

In the Matter
of an Application to Register
Filwood Park, Bristol
As a New Town Green

SECOND REPORT
of Mr. VIVIAN CHAPMAN Q.C.
19th November 2011

Bristol City Council,
Legal Services,
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Ref. Anne Nugent

67463/VRC/11/91/wp/S4/Filwood Second Report v2

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1. Introduction

[1] In my report dated 24th August 2011, I directed that the objectors should have a further opportunity to adduce documents and make submissions on the implied appropriation issue and that the applicant should be given an opportunity to make submissions on the further documents.

[2] There was some slippage on the times that I laid down in my directions:

- The objectors delivered 6 lever arch files of documents and a Further Statement of Case on 9th September 2011 and some further documents on 13th September 2011
- The applicant, after requesting and being granted two extensions of time, served written Further Submissions on 27th October 2011

[3] I propose:

- First, to review the new documentary evidence,
- Second, to consider the further legal arguments submitted by the objectors and by the applicant, and
- Third, to state my conclusions and recommendations.

2. The new documentary evidence

Open Spaces & Amenities Committee 3rd January 1984

[4] At a meeting of the Open Spaces and Amenities Committee held on 3rd January 1984, the committee was presented with a draft green paper on sport and recreation prepared by

officers at the previous request of the committee¹. The draft green paper drew a distinction between district parks and neighbourhood parks. The latter served a smaller built-up area and had fewer facilities. It referred to Filwood Park as an existing neighbourhood park of lower standard. It commented that there was an opportunity to use open space at Filwood as a new district park. Although it is not entirely clear from the draft green paper that this comment related to the existing Filwood Park it seems a reasonable inference that it did.

Open Spaces & Amenities Committee 4th September 1984

[5] At a meeting of the Open Spaces and Amenities Committee held on 4th September 1984, the committee received a draft joint report of the Parks Manager and the City Planning Officer entitled “Open Space in Bristol”². The report identified Filwood Park as a lower standard neighbourhood park which was a possible location for a district park. The report put forward proposed works to Filwood Park as aspirations for a 10 year programme of capital and revenue expenditure. The works were surface preparation, fencing, path construction and additional landscaping.

Open Spaces & Amenities Committee 2nd October 1984

[6] At a meeting of the Open Spaces and Amenities Committee held on 2nd October 1984, the committee received and noted a draft statement on sport and recreation in Bristol³. This was a revised version of the green paper mentioned above. It repeated the proposal that existing open space at Filwood should be used as an opportunity to create a new district park.

Joint meeting of Open Spaces & Amenity and Planning and Traffic Committees 9th November 1984

[7] At a joint meeting of the Open Spaces & Amenities Committee and the Planning and Traffic Committee held on 9th November 1984, the meeting received a slightly revised version of the report “Open Space in Bristol”⁴. The revisions did not specifically relate to Filwood Park and Filwood Park was not mentioned in the minutes.

Open Spaces & Amenities Committee 4th December 1984

[8] At a meeting of the Open Spaces & Amenities Committee held on 4th December 1984, the committee received a report of the Parks Manager summarising capital expenditure aspirations for parks and open spaces relating to proposals made in the report “Open Space in Bristol”. One item of expenditure was £50,000 on Filwood Park Phase I. The report comments:

¹ OA/1/11 (i.e. Objectors’ Additional Evidence Bundle volume 1 page 11)

² OA/1/65

³ OA/1/165

⁴ OA/1/212

“The land intended for the development of Filwood Park was acquired over ten years ago in response to a well supported petition. Since that time no monies have been made available to provide facilities for the Knowle West community. A proper neighbourhood park is seen as a priority in the draft report on “Open Space in Bristol”. Local consultation will be undertaken and the work would be phased over two years.”

I am not sure that this comment fairly represents the proposals in the report “Open Space in Bristol” which sees Filwood Park as an existing neighbourhood park which could be improved to become a district park. After considerable discussion, the committee accepted the estimates in the Park Manager’s report (and certain other reports) subject to confirmation about funding for maintenance of open space⁵.

Open Spaces & Amenities Committee 4th January 1985

[9] At the meeting of the Open Spaces and Amenities Committee held on 4th January 1985, the committee approved and adopted the wording of a preamble to the Civic Budget 1985/86 proposed in a joint report to the committee of the Recreation Manager, Parks Manager and Manager, Crematoria and Cemeteries⁶. This introduction was in general terms and did not deal specifically with Filwood Park.

Resources and Co-Ordination Committee 31st January 1985

[10] At a meeting of the Resources and Co-Ordination committee held on 31st January 1985, the committee considered a report of the City Treasurer into the Civic Budget 1985/86. In that report the capital aspirations for Open Spaces and Amenities - Parks Department included £50,000 in respect of Filwood Park.

Woodland Management Consultative Panel 8th March 1985

[11] At a meeting of the Woodland Management Consultative Panel (which appears to have been a panel consisting of some members of the Open Spaces and Amenities Committee and some outside members with relevant interests) held on 8th March 1985, the panel endorsed in general the proposals in the draft report “Open Space in Bristol”⁷.

Full Council 19th March 1985

[12] The full council met on 19th March 1985 to consider a report of the Resources and Co-Ordination Committee relating to the Civic Budget 1985/86⁸. The report is not easy to follow since only some of the appendices have been copied. However, as I read para. 8, the

⁵ Item 251.12/84

⁶ OA/2/2

⁷ OA/2/29

⁸ OA/2/40

aspirations for capital expenditure exceeded the capital available and the committee intended to consider priorities and report further. It was resolved that the estimates of the Open Spaces and Amenities Committee be approved and accepted, but the only estimates appearing in the report relate to a revenue budget. I do not think that the full council approved any capital expenditure aspirations.

Resources and Co-Ordination Committee 28th March 1985

[13] At a meeting of the Resources and Co-ordination Committee held on 28th March 1985⁹, the committee considered a report of the City Treasurer on the Capital Programme 1985/86. In the appendix to that report, under the heading “Open Spaces and Amenities: Parks Department”, there was a capital aspiration of £50,000 allocated to Filwood Park. The City Treasurer’s report pointed out that the total cost of funding the aspirations far exceeded the resources available. It appears that a list setting out the proposed capital programme for 1985/86 was circulated to the meeting. It seems that this list represented a selection and/or scaling down of the capital aspirations itemised in the City Treasurer’s report to meet the resources available. It was resolved that the circulated proposed capital programme for 1985/86 should be submitted to the City Council for approval at their next meeting. No copy of the list is attached to the minutes. However, a copy of the list appears as Appendix A to the Report of the Resources and Co-ordination Committee to the full council on 14th May 1985¹⁰. The list did not include any expenditure on Filwood Park. It therefore appears that none of the proposed capital expenditure on Filwood Park was to be put forward to the City Council.

Full Council 16th April 1985

[14] At a meeting of the full council on 16th April 1985¹¹, the council considered the report of the Resources and Co-ordination Committee. Part V of that report dealt with the Capital Programme 1985/86. Para. 11 of the report said that attached to the Council agenda was a copy of the City Treasurer’s report setting out the resources available for capital aspirations and a list of the capital aspirations submitted by the Programme Area Committees. Para. 12 of the report said that also attached as an appendix was a list of aspirations which had been provisionally approved by the Resources and Co-ordination Committee. This is clearly the list circulated at the meeting of the Resources and Co-ordination Committee. My copy of the minutes of the full council include yet another copy of the City Treasurer’s report but does not include a copy of the relevant list. However, as noted above, it appears that the list did not include expenditure on Filwood Park. Para. 12 of the report recommended the Council to approve the list of schemes as set out in the appendix. This must be the provisionally approved list which did not contain capital expenditure on Filwood Park.

⁹ OA/2/83

¹⁰ OA/2/115Va

¹¹ OA/2/98B

[15] The Council resolved to accept Part V of the report of the Resources and Co-ordination Committee and that the recommendations as set out therein be approved and adopted.

Resources and Co-ordination Committee 25th April 1985

[16] At a meeting of the Resources and Co-ordination Committee held on 25th April 1985¹² the committee considered a report of the City Treasurer on the Capital Programme 1985-86. The report contained a list of capital aspirations considered at the last meeting showing which aspirations had been approved. It appears from this list that none of the proposed £50,000 expenditure on Filwood Park had been approved. The report identified certain items where capital expenditure had been approved but which was now unlikely to be effected in 1985-86. These totalled £690,000 and the City Treasurer identified additional proposed schemes for capital expenditure in 1985-86 to utilise the resources no longer required. These included expenditure of £20,000 on Filwood Park. The committee resolved to submit the additional projects to the City Council for approval.

Full Council 14th May 1985

[17] At a meeting of the full council on 14th May 1985¹³ the council considered a report of the Resources and Co-ordination Committee. Part V of that report recommended additional proposed schemes for inclusion in the Capital Programme for 1985/86. Appendix B to the report listed the schemes which included £20,000 expenditure on Filwood Park. The full council resolved to accept Part V of the report and to approve and adopt the recommendations. It therefore appears that on 14th May 1985 the full council approved capital expenditure of £20,000 on Filwood Park to improve it as a park.

[18] It appears to me that this resolution must have effected an implied appropriation of Filwood Park to public park purposes under s. 164 of the PHA 1875 for the reasons explained in para. 139 of my earlier report. It follows that recreational use of Filwood Park after 1985 was not “as of right” but “by right”. This is fatal to the town green application.

Subsequent minutes

[19] I have been provided with a substantial quantity of subsequent minutes up to 1988. However, I do not think that it is necessary to review them in detail. All are consistent with continued use, maintenance and improvement of Filwood Park as a public park and none can be construed as containing an implied appropriation away from public park purposes.

3. The further legal arguments

¹² OA/2/100

¹³ OA/2/115A

[20] The objectors' further statement of case settled by Mr. Blohm Q.C. and dated 9th September 2011 essentially submitted that the approval by the full council of capital expenditure on the improvement of Filwood Park as a park must have involved an implied appropriation of Filwood Park to public open space use. That is an argument that I have already accepted in principle in para. 139 of my earlier report. Attached to the objectors' further statement of case is a detailed analysis of most of the minutes produced. I do not entirely agree with every part of that analysis but I have set out above my own analysis of what seem to me to be the relevant minutes. That analysis does, in my view, support the objectors' submissions.

[21] The applicant served further submissions settled by Mr. Bennett dated 27th October 2011. The submissions did not involve any detailed examination of the minutes, but rather made a number of general submissions, which I will now turn to consider. I will divide up my consideration by reference to the various sub-headings in the submissions.

No illegality

[22] It appears to me that there are several interwoven threads in the submissions under the sub-heading "No illegality".

[23] The first thread is a submission that there would be no illegality in the full council's authorising expenditure on Filwood Park as a public park without appropriating the land to open space purposes. I do not accept this submission. If the site of Filwood Park was held for education (or airport or housing) purposes, it seems to me that the council would be acting outside its statutory powers in authorising capital expenditure on Filwood Park as a public park. If a council holds land for one statutory purpose, I consider that its duty is to spend council money on the land for that purpose and for no other purposes.

[24] The second thread is a submission that land can be developed and redeveloped and can still remain held for redevelopment purposes "or for that matter educational purposes". The authority cited in support of this proposition is *R v City of London Council ex parte Master Governors and Commonality of the Mystery of Barbers of London* [1996] 2 EGLR 128. In this case, the council acquired certain land for planning purposes in the 1950s and built an office block on it called Shelley House. In the 1960s, the council transferred some adjoining land to the Barbers' Company for their Hall and covenanted not to interfere with light or air passing through the windows of the Hall. In the 1990s, the council proposed to redevelop Shelley House and claimed that it could breach the covenant with impunity by virtue of TCPA 1990 s. 237(1). This section authorises breach of covenant if land is held for planning purposes and developed in accordance with planning permission. The judge held that the Shelley House site remained held for planning purposes although it had been developed after acquisition. Section 237(1) therefore still applied. Certainly, it seems to me that the case is authority for the proposition that land can still be held for planning purposes if it is developed. The planning purposes includes redevelopment of land that has already been developed. However, I do not see that the case is authority for the proposition that land held for educational purposes can properly be developed for public park purposes without being

appropriated to the new purposes. If there were no appropriation the land would remain held for educational purposes and the council would be acting outside its powers in spending capital on it as a public park. That is why I consider that a resolution of the full council to spend capital on Filwood Park as a public park carries an implied appropriation to public park purposes.

[25] The third thread is a submission that there is simply no evidence whether the use of Filwood Park as a park was perceived by the council as temporary or permanent. I am not sure that the dichotomy between “temporary” and “permanent” is a true one. Few things in life are permanent. I think that the true dichotomy is between “temporary” and “indefinite”. In addressing the argument of Mr. Blohm that the *Teddington* principle applied, I pointed out in my earlier report that there was no evidence that use of Filwood Park as a public park was ever regarded as a temporary use until the site was sold in 2008 (report para. 141). That seems to me to be right. There was no evidence that use of the park as a park was regarded as temporary as opposed to indefinite. I cannot see any evidential basis for refusing to infer an appropriation to public park purposes on the ground that the proposed use as a public park was temporary.

[26] Finally, the applicant submits that the only clear evidence of the Council’s long term intention for the land was the documentation (terrier cards, computer data base and computer mapping) which indicated that it to be held long term for redevelopment purposes. However, all that documentary material derives from the invalid appropriation of 1974. The council is a legal and not a natural entity and it seems to me that its intentions can only be manifested by its valid legal actions.

No authorisation by full council to create public park

[27] The applicant argues that, although there is evidence that the full council approved capital expenditure of £20,000 on Filwood Park, there is no evidence that it knew that the expenditure was for public park purposes. In support of that argument, the applicant points out that knowledge that the expenditure was to be made by the Parks Department was not equivalent to knowledge that the expenditure was on a public park, since the Parks Department maintained land held for various purposes other than public parks, such as school playing fields. I cannot accept this submission for two reasons. First, the full council on 14th May 1985 had before it material which was not just limited to information that the money was to be expended by the Parks Department: the full council had before it both the original and additional list of capital expenditure submitted by the Resources and Co-ordination Committee. It was apparent from the material before the full council at that meeting that the £20,000 capital expenditure was on Filwood Park as a capital aspiration under the heading “Open Spaces and Amenities: Parks Department”. Second, it appears to me that the full council must be taken to have notice of the material recorded in the minutes of its committees, and it was abundantly clear from that material that the proposed capital expenditure was on the improvement of Filwood Park as a public park.

No implication to open space purposes

[28] The applicant submits that if a statutory appropriation can be implied as opposed to expressed, it would lead to great uncertainty in ascertaining under what statutory powers land was held at any one time and virtually dispense with the need for any formal express appropriation. If land was held for one statutory purpose, the council could effect an implied appropriation simply by spending money on the land for another statutory purpose. I accept that this is a powerful argument.

[29] However, it seems to me that the authorities are against this submission. The late Mr. Cullen QC (the judge in *Oxy-Electric*) thought that there could be an implied appropriation, as did Lord Walker in *Beresford* (see paras 64-66 of my earlier report). It is true that the views of Mr. Cullen and Lord Walker were *obiter dicta* and not binding on the CRA in the present case. However, it seems to me that these views (especially those of Lord Walker as a judge of the highest court in the land) are entitled to great respect and ought to be followed in the absence of some compelling reason to the contrary.

[30] If, as I think, there can be an implied appropriation, this strikes me as a strong case for an implied appropriation. Filwood Park has 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 full 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.

[31] The applicant refers to the *Castle Park* case and submits that the inspector found that use of a park for commercial purposes did not amount to an implied appropriation to commercial purposes. I was the inspector in *Castle Park* and I have looked back at my report dated 30th March 2009. However, I cannot see any reference in the report to an argument that use of the park for commercial purposes amounted to an implied appropriation and I cannot recall any such argument. As far as I can see I never considered the point.

[32] The applicant refers to the *South Purdown* case. I take this to be another inspector's report on a TVG application. However, I am not familiar with the case and was not supplied by the applicant with a copy of the report. I cannot usefully comment on it.

[33] The applicant says that the minutes of the OSA committee cannot give rise to evidence to support an implied appropriation. I agree that the OSA committee had no power to effect an appropriation, express or implied. However, as explained above, I do think that minutes of committees can be taken into account in deciding whether the full council knew that it was authorising expenditure on a public park.

The only possible implication must be appropriation to redevelopment purposes

[34] The applicant argues that, if appropriation can be implied, there was an implied appropriation to redevelopment purposes. The council carried out virtually all appropriations without full council approval. The applicant points, in particular, to the following matters:

- Filwood Park was transferred from the Education Committee to the Planning and Traffic Committee in 1974, which committee had responsibility for development land but not open space land.
- The terrier card V20/15 records the proposed use of the land as redevelopment
- The council computerised database records the statutory purpose of the land as redevelopment
- The council's maps showed the land coloured purple as development land
- The sale of Filwood Park was handled by Central Support Services

[35] The applicant further submitted that there was no confusion on the part of Mrs. White or Mr. Bennett between appropriation and the "ownership" of land by committees. The transfer of responsibility for the land to the Planning and Traffic Committee was evidence of an implied appropriation to redevelopment purposes.

[36] The difficulty that I have with these submissions is that it appears to me that a statutory appropriation requires a resolution (express or implied) to appropriate by the full council or by the committee with delegated power to effect a statutory appropriation. I cannot see that any of the matters relied upon by the applicant are evidence of such a resolution.

[37] The applicant refers to the *Cotswold Road* case. I take this to be another inspector's report on a TVG application. However, I am not familiar with the case and was not supplied by the applicant with a copy of the report. I cannot usefully comment on it.

Missing documents

[38] The applicant repeats her submission that there are documents not disclosed by the council which would support her case. I have already dealt with this point in my report. It appears to me that this case turns on implied appropriation. This must be found in some resolution of the full council or of a committee with delegated power to appropriate. All such resolutions are matters of public record and I cannot understand what other documents might exist which are relevant.

[39] It seems to me that there are only two factual situations which would assist the applicant.

[40] The first is that there never was any appropriation, express or implied, after the 1930s and that the land has remained ever since held for educational (or possibly housing or airport) purposes. I accept that this would be the correct analysis on the evidence in the absence of my finding of an implied appropriation in the full council resolution of 14th May 1985. I cannot see how any further documents can throw any light on the question whether there was an implied appropriation on 14th May 1985. All turns on the legal effect of documents which are matters of public record.

[41] The second is that there was an express or implied appropriation of Filwood Park to redevelopment purposes after the 1930s. It seems clear that there was no express appropriation. The purported appropriation of 1974 to “general planning and public park purposes” (whatever that means) was invalid because it was purportedly effected by committees with no power to effect an appropriation. Nor is there any evidence of a resolution by the full council or by a committee with delegated powers of appropriation to appropriate Filwood Park to redevelopment purposes. Again, everything turns on the documents which are matters of public record.

4. Conclusion and recommendation

[42] I conclude that the objector is right in submitting that there was an implied appropriation of Filwood Park to public park purposes in 1985 and that it follows that recreational use of the park by the public during the relevant 20 year period was “by right” and not “as of right”. The applicant has therefore failed to make out a case for registration of Filwood Park as a new green

[43] I therefore recommend to the council as CRA that it should reject the application.

[44] The 2007 Regulations require the CRA to give written reasons for rejecting the application. I recommend that such reasons are stated to be “the reasons set out in the inspector’s reports of 24th August and 19th November 2011”.

Vivian Chapman QC

19th November 2011

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