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

In reference to the report on the above matter which is to be considered by the Planning & Regulatory sub Committee on 8 October 2010.

Attached is a further report of the Inspector providing his detailed response to the comments of Planning Sanity and the Open Spaces Society submitted by Helredale Neighbourhood Council. I would ask Members to read this in advance of the committee meeting on 8 October in conjunction with the committee report.

Due to the holiday commitments of the Inspector his comments were not received before the deadline for final drafts of the committee report.

Members will note that having considered the comments of Planning Sanity and the Open Spaces Society the Inspector finds no reason to alter his recommendation to the County Council.

Doug Huzzard

for Corporate Director Business & Environmental Services

1st October 2010

In the Matter of

an Application to Register

Land at Helredale Playing Field, Whitby, North Yorkshire

As a New Town or Village Green

FURTHER REPORT

of Mr. VIVIAN CHAPMAN Q.C.

22nd September 2010

North Yorkshire County Council,

County Hall,

Northallerton,

North Yorkshire DL7 8AD

Ref SE/100683

66557/VRC/10/129/wp/S4/Whitby Further Report

In the Matter of

an Application to Register

Land at Helredale Playing Field, Whitby, North Yorkshire

As a New Town or Village Green

FURTHER REPORT

of Mr. VIVIAN CHAPMAN Q.C.

22nd September 2010

Introduction

[1] In this case, I delivered a Report dated 28th July 2010. I am instructed by email dated 15th September 2010 from Mr. Simon Evans of North Yorkshire County Council to give my views on the following two documents commenting on my Report:

- Response to Inspector's Report and Recommendation on behalf of the Applicant by Mr. Chris Maile (undated), and
- An Opinion on Judicial Review by Mr. Edgar SJ Powell of the Open Spaces Society (also undated).

[2] I propose to consider each document in turn.

Response to Inspector's Report

[3] The first point made by Mr. Maile is that it was I as inspector, rather than the applicant or objector, who first raised the issue concerning s. 12 of the Housing Act 1985. This is correct. However, I see nothing wrong in that. If it appears that there is an important point of law which is relevant to the determination of the application but which has not been raised by the parties, it seems to me that it is the duty of the inspector to raise that point with the parties so that the commons registration authority can make a fully informed decision on the success or failure of the application.

[4] The second point made by Mr. Maile is that I did not raise the legal issue until after all the oral evidence had been heard. I am afraid that Mr. Maile's recollection on this point is incorrect. At the conclusion of my opening remarks at the very start of the public inquiry, and before any evidence had been heard, I raised the question whether a playing field held under s. 12 of the Housing Act 1985 engaged the principle that

land held on a statutory trust for public use was used by right rather than as of right. I specifically referred in my opening remarks to Housing Act 1985 s. 12 and to s. 10 of the Open Spaces Act 1906 and s. 164 of the Public Health Act 1875.

[5] The third point made by Mr. Maile is that, in my Further Directions of 23rd April 2010, I specifically forbade further evidence being presented except to the limited extent that any documentation was forthcoming. This is incorrect. In para. **[27]** of my Further Directions, I gave the Applicant time to serve further written evidence and submissions. The Applicant was therefore entirely at liberty to serve further written witness statements. Further, if the Applicant considered that she was unduly restricted by the Further Directions either as to the class of evidence that she could produce or as to the time within which to produce it, she could have applied under para. **[31]** of my Further Directions for amendment of those directions. No such application was made.

[6] The fourth point made by Mr. Maile is that Mrs. Wright was unfairly criticised for not putting in any evidence of her further researches in the Whitby UDC minutes in circumstances where she was precluded from doing so by my Further Directions. This point is misconceived since Mrs. Wright was not prevented by my Further Directions from putting in a witness statement dealing with her researches. If she had mistakenly thought that she was, she could have applied to vary the Further Directions under Further Direction **[31]**. Furthermore, it does not appear to me that it would have made any difference to my recommendation if the results of her researches had been incorporated into a witness statement. Her results, as set out in Mr. Maile's submissions, were entirely negative. First, she did not find anything relating to the statutory power under which the 1951 Conveyance was entered into. Accordingly, the statutory power had to be identified on the available evidence and that is what I did in para. **[103]** of my Report. Second, she found nothing relating to the grant of ministerial consent to the setting out of the recreation ground. In para. **[122]** of my Report, I considered the legal position if ministerial consent had been given or not given. In both cases, I formed the view that recreational user by local people would be by right rather than as of right.

[7] The fifth point made by Mr. Maile is that I failed to re-open the public inquiry. Mr. Maile raised this issue in para. 13 of his further closing submissions of 6th May 2010. This was in support of a submission that, since the Housing Act 1985 s. 12 issue was only raised after the oral evidence was heard, the public inquiry should be re-opened so that witnesses could be questioned as to whether and when they were council tenants. As I have noted above, I raised the Housing Act 1985 s. 12 at the opening of the public inquiry and so this point is based on a false hypothesis. In any event, I made my recommendation on the basis that the public had a legal right to use the application land and so the question whether the users were council tenants did not arise. The question of the legal basis for public use of the application land appears to me to turn purely on the historical documents and the law and I can see no reason why the public inquiry should have been re-opened.

[8] The sixth point made by Mr. Maile is that I said that the land ownership evidence was not challenged by the applicant, whereas, at the time of the evidence, the land ownership issue was not in contention. I think that Mr. Maile is referring to the evidence of Mr. Pedley and to my comment at para. **[99]** of my Report. However, I do not think that there has ever been any issue about who owns the application land, and the documentary evidence on the point seems quite clear.

[9] The seventh point made by Mr. Maile was that there was insufficient evidence upon which to make a finding that the application land was purchased under the Housing Act 1936 and subsequently held under that Act and its statutory successors. I respectfully disagree. It seems to me that there was adequate evidence as set out in para. **[103]** of my Report. There was no evidence to suggest that the application land was purchased under any other statutory power and no evidence of any appropriation to another statutory purpose. It seems to me reasonably clear that the land was purchased and held for the purposes of building and providing a council housing estate. Mr. Maile points to the fact that, upon consolidation of the housing legislation in the Housing Act 1957, the requirement in the 1936 Act that housing should be for "the working classes" was dropped. However, I do not see that this change affects my recommendation, which is based on the proposition that the housing legislation empowered the council to provide public recreational areas on council estates. It is irrelevant to this proposition whether the council tenants were members of the working classes or not.

[10] The eighth point made by Mr. Maile is that I gave undue weight to the *obiter dicta* of the House of Lords in *Beresford* concerning the distinction between user "as of right" as opposed to user "by right or "of right". I respectfully disagree. Although the discussion by the House of Lords on this point was *obiter* it amounts to strong guidance by the then highest court in the land, which I think that a commons registration authority ought to follow. I adhere to what I wrote in para. **[121]** of my Report.

[11] The ninth and final point made by Mr. Maile is that I failed to give adequate weight to the statement in the *Warneford Meadow* case that local authorities are not immune from having their land registered as new greens. I do not see any force in this point. The judge in the *Warneford Meadow* case was addressing an argument by Mr. Whitmey that special principles applied generally to land held by public authorities. He was not addressing the "by right/as of right" point which did not arise in the *Warneford Meadow* case. It was not argued in the present case that the application land was immune from registration simply because the landowner was a local authority.

[12] Having carefully considered the points raised by Mr. Maile, I do not consider that they are good points and they give me no reason to alter my Report or its recommendation.

Opinion on Judicial Review

[13] I now turn to Mr. Powell's Opinion on Judicial Review.

[14] Mr. Powell starts with a general summary of the law relating to judicial review. I am broadly in agreement with that summary.

[15] Mr. Powell then identifies the fact that the application failed only on the "by right/as of right" point. I agree.

[16] Mr. Powell then considers the question of the burden and standard of proof in an application to register a new green. I consider that Mr. Powell does not distinguish as clearly as he should between the two distinct concepts of the burden and standard of proof. I adhere to the view expressed in para. **[41]** of my Report that the burden of proof lies upon the applicant and that the standard of proof is the balance of probabilities. As for the burden of proof, Mr. Powell is incorrect in asserting that the burden of proof lies upon the objector to disprove the case for registration. As for the standard of proof, I generally agree with Mr. Powell that the standard of proof is the simple balance of probabilities, although the cases that he cites (one of which in fact suggests that the standard of proof is not the simple balance of probabilities) have now been overtaken by the decision of the House of Lords in *Re B (Children)* [2009] AC 11, [2008] EWHL 35.

[17] Mr. Powell then says that my Report should be treated as expert evidence. I disagree. My Report is not evidence at all. I was instructed by the commons registration authority to hold a public inquiry, to consider the evidence and to write a report with my recommendation whether the commons registration authority should accede to the application to register the application land as a new green. The evidence for and against the application is the evidence submitted to the public inquiry.

[18] There is accordingly a double misconception in Mr. Powell's argument that my Report is expert evidence which is inadequate to overturn the case for registration. First, my Report is not expert evidence. Second, the burden of proof lies on the Applicant to prove her case for registration.

[19] Mr. Powell incorrectly describes my Further Directions as granting a two week adjournment to search for evidence to support my opinion. On the contrary, the purpose of the Further Directions was to make sure that both sides had a reasonable opportunity to adduce further arguments and evidence on the "by right/as of right" point, on which I had, at that stage, reached no firm view As I recall, I suggested that the parties should have some time after the public inquiry to put forward further evidence and submissions since the Housing Act point had arisen at the public inquiry and Mr. Maile asked only for a week. I felt that two weeks was more reasonable. Mr. Maile did not ask for any extension of the time allowed. Mr. Powell was misinformed in stating that the "by right/as of right" issue was not raised until all the evidence had

been heard. On the contrary, as noted above, I raised the point at the end of my opening remarks and before any evidence was heard.

[20] Having carefully considered Mr. Powell's Opinion on Judicial Review, I see no reason to alter my Report or its recommendation.

Conclusion

[21] I re-affirm my Report and its recommendation.

Vivian Chapman QC

22nd September 2010

9, Stone Buildings,

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