

Understanding the obligations and implications for open space land and development

24 April 2023

The case of R (on the application of Day) v Shropshire Council deals with the disposal of open space by local authorities, and a situation where parties can get tripped up, even unknowingly.

Section 123(2A) and (2B) of the Local Government Act 1972 (LGA 1972) outlines the disposal procedure requirements for open space land that is held by local authorities under a statutory trust. As part of the disposal procedure, a statutory notification is required whereby the relevant local authority must advertise its intention to dispose of open space land subject to a statutory trust in the local newspaper for two consecutive weeks. Any objections to the proposed disposal must be considered. If the local authority disposes of the land complying with the procedure, then the land is freed from any public trust. Where the notification requirement has not been followed, the land would not be freed from any public trust.

Shrewsbury Town Council sold open space land to a developer, CSE Development (Shropshire) Limited (CSE). At the time of the sale, neither party was aware that the land was subject to a statutory trust in favour of the public, for the purpose of public enjoyment, due to the passage of time since it had been used as such. The land had been acquired by the Council in the 1920s and had not been used as open space since before the Second World War. As a result, the sale proceeded without complying with the statutory notification procedure required for such disposals of open space.

Following completion of their purchase CSE then applied for and obtained planning permission to build houses on the land. A local resident of the area then brought judicial review proceedings challenging the grant of planning permission, arguing because the Council were uncompliant with the statutory requirements on the disposal of open space land and that the public rights over the land continued to bind the land CSE now owned.

Following a series of unsuccessful appeals at the High Court and Court of Appeal which considered the sale to have made the public rights unenforceable or the sale extinguishing the statutory trust, the Supreme Court unanimously allowed the appeal. The Supreme Court ruled a buyer who had acquired open space had acquired good title but was still subject to the statutory trusts imposed by section 10 of the Open Spaces Act 1906.

Section 123 LGA 1972 is evidently designed to ensure that members of the public should have the opportunity to learn about and object to a proposed sale of statutory trust open space land. The continuing existence of the statutory trust over the land is important particularly in planning applications. The Supreme Court quashed the planning application, but the land is still owned by CSE as an open space. This leaves CSE in something of an uncertain limbo and could have wider implications for anyone buying land from local authorities.

This case is a reminder to local authorities to take prudent steps to establish the status of land being sold and so enable compliance with the notification requirements for open space. Buyers might also be more wary going forward. It should be noted that in this case it was not obvious that the land being bought was open space but that did not prevent the notification requirements from applying. Buyers should make full enquiries as to the status of the land being acquired, including investigating the history of land.

Where does this end though? Will we find buyers making enquiries on any land purchase in case the land was historically owned by a local authority and might have been open space in the past, to check if the notification procedure was followed many years ago, as information that might not be available to the parties to the transaction if they are many steps removed from the original acquisition from the local authority? We will have to see how this plays out going forward.

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