NORTH YORKSHIRE COUNTY COUNCIL
PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE
8 OCTOBER 2010

HELREDALE PLAYING FIELD, WHITBY
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 Helredale Playing Field, Whitby ("the Site") as a Town or Village Green.

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. The Application, made in October 2007, was brought before the County's Yorkshire Coast and Moors County Area Committee on 9 April 2009, and a copy of the report to that Committee is attached to this report at **Appendix 1**.

2.2 That Committee 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.

2.3 Consequently Vivian Chapman Q.C., a barrister with extensive knowledge and experience of this area of the law and who has often acted as Inspector, was instructed and an inquiry was held at Sneaton Castle Conference Centre, Whitby on 21 and 22 April this year. The Inspector's report dated 28 July 2010 is attached to this report at **Appendix 2**. The Committee will note that the Inspector has recommended that the Application is refused, on the basis that the application fails to meet the relevant "as of right" criteria.

2.4 Following receipt of the Inspector's report at County Hall it was sent out to the applicant and the affected landowner (Scarborough Borough Council). In response the Applicant indicated by email on 8 August 2010 (copy attached as **Appendix 3**) that in the event of refusal of their application an application for judicial review would be made. With that email the applicant submitted copies of comments they had received both from the advocate who represented them at the Inquiry (Chris Maile of "Planning Sanity") and the Open Spaces Society. Copies of those comments are attached at **Appendix 4**.

3. CONSIDERATIONS

3.1 The principal matters for consideration in dealing with an application of this type were set out in the report to the County's Yorkshire Coast and Moors County Area Committee and dealt with by the Inspector. 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 Inspector found against the applicant on the question of whether persons using the Site for recreational purposes had been using it "as of right" concluding that up until at least 2003 use of the Site had been by persons who had a legal right to use it and so whose use of the field was "by right" rather than "as of right". Consequently he recommended that the application be rejected. To accept an application a Registration Authority must be satisfied that all of the criteria set out in section 15(2) have been met.

3.3 In their comments Chris Maile (Planning Sanity) and Edgar Powell(Open Spaces Society) criticise the Inspector particularly for reaching the conclusion he did about the legal powers under which Whitby UDC purchased the land and then Scarborough Council continued to hold it which in turn led to his conclusions on the issue of use "as of right". The point at issue is clearly highly technical and given the Inspector's acknowledged expertise in the field your officers believe his judgement on the point should be accepted. It is acknowledged that such a fine technical point will inevitably be the subject of legal argument and potentially alternative views.

3.4 The suggestion by Chris Maile (Planning Sanity) at para 5 of his comments that the Inspector misdirected himself by reliance on obiter comment in the leading legal case of "Beresford" is unfounded. The comments of Waksman.J at para 92 in his recent judgement of what is known as the "Warneford Meadow" case were merely pointing out that publicly owned land is not immune from being the subject of a Town & Village application. He made no judgement on the issue of a user of publicly owned open space having a right to be there and so being there "by right" and in turn being incapable of establishing use "as of right". The status of the Beresford obiter remains unaffected.

3.5 The applicant will be entitled to make application for judicial review if they wish to however it is your officer's opinion that there is insufficient reason before the Registration Authority to warrant a departure from the Inspector's finding.

4. RECOMMENDATION

4.1 That the Application be **REFUSED** because the Registration Authority is not satisfied that it meets all the criteria set out in section 15(2) of the Commons Act 2006 for the reasons set out in the Inspectors Report dated 28 July 2010.

DAVID BOWE
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

NORTH YORKSHIRE COUNTY COUNCIL

YORKSHIRE COAST AND MOORS COUNTY AREA COMMITTEE

9 APRIL 2009

HELREDALE PLAYING FIELD, WHITBY
APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN

1.0 PURPOSE OF REPORT

1.1 To report on an application for the registration of an area of land known as Helredale Playing Field, Whitby (identified on the plan comprising **Appendix 1**) as a Town or Village Green

2.0 BACKGROUND

2.1 Under the provisions of the Commons Act 2006 the County Council is a Commons Registration Authority and so responsible for maintaining the register of Town & Village Greens for North Yorkshire.

2.2 Section 15(2) of the Act 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

3.0 APPLICATION

3.1 An application to register land as village green has been submitted by Helredale Neighbourhood Council (HNC) claiming that the land concerned should be registered as green by virtue of the criteria set out section 15(2) having been satisfied.

3.2 In support the Application was accompanied by 58 Evidence Questionnaires completed by adults and a further 22 similar forms completed by children referring to a range of mostly familiar activities and pastimes (including sports, kite flying and picnicking) having taken place over time (**Appendices 2 & 3**). Additionally 30 letters from local residents supporting application were submitted.

4.0 APPLICATION SITE

4.1 The site which is the subject of the Application is owned by Scarborough Borough Council (SBC).

4.2 At present the land comprises a grassed area on part of which there is a marked football pitch with goal posts. Also situated on the application site are changing rooms. A path which crosses part of the site is publicly maintainable.

5.0 OBJECTION FROM SCARBOROUGH BOROUGH COUNCIL

5.1 The SBC objection to the application is contained in a letter dated 20 August 2008 from it's Legal & Support Services (**Appendix 4**). The principle objection raised is that the claimed uses of the site have not been exercised "as of right".

5.2 To support the objection and in particular in an effort to counter claims of use of the site *"as of right"* SBC points to arrangements over the past few years, which involved charges, with both the Whitby & District Sunday League and The Stakesby Arms for the use of the football pitch and changing rooms. Maintenance works to the pitch and grass cutting more generally across the site are also referred to as a indicating control over the site by the SBC.

5.3 The existence of a dog fouling by-law is also referred to by the SBC. However it is not considered that this affects assessment of whether or not the *"as of right"* criteria have been met.

5.4 HNC responded to the SBC objection in it's letter dated 31 August 2008 (**Appendix 5**). In particular it points out that users of the field have not been physically prevented from using the site. Also, some factual points are raised and questioned including the size of the football pitch and extent and intensity of grass cutting. Additionally the HNC points out that SBC's name for the site is the "Recreation Ground" thus indicating the underlying purpose of the site.

5.5 The issue of access to the site being physically unrestricted has not been questioned by SBC however the issue and extent of competing uses in respect of the football pitch area has and that should properly be determined by full investigation by means of public inquiry. That the site seems to be recognised by SBC as a recreation area may suggest that use has been by means of implied licence (see para 7.7) though alone the title given to the land is not persuasive on that point.

6.0 PROCEDURES

6.1 Statutory requirements to publish public notice of the Application in the local press and post similar notice on site have been complied with.

7.0 LEGAL ISSUES

7.1 As of Right

7.2 The question of whether or not activities on the site by the general public have been undertaken *"as of right"* is probably the most complex of the legal issues to be addressed in determining this application.

7.3 The courts have determined in principal that use *"as of right"* means use which has been exercised :-

> "*without force, stealth nor licence of the owner*"

7.4 In the recent Court of Appeal case of R(on the application of Lewis) v Redcar and Cleveland Borough Council and another (2009) "as of right" was discussed by Lord Justice Dyson at length. In particular he identified the following criteria that need to be met to show that s use has been *"as of right"* :-

> *"the use must be such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right"*

7.5 Where there are apparently competing uses between those of a landowner and the sports and pastimes establishing a claim of green status the issue becomes complex requiring full investigation of the manner and extent of the respective uses in order to determine an application.

"Interruption" – where claimed uses might be said to be disturbed - and - "deference" - where claimed uses are considered to defer to an overriding use of a landowner -

may be relevant to determining the issue. For each case reaching a conclusion is a question of fact and degree.

7.6 If uses claiming to give rise to green status have at times to be adjusted to accommodate competing activities of a landowner that may be said not to be giving an outward appearance to that owner that the use is being asserted as of right" but again it is a matter of fact and degree in each case. HNC has acknowledged that this may an issue on the part of Helredale Playing Field which is marked as a football pitch and where the changing rooms are situated. However, it also points out that a large part of the overall site is not affected by the pitch and so has not been subject to competing uses.

7.7 Implied Licence

7.8 Given the meaning (see para 7.3 above) the courts have attached to it where activities have taken place on land under licence then that will not amount to a use *"as of right"*.

7.9 The Courts seem satisfied that *"licence"* in this instance can include an implied licence. Effectively this means use of a site might technically be under *"licence"* without there actually being a written licence agreement in existence.

7.10 Determining whether or not an implied licence exists is technically complex and in the case of land in public ownership involves a thorough inquiry into the background of the status of the land concerned and the history of it becoming an open space used by the public.

7.11 During the leading case of Regina v City of Sunderland ex parte Beresford (2003) the court identified that activities on an area of land owned by a local authority pursuant to a statutory right thus implying a use under implied licence would NOT amount to use "as of right."

7,12 significant number / locality / neighbourhood / lawful sports or pastimes / 20 years

7.13 At face value it seems that determining these legal issues will be less complex and less of a matter of dispute between the parties though it is important that a full investigation is still undertaken into the claims of use made by the application.

8.0 ASSESSING THE EVIDENCE - NON STATUTORY INQUIRY

8.1 In this case there is a serious conflict of evidence that has been received from the interested parties particularly on the question of whether or not activities have taken place on the site "as of right".

8.2 In the leading case of The Queen on Application of Christopher John Whitmey and The Commons Commissioners (2004) it was the view both of Lord Justice Arden and Lord Justice Walker that where a registration authority is faced with a serious dispute it should reach a decision only after receiving the report of an independent legal expert who has at the registration authority's request held a non statutory inquiry.

8.3 Government guidance reflects this view and identifies that the holding of a hearing or inquiry is particularly likely if the registration authority or another local authority owns the land concerned so that the evidence can be tested impartially.

8.4 Use of non statutory inquiries to assist registration authorities determine applications is currently common practice across England and Wales.

9.0 **RECOMMENDATION**

9.1 In view of the conflicting evidence before the Council, it is recommended that the Corporate Director (Business and Environmental Services), in consultation with the Assistant Chief Executive (Legal and Democratic Services) be authorised to appoint an independent expert to conduct a non-statutory public inquiry into the application from the Helredale Neighbourhood Council and to prepare a report to assist the Council in its determination of this matter

9.2 Following the inquiry and receipt of the expert's report, that a further report be presented to this Committee in order that the application may be determined.

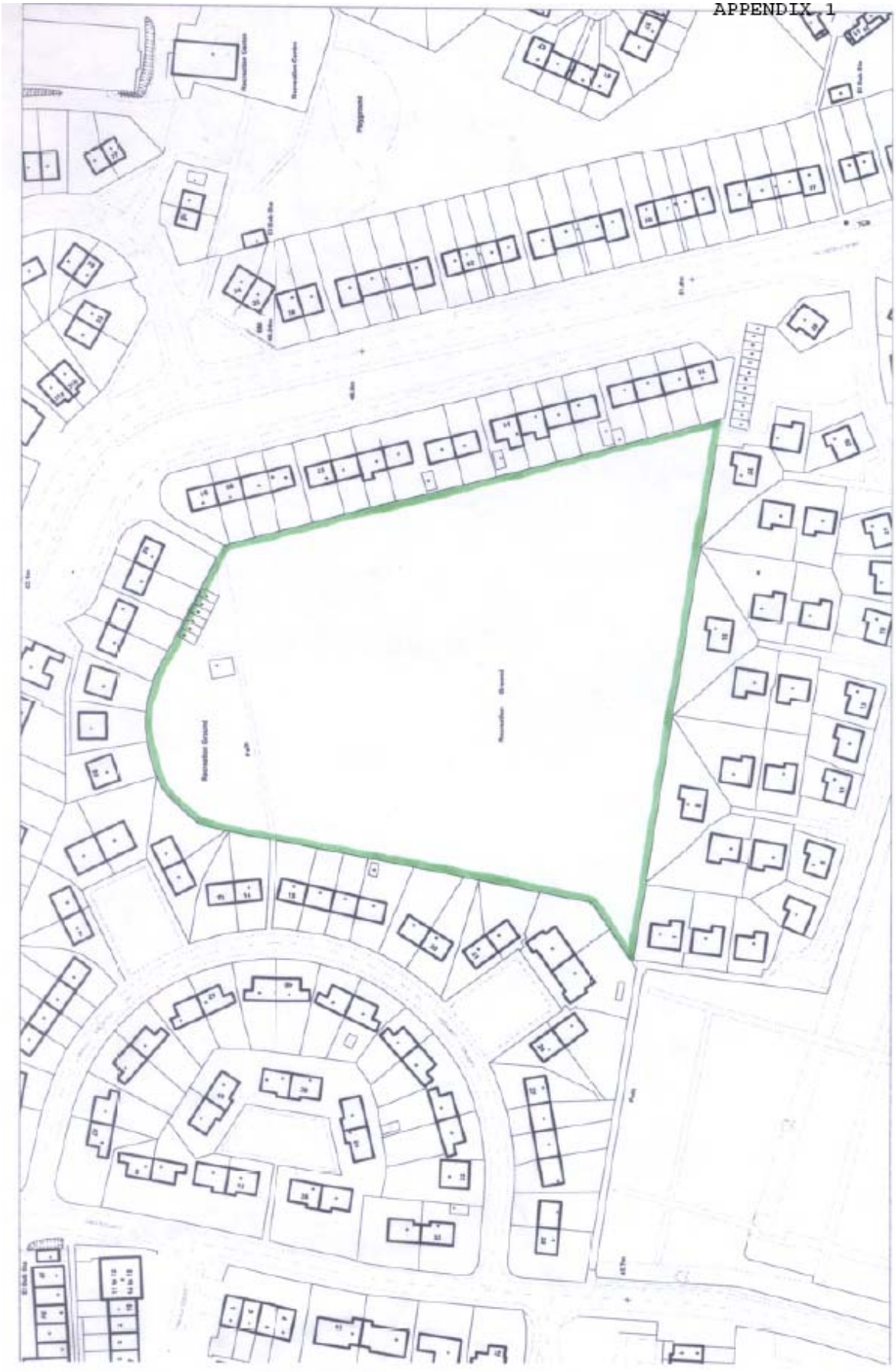
CAROLE DUNN
Assistant Chief Executive Legal & Democratic Services

Background Papers

File No 100683 held in Legal & Democratic Services

Contact: Simon Evans

APPENDIX 1



HELREDALE PLAYING FIELD, WHITBY APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN SUMMARY OF EVIDENCE QUESTIONNAIRES - APPENDIX 2

Timescale	football	rounders	cricket	bike riding	frisbee	kite flying	team	picnics	bonfire	friends	barbques	dog	playing	regularity	address
5	X			X					X	X				2/week	8 ESKSIDE COTTAGES
35	X	X	X	X			X	X	X	X				DAILY	79 ABBOTS ROAD
10	X									X				1/WEEK	ESKSIDE COTTAGES
60	X				X	X		X	X					3/WEEK	23 HELREDALE GARDENS
30	X	X	X	X	X	X		X	X					1/WEEK - PREV DAILY	46 ABBOTS ROAD
4	X	X					X		X		X	X		DAILY	11 WATERSTEAD CRESCENT
2	X	X	X	X	X	X	X				X	X		DAILY	6 LARPOOL CRESCENT
N/R									X	X				N/R	35 LARPOOL CRESCENT
6	X			X		X								MOST DAYS	37 LARPOOL CRESCENT
20		X	X		X	X	X	X	X	X	X			DAILY	19 LARPOOL CRESCENT
7	X	X	X			X	X		X		X	X		DAILY	29 HELREDALE ROAD
26	X					X			X	X				3/WEEK	42 LARPOOL CRESCENT
31												X		DAILY	1 SEAVIEW HELREDALE ROAD
10	X		X	X					X					3/WEEK	44 ST MARY'S CRESCENT
50										X		X		WEEKLY	17 HELREDALE GARDENS
10	X	X	X		X	X	X		X					DAILY	44 ST MARY'S CRESCENT
15	X	X	X	X		X	X	X	X					MOST DAYS	75 HELREDALE ROAD
25	X	X	X	X	X	X	X	X	X	X				DAILY	75 HELREDALE ROAD
10	X													WEEKLY	THE PADDOCK
20	X			X				X						FREQUENTLY	38 LABURNUM GROVE
1	X			X	X	X		X		X	X	X		DAILY	80 HELREDALE ROAD
1	X	X	X	X	X	X	X	X		X	X	X		DAILY	80 HELREDALE ROAD
13									X			X		DAILY	76 HELREDALE ROAD
13										X		X		DAILY	76 HELREDALE ROAD
20	X			X	X	X		X	X					3/WEEK	46 ABBOTS ROAD
50									X	X		X		DAILY	13 HELREDALE GARDENS
8	X	X	X	X	X	X	X		X	X				DAILY	95 HELREDALE ROAD
35		X	X	X				X	X	X		X		DAILY	18 LARPOOL CLOSE
54	X		X	X			X							DAILY	15 LARPOOL CRESCENT
3	X	X		X		X	X			X	X	X		DAILY	6 LARPOOL CRESCENT
15										X		X		DAILY	87 HELREDALE ROAD
15												X		DAILY	87 HELREDALE ROAD
22	X		X	X			X			X		X		DAILY	86 HELREDALE ROAD
N/R	X					X		X			X		X	DAILY	16 LARPOOL CRESCENT
9		X	X				X							OFTEN IN SUMMER	79 HELREDALE ROAD
39	X			X								X		N/R	3 LARPOOL CRESCENT
9		X	X				X							FREQUENTLY IN SUMMER	79 HELREDALE ROAD
LIFE	X	X			X									OFTEN	27 LARPOOL CRESCENT
25		X	X						X	X		X		4/WEEK	88 HELREDALE ROAD
25	X	X	X	X	X	X	X	X	X	X	X	X		DAILY	88 HELREDALE ROAD
35	X	X	X		X		X			X			X	DAILY	78 HELREDALE ROAD
33	X			X	X	X	X	X	X	X				MOST DAYS	78 HELREDALE ROAD
28	X													WEEKLY	54 HELREDALE ROAD
6		X			X	X	X	X			X	X		DAILY	6 LARPOOL CRESCENT
23	X	X			X	X	X	X						DAILY	6 LARPOOL CRESCENT
50		X		X			X		X	X			X	OCCASIONALLY NOW	99 HELREDALE ROAD
55	X	X		X		X			X	X		X		GT GRANDCHILDREN V. OFTEN	20 HELREDALE GARDENS
55				X				X	X	X		X		3/WEEK	77 HELREDALE ROAD
15												X		3/WEEK	77 HELREDALE ROAD
8	X	X	X		X		X				X	X		DAILY	81 HELREDALE ROAD
8	X	X	X	X	X	X	X	X	X	X	X	X		DAILY	81 HELREDALE ROAD
20	X	X		X	X		X			X		X		DAILY	86 HELREDALE ROAD

HELREDALE PLAYING FIELD, WHITBY APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN SUMMARY OF EVIDENCE QUESTIONNAIRE - APPENDIX 3

age	timescale	football	rounders	cricket	bike riding	frisbee	kite flying	team	picnics	bonfire	friends	barbcues	dog	playing	address
4	4	X	X	X	X	X	X	X	X	X	X	X	X		6 LARPOOL CRESCENT
14	14	X	X	X	X	X	X	X	X	X	X	X	X	X	19 LARPOOL CRESCENT
8	5	X	X		X	X	X	X	X	X	X	X		X	19 LARPOOL CRESCENT
15	7	X		X	X					X	X		X		29 HELREDALE ROAD
8	8	X	X	X	X	X		X	X	X	X				79 ABBOTS ROAD
4	4	X				X	X		X						45 ABBOTS ROAD
2	2	X			X	X	X		X	X					45 ABBOTS ROAD
9	6	X	X	X	X	X		X				X		X	78 HELREDALE ROAD
10	10	X	X	X	X	X	X	X	X		X		X		82 HELREDALE ROAD
10	8	X	X		X					X	X				75 HELREDALE ROAD
13	10	X			X					X					75 HELREDALE ROAD
12	12	X		X	X			X		X					HELREDALE ROAD
15	10	X	X	X	X			X		X	X				HELREDALE ROAD
7	1	X			X	X	X	X	X		X	X	X		80 HELREDALE ROAD
5	5	X	X	X	X	X	X	X	X	X	X	X	X	X	6 LARPOOL CRESCENT
12	10	X		X	X			X	X		X				HELREDALE ROAD
9	5	X	X	X	X	X		X			X		X	X	31 HELREDALE ROAD
8	7	X					X							X	2 SAXON ROAD
6	5	X					X							X	2 SAXON ROAD
8	7	X		X	X					X	X				26 HELREDALE ROAD
17	9	X	X	X	X		X	X		X	X		X	X	79 HELREDALE ROAD
11	8	X	X	X	X	X		X		X	X		X		86 HELREDALE ROAD

Appendix 4

Legal & Support Services
Town Hall
St Nicholas Street
Scarborough
YO11 2HG
Head of Service: Ian Anderson

Contact: Carol Rehill
Tel: 01723 384322
Fax: 0870 238 4160
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Web site: www.scarborough.gov.uk
DX: 719232 SCARBOROUGH 5

Scarborough Borough Council

Simon Evans
North Yorkshire County Council
Legal Services
DX 69140 NORTHALLERTON 3

Your Ref: 100683
Our Ref: CAR/P04/1114

20 August 2008

Dear Mr Evans

Helredale Playing Field, Whitby, North Yorkshire
Application for registration as a Village Green

I refer to the above mentioned village green application and your email to me dated 31 July 2008 requesting further representation from Scarborough Borough Council relating to its objection to the aforementioned village green application.

The freehold of the property known as Helredale Playing Field was transferred to the Urban District Council of Whitby by a conveyance dated 20 June 1951 between (1) Thomas Montgomerie Turnbull and Kenelm George Ridgard Bagshawe and (2) the Urban District Council of Whitby. The fee simple became vested in Scarborough Borough Council by virtue of the Local Government Act 1972 and Orders thereunder which came into effect on 1 April 1974. The freehold title to the property was registered by the Council in 2006 and is contained within Title Number NYK322507. I enclose a copy of the registered title and title plan as well as a certified copy of the original conveyance dated 20 June 1951. You will note that there are no covenants restricting the use of the property.

The Council currently maintains the property. The majority of the property is maintained as a football pitch which includes goal posts. From April to October in each year the Council cuts the grass at the property on a weekly basis. The football pitch is measure marked at the start of each football season and then remarked approximately every third week during the football season. Enclosed is an aerial photograph of the land which shows the extent of the football pitch.

The Council built the changing rooms at the property in or around 1985 for the benefit of the football pitch. The Council maintains these changing rooms and in the last two years

has carried out various works to the changing rooms including reroofing the building. Enclosed is a breakdown of costs incurred by the Council in maintaining this structure.

Up until 4 years ago the Whitby Leisure Centre of West Cliff, Whitby, YO21 3HT, which falls within the Council's Tourism and Culture Services, granted an annual licence to the Whitby and District Sunday League for the exclusive use of the football pitch and the changing rooms at the property every Sunday during the football season. Whilst a formal licence between the Council and the Whitby and District Sunday League was not completed, an annual licence fee was charged by the Council for this exclusive use of the property and the Whitby and District Sunday League paid this licence fee annually. This arrangement continued until the end of the 2004/2005 football season which was in April/May 2005. Please find enclosed financial records relating to the payment of this licence fee for the hire of the property by the Whitby and District Sunday League for the 1998/1999 football season, the 1999/2000 football season, the 2001/2002 football season and the 2004/2005 football season. The licence fee was charged to Mr J Tyreman, the Treasurer of the Whitby and District Sunday League, of 17 Well Close Terrace, Whitby, YO21 3AR.

Following the football season the Council would carry out reinstatement works at the property including cultivating and reseeding the grass at the property in preparation for the following football season.

During 2007/2008 football season 'The Stakesby Arms' of 1 Byland Court, Whitby, YO21 1JJ has had use of the playing field at the property. This arrangement was again made through the Whitby Leisure Centre. I have been advised that the Whitby Leisure Centre charges £27 per game for the use of the football pitch and changing rooms. I have been further advised that 'The Fleece' of Church Street, Whitby, YO22 4AS has expressed an interest in booking the property for the forthcoming season.

The Council has also placed signs at the property relating to the control of dogs at the property. The sign requires that dogs must be kept on leads and prohibits dog fouling. In 1996 the Council passed a byelaw relating to Dog Prohibited Areas, Removal of Canine Faeces and Dogs on Leads under section 23(2) of the Housing Act 1985 which specifically referred to the property. Please find enclosed a copy of that byelaw. The property is referred to as Helredale Recreation Ground. Please also find enclosed a map which indicates that Helredale Recreation Ground is defined as the property which is the subject of this village green application. The contravention of a byelaw is a criminal offence and I have been advised that the Council has enforced this byelaw at the property and has thereby restricted the use of the property.

In order for this application to register the property as a village green the property must meet the following definition:

20 August 2008
Simon Evans
North Yorkshire County Council

> "...land on which for not less than twenty years a significant number of inhabitants of any locality, or any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and...continue to do so."

The Council would contend that this definition has not been met. The Council would contend that the inhabitants have not indulged "as of right." The Council has controlled and restricted the use of the property through its maintenance of the property, licensing arrangements with third parties and through the passing of and enforcement a byelaw which specifically relates to the property.

Thank you for your continued patience and co-operation in this matter and if you should require any further information on any of the above or have any queries please do not hesitate to contact me.

Yours sincerely

C. Rehill

Carol Rehill
Solicitor

Enc

Cc Mike Close Estates Manager

Appendix 5

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C

Secretary: Mrs V Wright

77 Helredale Road

Whitby YO22 4HZ

Tel: 01947 604752 email: vivwright1@tiscali.co.uk

Mr Simon Evans
NYCC
Legal & Democratic Services
County Hall
Northallerton DL 7 8AD

Your ref: 100683 SE

31st August 2008

Dear Mr Evans

Helredale Playing Field Whitby – Application to register as Village Green

I refer to your letter dated 26th August and its enclosures detailing the objections put forward by Scarborough Borough Council.

Our comments are:
We disagree with their statement that our application does not meet with the relevant criteria because we have not indulged in the use of the land "as of right". I have spent considerable time researching the criteria required and case law, and in particular the House of Lords decision in the Trapp Grounds case. We have proved beyond doubt that the use of the field has been "as of right" since as early as 1955. The relevant law on Village Green Registration would have allowed us to register this land under the 20 year rule since 31st August 1970 had we felt it to be under threat at the time. We have claimed the right on behalf of the residents of the locality covered by Helredale Road and Gardens, Larpool Lane and Crescent and Abbots Road, in Whitby, none of whom has ever been prevented by Scarborough Borough Council from using the land. SBC in fact refer to it as Helredale Recreation Ground on their submitted map of the area, thereby admitting that it is a public recreation area. Their submission states that the "majority of the property is maintained as a football pitch which includes goalposts". We maintain that this is not the case and that the aerial photograph they submit as evidence has been stretched in length to show that the pitch occupies the majority of the land.

The field has been measured and found to cover an area 110m x 151.5m, a total of 16,665 sq metres. The football pitch as currently marked out measures 89m x 60m,

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Secretary: Mrs V Wright

77 Helredale Road

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a total of 5,340 sq metres. Taken as a percentage of the whole, the football pitch occupies a mere 32% of the Playing Field, thus proving SBC's claims to be false. Invoices submitted by SBC show that the Sunday League hired the Helredale Pitch during the seasons of 98/99 and 99/00, however this use was for a limited period of no more than 2 hours per week on a Sunday morning, weather permitting. The invoices submitted for the seasons of 01/02 and 04/05 do not state any location and therefore cannot be accepted as evidence of use specifically for the Helredale Pitch. SBC claims in one sentence that the League had exclusive use of the pitch and changing rooms only, but in another that an annual licence fee was charged for "this exclusive use of the property". They obviously do not know exactly which part of the land they were hiring out!

We have proved with measurements that can be verified that the pitch occupies less than one third of the whole Recreation Ground, therefore the remaining two thirds were available for use by the residents during the time a match was being played, and in fact, many residents enjoyed going out onto the field to watch the matches. We contend that by hiring only the football pitch and changing rooms for a minimal period time over a whole year that SBC has not prevented the use as of right of the Recreation Ground, as they call it, by residents during that time. A recreation ground is obviously for recreation, the definition of which is " *Noun* - an activity done for pleasure or relaxation" which covers all activities not just football.

We further contend that the football pitch was not used by the Stakesby Arms for football matches at any time during the season 2007/08, although it has been used on three occasions during August 2008 as a substitute for their usual pitch at White Leys Playing Field, Whitby, which has recently been re-seeded and was not available for use at those times. We are told that the Fleece football team, which SBC claims has expressed an interest in booking the field for the forthcoming season, is no longer in existence so we have to doubt the truth of this statement.

SBC's statement that they maintain the land and changing rooms is not disputed, this is part of their obligation to Council Tax payers and residents, but we dispute their claim that the grass is cut regularly on a weekly basis. The grass is cut only

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from late spring until early autumn usually every 2-3 weeks, depending on how long the grass has grown and also on the availability of machinery to cut it due to breakdowns of equipment. The pitch has not been re-marked every three weeks throughout the season for some considerable time, but at the end of July 2008 it was marked out for the temporary use by the Stakesby Arms team, as previously mentioned.

We agree that the Council has placed signs relating to the control of dogs on the land, but these state that dogs must be kept on a lead and canine faeces must be removed by the person in charge of the dog. This in itself effectively tells residents that they can use the Playing Field for the purpose of walking their dogs but that they may render themselves liable to prosecution should they infringe the terms of the Byelaw, which incidentally does not appear to be enforced by the Council because of their lack of dog wardens. We must draw your attention to the fact that such Byelaws relating to the control of dogs apply throughout the whole of the UK in public and open spaces, and we submit that they were never intended to be used in the context that SBC is using them as a means of preventing land from being registered as a village green.

At no time during the 55 years that I have used the Playing Field has there been any notice erected on the land to the effect that it must not be used by local residents for recreational purposes or for access, nor have I or any other resident ever been prevented by the Council or any of its employees or officers from using the area as of right. We therefore contend that the objections put forward by Scarborough Borough Council do not prove that the criteria for registration of the said land has not been met. The Trapp judgement further states that the new legislation was introduced to make it easier for residents to successfully apply for village green registration, it seems that SBC may be "clutching at straws" to prevent this from happening, and should their objections be accepted then very few such applications would be likely to be successful in future years unless the matter was referred to a judicial review.

Yours sincerely

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Vivienne L Wright
Vivienne L Wright
Secretary.

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APPENDIX 2

In the Matter of
an Application to Register
Land at Helredale Playing Field, Whitby, North Yorkshire
As a New Town or Village Green

REPORT
of Mr. VIVIAN CHAPMAN Q.C.
28th July 2010

North Yorkshire County Council,
County Hall,
Northallerton,
North Yorkshire DL7 8AD
Ref SE/100683
66557/VRC/10/105/wp/S4/Whitby Report

In the Matter of
an Application to Register
Land at Helredale Playing Field, Whitby, North Yorkshire
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CONTENTS

1. Helredale playing field

[1] Whitby is an attractive fishing port and resort on the North Yorkshire coast. It lies at the mouth of the River Esk, which runs in a northerly direction down from the North York Moors, through a deep gorge into the harbour and then into the North Sea. The main A171 road from Middlesbrough to Scarborough crosses the River Esk by the New Bridge to the south of the harbour and then passes through the south-eastern suburbs of Whitby.

[2] The first stretch of the main road to Scarborough after the New Bridge is called Helredale Road. On both sides of Helredale Road there is former local authority housing. This housing is made up of three estates:

- On the north-eastern side of Helredale Road there is a large estate, mostly of pre-war houses and maisonettes. The houses on the estate either front onto Helredale Road or are situated on two roads which branch off Helredale Road. One road is are called Abbot's Road (which has a smaller branch called Abbot's Walk) and the other road is called St. Peter's Road (which has a smaller branch called St. Peter's Court). Between Abbot's Road and St. Peter's Road there is a large shallow valley which is mostly laid to grass as a recreational area. In the valley there is a building used as a recreation centre.

- On the south-western side of Helredale Road, there is a smaller 1950s estate of houses. This estate lies between Helredale Road to the east and Larpool Lane to the west. The eastern side of the estate faces onto a service road

running alongside Helredale Road. The houses on this side have addresses in Helredale Road. The western side of the estate is situated on both sides of a semi-circular road leading off Larpool Lane and called Larpool Crescent.

- To the south of the second estate there is a yet smaller estate of modern bungalows built on the sites of former pre-fabricated bungalows. The road serving this estate is called Helredale Gardens. It leads off the south-western side of Helredale Road. To the south of this estate is Whitby Cemetery.
-

The three estates do not have official names but, for convenience, I will call them respectively the eastern, western and southern estates.

[3] The Helredale playing field ("the Field") is in the middle of the western estate. It is a 4 acre area of grassland shaped like a bell. The curved top of the bell is to the north and the flat bottom of the bell is to the south. The northern and eastern sides of the Field are lined by the back fences or walls of houses on the western estate which front Helredale Road. The western side of the Field is lined by the back fences or walls of houses on the western estate which front Larpool Crescent. The southern side of the Field is lined by a fence running along the northern side of the southern estate. The Field has a very noticeable slope downwards from south to north.

[4] There are four public entrances to the Field:

- At the south-western corner there is a pedestrian access from Larpool Lane by way of a path running alongside the cemetery.
- At the south-eastern corner there is a pedestrian access from Helredale Road by way of a path leading from the Helredale Road service road.
- At the north-eastern corner there is a vehicular access which leads to a row of garages with a small hard-surfaced area in front of them. To the west of the hard-surfaced area there is a small changing room building.
- From the hard-surfaced area a paved footpath cuts across the head of the bell to the fourth access, which is a pedestrian path between the houses in Larpool Crescent.

All four accesses are open at all times to the public. By each access, there is a sign relating to dogs. The wording of the signs differs slightly but the overall effect of the signs is to require dogs to be kept on a lead and to require dog walkers to clear up after their dogs. Some of the signs refer to the Dogs (Fouling of Land) Act 1996.

[5] The bulk of the Field lies above and to the south of the paved footpath and is fairly closely mown. In this area there is a fair sized football pitch with some dilapidated goal posts. The area below and to the north of the paved footpath and to the west of the garages, hard surfaced area and changing rooms building is a much smaller area of somewhat longer weedy grass.

[6] The Field has all the appearance of a typical municipal recreation ground, with easy access from the surrounding estates and suitable both for ball games (although the slope must create some difficulties for football matches) and for informal recreation by local people.

2. The town green application

[7] By an application[1] dated 12th October 2007 the Helredale Neighbourhood Council, acting by its secretary, Mrs. Vivienne Louise Wright, applied to North Yorkshire County Council ("NYCC") under s. 15 of the Commons Act 2006 ("CA 2006") to register the Field as a new town green. NYCC is the relevant commons registration authority ("CRA") for Whitby. The application was received on 23rd November 2007.

[8] The application was in the prescribed form 44 which contains a list of numbered questions. The answers to the following questions are to be noted:

- In answer to Q4 (basis of application for registration and qualifying criteria) the applicant stated that it relied upon CA 2006 s. 15(2)

- In answer to Q5 (description and particulars of the area of land in respect of which application for registration is made) the applicant described the land as Helredale Playing Field as shown on an attached map. The map[2] showed the whole Field including the garages, hard standing and the changing room building.

- In answer to Q6 (locality or neighbourhood within a locality in respect of which the application is made) the applicant stated "Helredale Road/Larpool Crescent Whitby" as shown on an attached map. In fact three maps were attached. Map 1[3] was a Google map showing the playing field outlined in bold and various roads in the vicinity extending beyond the three estates. Map 2[4] was a satellite map showing the playing field, the southern estate and parts of the eastern and western estates. Map 3[5] was a street map showing the playing field, the western and southern estates, parts of the eastern estate and some other roads in the vicinity.

- In answer to Q7 (justification for application to register the land as a town or village green) the applicant stated that the Field had been used as a leisure amenity area for lawful sports and pastimes by a significant number of the inhabitants of the Helredale area for more than 20 years.
- In answer to Q10 (supporting documentation) the applicant referred to the three maps, a statement of justification and various supporting letters and evidence questionnaires. The statement of justification[6] said that the playing field was given to the town of Whitby as a play area some 55 years ago and had been used ever since for football, community events and children's play.

The application was verified by a statutory declaration[7] made by Mrs. Wright in prescribed form.

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1 R1 (i.e. Red Bundle page 1

2 Not included in the inquiry bundles

3 R9

4 R10

5 R11

6 R12

7 R7

[9] The application was duly publicised by notice dated 18th April 2008 in accordance with the relevant regulations. The notice invited objections to the application. There was only one objection, and that was by Scarborough Borough Council ("SBC") as owner of the application land. The letter of objection[8] was dated 20th August 2008. It opposed the application on the ground that use of the application land had not been "as of right" because:

- SBC controlled use of the land by licensing its use by football teams,
- SBC had maintained the land by cutting the grass etc. and
- SBC had passed byelaws under the Housing Act 1985 restricting use of the land by dogs.

[10] I was instructed by NYCC to act as an inspector to hold a non statutory public inquiry into the application and to report whether NYCC as CRA should accede to or reject the application. I gave written directions to the parties before the public inquiry designed to facilitate the smooth running of the public inquiry by prior disclosure in writing of evidence and legal arguments and the preparation of inquiry bundles. The public inquiry was held in Whitby on 21st and 22nd April 2010. I held an accompanied site view on 22nd April 2010 during which I visited both the application land and all the streets in the three estates. I also visited the Field unaccompanied before the public inquiry. The applicant was represented by Mr. Chris Maile, a director of the Campaign for Planning Sanity, which is a charitable organization which gives support to local communities primarily in connection with planning applications which might have an adverse effect on the community. The objector was represented by Mr. James Marwick of counsel, instructed by Ms. Kimberley Proud of SBC. I wish to express my gratitude to Mr. Maile and Mr. Warwick for their helpful presentation of their respective cases. The public inquiry was organized by Mr. Simon Evans of NYCC with exemplary efficiency and I am most grateful to him for his excellent administrative support.

[11] At the beginning of the public inquiry, Mr. Maile said that the applicant did not pursue registration of the garages, the hard standing in front of the garages or the changing room building. He also said that the applicant relied on use by the inhabitants of the neighbourhood shown edged red on plan R294 within the locality of the SBC ward of Streonshalh (pronounced "Strenshaw"). The claimed neighbourhood edged red on plan R294 consists of the three estates together with a fairly small piece of additional housing along Larpool Lane.

[12] It became apparent during the course of the public inquiry that there was an important additional point which had not been canvassed in the parties' pre-inquiry written evidence or legal arguments. This was whether the application land had been used for recreation by local people "by right" rather than "as of right" as being recreational space provided under the relevant housing legislation. I therefore gave a further direction allowing both parties time to put in further written evidence and written legal submissions on this point after closure of the public inquiry. In the event, neither party put in any further evidence or asked for an extension of time to put in

[8] B12 (i.e. Blue Bundle page 12)

further evidence. Mr. Maile stated in his submissions that Mrs. Wright had searched in the Whitby UDC minutes and had found nothing relating to (a) the statutory power under which the 1951 Conveyance was entered into or (b) the grant of ministerial consent to the setting out of the recreation ground. However, there was no statement from Mrs. Wright dealing with the nature or extent of her researches. He also said that he understood that SBC had made similar but equally fruitless searches. However, both parties put in extensive further written legal submissions. Mr. Maile made further legal submissions on 6th, 23rd & 28th May 2010. Mr. Marwick made further legal submissions on 20th May 2010.

3. New greens: law and procedure

[13] The substantive law relating the registration of new greens is constantly developing because of the increasing amount of litigation generated by applications to register new greens. The procedure relating to the registration of new greens is somewhat unsatisfactory. I consider that it would be useful if, at this stage, I were to summarise my understanding of the current law and procedure relating to the registration of new greens.

[14] At common law a town or village green could only be created by custom. This required use since time immemorial (1189 AD in legal theory). The Commons Registration Act 1965 ("CRA 1965") introduced the concept of a new green created by prescription, i.e. 20 years' use. The requirements for registration of a new green were relaxed by the Countryside and Rights of Way Act 2000 ("CRoW Act 2000"). The previous legislation was replaced by the current law to be found in s. 15 of the CA 2006, which further relaxed the requirements for registration of a new green.

[15] Section 15 of the CA 2006 was brought into force on 6th April 2007 and contains (so far as presently material) the following provision for the registration of new greens:

*"**Registration of greens***

(1) Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2)… applies.

(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.

What is a Town or Village Green?

[16] A town or village green is land which is subject to the right of local people to enjoy general recreational activities on it. There is no legal requirement that it should

consist mainly of grass, be situated in or in reasonable proximity to a town or village, or be suitable for use by local inhabitants for traditional recreational activities[9].

What is the Effect of Registration?

[17] The effect of registration of land as a new green can be summarized as follows. Land becomes a new green only when it is registered as such[10]. Registration as a new green confers recreational rights over the green on local people[11], but not so as to override the right of the landowner to continue to use his land as before[12]. Registration as a new green subjects the land to the protective provisions of s. 12 of the Inclosure Act 1857 and s. 29 of the Commons Act 1876, which in practice preclude development of greens[13].

…a significant number…

[18] "Significant" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers[14].

…of the inhabitants of any locality or of any neighbourhood within a locality…

[19] 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 somewhat confusingly, the current jurisprudence is that the word "locality" may have different meanings in limbs (i) and (ii).

[20] A limb (i) "locality" cannot be created by drawing a line on a map[15]. It seems that a limb (i) "locality" must be some division of the county known to the law, such as a borough, parish or manor[16]. An ecclesiastical parish can be a "locality"[17]. It will be seen that the courts have adopted a very narrow construction of "locality". The House of Lords in the *Trap Grounds* case appeared to recognise and uphold the narrowness of this definition of "locality". However, it has recently been held in the *Leeds* case[18] 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. I understand that the *Leeds* case is being appealed to the Court of Appeal.

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9 *Oxfordshire County Council v Oxford City Council & anor.* [2006] 2 AC 674 (the *Trap Grounds* case) per Lord Hoffmann at paras. 3-16, & 37-39, Lord Rodger at para. 115 & Lord Walker at paras. 124-128 (Lord Scott dissenting at paras. 71-83)

10 *Trap Grounds:* Lord Hoffmann at para. 43, Lord Scott at para. 110 & Lord Rodger at para. 116 (Lady Hale dissenting at para. 142 in relation to the original definition).

11 *Trap Grounds* and see *R (Lewis) v Redcar & Cleveland Council* [2010] 2 WLR 653 (the *Redcar* case): Lord Walker at paras. 42-47, Lord Hope at para. 72

12 *Redcar:* Lord Walker at paras. 39-47, Lord Hope at paras. 70-77, Lord Brown at paras. 98-106, Lord Kerr at para. 115

13 *Trap Grounds*

14 *R (McAlpine) v Staffordshire CC* [2002] EWHC 76 (Admin) (the *McAlpine* case) at para. 77

15 *R (Cheltenham Builders Ltd) v South Glos. DC* [2004] 1 EGLR 85 (the *Cheltenham Builders* case) at paras. 41-48

16 *Ministry of Defence v Wiltshire CC* [1995] 4 All ER 931 at p 937b-e, *Cheltenham Builders* at paras 72-84 and see *R (Laing Homes Ltd) v Buckinghamshire CC* [2003] 3 EGLR 69 (the *Laing Homes* case) at para. 133

17 *Laing Homes*

18 *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch) (the *Leeds* case) where the judge held that a village that had not been an administrative area known to the law since 1937 was nonetheless a limb (ii) "locality".

[21] In the *Trap Grounds* case, Lord Hoffmann said that it had been decided in the *Sunningwell* case[19] that the narrowness of the definition of locality was qualified only by the fact that it was sufficient if the recreational users of the green came "predominantly" from the relevant locality[20]. However, this qualification was applied on consideration of an earlier, and narrower, definition of a prescriptive green under s. 22(1) of the CRA 1965 in the *Sunningwell* case. Under the current definition, the test is not whether the users come predominantly from the relevant locality or neighbourhood, but whether a significant number of the users come from such locality or neighbourhood[21].

[22] A "neighbourhood" need not be a recognised administrative unit. A housing estate can be a neighbourhood[22]. However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness[23]. 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[24]. In the *Trap Grounds* case, Lord Hoffmann pointed out the "*deliberate imprecision"* of the expression. 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[25]. I do however consider that a neighbourhood must have ascertainable boundaries because only the inhabitants of the relevant neighbourhood have recreational rights over the land[26].

…have indulged as of right…

[23] Although the statutory creation of a new green by 20 years' use does not depend on the inference or presumption of a grant or dedication, the expression "as of right" echoes the requirements of prescription in relation to easements and public rights of way. In both cases, qualifying user must be "as of right" because the inference or presumption of a grant or dedication depends fundamentally on the long acquiescence of the landowner in the exercise of the right claimed[27]. The subjective intentions of the users are irrelevant[28].

[24] The traditional formulation of the requirement that user must be "as of right" is that the user must be without force, secrecy or permission (or in the time-worn Latin phrase *nec vi, nec clam, nec precario*). The unifying element in these three vitiating

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19 *R v Oxfordshire County Council ex. p. Sunningwell Parish Council* [2000] 1 AC 335

20 *Trap Grounds:* Lord Hoffmann at para. 25.

21 *R (Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) (the *Warneford Meadow* case) followed and applied in the *Leeds* case.

22 *McAlpine*

23 *Cheltenham Builders* at para 85

24 *Trap Grounds:* Lord Hoffmann at para 27 disapproving *Cheltenham Builders* at para. 88

25 *Warneford Meadow*

26 *Trap Grounds:* para. 69(i), *Warneford Meadow*

27 *Dalton v Angus & Co.* (1881) 6 App. Cas. 740 at 773 as cited by Lord Hoffmann in *Sunningwell* at p. 351B and by Lord Walker in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 (the *Beresford* case) at para. 76

28 *Sunningwell*

circumstances is that each constitutes a reason why it would not be reasonable to expect the owner to resist the exercise of the right claimed[29]. It was held in the *Redcar* case that there is no further requirement that the recreational user by local people should not defer to the use of the land made by the landowner.

[25] "Force" does not just mean physical force. User is by force in law if it involves climbing or breaking down fences or gates or if it is contentious or under protest[30]. There is an undecided question whether user which involves ignoring a prohibitory notice such as "Private Keep Out" is user by force[31].

[26] Use that is secret or by stealth will not be use "as of right" because it would not come to the attention of the landowner.

[27] **"**Permission" can be express, e.g. by erecting notices which in terms grant temporary permission to local people to use the land. Permission can be implied, but permission cannot be implied from inaction or acts of encouragement by the landowner[32]. It was held in the *Beresford* case that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence.

[28] "As of right" means "as if of right". If user is in fact pursuant to a legal right, e.g. under a statutory right of public recreation under s. 164 of the Public Health Act 1875 or s. 10 of the Open Spaces Act 1906, it is "by right" or "of right" rather than "as of right". This point was extensively discussed by the House of Lords in the *Beresford* case although the discussion was not part of the *ratio decidendi* of the case.

…in lawful sports and pastimes on the land…

[29] The words "lawful sports and pastimes" form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play[33]. It does not include walking of such a character as would give rise to a presumption of dedication as a public right of way[34].

…for a period of at least twenty years…

[30] In the case of an application under CA 2006 s. 15(2), the period of 20 years is the 20 years immediately before the date of the application.

Procedure

[31] In most of England, including the county of North Yorkshire, procedure on applications to register new greens under the CA 2006 is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England)

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29 *Sunningwell* per Lord Hoffmann

30 *Redcar* per Lord Rodger at paras. 88-90 and see *Warneford Meadow*

31 See the discussion by Sullivan J at first instance in the *Redcar* case at [2008] EWHC Admin 1813 at paras 11-16

32 *Beresford*

33 *Sunningwell* at pp 356F-357E

34 *Trap Grounds* in the High Court: *Oxfordshire County Council v Oxford City Council* [2004] Ch 253 at paras 96-105

Regulations 2007. The 2007 Regulations closely follow the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under s. 13 of the CRA 1965. Those regulations proved quite inadequate to resolve many disputed applications and registration authorities have had to resort to procedures not contemplated by the Regulations to deal with such applications. In a small number of pilot authorities[35], the Commons Registration (England) Regulations 2008 apply. In Wales, there are different regulations but they are very similar to the 2007 Regulations.

Who can apply?

[32] Anyone can apply to register land as a new green, whether or not he is a local person or has used the land for recreation.

Application.

[33] Application is made by submitting to the CRA a completed application form in Form 44. The House of Lords in the *Trap Grounds* case has emphasised that the procedure is intended to be simple and informal and that applications are not to be defeated by technical objections to the form of applications provided that the applications are handled in a way which is fair to all parties[36]. An application can be amended with permission of the CRA if it would cause no unfairness to the objector. No fee is payable on making an application to register a new green.

Accompanying documents.

[34] Although the application form has to be verified by a statutory declaration by the applicant or his solicitor, there is no requirement that the application should be accompanied by any other evidence to substantiate the application. Instead, reg. 3 provides for the application to be accompanied by any relevant documents relating to the matter which the applicant may have in his possession or control or of which he has the right to production. In many cases, there are few, if any, of such documents as the application turns simply on a claim that the application land has been used for recreation by local people for more than 20 years.

Evidence

[35] The applicant is only required to produce evidence to support the application if the CRA reasonably requires him to produce it under reg. 3(2)(d)(ii).

Preliminary consideration

[36] After the application is submitted, the CRA gives it preliminary consideration under reg. 5(4). The CRA can reject the application as not "duly made" at this stage,

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[35] Blackburn with Darwen Borough Council, Cornwall County Council, Devon County Council, County of Herefordshire District Council, Hertfordshire County Council, Kent County Council & Lancashire County Council

[36] Lord Hoffmann at paras 60-62, Lord Scott at para 110, Lord Walker at para 124 & Lady Hale at para 144.

but not without giving the applicant an opportunity to put his application in order. This seems to be directed to cases:

- where Form 44 has not been duly completed in some material respect,
- where the application is bound to fail on its face, e.g. because it alleges less than 20 years use, or
- where the supporting documents disprove the validity of the application

Publicity

[37] If the application is not rejected on preliminary consideration, the CRA proceeds under reg. 5(1) to publicise the application:

- by notifying the landowner and other people interested in the application land
- by publishing notices in the local area, and
- by erecting notices on the land if it is open, unenclosed and unoccupied.

Objectors

[38] Anyone can object to an application to register a new green, whether or not he or she has any interest in the application land

Objection Statement

[39] Any objector has to lodge a signed statement in objection. This should contain a statement of the facts relied upon in support of the objection. There is a time limit on service of objection statements. The time limit is stated in the publicity notices issued by the CRA. However, the CRA has a discretion to admit late objection statements.

Determination of application

[40] After receipt of objections the CRA proceeds to "further consideration" of the application under reg. 6. Under reg. 6(4) the CRA may not reject an application without giving the applicant a reasonable opportunity to deal with (a) any matters contained in the objection statements and (b) any other matter in relation to the application which appears to the CRA to afford possible grounds for rejecting the application. The most striking feature of the regulations is that they provide no procedure for an oral hearing to resolve disputed evidence. The regulations seem to assume that the CRA can determine disputed applications to register new greens on paper. A practice has grown up, repeatedly acknowledged by the courts at the highest level, most recently by the Supreme Court in the *Redcar* case, whereby the CRA appoints an independent inspector to conduct a non statutory public inquiry into the application and to report whether it should be accepted or not. In some cases,

procedural fairness will make an oral hearing not merely an option but a necessity[37]. In the *Whitmey* case[38], it was held that the procedure by non statutory public inquiry did not infringe art. 6 of the ECHR because any decision of the CRA is subject to review by the courts. A non statutory public inquiry has no power to award costs.

Procedural issues

[41] A number of important procedural issues have been decided by the courts:

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[39]. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.

- **Defects in Form 44.** The House of Lords has held in the *Trap Grounds* case that an application is not to be defeated by drafting defects in the application form. The issue for the CRA is whether or not the application land has become a new green.

- **Part registration.** The House of Lords also held in the *Trap Grounds* case that the CRA can register part only of the application land if it is satisfied that part but not all of the application land has become a new green. Indeed, the House thought that a larger or different area could be registered if there was no procedural unfairness[40].

4. Evidence in support of application

[42] I now turn to consider the evidence submitted to the public inquiry in support of the application. I will first consider the evidence of the witnesses who gave oral evidence to the public inquiry. For convenience, I will deal with these witnesses in alphabetical order rather than in the order in which they gave their evidence to the public inquiry. Then, I will consider the evidence of the witnesses who submitted only written evidence to the public inquiry. Again, I will consider them in alphabetical order.

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37 *Trap Grounds* case *per* Lord Hoffmann at para 29 approving Sullivan J in *Cheltenham Builders*

38 *R (Whitmey) v Commons Commissioners* [2005] 1 QB 282.

39 *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 at p 111 per Pill LJ approved by Lord Bingham in *Beresford* at para. 2

40 Lord Hoffmann at paras 61-62, Lord Scott at para 111, Lord Rodger at para 114, Lord Walker at para 124 and Lady Hale at para 144.

Oral evidence

Mrs. Stephanie Akel

[43] Mrs. Akel produced (a) an evidence questionnaire dated 24th September 2007[41], (b) a witness statement dated 2nd April 2010[42] and (c) a number of photographs[43]. She gave oral evidence to the public inquiry.

[44] Mrs. Akel lived with her parents and younger brother at 18, Larpool Crescent, on the western estate from 1976 (when she was 10) until she left home in 1989. Her parents were council tenants. Their house backed onto the Field and there was a gate in the back wall. As a child, she played regularly in the Field with friends. She camped in the Field in hot weather and sledged on it in the snow. There was a bonfire party on the Field every year. When she became a teenager she hung out with her friends on the Field. She used to watch the Sunday league football matches on the Field from her bedroom window. They took place most weekends in the football season. She never saw anyone interfere with the matches: the Field was big enough to be used both for football matches and for other recreation at the same time. When she was a child there was children's play equipment north of the footpath crossing the Field. The play equipment is no longer there but that land is still used for the annual bonfire and children still play there although it has become rather overgrown.

[45] In 1989, she moved to Haggersgate in the centre of Whitby. She visited her parents in Larpool Crescent several times a week and, in nice weather, she and her parents would sit in the Field to watch children play and to chat with neighbours. Her parents bought their house from the council in about 1993/4. Her son, Kaan, was born in 1998, and Mrs. Akel's mother used to look after him on the days when Mrs. Akel worked. Her mother took Kaan on the Field in his pram and, when he was older, to play on the Field.

[46] In 2003, Mrs. Akel moved to 79, Abbot's Road on the eastern estate. She is a tenant. A few years ago, SBC transferred its remaining housing stock to a housing association called Yorkshire Coast Homes. She estimated that about 80% of the houses in Abbot's Road were still tenanted. She used to take Kaan over to her mother's and play with him in the Field. When he got older, he played on his own or with friends in the Field. It was a safe place to play because it is surrounded by houses and there is always someone looking out for the children. The Field is used by children for playing and by adults for exercise, dog walking and passing the time of day with others. On the Whitby Regatta weekend, local people gather on the Field to watch the air displays and fireworks. Mrs. Akel joins them with her parents and son every year. The people who use the Field are local people and she recognizes most of them.

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41 R17

42 R13

43 R24-25

[47] Mrs. Akel regarded the local community as being those who lived on Abbot's Road, St. Peter's Road, Helredale Road, Larpool Crescent and Helredale Gardens. She uses the recreational area on the eastern estate, but there is not a football pitch over there and a lot of people come over from the eastern estate to use the Field.

[48] Mrs. Akel has never sought or been given permission to use the Field and has never been prevented from using it and has never been challenged or asked to leave.

[49] I found Mrs. Akel to be an honest witness and I accept her evidence.

Mrs Christine Barkas

[50] Mrs. Barkas produced an evidence questionnaire[44] dated 23rd September 2007 and a witness statement[45] dated 17th March 2010.

[51] Mrs. Barkas moved into 23, Helredale Gardens with her parents in 1946, when she was two years old. Helredale Gardens was an estate of 31 prefabricated bungalows erected in 1946. Originally there was a field with cows to the north of Helredale Gardens. In the 1950s, the council bought the field and built houses around it. The land in the middle was set out as a playing field, i.e. the Field. The back garden of 23, Helredale Gardens backs onto the Field. As a child, she played on the Field with her friends and many other local children. She played ball games, walked the family dog, went to bonfire parties and sledged in the snow.

[52] In 1968, the council demolished the prefabricated bungalows and replaced most of them by the present sectional buildings on the same sites. Two of the prefabricated bungalows were not replaced and their sites were used for car parking. Her parents moved out for 6 weeks while their prefabricated bungalow was replaced and then moved back into the new bungalow on the same site.

[53] Also in 1968, Mrs. Barkas got married and moved to live at 5 Helredale Road until 1971 when she moved to 33, Eskdale Road. Both properties were only a few minutes walk from her parents' house. Eskdale Road is on a private estate built by Barratts and is situated to the south of the southern estate on the other side of the cemetery. Her house was newly built when she moved in. She had two children. She left them with her parents when she was at work and they played on the Field. They rode their bikes there and walked the family dog. Her son had a bonfire party in the Field with his friends every year. Her son used to play on the Field with his school friends. After her children grew up, Mrs. Barkas continued to visit her mother daily and walk her dog on the Field. In 1989, her mother purchased the bungalow from SBC. Of the 29 bungalows in Helredale Gardens only 6 have been bought by the tenants. The other 23 are occupied by tenants of Yorkshire Coast Homes (as successor to the council).

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44 R26

45 R20

[54] In 1999, her mother died and Mrs. Barkas inherited her bungalow. She moved back to live in 23, Helredale Gardens. Mrs. Barkas's daughter regularly walks her dog on the Field. Mrs. Barkas has three grandchildren who play on the Field. She has been down to the northern end of the Field with her oldest grandchild, where he got stung by nettles retrieving his ball. Every year, local people gather on the Field during the Whitby Regatta to watch the air display and fireworks.

[55] Since the Field was laid out as a playing Field in the 1950s, the pattern of use has not changed. It has been much used by children to play, by teenagers to hang out and by adults to walk their dogs. So long as she can remember there has been an annual bonfire on the Field. It was usually held at the northern end. There were other bonfires elsewhere in the Field. Mrs. Barkas used to have a family bonfire at the southern end of the Field. There was a Sunday League which used to play football on the Field for about five years. A lot of spectators used to watch the football matches. Mrs. Barkas has never sought or been given permission to use the Field. Her use of the Field has never been challenged. There have been no notices discouraging use of the Field.

[56] I think that Mrs. Barkas may have underestimated the number of years that the Field was used by the Sunday League but I considered Mrs. Barkas to be an honest witness and (subject to the Sunday League point) I accept her evidence.

Mr Joe Bollands

[57] Mr. Bollands produced a written statement[46]. He has lived in 7, Larpool Crescent (on the western estate) for 30 years. Previously, he lived at 8, Larpool Crescent for about twenty years. The Field has always been a playing field. In the 1950s, when he was a child, he was a member of Helredale Rovers, which used to play football on the Field. The council provided goal posts and charged no rent. Team members came from both sides of Helredale Road. In about 1976, he helped form the Sunday League which played on the Field. Four generations of his family have played on the Field, his father, himself, his son and his grandchildren. Kids play on the Field seven days a week. They use the whole of the Field, including the northern end. I accept Mr. Bollands's evidence.

Miss Ruby Brennan

[58] Miss Brennan is 10 years old. She has lived at 19, Larpool Crescent for 5 years. She plays on the Field with her friends. Other people play there. She plays rounders and rides her bike on the Field in summer and sledges and builds snowmen on the Field when it snows. She sometimes goes on the Field to watch the Whitby Regatta events. I accept Miss Brennan's evidence.

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[46] R82

Mr. Shaun Brennan

[59] Mr. Brennan is Ruby's father. He has lived at 19, Larpool Crescent for 5 years. While they have lived there, kids have used the Field. His father, who lived elsewhere in Whitby, played football on the Field 30 years ago. I accept Mr. Brennan's evidence.

Mr. Thomas Niall Carson

[60] Mr. Carson lives in Sleights (another part of Whitby). He is a Whitby Town Councillor but gave evidence in his private capacity. The Council had made a grant to support the present application. He supported the application but had no evidence to offer relating to the use of the Field.

Mr. Dave Goodwill

[61] Mr. Goodwill produced a letter written[47] jointly with his wife and an evidence questionnaire[48]. He played football on the Field from 1972-82. About 16 years ago he moved to 75, Helredale Road as a council tenant. About 2 years later he bought the house. The house backs onto the Field and has a gate into the Field. He has 4 children who play on the Field every day. I consider that "every day" is probably an exaggeration but I accept that they have played there frequently. Subject to this qualification, I accept Mr. Goodwill's evidence.

Mr. Fred Lorains

[62] Mr. Lorains produced a letter written by his wife[49]. He has lived at 84, Helredale Road for 20 years. His wife has lived in the house since 1964. Her parents were council tenants. They purchased the house in 1987. His wife's parents died in 1989 and 1993. His wife was one of 12 children. They all played in the Field. Mr. Lorains's children and grandchildren played in the Field. There was a Sunday League and a Saturday League. Sometimes, there were two matches on a Sunday. I accept Mr. Lorains's evidence.

Mr. Mark Nicholson

[63] Mr. Mark Nicholson produced the following documents:

- A letter written jointly by himself and his wife to SBC dated 15th July 2007[50]
- An evidence questionnaire dated 22nd September 2007[51]

47 R87
48 R150
49 R94
50 R35
51 R44

- A witness statement dated 21st March 2010[52]
- An analysis of the user evidence by address, type of use, age and length of use[53]
- An undated statement supported by statistical information downloaded from the Office for National Statistics website concerning the neighbourhood called Scarborough 003B[54]
- An undated statement about Sunday League use of the Field with attached information about football pitch sizes and the length of the football season[55].

Mr. Nicholson gave oral evidence to the public inquiry.

[64] Mr. Nicholson moved to 112, Helredale Road (which is on the western estate) in 1991 as a council tenant. After three years, he purchased 87, Helredale Road (also on the western estate) from a former council tenant. He moved in with his wife and two step-daughters. He has lived there ever since. The back garden of his house adjoins the Field. As long as he has known the Field, it has been used as a recreational area. Children play there. Teenagers congregate there. He recognises some of the teenagers but does not know where they all come from. His impression was that people used the Field from both sides of Helredale Road. His step-daughters played in the Field from both addresses. He has had various dogs since living at 87, Helredale Road and has walked and trained then on the Field. He has used the part of the Field north of the footpath and has seen children playing there, although not very often. There is usually an annual bonfire and fireworks party on the Field. During the Whitby Regatta Weekend in August many residents gather in the Field to watch the air displays and fireworks. He thought that most users came from the Helredale area which he regarded as being the surrounding streets on both sides of Helredale Road. He has used the Field openly and without seeking or being granted permission. He has never been discouraged from using the Field or asked to leave.

[65] Mr. Nicholson produced a helpful analysis of the user evidence relating to recreational use of the Field. The accuracy of this analysis was not challenged by the objector.

[66] The statistical information showed that Scarborough 003B has c. 1,500 residents and that the borough of Scarborough has c. 110,000 residents. However, it was not clear to me exactly what land was comprised in the area Scarborough 003B.

[67] Mr. Nicholson said that the football pitch on the Field measured 60m x 90m and occupied about a third of the Field. The Sunday League played on the Field only about a dozen times a season. People did not walk on the pitch when a match (or even an informal game of football) was in progress. It was basic manners.

[68] Mr. Nicholson helped Mrs. Wright in collecting evidence questionnaires in support of the TVG application. They collected evidence questionnaires from the

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52 R29

53 R36 (and incorporated in his WS)

54 R46A

55 R46H

streets around the Field. They did not appreciate that there was any need to be specific about the boundaries of the neighbourhood.

[69] I found Mr. Nicholson to be an honest witness and I accept his evidence.

Mr. David Riley

[70] Mr. Riley lives at 79, Helredale Road. He has been on the Field every day of his life. He sees people walking their dogs, playing football and kickabout games. He takes his family and friends on the Field. I consider that the claim to have used the Field every day of his life was somewhat exaggerated but I accept the general thrust of his evidence about recreational use of the Field.

Mr. Stephen Ross

[71] Mr. Ross produced an evidence questionnaire[56]. He has lived at 79 Helredale Road for twenty years and has used the Field for thirty years. The Field was used for football matches. It is a safe area for kids to play. He has never been denied access. His wife says that he has lived there for 18 years[57] but their evidence may be given as at different dates. Subject to this small qualification about dates, I accept Mr. Ross's evidence.

Mr. Christopher Storr

[72] Mr. Storr produced (a) an evidence questionnaire[58] dated 30th September 2007, (b) a witness statement[59] dated 25th March 2010 and (c) an undated letter[60]. He gave oral evidence to the public inquiry.

[73] When he was in his early 20s in the late 1970s, Mr. Storr used to play football on the Field in the Sunday League. The Sunday League was still using the Field when he moved to 78, Helredale Road 12 years ago. When the Sunday League was playing matches on the Field, the pitch was marked out by one of the lads in the team. The pitch did not take up the whole Field and the rest of the Field continued to be used for informal recreation.

[74] 78, Helredale Road backs onto the Field. He has played on the Field with his son, Jack, since he was a toddler. They played football and frisbee, have enjoyed picnics and set up a tent in the Field. Now Jack is older he plays in the Field with his friends. The Field is much used by children playing and by teenagers hanging out. Helredale Gardens is mostly occupied by the elderly and they use the Field to walk, to exercise their dogs and to chat. He and his family stand on the Field during the Whitby Regatta to watch the air displays and fireworks.

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56 R228

57 R97

58 R52

59 R47

60 R51

[75] Mr. Storr said that he regarded the area he lived in as "Helredale". He thought that the Barratt estate centred on Eskdale Road was in Helredale. He considered that the Field was the unifying feature of Helredale.

[76] Mr. Storr struck me as an honest witness and I accept his evidence about the use of the Field. I think that his perception of "Helredale" as an area including the Barratt estate was honestly held although it did not seem to be shared by other witnesses. I note that Eskdale Road does not in fact lead off Helredale Road but from the next section of the A171 called Stainsacre Lane.

Master Jack Storr

[77] Master Jack Straw produced (a) an evidence questionnaire[61] dated 18th September 2007 and (b) a witness statement[62] dated 26th March 2010. He was not cross examined. He was born in 1998 and has lived at 78, Helredale Road (on the western estate) all his life. His house backs onto the Field and there is a gate from his back garden onto the Field. He has frequently played on the Field with his father and with friends. Adults use the Field for dog walking and many other children play there. Every year local people watch the air displays and fireworks of the Whitby Regatta from the Field. He has never sought or been given permission to use the Field and has never been prevented or discouraged from using the Field. I accept his evidence.

Mrs Sandra Turner

[78] Mrs. Turner is a SBC councillor but she gave evidence in her private capacity. Although she does not live in the neighbourhood, she did know 80, Helredale Road about 20-30 years ago. Her sister-in-law's family had lived in the house. Then one of her brothers lived there for about 5 years. Then her other brother lived there for about 5 years. The house backed on the Field and had access through a gate from the back garden. All the children of the house played on the Field as did other children. As a child, Mrs. Turner also used to play on the Field when visiting. I accept Mrs. Turner's evidence.

Miss Lacey Winspear

[79] Miss Winspear produced an evidence questionnaire[63]. She has lived in 82 Helredale Road for the last two years. For 8 years before that, she lived in 81 Helredale Road. Both properties are owned by her father. Both back onto the Field. When she was younger, she played in the Field. Since moving to no. 82, she has set up a weekday childcare business and takes the children out to play on the Field every weekday. I think that Miss Winspear meant that she "normally" took the children on the Field every day since no doubt there are days when conditions are not suitable to take young children out. Subject to this slight qualification, I accept Miss Winspear's evidence.

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61 R59

62 R56

63 R261

Mr Robert Winspear

[80] Mr. Winspear produced a written statement[64] and an evidence questionnaire[65]. He is Miss Winspear's father. He lived at 55, Helredale Road (on the eastern estate) as a child over 40 years ago. There were six children in the family and they used to play on the Field. His father's family lived at 81, Helredale Road from about 1976. He moved to 81, Helredale Road 12 years ago. His children played in the Field. Now his grandchildren play in the Field. There are always kids playing on the Field. He said that he used the Field "every day". I think that that must be an exaggeration but, subject to this point, I accept Mr. Winspear's evidence

Mrs Vivienne Louise Wright

[81] Mrs. Wright produced (a) an evidence questionnaire dated 6th October 2007[66], (b) a written proof of evidence dated 26th March 2010[67], (c) a collection of photographs taken in the summer of 2007[68], and (d) an undated written statement[69]. She gave oral evidence to the public inquiry.

[82] Mrs. Wright was born in 1947. Until she was 5 years old she lived with her parents in 38 Helredale Road. In 1952, she moved with her parents to 78 Helredale Road. It was a newly built council house on the western estate. She was the oldest of six children. She lived with her parents at 78 Helredale Road until 1968, when she married and moved to another part of Whitby. Her parents continued to live at 78 Helredale Road as council tenants for the rest of their lives. Her father died in 1977 and her mother died in 1992. In 1993, Mrs. Wright and her husband bought 77 Helredale Road from the owners, who were ex council tenants who had bought the house under the "right to buy" scheme. 77 Helredale Road is next door to her parents' old house on the western estate. She has lived there ever since. There is nothing in the title deeds to her property about the Field.

[83] Her childhood home at 78 Helredale Road backed onto the application land. The western estate was newly built when she was a child and was mostly occupied by young families with children. She and her brothers and sisters frequently played on the Field, as did many other local children. The part of the Field to the north of the crossing footpath had swings and slides in those days. They were removed in 1974 when SBC took over from Whitby UDC. Children sledged down the Field in the snow and her family and other local families enjoyed bonfire parties in the Field each year. Local football teams used to play on the pitch on the Field, using a wooden scout hut in a corner of the Field (long since burned down) to change. Local residents held a party on the Field to celebrate the Coronation.

[84] After she married and moved to another part of Whitby in 1968, she continued to visit her parents several times a week for the rest of their lives. In the

64 R105
65 R264
66 R78
67 R60
68 R72-75
69 R76

early days, she played with her younger brothers and sisters in the Field. She started her own family in 1969 and took her children to visit her parents. She played with her children in the Field. After her own children grew up, she used to walk her own dog and her mother's dog in the Field. Her mother used to walk in the Field with Mrs. Wright or her sister on a nice day although she was nearly blind in her last years. The pitch on the Field was used by a Sunday football league for a few years. Other users did not interfere with the football matches: they just watched or used the rest of the Field while the pitch was being used for a football match. The matches only lasted a couple of hours and were not every weekend.

[85] After moving to 77 Helredale Road in 1993, she walked her dog twice daily in the Field until she died in 2002. She learned to ride a bicycle on the Field 6 years ago. Every year, there is a Whitby Regatta Weekend in August and local people gather on the Field to watch the aircraft and firework displays. She uses her back bedroom as an office. It overlooks the Field and she sees children and young persons playing games on the Field and teenagers "hanging out" on the Field in the warmer months. The Field is used daily by local dog walkers. She submitted a number of photographs which she took in the summer of 2007 showing the Field being used for informal recreation, camping and community events.

[86] The Field has always been used openly by herself and other local people. She has never sought or obtained permission to use the Field. She has never been asked to leave the Field. There have been no notices discouraging or giving permission to use the Field.

[87] In June 2007, a neighbour saw men in suits walking about the Field. He asked them what they were doing and they said that the Field was being considered for sale to build social housing. Local people met and agreed to form the Helredale Neighbourhood Council to apply to register the Field as a green. Evidence questionnaires were distributed to residents of the three estates, which they considered to be the neighbourhood where the majority of users of the Field resided. In the event, some completed questionnaires and letters of support were returned from other parts of Streonshalh ward. After gathering this evidence, Mrs. Wright made the present application.

[88] Mrs. Wright was cross examined in some detail about (a) where recreational users of the Field came from and (b) what area she regarded as the local neighbourhood. On the first issue, her impression was that most recreational users of the Field came from the western and southern estates. Helredale Road was quite a busy road to cross although there is now a crossing near the junction with Abbot's Road. The eastern estate has its own recreational area with some basic children's play equipment. However, children who wanted a larger and flatter area to play games would cross over Helredale Road from the eastern estate to the Field. On the second issue, she regarded her local neighbourhood as being the three estates. She could not identify any facilities or organizations that were specific to the three estates but she regarded the three estates as collectively forming a distinctive block of former local authority housing in the south east part of Whitby.

[89] I found Mrs. Wright to be an honest and genuine witness. I accept her evidence.

Written evidence

[90] In addition to the above witnesses who gave oral evidence to the public inquiry, numerous written statements and evidence questionnaires were submitted to the public inquiry in support of the application. I view this evidence with considerable caution because I have not seen the witnesses, their evidence has not been subject to cross examination and much is rather vaguely expressed. Some statements are purportedly made by infants. Some evidence questionnaires are purportedly completed by children but the handwriting on the evidence questionnaire is markedly different from the signature. This tends to shake confidence in the quality of the evidence. This written evidence carries less weight than that of witnesses who gave oral evidence. However, this evidence is entitled to the appropriate weight and it is fair to say that it generally supports and reinforces the evidence that the Field has been used by local people for recreation for many years. I summarise the written evidence as follows:

Name	Address	User period	Reference
Master Kaan **Akel**	79, Abbot's Road	8 years	R274
Mrs. G **Allison**	8, Eskside Cottages	10 years	R109
Mr. Sam **Allison**	8, Eskside Cottages	5 years	R112
Master Alfie **Barkas**	46, Abbot's Road	2 years NB Master Barkas was only 2 years old when he supposedly made his statement which appears to have been written on his behalf by someone else.	R276
Mr. C **Barkas**	46, Abbot's Road	30 years	R115
Master George **Barkas**	46, Abbot's Road	4 years NB Master Barkas was only 4 years old when he supposedly made his statement which appears to have been written on his behalf by someone else.	R275
Mr. Steven **Barker**	11, Waterstead Crescent	4 years	R121

Miss Zanna **Barker**	6, Larpool Crescent	4 years NB Miss Barker was only 4 years old when she gave this evidence. The statement seems to have been filled in by her grandmother.	R118 R272
Mr. Ron **Barnett**	9, Falcon Terrace	1952-?	R81
Mrs. M **Bollands**	49, Helredale Road	Over 50 years	R84
Master Aaron **Brennan**	19, Larpool Crescent	14 years	R277
Miss Ruby **Brennan**	19, Larpool Crescent	5 years	R278
Toni **Brennan**	19, Larpool Crescent	20 years	R127
Mr. Sean & Mrs. Emma **Broadley**	37, Larpool Crescent	6 years	R124
The **Butler** family	29, Helredale Road	6-7 years	R85 R130 R273
Mrs. Valerie **Butler**	42, Larpool Crescent	26 years	R133
Ms. Myra **Clarkson**	1, Seaview, Helredale Road	31 years	R136
A **Clucas**	26, Helredale Road	“many years”	R86
Miss Danielle **Crisp**	4, Talbot Court, Larpool Lane	6 years	R270
Master Jack **Crisp**	4, Talbot Court, Larpool Lane	6 years	R271
Miss Shannon **Denham**	82, Helredale Road	10 years	R279
Mr. Craig **Entwistle**	44, St. Mary’s Crescent	10 years	R139
Mr. Ian **Entwistle**	44, St. Mary’s Crescent	10 years	R141
Ms. Jennifer **Entwistle**	44, St. Mary’s Crescent	10 years	R144
E **Fish**	17, Helredale Gardens	50 years	R147
Mr. Barry **Goodwill**	The Paddock	10 years	R159
Miss Elle-Louise **Goodwill**	75, Helredale Road	8 years	R280
Master Joe **Goodwill**	75, Helredale Road	10 years	R281
Master Leo **Goodwill**	75, Helredale Road	12 years	R282
Mrs. Lisa **Goodwill**	75, Helredale Road	15 years	R153
Ms. Margaret **Goodwill**	38, Laburnum Grove	20 years	R156
Mr. Martin **Goodwill**	38, Laburnum Grove	20 years	R162
Master Robbie **Goodwill**	75, Helredale Road	10 years	R283
Mrs. Claire **Greenwood**	80, Helredale Road	1 year	R168
Mr. Ken **Greenwood**	80, Helredale Road	1 year	R165
[illegible] **Greenwood**	80, Helredale Road	1 year	R284
Mr. Colin **Harrabin**	76, Helredale Road	13 years	R171
R **Harrabin**	76, Helredale Road	13 years	R174
Mrs. AC **Hill**	18, Helredale Road	Not stated	R90

Mrs. M **Howard**	21, Larpool Crescent	42 years	R177
Hutchinson/Cook	40, Larpool Crescent	34 years	R180
Mrs. B **Hutchinson**	17, Larpool Crescent	53 years	R91
Ms. Jayne **Jobling**	46, Abbot's Road	20 years	R183
Mrs. M **Knaggs**	13, Helredale Gardens	50 years	R186
Mr. D **Locker**	8, Baxtergate	The Field was home pitch for Sunday League for 20 years	R92
Mrs. SA **Locker**	95, Helredale Road	8 years	R93 R189
Mr. J Barry **Maddison**	18, Larpool Crescent	Since 1969	R95
Mrs. Maureen **Maddison**	18, Larpool Crescent	35 years	R195
Mr. John **McClure**	15, Larpool Crescent	54 years	R192
Master Zac **Nelson**	6, Larpool Crescent	5 years NB Master Nelson was only 5 years old when his purported WS was completed by his grandmother	R198 R285
Ms. Janine **Nicholson**	87, Helredale Road	15 years	R201
Ms. Claire **Overton**	10a, Larpool Crescent	5 years	R204
Mr. Mark **Page**	86, Helredale Road	22 years	R207
Miss Emma **Parker**	2, Saxon Road	5 years NB Miss Parker was only 6 at the date of her WS and the handwriting (other than the signature) does not look like a 6 year old's.	R289
Mrs. M **Parker**	23, Helredale Gardens	40 years	R210
Master Robbie **Parker**	2, Saxon Road	7 years	R288
Ms. Kym **Parkin**	16, Larpool Crescent	25 years	R213
Master Callum **Pearson**	[?] Helredale Road	10 years	R286
Miss Jordan **Peart**	26, Helredale Road	7 years NB The signature seems different from the rest of the	R290

		handwriting in the WS	
Mr. MJ **Price**	14, Larpool Crescent	34 years	R222
Miss ?Kade? ?**Purvis?**	31, Helredale Road	5 years	R287
Ms. Joyce **Rolfe**	3, Larpool Crescent	39 years	R216
Mr. Robert **Rowell**	27, Larpool Crescent	"all my life" but age not stated	R231
Master David **Riley**	79, Helredale Road	9 years	R291
Ms. Deborah **Riley**	79, Helredale Road	9 years	R219
Mrs. C **Ross**	79, Helredale Road	9 years	R97 R225
Mr. S **Bolton Smith**	Kent (family at 84, Helredale Road)	"over 40 years"	R98
Mrs. Samantha **Smith**	37, Helredale Road	Not stated	R99
Mr. J **Stanforth**	88, Helredale Road	25 years	R237
Mrs. Jean **Stanforth**	88, Helredale Road	25 years	R234
Mr. AE **Storr**	54, Helredale Road	Since 1952	R100
Lesley **Storr**	78, Helredale Road	33 years	R240
Mr. Richard **Storr**	54, Helredale Road	Since 1960s	R243
Mr. C **Stringer**	10, Fairmead Court	Not stated	R101
Ms. Jodie **Swales**	6, Larpool Crescent	6 years	R249
Mrs. Jodie Louise **Swales**	6, Larpool Crescent	23 years	R246
Master Arron **Tillson**	86, Helredale Road	8 years	R292
Ms. Barbara **Upton**	99, Helredale Road	50 years	R252
Mrs. Mary & Mr. Philip **Walker**	20, Helredale Gardens	55 years	R102 R255
Mrs. B **Waller**	7, Helredale Gardens	50 years	R103
Mr. Ian **Ward**	Harrogate	1958-early 1990s	R104
Mr. David **Wright**	77, Helredale Road	15 years	R258
Ms. Karen **Young**	86, Helredale Road	20 years	R267
Illegible	68 Helredale Road	23 years	R106
Illegible	44, Helredale Road	Not stated	R107
Illegible	15, Larpool Lane	10 years	R108

5. Evidence in support of objection

[91] I now turn to the evidence submitted to the public inquiry by SBC as objector. There were two witnesses who submitted written statements and gave oral evidence and one witness who did not give oral evidence but whose written statement was submitted to the public inquiry. I deal with these three witnesses in alphabetical order.

Mr Martin Pedley

[92] Mr. Pedley submitted a witness statement dated 9th April 2010[70] and gave oral evidence to the public inquiry. He is employed by SBC as Asset and Risk Manager. Much of his evidence was taken from the records of SBC.

[93] By a Conveyance[71] dated 20th June 1951 and made between (1) TM Turnbull & KGR Bagshawe and (2) Whitby UDC, Messrs Turnbull and Bagshawe conveyed to Whitby UDC some 30 acres of land in Whitby. The land included the site of what is now the Field and the western estate. A plan is attached to the 1951 Conveyance which is drawn by the Whitby Engineer and Surveyor and marked "Housing Estate – West Side of Helredale Road". The 1951 Conveyance does not specify the statutory power under which Whitby UDC entered into the conveyance. The Conveyance is indorsed with numerous memoranda relating to houses sold off from the estate after 1980. The sales were clearly sales of council houses under the "right to buy" legislation.

[94] The land subject to the 1951 Conveyance vested in SBC on local government reorganization pursuant to the Local Government Act 1972.

[95] In 1984, SBC obtained planning permission to erect changing rooms on the Field and implemented that permission in the same year. The changing rooms were thereafter maintained by SBC.

[96] In 1996, SBC passed byelaws[72] under Housing Act 1985 s. 23(2) in connection with certain amenity areas provided in connection with housing and held under s. 12 of the 1985 Act. One of the amenity areas was "Helredale Recreation Ground", i.e. the Field. The effect of the byelaws was to require users of the Field to keep dogs on leads and to remove canine faeces. Signs were erected close to the entries to the Field. The wording varied but the overall message was to keep dogs on leads and to clear up after them. There is no record of any prosecution for breach of the byelaws on the Field.

[97] In 2003, the remaining council housing on the three estates was transferred to a housing association called Yorkshire Coast Homes.

[98] In 2006, the Field (together with other land) was registered at the Land Registry in the name of SBC under title no. NYK322507[73].

[99] None of this evidence was challenged by the applicant and I accept it.

Mr Christopher David Roe

[100] A witness statement of Mr. Roe[74] was submitted to the public inquiry although Mr. Roe did not give oral evidence. Mr. Roe is SBC Area Parks Officer North and

70 B16 (i.e. Blue Bundle page 16)
71 B23
72 B36
73 B30
74 B65

has been employed by SBC for c. 25 years. His evidence was that the grass on the Field was cut about every 10-14 working days in the summer and less frequently in the winter. The football pitch is marked out once a year but was marked out weekly when used by the local football league. The statement does not say who cut the grass or marked out the pitch although I infer it was SBC. Nor is it clear to what years the statement relates. The precise source of Mr. Roe's evidence is not clear. However, I accept that SBC has cut the grass on the Field and marked out the football pitch for some years.

Mr Andrew Williams

[101] Mr. Williams produced a witness statement[75] and gave oral evidence to the public inquiry. He has been employed by SBC as Leisure and Community Services Officer since 1998. He has no personal knowledge of use of the Field but, based on SBC records, he said that the Field was used by the Whitby and District Sunday League under licence from SBC from 1998-2005. The League had use of the changing rooms under licence from SBC. The changing rooms have been maintained by SBC and are kept locked when not in use. Since 2005 the Field and changing rooms have been available for hire although they have not in fact been hired. Mr. Williams's evidence was not materially challenged by the applicant and I entirely accept it so far as it goes, although the evidence of the applicant's witness suggests that there was league use of the Field long before 1998.

6. Findings of fact

[102] I now turn to make findings of fact based on the evidence, both oral and written, submitted to the public inquiry.

Holding power

[103] I find that the site of the Field was acquired by Whitby UDC in 1951 and was thereafter held by Whitby UDC and its successor SBC under statutory housing powers. Although the 1951 Conveyance did not specify the statutory power under which the land was acquired, a local authority is a creature of statute and must act under powers conferred by statute. I rely on the following matters:

- The annotation on the 1951 Conveyance plan "Housing Estate – West Side of Helredale Road,
- The fact that the part of the 1951 Conveyance land between Helredale Road and Larpool Lane was in fact laid out and maintained until 2003 as a council housing estate (i.e. the western estate)
- The fact that the 1996 Byelaws were made by SBC under the Housing Act 1985 on the basis that the Field was an amenity area provided in connection with housing and held under s. 12 of the Housing Act 1985.

Maintenance of Field

[104] I find that the Field has been maintained by SBC in the following ways:

- SBC cuts the grass on the Field regularly during the summer

[75] B54

- SBC has marked out the football pitch weekly until 2005 (when the Sunday League stopped using the Field) and annually since 2005
- SBC has supplied the (now rather decrepit) goal posts.

Recreational use of Field

[105] I find that there have been two classes of recreational use of the Field during the 20 year period from 1987 to 2007:

- First, there has been use of the marked out pitch by a local football league for football matches under licence from SBC until 2005. Matches were on Sundays (and possibly sometimes Saturdays) during the season.
- Second, the Field has been extensively and openly used for informal recreation by local people. Such recreation has been largely children's play and walking with or without dogs. The pitch has been used for informal games of football. Local people have held an annual bonfire party on the Field, usually at the northern end and there have been smaller family bonfire parties on the Field. Annually, local people gather on the Field to watch the air display and fireworks of the Whitby Regatta. I am satisfied that the whole of the Field was used for recreation by local people including the rougher area north of the crossing footpath.

[106] I find that there has been no material conflict between these uses. As a matter of courtesy and good manners, local people did not interfere with the league football matches. However, they continued to use the rest of the Field for informal recreation during the relatively short periods of time while matches were in progress and used the whole of the Field when matches were not in progress.

Access to Field

[107] I find that access to the Field by local people was mostly obtained from one or other of the four public access points described above. These access points were always open. However, some local people with gardens bordering on the Field have had gates in the garden fences or walls through which they have gained unrestricted access to the Field.

Where did recreational users come from?

[108] Although the majority of the witnesses came from the western and southern estates, some witnesses came from the eastern estate[76] and there was also evidence, which I accept, that the Field was also used by residents of the eastern estate. Although they had a busy road to cross I think that the Field offers facilities for ball games on a relatively flat surface which are not offered by the more uneven recreational area on the eastern estate. There was little evidence of use of the Field by residents of other parts of Whitby.

[76] See the plan of witnesses' addresses at R295A

Signs

[109] I find that there have never been any signs on the Field prohibiting or granting permission for recreational use. The only signs are those near the four access points exhorting users to keep their dogs on leads and to clear up after them.

7. Applying the law to the facts

[110] I now turn to apply the law to the facts that I have found. It is convenient to do so by reference to the various elements of the statutory test laid down by CA 2006 s. 15(2).

…a significant number…

[111] I am satisfied that the Field has been used by a significant number of local people for informal recreation. In my view this has not been a matter of occasional acts of trespass but of general use by the local community for recreation.

…of the inhabitants of any locality…

[112] The applicant does not rely on use by the inhabitants of a locality.

…or of any neighbourhood within a locality…

[113] I am satisfied that the western, eastern and southern estates collectively constitute a "neighbourhood". Although built at different times and in different styles, they form a single block of local authority housing in the south eastern suburbs of Whitby with clearly defined boundaries. I do not consider that the cohesive nature of this neighbourhood has been affected either (a) by the privatisation of some of the housing under the "right to buy" legislation or (b) by the 2003 vesting of the remaining council houses in Yorkshire Coast Homes. It is true that the "neighbourhood" put forward to the public inquiry by the applicant in opening also included a small area of private housing in Larpool Lane outside the three estates. I have difficulty in regarding this additional area as part of the same cohesive neighbourhood as the three estates. However, I do not consider that the objector would be prejudiced by restriction of the "neighbourhood" to the three estates.

[114] I am satisfied that a significant number of the recreational users of the Field were inhabitants of this neighbourhood.

[115] The "locality" relied upon by the applicant at the public inquiry was the SBC ward of Streonshalh. The applicant did not produce to the public inquiry any satisfactory evidence as to the existence and boundaries of this ward or any evidence that it had existed throughout the 20 year period. It was all assertion. I consider, in the light of the *Leeds* case, that a local government ward can be a limb (ii) locality**.** However, I do not regard this deficiency in the evidence as being in itself fatal to the application. First. I see no reason why NYCC should not make its own inquiries of SBC as to whether the ward of Streonshalh has existed materially

unchanged throughout the relevant 20 year period. Second, even if it has not, there are obvious alternative localities, i.e. Whitby (the area of the former Whitby UDC) or Scarborough (the area of SBC).

[116] I am therefore satisfied that the Field has been used by a significant number of the inhabitants of a neighbourhood within a locality.

…have indulged as of right…

[117] I am satisfied that use of the Field for informal recreation by local people was not forcible or contentious (*vi*). Access to the Field was open at all times. No objection was taken by SBC to the fact that some local residents used gates from their back gardens to access the Field. There were no signs forbidding access to the Field. SBC took no other steps to forbid or discourage use of the Field for informal recreation by local people.

[118] I am satisfied that use of the Field for informal recreation by local people was not secret (*clam*). Such use was perfectly open and obvious.

[119] Although the Sunday League obtained permission to use the football pitch on the Field, there was no evidence that permission was ever expressly sought or granted for use by local people for informal recreation. However, SBC relied on three matters as giving rise to an implication of permission:

- First, it relied on the fact that SBC cut the grass, supplied goalposts and marked out the football pitch on the Field. However, in my view, these were simply actions which encouraged and facilitated recreational use of the Field. In the light of the *Beresford* case, they could not give rise to an implication of permission.

- Second, it relied on the 1996 Byelaws as giving rise to an implication that recreational use of the Field was permissive. However, it appears to me that the 1996 Byelaws carry the opposite implication. If it necessary to rely on statutory byelaw making powers to regulate recreational use of the Field, it suggests that the recreational use of the Field was not permissive but under some legal right which required legal power to restrict its exercise.
- Third, it relied on the signs near the four accesses to the Field exhorting users to keep their dogs on leads and to clear up after them. These signs appear to giving effect either to the 1996 Byelaws or to the Dogs (Fouling of Land) Act 1996. I cannot see how the signs amount to an implied grant to local people of permission to use the Field for recreation. In my view, they are more consistent with the exercise of statutory powers to restrict a legal right to use the Field for recreation.

Accordingly, I do not consider that use of the Field by local people for informal recreation has been permissive (*precario*).

[120] Although the evidence is that local people did not interfere with the authorized use of the football pitch by the Sunday (and Saturday) League, I do not consider that this deprived the recreational use of the Field by local people of its character as user

as of right. It appears to me that the situation is precisely on all fours with the relationship between the golfers and local people in *Redcar*. The two recreational uses co-existed with the benefit of courtesy and give and take.

[121] In my view, the critical issue in this case is whether recreational user of the Field by local people was "by right" or "as of right". Although the discussion of the point was *obiter*, there is strong guidance from the House of Lords in *Beresford* that user which is under a legal right is not user "as of right"

Lord Bingham paras 3 & 9
Lord Hutton para 11
Lord Scott paras 29-30
Lord Rodger para 62
Lord Walker paras 72, 87 & 88

The comments of Lord Walker at para. 87 are particularly pertinent. He considered that it would be difficult to regard recreational users as trespassers acting as of right not only where there was a statutory trust under s. 10 of the Open Spaces Act 1906 but also where land had been appropriated for the purposes of public recreation. Under s. 122 of the Local Government Act 1972 (as amended) a local authority can appropriate land from one statutory purpose to another. I understand Lord Walker to be remarking that if a local authority holds land for a statutory purpose which involves public recreational use of the land (albeit without an express statutory trust in favour of the public) use of that land for public recreation would not be "as of right".

[122] At the date of the 1951 Conveyance, the relevant housing legislation was the Housing Act 1936. Part V dealt with the provision of housing accommodation for the working classes. It appears to me that the site of the western estate must have been acquired by Whitby UDC pursuant to s. 73(a) of the 1936 Act which authorized a local authority to acquire land as a site for the erection of houses for the working classes. Section 72(1)(a) authorized the local authority to provide housing accommodation for the working classes by the erection of houses on any land acquired by them. Section 80(1) empowered a local authority to provide and maintain in connection with any such housing accommodation, and with the consent of the Minister, recreation grounds which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. It appears to me to be a reasonable inference that the Field was set out and maintained as a recreation ground pursuant to s. 80 of the 1936 Act. Provided that the Field benefited the council tenants (which it clearly did), it did not matter that it also benefited other people within the local community: *HE Green & Sons v The Minister of Health (No. 2)* [1948] 1 KB 34. This principle would, in my view, justify the council in allowing use of the Field by the Sunday League, even if its players were not all council tenants. Accordingly, it was within the power of Whitby UDC under s. 80 to set out and maintain a public recreation ground provided that it benefited its tenants. It is true that there is no evidence, one way or the other, as to whether the Minister gave his consent. However, I consider that I am entitled to apply the usual presumption of regularity. In any event, a local authority had power to lay out public open spaces on council estates under s. 79(1)(a) without ministerial consent. If there had been no ministerial consent to setting out the Field as a recreation ground, it seems to me that the Field would fall to be regarded as a

public open space. The 1936 Act contains no definition of “recreation ground” or “open space” for the purposes of these sections.

[123] All these provisions in the Housing Act 1936 were subsequently consolidated without material amendment (save for the abandonment of the requirement that housing should be for “the working classes”) in the Housing Act 1957 Part V ss 92, 93, 96 & 107 and then in the Housing Act 1985 Part II ss. 9, 12, 13 & 17.

[124] The question that arises is whether local people had a legal right to use a recreation ground which was set out under s. 80 of the 1936 Act and (during the relevant 20 year period) maintained under s. 12 of the 1985 Act as a recreation ground open to the public. The Open Spaces 1906 Act created by s. 10 an express statutory trust for public recreation. However, there is authority that where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it. This point has been explored in relation to Public Health Act 1875 s. 164 (which contains no express trust for public recreation) in a series of cases:

A-G v Loughborough Local Board The Times 31st May 1881
Hall v Beckenham Corporation [1949] 1 KB 716
Sheffield Corporation v Tranter [1957] 1 WLR 843
Blake v Hendon Corporation [1962] 1 QB 283

The same principle must apply to a recreation ground laid out under statute as an area for public recreation on a council estate. Council tenants, who are the primary objects for the provision of recreation must have had a legal right to use the land for harmless recreation. It would be absurd to think of them as trespassers unless they first obtained the permission of the council to use the land for harmless recreation. Where the recreation ground, as in the present case, is laid out and maintained as a recreation ground open to the public pursuant to statutory powers, it seems to me that the public must similarly have a legal right to use the land for harmless recreation. Again, it would be absurd to regard them as trespassers. This view is supported by the *obiter* comments of Lord Walker in para. 87 of *Beresford*. I therefore consider that at least until 2003, when SBC ceased to be owner of the remaining council houses, recreational use of the Field by local people was by right and not as of right. I did not hear any argument on the effect of the 2003 transfer of the remaining housing stock to Yorkshire Coast Homes, but it is not necessary for present purposes to consider the post 2003 legal situation.

[125] I therefore consider that, at least until 2003, recreational user of the Field by local people was not “as of right”. The application fails on this ground.

…in lawful sports and pastimes…

[126] The informal recreation enjoyed by local people on the Field clearly amounts to “lawful sports and pastimes” as that expression was construed in *Sunningwell.*

…on the land…

[127] I am satisfied that the whole of the Field (excluding the garages, hard standing and changing rooms) has been used for lawful sports and pastimes by local people. In particular, although the area to the north of the crossing footpath was less well maintained and somewhat overgrown, I am satisfied that that area was also used to a material extent for recreational activities.

…for a period of at least 20 years…

[128] I am satisfied that the Field was used for recreation by local people for the whole of the relevant 20 year period (1987-2007) and, indeed, for long before 1987.

…and they continue to do so at the time of the application.

[129] I am satisfied that the Field was still in use for recreation by local people as at the date of the application to register it as a new green.

Conclusion and recommendation

[130] The application was not pursued at the public inquiry in relation to the garages, hard standing and changing rooms. I conclude that the application (as so pursued) fails on one point only. That point is that recreational user of the Field by local people during the relevant 20 year period (at least until 2003) was not "as of right" because they had a legal right to use the Field as a recreation ground provided and maintained by the local authority under s. 12 of the Housing Act 1985 (subject only to any restriction imposed by byelaws made under s. 23 of the 1985 Act).

[131] I recommend that the application should be rejected. Under reg. 9(2) of the 2007 Regulations the CRA must give the applicant written reasons for rejection. I recommend that they are stated to be "the reasons set out in the inspector's report dated 28th July 2010".

Vivian Chapman QC
28th July 2010
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN

APPENDIX 3

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From:       Vivienne Wright <vlwright@hotmail.co.uk>
 To:  Simon Evans <simon.evans@northyorks.gov.uk>
 Date:      08/Aug/10 8:05 pm
 Subject:   Helredale Playing Field
 Attachments:     response-inspectors-reportHelredalePlanning Sanity.doc;
response-inspectors
      -reportHelredalePlanning Sanity.doc


Dear Simon



Having taken advice on the content of the Inspector's Report I advise you
that, in the event of the relevant committee refusing the application based
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on the Inspector's recommendation, we shall file for a Judicial Review, with the intention of taking the matter to the Supreme Court of Appeal should that be required.

Our decision is made on the advice given by two experts in such matters, and I attach their reports for your information and action. Please note that I shall be abroad from 11th October until 25th October should the proposed date of the meeting be changed.

I look forward to hearing further from you.

Viv

APPENDIX 4

Campaign for Planning Sanity

LOCAL COMMUNITY SUPPORT FOR ADVERSE PLANNING & DEVELOPMENT APPLICATIONS
56 Kimmeridge Ave, Poole, Dorset, BH12 3NX
TEL/Fax: 01202 770391 : Help Line: 0871 750 3992
EMAIL: info@planningsanity.co.uk : WEB: www.planningsanity.co.uk

RESPONSE TO INSPECTORS REPORT AND RECOMMENDATION ON BEHALF OF THE APPLICANT REGISTRATION OF A TOWN OR VILLAGE GREEN HELREDALE PLAYING FIELD - WHITBY

1. The Applicant has asked for my comments on the Inspector's report with regard to the above application to register land as a town or village green. It is my opinion that the Inspector has misdirected himself in regards to his finding that the use of the land was by right as opposed to as of right for the reasons that I set out below, and as such I recommend that the Applicant or other affected residents consider whether they should seek advice of counsel with a view to applying for judicial review of any determination that is based on the recommendation that the application should be refused on the grounds as set out in the Inspector's report.

2. It is first important to consider some of the facts of the evidence presented to the inquiry and directions of the inspector with regard to further evidence and representations in regards to the question of the various housing acts that could be submitted after the close of the inquiry. It was the Inspector, and not the Objector or Applicant, who first raised the issue of the Housing Act, and then not until after the Applicant had presented all her evidence, and after the Objector's only witness that could have addressed the issue had given evidence, and therefore there was no serious ability of the Applicant *(or the Objector)* to deal with the issue from an evidential stance. Furthermore, the Inspector specifically, in his final directions in regards to the matters relating to the Housing Acts, forbade further evidence being presented except to the limited extent that any documentation was forthcoming. Mrs Wright and other local residents after the close of the inquiry undertook considerable research as did the Objector into whether any documentation existed that pointed either way into whether the land formed part of a housing holding under any statutory provisions, they found none, as the Inspector rightly accepts. But it is important that he then goes on to conclude, which clearly had a bearing on his final of fact and recommendation that Mrs Wright had not submitted any evidence of the research she undertook. Had she done so then clearly she would have been acting contrary to the directions of the Inspector, he therefore is unfair to Mrs Wright where he criticises her for that

failure at para 12 of his report, and was therefore clearly wrong as a matter of law not to accept as evidence the statement set out in my own further submission that no such documents existed. It is also strange that the Inspector fails to address the issue of reconvening the inquiry, this was raised by myself in the further housing submission that if the matter rested solely on the point of evidence the inquiry should be reopened. Yet the Inspector simply fails to even refer to that prospect, despite the fact that the point is fundamental to his recommendation to refuse.

3. Criticism should also be pointed at the Inspector where he states that the evidence relating to land ownership was not challenged by the Applicant, whilst being correct, it is misleading in that at the time of the relevant witness giving his evidence the issue was not in contention, and therefore why would a non-contentious issue be the subject of serious challenge? It was neither here nor there until after that evidence was given and the Inspector raised the question of land ownership in regards to the housing issue. Had the issue been one of contention then clearly that witness would have been taken to task. As I set out elsewhere in this response, I specifically requested that the inquiry be reconvened if the Inspector was to make a determination that rested on the evidential matters relating to the housing issue.

4. Whilst the Applicant does not challenge the right of the finder of fact to make relevant assumptions where there is some basis to conclude that the land owning council must have held the land at some stage for a statutory purpose. But the Applicant challenges whether the Inspector was so entitled to do so on the facts of the present case, where the evidence as to how the land was first acquired and for what purpose was of a very poor quality, and was non-existent after the first initial purchase. The matter is further complicated in that even if it was accepted that the land was purchased under one of the Housing Acts for recreational purposes, as to what Act it was purchased under is very important in regards to the present case because the Inspector made a finding that the land was purchased under the 1936 Act. If that was the case, then the beneficiaries were the *'working classes'* as opposed to the provisions in the latter Acts which used the term *'council tenants'* although the 1957 Act was a consolidating Act and therefore that may have changed the category of beneficiaries, nevertheless there is uncertainty as to who, in the early stages, might have had some statutory benefit to use the land. The reality is that we then move on many years to a period where there are simply no records as to what purpose the land is being used. Whilst it may well have been obtained

for a housing benefit in 1951, it is a considerable jump to get from there to the statutory 20 year period relevant to the present application without one shred of evidence that the land was so continuing to be held for that purpose.

5. However, as a matter of law the Inspector misdirected himself as to the extent of weight that he could afford to the *obiter* finding in Beresford that some statutory provision that entitled a resident *(member of the public)* to use the land was such as to prevent registration on the grounds that the use was *'by right'* as opposed to *'as of right'*. The finding in Beresford was quite clear that the question was for another day, and that they were not so finding on the facts of that case, therefore the question was left wide open. We then move on to the present year, when in March Mr Justice Waksman QC in *Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust & Ors, R (on the application of)v Deluce & Ors [2010] EWHC 530 (Admin)* at para 92 made the following finding:-

"Finally, Mr Whitmey contends that the Authority, being a public body, is not bound by s22 (1A) because its "fiduciary" obligations to the public are somehow inconsistent with it. If there was anything in this point, it is surprising that the Authority did not take it. In truth there is no such exemption for the Authority. The facility to apply for registration of a TVG applies to all land including Crown land. In practice many owners of such land are public authorities with an array of obligations to the public. That does not render them immune to such applications....."(my emphasis)

6. This is clearly the later case that the House was referring to in Beresford, yet, even though I raised this case with the Inspector, he has failed to refer to the case or give it any weight whatsoever, which is clearly astounding given that his decision rests on the primary point addressed by Mr Justice Waksman at his para 92, a case which the Inspector was specifically referred to in regards to the housing point. Albeit in that case Mr Justice Waksman QC is referring to a highways dedication, but it is clear that given that the point had been left open by *Beresford* to a later date, that the issue having been dealt with the door is now firmly closed to such arguments, at least without further and better evidence presented in this case.

7. As such, it is my view that if the Registration Authority concludes that they will accept the Inspector's Report and refuse the application, then a *prima facia* case for challenge by the way of judicial review will exist. I

should also end by saying that I have had the benefit of a further advice received by the Applicant from the Open Spaces Society making similar observations and conclusions. I therefore recommend to the Applicant that she, or some other local resident should seek advice of counsel as to whether an application should be submitted to the High Court for judicial review of any determination to refuse the application that is based on the Inspector's report.

Chris Maile
For and on behalf of the Applicants

Vice President
Edgar S J Powell
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Open Spaces Society

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Charity no 214753

I am invited to give an opinion on the probability of a challenge by way of a judicial review succeeding in regard to the advice given by Mr. VIVIAN CHAPMAN Q.C. on 28th July 2010 following his consideration of the evidence in the claim for land known as Helredale Playing Field Whitby to be registered as a Town or Village green.

In my opinion, if such a challenge is to be made, it should be made against the registration authority decision not to register the land if they follow the advice they have been given.

I also recommend that a good case can be mounted on the facts, the applicants should, in the first instance, write to the registration authority indicating that in the event that they were minded not to register the land upon the basis of the recommendation they would be minded to seek a judicial review of that decision because the basis of the advice given was flawed.

JUDICIAL REVIEW – broad outline of what it is and how it works

The form of relief sought by way of judicial review would effectively be a quashing order previously known as a writ of certiorari.

A judicial review is a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

A judicial review is not concerned with the conclusions reached in terms of whether, on the facts, the decision was 'right'; it is solely concerned with whether the correct and right procedures were followed in arriving at that decision.

In a judicial review a court will not substitute what it thinks is the 'correct' decision; from which it follows that even if successful the court would not instruct the authority to register the land as a green.

And further, even if a judicial review were successful, it would not prevent the same decision being taken again so long as, on the subsequent occasion, the decision is taken lawfully, for example by following the correct procedures and considerations.

A BASIC UNDERSTANDING OF THE PRINCIPLES OF THE GROUNDS UPON WHICH A JUDICIAL REVIEW MIGHT BE SOUGHT

The principle engaged in a judicial review is based upon the requirement that authorities must act reasonably in their employment of appropriate processes in reaching the decisions they take.

The principle first arose in 1948 in the case of ASSOCIATED PROVINCIAL PICTURE HOUSES v WEDNESBURY CORPORATION and effectively Lord Green, in delivering his speech, defined three conditions or tests which I slightly paraphrase below.

Firstly an authority in making a decision must **not take into account factors that ought not to have been taken into account;**

Secondly an authority must take into account **all of the factors that it ought to have taken into account;**

Thirdly a decision taken by an authority **must not be so unreasonable that no reasonable authority would ever consider imposing it.**

Expressed somewhat differently, Wednesbury unreasonableness is that unreasonableness of an authority which is so extreme that courts may intervene to correct it.

WHAT SORT OF REASONING MIGHT APPLY IN THIS CASE

In this case I believe that the argument, as it might be advanced if the evidence supports it, **would arise if the authority refuse to register the land as a green.**

If the evidence supports the review, the case would be that the Registration Authority, **acting on obviously flawed advice, were in error in failing to register the land and failed to take into proper account all of the factors it ought to have considered**.

ARE THERE GROUNDS FOR SUCH A CHALLENGE – WOULD THE EVIDENCE SUPPORT A REVIEW

By what appears to be common consent and agreement the element of the decision which falls to be examined in order to decide whether it may be sufficient to seek a judicial review concerns the following opinions expressed by Mr Chapman QC.

I conclude that the application (as so pursued) fails on one point only. That point is that recreational user of the Field by local people during the relevant

20 year period (at least until 2003) was not "as of right" because they had a legal right to use the Field as a recreation ground provided and maintained by the local authority under s. 12 of the Housing Act 1985

Which he reached by considering that:-

122] At the date of the 1951 Conveyance, the relevant housing legislation was the Housing Act 1936. Part V dealt with the provision of housing accommodation for the working classes. It appears to me that the site of the western estate must have been acquired by Whitby UDC pursuant to s. 73(a) of the 1936 Act which authorized a local authority to acquire land as a site for the erection of houses for the working classes. Section 72(1)(a) authorized the local authority to provide housing accommodation for the working classes by the erection of houses on any land acquired by them. Section 80(1) empowered a local authority to provide and maintain in connection with any such housing accommodation, and with the consent of the Minister, recreation grounds which in the opinion of the Minister would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. It appears to me to be a reasonable inference that the Field was set out and maintained as a recreation ground pursuant to s. 80 of the 1936 Act. Provided that the Field benefited the council tenants (which it clearly did), it did not matter that it also benefited other people within the local community: *HE Green & Sons v The Minister of Health (No. 2)* [1948] 1 KB 34. This principle would, in my view, justify the council in allowing use of the Field by the Sunday League, even if its players were not all council tenants. Accordingly, it was within the power of Whitby UDC under s. 80 to set out and maintain a public recreation ground provided that it benefited its tenants. It is true that there is no evidence, one way or the other, as to whether the Minister gave his consent. However, I consider that I am entitled to apply the usual presumption of regularity. In any event, a local authority had power to lay out public open spaces on council estates under s. 79(1)(a) without ministerial consent. If there had been no ministerial consent to setting out the Field as a recreation ground, it seems to me that the Field would fall to be regarded as a public open space. The 1936 Act contains no definition of "recreation ground" or "open space" for the purposes of these sections.

ANALYSIS OF THE CASE FOR A REVIEW.

1 **All of the elements required to be established in order for land to be registered as a green must be properly and strictly proved. A principle for which the judicial authority arose from Pill LJ in *R v Suffolk CC ex p Steed* (1996) 75 P&CR 102 and subsequently and much more recently approved by Lord Bingham in *Beresford.***

2 **In my submission the principle as articulated above must by any standard of fairness and reasonableness be extensible in the following terms shown in red below :- All of the elements required to be established in order for land to be registered as a green must be properly and strictly proved or as the case may be, by evidence to the contrary, be properly and strictly disproved.**

3 **The standard of proof required is the civil standard of proof on the balance of probabilities.**

4 Several elements of the above reasoning are found within paragraph 41 of the advice and recommendations of Mr. VIVIAN CHAPMAN Q.C. An extract from paragraph 41 is reproduced below.

- **Burden and Standard of Proof.** The onus of proof lies on the applicant for registration of a new green, it is no trivial matter for a landowner to have land registered as a green, and all the elements required to establish a new green must be "properly and strictly proved"[1]. However, in my view, this does not mean that the standard of proof is other than the usual civil standard of proof on the balance of probabilities.

5 **In this analysis I believe it is necessary to establish a greater degree of certainty of interpretation as to what is meant by and how the requirements of the civil standard of proof "on the balance of probability" is required to be applied and I analyse the following judicial authorities.**

5.1 In B v Chief Constable of Avon & Somerset Constabulary [2000] EWHC 559 (QB) (05 April 2000) Lord Bingham CJ said (at pp. 353-354)
"…the civil standard of proof does not invariably mean a bare balance of probability, and does not mean so in the present case. The civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those

certain procedures in his report. The following list is taken from the guidance booklet for experts produced jointly by Assistant Chief Police Officers and the Crown Prosecution Service

The Report

Your report(s) should contain information relating to the following:

- details of your qualifications, experience or accreditation relevant to the work performed
- the range and extent of your expertise
- details of any information upon which you have relied in arriving at your opinion
- details of any statements of fact upon which you have relied in reaching your opinion
- clarification of which of the facts are within your own knowledge
- information relating to who has carried out measurements, examinations, tests etc and if under your supervision
- your opinion(s) and a justification for these
- where you have provided qualified opinions details of the qualifications
- a summary of all your conclusions

Other less well authenticated but still useful sources such as the one below is taken from Fire Net believed to be an international organisation concerned with fire solutions who are sponsored by the International Aviation Fire Protection Agency and the Rail Industry Fire Association and have recorded the following opinions which I believe to be useful because I presume they arise from wide experience.

An expert may refer to professional treatises, tables, reports etc to refresh his memory, but it is his evidence and not that material which is admissible (q). When an expert witness is asked to express his opinion on a question, the primary facts on which that opinion is based must be proved by admissible evidence given either by the expert himself or some other competent witness. However once such facts are proved, the expect witness is then entitled to draw on the work (including unpublished work) of others in his field of expertise as part of the process of arriving at his conclusion, provided he refers to that material in his evidence so that the cogency and probative value of his

matters…"

5.2 The justices in An, R (on the application of) & Anor v Secretary of State for the Home Department & Ors [2005] EWCA Civ 1605 (21 December 2005) Para 62 stated that:-

"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

5.3 In H & Ors (minors), Re [1995] UKHL 16 (05 April 2000) Lord Nicholls made the following observations :

Where the matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the established general principle. There are exceptions such as contempt of court applications……

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.

6 **In this analysis it appears to me that there is a need to be particularly clear in regard to the nature of evidence and a distinction between evidence and opinion and the particular and special nature of Expert Opinion.**

Generally opinions do not amount to evidence. However expert opinions are considered to have a much greater authority and subject to certain reasoning expert opinions are admissible as evidence.

The opinions by Mr. VIVIAN CHAPMAN Q.C would be considered to be expert opinions.

In forming and giving his opinions an expert witness is generally expected to follow

3 **An analysis of the key critical opinion which these considerations attempt to explore shows that his opinion was formed upon nothing more than how the site circumstances appeared to Mr. VIVIAN CHAPMAN Q.C and in the pursuit of the analysis I refer to the following extracts of Mr. VIVIAN CHAPMAN Q.C**

It appears to me that the site of the western estate must have been acquired by Whitby UDC pursuant to s. 73(a) of the 1936 Act

It appears to me to be a reasonable inference that the Field was set out and maintained as a recreation ground pursuant to s. 80 of the 1936 Act. [WHICH REQUIRED THE CONSENT OF THE MINISTER]

It is true that there is no evidence, one way or the other, as to whether the Minister gave his consent.

If there had been no ministerial consent to setting out the Field as a recreation ground, it seems to me that the Field would fall to be regarded as a public open space. The 1936 Act contains no definition of "recreation ground" or "open space" for the purposes of these sections.

4 **In the e-mail extract inserted below reference is made to what, as described, can only be taken to have been a two-week adjournment in order for all concerned to search for evidence which supported Mr. VIVIAN CHAPMAN Q.C opinion. This opinion, which appears to me to have been expressed entirely without any or any sufficient evidence, appears to have been predicated upon nothing more than what was merely a statutory possibility available as a power.**

He did not raise this issue of the law until all evidence had been heard, and we were given a further 2 weeks to search archives to find any relevant council records stating this. As you will see, neither the objector (the local council) not ourselves could find anything.

FINAL CONCLUSION

From my above analysis I believe that prima facie there is a prospect that a judicial review may be capable of being pursued successfully because an unsupported opinion, for which even following a detailed two-week search

there was not discovered one scintilla of evidential support, does not in my opinion in the light of the circumstances satisfy the conclusion that upon the balance of probability the land should not be registered.

However I very strongly recommend that the services of a qualified and experienced solicitor be engaged who may consider it appropriate to obtain a barrister's opinion of the prospects for a successful outcome.

However I suggest that a letter should be sent to the registration authority before they formally consider the recommendations pointing out the intention to seek a judicial review if a refusal to register is decided explaining the basis upon which such an action would be launched.

Edgar S J Powell