

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE

8 OCTOBER 2010

SUNKEN GARDENS, SCARBOROUGH

APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN

1.0 PURPOSE OF REPORT

1.1 To report on an application (“the Application”) for the registration of an area of land known as the Sunken Gardens, Scarborough (“the Site”) as a Town or Village Green.

2.0 BACKGROUND AND PROCEDURAL MATTERS

2.1 Under the provisions of the Commons Act 2006 (“the Act”) the County Council is a Commons Registration Authority and is responsible for maintaining the Register of Town & Village Greens for North Yorkshire. The Application, made in 2008, was brought before the County’s Planning and Regulatory Functions Committee on 15 December 2009, and a copy of the report to that Committee is attached to this report at **Appendix 1**.

2.2 Members resolved in accordance with the officers’ recommendation to appoint an Inspector to hold a non-statutory public inquiry to hear the evidence and to make a recommendation to the Registration Authority. In particular the Inspector was to be appointed to hear evidence on the principal evidential uncertainties identified in the officers’ report together with any other relevant matters that could not be agreed as common ground between the parties.

2.3 That inquiry was held in Scarborough in March, and the Inspector’s report dated 28 May 2010 is attached to this report at **Appendix 2**. Members will note that the Inspector has recommended that the Application is refused, on the basis that the applicant has failed to prove that the users of the Site were inhabitants of any proven locality or of a neighbourhood within a locality or localities.

2.4 The Inspector’s report was sent out to the applicant and other interested persons, seeking comments by the end of June 2010. Two letters of comment have been received, and copies of these are attached at **Appendix 3**.

3.0 CONSIDERATIONS

3.1 The principal matters for consideration were set out in the previous report at **Appendix 2** and dealt with by the Inspector. To recap, section 15(2) of the Commons Act 2006 provides for land to be registered as a town or village green where:

- a) **a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes** on the land for a period of at least 20 years; and
- b) they **continue to do so** at the time of the application.

3.2 The previous officers' report identified the principal evidential uncertainties arising over the issue whether the use had been carried out "as of right", and whether the relevant use had been interrupted such that a continuous 20 year period could not be established.

3.3 The Inspector concluded in the applicant's favour on both of these matters. He concluded that the "art fairs" that are held twice a year on the site were not inconsistent with the use "as of right" and that they did not prevent the 20 year period accruing.

3.4 However, the Inspector found against the applicant on the question whether the persons using the Site for recreational purposes had been sufficiently identified as "inhabitants of any locality, or of any neighbourhood within a locality".

3.5 This was an issue upon which officers had sought the applicant's clarification on a number of occasions, largely without success. The previous officers' report identified the probable 'locality' as meaning the developed area of Scarborough.

3.6 However the Inspector has concluded that such a 'locality' was not supported by the applicant's case and the boundaries of the 'locality' that had been suggested by the County's officers were not identified in the evidence before him.

3.7 He recommended that the application be rejected.

3.8 The two letters that have been received in response to the Inspector's report have suggested that the Registration Authority should depart from the Inspector's finding on the matter of the 'locality', given the previous view expressed by the County's officers on the matter.

3.9 The legislation provides for the recreational users of the application land to be a significant number of **either** "any locality" (limb (i)) or "any neighbourhood within a locality" (limb (ii)). Perhaps confusingly, the current jurisprudence is that the word "locality" may have different meanings in limbs (i) and (ii).

3.10 A limb (i) "locality" cannot be created by drawing a line on a map, but it is narrowly defined as meaning some division of the county known to the law, such as a borough, parish or manor.

3.11 So the “developed area” of Scarborough cannot meet the requirement of being a limb (i) “locality” because it is not an area of legal definition.

3.12 However, it has recently been held in the Leeds Group plc v Leeds City Council case in the High Court that a limb (ii) “locality” can have a less rigid meaning. It seems that it does not have to be an area known to the law provided that it is a recognizable community with definite geographical boundaries. The “neighbourhood” that falls within it need not be a recognised administrative unit. A housing estate can be a neighbourhood. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness. It was said in the Leeds case that the cohesive factor cannot be simply the fact that recreational users of the application land live in the area. A neighbourhood need not lie wholly within a single locality. The statutory test is fulfilled if the applicant can prove that a significant number of qualifying users come from any area which can reasonably be called a “neighbourhood” even if significant numbers also come from other neighbourhoods. A neighbourhood must, however, have ascertainable boundaries because only the inhabitants of the relevant neighbourhood have recreational rights over the land.

3.13 Applying the facts, although the developed area of Scarborough might meet the limb (ii) “locality” requirements, it remains the case that the applicant has not identified any cohesive “neighbourhood” within it whose inhabitants have established recreational rights over the Site.

3.14 There is insufficient evidence before the Registration Authority to warrant a departure from the Inspector’s clear finding on the evidence on this matter.

4.0 RECOMMENDATION

4.1 That the Application be **REFUSED** because the Registration Authority is not satisfied, on the balance of probabilities, of the existence of a locality or neighbourhood within a locality a significant number of whose inhabitants have indulged in lawful sports and pastimes as of right upon the Site for a period of 20 years or longer at the date of the application.

DAVID BOWE
Corporate Director Business & Environmental Services

Background Documents to this Report:

Application case file held in County Searches Information - Business & Environmental Services

Contact: Doug Huzzard /Chris Stanford

REVISED REPORT

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS COMMITTEE

15 DECEMBER 2009

SUNKEN GARDENS, SCARBOROUGH

APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN

1. PURPOSE OF REPORT

- 1.1 To report on an application ("the Application") for the registration of an area of land known as the Sunken Gardens, Scarborough ("the Site") as a Town or Village Green. The general location of the site is identified on the plan comprising **Appendix 1** to this report.

2. BACKGROUND AND PROCEDURAL MATTERS

- 2.1 Under the provisions of the Commons Act 2006 ("the Act") the County Council is a Commons Registration Authority and is responsible for maintaining the Register of Town & Village Greens for North Yorkshire.
- 2.2 The Application dated 13 June 2008 was received for consideration on 2 July 2008 to register the Site as a town green.
- 2.3 Applications to register town or village greens are usually the province of the County Council's Area Committees, but in this case Scarborough Borough Council (SBC) owns the Site which meant a determination by the Area Committee (consisting mostly of dual-hatted Members) was inappropriate. The function is also delegated to the Planning and Regulatory Functions Committee. Any Members wishing to discuss Code of Conduct issues arising from this report are invited to contact the Monitoring Officer in advance of the meeting.
- 2.4 Applications of this nature are not determined by reference to the "merits" of assigning any particular status to the land in question, but on the evidential tests set out in the relevant legislation (for which, see below). Members, who will sit in a quasi-judicial capacity for the purpose, are not expected to bring their local knowledge to bear on the Application, but to determine it upon considering the evidence set out before them in this report.

3. THE APPLICATION LAND

- 3.1 The Sunken Garden presently comprises approximately 50% flagged area, 25% flower beds and 25% tree planted (**Appendix 2 - photographs**) and is approximately 540 square metres in area. The site is situated within the town centre of Scarborough and in the centre of the Castle electoral ward. It is abutted to the east by a public walkway known as Marine Parade, from which access to the site can be gained directly, and to the north by Harcourt Place. The site can also be accessed from the west via St. Nicholas Cliff using steps. The northern section of the land consists of a flat area of land where plants, shrubs and small trees have been planted, this leads to an inclined area which has also been planted. Where the inclined area meets the paved area they are separated by a short retaining wall. At the southern section of the land storage facilities have been built together with an alcove in which there is a seating area. There are also two dwarf walled planted garden areas either side of the alcove.
- 3.2 The site has been clear of any buildings since 1939.
- 3.3 In February 2006 planning permission for construction on the site of a three storey building incorporating two retail units was granted by SBC in its capacity as planning authority. That permission has now lapsed due to the length of time that has passed since it was issued. It is not relevant to Members' deliberations.

4.0 THE RELEVANT LAW

- 4.1 Section 15(2) of the Act, which is the relevant section under which the Application was made, provides for land to be registered as a green where :-
- (a) a **significant number** of the **inhabitants of any locality, or of any neighbourhood within a locality**, have indulged **as of right** in **lawful sports and pastimes** on the land for a period of at least **20 years**;
- and
- (b) they **continue to do so** at the time of the application
- 4.2 There are therefore several criteria to be satisfied. Interpretative precedent and guidance derived from Court judgments will be referred to, where relevant, below.
- 4.3 In determining the period of 20 years' use, section 15(6) states that any period during which access to the land was prohibited to members of the public by reason of any

enactment is to be disregarded and treated as though the use was continuing. This does not arise in the present case.

- 4.4 An application must be made in accordance with the 2007 Regulations. These provide for the formalities of an application and that any application must be supported by a Statutory Declaration. The formalities have been satisfied in this case.
- 4.5 The task of proving the case in support of registration of the land as a town or village green rests with the person making the application, and the burden of proof is the normal, civil standard: the balance of probabilities.
- 4.6 The Courts have considered whether, faced with a deficient application or one that is not made out in any particular, it is incumbent upon a Registration Authority to 'amend' the application before it. Dealing with an application under earlier, although not substantively different, legislation, Lord Hoffmann said in *Trap Grounds*¹ that

...the registration authority should be guided by the general principle of being fair to the parties...

... the registration authority has no investigative duty which requires it to find evidence or reformulate the Applicant's case. It is entitled to deal with the application and the evidence as presented by the parties.

... the registration authority is entitled, without any amendment of the application, to register only that part of the subject premises which the Applicant has proved to have been used for the necessary period.

- 4.7 It appears therefore that the Authority is entitled though not obliged to consider reformulating the application. On the particular subject of the relevant "locality", upon dealing with a challenge on the basis that the Registration Authority had assessed for itself what this was (rather than simply assessing the application against the applicant's submission on the matter) Sullivan J in *Laing Homes*² (again under different legislation) considered that

The Registration Authority should, subject to considerations of fairness towards the applicant and any objector to, or supporter of, the application, be able to determine the extent of the locality whose inhabitants are entitled to exercise the right in the light of all the available evidence.

¹ Oxfordshire County Council v Oxford City Council and others [2006] UKHL 25

² R (on the application of Laing Homes Ltd) v Buckinghamshire County Council and others [2003] EWHC 1578

- 4.8 This Application has been deferred for consideration because the "locality" was inadequately identified by the Applicant. His clarified submission will be dealt with below.

5. EVIDENCE AND SUBMISSIONS MADE IN SUPPORT OF THE APPLICATION

The Applicant's case

- 5.1 The Applicant, Julian Stuart-Lofthouse aka Lord Mandesville, has completed an Application form (Form 44) stating that he resides at Marine Parade, St Nicholas Cliff, Scarborough. The Application was signed on 13 June 2008 and recorded as received at the County Council on 2 July 2008. He states that "the Council [SBC] denoted it [the Site] as an 'amenity space'" following demolition of the buildings in 1939. He states the land is maintained by SBC, and further states that the Scarborough Art Society have been holding exhibitions on the Site since 1959 at the request of SBC.
- 5.2 He has also completed an "Evidence Questionnaire" made on a pro-forma form supplied by the Open Spaces Society. In this, he identifies the relevant "locality" in which the Site is situated as being the Site itself. He states he has known the land from 1958 to present.
- 5.3 He further contends that the Site is 'open amenity land', being open to walk through and sit in. He states he uses it 10 – 20 times a day. He uses it to talk to local people, to attend art exhibitions twice yearly and for the purposes of emptying his bin. He also mentions that people eat their lunch there. He mentions witnessing filming, skateboarding, children playing, drawing and painting, dog walking, community celebrations, fetes, football, bird watching, picnicking, walking and bicycle riding. He states that no permission has ever been sought, he has never been prevented from using the land, and he has witnessed no attempts to discourage use. He also encloses a SBC committee report dated 23 February 2006 stating that the buildings... "were demolished in October 1939. Following this the site became amenity space in its current form". He has also enclosed a photograph of the Site showing the stands for an 'art fair' blown over in the wind.
- 5.4 He has also enclosed a further 20 Evidence Questionnaires completed by other persons, which are summarised by the table in **Appendix 3** and set out more fully below. All were completed shortly prior to the submission of the Application. A plan of Scarborough showing the residences of all those completing the Questionnaires is attached at **Appendix 4**. All of the Evidence Questionnaires assert that a public

footpath runs across the site. They are each accompanied by 3 plans: (i) a coloured plan of the Site; (ii) a plan of the area showing the Castle Ward of Scarborough denoted by a thick black line around its boundary; and (iii) a plan of Scarborough showing the location of their residence.

- 5.5 William Gibson resides at St Nicholas Cliff. In one part of the form he states he used the Site between 1975 and 1983, but then goes on to say he has used it for 25 years.
- 5.6 Richard Baldwin resides at St Nicholas Cliff. Has known the land since 1964 but only used it since 1997. He does not say why. He then states he has carried on the activities in the questionnaire for 21 years. His use, and witnessing of use, are similar to the Applicant's. He too identifies the "locality" as being the Site.
- 5.7 Nigel Middleton resides at Filey Road, Scarborough. He states he has known the land and used it since 1985. His use, and witnessing of use, are similar to the Applicant's.
- 5.8 Mr. & Mrs. Asheq reside at Gladstone St. They state they have known and used the land for 31 years. Their use, and witnessing of use, are similar to the Applicant's. They too identify the "locality" as being the Site.
- 5.9 Mrs. Moulon resides at Raincliffe Crescent, Scarborough. She identifies the "locality" as being the Site. She states she has known and used the land from 1954 to the present, but then goes on to say she has carried on activities on the Site for only 49 years (not 54). Her use of the site has been a more limited use than the Applicant's.
- 5.10 Mr. T M Corrigan resides Rothbury Street. He identifies the relevant "locality" as the Castle Ward. He states he has known and used the land between 1979 – 2008, 29 years. His use, and witnessing of use, are similar to the Applicant's.
- 5.11 Graham & Yvonne Irving reside at Laburnum Avenue, Robin Hoods Bay. They identify the Site as the relevant "locality". They also state they think they are local inhabitants. They state they have known and used the Site from 1970 to date, 38 years. They also claim knowledge of Scarborough Art Society use since 1959. Their use, and witnessing of use, are similar to the Applicant's.
- 5.12 Colin Spink resides at St Nicholas Cliff. He has known the land since 1965 and used it since 1966, 42 years. His use, and witnessing of use, are similar to the Applicant's.
- 5.13 Mrs. J Wells resides at St Nicholas Cliff, and formerly at Royal Avenue. She appears to identify the "locality" as the Site, but refers to land marked in green – her plan

shows the land in yellow. She states she has known and used the land since 1985, 23 years. Her use, and witnessing of use, are similar to the Applicant's. She states that public seating/benches have 'lessened' over the past 2 years.

- 5.14 Mrs. S M Corrigan resides at Auborough Street. She identifies the relevant "locality" as the Castle Ward. She states she has known and used the Site since 1959, 49 years. She uses it to sit. She witnesses use similar to that witnessed by the Applicant.
- 5.15 Mr. & Mrs. Webster reside at Filey Road, Scarborough although they give no address for the period in which they used the Site. They state they have known and used the land between 1968 and 2008, but go on to say they have used for it for only 37 years. Their use, and witnessing of use, are similar to the Applicant's. They identify the "locality" as being the Site.
- 5.16 S M McCarthy resides at St Nicholas Cliff. He states he has lived at his current address for 6 years, previously Barkston Ash for 12 years and York for 4 years. He states he has known the land since 1985 and used it between 1986 – 2002 and then 2002 – 2008. He also claims knowledge of the Scarborough Art Society's use of the site since 1959. His use, and witnessing of use, are similar to the Applicant's. He identifies the "locality" as being the Site.
- 5.17 Kate Ward also resides at Auborough Street. She states she has known the land since 1983 – but does not say she has used it and does not say for how long she has used it. However she then states she has used it for similar purposes to the Applicant, and has witnessed similar other purposes. She also claims knowledge of the Scarborough Art Society use since 1959.
- 5.18 James Dungey resides at Newlands Park Grove, Newby. Considers himself a "local inhabitant". He has known and used the Site between 1956 and 2008. His use, and witnessing of use, are similar to the Applicant's. He identifies the "locality" as being the Site.
- 5.19 Ian Purshouse resides at Percy Street, Rotherham. He states he has known and used the Site between 1980 and 2008, 2/3 times a year. His use, and witnessing of use, are similar to the Applicant's. He identifies the "locality" as being the Site.
- 5.20 Brian Tavener (whose form is completed in different inks and possibly in different handwriting) resides at Scholes Park Road. He thinks he is a local inhabitant. He has known and used the Site between 1989 and 2008, 19 years. His use, and witnessing of use, are similar to the Applicant's. He too identifies the "locality" as being the Site.

- 5.21 Jeanette Mendola resides at Filey Road but appears to have a shop near the site as she refers to using the land as a bin area for her shop. She states she has known & used the land for 35 years. (Some parts of her form are also completed in different ink & possibly different handwriting.) Her use, and witnessing of use, are similar to the Applicant's.
- 5.22 Mr. P Braithwaite resides at St Nicholas Cliff. He states he has known and used the Site between 1981 and 2008. His use, and witnessing of use, are similar to the Applicant's. He does not identify the "locality". He also claims knowledge of the Scarborough Art Society use since 1959.
- 5.23 Mrs. D Neaves resides at Green Lane. She does not identify the "locality". She states she has known the land for 40 years and used it 1978 – 2008 (a period of 30 years). (Her form has been completed in different inks and possibly different handwriting.) She states she uses the Site for walking and 'gym'. She also claims knowledge of the Scarborough Art Society use since 1959. Her witnessing of use is similar to the Applicant's.
- 5.24 Edward Oldroyd resides at Chestnut Bank and states he has known and used the Site since 1975. He does not identify the "locality". He states he has used the Site for rest, meeting friends, art exhibitions. He does not identify any activities he has witnessed taking place on the land. He too claims knowledge of the Scarborough Art Society use since 1959

Additional Submissions and Evidence in support supplied by the Applicant

- 5.25 The Applicant encloses a letter from a Russell Bradley, a solicitor and former Chief Executive of SBC. He states that the future of the Site had been previously considered by SBC which had decided it should continue to be available for enjoyment by inhabitants of 'Old Scarborough'. He also contends that formal steps to protect the status of the Site are long overdue.
- 5.25 Also enclosed are a number of articles from the Scarborough Evening News. An article re. continental café proposals of April 2001 is of no probative value. In May 2005 an article appeared concerning the ending of art fairs on the Site. It states it has been used for the purpose since the 1970s. A Member of the Art Society is quoted as saying "the council [SBC] said they would help us find somewhere". An article from May 2007 refers to the continuation of the art fairs. In February 2006 a letter appears from a correspondent, Justine Craven, referring to the Site as "a public area".

5.26 Also enclosed is an "Archaeological Evaluation" – Scarborough Archaeological and Historical Society interim report 2004. This refers to the demolition of buildings on the Site in 1939 and is otherwise of no probative interest.

5.27 A letter of 28 May 2008 is signed by 30 members of the Scarborough Art Society. The southern half of the Site is outlined on an attached plan. The letter states this area has been used since 1959 twice yearly. It further states that

The site is owned by Scarborough Council who have always been very helpful to the society with setting it up and dismantling and it would be a shame to lose the venue. All our members are residents of the borough and are council taxpayers so do have a vested interest in the designation of this area as a "Town Green".

5.28 An extract of a publication, Sixty-Five Years of Scarborough Art Society, states that

Around this time in 1959 the first Open Air exhibitions started. Scarborough Art Society was asked by Scarborough Borough Council to provide an exhibition in the Sunken Gardens...

5.29 A letter from the Scarborough & District Civic Society of 14 June 2008 states:

... since 1939, Scarborough residents and visitors have been accustomed throughout their lives to the present situation, namely that the junction of Harcourt Place, Marine Parade and St. Nicholas Street is a wide and spacious area for pedestrians which is backed by the Sunken Gardens...

....We also deplore the loss of this land as it is an amenity space used by people to sit, to eat their lunch and to view the exhibitions of the Scarborough Art Society....

5.30 A publication, SBC Parks & Green Spaces Strategy 2007 – 2011, contains nothing of probative value.

5.31 A number of letters are enclosed passing between the Scarborough Art Society and SBC:

15.9.01 Letter from the Honorary Secretary of Scarborough Art Society to SBC's Director of Tourism and Leisure "writing to confirm the dates" for the 2 art

sales in the Sunken Gardens. "As in previous years, we would like the stands erected the previous Thursday in both cases".

- 16.09.01 Letter from the Honorary Secretary of Scarborough Art Society to Gareth Jones, Community Officer of SBC, enclosing letter giving details of the 2002 dates
- 21.09.01 letter from Gareth Jones, SBC, to the Honorary Secretary of Scarborough Art Society. Confirms the dates of 18 May to 1 June 2002 and 17 August to 31 August 2002. States he will arrange for the Outdoor Leisure Manager to contact her nearer the times to arrange for the erection of the stands.
- 29.10.03 Letter from the President of the Scarborough Art Society to Gareth Jones. To "formally confirm" the 2004 dates for open air sales. "The stands will need to be set up on the Thursdays".
- 14.11.03 Gareth Jones to President. "I have passed the dates on to Carol Sutton, [marketing officer] who is responsible for the guide publication"... "I have passed on your dates..." re. setting up
- Undated letter from President to Gareth Jones "to give you the dates of our open air exhibition" in 2005
- 01.07.04 Gareth Jones to President referring to telephone call and letter confirming the date for proposed exhibitions.
- 26.08.04 Gareth Jones to President withdrawing dates for 2005.
- 5.32 A Licence Agreement dated 10 July 1997 between SBC and a N J Bailey. This covers part of the Site. It is a private licence giving rights of way to adjoining properties. SBC is identified as freehold owner free from incumbrances. A licence is granted to the "Licensee and the owners and occupiers for the time being of the Properties" which are shown edged blue on the plan. They are 32 to 36a St Nicholas Cliff and no.s 7 & 8 Marine Parade. The licence is "to pass and repass on foot only over and along the Land for the purposes of access to and egress from the bin stores adjoining the Properties and for no other purpose whatsoever".

Other representations in support of the Application

- 5.33 Following public notification of the application, a number of other representations were received. As a generality these are of limited probative value and tend to be directed towards the merits or demerits of registration or building proposals. Where relevant, they are set out below:
- 5.34 Paul Cooney, Director, Crescent Hotel "The area is currently used in a very effective and community spirited manner by area art society's (*sic*) and others."
- 5.35 Robert Faley, Hackness Road "The area has been a valuable resource for local organizations and the public for many years and should be allowed to continue as such for future generations."
- 5.36 Aftab Masood, Wynford Rise, Leeds "I am aware of the area known as the Sunken Gardens which appears to have been a longstanding "open" area surrounded by beautiful, historic building. On my visits I have known the area to be well used either by locals and visitors, such as myself, to relax awhile and or to enjoy exhibitions."
- 5.37 Michele Masood "I am very fond of the Sunken Gardens, not only from personal memories but also for the "natural open space" element within the setting of historic buildings and, in fact, built upon a moat. This has been a much loved area for local residents and visitors, certainly during my lifetime, who have enjoyed the area in all seasons used not only for relaxing but regular public exhibitions."
- 5.38 Standing Conference of Women's Organisations Letter expressing support on the merits but of no probative interest.
- 5.39 Katharine and Michael Cook, Hackness Drive, Newby. Letter supporting the Site's restoration "to its former glory" but otherwise of no probative value.
- 5.40 Christine Perry, Deepdale Avenue describes an "area...where people can sit...has benches which are well-used, either by people eating snacks or as a meeting-point or just resting... I think that people who work nearby find it useful as a place to eat their packed lunch or a takeaway... one of the benches... bears a plaque which reads: "Happy Memories of Sue Young from all her friends and colleagues at Marks & Spencer".... The paved area is famous as the location of open-air exhibitions by the Scarborough Art Society... this year will be the 50th anniversary of exhibitions on this site... this small patch of ground is host to a variety of pastimes...".

- 5.41 Mrs. P Walker, Manor Road - Letter of support but of no evidential value
- 5.42 John Burrows, Westborough "It is a central recreational facility for the arts societies from Bridlington, Whitby, Filey and Scarborough...". Otherwise of no probative value.
- 5.43 Mrs. K D Corrigan Foreshore Road No probative value
- 5.44 R W Wells, Willow Garth, Newby No probative value
- 5.45 Mrs. Lynne Burnett, Hutton Buscel No probative value
- 5.46 Mrs. J P Watson, Main Street, Cayton No probative value
- 5.47 Miss J R Johnson, West Park Avenue "Painting Exhibitions and other Events are most attractive...".
- 5.48 Mr. & Mrs. Urwin, Nansen Street Registering support so that the site "remains public property for the use of present townspeople and visitors and future generations"
- 5.49 Mary Walker, Station Road, Scalby "It is a vital open space"
- 5.50 Alan Campbell, Cliff Bridge Studio, Cliff Bridge Terrace "This is an important open space"
- 5.51 Roy Buckley, Scarborough Art Society Gordon Street "As a society we have been holding exhibitions and sales of work at this site for over 40 years."
- 5.52 Mrs. J Bradley, Station Lane, Cloughton describes "a very much loved part of Scarborough" but no probative value
- 5.53 Mrs. M Mitchell, Willow Close, Filey No probative value
- 5.54 Mrs. L R Davies, Pentonville Road, Islington, London No probative value
- 5.55 Mr. P W Davies, Pentonville Road, Islington, London No probative value

Further representations

- 5.56 Following the receipt of objections to the application, further correspondence was received in its support. Where relevant, this is set out below:

5.57 Cllr. Penny Marsden "I thought the rules were people were to have used the area for Leisure activities for 20 years or more, in other words established use. I believe this is certainly so, I lived and worked on the seafront for many years in the late 70's early 80's and I can reassure you there were not many free seats to sit on anywhere then, this area was always quite full."

5.58 Applicant:

8th January 2009

"Why have the Council built, maintained, and stored specially made 'stalls' for the Art Societies (*sic*) Exhibitions held twice a year for many years. It is also used by film crews and, as important, visitors"

"I have personally been in business in the immediate area since 1958 and have never known it other than an amenity garden within a designated Conservation Area which includes commemorative seating sited by the Council"

25th August 2009

No probative value

15th September 2009

"your request I state in which Locality or Neighbourhood within a locality in respect of which the application is made, can in all reality not be defined"

29th October 2009

"The area is grassed (approx 1.3rd)."

"The area is significantly used by residents of the Castle Ward to (*sic*) which is the Ward encompassing the area but also surrounding wards in Ramshill, Weaponess, ect ect. (*sic*) It is situated in the Town Centre."

23rd November 2009

"This "licence" [to the residents of McBean Apartments] does not effect (*sic*) the access to the garden area. It relates to the Apartment Owners Bin Store..."

"the Art Exhibition only covers a partial area of the site. It does not impede on general use and does not interrupt that use"

26th November 2009

"Considering these [fire] 'assemblies' last at the most from minutes to ¾ of an hour, one can still sit on the grassed area or seating, and walk through those 'assembled'"

- 5.59 In other recent correspondence the Applicant,, in response to an invitation from officers following the Committee's decision to defer this item at its last meeting, identified the site as being for "the benefit of the whole of Scarborough" and in doing so submitted a map on which a large part of the built up area of Scarborough was outlined (see paras 8.32 – 8.37) .

6. EVIDENCE AND SUBMISSIONS MADE OPPOSING THE APPLICATION

SBC: The Landowner's case

- 6.1 SBC wrote on 12 January 2009 to say that they did not think the statutory requirements for registration were satisfied. They demonstrated by enclosing the relevant Land Registry entries that SBC owns the freehold title to the Site and that there were no covenants on the Site restricting the use. They state that consent has been given to the Scarborough Art Society to use the land for open air art exhibitions and they too enclosed the correspondence with the Scarborough Art Society that is referred to in paragraph **5.31** of this report. SBC contend that:

This correspondence demonstrates that the art exhibition on the land were with the consent of the Council. Furthermore in giving its consent any assertion to 20 years indulgence in lawful sports and pastimes as of right in accordance with the Commons Act 2006 has been interrupted. The Council in giving consent to the exhibitions has asserted its rights as landowner.

- 6.2 The letter also refers to the 1997 licence to Mr. Bailey referred to at paragraph **5.32** above. It is not expressly stated that the licence has not been surrendered, although the implication is that it has not. SBC contend that

The grant of this licence is a further assertion of the Council's rights as landowner.

- 6.3 SBC wrote again on 4 August 2009 raising further objections. They re-stated their contention that the requirements of section 15(2) of the Act

...have not been met. The applicant by his own admission refers to the use of the Property by the Scarborough Art Society for exhibitions with the consent of the Council thereby defeating any claim by the applicant to use the land "as of right". Furthermore the Council has granted an annual licence to pass and repass over part of the Property thereby demonstrating an assertion of the Borough Council's rights as owner of the property and interrupting any claim of indulgence in lawful sports and pastimes on the land for a period of 20 years.

- 6.4 This letter enclosed copies of the conveyances by which SBC came to own the relevant land. Part of the southern half of site was conveyed on 16 October 1897. The Mayor and Burgesses of Scarborough entered into the conveyance under the powers of the Public Health Act 1875, although does not specify any particular provision. The remaining part of the southern half of the Site was conveyed in August 1899, again "for the purposes of the Public Health Act 1875". The northern part of the Site was conveyed in 1939, with no mention of the purpose for which the land was intended to be held.
- 6.5 The letter also referred to SBC having recently gone through the statutory formalities to dispose of "open space" land under s. 123 of the Local Government Act 1972. Several SBC committee reports and minutes were enclosed, including a cabinet report of 21 February 2006 resolving to proceed with a disposal of the Site having considered the representations received in response to the s. 123 notice. The letter also confirmed that a planning permission to redevelop the Site granted in February 2006 had by then lapsed. The letter does not say (in response to an officer invitation to do so) whether any part of the Site had ever been appropriated by SBC to use for any particular purpose.
- 6.6 Further correspondence was received from SBC dated 17 November 2009 which states that SBC had not received copies of the Evidence of Use Forms submitted with the Application. It transpires that the forms were included on a CD sent by the County Council but were unreadable because of the method of downloading. Copies of the forms have since been sent to SBC and its comments on them are referred to in paragraph **6.10** below.
- 6.7 The licence to owners and occupiers of McBean apartments is again referred to stating that :-

"Given that these properties are likely to fall within the applicant's claimed locality the Borough Council would question whether use can be demonstrated to be "as of right" when for these owners and occupiers it is by virtue of a licence."

- 6.8 The letter confirms that the site has not been appropriated as public open space. It repeats reference to having gone through statutory formalities for a proposed disposal of the site and mentions :-

"In response the Council only received 10 representations objecting to the sale with only half those referring to the loss of open space"

- 6.9 SBC's letter also advises that Art Society Exhibitions are currently still held on the site twice a year most recently from 16 May 2009 until 1 June 2009 and 22 August 2009 until 7 September 2009. It contends that the holding of the exhibitions has constituted an interruption to the claimed continuous use of the site. The letter refers to the issuing of consent by SBC Estates & Valuation Department though your officers have not seen evidence of such. SBC also state that

"Up until 2006 the Borough Council gave Scarborough Art Society use of the Borough Council's stalls for the art exhibition and the Borough Council would deliver those stalls to the site."

- 6.10 In further correspondence dated 25 November 2009 SBC contend that only 6 of the completed Evidence Questionnaires have any relevance to the Application having been completed by people who *"claim to reside close to the site"* and that of those only 2 have potential to be taken into account as the others either do not demonstrate 20 years use or use that use has been *"as of right"* rather than *"by right"*. SBC state that of whilst the remaining questionnaires were submitted by residents of Scarborough they are from residents of various wards within Scarborough. It is also suggested that the form submitted by Mr & Mrs Asheg (see para 5.8) should be disregarded as it claims that uses which are not physically feasible on the site (fishing and picking blackberries) have been observed having taken place. Your officers' consideration of these issues is covered elsewhere in this report.

- 6.11 SBC also stated that the application site is used as an assembly for fire alarms by SBC staff and that as this involves 100 staff it is *"doubtful that any person could claim to be enjoying the pursuit of "lawful sports and pastimes" during these times."*

Other submissions and evidence opposing registration

6.12 A letter was received from Gordon Somerville of Lancaster Close, Scarborough, in which he states he is the former Chief Planning Officer of SBC. He states that the Site "is not a long-standing green space or recreation area". "The Lounge [by which name the Site, or part of it, was formerly known] was demolished in 1939, to make way not for open space, but a road proposal". "The application papers talk about football and cricket, which is nonsense... the arts club... have used the site, once or twice a year for a temporary display, but this does not make it an open space... Apart from the odd person sitting down, I know of no regular or continuous public activity that qualifies the site as a village green."

7. PROCEDURES

7.1 Statutory requirements to publish public notice of the Application in the local press and post similar notices on site have been complied with. The Authority has also complied with the requirement to bring all objections that it is obliged or intends to consider to the attention of the Applicant before proceeding to determine the Application.

8. CONSIDERATIONS

SITE CHARACTERISTICS

8.1 At first sight the application site may appear at odds with what one might ordinarily expect a town or village green to look like. However, it is unnecessary for the land to have any peculiar characteristics; the character of the land itself is not part of the statutory tests for registration.

8.2 Each criterion of the statutory definition (in approximately reverse order) will now be considered.

IDENTIFICATION OF THE RELEVANT 20 YEAR PERIOD

8.3 There has been no assertion that the claimed use was not continuing at the date of the application, and the Application has been made pursuant to section 15(2) of the Act. Accordingly the relevant 20 year period is the 20 years prior to the making of the Application.

- 8.4 The majority of those supplying Evidence Questionnaires in support of the Application claim to have known and used the Site for in excess of 20 years. There is some inconsistency of user evidence, as set out above; principally internal inconsistencies within some of the Questionnaires. However, no objection is raised to the Application on the basis that 20 years' user is not established. (As to whether this has been interrupted or has been carried on 'as of right' will be dealt with below.)

USE OF THE AREA FOR LAWFUL SPORTS AND PASTIMES

- 8.5 The question what constitutes lawful sports and pastimes has been considered by the Courts, particularly in *Sunningwell*³ in which Lord Hoffmann expressed the view that the term 'sports and pastimes' was not to denote two classes of activities but was a composite phrase which covered any activity that could properly be described as a sport or pastime.
- 8.6 The uses described by those completing the Evidence Questionnaires are generally confined to walking, sitting, picnicking and attending art exhibitions. Further recreational uses are described as having been witnessed, although no evidence has been submitted on whether those participating in, say, children's games, football or skateboarding are inhabitants of the neighbourhood or locality. Therefore the nature of the user must be assessed against the stated uses of those who have completed Evidence Questionnaires and who are 'inhabitants of the locality or neighbourhood within the locality'. Use by other persons is largely irrelevant.
- 8.7 One of the objectors, although not the landowner, appears to dispute that the activities that have taken place amount to qualifying activities for the purposes of registration. He does concede that "sitting down" has taken place.
- 8.8 Your officers consider that the activities described as having been participated in by those completing Evidence Questionnaires are recreational activities sufficient to amount to "lawful sports and pastimes". Such a use will be referred to below as a "recreational user". Whether or not the 'art fairs' have been a component activity of that user will be discussed below under the principle of interruption.

Whether the use involved the whole area of the application land

- 8.9 No objection is raised on the basis that parts of the Site are laid to shrubbery and so might not be capable of sustaining the claimed uses across the whole of the Site. In

³ R v Oxfordshire County Council and Oxford Diocesan Board of Finance *ex parte* Sunningwell Parish Council [1999] UKHL 28

Trap Grounds Lord Hoffmann acknowledged that although parts of an application site might not be accessible for the claimed activities this would not necessarily be inconsistent with a finding that there had been recreational use of the site as a whole. As an example, he said,

the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flower beds, borders and shrubberies on which the public may not walk.

- 8.10 Whether the 'art fairs' have constituted an 'interruption' of the use, at all or on only part of the Site, will be considered below.

Footpath

- 8.11 All 21 Evidence Questionnaires state that there is a public footpath across the Site. No further information or evidence is given. No footpath is recorded on the Council's register of Public Rights of Way. Linear access through the Site might not be thought to be a 'lawful sport or pastime' compatible with registration as a town green. However, no objection has been raised on this basis.

WHETHER USER HAS BEEN INTERRUPTED

- 8.12 SBC contend that the user has been interrupted by the periodic assertion of the landowner's use. They make this contention on the basis that the 'art fairs' have constituted an interruption of the claimed recreational use, meaning that no continuous period of 20 years' use has been made out. (In the alternative, SBC claim that the 'art fairs' are a recreational use but with the permission of the landowner, meaning that the use has not been 'as of right'.)
- 8.13 Assuming for the moment that SBC's first contention is made out; that the 'art fairs' have been held by the Scarborough Art Society as "agents" for the landowner, and have not been a use of the land for "sports and pastimes", the Registration Authority must consider whether the claimed recreational use has been 'interrupted' by the holding of those fairs.
- 8.14 The appropriate principles have been set out by Dyson LJ in Lewis⁴:

...the principles that should be applied in determining whether local

⁴ R (on the application of Lewis) v Redcar and Cleveland Borough Council and another [2009] EWCA Civ 3

inhabitants have indulged in lawful sports and pastimes "as of right" within the meaning of s 15 of the 2006 Act. It must be shown that their user is such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right.

"Interruption" and "deference", which are aspects of the "amount or manner" of the use... may be relevant to a determination of whether the user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land... It is a question of fact and degree in every case.

... where the owner does not put the land to any competing use, a claim founded on activities such as walking, picnicking and kicking a football about does not fail just because those activities are not carried out all the time.

That is to be contrasted with the situation where the land is not used by local inhabitants at certain times by reason of the activities of the owner on the land at those times...

... there are cases where, in practice, the activities of the owner will be inconsistent with user by the local inhabitants... The inconsistency will manifest itself where the recreational users adjust their behaviour to accommodate the competing activities of the owner...

... it is a question of fact and degree for the fact-finder to resolve whether in practice there is inconsistency between the activities on his land of the owner and the recreational activities of the local inhabitants.

- 8.15 Here, there is no evidence before the Authority to show whether the recreational users were in practice interfered with as a result of the 'art fairs' or whether their behaviour upon the Site altered as a result. The photograph submitted by the Applicant shows that the art fair stands (when not blown over) took up some portion of the Site so would be a physical impediment to, say, kicking a football about, but not necessarily to those users seeking to sit on a bench to eat a picnic. The Scarborough Art Society, by their letter of May 2008, enclosed a plan apparently denoting (only) the southern half of the Site having been used for the art fairs.
- 8.16 Most of the Evidence Questionnaires appear to consider that holding and attending the art exhibitions form part of the recreational use establishing the right to registration and so, whether or not it was an assertion of the landowner's use, did not

constitute an 'interruption' of the claimed recreational user.

- 8.17 If an 'art fair' was in the tradition of a fete, then it appears to officers that it may constitute a 'sport or pastime' for registration purposes. If on the other hand it was more in the nature of a trade sale then that might lend weight to the view that it was not a recreational user.
- 8.18 On balance officers are of the view that the holding of the art fairs have constituted a sport or pastime consistent with (in fact, part of) the claimed user, and so have not amounted to an interruption of the use by the landowner. However, the matter is unclear and requires further investigation.
- 8.19 The foregoing analysis has proceeded on the assumption that the 'art fairs' were held by the landowner and so, if they were inconsistent with the recreational user (which your officers on balance consider is unlikely), they would have amounted to an assertion of the landowner's use to the exclusion of the recreational users whether over part or all of the Site.
- 8.20 It is clear from the evidence that the 'art fairs' began at the request of SBC perhaps as long as 50 years ago. What is not clear, however, is the basis on which that request was made. Only the most recent correspondence (ref paragraph 6.6 above) from SBC refers to involvement by the 'landowning' arm of SBC, perhaps seeking to make a beneficial use of its land, and no evidence of this is supplied. So it is not clear whether or not the Art Society have as a matter of fact used the Site, or part of it, under the aegis of the landowner.
- 8.21 The Applicant has also stated that the land is used by SBC as a fire assembly point, which SBC has confirmed (see para 6.11 above)

WHETHER USER HAS BEEN 'AS OF RIGHT'

- 8.22 Use 'as of right' has to be, in the Latin phrase, *nec vi, nec clam, nec precario*: that is, without force, without secrecy and without permission. As Lord Hoffmann put it in Sunningwell,

The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had

consented to the user...

Without force

- 8.23 There is no assertion that the user has been 'by force'. The Site is unfenced and accessible.

Without secrecy

- 8.24 Equally there is no assertion that the user has been 'by stealth'. The user has been carried on openly and no objection is raised on the basis that the landowner did not know (or could not have known) of the use.

Without permission

- 8.25 However, an objection is raised on the basis that the use has been permissive.
- 8.26 SBC were asked to confirm whether the Site had been appropriated to any particular use. It is noted that part of the Site was acquired by SBC (or its statutory predecessor) for the purposes of the Public Health Act 1875. One of the purposes for which land might have been acquired under that Act was for use as "public walks or pleasure grounds" (section 164). If the land had been appropriated by SBC as similar "open space" under statutory authority, it might follow that the user had been permissive. However SBC has acknowledged that no such appropriation took place and the Site appears to have been largely built upon at the time of the relevant land acquisitions. SBC have undergone a procedure to advertise its intended disposal of the "open space" land under s. 173 of the 1972 Local Government Act. "Open space" land for these purposes is defined by s. 336 of the 1990 Town and County Planning Act and does not connote any town green status. Your officers do not attribute any weight to the description of the Site in SBC's February 2006 Cabinet Report as "amenity space". So in summary there is no assertion, or evidence to indicate, that the Site cannot be registrable as a town green by reason of it having been used pursuant to a 'statutory' permission.
- 8.27 The assertion that has been made by the landowner, however, is that the 'art fairs', if they constitute a recreational user, have been held with the permission of SBC.
- 8.28 Whether this is so is unclear. The disclosed correspondence between the Art Society and SBC has been with officers in the Tourism and Leisure Directorate of the Council. They are concerned with help setting up the stalls, and marketing of the art fairs. There is no evidence in the correspondence of any consent by SBC, whether in its landowning capacity or otherwise, to the holding of the fairs upon the Site. A newspaper report of May 2005 quotes a member of the Art Society as saying that

SBC had indicated a responsibility towards helping the Society find an alternative site for future art fairs. Up until 2008 stalls owned, maintained and stored by SBC were used for the art fairs. In their letter of 17 November 2009 SBC refer to "consent" being given by SBC in the most recent instances of the exhibitions by SBC's Estates & Valuation Department. It is difficult to be conclusive on this point. However, even if the art fairs have been held with the consent of the landowner, it does not necessarily follow that the recreational use of the Site as a whole was with the permission of the landowner for the duration of those fairs. It might be that during those periods the use was partly permissive (i.e. insofar as the art stalls took over part of the Site) and partly as of right (i.e. the use of the remainder).

- 8.29 Additionally, SBC assert that the use has been with the permission of a Licence Agreement benefiting property owners on St Nicholas Cliff and Marine Parade. However, the terms of that licence are clear in that they confer a permission to pass and re-pass over part of the Site only for the express purpose of getting to and from the rubbish bins. That is not part of the claimed recreational user.

THE LOCALITY OR NEIGHBOURHOOD WITHIN A LOCALITY

- 8.30 As set out above, the Applicant initially identified the Site itself as being the relevant "locality". Two persons completing Evidence Questionnaires identified the 'locality' as the Castle Ward of Scarborough. One couple from Robin Hood's Bay and one person from Newby stated they considered themselves to be 'local inhabitants'.
- 8.31 The Registration Authority must be able to define the "locality" or "neighbourhood" whose inhabitants stand to benefit from the town green rights, if they are established. This is on the basis that usage by those inhabitants over time, subject to all the other tests, has given rise to the rights. Without identifying a 'locality' or 'neighbourhood' the Authority cannot then go on to assess whether a 'significant number of the inhabitants' of said locality or neighbourhood have indulged in the recreational use.
- 8.32 Officers wrote to the Applicant again on this subject on 3 November, following a determination by this Committee to defer consideration of the application until this point was clarified. A response was invited by 18 November but in the event was received on 6 November. The Applicant then wrote again on 12 November seeking to amend his response.
- 8.33 Defra's Guidance to Applicants sets out that they should

try to specify the locality or neighbourhood by reference to a recognised

administrative area, such as a civil parish or electoral ward, or an obvious geographical characteristic such as a village or housing estate. If that is not possible, then [they] should instead include a map showing what [they] believe to be the locality or neighbourhood, for example by drawing a line around it.

- 8.34 The Applicant indicated by his response of 6 November that he believes the Castle Ward to be the relevant "neighbourhood/locality" against which the Application should be assessed. The Ward is a recognised administrative entity. It is unclear whether the Applicant considered it to be a "neighbourhood" or a "locality".
- 8.35 However, the Applicant then wrote again on 12 November to note that the original letters of support for the application were not limited to persons resident in the Castle Ward but to have come "from various areas/wards abounding the Town Centre garden". He reiterated that the Site was used by the "Town Hall" as a rallying point in the case of fire or alarms.
- 8.36 The Applicant then wrote that he felt it incumbent upon him "to re-iterate that this being a Town Centre area, it being of benefit to the whole of the Scarborough area (in the most substantial way) of which [he enclosed] a ward map/s showing the residential wards abounding who benefit in particular this garden site".
- 8.37 The attached map drew a line around the Castle, Central, Newby, North Bay, Northstead, Stepney, Weaponness and Woodlands wards.
- 8.38 It appears to your officers that this delineation is somewhat artificial. The relevant locality that appears to fall for assessment for this purpose is the development boundary of Scarborough town. That is a reasonably readily identifiable locality.
- 8.39 Of the 21 Evidence Questionnaires, 19 were completed by persons resident in the town. Of these, 15 evidence use of the Site over the full relevant 20 year period.

Whether use by a significant number of inhabitants of the locality

- 8.40 The question that then arises is whether the 15 Evidence Questionnaires are sufficient to evidence the continued use by a significant number of the inhabitants of the town. In the *McAlpine Homes*⁵ case the High Court did not accept that 'significant' meant a substantial number of users, but that the number of people using the land had to be sufficient to signify that the land was in general use by the local community

⁵ R (on the application of McAlpine Homes Ltd) v Staffordshire County Council [2002] EWHC Admin 76

for informal recreation, rather than occasional use by individuals as trespassers.

- 8.41 Your officers are satisfied that the requirement to demonstrate use by a “significant number” is met by the Application.

9. CONCLUSIONS AND RECOMMENDATION

- 9.1 In summary, the principal evidential uncertainties are these:
- (i) whether the ‘art fairs’ have been a component part of the claimed recreational user;
 - (ii) or whether the ‘art fairs’ have been inconsistent with and interrupting the claimed recreational user over part or all of the Site;
 - (iii) whether the ‘art fairs’ have been held by or ‘on behalf of’ the landowner;
 - (iv) or whether the ‘art fairs’ have been held with the consent of the landowner meaning that the recreational use has not been carried on ‘as of right’; and
 - (v) in either case (iii) or (iv) whether the result is that the recreational user of the Site as a whole has been permissive and so not ‘as of right’.
- 9.2 Given these uncertainties, officers recommend that a decision on registration should not be taken until the issues have been aired in a public hearing. Officers therefore recommend convening a non-statutory public inquiry, to be chaired by a member of the Bar or an Inspector from the Planning Inspectorate, to hear the evidence on these matters (and any other relevant matters that cannot be agreed between the parties) and to make a recommendation to the Registration Authority. The funding for such an inquiry would be met within the existing BES budget.

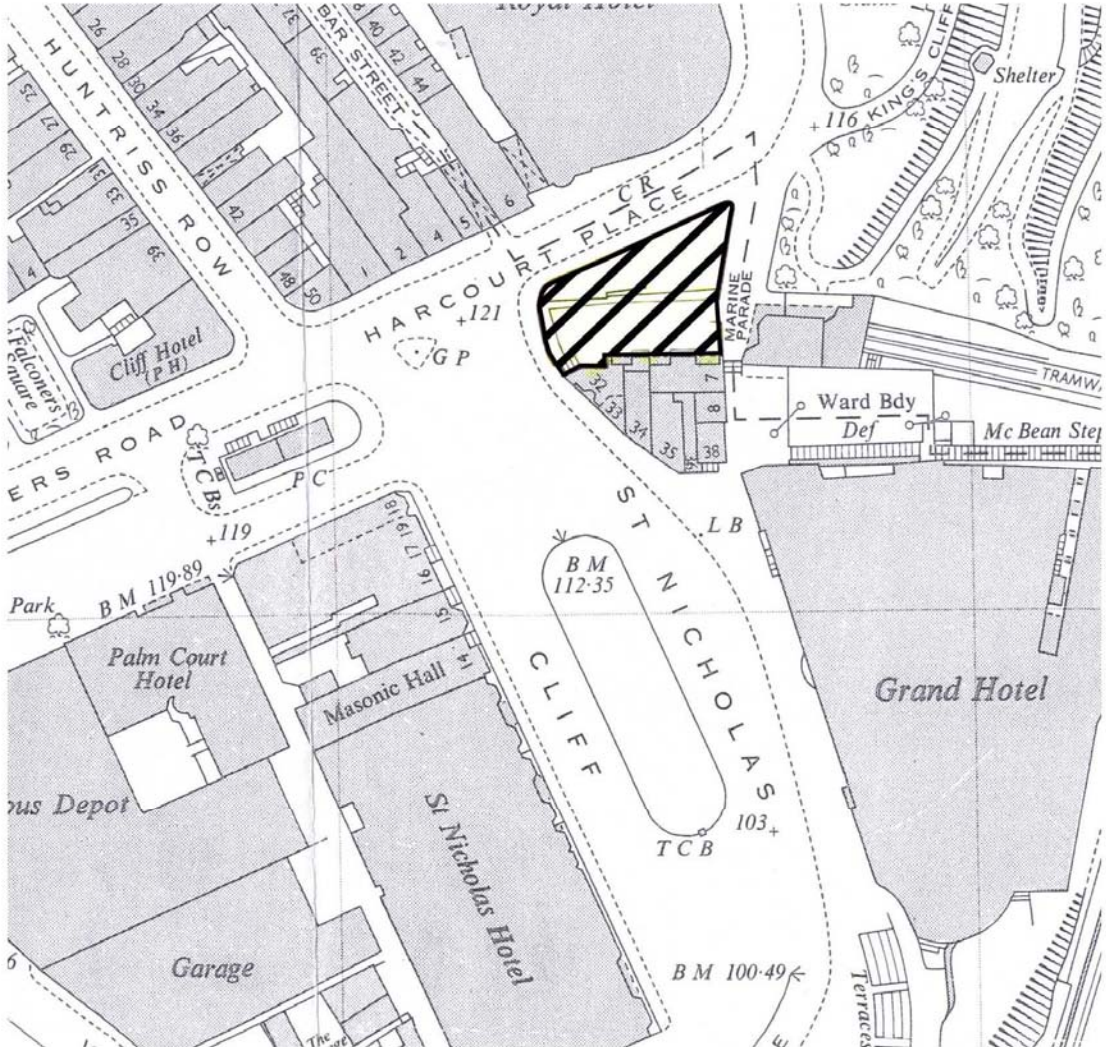
RICHARD FLINTON
Corporate Director Business & Environmental Services

Background Papers

Application case file held in County Searches Information - Business & Environmental Services

Contact: Doug Huzzard /Chris Stanford

APPENDIX 1



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**In the Matter of an Application to Register land known as the Sunken Gardens,
Scarborough as a Town or Village Green**

REPORT
of Mr. Martin Carter.
28th May 2010.

Carol Dunn, Solicitor

Assistant Chief Executive (Legal & Democratic Services)

North Yorkshire County Council

County Hall

Northallerton

DL7 8AD

Ref: 102104 LR

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN
AS THE SUNKEN GARDENS, SCARBOROUGH AS A TOWN OR
VILLAGE GREEN.**

REPORT

Introduction

1. As explained below, this application to register land as a Town or Village Green (“TVG”) has to be dealt with in accordance with the law as set out in the Commons Act 2006.
2. I am asked to make a recommendation to North Yorkshire County Council, as Registration Authority (“RA”), as to whether an application to register land at known as the Sunken Gardens in Scarborough, as a TVG should succeed.
3. Under the Commons Act 2006 (“CA 2006”) the County Council is the Registration Authority for the registration of land in the Register of Town and Village Greens. Neither the CA 2006 nor any Regulations made pursuant to the powers set out in that Act provide any mechanism for the RA to carry out any factual investigation which may be necessary to allow applicants and objectors to put their respective cases. In common with the practice in many other instances, the RA instructed me to hold a non-statutory public inquiry to consider the parties’ respective cases.
4. I held that informal inquiry on Monday 29th March 2010 at Scarborough Town Hall. Upon being instructed, I was invited to make informal directions as to the exchange of evidence and of skeleton arguments. I received further material that is listed below.
5. It is important to state that this report can only be a set of recommendations to the RA – I have no power to determine anything. Provided it acted lawfully, the RA would be free to accept or reject my recommendations. It is also free to seek further Advice from another person as to the content of this report before deciding whether or not to accept any or all of its recommendations.

The Application

6. The Application was made by Julian Stuart Lofthouse (Lord Mandesville) of 7 Marine Parade, St. Nicholas Cliff, Scarborough and “High Sail”, Mount Pleasant, Scalby, Scarborough (whom I shall call “the Applicant”). The application was dated 13 June 2008. It was marked as received by the RA on 2 July 2008.

7. Part 4 of the application form says that section 15(2) of the CA 2006 applies to the application. Part 5 of the application states that the land is usually known as “‘The Sunken Gardens’ (Ex. ‘Lounge Site’)” and under “Location” the entry “St. Nicholas Cliff/Marine Parade, Scarborough, N. Yorks” has been made. Part 6 of the application, under the heading “locality or neighbourhood within a locality in respect of which the application is made” says: “Bounded By Harcourt Place, St. Nicholas Cliff, Marine Parade”. Part 7 of the application sets out 9 points in support of the application.. The application was accompanied by a statutory declaration completed by the Applicant and by 21 completed evidence forms, of which one was completed by the Applicant. There were also copies of 3 plans accompanying each user form. One showed the application site (“AS”) in its immediate context at 1:1250 scale, one showed it within the context of the Castle Ward, and one showed it within the context of the wider Scarborough area. The users who completed the forms have made no discernible mark on the maps.
8. The application attracted two objections. One was made by Scarborough Borough Council (“SBC”) as landowner, contained in a letter dated 12 January 2009. The other was made by Mr. Gordon Somerville, contained in a letter dated 8th December 2008.

Documents provided

9. Prior to the inquiry I received:
 - A bundle called the Commons Registration Authority Inquiry Bundle. References to documents in that bundle give the page number thus [CRAIB 123];
 - An Applicant’s Inquiry Bundle, references to which are set out thus: [AIB 123];
 - A Landowner’s Inquiry Bundle, references to which are given thus [LIB 123];
 - Both parties submitted files containing their skeleton arguments and relevant authorities.
10. I am very grateful to the parties for the submission of their documents in advance of the inquiry and in a clear and easy to use format. That has made my task much easier.
11. During the inquiry I received colour photocopies of the conveyance plans contained in the objector’s evidence. I also received colour copies of the photographs at [CRAIB 387 and 388].

Representation at the Inquiry and procedural matters

12. At the inquiry, the Applicant appeared on his own behalf. The objector was represented by Mr. Hunter, of counsel. At the inquiry, I asked whether Lord

Mandesville objected to my hearing the case, given that Mr. Hunter and I share Chambers. He indicated that he had no objection.

13. I also raised at the beginning of the inquiry the approach I would take. The material I had been sent included reports prepared for the RA's Planning and Regulatory Functions Committee, where Officer views and recommendations were set out. The Applicant referred to some of those views in his skeleton argument, implying that he believed that the RA had made a decision about those matters. I explained that I had to assess the evidence I heard and read for myself and form my own conclusions, and that I would not and could not regard myself as bound by the officers' views.
14. I explained that my sole remit was to consider whether the AS met the criteria for registration as a TVG. It is no part of my function to consider whether registration would be advantageous or disadvantageous. Nor is it relevant for me to consider the existence or merit of any other proposals for the use or development of the AS.
15. Finally, I also stated at the inquiry that whilst I would take into account all of the written material which I had seen, I could give less weight to evidence which was controversial if it had not been tested by cross-examination than I could to evidence which had been so tested.

Description of the present condition of the AS and the area around it

16. The AS is defined on the plan which accompanied the application [CRAIB 059] It is an irregularly shaped area of land. According to the report to the RA's Planning and Regulatory functions committee of 15 December 2009, the AS is approximately 540 square metres in extent [CRAIB 020, paragraph 3.1].
17. The AS is bounded to the north by Harcourt Place, to the east by Marine Parade, to the south by buildings and to the west by highway in the junction of Harcourt Place and St. Nicholas' Cliff.
18. Approximately half of the site is made up of a flagged area. This portion of the site occupies the southern portion of the AS. Adjoining the flagged area is an area of shrubbery, making up perhaps a further 25% of the site area. The remaining area next to Harcourt Place is made up of grass planted with 4 mature trees. Photographs of the site are at [CRAIB 263] and also at [CRAIB 387 to 388]. From the west, access to the flagged area is via a short flight of steps. As its name suggests, the flagged part of the Sunken Gardens is below the level of much of the surrounding land, namely that to the west and the planted/ grassed area to the north of the flagged area. At the north and west sides of the flagged area are low walls, behind which is a narrow planting bed, beyond which are retaining walls. The south side is dominated by a wall of the neighbouring buildings, which follows an irregular line. Along the wall are two small planted beds and also two recesses, covered by doors, which act as bin stores.

19. At the east end of the flagged area, there is a low brick wall along approximately half the length of the east side of the flagged area. The rest of the east end is open, giving easy level access to Marine Parade and to the cliff railway down to the sea front.
20. The grassed area has a tarmac path running across it, roughly north west to south east, from Harcourt Place towards the top station of the cliff railway. There is a litter bin in the south east part of the grassed area.
21. There are 3 benches on the AS. The bench in the north west part of the flagged area carries a small undated plaque inscribed "Happy memories of Sue Young from all her friends and colleagues at Marks & Spencer".

The circumstances of the acquisition of the AS

22. The site was purchased by the objector's predecessors in three purchases:
 - a) The purchase of a property known as 29 St. Nicholas Cliff by conveyance dated 16 October 1897;
 - b) The purchase of 4 Harcourt Place and 28A St. Nicholas Street, by conveyance dated 30 August 1899 and
 - c) The purchase of 30 and 31 St. Nicholas Cliff on 7 March 1939.
23. There is some evidence that the plots were acquired under Public Health legislation, but the objector did not claim that the purchases were for the purpose of open space or as a pleasure ground. Nor was there any claim that the AS had been appropriated to open space or pleasure ground purposes since acquisition.

Evidence in Support of the Application: Live Evidence

24. I heard live evidence from the following witnesses.

For the Applicant

Mr. Roy Buckley

25. Mr. Buckley is the past President of the Scarborough Arts Society. He confirmed that he was the author of the letters at [CRAIB 242 and 272] and at section 2 of the AIB. He has known the Sunken Gardens for all of his 68 years. He has passed through them and used them as a member of the Arts Society. He was President for three years and is still the Treasurer. When asked by the Applicant how he would organise the Arts Fairs, he said that he would write to Mr. Close at the Town Hall asking for permission and that he would get an answer by letter, email or by telephone. The Arts Fairs are held for two week periods, twice a year. The first is for a week before and a week after the Whitsun Bank Holiday. The second is for a week before and a week after the August Bank Holiday. The Arts Fair has stands made out of

scaffolding poles, with peg boards attached to them. The art works which are for display and sale are fixed to the pin boards. The stands are put along the west side of the flagged area and along three quarters of the length of the north side of the flagged area. Mr. Buckley referred to the photograph of the 2006 Arts Fair at section 4 of the AIB. He said that the photograph shows the usual layout. He was asked by the Applicant whether the Arts Fair “impedes persons passing through” the AS. His answer was that it did not. People still used the benches for eating their lunch. There used to be 5 benches, but there are now three.

26. In cross-examination, Mr. Buckley was taken to the photograph showing the stands blown over after high winds [CRAIB 239]. He agreed that the stands occupied the boundaries of the flagged area. He agreed that when the fairs were held, there would be people standing at the stalls, looking at and buying the art and that there are lots of people “milling about”. When it was suggested to him that there would not be space for ball games and the like to be carried on when the Arts Fair was on, he replied “One or two have had a go.” He had been involved in organising the Arts Fairs for 15 years, but had visited them before that. He said that before 15 years ago, permission was still sought for the fairs.
27. In response to me, Mr. Buckley said that when the Arts Fairs are being held they were open from 10.00 until 16.30. The stands remained in place overnight throughout the fair. No entry fee was charged to the fair.

Mr. Russell Bradley

28. Mr. Bradley lives at Wykeham Village. He had submitted a proof of evidence [AIB section 3] which he read. He had long service with Scarborough Borough and its predecessors. In total, he had 45 years experience in Local Government. For the fifteen years from 1973 his office overlooked the AS. Proposals to build a ring road had been discussed prior to the early 1970s, but the idea, which would have affected the roads adjoining the AS, was dropped in the early 1970s. The AS had been used as an amenity/recreation area for the past 40 years, at least. He also discussed the merit of the planning proposals for the site.
29. Mr. Russell was only cross-examined as to the location of Wykeham Village.
30. The Applicant did not give evidence himself.

Live Evidence for the landowner

Michael Derek Close

31. His witness statement is at [LIB 1 to 4] and is accompanied by Exhibits. His statement deals with the acquisition of the AS by the objector’s predecessor authorities. He also deals with the holding of the Arts Fairs for the last 50 years, with the permission of the Borough Council. He deals with the objections received to the proposed sale of the AS.

32. He says in his statement that the Arts Fairs stands occupy most of the paved area, so that it is unlikely that a member of the public would carry out any activity other than being at the Arts Fair when the Fairs are held.
33. He also describes the licence granted on 10 July 1997 [LIB 35 to 38] which granted permission to the occupants of the McBean apartments to the south of the AS to use the AS for the purpose of access and egress to the bin stores set into the wall at the southern side of the AS. The licence shows that the Council has granted permission to use the AS. He also contends that persons going to and from the bin stores “may interfere with any purported use of the land by a member of the public and could at any time prevent a member of the public from carrying out a purported sport or pastime.”
34. In cross-examination, Mr. Close said that Gareth Jones dealt with organising the Arts Fairs until 2003 and he took over after that. The Arts Society dealt with the Council’s Tourism and Leisure Department. He was taken to the extract from the history of the Arts Society [CRAIB 246] and agreed that the Arts Fairs started in 1959, adding that it was clear that the Fairs were held with the permission of the Council. The extract says:
- “Around this time in 1959 the first Open Air exhibitions started. Scarborough Art Society was asked by Scarborough Borough Council to provide an exhibition in the Sunken Gardens by the Grand Hotel...”
35. Mr. Close agreed that there was no documentation relating to the organising of the Arts Fairs other than the documents he produced in his statement. He said that there was an exchange of correspondence and no “legal document”. He adhered to his statement that the stands for the Fair covered most of the paved area, even when shown the photograph of the 2006 Fair at section 4 of the AIB. He was asked about the other activities users refer to, such as sitting, walking by, bird watching and eating lunch. His answer was to point out that people had referred to other activities which could not have taken place, such as lighting bonfires.

Other live evidence

Adrian Perry

36. Mr. Perry belongs to the Scarborough Civic Society and lives at 35 Deepdale Avenue. He pointed out that the site was unfenced and has unrestricted access. He referred to the Civic Society’s discussions with the Borough Council on the proposals for the development of the AS. He said that he regularly comes into the town and regularly sees people in the Sunken Gardens. He occasionally is involved in litter picking when “hundreds” of cigarette ends and takeaway litter are collected.

Dr. Jack Binns

37. Dr. Binns wanted to inject what he called “historical accuracy” into the evidence. He said that the Woodhall family sold up in 1899. Under the Public Health Act 1875 the properties on the AS were bought and demolished. No particular reason was given for the demolition of the former Granby House. It was, however, insanitary and unsafe. It also occupied a site which narrowed the entrance into St. Nicholas Street. The frontage to Harcourt Place was acquired for road widening purposes. A report by Adshead in 1938 suggested that road widening was important. The Town Council’s minutes (which were not produced to me) apparently show a desire to preserve the Sunken Gardens as open space.

Evidence in Support of the Application: Written Evidence

38. The CRAIB contains the user forms produced by the applicant and which accompanied the application. Their contents are summarised at [CRAIB 023 to 025]. As explained above, I can give such untested evidence limited weight compared to tested evidence. Certain common themes appear. No one has referred to there being signs, gates or fences or to being turned off or refused access to the site. All of the users tick a number of the sports and pastimes listed on page 3 of the pro forma user form. Many refer to use for more than 20 years and, taken together, they refer to use of the site for more than twenty years prior to the date of the application. The use which people write about, as opposed to ticking off on the checklist, is focussed upon walking through the site, sitting on the benches, eating lunch or takeaways on the site, watching people or enjoying sun or shelter. I attach more weight to the descriptions of uses which people have thought about and written down, rather than entries on a tick list.
39. A Borough Council report from 28 February 2006 [CRAIB 050] refers to the AS becoming “amenity space in its current form” after demolition of a building known as “The Lounge” in 1939.
40. There are a number of letters from supporters of the application. Many of them deal with the desirability of the AS becoming a TVG or of the alternative proposals for the AS. Where they refer to use of the AS, they confirm and add little to the use discussed in the user forms.

Written evidence against the application

41. Mr. Somerville’s written objection is at [CRAIB 307]. He questions whether there has been 20 years user, says that the AS has not always been a green space, that it is “nonsense” to refer to the playing of football and cricket. The Arts Society could easily find another location.

The Law

Introduction

42. I will have to consider more detailed matters when I come to apply the facts to the law, but this is the basic legal framework within which I have to form my conclusions.
43. Section 15(2) of the Commons Act 2006 provides:
- (2) This subsection applies where—
 - (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
 - (b) they continue to do so at the time of the application.
44. I shall refer to the use of land which meets the requirements of section 15(2) of the CA 2006 as “qualifying use” in this report.
45. The parties referred me to a number of reported cases and there was some discussion about the relevant legal principles at the inquiry.

Burden and Standard of Proof

46. The burden of proof lies on the applicant to show that the land meets the criteria for registration as a TVG. R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102 is authority for the proposition that all of the elements required to establish that land has become a town or village green must be “properly and strictly proved” [at page 111 per Pill LJ].
47. However, the standard of proof is still the civil standard of proof on the balance of probabilities. That is the approach I have used.

The Relevant Area of Land

48. The application does not have to stand or fall on the basis of the original area of land specified in the application. Provided that the procedure adopted is fair, a smaller area can be address and, if appropriate, registered.

The Correct Twenty Year Period

49. It must be shown that the local inhabitants have used the land as of right for lawful sports and pastimes for not less than twenty years, and the use must continue to the date of the application. It was agreed by the parties at the inquiry that as the application in this case was validated on 2 July 2008, qualifying use must persist throughout a period beginning no later than 2 July 1988. If qualifying use began earlier, then it must continue until 2 July 2008.

The Use of the Land

50. In the case of R v Oxfordshire County Council ex parte Sunningwell Parish Council [2000] 1 AC 335 the House of Lords held that “lawful sports and pastimes” is a single composite class which includes modern activities such as dog-walking and playing with children, provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user as of right.

The Users of the Land

51. The persons who use the land must be a significant number of the inhabitants of either a locality or of a neighbourhood within a locality. It is now generally accepted that a “locality” has to be some geographical unit whose existence is recognised by the law, such as a borough, ward, electoral or ecclesiastical parish: MoD v Wiltshire CC [1995] 4 All ER 931; R (on the application of Cheltenham Builders Limited) v South Gloucestershire DC [2003] EWHC 2803 at paragraphs 72 to 84 and R (Laing Homes Limited) v Buckinghamshire CC [2003] EWHC 1578 Admin at paragraph 133.
52. If a case is put on the basis of “locality” then there must be a single locality that can be identified. When the word “locality” appears on its own, and not as part of the phrase “neighbourhood within a locality”, the word means a single locality: Oxfordshire County Council v Oxford City Council and another [2006] 2 AC 674 at [27] per Lord Hoffmann.
53. A “neighbourhood within a locality” does not have to be within one locality (Oxfordshire paragraph 27), but it must be an area which has a sufficient degree of cohesiveness: Cheltenham Builders, paragraph 85.
54. Whether use has been by a significant number has been held to be a matter of impression and “significant” is to be approached according to its ordinary meaning. The use has to be sufficient to indicate that the land is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: R (on the application of Alfred McAlpine Homes Limited v Staffordshire CC [2002] EWHC 76 (Admin).

Extent of User

55. The Registration Authority does not have to look for evidence that every square foot of a site has been used. Nor is there any mathematical formula to be used. Rather, the RA needs to be persuaded that for all practical purposes it can sensibly be said that the whole of the site had been used for lawful sports and pastimes for the 20 period.

Continuity/Interruption

56. The use has to be continuous throughout the relevant twenty year period: Hollins v Verney (1884) 13 QBD 304. The use has to show the landowner that a right is being asserted and must be more than sporadic intrusion onto the land. It must be use which suggests that rights of a continuous nature were being asserted. That is not to equate an intermission in use with a lack of continuity. What matters is that the use is frequent and when sports and pastimes are not being indulged in, there must have been no other activity happening which would have prevented lawful sports and pastimes from being enjoyed.

As of Right

57. Since Sunningwell it is clear that the intention or knowledge of the user of the land is irrelevant. "As of Right" means without force, without secrecy and without revocable permission. Permission can be expressly given or implied from the landowner's conduct, but cannot be implied from the mere inaction or acts of encouragement of the landowner: R (Beresford) v Sunderland CC [2003] 3 WLR 1306.
58. It is now clear that to establish that use is "as of right" it is only necessary to show that use was open, without force and not with revocable permission and that there is no need to additionally consider how the user would have appeared to the reasonable landowner. That is because any user which creates the right to have the land registered as a TVG does not lead to the local inhabitants being able to prevent use of the kind formerly carried on by the landowner. The inhabitants' use and that of the landowner can and should co-exist: R (Lewis) v Redcar and Cleveland BC [2010] UKSC 11.

Applying the Law to the Facts

59. In order to approach the matter in a logical and coherent way, I shall split up my consideration of the matter into the various elements of the definition of a prescriptive TVG, but I recognise that I have to keep in mind the need to consider and apply the definition as a whole.

Land

60. All subsections of section 15 of the CA 2006 concern the use of "land". The land in this case is not within one of the exemptions from the application of Part I of the CA 2006 set out in section 5 of the Act. There is no difficulty in identifying the relevant land and this element of the definition is clearly met.

A significant number of the inhabitants of any locality or neighbourhood within a locality

61. It is fair to say that the Applicant's case has changed on this point, and it is this issue which forms one of the objector's two points of objection to the application.

62. As noted above, Part 6 of the application form simply describes the “locality” by reference to the site boundaries. In his letter of 15 September 2009 [CRAIB 012] the applicant says that the locality or neighbourhood “can in all reality not be defined” [emphasis in original], although he states that the AS is within Castle Ward. The reference to Castle Ward being the locality/neighbourhood was repeated in the applicant’s letter of 6 November 2009 [CRAIB 326].
63. Six days later, the position changed again in the applicant’s letter of 12 November 2009 [CRAIB 327]. The applicant said that the AS “being a TOWN CENTRE area, it being of benefit to the whole of the Scarborough area (in the most substantive way) of which I enclose ward maps showing the residential wards abounding who benefit in [sic] particular this garden site” [emphasis in original]. Attached to the letter was a list of town centre wards where the wards of Castle, Central, Newby, North Bay, Northstead, Stepney, Weaponness and Woodlands had been underlined [CRAIB 330 to 331].
64. On 30 November 2009, the applicant said that in the original application the whole of Scarborough was delineated as the locality and witnesses signed their evidence to that effect [CRAIB 341]. I do not accept that. As set out above, the application form simply referred to the site boundaries when the issue of locality was addressed.
65. At the inquiry, the position changed again. My note of the applicant’s closing is that the locality was made up of “Castle Ward and three adjacent wards – Central, Ramshill and Stepney”.
66. In my view, the applicant has not proven that there is a locality in this case. That is for the following reasons.
67. First, a locality has to be just that, a single locality. A number of localities cannot be taken together: see paragraph 27 of the Oxfordshire v Oxford [Trap Grounds] case referred to above. The Commons Act 2006 requires use by a significant number of the inhabitants of “a locality”. Four electoral wards do not together make one locality.
68. Second, the change in the applicant’s case over time shows that, as the objector’s skeleton submits, there is an assumption by the applicant that an area used by the public for recreation must necessarily relate to a particular locality. I agree with the objector that that is not the case. The applicant’s letter of 15 September 2009 is, in my view, revealing. Written at an early stage in the detailed correspondence on “locality”, the applicant said that the locality was, in reality, impossible to define. That seems to me to be a telling statement, revealing the artificiality of the later attempts to identify a locality.
69. Nor is there any cogent evidence of a “neighbourhood”. The applicant did not put his case on the basis of there being a proven neighbourhood. It is not for me or the RA to make good any deficiencies in his case, especially when he has been alerted to the need to deal with the question of locality/

neighbourhood. I heard no evidence or submissions from the applicant that there is a proven neighbourhood within one or more localities. The issue simply did not figure in his case. I cannot properly conclude, without evidence or submissions on the point, that the four electoral wards mentioned in closing submissions by the applicant are a “neighbourhood”. Nor can I make any similar finding about Castle Ward, any other combination of wards or Scarborough town centre.

70. I do not attach any weight to the RA’s officer’s view that Scarborough town is a locality. That is because it is not how the applicant put his case and I heard no evidence that the town has legally recognised boundaries, nor was I given any map or plan illustrating what those boundaries are.
71. I therefore conclude that the application should be rejected because the applicant has not proven either (i) a locality or (ii) neighbourhood within one or more localities.
72. That conclusion means it is not strictly necessary to consider whether the users were significant in number, because there is no proven locality against which to test that number. However, I should set out that the way that the applicant’s case was put in closing means that it has been impossible for me to compare the locations of the addresses of the people who have completed user forms with the four wards relied upon in closing. The only map base I have is that at [CRAIB 332] and comparison of precise addresses to that map base is not possible in any reliable way.

Use for lawful sports and pastimes

73. The inquiry was unusual in my experience in that there was little evidence given at the inquiry of use of the site, apart from its use for the Arts Fairs. The applicant gave no evidence and the evidence of Mr. Bradley and Mr. Perry simply referred to people using the AS without connecting them to any claimed locality or neighbourhood. Those people could have been inhabitants of the claimed locality or holidaymakers or workers who lived outside the claimed locality.
74. The evidence of lawful sports and pastimes is, unsurprisingly given the size and nature of the site, connected to low key activities. I disregard evidence based on walking through the AS – that is more indicative of use of a right of way rather than use of the whole of the AS for lawful sports and pastimes. However, there is evidence within the material I have seen of people sitting on the benches, people taking in the sun, finding shelter, watching birds or just watching the world go by. These activities are a long way from organised games or sports, but I still consider that they can fall within the definition of a pastime. Sitting in the sun eating one’s lunch can be called a pastime. It is an activity which serves to make time pass agreeably.

75. I do not lose sight of the fact that the evidence of use is largely documentary and that Mr. Hunter could not therefore test it by cross-examination. But I also have to keep in mind that it was no part of the objector's case to say that the alleged use did not occur, save when the Art Fairs were in progress (which is dealt with below) or perhaps when residents of the apartments went to and from the bin store (which I also deal with below). The availability of benches on the AS seems to me to be a good indication that the AS was used for sitting and enjoying the outdoors.

Use as of right and continuity of user

76. Issues under this subheading formed the other main plank of the objection by the landowner.
77. There is no suggestion or evidence that use has been by force or in secret. Consideration needs to be given to the question of use with revocable permission.
78. The correspondence at [LIB 7 to 14] covering the period 2001 to 2004 does not expressly ask for permission. The terms of the correspondence reads as notification of intended dates of use of the AS, rather than a request for permission to use the AS. Some of the correspondence in Mr. Close's Exhibit MC2 does suggest that the Society knew it needed consent – see the letters of 28 January 2008 [LIB 19] and 10 March 2008 [LIB 17]. In exhibit MC3, the correspondence is more suggestive of the asking for and giving of permission: see the letter of 8 April 2008 [LIB 21], 18 June 2008 [LIB 23] and 2 July 2008 [LIB 24].
79. However, any doubt about the position is removed by Mr. Buckley's evidence. His evidence to the inquiry was clear. The Art Society asked for permission to use the AS for the Arts Fairs each year. I accept that evidence and I conclude that the Arts Fairs have always been held with the permission of the landowner.
80. That means that the users of the AS during the Arts Fairs who were exhibitors and visitors to the Arts Fairs were on the AS with the permission of the landowner.
81. The question then becomes whether other persons used the AS for lawful sports and pastimes as of right while the Art Fair was being held. This issue has two aspects (i) whether use of the site for lawful sports and pastimes actually occurred when the Art Fairs were in progress (relevant to continuity) and (ii) if it did, was such use to be regarded as permissive use and so not use as of right.

82. On the first issue, this is how the objector puts the case in its skeleton. It is there argued that the Arts Fairs created a situation where “the vast majority of the paved area at this time would have been given over to the stands” so that it would not have been possible to indulge in ball games, or even sit and enjoy the shrubbery. This, it was argued, is not to resurrect the issue of “deference”, but to point out that use of the site for purposes other than the Art Fair would have been practically precluded.
83. I do not accept that argument. The photographs of the Art Fair stalls [CRAIB 239] and [AIB section 4] show that the stands did not occupy the majority of even the flagged area. The grassed area was not affected. Even the flagged area had some spare space. The stands were around the side of the flagged area. Even allowing for some congestion at every stand at a time when many people were looking at the art works, it seems to me that there would still be room for other people to use benches or the low walls on the site to enjoy the sun, find shelter or eat their lunch. Mr. Buckley said as much in his evidence. I therefore find that use of the AS for lawful sports and pastimes continued when the Art Fairs were held, albeit in a reduced part of the flagged area.
84. The second issue is flagged up in Mr. Hunter’s opening submission. In opening, he argued that the extent of the permission to use the AS for the Art Fairs “would have embraced user by all those that could have been said to be ‘attending’ the fair, even if just observing the art when passing through”.
85. I do not accept this submission either. The evidence is that the permission was for the Art Society to use the AS for the Art Fair. No doubt people were attracted to the AS to see the art. But it is not the case that the AS was given over to the Art Fair entirely and I do not interpret the evidence I have heard and read as being to the effect that everyone who went on the AS during the Art Fairs was involved in looking at or buying the art. The grass was still available for use. Benches were still available for use. People could still use the AS to sit, pause and enjoy the sun or fresh air. Mr. Buckley’s evidence suggests that was done. He was certainly not cross-examined in a way which showed that use of the AS for any and all lawful sports and pastimes which were possible in the reduced space were tied in with the Art Fair. In my view, this submission is not supported by the evidence.
86. But even if these submissions had succeeded, and all use of the site for lawful sports and pastimes either stopped during the Art Fairs or was to be viewed as permissive during the Art Fairs, I do not think that that would have advanced the objector’s case in any event. Use of land which is sought to be registered as a TVG has to be continuous. But it is one of the differences between the terms of the Commons Act 2006 (and the Commons Registration Act 1965) and the Prescription Act 1832 or section 31 of the Highways Act 1980 that the Commons Act does not refer to the use being “without interruption”. What is important is that the use has to be continuous, which does not mean that the use has to be carried out all of the time. What is important is that the use is of such a kind and frequency as to be in the character of the assertion of a continuing right. I am far from persuaded that use of the AS for 48 weeks of the year for at least 20 years when the Art Fairs

were not present would not have been continuous use. Rather, the use of the AS for lawful sports and pastimes would have existed alongside the use of the land for the Arts Fairs.

87. In my view, the evidence supports the finding that there has been use of the AS as of right continuously.
88. The bin store licence seems to me to be of no importance whatever. Going to and from one's bin is not a lawful sport or pastime. The fact that a licence was given to go to the bin store tells one nothing about whether use of the AS for lawful sports and pastimes was use as of right. I also think it is fanciful to suppose that the exercise of the right given by the licence would prevent or interfere with the use of the AS by local inhabitants. There is room on the AS for the right to be exercised whilst lawful sports and pastimes are undertaken, even if the sport or pastime. The point was, rightly in my view, not pressed in closing by the objector.

For a period of at least twenty years

89. The relevant twenty year period is from no later than 2 July 1988 to 2 July 2008. The evidence that I have heard, supported by the evidence that I have read, shows that this element of the definition is satisfied. Use covers the whole of this period.

Use continuing until the date of the application

90. The evidence covers the period down to the date of the application and Mr. Hunter made no submissions to the effect that qualifying use stopped prior to the 2 July 2008.

OVERALL CONCLUSIONS AND RECOMMENDATION

91. My overall conclusion is that the application should fail because the applicant has failed to prove that users were inhabitants of any proven locality or of a neighbourhood within a locality or localities.

92. My recommendation is that the application should be rejected and that the land should not be registered as a TVG.

MARTIN CARTER
28 May 2010

Kings Chambers
36 Young Street
Manchester
M3 3FT and
5 Park Square East
Leeds
LS1 2NE

Ms. L. Renaudon,
Legal & Democratic Services,
North Yorkshire County Council,
Northallerton,
DL7 8AD



27th June, 2010

Your ref: 102104LR

Dear Ms. Renaudon,

Sunken Gardens, Scarborough, application to register land as Town or Village Green

Thank you for your letter of 9th June enclosing the Inspector's report following the public inquiry and for giving me the opportunity to comment on that report.

On page 3, paragraph 7, there is a comment about Part 6 of the application form, which clearly indicates to me that the location is being described, not the locality. I think the registration authority realised that this was a simple misunderstanding and asked the applicant to reconsider, showing more sympathy than the inspector!

The last sentence of that same paragraph concludes: "The users who completed the forms have made no discernible mark on the maps." As I am not the applicant I do not have copies of the evidence questionnaires, but I did see some of them before the application was made. I feel quite certain that I remember that the users had indicated their homes on the maps. As I assume that you have the original evidence questionnaires, perhaps you could confirm that the users did indicate on maps where they lived in relation to the Sunken Garden.

On page 11, paragraph 30, the inspector notes that the applicant did not give evidence himself. I consider this to be a very unfair comment. Throughout the hearing, I was waiting for the applicant to be invited to give his evidence. I now presume that the applicant relied on his skeleton argument, and did not realize that he should have given verbal evidence. I think that someone who understood the procedure of such public inquiries i.e. the inspector, should have prompted the applicant to give his evidence verbally.

The report to Planning & Regulatory Functions Committee on 15th December 2009 concluded that the principal evidential uncertainties all involved the "art fairs". Were they held with the landowner's permission and did they interrupt the use of the site by other users.

The inspector chose to report on every aspect of the application (page 5 paragraph 13) and did not restrict himself to the question of the art fairs. Although the NYCC report seemed to indicate at 8.38 that they were satisfied with the locality or neighbourhood within a locality being the development boundary of Scarborough town, the inspector has rejected this by writing: "I do

not attach any weight to the RA's officer's view that Scarborough town is a locality."

Yet on the matter of the art fairs, the inspector wrote in his report: "In my view, the evidence supports the finding that there has been use of the application site as of right continuously."

The result of all this is that the registration authority accepted the locality and questioned the status of the art fairs, while the inspector was not satisfied with the locality but accepted that the art fairs had not interrupted use.

As your officer seemed to find the locality satisfactory, you can now choose to ignore the inspector's view of that aspect of the application, and satisfy yourselves that the "art fairs" did not interrupt use of the application site. I hope that the next report to Planning & Regulatory Functions Committee will recommend registration of the Sunken Garden as a Town Green, as the inspector's opinion about the art fairs should quash any uncertainties on that aspect of the application. Those issues were aired at the public hearing, with Mr. Buckley representing the Art Society and Mr. Close representing the landowner.

Yours sincerely,



Mrs. C. Perry
35, Deepdale Avenue,
Scarborough
YO11 2 UF

Lord Mandesville

Ms Laura Renaudon
Assistant Chief Executive
(Legal & Democratic Services)
County Hall
Northallerton
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DL7 8AD

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25th June 2010

Your Ref: 102104LR

The Chairman and Councillors of the
Planning and Regulatory Functions Committee.

Sunken Gardens Scarborough
Application to Register Land as a Town or Village Green

I am advised by your legal officers I may comment to the Planning and Regulatory Functions Committee in response to the Inspectors decision and remarks regarding the above Application.

You will be aware that the Inspector concluded in his report "That the application should fail because the applicant has failed to prove that users were inhabitants of any proven locality or of a neighbourhood within a locality or localities".

May I point out to the Committee that the Inquiry was held due to your officers **principal uncertainty** regarding **interruption** of the recreational users by the Arts Fairs held periodically on the site.

I enclose a copy of the page alluding to this matter from the Revised Report of the Planning and Regulatory Functions Committee 15th December 2009.

The **whole bases** of the Inquiry was argued on this point.

The Inspector in his report on the point of the Arts Fairs writes " In my view, the evidence supports the finding that there has been use of the application site as of right **continuously**".

However, the Inspector now dismisses your officers statement on Page 23. of the Planning and Regulatory Functions Committee Report (8.38) which states, "The relevant locality that appears to fall for assessment for this purpose is the development boundary of Scarborough Town. That is a reasonably identifiable locality". This **surely** indicates the officers were satisfied with the locality or neighbourhood?

Further P.24. (8.41) "Your officers are satisfied the requirement to demonstrate use by a **significant number** is met by the Application".

If this is the case, then one **must** argue that those 'significant number of persons' must be from within the stated and **accepted** locality?
ie Castle Ward etc.

Hovingham Holdings

Jay Holdings

Julian DESIGN

Greenacre Holdings

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If this was **still** a point of objection by Scarborough Borough Council, why was it not raised at the Inquiry?
It was **never** mentioned by them.

The Inspector remarks P.23 (sec.70) in his report "Not having any map or plan illustrating what those boundaries are".

This seems quite extraordinary. Several maps and plans were supplied and were **included** in the C.R.A.I.B. illustrating the areas concerned.

Finally, I refer to P.11 (sec.30) of the Inspectors report in which he states " The Applicant did not give evidence himself"

I thought that through my evidential submission and statement/s with regard to the indicated Inquiry uncertainties, there would be no requirement to submit further evidence. North Yorkshire County Council officers having indicated all other submissions fulfilling the criteria.

I have to state, that if this application is rejected due to the reason stated by the Inspector, then I will seriously consider submitting a re-application. The enormous amount of time devoted to this by your officers, the various people of Scarborough who have supported this application (as well as cost), is too serious for the people of this town being denied a most valuable and necessary 'Town Centre Green'.

Thank you for your time and consideration

Mandersill

Eni.

for informal recreation, rather than occasional use by individuals as trespassers

- ✱ 8.41 Your officers are satisfied that the requirement to demonstrate use by a "significant number" is met by the Application.

9. CONCLUSIONS AND RECOMMENDATION

- 9.1 In summary, the principal evidential uncertainties are these:
- (i) whether the 'art fairs' have been a component part of the claimed recreational user;
 - (ii) or whether the 'art fairs' have been inconsistent with and interrupting the claimed recreational user over part or all of the Site;
 - (iii) whether the 'art fairs' have been held by or 'on behalf of' the landowner;
 - (iv) or whether the 'art fairs' have been held with the consent of the landowner meaning that the recreational use has not been carried on 'as of right'; and
 - (v) in either case (iii) or (iv) whether the result is that the recreational user of the Site as a whole has been permissive and so not 'as of right'.
- 9.2 Given these uncertainties, officers recommend that a decision on registration should not be taken until the issues have been aired in a public hearing. Officers therefore recommend convening a non-statutory public inquiry, to be chaired by a member of the Bar or an Inspector from the Planning Inspectorate, to hear the evidence on these matters (and any other relevant matters that cannot be agreed between the parties) and to make a recommendation to the Registration Authority. The funding for such an inquiry would be met within the existing BES budget.

RICHARD FLINTON
Corporate Director Business & Environmental Services

Background Papers

Application case file held in County Searches Information - Business & Environmental Services

Contact: Doug Huzzard /Chris Stanford