

**NORTH YORKSHIRE COUNTY COUNCIL**

**PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE**

**13 JANUARY 2012**

**LAND KNOWN AS AUNUM'S FIELD, THORNTON LE DALE**  
**APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN**

**Report of the Corporate Director – Business and Environmental Services**

**1.0 PURPOSE OF REPORT**

- 1.1 To report on an application (“the Application”) for the registration of an area of land at Aunum’s Field, Thornton Le Dale identified on the plan at **Appendix 1** (“the Application Site”) as a Town or Village Green.

**2.0 LEGAL CRITERIA**

- 1.1 Under the provisions of the Commons Act 2006 (“the Act”) the County Council is a commons registration authority and so responsible for maintaining the Register of Town & Village Greens for North Yorkshire.

- 1.2 Section 15(1) of the Act sets out that

*Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies*

Section 15(2) of the Act provides for land to be registered as green where:-

- (a) *a significant number of the inhabitants of a 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*

Section 15(3) of the Act provides for land to be registered as green where:-

- (a) *a significant number of the inhabitants of a 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 ceased to do so before the time of the application but after the commencement of this section;*

and

(c) *the application is made within the period of two years beginning with the cessation referred to in paragraph (b)*

2.3 A commons registration authority needs to be satisfied that on the balance of probabilities all the relevant elements of section 15 have been demonstrated by an application for it to be approved. The onus of proof rests with the applicant.

### **3.0 APPLICATION SITE**

2.1 That part of the Application Site shown hatched on the plan at **Appendix 1** is owned by Sanctuary Housing Association and the remainder by Alwyn Dudley Smith. Sanctuary Housing Association purchased the land it now owns from Alwyn Dudley Smith in February 2011. Public rights of way cross the Application Site as depicted on the plan.

2.2 That part of the Application Site still owned by Alwyn Dudley Smith comprises rough pasture and is currently occupied by tenant farmer John Shepherd.

2.3 Planning permission has been granted for the construction of low cost housing on the land now owned by Sanctuary Housing Association and in February 2011 the land was fenced off pending construction work. Work subsequently commenced and is continuing. The land owned by Sanctuary Housing Association formerly formed part of the same field that is retained by Alwyn Dudley Smith.

2.4 Photographs of the Application Site will be displayed on screen at the committee meeting.

### **4.0 APPLICATION (see **Appendix 2**)**

3.1 The Application submitted by "Westgate Protest Group(c/o Mr A.C.James)" ("the Applicant") was received by the County Council on 13 May 2011. It relies on the criteria contained in section 15(2) of the Act as having been met in respect of that part of the site owned by Alwyn Dudley Smith and section 15(3) of the Act having been met in respect of the remainder of the site owned by Sanctuary Housing Association. The Westgate Protest Group was initially formed to oppose development of low cost housing at Aunum's Field.

3.2 The application comprises :-

- i a completed Form 44 in the standard format (including continuation sheets, a statutory declaration and maps)
- ii a covering letter from Mr James on behalf of the Applicant
- iii 79 witness statements – (see summary spreadsheet **Appendix 3**)
- iv various photographs of the site

3.3 The witness statements are all in the same format an example copy of which is included at the end of Appendix 2. Of particular relevance each form includes provision for the witness to set out the time period over which they

claim to have used the land and to identify the uses that they have taken part in. What is unclear for those witnesses evidencing a familiarity with the Application Site in excess of twenty years is to what extent if at all their claimed uses have taken place in the last twenty years.

- 3.4 The forms also make provision for witnesses to identify activities they claim to have observed others taking part in and are generally silent on when those observations occurred and to what extent (e.g. where “rounders” has been said to be observed it is not possible to determine whether that was as a result of one event when it was seen played or whether it has been seen for example being played every week of the last 10 years). No indication on the part of the observer is provided of any knowledge of the basis on which people were seen on the land (eg whether with or without permission or as a consequence of using one of the public rights of way).
- 3.5 Whilst the age of the witnesses is not included on the forms it appears a small proportion of them may be children.
- 3.6 Determining an application of this kind is a matter of assessing evidence to determine whether or not the relevant criteria set out in section 15 the Act have been met. Any representations which might be made relating to the alleged merits or otherwise of a site being a village green are immaterial and must be ignored in considering the application.

## **5.0 OBJECTIONS**

### **5.1 Grays (Appendix 4)**

5.2 Objection to the Application was received from Grays (solicitors) on behalf of Alwyn Dudley Smith and John Shepherd. In objection Grays state that claimed historic use predating the minimum 20 year period relevant to the Application ceased in advance of the 20 year period and that in any case was undertaken with the consent of the then tenant farmer (thus not amounting to use “as of right”). However there is nothing significant advanced in support of either of those statements.

5.3 Further, Grays suggest that much of the more recent claimed user is of use which either would be consistent with use of public rights of way which cross the Application Site (so not qualifying as use “as of right” but use “by right”) or actually took place not on the Application Site but on adjacent land.

5.4 Additionally it is suggested that it would not have been possible for some of the claimed uses to have taken place because of the characteristics of the site.

5.5 The objection submitted by Grays is supported by witness statements from :-

- Alwyn Dudley Smith (owner)
- John Shepherd (current tenant)
- Rachael Cook (partner of John Shepherd)

- Michael Harper (building site manager)
- Richard Gray (local resident.)
- Karen Hustler(former school worker)
- Leigh Holliday

5.6 The chief witness statement of the objection is that of Alwyn Dudley Smith. In it he expresses concern about the influence of a briefing note produced by the Applicant which accompanied witness statements when they were circulated (that is covered elsewhere in this report). He details that he believes some of the claimed uses to be consistent with use of the public rights of way and also claims that alleged sledging took place on land other than the Application Site.

5.6.1 That there may have been deference to the grazing of sheep on the land by a number of claimants, as suggested by Mr Dudley Smith, is not in itself reason why such claims could not have merit. It is possible for land to be registered as village green even where use in exercise of village green rights may be shared with other uses.

5.6.2 The point that claimed uses by those who are not inhabitants of Thornton le Dale is not qualifying use is correct. Any such use should be disregarded. Whilst he acknowledges that the local football team used the field around fifty years ago he gives reasons as to why use for football of any of the site either formally or informally has not taken place in the twenty year periods of relevance to the Application.

5.6.3 Doubts that claims of use by the Ryedale Forum 50+ Group and of kite flying should be given any weight appear to have sound basis. That any bird watching or picnicking may have been incidental to use of the public rights of way is a matter of conjecture which would require the further testing of that evidence to come to a clear judgement. Equally so the issues about the picking of autumn fruits. Representations questioning the merits of the need for Aunum's Field to be a village green seem irrelevant save to act as a means of trying to substantiate doubts that that certain claimed uses actually ever took place. A large portion of the statement refers to historical uses predating the 20 year periods relevant to the application. With regard uses during the 20 year period he expresses doubt about them having taken place.

5.7 John Shepherd explains his lifelong acquaintance with the Application Site and how regularly he has to visit it. In short he does not accept that any of the uses claimed in the Application have taken place other than as a consequence of use of the public footpaths that cross the site.

5.8 For the most part Rachael Cook's statement covers issues of animal husbandry which are largely immaterial other than to demonstrate why she might also have reason to visit the site regularly. Rachael again denies ever

having witnessed people taking part in any of the activities claimed in the Application.

- 5.9 Michael Harper has only been familiar with the Application Site since February 2011 and so his evidence is of no value in respect of that part of the site owned by Sanctuary Housing in respect of which the Application relies on use pre dating that time. It carries little weight in respect of the remainder of the site. That said he notes only having witnessed activity on the public rights of way during that time. By his own admission he has not been on site in the evenings or weekends during that time.
- 5.10 Richard Gray (aged 62) has lived in Pickering all his life. His aunt ran a youth club in the town and activities of the youth club, albeit prior to the 20 year periods of particular relevance to the Application, are mentioned in the Applicant's evidence. Mr Gray is convinced that use of land by the youth club would not have taken place without the prior consent of the tenant farmer of the time. Such uses thus being exercised "by right" (and so not satisfying section 15 criteria).
- 5.11 Karen Hustler a volunteer at the neighbouring school between 1997 and 2001 does not recall the school accessing the Application Site at all during that time.
- 5.12 Leigh Holliday was born in Thornton le Dale in 1975 and lived there until 1999 returning again 3 years ago. She does not recall anyone playing on the Application Site and in particular recalls that sledging took place on adjoining land and not on the Application Site itself.

## **6.0 WRAGGE & CO (Appendix 5)**

- 6.1 Objection was received from Wragge & Co (solicitors) on behalf of Sanctuary Housing Association
- 6.2 The objection acknowledges that the housing association has only been familiar with the site since 2010 and so cannot offer any great witness evidence of its own although Michael Harper is given similar reference as in the objection from Grays
- 5.3 In an assessment of the Application and objector's evidence Wragge & Co conclude that it is evident the Application Site has always been rough pasture and that public use of the site has been limited to use only of the public footpaths across the site. That 60% of the witnesses produced by the Application evidence individually less than the full twenty year use of the site is not in itself a significant issue. It is not unusual that the weight of user evidence put forward in cases such as this leans toward the latter part of the twenty year period. The more critical issue is whether or not the claimed uses actually took place in the manner claimed. Wragge & Co also suggest that there may be some confusion amongst witnesses as to exactly where some activities took place in the past.
- 5.4 Inferences as to motivation for the application in the objection from Wragge & Co are immaterial.

5.5 In conclusion Wragge & Co request that either the Application is refused or that a non statutory inquiry is held and for the inspector of such an inquiry to then report back to the County Council.

## **7.0 PARISH COUNCIL(Appendix 6)**

7.1 The local parish council has made two submissions by letter. Initially on 3 August 2011 and secondly a brief follow up on 7 October 2011. Reference to a lack of representation that the Application Site was common land during the planning process which led to permission for the Sanctuary Housing Association development is largely immaterial and of little evidential weight.

7.2 The parish council also acknowledges the existence of public rights of way across the site and suggests that the presence of sheep on the site will have limited the potential for dog walking (one of the more popular claimed uses) on the site.

7.3 The parish council states that it has concluded the Applicants have not established a right to use the whole of the land but it does not explain how that conclusion has been reached.

7.4 In its letter of 7 October 2011 the parish council effectively questions whether use by a significant number of inhabitants is demonstrated by the Application. Assessment of this point is not, as suggested by the parish council, an issue of determining what proportion of inhabitants has submitted evidence as explained elsewhere in this report.

## **8.0 APPLICANT RESPONSE (Appendix 7)**

8.1 The County Council followed due procedure by offering the Applicant the opportunity to comment on objections received and further representation was submitted dated 23 September 2011. In it the Applicant requests that in the event that the County Council is not minded to approve the Application at this stage that it appoints an inspector to hold a non statutory inquiry.

7.2 The Applicant questions the weight to be given to points made by objectors regarding uses made of the site prior to the 20 year periods of significance to the Application. This is most likely in particular to relate to allegations of permission having been given at that time for any use of the land. Whilst evidence of use made pre the twenty year period might, for example, help to add some credibility(or otherwise) to use which may have subsequently occurred it is the twenty year period that is of most relevance to applications of this kind.

7.3 In defending accusations concerning credibility of evidence the Applicant in particular points to the volume of user evidence questioning the potential for

so many witnesses to offer evidence without basis. There may be some argument to this which needs to be balanced against opposing evidence from the objectors and accounting for the possible influence of elements of the briefing note that was distributed with the witness forms.

- 8.4 The Applicant suggests presumption on the part of objectors that certain claimed uses were actually consequent upon use of the public rights of way on the Application Site. On the one hand there has to be some potential that claimed uses such as bird watching could have been exercised whilst walking on the public rights of way. At the same time it would seem there is similar potential that they were not.
- 8.5 The claimed familiarity by Alwyn Dudley Smith with occurrences on site is challenged by the Applicant pointing to his alleged absence from the country for significant periods.
- 8.6 It is appropriate for the Applicant to point to the planning history of the Application Site as being separate from the question of whether or not town or village green status should be appointed to it. The objector pointing to an apparent lack of previous representation(i.e. during the planning process) of the land concerned being the subject of public use is understandable and could have some influence on assessing credibility of subsequent claims but it would not, at this stage, be appropriate to attach too much weight to the point.

## **9.0 FURTHER REPRESENTATION (Appendix 8)**

- 9.1 Further points were exchanged between Grays (17 October 2011) and the Applicant (24 October 2011) following the abovementioned initial submissions.
- 9.2. For the most part those comprise an exchange of comments on questions of fact on which members of the committee will take a view or otherwise points which are dealt with throughout this report. Issues raised regarding the question of whether or not sheep grazing would be possible in the event of registration of the land as a village green are immaterial with regard to determining the Application. In the exchanges Grays are correct to point out that objectors do not need to be residents of the locality.

## **10.0 EVIDENCE REVIEW**

### **10.1 Witness statements**

When distributed for completion by potential witnesses it is understood the witness statement forms were accompanied by the briefing note (**Appendix 9**). Whilst in part the note can be said to provide helpful general background information there is a substantive element of the note which aims to prompt the answers to be given to certain questions on the form. Additionally the forms contain pre-completed answers to some questions. It is difficult to judge how much of an influence the promptings contained in the note had on witnesses but it has the potential to introduce doubt to the credibility of witness evidence produced from it. Should witnesses have chosen to

deliberately access the Application Site subsequent to receipt of the briefing note as urged to in the note that will only have had potential for evidencing use at the very tail end of the 20 year period concerned.

## 10.2\_\_inhabitants of a locality, or of any neighbourhood within a locality

In answer to Part 6 of the application form the Applicant has referred to “The Village of Thornton Dale within the Parish of Thornton Dale” thus indicating in the context of the Act the application to be in respect of the “neighbourhood” of Thornton Dale within the “locality” of the Parish of Thornton Dale. The witness statement forms however refer to Thornton le Dale as being the “locality” of the Application.

10.3 Whilst not entirely clear whether the application is relying on use by inhabitants of a “neighbourhood within a locality” or of a “locality” it is considered that the former is probably the intention and that consequently Thornton le Dale is being relied upon as a neighbourhood within a wider locality.

10.4 In considering what constitutes a “neighbourhood” for the purposes of section 15 the courts have ruled that:-

*“a registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness”*

Therefore a neighbourhood should be recognisable as a community in its own right. It is not required to be a formally designated administrative area in law.

10.5 There has been and continues to be technical debate in legal circles both within and beyond the courts on the meaning of “neighbourhood” and “locality”. However, what amounts to more or less the entire village of Thornton le Dale appears to be at the extreme end of what might be considered to be a cohesive community that amounts to a neighbourhood for the purposes of the Act.

10.6 Where use by inhabitants of “locality” is relied on (rather than “neighbourhood within a locality”) that locality needs to be an administrative unit recognised in law. “The Parish of Thornton Dale” meets that criteria.

## 10.7 Significant number

What constitutes a “*significant number*” in any one case does not need to be considerable or substantial. The characteristics of the neighbourhood concerned determine what is likely to be considered to constitute being a significant number from that neighbourhood. To constitute use by a significant number the usage needs to signify evidence of general use by the local community. There is no formula as to precisely what number of users will constitute a significant number in any one case.

10.8 Suggestion by Alwyn Dudley Smith in his witness statement to the number of claimants not amounting to a significant “proportion” of the population of Thornton le Dale is an inappropriate interpretation section 15. It is not an issue of proportion.



10.9 What the County Council needs to be satisfied of in this case is that the evidence signifies general use by the community of Thornton le Dale.

#### 10.10 **As of right**

A large proportion of the claimed usage appears to relate to walking both with and without dogs. It is difficult without fully testing those claims to be clear how much if any of the said walking has been a consequence of use of the public footpaths crossing the site. Use of a footpath would comprise the exercise of a legal right and so be use “by right” rather than “as of right”. For example a dog straying from owners using a path is unlikely to comprise qualifying use for the purpose of the Application. Even an owner straying from a path can still amount in essence to use of the path rather than something else.

10.11 Further, walking, where not on the public rights of way, may amount to something which more appropriately might be viewed as possibly establishing further public rights of way rather than a town or village green. Particularly where such use has followed say a relatively common or defined linear route or routes which are not already public rights of way.

10.12 The courts have interpreted “as of right” to be use which has not been by “*force, stealth nor with the permission or licence of the owner* “. Almost without exception the Application Witness Statements make no reference to consent having been granted in order to use the site or to any challenges made either verbally or by for instance signage having been erected by landowner or tenant. The landowner’s evidence offers little hard evidence of permissions being granted despite claims that was what happened in the past.

#### 10.13 **Lawful Sports and Pastimes**

The courts have interpreted what constitutes “*lawful sports and pastimes*” widely. Most of the types of uses referred to, submitted by witnesses on the face of it comprise “lawful sports and pastimes” though observing sheep/lambs would seem to be stretching a point. That said a large proportion of the claimed usage appears to relate to walking both with and without dogs. It is difficult without fully testing those claims to be clear how much if any of the said walking has been a consequence of use of the public footpaths and so to be disregarded.

#### 10.14 **period of at last 20 years**

Given that the Application is relying on two different elements of section 15 in respect of the different parts of the Application Site there are two 20 year periods to be considered. That dating back from February 2011(the time from which access was prevented) in respect of that part of the site owned by Sanctuary Housing Association and the 20 years dating back from May

2011(the time of the Application) in respect of the rest of the site. There is not a major difference in the two periods and given that no material differences occurred regarding accessibility of land retained by Mr Dudley Smith in the interim period then assessment of evidence should not significantly differ in respect of the two parts of the Application Site.

- 10.15 Taken at face value there are a significant number of witnesses who claim to have been using the site at various times over the twenty years concerned and prior to that. What is less clear from the evidence is how consistent use may have been over twenty years.

## **11.0 DECISION MAKING**

- 11.1 The decision whether or not to approve the Application and so register the land concerned rests with the County Council in its role as a commons registration authority. In doing so it must act impartially and fairly.
- 11.2 It is not relevant to consider the merits or otherwise of the land being (or not being) registered. The County Council must direct itself only to whether or not all the relevant criteria set out in section 15 have been met.
- 11.3 Any challenge to the decision reached by the County Council would need to be by way of application for permission for that decision to be the subject of a Judicial Review.

## **12.0 CONCLUSIONS**

- 12.1 For the Application to be approved the County Council must be satisfied that on the evidence available to it ALL the criteria contained in section 15 of the Act are met.
- 12.2 Whilst the Application relies on two different elements of section 15 the difference in the two relevant 20 year periods is short and circumstances across the whole of the site otherwise similar over the 20 years that there is no requirement for any significant difference in the assessment of evidence of past usage between the two parts of the site concerned. There was no material change to the accessibility of that part of the site retained by Alwyn Dudley Smith in the time between the fencing off of the Sanctuary Housing Association land and the date of the Application.
- 12.3 Whilst the courts have resisted suggestion that to demonstrate general use by a community it is necessary for witnesses to comprise an even “spread” of inhabitants from across the locality concerned it is still necessary for a commons registration authority to be satisfied the evidence signifies that the Application Site has been in general use by the local community concerned (in this case Thornton le Dale). When taken at face value evidence tends on balance not to indicate general use by inhabitants of the whole of Thornton le Dale but more use from a smaller geographical area than that.

- 12.4 The Application Site is crossed by two public rights of way. A large element of the use claimed to have been exercised by witnesses comprises walking or a walking related activity which may be associated with use that could be conducted on public right of way. Given the extent of public right of way across the site it seems there is likely to be a relatively high potential for layman witnesses to have unwittingly recorded user experiences which amount to no more than a valid use of the public rights of way and so not comprise use “as of right” of the Application Site.
- 12.5 Overall the high number of witnesses is persuasive of the use of the Application Site for lawful sports and pastimes having taken place. However, it is unclear as to whether such use, even taken at face value, has been consistent enough across the relevant twenty year periods to constitute the 20 year rule having been met. There must be some question over the credibility of user evidence offered against the background of the briefing note distributed with the user evidence forms and the answer to some of the questions on the forms having already been completed by the Applicant for the witnesses.
- 12.6 On the basis of the evidence submitted it is on balance doubtful there are currently grounds on which to approve the Application.
- 12.7 That said Government guidance contained in the DEFRA “Guidance Notes for the completion of an Application for Registration of Town or Village Greens outside the pilot implementation areas” advises that a commons registration authority may decide to hold an inquiry into an application to establish and properly test evidence. Such inquiries have become known as “non statutory inquiries”. The Guidance points out:
- “the Court of Appeal has ruled that in determining applications where there is a dispute the registration authority should consider convening such a hearing or inquiry.”*
- 12.8 The Courts have suggested that where there is serious dispute the procedure of conducting a non statutory inquiry through an independent expert should be followed *“almost invariably”*.
- 12.9 The procedure is widely used by commons registration authorities across the country. In summary an inspector (usually a barrister with recognised specialist knowledge of in this area of law) is appointed to hold an inquiry.
- 12.10 Inquiries provide opportunity for interested parties on all sides to fully explain, explore and test relevant evidence and so ultimately help an authority to arrive at a fully informed decision.
- 12.11 Where an inquiry is held an appointed inspector will prepare a report including recommendation. The decision as to whether or not an application is approved ultimately rests with the Commons Registration Authority. The cost of conducting an inquiry is likely to be in the region of £15,000. At the end of the day the decision and discretion as to how to proceed to reach that decision rests with the County Council.

12.12 It is your Officers view that all the relevant criteria of Section 15 of the Act are not satisfied and the application should be refused. The following recommendation reflects this view. However, in the event that Committee is not minded to refuse the Application at this stage it is recommended that the Corporate Director (Business & Environmental Services), with advice and guidance from the Assistant Chief Executive (Legal & Democratic Services), be authorised to appoint an independent expert to conduct a non-statutory inquiry and to then prepare a report to assist the County Council in determining the application thereafter. Following receipt of the independent expert's report, that a further report be presented to this Committee to enable it to determine the application.

**13.0 RECOMMENDATION**

13.1 That Committee resolves to refuse the Application on the grounds that it is not satisfied that all the relevant criteria of section 15 of the Act are evidenced by the Application

DAVID BOWE  
Corporate Director Business & Environmental Services

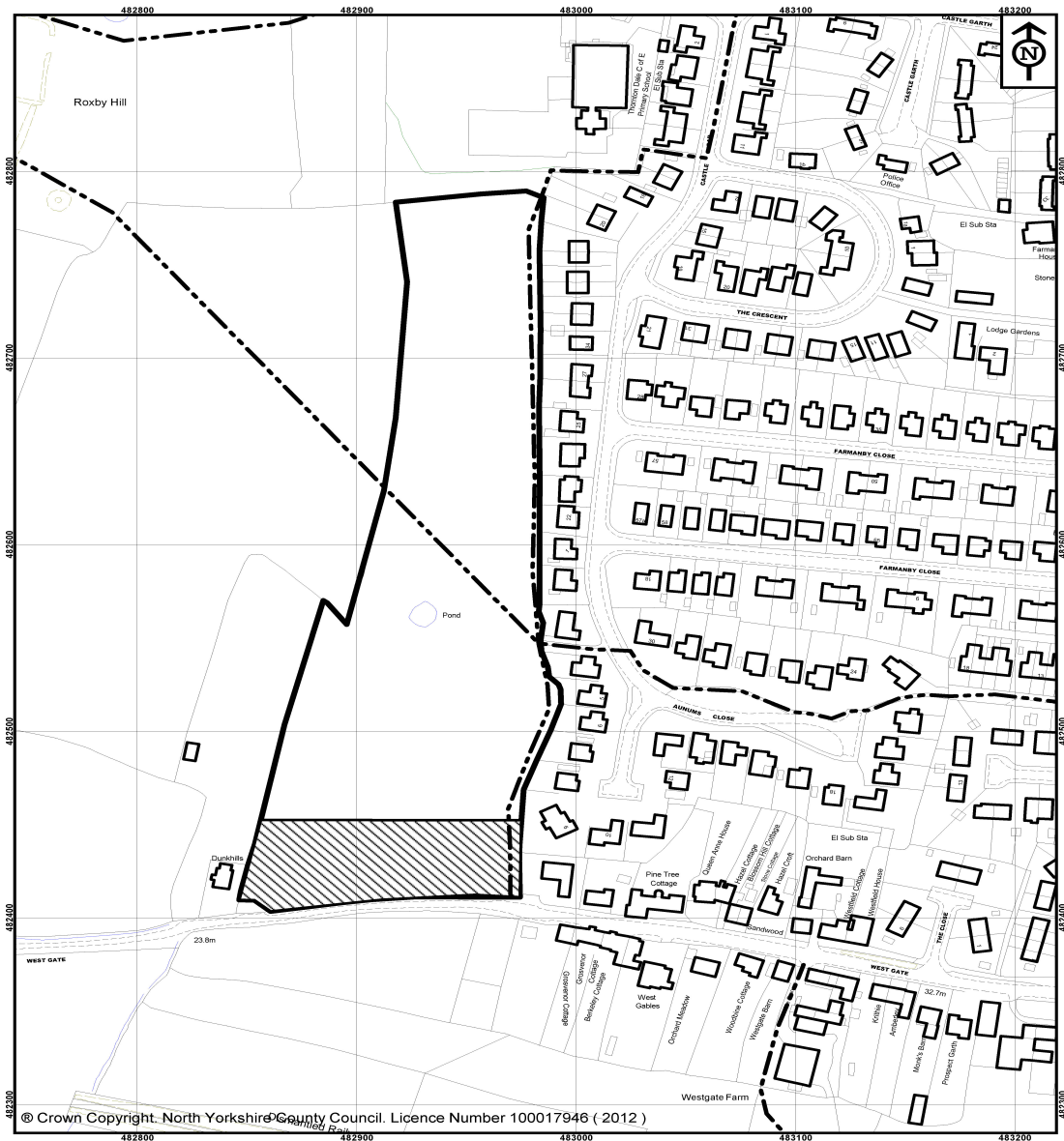
Author of Report: Doug Huzzard/Chris Stanford

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

## **LIST OF APPENDICES**

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Appendix 8	Observations of Westgate Protest Group
Appendix 9	Village Green Witness Form – Briefing Note

THORNTON LE DALE – LOCATION PLAN



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**North**  
**Yorkshire County Council**

Public Rights of Way  
 Waste and Countryside Services  
 County Hall  
 Northallerton  
 DL7 8AH

Key:  
 Public footpaths ————  
 Village Green application

Map drawn on 12 December 2011  
 Drawn by JRP Scale 1:2500

**North Yorkshire County Council**

Plan prepared for the  
 Planning & Regulatory Functions  
 Sub-Committee  
 on 13 January 2012

**LOCATION PLAN**

File Ref No.