Neutral Citation Number: [2020] EWCA Civ 154

Case No: C1/2019/1250

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION (ADMINISTRATIVE COURT)
Mr Justice Kerr
[2019]EWHC 1129 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

- -

Between:

KIRKLEES METROPOLITAN BOROUGH COUNCIL	**Appellant**
R (ADAMSON)	
- and -	
R (ADAMSON)	**Respondent**
- and -	
NATIONAL ALLOTMENT SOCIETY	**Intervener**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Interested Party**

- -
- -

Mr Christopher Knight (instructed by **Kirklees Council Legal Services**) for the **Appellant**
Mr Jonathan Adamson appeared in person (represented by **FHF Consulting**) for the **Respondent**
The Intervener and Interested Party were not represented at this hearing

Hearing dates: 05 February 2020

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Approved Judgment

Lord Justice Lewison:

Introduction

1. The issue on this appeal is exactly as described by Kerr J in the court below:

> "whether the … council was obliged to obtain the consent of the minister before deciding to dispose of certain land in its area currently in use as allotments by the claimant, Mr Adamson, and others. That depends on whether the council has "appropriated" that land for use as allotments within section 8 of the Allotments Act 1925, as amended. If it has, it may not dispose of the land without the consent of the minister."

2. The judge decided that the land had been appropriated for that purpose in 1935 when, as part of a town planning scheme, the council decided to zone the land for allotments. His judgment is at [2019] EWHC 1129 (Admin).

3. We had the benefit of helpful background submissions from the National Allotments Society. Although they were not directly relevant to the issue arising on the appeal, they rightly stressed the importance to local communities of allotments; and their contribution to the general health, mental well-being and social cohesion of communities. There is no doubt that the provision of allotments is in the public interest.

The land in issue

4. The land in issue is at Cemetery Road, Birkby, Huddersfield and is owned by Kirklees Council. It is used in part as allotments by Mr Adamson and others. The council wants to use the land to develop new facilities for a primary school; and, in particular for use as a playing field and car parking. In order to do that it needs to appropriate the land for use for educational purposes. The council has a general power of appropriation of land under section 122 (1) of the Local Government Act 1972. That power is exercisable where the land is "no longer required for the purpose for which it is held immediately before the appropriation". But in the case of land which the authority has "purchased or appropriated for use as allotments" the council may not use the land for any other purpose without the consent of the Minister of Agriculture, Fisheries and Food: Allotments Act 1925 s 8. The Minister is now the Secretary of State for Housing, Communities and Local Government. It is common ground that the Minister's consent has not been obtained; although the council has recently applied for such consent.

5. The requirement under section 8 of the 1925 Act to obtain the Minister's consent does not apply to all land which is in fact used as allotments. It applies only to land which has been "purchased or appropriated" for that purpose: *Snelling v Burstow Parish Council* [2013] EWCA Civ 1411, [2014] 1 WLR 2388.

6. The council took its decision to appropriate the land for educational purposes on 21 August 2018. The question, then, is whether it had previously purchased or appropriated the land for use as allotments. If it had, then the decision to appropriate

the land for educational purposes was invalid, because the Minister's consent had not been obtained.

7. The council (or, to be accurate, its predecessor) acquired the land in 1920 under powers conferred by a private Act of Parliament. At the time the land consisted of what was known as the Ramsden estate. It is not disputed that the council did not *purchase* the land for use as allotments. But it has been used as allotments since at least 1935. So the question can be more narrowly formulated: did the council *appropriate* the land for use as allotments at some time before 21 August 2018?

The statutory framework

8. The relevant statutory powers in the period under consideration were as follows. Section 25 of the Small Holdings and Allotments Act 1908 provided:

> "The Council of a borough, urban district, or parish may, for the purpose of providing allotments, by agreement purchase or take on lease land, whether situate within or without their borough, district, or parish.."

9. Section 22 of the Land Settlement (Facilities) Act 1919 provided:

> "(1) A council of a borough, urban district, or parish may, in a case where no power of appropriation is otherwise provided, with the consent of the Board of Agriculture and Fisheries and the Local Government Board, and subject to such conditions as to the repayment of any loan obtained for the purpose of the acquisition of land or otherwise as the last-mentioned Board may impose,—
>
> (a) appropriate for the purpose of allotments any land held by the council for other purposes of the council; or
>
> (b) appropriate for other purposes of the council land acquired by the council for allotments"

10. Section 22 remained in that form until 1965.

11. The statute authorising the initial purchase of the Ramsden estate was a private Act of Parliament called the Huddersfield Corporation (Lands) Act 1920. Section 4 (4) of that Act provided that following the acquisition:

> "the same or any part or parts thereof may be appropriated to any undertaking or to any of their powers or duties and when so appropriated a transfer of the outstanding loan in respect thereof shall be effected to the proper account in the books of the Corporation"

12. This was subject to the proviso:

> "…that nothing in this sub-section shall authorise the Corporation-

> …
>
> (b) To appropriate such lands to any purposes other than purposes for which and subject to the conditions under which they are for the time being authorised to acquire and use lands"

13. Section 5 of the 1920 Act gave the council wide powers to retain, manage and dispose of the land "for such purpose and upon such terms and conditions in all respects as they shall think fit."

14. Section 163 of the Local Government Act 1933 provided:

> "(1) Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land."

15. The judge traced the evolving legislative history of allotments and town planning. There were a number of highlights on this journey. Section 23 of the 1908 Act imposed a duty on certain borough, urban district and parish councils, if they formed the view that there was a demand for allotments, to provide a sufficient number to let to persons in their area. In 1922 section 14 of the Allotments Act 1922 imposed on the council a statutory duty to establish an allotments committee. In 1925 Parliament passed two relevant Acts. The first was the Town Planning Act 1925. This gave local authorities power to make a town planning scheme (s. 2); and imposed a duty to make such a scheme on councils of every borough or urban district with a population of more than 20,000 (s. 3). The second was the Allotments Act 1925. Section 3 of that Act provided:

> "(1) Every local authority or joint committee of local authorities preparing a town-planning scheme in pursuance of the Town Planning Act, 1925, shall, in preparing such scheme, consider what provision ought to be included therein for the reservation of land for allotments.
>
> …..
>
> (3) The council of every borough or urban district, any part of whose district is within the area of a town-planning scheme, shall take into consideration from time to time, but at least once in every year, the question whether any and, if so, what lands within the area of the scheme are needed for allotments, whether reserved for the purpose or not, and ought to be acquired under and in accordance with the provisions of the Allotments Acts, 1908 to 1922, as amended by this Act"

16. The Town Planning Act 1925 was repealed by the Town and Country Planning Act 1932. Section 1 of that Act provided, so far as relevant:

> "A scheme may be made under this Act with respect to any land, whether there are or are not buildings thereon, with the general object of controlling the development of the land comprised in the area to which the scheme applies…"

17. It is common ground that, by virtue of section 54 (1) (c) of the 1932 Act, the reference in section 3 of the Allotments Act 1925 to the Town Planning Act 1925 was to be construed as a reference to the corresponding provision in the 1932 Act.

The facts

18. As noted, the land was acquired in 1920. Evidence of contemporaneous Ordnance Survey maps suggests that it was not used as allotments at that time. Nor was it recorded as being in use as allotments on the 1922 or 1932 Ordnance Survey maps. It was, however, the subject of an aerial photograph taken in 1949 which did show it in use for allotments. It is accepted by the council that its use as allotments began at some time in the mid-1930s.

19. In 1923 the council resolved to constitute its Agricultural Committee as an allotments committee in accordance with its duty under the 1922 Act. Under the terms of the resolution the Agricultural Committee had delegated to it all the council's powers and duties under the Allotment Acts (except for the raising of a rate). In 1929 the council's Agricultural (Special) Sub-Committee met to consider the subject of "permanent allotments". The brief minute makes reference to the "town planning scheme". The judge inferred that such a scheme had been made under the 1925 Act; and that inference is not challenged. The judge recorded that the minute of the meeting stated that the sub-committee:

> "marked out certain lands for submission to the Highways Committee as permanent allotments"

20. There is nothing in that minute to suggest that that land included the land at Cemetery Road. The Agricultural Committee met on 7 December 1931. At that meeting it resolved that the allotments known as Barcroft Road and Clayton Fields be made "permanent allotments".

21. As noted, the Town Planning Act 1925 Act was repealed and replaced by the Town and Country Planning Act 1932. It authorised the making of a scheme with the general object of controlling the development of land. The judge found, based on war-time minutes, that the council adopted the Huddersfield Town Planning Scheme in 1935 (although the scheme itself has been lost). On 9 December 1935 the council's Agricultural Committee met. It was presented with particulars of allotments showing both allotments under the control of the committee and also allotments which were not under the committee's control. It inspected the Town Planning Maps for the Huddersfield Town Planning Scheme. It then passed a resolution which, so far as material, read:

> "RESOLVED:- That the land zoned on the maps for use as allotments be approved, subject to the undermentioned additions viz:-

> …
>
> (2) That the land comprising about 8 acres sloping down from Highfields to St John's Church be zoned for allotments.
>
> …
>
> and that this Committee respectfully request the Highways Committee to amend the maps accordingly."

22. The land referred to in paragraph (2) of that resolution is the allotment land at Cemetery Road. In the judge's view this was the key meeting. He said:

> "[110] And when, on 9 December 1935, the Agricultural Committee considered "land for allotments" in the context of the 1935 Scheme, the committee having inspected the maps and found that three parcels of allotment land under the committee's control were, in its opinion, wrongly "zoned" for other uses as housing or building land, the committee resolved that those lands on the maps be "re-zoned for allotments". In the case of what is now the Cemetery Road site, the committee found no fault with the map but simply resolved that it be "zoned for allotments".
>
> [111] That seems to me a very plain case of a local authority undertaking what Dove J many years later called a "conscious deliberative process". I reject Mr Knight's suggestion that the committee was merely indicating informal use of the land as allotments and merely requesting the map makers to indicate on the maps where land was that happened to be in use, informally, as allotment land. That suggestion is consistent neither with the statutory context, nor with the purpose of the 1935 Scheme, nor with the use of the verb "zone"."

23. He added:

> "[115] But here, the corporation did not merely itself use the lands "zoned" or "re-zoned" as allotment land. It took a considered and conscious decision, recorded in committee minutes, in the performance of statutory functions: that specific land should be "zoned" or "re-zoned" for use as allotments by tenants. That "zoning" exercise was begun by other parts of the corporation when they produced the maps in the evolution of the 1935 Scheme.
>
> [116] The Agricultural Committee's contribution was to identify four additional sites appropriated for allotment use. I find this to be a very plain case of statutory appropriation of that land for use as allotments. I think the use of the verb "zone" was its current use in town planning parlance: "[t]o divide (a city, land, etc.) into areas subject to particular

> planning restrictions; *to designate (a specific area) for use* or development *in this manner* " (my italics).
>
> [117] It is then not surprising to find evidence of subsequent continued use of that land, under tenancy agreements, as allotments, into the 1950s and 1960s. Requesting amendment of the maps to accord with the Agricultural Committee's decision was not a mere informal expression of a wish; it was a formal request to ensure that the 1935 Scheme properly reflected the Agricultural Committee's decision."

24. The judge referred to documents from the war years; but none of them referred to the allotments at Cemetery Road. I do not consider that they take the case any further. He went on to consider a number of other documents produced by the council during the post-war years. Documents from the late 1950s (some 20 years after the "zoning" for the purposes of the Huddersfield Town Planning Scheme) contained a request from a sub-committee of the Allotments Sub-Committee resolving to recommend the Estates and Property Management Committee to agree to the "appropriation" of a number of sites for allotment purposes, including the Cemetery Road site. Over the next few years the question of appropriation of the Cemetery Road site came up from time to time. The most significant of these was a minute of the meeting of the Allotments Sub-committee on 15 November 1957. The minute of that meeting records that the Estate and Property Management Committee were to be asked to agree to the appropriation of a number of sites, all of which were "at present used for allotments". The sites included the allotments at Barcroft Road and Clayton Fields, even though the Agricultural Committee had resolved on 7 December 1931 that those sites be made "permanent allotments". They also included two sites that had been "zoned" for allotments in 1935. The judge regarded this as showing that the post-war committee members did not have a full understanding of what had happened before the war.

25. In September 1958 the Estates and Property Management Committee agreed to the appropriation of some sites for allotment purposes, including some that had been declared to be "permanent allotments" in 1931, and some that had been the subject of "zoning" in 1935. But in relation to Cemetery Road it resolved that "no action be taken at the present time". Where land was appropriated for allotment purposes the minutes recorded that the land:

> "… be appropriated under section 4 (4) of the Huddersfield (Corporation) Lands Act 1920 to allotment purposes and that the District Valuer be requested to submit his valuations in order that the necessary adjustments made be made in the accounts."

26. No further relevant decision in relation to Cemetery Road was brought to the judge's attention. But subsequent documents produced by the council do record sites that had been appropriated for allotment purposes. They did not include Cemetery Road. In addition there are many minutes of the council's allotments sub-committee which record decisions to discuss the appropriation of the land at Cemetery Road as allotments; but no decision actually doing so.

27. The judge dealt with the later documents as follows:

> "[122] It is quite clear to me that the minutes and discussion documents dating from the 1950s and later, are not in point. They overlook the earlier statutory appropriations of allotment land that occurred in the 1930s. Mr Knight correctly conceded in his skeleton argument that the council "cannot absolutely rule out the possibility of a historical appropriation which was not properly recorded or for which records have been lost".
>
> [123] The discussions in the 1950s must have taken place without those taking part in them having access to the documents from 1929-1943 which I have seen; otherwise those documents would surely have been mentioned in those minutes and discussions. Gallows Fields, Reinwood, Barcroft Road and Clayton Fields and the Cemetery Road site did not need to be re-addressed in the 1950s, though they were.
>
> [124] The table of sites dating from about March 1959 clearly indicates that the "regrouping" and decision making exercise that took place during the 1950s was undertaken without knowledge of and access to the pre-war and wartime documents which the diligence of the parties has enabled me to see for the purposes of this case.
>
> [125] If there were no statutory appropriations prior to the 1950s, as that document indicates, a power on the statute book since 1919 went unexercised for over 40 years. That seems to me wholly unrealistic."

The council's case

28. Mr Knight, for the council, stressed the formality of an appropriation in local government law. It requires, he said, a process by which land held by a local authority for one purpose is considered and formally decided by way of a conscious deliberative process to be held for a different purpose. That conscious deliberative process must identify and address the substance of the power. The fact that the site has in fact been used as allotments (and has been so used for at least 80 years) is not enough. The best evidence is to be found, not in the minute of 9 December 1935 on which the judge relied, but on the subsequent documents from the 1950s and 1960s, all of which showed that no formal decision to appropriate had been taken. If the land had already been appropriated for allotment purposes, that would surely have been recorded somewhere in the council's records. It was much more likely that twenty years after the supposed appropriation there would have been a better "corporate memory" than it was possible to reconstruct at the hearing before the judge. Moreover, the minute of 9 December 1935 was not itself a decision. It was merely a request to the Highways Committee to amend the maps for the purposes of the Huddersfield Town Planning Scheme. There is no evidence that the Highways Committee acceded to that request; or that the maps were in fact changed.

Mr Adamson's position

29. Mr Adamson does not object in principle to the provision of new facilities for the school. But he considers that the council's proposal is unnecessarily disruptive to the allotment holders. He considers that the facilities can be better provided elsewhere on the site; and that if the Secretary of State were to consider the matter, that is what he would decide.

30. As far as this appeal is concerned, he supports the decision of the judge for the reasons that he gave.

Appropriation

31. A local authority is a creature of statute. It can do only what it is authorised to do by statute, either expressly or by necessary implication. It is for that reason that where a local authority acquire land for one purpose, it cannot use the land for a different purpose unless authorised to do so by statute: *Attorney-General v Hanwell Urban District Council* [1900] 2 Ch. 377. The mechanism by which a local authority, having acquired land for one purpose, is enabled to use for a different purpose is appropriation.

32. If the power to appropriate is conditional, then any conditions must be satisfied before the power can be exercised. The current general power in section 122 of the Local Government Act 1972 (replacing section 163 of the Local Government Act 1933) is conditional on the land no longer being required for the purpose for which it is held before the appropriation. The decision-maker as to whether the land is no longer required for a particular purpose is the local authority itself, although its decision would be open to challenge on public law grounds: *Dowty Boulton Paul Ltd v Wolverhampton Corporation (No 2)* [1976] 1 Ch 13. Other conditions, such as obtaining the consent of the Minister where applicable, must also be satisfied before the power can be validly exercised. Indeed, it is precisely because the council has not obtained the consent of the Secretary of State to the appropriation decision of 21 August 2018 that Mr Adamson is able to mount this challenge.

33. At the time of the acquisition, the council was empowered to hold land for the purposes of allotments by section 25 of the 1908 Act. It follows that the proviso to section 4 (4) of the 1920 private Act did not preclude the council from appropriating the land for use as allotments. That power of appropriation was not conditional upon anything else. In that respect it was quite unlike any of the powers of appropriation conferred by public general Acts. The power of appropriation under section 22 of the 1919 Act was conditional on the consent of Board of Agriculture and Fisheries and the Local Government Board. In addition the power under the 1919 Act only applied "where no power of appropriation is otherwise provided". Since the council had a general power of appropriation in relation to the Ramsden estate under the 1920 private Act, that power does not appear to have been exercisable over the land at Cemetery Road. The council also had a power of appropriation under section 163 of the 1933 Act; but that power was also conditional first, on the council being satisfied that the land was no longer required for the purpose for which it was held; and second, on obtaining the consent of the Minister.

34. There is no general definition of what is required to constitute an appropriation, either in statute or in the case law. It is a word that takes its meaning from its context. Its meaning in the law of theft clearly differs from its meaning in the law of local government. The relevant dictionary definition of the word "appropriate" in the present context is:

> "To devote, set apart, or assign to a special purpose or use."

35. The meaning of the word has caused some difficulty over the years. In *R v Leeds City Council* (1997) 73 P & CR 70 the question was whether land had been appropriated for planning purposes. McCullough J said:

> "I do not find the concept of "appropriation" easy to grasp, since land which is "appropriated" is already in the council's ownership. More must surely be involved than a mere decision that land held for one purpose will henceforth be held for another. Otherwise, for example, if an authority decided to build houses on a small part of land it was holding for future light industrial development, the change of purpose would involve, indeed require, an "appropriation", and, as a consequence of section 237, could materially effect the rights of any interested third parties. It seems to me that, at least in a case where third parties are known to have rights, an authority cannot properly embark on such a course unless it has good reason to believe that interference with such rights is necessary. I regard it as significant that a single provision in the 1990 Act, section 226, empowers an authority both to acquire land compulsorily and to "appropriate" its own land. I see "appropriation", therefore, as the equivalent of compulsory purchase of a council's own land, and the same degree of "requirement" or "necessity" should apply in each case."

36. There was, however, no doubt that the council in that case had purported to appropriate the land for planning purposes; and public law challenges to that appropriation failed.

37. In *R (Malpass) v Durham County Council* [2012] EWHC 1934 the question was whether the council held land as open space, either under the Public Health Act 1875 or under the Open Spaces Act 1908. The title deeds under which the council acquired the land in 1936 did not state the purpose for which it had been acquired. The council relied on a subsequent deed dated 1964. That deed recited that "the Council have been requested to put on record the purposes for which the lands are to be used and the Council have decided so to do by this Deed". It then purported to declare that the land was "held by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds". Consistently with the deed the land was used for that purpose for many years. In the course of a non-statutory inquiry the inspector decided that the deed amounted to an appropriation. But HHJ Kaye QC disagreed.

38. HHJ Kaye accepted the submission that:

> "It was insufficient merely to state that the land was "in practice" held for a purpose which was not inconsistent with the new, informally appropriated, purpose. To be a valid appropriation to the stated use, the local authority must have concluded that the land subject to the appropriation was "not required" for its existing purposes (see Local Government Act 1933, ss 163, 165). No such conclusion is recorded in the 1964 Deed or elsewhere nor does the 1964 Deed declare it was appropriating the land to a different purpose. Moreover, to take effect as an appropriation from one use to another the formal statutory mechanisms of the Local Government Act 1933 needed to be complied with and ministerial approval (at that time) was needed. It was apparent none of the formalities had been observed. All this is unsurprising given the inspector was relying on and treating the 1964 Deed as an informal process."

39. The relevant power to appropriate at the time was that in section 163 of the 1933 Act. That power was subject to two conditions: first that the council had decided that the land was no longer required for the purpose for which it was held (whatever that was); and second that the Minister's consent to the appropriation had been obtained. In my judgment HHJ Kaye's decision was based on the lack of evidence that either of those two conditions had been satisfied.

40. In *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889 the land in question had been acquired by the Washington Development Corporation under the New Towns Act 1965 as part of its development of Washington New Town. Under the New Towns Act, new town development corporations were given very wide powers. Normal planning controls were dispensed with, and the minister would give planning permission by a special development order for the corporation's proposals submitted and approved under section 6(1) of the Act. In the corporation's new town plan 1973, which would have been approved under section 6(1), the land was identified as "parkland/open space/playing field". It was laid out and grassed over by the corporation in 1974. From 1974 the corporation and its successors mowed the grass each summer. In 1977 benches were installed around three sides of the land, and a non-turf cricket wicket was laid down in 1979. Commenting on that case in *R (Barkas) v North Yorkshire CC* [2012] EWCA Civ 1373, [2013] 1 WLR 1521 Sullivan LJ said at [36]:

> "I confess that I find it difficult to understand why the statutory approval of the corporation's new town plan 1973 by the minister, which had the effect of granting planning permission for the development of the land as "parkland/open space/playing field", when coupled with the subsequent laying out and grassing over of the land, was not sufficient to amount to an "appropriation" of the land as recreational open space in the sense in which Lord Walker used that word."

41. In the Supreme Court ([2014] UKSC 31, [2015] A.C. 195) their Lordships agreed with Sullivan LJ. At [46] Lord Neuberger used the word "appropriated" "in the sense of allocated or designated", which corresponds with its dictionary meaning. Lord

Carnwath quoted the above passage from the judgment of Sullivan LJ and said at [85]:

> "I agree. If "appropriation" in that sense was required, then the new town plan provided it."

42. It is true, however, that the kind of "appropriation" under consideration was not formal appropriation from one use to another under statutory powers. Nevertheless, it is a useful indication of the importance of a planning designation coupled with subsequent use.

43. In *R (Goodman) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWHC 2576 (Admin), [2015] EWHC 2576 (Admin) the council had acquired land for open space purposes. It subsequently appropriated the land for industrial and employment purposes. But the land continued to be used for recreation. On an application to register the land as a town or village green, the inspector held that it could be inferred from the council's conduct that it had re-appropriated the land to open space use, alternatively, it had impliedly granted permission for lawful sports and pastimes to be carried out on the land. Dove J quashed that decision. The first main point that he made at [16] was this:

> "First, section 122(1) contains no prescribed formula for the procedure to be adopted when a council appropriates land from one purpose to another. It does however need the council to determine that it no longer requires the land for the purpose for which it was holding it up to the point of that appropriation."

44. Because under section 163 of the 1933 Act (and now section 122 of the Local Government Act 1972) the local authority must *decide* whether or not the land is required for the purpose for which it is held, it must carry out what has been described as a conscious deliberative process. Thus the suggestion that an appropriation can be inferred from use alone is problematic. As Dove J put it in *Goodman* [22]:

> "The difficulty with that suggestion is the need for the authority, when exercising the power under section 122 of the 1972 Act, to be satisfied that the land "is no longer required" for the purpose for which it is held. That requires some conscious deliberative process so as to ensure that the statutory powers under which the land is held is clear and appropriation from one use to another cannot, in my view, be simply inferred from how the council manages or treats the land."

45. Both parties to this appeal were content to adopt this as a correct statement of the law applicable to section 122. As I have said, in addition to a deliberative process, any necessary conditions must be complied with. It is to be noted, however, that when Dove J said that "that" required a conscious deliberative process, what he was specifically referring to was the authority's satisfaction that the land was no longer required for the purpose for which it was held.

46. In *Ramsgate Town Council v Thanet District Council* [2018] EWHC 3042 (Ch) the question was whether land that had once been held for allotment purposes had been

appropriated to different uses. Ms Sarah Worthington QC, sitting as a judge of the Chancery Division, summarised the facts. She described Thanet's case as follows:

> "[Thanet's] case is simply that in 2006 (a) the Land had not been used for allotment purposes for some time, (b) [Thanet] had decided it was surplus to requirements, (c) [Thanet] had formally sought the Secretary of State's consent to sale on the basis that it was surplus, and (d) the Secretary of State accepted that the Land was surplus and gave consent. Thereafter, the Land was not held as allotment land, but was simply held pending sale. Alternatively, if the Secretary of State's consent was not sufficient to change the basis on which the Land was held, then the status changed when the [Thanet] formally decided to sell, in 2008, and thus appropriated the land to be held for sale, as it was permitted to do given the 2006 Consent."

47. The deputy judge found for Thanet. The first way in which she put her conclusion was that once the Secretary of State had given consent to the disposal of the land, it was no longer held for allotment purposes (even though it continued to be used for that purpose). The second way in which she expressed her conclusion was by pointing out that Thanet had obtained the consent of the Secretary of State as required by section 8 of the Allotments Act 1925. She continued at [23]:

> "Since there are no statutory formalities required for an effective appropriation, such an appropriation ought sensibly to be regarded as having been made when [Thanet] put on formal record its intention to behave henceforth in a particular way, and seeks the necessary consents to enable it to do so legitimately. Once those consents have been received, the appropriation of the Land to another use is effective unless the imposed conditions make other provision, e.g. for continued use as allotment land for a further period before the consent to another use is effective. There were no such conditions imposed in this case, so the appropriation to another use occurred, on this analysis, on 26 September 2006 when the Secretary of State gave consent to alternative use of the Land."

48. The formal record was to be found in Thanet's resolution to dispose of the land.

49. In *R (Day) v Shropshire Council* [2019] EWHC 3539 (Admin) the question was whether the council held land as public open space. Its predecessor had acquired the land for that purpose in 1926, and had used it as such. During the war, part of the land had been temporarily appropriated for allotment purposes under powers contained in Defence Regulations. By the late 1970s the land had fallen into disuse. The council operated a tree nursery on that part of the land for some 30 years, but it closed in the late 1990s. The council proposed to grant planning permission for house building on the land. An officer's report presented to the relevant committee expressed the view that the land was not held as public open space; and that it was separate from the remainder of the recreation ground. Based on that report the council granted planning permission for housing. Lang J quashed the decision. Part of her reasoning was based

on the inadequate inquiries that had been made before concluding that the land was not held a public open space. She found that the land had been originally acquired as public open space. She then went on to consider whether there had been any change in that state of affairs. The question she posed was whether the land had been appropriated for uses other than public recreation. Having set out the statutory powers of appropriation, and some of the case law, she said:

> "[97] If Shropshire Council had considered the application of these legal principles to the evidence in this case, it would have been very likely to conclude that, aside from the temporary war time allocation allotments, there had been no formal appropriation of any part of the Greenfields Recreation Ground to a purpose other than recreational use. There was no evidence of a resolution by the Borough Council or Town Council that a portion of the Recreation Ground was no longer required for recreational purposes and should be appropriated for another use. Nor was there any evidence that the formal procedures for appropriation had been followed. There was no evidence of ministerial approval for appropriation under the previous legislation, nor formal notices advertising proposed appropriation and consideration of objections under the LGA 1972, as amended.
>
> [98] In my view, it is very likely that the Borough Council was authorised to appropriate a portion of the recreation ground for use as temporary allotments during World War II. Mr Goodman's research revealed that the Defence (General) Regulations 1939 conferred on local authorities a temporary power to allocate its land for use as allotments, including land forming part of a park or open space, as part of the "Dig for Victory" project. The temporary power was revoked by section 5(1) of the Emergency Laws (Miscellaneous Provisions) Act 1953. Section 5(1) also made provision for local authorities to let land for the purpose of allotment gardens, "notwithstanding anything in any Act …. or any trust or covenant or restriction affecting the land". However, there was no evidence that the Borough Council ever resolved to exercise its powers under the 1953 Act to continue to let the land as allotments on a more permanent basis."

50. There was, therefore, no evidence either of a formal decision by the council; nor evidence of satisfaction of any of the conditions required to be fulfilled before a lawful appropriation could be made. The mere fact that the land had been used for other purposes (including as allotments and as a tree nursery) was not enough.

Approach to evidence

51. Plainly, the best way of showing that such appropriation has taken place is by recording it in a formal resolution or minute of the meeting of the local authority that took the decision in question. But I do not read the case law as requiring any particular evidence to be produced to the court in order for it to be able to conclude

that the necessary deliberative process has taken place; or that any required conditions have been satisfied. It may well be that the mere fact that land has been used for a particular purpose is insufficient evidence from which to infer that such a process has taken place; but that is a question of evidence rather than law. In evaluating the evidence, a court must also make allowances for the fact that, where the event alleged to have given rise to the appropriation took place many decades ago, many relevant documents may have been destroyed, lost or mislaid.

52. *R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs* [2019] UKSC 58, [2020] 2 WLR 1 was a case about the registration of a town or village green. The main issue in the case was the extent of the principle of "statutory incompatibility". But a subsidiary issue was whether Lancashire CC held the land in question for educational purposes. In order to show that, the council had to show that the land had been acquired or appropriated for those purposes. The inspector was not satisfied that the council had demonstrated that it was. Various conveyances (from the 1940s and 1960s) were produced. She pointed out that:

> "…. no council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown."

53. When the matter came before Ouseley J ([2016] EWHC 1238 (Admin)) he said that he would have arrived at a different conclusion; but considered that that did not entitle him to interfere with the inspector's evaluation of the evidence. He said:

> "I can see no real reason not to conclude, on that basis, that the acquisition was for educational purposes. No other statutory purpose for the acquisition was put forward; there was no suggestion that the parcels were acquired for public open space. *I would have inferred that there were resolutions in existence authorising the acquisitions for that contemporaneously evidenced intended purpose, which simply had not been found at this considerable distance in time.* It would be highly improbable for the lands to have been purchased without resolutions approving it. *The presumption of regularity would warrant the assumption that there had been resolutions to that effect*, and that the purpose resolved upon would have been the one endorsed on the conveyances. This is reinforced by the evidence in DL para 116, which shows the property, after acquisition, *to be managed by or on behalf of the Education Committee. The actual use made of some of the land is of limited value in relation to the basis of its acquisition or continued holding*." (Emphasis added)

54. This court supported the judge's conclusion that he could not interfere with the inspector's evaluation. The Supreme Court, however, disagreed. In their joint judgment Lords Carnwath and Sales said at [32]:

> "In our view, Ouseley J's approach to the natural inferences to be drawn from the material before the inspector was correct, but he was wrong to be deflected by deference to the inspector's fact-finding role. The main difference between them was in the weight given by the inspector to the absence of specific resolutions, from which she found it "not possible to be sure" that the land had been acquired and held for educational purposes. On its face the language appears to raise the threshold of proof above the ordinary civil test to which she had properly referred earlier in the decision. But even discounting that point, she was wrong in our view to place such emphasis on the lack of such resolutions. Her task was to take the evidence before her as it stood, and determine, on the balance of probabilities, for what purpose the land was held. On that approach, Ouseley J's own assessment was in our view impeccable."

55. In my judgment, the Supreme Court must be taken to have agreed with Ouseley J:

i) That it is permissible, in appropriate circumstances, to infer the existence of resolutions that have been lost;

ii) That there is evidential significance in the identity of the council's committee that manages the land; and

iii) That there is evidential significance (albeit limited) in how the land was in fact used.

56. So far as compliance with conditions is concerned in our case, there was no direct evidence that the consent of either the Board of Agriculture and Fisheries and the Local Government Board had been obtained in order to satisfy the conditions attached to the power of appropriation in the 1919 Act. Nor was there any direct evidence that the consent of the Minister had been obtained in order to satisfy the condition attached to the power of appropriation in the 1933 Act.

57. In appropriate circumstances the court may even infer that ministerial consent has been obtained but is now lost. In *Re Edis' Declaration of Trust* [1972] 1 WLR 1135 the Artists' Rifles took a building lease of land in 1888, on which they constructed a drill hall financed at least in part by public subscription. They acquired the freehold 10 years later. The drill hall remained in use for some 70 years, and further public money was spent on its maintenance. The power of a volunteer corps to acquire land was conferred by section 1 of the Military Lands Act 1892. But that power was a power to acquire land "with the consent of the Secretary of State". There was no direct evidence that the consent of the Secretary of State had been obtained. Goulding J held that the requirement of prior consent was a mandatory requirement and that the lack of consent could not be waived or ratified. But he went on to say:

> "Ought I to conclude that the consent was in fact obtained? There is no direct evidence that it was. However, the Act of 1892 did not require the consent to be expressed in any particular form. The intention of the declaration of trust that

> both the 21-year lease and the freehold reversion should belong to the corps is, in my judgment clear, and to effectuate such intention it was on my view of the law necessary for consent to be obtained. Moreover the premises were for nearly 70 years after 1898 used and enjoyed as property of the corps, and public money was expended upon their maintenance in that character. Of themselves those circumstances entitle the court in my judgment to infer that consent was duly given by the Secretary of State at the proper time."

Appellate review of findings of fact

58. There are many cases which stress the importance of an appeal court not interfering with a trial judge's findings of fact. But in the main those cases were cases in which the trial judge had heard oral evidence. How does the matter stand where the first instance judge has based his decision entirely on the documents? *DB v Chief Constable of Police of Northern Ireland* [2017] UKSC 7, [2017] NI 301 was an application for judicial review concerning the powers of the police service to prevent a parade from taking place in Belfast. At first instance Treacy J allowed the application but his decision was reversed by the Court of Appeal of Northern Ireland. On further appeal to the Supreme Court Lord Kerr referred to a number of well-known cases about appellate interference with first instance findings of fact. He continued at [80]:

> "The statements in all of these cases and, of course, in *McGraddie* itself were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

59. On the other hand, in the *Lancashire* case Lords Carnwath and Sales drew attention to the fact that the finding of fact under attack was based "not so much on evaluation of oral evidence, but largely on the inferences to be drawn from legal or official documents of varying degrees of formality." In their view that should not have commanded the deference that Ouseley J gave to it; although their ultimate conclusion

was an orthodox application of the *Edwards v Bairstow* test (i.e. that there was *no* evidence to support the finding).

60. This is not, I think, a case like *DB* where, although the case was decided without oral evidence, an appeal court should defer to the findings at first instance. It is more akin to the *Lancashire* case where the result turns on inferences to be drawn from (and in the present case the interpretation of and the weight to be given to) a single document.

Discussion

61. The private Act of 1920 was passed at a time when there was no generally applicable power of appropriation available to local authorities. On the contrary, the general position was that a local authority had no power to change the use of land. One purpose of the 1920 Act was to free Huddersfield from that constraint. That freedom, however, was applicable only to the Ramsden estate. It did not apply more generally to land held by Huddersfield. It is no surprise, then, to find that the power of appropriation is drawn in extremely wide terms. In order to exercise the power of appropriation under the 1920 Act there is no requirement for prior consent; nor any requirement that the council be satisfied of anything in particular. The only limitation on the power of appropriation is that the purpose for which the land was appropriated was a purpose for which the council was entitled to hold land. The 1908 Act clearly gave the council such power. It is true that the 1920 Act required a transfer of the loan to be made in the council's books. But that requirement was not a pre-condition of the power to appropriate. On the contrary, the transfer was to be made "when [the land was] so appropriated;" that is to say *after* the appropriation had taken place.

62. The meeting of 9 December 1935 was explicitly concerned with the Huddersfield Town Planning Scheme. The sub-committee's input into that scheme was limited to land to be used for allotments. It is a reasonable inference that at the meeting of 9 December 1935 the committee was performing the statutory duty imposed by section 3; and thus deciding what land should be "reserved" for allotments. Mr Knight accepted that this was so. What had been delegated to the committee were all the powers of the council under the Allotments Acts (except the power to levy a rate). Accordingly, any decision of the committee under the Allotments Acts can, for this purpose, be taken to be a decision of the council.

63. We do not have a minute of the Highways Committee responding to the request to alter the map. Nor do we have the map itself. I would not regard the final part of the minute "respectfully request[ing]" the Highways Committee to alter the map as being anything more than bureaucratic politeness. But given that the Agricultural sub-committee had the statutory responsibility for reserving sufficient land for allotments, what reason could the Highways Committee have had for refusing the request? At this remove of time (over 80 years) I would be prepared to infer that the Highways Committee acceded to the request and altered the map. Mr Knight accepted, as I understood it, that this was a permissible inference.

64. Did the minute of the meeting of 9 December 1935 amount to an appropriation? The judge regarded it as "a very plain case of statutory appropriation of that land for use as allotments." He did not, however, specifically identify the power which had been exercised. Nor did he say that he inferred that the consent of the Minister must have been obtained and subsequently lost. So, in my judgment, if his decision was based on

inferring an appropriation under the 1919 Act, a crucial step in the reasoning is missing. There is no Respondent's Notice asking this court to draw the requisite inference. In addition, as I have said, the power of appropriation under the 1919 Act applies only where there is no other power, which is not the case here.

65. It follows that the only real candidate is the private Act of 1920.

66. The best justification for the judge's decision seems to me to be this. The council's statutory function under section 3 of the Allotments Act 1925 in preparing a town planning scheme was to consider what provision ought to be made in it for the *reservation* of land for allotments. The word "reservation" is an important one. It imports more than merely allowing land to be temporarily used as allotments. If land has been "reserved" for a particular purpose it could be said to have been devoted, set apart, or assigned to that purpose. That would coincide with the dictionary definition of "appropriate". The resolution is itself a record of a conscious deliberative decision having been made; and the altered map, taken in conjunction with the resolution, would have "put on formal record [the council's] intention to behave henceforth in a particular way." That is enough to amount to an appropriation.

67. Mr Knight submitted, however, that the minute (whether or not taken in conjunction with an altered map) was not enough to amount to an appropriation. The alteration of the map was something that took place in the course of formulating a scheme under the Town Planning Act 1932. Such a scheme was no more than an exercise in planning or development control which applied to all land within the scheme, whether under the council's control or not. It follows that a scheme of this sort cannot allocate land for a particular purpose; still less can it change the lawful use of land. He also pointed out that:

    i) The committee did not use the language of "appropriation" and did not refer to any power of appropriation. Indeed, as noted, the judge did not identify the power which the committee had exercised. If the minute of 9 December 1935 is to be regarded as an appropriation, it amounted to an appropriation by accident. That is the antithesis of a conscious decision. As Dove J said in *Goodman*, one of the purposes of appropriation is to achieve clarity about the statutory power under which land is held. Clarity is not achieved by an accidental appropriation.

    ii) The purpose of a town planning scheme is not to appropriate land owned by the council from one use to another. It has nothing to do with land ownership.

    iii) All that the committee was doing was to identify land in actual use as allotments. Some of that land was under the control of the committee; and some was not. The minute and the town plan cannot be supposed to have different effects on different parcels of land, depending purely on the happenstance of ownership.

    iv) The subsequent proceedings of both the Agricultural Committee and the Estates Committee make it clear that neither thought that the land at Cemetery Road had been appropriated for use as allotments. That evidence shows that they knew how to exercise a power of appropriation under the 1920 private Act; and what accounting adjustment needed to be made in accordance with

section 4. The judge was wrong to discount that evidence. He did so on the basis that the sites to which he referred had already been appropriated to allotment purposes. But that was to beg the very question he had to decide. His task was to decide, having considered *all* the evidence, whether it was more likely than not that the council had appropriated the land for allotment purposes. In the face of the subsequent evidence the peg upon which the judge based his decision will not bear the weight attributed to it.

v) An appropriation under the private Act of 1920 would have required an adjustment to the council's accounts. There was no evidence that such an adjustment had been made (in contrast to the later appropriations in the 1950s). Nor was it suggested that such an adjustment had been made. Although the accounting adjustment may not have been a condition precedent to an appropriation, the fact that no such adjustment had been made is at least evidence that no appropriation had taken place.

vi) Although in appropriate circumstances it may be legitimate to infer from long use that an appropriation has taken place, that is only because of the presumption of regularity. It was that which tipped the balance in the *Lancashire* case. In the present case there was no need for the presumption, because the council already had wide powers of land management of the Ramsden estate under section 5 of the 1920 private Act. It was perfectly entitled to use the land for the purposes of allotments without appropriating it to that use.

68. I do not consider that any one of these points is decisive on its own. As I have said, it is not necessary for an appropriation to be recorded in a resolution which uses that very word. But when all the various points are taken together, particularly the contrast between what happened in the 1930s and what happened in the 1950s, I come to the reluctant conclusion that the judge's decision cannot stand.

69. Although I do not rest my decision on this point, I might also add that what had been delegated to the Agricultural Committee were the council's powers and duties under the Allotments Acts. An appropriation under those Acts (and in particular section 22 of the 1919 Act) required central government consent. It is not suggested that such consent had been obtained. The resolution delegating the council's powers to the Agricultural Committee was limited to its powers under the Allotments Acts. It did not include the council's power of appropriation under the 1920 private Act. Accordingly, the Agricultural Committee had no power to exercise that power of appropriation. Nor have we seen any material which would suggest that the Highways Committee had such power. The judge was not asked to infer the existence of a lost resolution of the council under the private Act of 1920. Nor were we. Had this point been decisive, we would have invited submissions on it from both parties. As it is, however, I mention it only for completeness.

Result

70. It may seem very strange to a member of the public (or even, I may say, to a judge) that a use that has gone on for over 80 years has never been the subject of an appropriation to that use. But I am reluctantly driven to the conclusion that the minute of 9 December 1935 was not an appropriation in the sense in which that expression is

used in local government law (and in particular in section 8 of the Allotments Act 1925). It follows that the consent of the Secretary of State was not needed before the council took its decision to appropriate the land for educational purposes. I would, therefore, allow the appeal.

Lord Justice Peter Jackson:

71. I agree.

Lady Justice Asplin:

72. I also agree.