

Subject: Whitewebbs Park - your letters of 3rd November and 15th December 2022 - the Council's reply 22nd December 2022 [SEC=OFFICIAL:RESTRICTED ACCESS]

Classification: OFFICIAL - RESTRICTED ACCESS

To: Ms Alice Roberts

CPRE London

By e-mail

Dear Ms Roberts,

Whitewebbs Park – your letters of 3rd November and 15th December 2022 – the Council's reply 22nd December 2022

1. I have been asked to reply on behalf of the Council to your letter of 3rd November 2022, e-mail and attachments thereto of 8th November 2022, and letter of 15th December 2022 sent on behalf of CPRE, the Friends of Whitewebbs Park, and Enfield RoadWatch. The contents of your letters and e-mail are carefully noted.
2. As stated in my senior property colleague Helen Berry's emails to you of 22 April 2022 and 11 August 2022, the Council's proposed way forward has been to exercise its statutory power in section 123(2A) and (2B) of the Local Government Act 1972 ("LGA 1972") to dispose of the Whitewebbs Golf Course to Tottenham Hotspur Limited ("THL") by advertising the proposed agreement for lease in a local newspaper for two consecutive weeks and to consider properly any objections to the proposed disposal which may be made to the Council, before determining whether it should enter into the proposed agreement for lease. You will no doubt be aware that the Council's section 123 notice has been advertised over the last two weeks.
3. For the following reasons the Council respectfully disagrees with your contention that this is not the legally correct way forward.

4. First, please find attached above for your ease of reference a copy of LGA 1972 section 123 as currently in force. In the Council's respectful view, it is plain from the express language of section 123(2A) and (2B) that by the taking of the steps required under subsection (2A) that under subsection (2B) the land will be freed by the disposal from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with section 10 of the Open Spaces Act 1906. You and your co-signatories have not sought to explain why the express wording of subsection 123(2B) should not have the effect stated in that subsection.

5. Second, there is non-binding but persuasive support in the following authorities that the section 123(2A) procedure, if operated compliantly, has the effect stated in section 123(2B).

The House of Lords' decision in *R (oao Beresford) v Sunderland City Council* [2004] 1 All ER 160

6. The issue was whether a parcel of land near the centre of Washington and owned by the defendant local authority should be registered as a town or village green under the Commons Registration Act 1965. In argument, Leading Counsel for Mrs Beresford suggested that, once land acquired the status of a town or village green, if the council were to dispose of the land after complying with the section 123 procedures, it would still retain its status as town or village green. Counsel for the defendant Council did not contend that this was wrong. At paragraph 28 of the case report, Lord Scott of Foscote continued:

"28. ... Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. An appropriation to other purposes duly carried out pursuant to s 122 would plainly override any public rights of use of an 'open space' that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by s 123 for a disposal must surely bring about the same overriding effect."

7. The above is part of a longer passage, comprising paragraphs 27 to 29, in which Lord Scott dealt with this issue. At the end of paragraph 29, Lord Scott observes:

"29. Section 123 (2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust."

8. None of his fellow Judges referred to Lord Scott's paragraph 27 to 29 and none disagreed with his remarks in those paragraphs.

9. Subsequently, in *R (oao Barkas) v North Yorkshire County Council* [2014] UKSC] 21, which concerned the County Council's refusal to register a playing field in Whitby, owned by the Scarborough Borough Council and held under section 12(1) of the Housing Act 1985, as a town or village green under the Commons Registration Act 2006, the Supreme Court considered the decision in *Beresford* and concluded that the House of Lords had wrongly decided *Beresford* on the registration issue. Accordingly the decision in *Beresford* (so far as it related to that issue) was overruled.

10. Whilst the speeches in *Beresford* were subjected to detailed analysis and, in some respects, criticism by Lords Neuberger and Carnworth, who gave the leading speeches, neither of their Lordships referred directly to Lord Scott's observations which I quoted above. However, at paragraph 22 of the case report Lord Neuberger stated:

“ ...it is unnecessary for present purposes to go into the question of what steps the Council would have to take to remove the field from the ambit of [section 12(1) of the 1985 Act].”

11. This may have been an oblique reference to Lord Scott's observations. However the key point in the Council's view is that neither Lord Neuberger nor his fellow Supreme Court Judges in *Barkas* expressed disagreement with what Lord Scott said about sections 122 and 123 of the Local Government Act 1972 in *Beresford* – just as none of Lord Scott's fellow Judges in *Beresford* had expressed disagreement with Lord Scott's observations..

The Court of Appeal's decision in *R (on the application of Day) v Shropshire Council and Others* [2020] EWCA Civ 1751

12. The facts in *Day* are distinguishable from the position at *Whitewebbs*. *Day* concerned a parcel of land close to the town centre of Shrewsbury. In 2017, unaware that the land was public open space, the Town Council sold the land to a developer - who was likewise unaware that the land was public open space - without first going through the procedure under LGA 1972 section 123. The question before the Court of Appeal was whether, in the circumstances, the statutory trust continued or ended and, in either case, what were the legal implications for the authority and the developer.

13. In substance, the proceedings were a challenge to the later grant, in November 2018, of conditional planning permission to the developer by the defendant local planning authority, the Shropshire County Council, for the construction of 15 dwellings on the land. At first instance, Mrs

Justice Lang (who was also the Judge at first instance in *Muir v Wandsworth Borough Council*) held that, if the disposal of the land did not bring the trust to an end, the trust obligations were nonetheless unenforceable against the developer as purchaser.

14. The Court of Appeal's analysis of the statutory provisions began with what would be the position where section 123(2A) is complied with prior to the disposal: please see paragraphs 41 and 42 of the Court's judgment, which so far as relevant I set out below.

"41. ...In our view, the correct analysis of the statutory provisions is as follows.

42. As we have described (see paragraph 27 above), until the 1947 Act, a local authority could not dispose of land subject to a section 10 trust. The relevant power of disposal is now found in section 123 of the 1972 Act; but that power is only exercisable if there has been compliance with the statutory requirements of section 123(2A) for advertisements and consideration of objections. Where those requirements are met, the consequences of the disposal for any section 10 trust are set out in section 123(2B): by virtue of the disposal, the land is freed from the trust."

15. In paragraphs 43 to 45, the Court considered the position where there has not been prior compliance with section 123(2A). In paragraphs 46 to 54, the Court dealt with 4 matters raised in argument, then in paragraphs 55 to 62 discussed 6 cases which had been cited to the Court. The sixth of these was *R (Western Power Distribution Investments Limited) v Cardiff City Council* [2011] EWHC 300 (Admin), which you rely on in your letter of 3rd November 2022. The Court's overall conclusion on the authorities, at paragraph 63, was:

"63. Consequently, we do not consider that any of the authorities undermine the construction of the 1972 Act which we favour... "

16. Paragraph 42 of the Court's judgment is non-binding, since in *Day* the section 123 procedure had not been operated prior to the disposal of the land to the developer. However the Council considers that the views set out there are strongly persuasive, given that this was the joint judgment of the members of the Court of Appeal (Lords Justice Richards, Hickinbottom and Andrews) and was also common ground between the parties to the appeal, as paragraph 32 of the judgment records:

"32. Pausing there, it is to be noted that section 123(2A) is in negative mandatory terms, i.e. unless there has been compliance with the section 123(2A) requirements for advertisement etc, an authority is proscribed from disposing of land subject to a section 10 trust; and before us it is

(rightly) common ground that, as a result of the reference to subsection (2A), subsection (2B) expressly frees land from any section 10 trust that attaches to it where – and only where – there has been compliance with the statutory requirements for advertisement etc set out in that subsection. As we have already indicated, it is not in dispute that, when the Town Council sold the Site to the Developer, it did not comply the requirements of section 123(2A).”

17. Dr Day’s appeal to the Supreme Court was heard on 7th December 2022 and, as the Council understands from the Supreme Court’s website, usually judgement is handed down between 3 and 9 months after the hearing of the appeal. The Council awaits the Supreme Court’s judgement with interest.

Mr Justice Ouseley’s decision in *Western Power Distribution Investments Limited v Cardiff County Council* [2011] EWHC 300 (Admin)

18. You rely on this decision in your letter of 3rd November 2022. The case concerned an application for judicial review of the Cardiff City Council’s decision to designate part of land, which it held subject to a statutory trust in favour of the public under section 164 of the Public Health Act 1875, as a nature reserve pursuant to section 21 of the National Parks and Access to the Countryside Act 1949. The Claimant, a major neighbouring landowner, argued that the designation was unlawful because section 122 of the Local Government Act, which deals with the appropriation of land from one use to another, should have been used to take the land out of the 1875 Act trust to permit its designation as a 1949 Act nature reserve. Mr Justice Ouseley’s judgment is largely devoted to whether nature reserve use would be compatible with the statutory trust under section 164, his conclusion being that on the facts of the case it would not be: the Council should therefore have first appropriated the land by operating the procedure under LGA 1972 section 122. Commenting on the Claimant’s primary submission to this effect, Mr Justice Ouseley observed at paragraph 14 of his judgment:

“14. Appropriating land held under s164 of the 1875 Act frees it from the trust; s122(2B). However, by s122(2A) such land can only be appropriated after the Council has publicised notification of its intention to do so, and has considered the ensuing objections. [Leading Counsel for the Claimant] anticipates that were such a step taken in respect of the Nant Fawr LNR, local objections would indeed ensue. [Leading Counsel for the Claimant]’s contention is that by avoiding such a process, the real significance of what the Council has done to the public trust land has been obscured. Similar provisions apply to the disposal of public trust open space.”

19. As with the observations of Lord Scott in *Beresford* and the Court of Appeal in *Day* with regard to the effect of complying with section 123, Mr Justice Ouseley’s final sentence in his paragraph 14 is non-binding but highly persuasive. Further *Western Power* is distinguishable from

Whitewebbs on its facts. Accordingly, and in the Council's respectful view, the decision in Western Power does not support your and your co-signatories' contentions regarding Whitewebbs and section 123.

The Court of Appeal's decision in R (oao Muir) v Wandsworth Borough Council [2018] EWCA Civ 1035

20. You have relied on this case throughout this correspondence. In the Council's respectful view, Muir v Wandsworth BC does not support your contentions as its facts are distinguishable from the position at Whitewebbs. In Muir, Wandsworth Borough Council proposed to grant a commercial lease of a property forming part of Wandsworth Common to a third party without operating the section 123 procedure and instead relied on powers in the Greater London Parks and Open Spaces Order 1967, unsuccessfully. In contrast, at Whitewebbs the Council has publicly stated (and has confirmed that indication to you in correspondence) that it will operate the section 123 procedure before any disposal to THL: and is doing so. Further the Council is not relying on the 1967 Order. Reflecting these fundamental factual differences, the Court of Appeal's judgement in Muir does not mention section 123.

Conclusion

21. The Council respectfully disagrees with your suggestion, in section 5 of your letter of 3rd November 2022, that the Council should operate the LGA section 122 procedure to appropriate the land, then operate the section 123 procedure, before deciding whether to dispose of the land to THL. In the Council's view, the section 122 and section 123 procedures are parallel and separate procedures involving public advertisement of the proposals and then consideration of objections to the proposals, not sequential procedures, as the non-binding but persuasive judicial observations referred to in this e-mail make clear. Indeed, in the Council's respectful view, the suggestion that a local authority should go through two lengthy and potentially expensive public consultations on the same proposed disposal, one after the other, does not accord with the principles of good public administration.

22. It appears from the final paragraph of your letter of 3rd November 2022 that CPRE, the Friends of Whitewebbs Park and Enfield RoadWatch have not taken professional legal advice in this matter. If this is so, the Council respectfully urges CPRE and the other signatories to your letter to do so at your earliest opportunity.

23. This e-mail seeks to explain the legal reasoning underlying the Council's proposed way forward with regard to the proposed disposal to THL at Whitewebbs. It is not intended as, and is not, legal advice to you and the co-signatories to your letter. As per the previous paragraph, the Council respectfully recommends that you seek professional legal advice on this correspondence at your earliest opportunity.

24. This e-mail is an open e-mail and the Council reserves the right to refer the Court to this e-mail in any relevant proceedings on the question of costs.

Please address all future correspondence in this matter to me. I look forward to hearing from you at your early convenience.

I am copying this e-mail to my Legal colleague Nikolina Porcheva, for information.

Yours sincerely,

Michael Smith

Lawyer | Corporate Team | Legal Services

On behalf of the Director of Law and Governance

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