**APPLICATION TO REGISTER LAND AT DREWS PARK, DEVIZES**
**AS A TOWN GREEN**
**UNDER THE COMMONS REGISTRATION ACT 1965**

**REPLY TO RESPONSE BY APPLICANTS TO REPRESENTATIONS**
**OF THE LANDOWNERS**

**JULY 2006**

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## A INTRODUCTION AND SUMMARY

This reply to the applicant's response reiterates the landowners' overall conclusions on the application and concludes that there is a need for a public inquiry to properly test the evidence put forward by both parties. No new evidence is put forward by the landowners. It is not thought necessary or appropriate to repeat once more the detail of the landowners' objections, nor to explore once again the evidence of the applicant. In Part C, we have replied to the issues raised by the applicant and also highlighted any omissions in the response which might be worthy of note.

## B CONCLUSIONS ON THE REPLY

1 The applicant's response offers nothing of any significance to challenge the landowners representations that the application must fail because:

a) the Land has not been used by a significant number of residents in the locality or at all. Since 1996 Mr John Piper, the United Kingdom land agent for Lilac Investments Ltd, has visited the Land several times a year and he has owned a dwelling in Drews Park since 2000, spending several weeks a year there. In all his comings and goings, Mr Piper has never seen anyone using the Land. The locality chosen by the applicant is a false locality – simply putting electoral wards together does not create a locality. Why would any resident living several miles away choose to visit a wholly unremarkable, overgrown (and small) piece of land when there are far more attractive and accessible areas of open land nearer to home?

b) there is good reason to doubt that all of the applicant's witnesses are referring to the Land the subject of the application, notwithstanding the maps attached to their statutory declarations. The descriptions of the Land, by referring to cricket pitch or playing fields create significant doubt, not least because these are words which could easily be applied to another parcel of land to the south-west of Bowes Court and shown in blue on the exhibit CN1 to the statutory declaration of Christopher Nicholson.

c) if the Land has been used at all by the public (which is denied), it has been sporadic and certainly not continuous for the 20 years prior to the application being made. The landowners have provided clear evidence that during redevelopment the Land was fenced off; that drainage works prevented access to most of the land for many months; and the orchard is so overgrown that access is indeed prevented.

d) the evidence of what witnesses have seen, as opposed to their own claimed use of the Land, is weak – prior to the closure of the hospital, it was a bustling "community" with patients, staff, visitors, tradesmen etc all present on site. But these were not residents of a locality within the meaning of the legislation – there were all on site in connection with their treatment or their employment. How can the witnesses be sure that these were local residents using the Land?

e) not all of the Land has been used for lawful sports and pastimes – taking apples from the orchard was hardly lawful, unless they had permission – and permission would defeat the claim "as of right".

f) there has been no use as of right – any use by residents not associated with or in connection with the hospital was by permission only until its closure. Any use since closure has taken place in the face of security measures – fencing, security guards – and more recently objections by the landowners, all of which operate to remove the "as of right" quality to any claimed use.

2 Naturally, both the applicant and the landowners prefer the evidence of their own witnesses over those of the other. There is nothing to be gained here from entering again into a detailed critique of the evidence – where this can be done on paper, it has already been included in the initial representations of the landowners. The nature of the evidence is such that it can probably only be properly tested at a public inquiry with evidence taken under oath. There is a divergence in the factual evidence of the parties such that only cross-examination and questions from the Inspector will be able to reveal whose evidence is to be preferred on the balance of probabilities.

## C REPLY TO RESPONSE

In this reply, for ease of cross-reference, we use the paragraph numbers of the response, which in turn refer to those of the landowners' original representations.

2.2 The landowners, Lilac Investments Ltd and Alan Brown, can only provide evidence that is within their knowledge, but that does not prevent them (or those acting for them) from giving opinions or expressing beliefs. The question of what evidential weight to give to such opinions and comments is a matter for the Council or the inspector at a public inquiry. No adverse comment should arise from failing to deal with any period of time during the 20-year period prior to the application being made. It is simply a question of whether the landowners know or have been able to contact people who may have some experience of the site history.

There is a difference between encouraging the patients out into the community and the community coming to the patients. What evidence has been put forward to support the assertion that the public were 'actively encouraged' to use the land? Were there open days or events? Were the public taken on a tour of the grounds? How was contact fostered between the patients and the local community? Mention is made of school nature activities, but these presumably took place with the permission of the hospital. Which schools were involved? Quite what there was to see on an area of grass/meadow and an orchard is unclear.

Whilst hospitals such as Roundway wanted to reduce the stigma attached to such establishments, it was hard to overcome such attitudes. In the local history book, "Down Pans Lane", P Steele ISBN 0953 926400, Chapter 18, the author talks about the relaxation of restrictions for certain patients and the kindness shown by the people of Devizes. No mention is made, however, of the same people feeling comfortable enough to use "that place down Pans Lane" for recreation.

2.3 The application is not about the access roads, the buildings or the site, but the Land the subject of the application. The applicant is describing a construction site with hoardings and security fencing. The landowners query therefore whether the Land itself, adjacent to such a site, would really be as attractive to local inhabitants as the applicant seeks to portray. There is clearly conflicting evidence on the history and use of the land and it seems that the only way this can be tested is by way of public inquiry.

2.5 Condition 35 to planning permission K/33069 granted in July 1997 is all about visual amenity and ensuring that the open appearance of the land remains to preserve the general visual amenity and character of the area. That is clear from the reasons supporting the condition. It does not create an area of public open space to which the public has any right of access. A planning condition cannot create rights over land – only a planning obligation can do so. There is nothing in the section 106 agreement which requires our client as owner to permit the public to enter the land as of right or otherwise. It is quite common to find such clauses in planning agreements, but there is nothing in this particular agreement. Is this not worthy of some thought? It would have been relatively straightforward for Kennet District Council as local planning authority to formalise arrangements for public access to the land if they believed that the land was such a community asset. Or they could have required the land to be kept as public open space. They did not.

The only reason for the Land being classed as "amenity" land relates to the visual amenity and the character of the area in planning terms. The designation should not, therefore, be regarded as some acknowledgement of the public use of or public rights over the land. In fact, the reason for condition 35 and the absence of any planning obligation securing public access may in fact lend greater weight to our client's argument that there was been little if any use of the Land by the public during the 1990's (and certainly in 1996/97) when the Land was part of a development site.

2.6 The evidence of another security guard was not thought necessary given the evidence of Martin Kehoe who, as managing director of MK1 Security, would be in a position to know the instructions given by the owners/developers of the land and the instructions given to the security guards themselves. MK1 is a small security firm with just a handful of employees. Martin Kehoe is also a security guard and was actively involved in providing security at the former hospital site and at times resided on site. He is therefore in a position to know what actions were taken to prevent use by the public during the period his firm was engaged.

We have not said that the land was "secure" between 1997 and 2000. As a development site, security was provided until it was no longer deemed necessary in 2000. The reference to "public access" would not include those involved in the development of the site, the land agents and the purchasers. We note that by the end of 1999, the applicant claims that 75 houses were sold and occupied. We have no evidence to dispute that claim, but it is a matter for the applicant to prove. Quite what the sale and occupation of dwellings brings to the question of public access is unclear.

The applicant has failed to deal with the evidence of Christopher Nicholson about the request of Wiltshire Police to use the Land for shooting practice.

2.7 It cannot reasonably be argued that the drainage works involved "a small strip" of the Land. The plan SB1 attached to Simon Bryant's statutory declaration clearly shows a significant part of the land was fenced off.

2.8 It would be helpful if the nature of the <u>recreational</u> activities which can be enjoyed in the overgrown orchard could be specified and supported by evidence. Historically, as the name suggests, the orchard provided apples for the hospital. It is not disputed that some members of the public will have taken some of the apples, but they can hardly have thought that they had the right to do so.

The orchard is so overgrown that public access for recreational purposes is impossible – brambles and nettles are above waist height and there are no paths through this undergrowth. The old trees have very low branches and these branches meet those of adjoining trees in many places.

**The Land**

3.1 The landowners maintain their doubts about whether, despite the plan attached to their statutory declarations, all the witnesses for the applicant are clear about the Land the subject of the application and therefore their use and knowledge of it. We believe this probably requires investigation at a public inquiry under oath. That there might be some confusion is perhaps not surprising – even those placing the public notices do not appear to have been clear as they were posted on land which was the old cricket pitch to the south of Bowes Court and on a footpath which runs to the east of Drews Park south to the nature reserve and does not connect with the Land at all.

**Use for Lawful Sports and Pastimes**

3.2 If Mr Piper visits the land for between 30 and 50 days a year and fails to observe use of the Land by the public, surely this provides an indication of the level and nature of use by the public? It matters not that Mr Piper does not have a direct view of the Land from his property. Simply going to and from Drews Park at various times in the day is sufficient to provide him with an understanding of the use of the Land by the public.

It is reiterated that part of the Land was an orchard which supplied apples to the hospital. It appears that the public did at times help themselves, but this could hardly be classed as a lawful sport or pastime.

**Use continuously for 20 years**

3.3 We wholly agree with the point that it is not necessary for all those giving evidence to have used the Land for 20 years. We also agree with the statement that the use, by different persons, must <u>continue</u> throughout the 20-year period. The burden of proof rests with the applicant. It is enough for the landowners to show on the balance of probability that the use, if any, was not continuous. Apart from their own personal knowledge of the use of the Land, the landowners have provided evidence which shows that a significant part of the land was inaccessible for a period of 7 to 10 months between 2003 and 2004 when drainage works were carried out. The applicant dismisses this as "a small strip", but it was rather more than that. To say that the fencing did not prevent access is a nonsense – the heras fencing was more than enough to prevent access to most of the Land to the north of the orchard – and noone

would have wanted to get past the fencing, because they would have encountered a large bund of soil arisings from the excavation. The applicant fails to address the use of the Land by Wiltshire Police for dog and gun training.

**Use as of right**

3.4 The point remains that any use of the Land was not "as of right" but with the permission (and perhaps from time to time encouragement) of the hospital management. In taking apples from the orchard on the Land, the public could not have believed that they had a right to do so. The fruit remained the property of the hospital and the public had no "right" to it.

Much is made by the applicant in their reply about the dates on which the original application was withdrawn and the revised submitted. With respect, it is the revised application which is under consideration. The landowners objected to the original application on 19 September 2005 - the deadline set by Wiltshire County Council, following notification of the application by letter dated 28th July 2005. The revised application was not submitted until the end of November 2005 (and received 29 November 2005) at which time the original application was withdrawn. It is therefore an indisputable fact that for the period of two months before the submission of the revised application – which is now the application for determination – the applicant (and indeed we presume the witnesses for the applicant) was aware that the landowners objected to any use of the Land by the public and for that two-month period, any use failed to have the quality "as of right".

More is made of the failure of the landowners to erect signs at any point prior to the submission of the revised application, but the original application was so defective that they did not see any real prospects of it succeeding. Neither were the landowners aware that a revised application was being prepared – Wiltshire County Council had simply notified the landowners that the original applicant had been given permission to submit additional evidence and it was that evidence which was awaited. The landowners did not expect a revised application and had no notice of it prior to submission. No weight should be attributed to this criticism of the landowners for failing to take steps that at that time did not appear to be necessary.

The landowners did seek to erect signs after the submission of the revised application, but these were torn down by persons unknown. The police were notified. It is therefore difficult to see in this climate how signs, likely to be torn down as later events now prove, could have prevented the claimed access by people so determined to override the landowners' rights.

Furthermore, the position with regard to signs erected after the date of the application but before registration has now changed, following the House of Lords decision in the Oxfordshire case. The landowners accept that and the signs erected by the landowners earlier this year, but since vandalised and removed, do not of themselves destroy the claim to use as of right.

We apologise that the reference to the evidence of Stuart Hislop was not clear – the ambiguity is in the phrase "no formal restrictions" on the use of the land by the public, implying that there were some informal rules or tolerance and the reply to question 3.5 in the user evidence form completed by Mr Hislop which referred to "no restrictions enforced".

### Use by a significant number of residents of a locality

3.5 The landowners continue to assert that the use of the Land could equally have been by the hospital residents, the staff, their visitors and families. People do use hospital grounds when they have a purpose to visit the hospital itself, but such use can hardly be regarded as use by local residents. It is use incidental to their business at the hospital. The applicants do not explain quite why an area within hospital grounds would prove a destination of choice for a significant proportion of a locality which stretches some distance to the north of Devizes when a) the Land is a mile from the centre of Devizes and in an area which has only recently become residential in character b) there are other areas of public open space readily and more conveniently accessible in the locality and c) the Land has no qualities of its own which would attract a person from some distance – its attractiveness is the open parkland effect it creates next to the Drews Park development.

The locality is a false one. It has been drawn to encompass those few witnesses who lived or live some distance from the application. Electoral wards are not a locality and are not recognised on the ground – they are not a cohesive entity. Devizes as a whole is a locality and the area of Devizes to the south of the Kennet and Avon Canal might also be a locality. The Drews Park/Green Lane area could be a new neighbourhood within a locality, but not one with a 20-year history. As it is, the locality put forward by the applicant excludes the part of the historic town centre of Devizes and extends some several miles to the north of the town.

### Statutory Declaration of Mr Nicholson

4.2 The offer to sell the Land did not progress to completion due to the various demands of the Association which Mr Nicholson felt unable to agree to. The Association attempted to impose and dictate terms which Mr Nicholson considered unacceptable. The applicant has not addressed the use of the Land by the Wiltshire Police for shooting practice and how that fits with recreational use by the public.

### Statutory Declaration of Joyce Ann Little

There is clear and direct conflict between the evidence of Ms Little and the evidence of Christopher Nicholson, Martin Brady and Martin Kehoe. This needs to be tested at a public inquiry so as to decide which evidence is to be preferred.