of the Act are used most of all in relation to facilities for which a charge is made: use of such facilities would plainly not be as of right. It is submitted that however radical the decision in *Beresford* may be, it does not contemplate that land which has been expressly made available for use by the public under section 19, albeit without charge, could become a town or village green. However, arguments to the effect that such local authority land had become a town or village green were addressed to a non-statutory Inspector in a case in the

London Borough of Bromley, and no doubt it is likely that the point will be argued in due course elsewhere.

6. But what about local authority land more generally?

**Local Authority had not specifically held as public open space**

7. A simple analysis would say that it stands in exactly the same situation as the land of a private owner. Thus, for example, if land is appropriated for housing purposes it will be susceptible – all other things being equal – to registration as a town or village green if there has been twenty years use of it for lawful sports and pastimes.
8. Pre-*Beresford* it is likely that no one would have quibbled with this conclusion as regards use that was *adverse* to the local authority e.g. informal use by the public of a housing site which was otherwise not being used. If the use however had been encouraged by the local authority either on a temporary basis (because e.g. such use was appropriate pending redevelopment) or a permanent basis (because e.g. it was open space held in connection with a housing estate), the tendency would have been to say that it was by way of a licence (not necessarily an implied licence although, following *R v Secretary of State for the Environment, ex parte Billson* [1999] QB 374, quite possibly one that was not communicated).

9. Post-*Beresford* all local authorities will be worried about land used for informal public access which has not been formally appropriated as public open space.

10. This is where Lord Scott's suggestions in *Beresford* come in. At paragraph 52

Lord Scott said:

*For these reasons I would, on the basis on which the case has been argued before your Lordships, allow the appeal. I am, however, for reasons which will have appeared, uneasy about this conclusion. Where "open space" land comes into the ownership of a "principal council", I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your Lordships.*

11. The first suggestion is apparently limited to the construction of section 21 of the New Towns Act 1981. The idea is that although the land was not acquired as open space, it was subsequently put to this use. This, Lord Scott is saying, may bring it within the same (or essentially the same) regime as that on which local authority open space is held. Accordingly the land could not become a town or village green<sup>1</sup>.

12. The second suggestion is more radical. Lord Scott said:

*I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or*

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<sup>1</sup> This is what I think Lord Scott is saying. If what he said was intended as potentially having a broader implication, it would mean that it would not be possible to register any local authority land as a town or village green.

*not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion (para 52).*

13. Here the idea is that the land in *Beresford* was *de facto* open space: dispose of it for some other purpose and the village green status of the land will be overridden.

14. *Open space* means

*Any land laid out as a public garden, a need for the purposes of public recreation, a land which is a disused burial ground (see section 336 of the Town and Country Planning Act 1990<sup>2</sup>)*

15. Thus on the face of it the land in *Beresford* was subject to section 123. The City Council treated it as such and applied section 123(2A) whereby they advertised the intended disposition and considered objections to that course.

16. This may be considered as potentially trumping village green “rights” because those rights have arisen as a result of the land being made available as public open space. But the Local Government Act 1972 does not say this.

17. For my part, I think that that is reading too much into the section to hold it has this effect.

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<sup>2</sup> Section 336 is applied by section 270(1) of the Local Government Act 1972.

18. What Lord Scott said does however, if correct, have implications for all local authorities' land. If (say) housing land has been registered as a town or village green, let the local authority appropriate it for open space purposes – they cannot, after all, now develop it for housing. But what then is to prevent them from subsequently re-appropriating it for housing?

19. In such circumstances there would, no doubt, be issues as to whether the appropriation of the land as open space was for an ulterior motive. Nonetheless it is odd if the local authority are legally bound in effect to continue to hold as housing land, land which could not be put to other uses: how would they ever thereafter appropriate it to open space uses if the consequence of that was to open the way to its use for something else?