The London Borough of Richmond upon Thames (Twickenham Riverside) Compulsory Purchase Order 2021

Application for a Certificate under section 19 of the Acquisition of Land Act 1981

CLOSING SUBMISSIONS
ON THE USE OF S. 19 ALA 1981
ON BEHALF OF THE TWICKENHAM RIVERSIDE TRUST

Introduction

1. These submissions amalgamate the legal submissions which the inquiry has already received with a summary of the relevant evidence and the application of that evidence to the law.

2. At the outset, it is essential to recognise that the s. 19 procedure and consideration of whether the CPO should be confirmed are entirely separate decisions and in no way dependent on each other. In other words, confirmation of the CPO is not dependant on the AA succeeding in arguing that certificates should be granted under s. 19(1)(a) and s. 19(1)(aa) of the ALA 1981, and vice versa. Similarly, the decisions on s. 19(1)(a) and s. 19(1)(aa) are also entirely independent of each other: one or other or both can succeed or fail.

3. The Trust's case is that the AA has failed to meet the statutory tests in s. 19(1)(a) and in s. 19(1)(aa) and thus neither certificate can be granted.

4. The consequences of the AA failing to meet the statutory tests in s. 19 simply means that, in order to deliver the scheme subject to the CPO (if the CPO is confirmed), the Order will need to go through the 'Special Parliamentary Procedure' (SPP) in respect of the open space[1]. The SPP is thus the default position whenever open space is

[1] Under the Statutory Orders (Special Procedure) Acts 1945 and 1965. In broad summary, this procedure requires that the order is laid before Parliament and there is then an

proposed to be compulsorily acquired. Section 19 simply provides a short-cut for the Secretary of State to certify that an AA can bypass that procedure.

Section 19(1)(a)

5. The statutory test may be broken down insofar as is relevant as follows:

   Insofar as a CPO authorises the purchase of any land forming part of an open space, the order shall be subject to SPP unless the Secretary of State is satisfied that there will be given in exchange for such land other land which is:

   (a) Not less in area; and
   (b) Equally advantageous to the persons entitled to rights over the land; and
   (c) Equally advantageous to the public; and
   (d) The exchange land will be vested in the persons in whom the land purchased was vested; and
   (e) The exchange land will be subject to the like rights, trusts and incidents as attach to the land purchased.

6. I will consider each element in turn.

Insofar as a CPO authorises the purchase of any land forming part of an open space

7. Section 19(1)(a) applies where the CPO authorises the purchase of any land forming part on open space. It is irrelevant whether the land is to be retained or lost as open space post-purchase: simply that it is being purchased as part of the CPO. Hence, the AA was originally (quite correctly) proposing to utilize s. 19(1)(a) for the whole of the open space to be purchased (including that part which is to be retained as open space). However, since they were unable to provide a sufficient amount of exchange land, they changed tack in September 2021, as is evidenced in CD1.09 and was confirmed by Mr Chadwick, and proposed using s. 19(1)(a) only in relation to the part

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opportunity for persons to petition against the order or seek amendments to it. The petitions will normally be considered by a joint committee of both Houses of Parliament which then reports whether or not the order should be approved, with or without amendments. If the joint committee recommends that the order should not be approved, or it recommends approval subject to amendments which the Minister does not accept, the order cannot take effect unless it is confirmed by an Act.

of the open space which is to be lost as open space to built development. Consideration of the use of s. 19(1)(aa) in relation to the remainder which is to be retained as open space is considered separately below.

Not less in area

8. This is clearly a matter of mathematical calculation and evidence. The land given in exchange cannot already be open space. It must be land to be newly created as open space.

9. The newly created exchange land open space must actually function as 'open space' (i.e. not as highway, as is accepted by the AA: see Chadwick PE at 10.15.6).

10. 'Open space' is defined, insofar as is relevant, in s. 19(4) as: "any land laid out as a public garden, or used for the purposes of public recreation". Thus, any land which is either laid out as a public garden (even if not in use for public recreation e.g. by virtue of being inaccessible due to planting) is open space, as is any land used for the purposes of public recreation which is not a 'garden' (e.g. areas of hardstanding used for recreation). 'Recreation' is an activity carried out specifically for enjoyment. It is not an activity such as walking from A to B along a path to get to a destination; it is not carrying out retail transactions such as at a market; it is not parking a car.

11. The Trust's case is that the AA – even post-September 2021 – has failed to provide equal or more exchange land than the land to be lost. In particular:

    (i) What the Trust has described as 'The Water Lane Retail Walkway', which is proposed as exchange land, is neither laid out as a public garden nor to be used for public recreation. The area, including its public realm planting and benches, is classic retail circulation space, typical of any shopping street. It is of course telling that it was never originally proposed as exchange land (quite correctly) and Mr Bannister did not design it as public open space or as any kind of replacement for the lost Diamond Jubilee Gardens. It does not function with the other parts of (properly classified) open space and is essentially a connection route from the town to the river. To classify it as being used for

public recreation i.e. for sports or pastimes is strained beyond reasonableness. No sports can effectively be played there (the idea of a tug of war is ludicrous and it is noteworthy that this is the only example the AA could give, and that was in the context of an event, not sport more generally). Whilst people can sit on benches, this does not – in the context of the surrounding environment – make it place for pastime. The benches would be interpreted simply as public realm for the surrounding retail. The proposed market stalls are unrealistic due to both location and capacity. Commercial seating for customers of the new retail outlets is a far more realistic prospect, as Mr Bannister said. In any event, market stalls are for shopping and do not meet the definition. 'Pay to play' seating is not part of public recreation.

This area measures 497.8 sqm. If this land is excluded from the proposed exchange land, this would reduce the total measurement of the exchange land to 1,317.20 sqm ie 18.2 sqm below the threshold (of 1,336 sqm) of exchange land required to satisfy the s19(1)(a) test. Thus, if the Inspector agrees with the Trust on this point alone, a certificate under s. 19(1)(a) cannot be granted.

(ii) The part of the Jubilee Gardens to the south of the site also cannot be used as exchange land as it is already 'open space' within the definition. Even its name makes clear this is already a 'garden' and the relevant area of land comprises a lansdscaped terraced area which has a sign on its wall describing it as the Jubilee Gardens. The AA contend that this area fails to meet the definition of open space because it is no longer maintained as open space and in their words is now 'scrubland'. They further argue that it cannot be enjoyed for the purpose of public recreation. They are wrong on both counts. The land (along with the rest of the Jubilee Gardens) was granted planning permission in 2004 to be used as a landscaped area forming part of the newly formed Jubilee Gardens. This is all evidenced on the AA's own planning portal (ref 03/1141/FUL) which shows the full planting plan for this area and the wider Jubilee Gardens. The area shares the same brickwork and railings as the remaining Jubilee Gardens (whose existence as open space is not in dispute) and until quite recently was maintained to the same standard. Only in recent

times has the AA decided to allow this area to grow more naturally (in keeping with many re-wilded areas in the Borough). And, of course, as Mr Chadwick said in his evidence, many parts of the Borough's open space are what he would term 'scrubland'. But that does not mean that they are not open space.

It would be hugely inequitable if the Authority were allowed to rely on its own lack of management and maintenance of this land to enable it to offer it back as exchange land. It would also set a concerning legal precedent. Imagine in the future in similar circumstances another authority struggling to provide a sufficient amount of exchange land when promoting a development which requires the acquisition of open space. Will it consider adopting a similar strategy to that used by the Borough of Richmond at Twickenham Riverside – i.e. by degrading existing open space to a sufficient extent that it can now be recycled as exchange land? That cannot be right and should not be condoned.

In cross examination, Mr Chadwick argued that the 2004 planning permission was only temporary and that accordingly this area can no longer be considered to be open space. Whilst it is true that the 2004 permission was only granted on a temporary basis (and was renewed on similar terms in 2009 and 2010 (expiring in 2012)) the Jubilee Gardens (and the play area, the café and another equivalent landscaped area to the one in question that all formed part of the original 2005 Jubilee Gardens but were later incorporated into the 2012 Diamond Jubilee Gardens) have continued to exist as public open space since then and now have an established planning use. This was acknowledged by the planning authority in its officer's report prior to the grant of planning permission for the Scheme in November 2021 (at para 8.6 on p55) when it confirmed that the areas originally consented by the 2004 permission have now gained lawful use through the passage of time. Accordingly this land is open space laid out as public garden within the meaning of s19(4) of ALA 1981. It also, as Mrs Holman confirmed, provides public recreation through the visual amenity that it provides both from the Diamond Jubilee Gardens and from Embankment level. For example, from both areas the mature tree is this area provides a pleasant aspect.

Whilst removing this area from the exchange land would not in and of itself take it below the 1,336 sqm threshold, once this area (of approximately 100sqm) is further deducted from the exchange land in conjunction with the Water Lane Retail Walkway, it measures 1,217.20 sqm – ie 118.2 sqm below the required threshold for exchange land, thus worsening the situation.

(iii) The Trust has also set out that the Wharf Lane Building Forecourt and embankment flowerbeds should have been classified as Lost Open Space. These meet the 'open space' definition in their current form and add just under 160 additional sqm to the area to be compensated for.

Equally advantageous

12. It is agreed that the date for assessing equality of advantage is the date of exchange but that regard may be had to committed improvements to the exchange land (i.e. those proposed within the scheme) (see Chadwick PE 10.43-10.46). However, whilst the long term prospects for the exchange land are relevant to the assessment, regard must be had to the time needed for their completion and the prospects of them being successfully completed within that time. This is ultimately a matter of judgement: see Greenwich LBC v. Secretary of State for the Environment [1993] Env LR 344.

13. In this case, the scheme will not come forward for some years and the Diamond Jubilee Gardens will be completely inaccessible and incapable of any use by the public during the period of construction. As Ms Holman said, the Gardens act as a *de facto* garden for those living in flats in Twickenham without their own private outdoor space (who are often from lower socio-economic groups and for whom the Gardens represent a safe and free space for them and their families to enjoy) and are also used by local businesses and other groups, such as the local nursery who use the gardens for 'pick up and drop off' and as a safe play space for very young children. There is no equivalent alternative for them to use within a reasonable distance during the construction period (of 2-3 years) and those impacts should weigh as disadvantages in the balance. It will also take many, many years for the proposed tree planting to

mature. Meanwhile, the existing mature 'green screen' which shields the Gardens from the rather unsightly rear of the King Street properties will be gone.

14. 'Equally' advantageous does not mean that the advantages must be the same or that the exchange land must have the same character and features as the order land. However, there must be equality of *advantage* i.e. the exchange land must be equally beneficial as 'open space' to the relevant persons (see below).

15. The 'compare and contrast' must be carried out *solely* in relation to the open space to be acquired and the open space to be provided in exchange. There is simply no 'broader context', as the AA argue, to consider in relation to whether a certificate can be granted (in particular they argue that regard should be had to the public benefits of the 'Future Functioning Open Space' which is open space that falls outside of the definition of 'open space' in s. 19: see e.g. para 48 of the AA's Opening Statement). I am not suggesting that the surrounding context of the lost open space and exchange land is ignored, as the AA tried to paint the Trust's case, referring to 'islands'. It is obviously important, when assessing equality of advantage, to consider whether the exchange land will function as well in its context as the land to be lost does at present. However, what is not right is to rely on general public benefits associated with the provision of other open space within the scheme which has nothing to do with the particular land to be lost and its proposed replacement. As is well explained in *Gadsden on Commons and Greens* (3rd edition, Sweet & Maxwell, 2020) at 12-04, p. 551: "In effect, while the confirmation of the CPO will have regard to the merits of the scheme as a whole (e.g. whether the public benefits arising from the proposed development outweigh the adverse impact on the owners and occupiers of land which will be compulsorily acquired), the Secretary of State's consideration under s. 19 will focus on the *merits of the exchange of land*" (emphasis added).

Equally advantageous to the persons entitled to rights over the land

16. The AA seemingly do not consider that the Trust is entitled to any right over the land to be acquired and therefore have excluded consideration of whether the exchange land would be equally advantageous to them. They have focussed their consideration solely on whether it would be equally advantageous to the public.

17. This approach is wrong. The Trust clearly is entitled to a right over the open space to be acquired. It has a long leasehold interest which is a property right enabling it to have exclusive possession of the open space, to control public access to the land, determine how it is used (e.g. what events are held), and how it is managed (in due course in accordance with the terms of that lease). It has no lesser right than, say, someone with the benefit of a right of way over the land, or a right of common, or a right to carry out lawful sports and past-times on the land. The fact that the CPO would extinguish that leasehold interest is neither here nor there. All such rights (e.g. easements, rights of common etc.) are capable of being extinguished by a CPO.

18. The advantages and disadvantages of the exchange land must therefore be viewed in the context of the advantages and disadvantages to the Trust itself as well as the public at large. Given that the Trust will not be offered any new similarly advantageous lease of the exchange land, the AA has failed to meet this test. Irrespective of this, whether or not the exchange land is equally advantageous to the Trust must be considered more generally as well. It is notable that one of the principal duties of the Trust under its lease and management obligations is to host and curate events on the open space throughout the year. As is set out further below, the configuration of the proposed open space, its proximity to highways, cyclists, pub users and the river, and its location partly on a retail walkway adjacent to the busy King Street and partly on embankment level within areas susceptible to flooding means that the Trust will be severely disadvantaged in its ability to run such events.

Equally advantageous to the public

19. The Secretary of State takes the view that 'the public' means mainly the section of the public who has benefitted from the land. This means, for example, that for land used for recreation by residents of a particular area, the exchange land would normally be expected to be equally accessible for those residents (see CPO guidance at para 199, p. 97). By analogy, where the existing land has been used by various sections of the public (such as children, teenagers, particular groups and societies) regard must be had as to whether the exchange land will be equally advantageous to those particular

groups (and not merely theoretical other groups of the public at large who might have an interest in carrying out recreation on the exchange land).

20. The primary consideration, therefore, is to identify who is using the part of the Diamond Jubilee Gardens to be lost at present and whether the exchange land will be equally advantageous to them. Lots of people use the gardens through the day / weeks / months of the year, as the timelapse footage showed. They use it as a homogenous whole and it is therefore difficult to break down the public into different parts of the Gardens, particularly since the part in respect of which the AA seeks a certificate under s. 19(1)(a) is an entirely artificial line on a plan (based on the future development proposals) and has nothing to do with the existing physical features on the ground. It is clear that the area is used extensively by children and their carers as it contains the whole of the play space. On the face of it, the exchange land has nothing for them, although a playground will be provided in the area to be retained as open space. Is this to be taken account as context or not? This is part of the legal difficulty the AA has created for itself by relying on s. 19(1)(a) only in respect of part of the open space to be compulsorily acquired rather than in respect of all of it, as it was originally proposing to do. On a strict interpretation of s. 19(1)(a), a narrow interpretation is correct: the test is simply whether the exchange land is equally advantageous to the land to be acquired for the public using the land to be lost. There is no consideration of other land nearby and whether there might be alternatives for them there.

21. However, if the Secretary of State disagrees and wishes to take what the AA styles a more general realistic approach in the round to this case, then it must still compare apples with apples. This means, if he wants to look more widely, he must look at all of the public who currently use the land to be acquired as a whole (including those parts subject to s. 19(1)(aa) as well as s. 19(1)(a)) and compare the future advantages of the scheme for them. In other words, the AA cannot chose to restrict consideration to the part of the land to be lost in assessing equality of advantage and yet, on the other side of the coin, compare it to *all* of the land (not just the exchange land) in making the judgement. That would not be fair.

22. Other sections of the public (other than children and their carers) use both the land to be lost and the Diamond Jubilee Gardens more generally. These include local groups such as the yoga and tai chi groups or individuals, young people playing football and rugby and other ball games, people socialising or relaxing, multi-generational users and picnickers, people attending events. As Ms Holman said, it is both a very active public and also a passive one. The different 'rooms' within the existing Gardens allow for a wide range of activities to take place concurrently by different sections of the public who do not interfere or come into conflict with each other.

23. In terms of whether the exchange land will be equally advantageous to the lost land *taking a broader, more general approach* as the AA advocates, there are a number of reasons why the post-scheme world will be worse than the existing. At present, the lost open space and Diamond Jubilee Gardens sit almost exclusively in the lowest risk flood zone, being raised above the embankment. This represents long-term assurance against the public's use of the land being degraded or compromised by the effect of climate change. In the context of the lease that expires in 2134, this is an important consideration for the Trust in the execution of its objects for its beneficiaries i.e. the public. It also means that, as matters currently stand, the Gardens can be used with predictability about flood risk, which is particularly important when planning events.

24. The existing land (including part of the lost open space) comprises an all-weather surface which is used extensively all year around for sitting on, for ball games and for various activities undertaken, for example, by local nurseries on a daily basis, year round, weather permitting. It does not get muddy and dries quickly after rain. It is easily maintainable (unlike the riverside lawned area of Richmond which has to be regularly re-seeded). The AA see it as a negative and prefer the idea of real grass. However, for the public who currently use the open space it is invaluable in terms of year-round use. Furthermore, the boundaries of the area mean that ball games can be relatively contained away from other users. There is no conflict with the highway making it a safe place to play both for adults and also for young children who can use the area e.g. to practice learning to ride a bike or to run around in a free way.

25. By contrast, the sloped terraced lawn proposed in the exchange land will get muddy in winter and contain several slopes impeding the ability to play certain sports. The lawn

is also, critically, right next to the adjoining highway with no barrier. It would simply be unsafe, as Ms Holman said, for young children to run after balls or the like there in the same way that they do in the Diamond Jubilee Gardens. There is simply no suitable space for ballgames at all within the new scheme. All of the recreational uses the AA envisages are very passive in comparison with the multi-functioning and often very active way in which the Gardens are currently enjoyed.

26. The whole of the existing Gardens is safe in terms of traffic. The public are enclosed and in a raised area. They are above what existing vehicular movements go on down on the embankment and largely unaware of them. The road to the rear is well screened by trees. By contrast, large parts of the exchange land are termed by the AA 'circulation space'. Water Lane is going to be a 2 way highway. There will also be a significant service area to the south with frequent turning manoeuvres being carried out by commercial and private vehicles immediately infront of the lawned areas and adjacent to the proposed events space. The public will be, for the large part, 'on a level' with vehicular and cycle movements and there is the real potential for conflict, whereas there is none at present.

27. Events at present take place throughout the Diamond Jubilee Gardens, to include in the lost open space e.g. facepainting tents which have been set up several times on the all-weather lawn, with children 'queuing' while simultaneously being able to play in the adjacent playground. The all-weather lawn that is part of the lost open space also hosted the 'dragon dance' performance that featured in the wider January 2023 Lunar New Year event hosted on the Gardens. Looking beyond the lost open space in isolation, events can take place easily throughout, because the Gardens are a large, single level, flat, accessible area that does not flood. Different events can work with the space in different ways. There is no need for a single designated 'events space' (and the hardstanding does not constitute such, contrary to the AA's labelling) because all of the open space can and does function as the events space. By contrast, the exchange land and the post-scheme world more generally, has to have a specific 'events space' because the areas will not be able to be used in an equally flexible way. And that 'events space' itself may not even be usable for events for parts of the year. In winter, it has a high risk of flooding (or at least there will such a risk of flooding that no one will invest in planning an event there), and given climate change issues

there is also a risk of 'flash flooding' in the summer too. Mr Bannister acknowledges in the PE that he cannot account for climate change (PE 10.13). It will also be compromised by its proximity to the proposed public house and outdoor drinking area (creating noise) and significantly overshadowed in early summer evenings making it an unappealing place. The other spaces proposed for events e.g. the Water Lane Retail Walkway are completely unrealistic.

28. Furthermore, the events space is not the only area to be overshadowed as a result of the scheme. As the timelapse footage taken in February 2019 and 2022 showed, on a sunny winter's day as things currently stand, the sun lights up the space from dawn to dusk and the amenity value of the space, particularly in winter months, is greatly enhanced. The Wharf Lane Building will cast much of the space into shadow (including the exchange land, not just the Lost Open Space). Mr Bannister accepted that his daylight and sunlight studies were not accurate and he had assessed winter without acknowledging that the deciduous trees will not be in leaf. However, whatever the accuracy of the assessments, it is clear that the post-scheme position will be worse in terms of sunshine than the existing. Shade is only a good thing where there is choice of sun or shade. Ubiquitous shade is not a good thing in and of itself, especially in cold winters (e.g. by 1pm in mid-December all of the petanque courts and most of the proposed play area will be in shadow, precluding any pleasant use of them after that time). At present, there is ample choice in the gardens of where to sit if an individual wishes to seek shade (under trees e.g. around the petanque courts). But an individual can equally seek out the sun. The exchange land does not provide equal or greater advantages. The Water Lane Retail Walkway will also be in significant shade for much of the time due to the surrounding buildings.

29. The existing Diamond Jubilee Gardens are a cohesive space which is multi-functioning. By contrast, the scheme's alleged replacement open space is disparate (in particular, the Water Lane Retail Walkway cannot sensibly be seen as a coherent part of the Gardens: it is rather an extension of the High Street). It is also inflexible with dictated zones for different activities. Much of it is also far further away from the riverside that the existing Gardens, thus diminishing its amenity value. There will be significant tree loss e.g. the current screening of the unsightly rear of King Street, and new trees will take many years to establish. There will also be loss of existing views

of the river as a result of the scheme. Overall, as the Trust have set out, the scheme does not prioritise 'green over grey' and is, as such, less advantageous to the public in terms of being laid out as a public garden.

30. The Water Lane Retail Walkway is particularly poor and would not have any real amenity value to function properly as open space, even if that were the intention (and contrary to the Trust's submissions above). It sits in the shadow of a new 4 storey building and adjacent to the four lanes of highway in the busy King Street and faces two lanes of highway in Water Lane, together with its loading bays and motorcycle parking areas. It is bounded by retail units and is incomparable to the open space being acquired.

31. In sum, even adopting the AA's position that one looks generally at a compare and contrast between the existing and the proposed in the s. 19 context, it is clear that the public will be worse off in terms of their use of the open space for recreation and enjoyment of land laid out as a public garden as a result of the scheme. Even if the AA has provided a sufficient amount of exchange land, it still fails to meet, as a matter of judgement, the test for granting a certificate under s. 19(1)(a).

The exchange land will be vested in the persons in whom the land purchased was vested and the exchange land will be subject to the like rights, trusts and incidents as attach to the land purchased

32. This is the corollary (or compensation for) the fact that the CPO may acquire all legal interests in the open space and, under s. 19(3)(b), the CPO may provide for discharging the open space purchased from all rights, trusts and incidents to which it was previously subject. In other words, the open space which is acquired is obtained by the AA as a blank canvas. However, in exchange, the AA must not just provide equally advantageous new open space generally, but must provide that new open space specifically to those who had ownership of the lost open space and subject to the same rights, trusts and incidents that the lost open space was subject to.

33. Section 19(3)(a)(1) provides that a CPO may provide for vesting land given in exchange in the persons, and subject to the rights, trusts and incidents. As is again

well set out in *Gadsden on Commons and Greens* (at 12-04, p. 552): "The CPO may provide for the vesting of exchange land in certain persons and the CPO should provide that it will be subject to the same rights as the land being compulsorily acquired." This type of exchange is a fundamental concept of the modern compulsory purchase system and, indeed, almost identical words appeared in s. 11 of the Acquisition of Land (Authorisation Procedure) Act 1946.

34. The AA's position is that it meets this requirement in relation to the exchange land because it is itself the freehold owner of the land to be acquired and it will be the new freehold owner of the exchange land. However, what of the Trust's long leasehold interest? The AA's position is that it is irrelevant: it is extinguished in relation to the land to be acquired so the AA obtains its 'blank canvas', but the Trust gets nothing *in relation to the exchange land (other than financial compensation)*.

35. That cannot be right as a matter of principle. There can be no dispute that, had the position been that the AA was compulsorily acquiring the open space from the Trust as freehold owner, it would be *bound* to vest the exchange land in the Trust, in order for a s. 19 certificate to be granted. Similarly, if the Trust were a beneficiary under a deed of trust or had a right of access or a right to lay a water pipe (or anything like that) or even simply a right to carry out lawful sports and pastimes on the land, the AA would be *bound* to afford them the same right in relation to the exchange land. The word 'like' in this context means 'identical'. So, how can the AA extinguish the Trust's lease (without going through normal landlord and tenant procedures), but not be bound to offer them an equivalent new lease of the exchange land?

36. There is no direct legal authority in relation to leasehold interests and s. 19. However, a leasehold interest is the temporary and *exclusive right* to possess, occupy and use land or property for a definitive period of time pursuant to a lease (see Street v. Mountford [1985] UKHL 4). It amounts to a 'legal right'. Even if that is not correct, a lease would fall within the very broad definition of an 'incident'. An 'incident' is defined in the Oxford English Dictionary as: "A privilege, burden, or right attaching to an office, estate, or other holding". At the very least, a lease is a privilege that the Trust enjoys in relation to the existing open space, and that privilege must therefore be replicated in relation to the exchange land, if the s. 19 certificate procedure is to be

used. Otherwise, the AA must go through SPP. It cannot bypass that procedure where it proposes to take away on the one hand but not replace on the other.

37. The AA seeks to draw a distinction between what it calls 'proprietary interests' (which includes freehold and leasehold interests) and 'rights'. It is not disputed that a lease is a proprietary interest in land. However, no such distinction is made within the terms of s. 19(1)(a). A Court in interpreting the words of a statute will always start with the literal meaning of the words used. As I have said, these statutory words are nothing new and have been around in various guises since 1947. The phrase 'rights, trusts and incidents' is obviously very broad. A lease is a legal right. It is also a legal privilege which is enjoyed by the tenant. Furthermore, even applying a 'mischief' rule, the Trust's interpretation means that the injustice of vesting the exchange land in the freeholder but giving the leaseholder nothing other than financial compensation is avoided.

Section 19(1)(aa)

38. The statutory test may be broken down insofar as is relevant as follows:

> Insofar as a CPO authorises the purchase of any land forming part of open space, the order shall be subject to SPP unless the Secretary of State is satisfied that:
>
> *(a)* The land is being purchased in order to improve its management (or securing its preservation).

39. S. 19(1)(aa) may not be utilized merely when the land to be acquired will remain as open space. It is far more prescribed than that. A s. 19 certificate may only be granted where the open space is being purchased in order to improve its management. As set out above, s. 19(1)(a) can be used whenever open space is being compulsorily acquired, provided exchange land is provided. It makes no difference whether the land to be acquired is to be developed or will remain as open space. Thus, s. 19(1)(a) *could have* been used in relation to the 'Retained Open Space'. That is an appropriate power, as was in fact originally proposed by the AA in its June 2021 Draft Statement of Reasons. S. 19(1)(aa), by contrast, is *only* to be used where the *purpose* of the acquisition is to improve the open space's management (or secure its preservation).

The AA has misunderstood this and has presented a picture of the purpose of s. 19(1)(aa) as being to enable land to be acquired without providing exchange land where the acquired land would remain as open space (see para 53 of its Opening Statement). That picture was also painted to Members when the use of the s. 19(1)(aa) power was first alighted on in September 2021.[2] That is, however, not the position.

The Purpose or Reason of Acquisition being to Improvement the Open Space's Management

40. The words "in order to" show that the direct purpose or reason of acquisition must be to improve management. As the CPO guidance states: "In such circumstances, ie where *the reason* for making the order is to … improve management of land to which section 19 applies, a certificate may be given in the terms of s. 19(1)(aa)" (para 242, p. 110). In other words, the whole purpose or reason, or at the very least, the primary purpose or reason of the acquisition, must be to improve the management of the open space. That is simply not the case here.

41. The AA is quite candid as to what the actual purpose of the acquisition of the retained open space is. Mr Chadwick states: "As a matter of fact the Scheme and its benefits cannot be delivered without acquiring part of the Existing Designated Open Space which would be Retained Open Space within the Scheme – the reconfiguration of the Future Designated Open Space requires the retention and reconfiguration of part of the Existing Designated Open Space. The acquisition is needed to facilitate the whole site solution and is an integral part of the compelling need for the Modified Order" (PE at 10.54). Similarly, the AA states in its Opening Statement: "The acquisition is essential in order to reconfigure the open space on the Scheme Land and deliver the significant improvements in the quantity and quality of open space" (para 53). It is clear that the open space is being acquired *in order to reconfigure the open space to deliver the whole scheme*. That purpose has nothing to do with improving

[2] The Report to the Finance, Policy and Resources Committee of 20 September 2021 defined 'Category 3' land as "existing open space which is being compulsory acquired, and will remain as open space once the scheme has been developed. Section 19(1)(aa) will apply to this land" (para 3.15). Reference to management only appears in quoting from the statute without distinguishing from securing its preservation (see para 3.18) and in the very final conclusion in para 3.19 but only consequent to stating that the "Category 3 land is required to implement the improvements".

management. Suggestions to the contrary in its Statement of Reasons and elsewhere in evidence are artificial and Mr Chadwick, in fairness to him, did not resile in oral evidence from the position that the purpose of the compulsory acquisition is to "deliver the ambitious scheme".

42. It is of course telling that the AA only alighted upon the s. 19(1)(aa) power at a late stage and shortly before making the CPO and was originally proposing to use s. 19(1)(a) in relation to the Retained Open Space as well as the Lost Open Space. It was only when it realised that it could not provide sufficient exchange land (as it was originally seeking to use existing open space as part of the exchange land) that it sought to rely on s. 19(1)(aa). There was no change in the scheme or any other circumstances. The only change, as Mr Chadwick confirmed, was that they were relying on s. 19(1)(aa) "on legal advice". That 'change of tack', following some blue sky thinking on the part of the AA's lawyers, evidentially corroborates the position that the purpose of acquisition has nothing in reality to do with improving management. The Trust's case is that there are no 'management benefits' to the AA as a result of the scheme at all. But even if there are, any 'management benefits' afforded to the AA (who already manage the open space across the development site, to include the Retained Open Space) as a result of it being part of a wider scheme are purely ancillary or a by-product of the primary purpose of the acquisition which is to reconfigure the space to the AA's design. The subordinate relationship of the alleged management benefits is apparent from the Report to the Finance, Policy and Resources Committee in September 2021 when the s. 19(1)(aa) power was first introduced. The only reference to 'management' (other than in quoting the Act) is as follows: "The Category 3 land is required to implement the improvements, and ***thus*** improve its management as part of the overall scheme" (para 3.19, CD 1.09).

43. The AA cannot point to any precedent for this kind of use of s. 19(1)(aa).[3] The CPO guidance gives 'typical examples': where a local authority wishes to acquire part or

[3] The Trust has provided copies of two decisions where s. 19(1)(aa) has been used: LB Tower Hamlets (Blackwall Reach) CPO 2013 (in that case the relevant open space had not been properly maintained) and LB Tower Hamlets (Millennium Green East) CPO 2019 (in that case the landowner of the relevant open space had not been able to adhere to its land

all of a privately owned common in order to improve its management or the land might be neglected or unsightly, perhaps because the owner is unknown, and the authority may wish to provide, or to enable provision of, proper facilities (para 242, p. 110). Of course, these are examples only, but they give a flavour of the kind of situation envisaged. It is noteworthy also that s. 19(1)(aa) also deals with the situation where compulsory purchase is required in order to secure the preservation of the open space. Improving management and securing preservation feature together in the same subsection, suggesting that they share a common legislative aim. In both cases, the legislation enables compulsory purchase of open space without going through SPP in order to deal with some kind of existing 'problem' which needs remedying. Mr Chadwick confirmed that he is not criticising the existing management of the open space by the Authority and neither was it part of his case to suggest the land needed acquiring because the Trust would not be able to manage it properly in the future. There is thus no reason why this land needs to be acquired to improve its management. And hence, to suggest that is why it is being acquired is simply a fiction to seek to get around the lack of sufficient exchange land.

44. Furthermore, the AA's interpretation opens dangerous floodgates. It would legitimise the acquisition of any perfectly well-managed privately owned open space by an AA without providing exchange land or without going through SPP for any development scheme which wanted or needed new open space. The AA could argue in any case that, by bringing the land within its comprehensive scheme, its management would somehow be improved. That cannot have been the intention of Parliament. Had the legislators intended that the statute be used in the way the AA seeks to use it, then they would have expressly provided to certification to allow for acquisition of open space to deliver a comprehensive scheme or to improve the open space, or words to that effect. If the position is ambiguous, then the Secretary of State should revert to the default SPP procedure, rather than issuing a certificate.

45. The Inspector has asked for guidance as to what is meant by 'management'. I am not proposing any unduly restrictive definition or confusing 'management' with

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covenants to ensure that a Green was suitably managed and maintained for public use). These follow exactly the same sentiment as in the CPO guidance.

'maintenance'. Management means simply the process by which the manager, i.e. in this case the AA, deals with or controls the land. But simply delivering a new scheme or reconfiguring a space does not automatically mean that the way the AA will be able to deal with or control that space will be improved or, more importantly, that that is *the reason* why they are purchasing the land. The fact that the boundary of the s. 19(1)(aa) land is entirely scheme driven rather than having anything to do with what is on the Gardens at present (and indeed the s. 19(1)(a) area is indistinguishable in terms of existing management) indicates that this is nothing to do with improvement of the management of the Diamond Jubilee Gardens. In fact, there is nothing within s. 19(1)(aa) to stop an AA building on open space certified under s. 19(1)(aa) so long as that is in order to improve its management. So, if the compulsory purchase of the Diamond Jubilee Gardens really is about improving its management, one must question why the AA has not relied on s. 19(1)(aa) in relation to the Lost Open Space as well?

46. The importance of a strict interpretation of the scope of s. 19(1)(aa) is apparent because no exchange land is provided to the owner. The owner is thus severely disadvantaged and is taken out of the equation entirely, which was perhaps considered justified where there was some element of 'risk' or 'peril' in relation to the existing position forcing the AA to step in and taken over management. Obviously, that mischief which the provisions were designed to address cannot apply here because the AA is acquiring land which it already owns and already manages. This adds to the importance of ensuring that, for the section to be satisfied, the reason for acquisition truly is to improve the management of the open space and not in reality simply to deliver a new scheme.

47. The Trust's case is that, far from improving management, the scheme will actually make management of the open space more difficult for the AA. Management will be more resource intensive and have to be more 'active' because of the potential for so many more conflicts between users of the space. By way of example, the planning permission conditions envisage a conflict between users of the outdoor drinking/dining area on the riverside frontage of the Wharf Lane Building and residents of the building and users of the open space more generally. As a consequence, the outdoor drinking/dining area will have to be closed at 9pm. So,

where will these (probably disgruntled) people go? Mr Chadwick accepted that they may well go to other areas of the Gardens. That cannot be a desirable situation and one which may be difficult to manage. There is also the potential for conflict between new residents and users of the Gardens e.g. during events.

48. The AA has raised points about the existing space being badly lit leading to antisocial behaviour and lacking in passive surveillance[4]. Irrespective of whether or not there is a problem at all, such issues could be easily resolved e.g. by repairing the 40 out of 47 existing lights with the AA has indicated to the Trust that there is not the necessary allocated budget to fix or by building on the surrounding derelict areas to create overlooking, if that were considered so important. The AA does not need to compulsorily purchase the Gardens to improve these issues.

49. Overall, to be frank, s. 19(1)(aa) was alighted upon by lawyers because the AA hit a serious problem in September 2021 when it realised, having been informed by the Trust following the Trust having received its initial Open Space Replacement Land report based on the June 2021 Order Land map that accompanied the AA's Draft Statement of Reasons, that it could not provide a sufficient amount of exchange land to make up for the compulsory acquisition of the Trust's demise within the wider Diamond Jubilee Gardens. Any suggestions about the scheme improving management have only been raised subsequently to justify that position. They are artificial. To allow bypassing SPP for the compulsory acquisition of open space simply to deliver a scheme (even if the AA can argue that the scheme will somehow allow them to manage the space better) is outwith the statutory purpose and is an abuse of the certification regime.

Impact of Acquisition on the Existing Rights, Trusts and Incidents Enjoyed over the Open Space

50. Since the AA is only supposed to be acquiring the open space under s. 19(1)(aa) to improve its management, and not for other purposes such as developing a scheme, the

[4] However, it is noteworthy that it provides no data or reports or other evidence in support of this.

land does not come to them as a 'blank canvas' (as with s. 19(1)(a)). In s. 19(1)(aa) cases, the CPO may *not* discharge the land purchased from all rights, trusts and incidents to which it was previously subject (see s. 19(3)(b)). Thus, anyone with a right to use the land or anyone who has any kind of legal privilege in relation to it, will continue to enjoy that post-acquisition. As above, the Trust's lease is a legal right to exclusive possession of the open space for a term. It cannot be discharged under the CPO without exchange land being provided subject to equivalent rights; or else the AA must go through SPP.

51. If an Authority wishes to remove a tenant to develop its own open space land (or, indeed, even to improve its management) it must act in accordance with the terms of its lease and landlord and tenant law. It cannot use s. 19(1)(aa) in effect to terminate a tenancy and take back the open space from its tenant in the name of improving its management. It is an unconscionable abuse of the power in s. 19(1)(aa) which was not designed to remove tenants from local authority owned land wherever a local authority considers it might want its land back (even if it wants it back to manage it better than its tenant). Such an interpretation would create an imbalance between the position of private landlords of open spaces and landlords who have powers of compulsory purchase powers and cannot have been intended.

Conclusion

52. The Trust's legal submissions are not misconceived, as the AA has suggested (para 55 of its Opening Statement). The simple position is this:

    (i) If the AA wishes to compulsorily acquire this open space and rely on the s. 19 certification procedure, it should have:
        (a) Used s. 19(1)(a) in its entirely (and placed no reliance on s. 19(1)(aa));
        (b) Provided exchange land which was greater in size than the total area being acquired (and not simply greater than the area to be lost as open space (which in itself is disputed));
        (c) Provided exchange land which was equally advantageous not only to the public but also to its tenant, the Trust;

(d) Vested that exchange land in itself but also with the offer of an equivalent lease to the Trust (and with any other equivalent rights, trusts and incidents).

(ii) If it was unable or unwilling to do all of the above (a) to (d), then it should have accepted that the CPO needs to go through SPP.

53. By contrast, the AA has:

(a) Sought to rely on s. 19(1)(aa) in relation to the Retained Open Space in the mistaken belief that that is an appropriate power in any case where land will be retained as open space, post-acquisition. Retention of the land as open space is not enough. S. 19(1)(aa) can *only* be relied on where the *real reason* for the compulsory purchase is to improve the management of the open space. Belated attempts by the AA to 'fit a square peg into a round hole' in relation to arguments about 'improving management' fail. The obvious primary reason why the land is being required is to (erroneously) seek to remove the Trust's leasehold interest so that the AA can reconfigure the space to their own design.

(b) Failed to recognise that, in any event, a CPO which is subject to certification under s. 19(1)(aa) is incapable of extinguishing the Trust's legal right / privilege of its long lease of the open space with exclusive possession etc.

(c) Abused its position by using s. 19(1)(aa) in effect to terminate a tenancy in circumstances which would not be open to a landlord without powers of compulsory acquisition.

(d) Failed to consider the equality of advantage of the exchange land versus the Lost Open Space in relation to the Trust who have an existing right over the Lost Open Space.

(e) Failed to identify the public who currently enjoy the existing open space and failed to provide a sufficient amount of equally advantageous exchange land to the public.

(f) In any event, failed to provide exchange land which is equally advantageous to the public.

(g) Failed to provide the exchange land subject to identical rights, trusts and incidents as the Lost Open Space, in particular by failing to provide it subject to the option to enter into an equivalent lease to the Trust. Whilst there have been some negotiations concerning a potential new lease to the Trust, the Trust has never been offered a lease of the whole of the exchange land and never been offered a lease on identical terms to the existing. Consequently, these negotiations are irrelevant to the question of whether the s. 19 tests have been met. They are merely of general interest as to commercial discussions that have gone on outside of the process.

(h) Created an unfair situation whereby, if the Trust had been a freehold owner of the Lost Open Space, it would have been bound to have the exchange land vested in it (and, equally, if it had been e.g. the beneficiary of a trust in relation to the land, it would still get the same benefit in relation to the exchange land), but because it is a long leasehold owner, it gets nothing other than financial compensation.

54. This is unchartered territory and there is no precedent available for what the AA is trying to do. The tests in s. 19(1)(a) and s. 19(1)(aa) have nothing to do with the merits of the scheme as a whole and the merits of confirming the CPO. Irrespective of the position with regard to that (which is subject to separate argument by the Trust), the Secretary of State should not grant the certificates sought in these circumstances. To do so would be wrong in law, and would set a dangerous precedent.

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