

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE

10 AUGUST 2012

PROSPECT HILL, WHITBY
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 (identified on the plan at Appendix 1) known as Prospect Hill, Whitby as a Town or Village Green.

2.0 BACKGROUND AND PROCEDURAL MATTERS

- 1.1 The County Council is responsible for maintaining the Register of Town & Village Greens for North Yorkshire. The Application, made in January 2005, was brought before the County Council’s Yorkshire Coast and Moors County Area Committee on 9 April 2009, and a copy of that report is attached at Appendix 2.
- 1.2 That Committee resolved in accordance with the officers’ recommendation to appoint an Inspector to hold a non-statutory public inquiry to hear evidence and to make a recommendation to the County Council in its role as Registration Authority.
- 1.3 Consequently Ruth Stockley, 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 26th and 27th July 2011. The Inspector’s extensive report dated 6 February 2012 is attached to this report at Appendix 3. The Committee will note that the Inspector has recommended that the Application is refused, on the basis that the application fails to meet the any of the relevant legal criteria.
- 1.4 Following receipt of the Inspector’s report by the County Council it was sent to Thorpe & Co. solicitors acting for the Applicant and to BHP Law solicitors acting for the affected landowner. Response received from BHP Law on behalf of the landowners is attached as Appendix 4. No response was received on behalf of the Applicants.
- 1.5 Officers accept that the case law referred to in the letter from BHP Law strengthens the findings of the Inspector.

3.0 CONSIDERATIONS

- 2.1 The principal matters for consideration in dealing with the application were set out in the report to the County's Yorkshire Coast and Moors County Area Committee and dealt with comprehensively by the Inspector. The appropriate element of Section 13(as amended) of the Commons Registration Act 1965 provided for land to be registered as a town or village green where:

"...land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

- 3.2 Although section 13 of the Commons Registration Act 1965 has now been repealed and replaced by provisions of the Commons Act 2006 the provisions of section 13 are still applicable to applications made prior to the date of its repeal on 6 April 2007. Consequently it is section 13 that applies in this case.
- 2.3 For an application to be successful it is necessary for it to meet all the criteria set out in section 13 and the Inspector found that the application failed to meet any of them. Officers concur with the Inspector's findings. It is not obligatory for a Registration Authority to follow the findings of an Inspector though it must act lawfully in any decision it reaches. Arguments as to the merits or desirability of land being registered are not relevant.
- 2.4 In the event the committee resolve to accept the officer recommendation contained in this report the Applicant will be entitled to make application for judicial review. 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 and that the authority has proceeded appropriately such that any application for such a review would be unlikely to succeed.

4.0 EQUALITIES IMPLICATIONS

- 4.1 Consideration has been given to the potential for any equality impacts arising from the recommendation. It is the view of officers that the recommendation does not have an adverse impact on any of the protected characteristics identified in the Equalities Act 2010.

5.0 FINANCE

- 5.1 There are no financial implications associated with the introduction of these proposals.

6.0 RECOMMENDATION

- 6.1 That the Application be **REFUSED** because the Registration Authority is not satisfied that it meets all the criteria set out in section 13 of the Commons Registration Act 1965 for the reasons set out in the Inspectors Report dated 6 February 2012, comprising Appendix 3 to this report, and taking into further account the case law referred to in correspondence from BHP Law comprising Appendix 4 to this report.




DAVID BOWE

Corporate Director – Business and Environmental Services

Author of Report: Doug Huzzard / Chris Stanford

Background Documents: Application case file held in County Searches Information



 <p>North Yorkshire County Council</p> <p>Public Rights of Way Waste and Countryside Services County Hall Northallerton DL7 8AH</p>	<p>Key:</p> <p>Village Green Application </p> <p>Public footpath </p>	<p>North Yorkshire County Council</p> <p>Planning & Regulatory Functions Sub-Committee</p> <p>10 August 2012</p> <p>APPENDIX 1</p>
	<p>Map drawn on 25 June 2012</p> <p>Drawn by JRP Scale 1:1250</p>	

Appendix 2

NORTH YORKSHIRE COUNTY COUNCIL
YORKSHIRE COAST AND MOORS COUNTY AREA COMMITTEE

9 APRIL 2009

LAND AT PROSPECT HILL, 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 as a Town or Village Green an area of land at Prospect Hill, Whitby (identified on the plan comprising **Appendix 1**)

2.0 BACKGROUND

- 2.1 The County Council is a Commons Registration Authority and so responsible for maintaining the register of Town & Village Greens for North Yorkshire which includes determining applications to add to the register land that is claimed to have become green.

3.0 APPLICATION

- 3.1 An application dated 5 January 2005 to register land at Prospect Hill, Whitby as village green was submitted by Mayfield Residents Action Group claiming that the land had been "*in use for a period in excess of 20 years immediately prior to the Application*"
- 3.1 The criteria in respect of which the application has to be assessed is that contained in the Commons Registration Act 1965. Namely that :-

*for not less than twenty years a **significant number** of the inhabitants of any **locality**, or of any **neighbourhood within a locality**, have indulged in lawful sports and pastimes **as of right** and either*

(a) continue to do so, or

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions

- 3.2 In support the Application was accompanied by 24 type written statements and a petition of claims all referring to a range of activities and pastimes having taken place over time (**Appendix 2**)

- 3.3 Some of the signatories to the petition also signed written statements. Allowing for this in all there appears to be claims of use and observations of usage by others from at least 32 people.

4.0 APPLICATION SITE

- 4.1 The land which is the subject of the Application is privately owned.

- 4.2.1 The owners state that the site was licensed for grazing for over 50 years up until May 2004 and additionally that part of the site was used as a building compound during the development of adjoining land.
- 4.2.2 A public footpath runs through the land concerned bounding one side of the main body of the land (**Appendix 1**)

5.0 **OBJECTIONS**

- 5.1 The landowners have objected to the Application on a number of grounds :-
- a) that claimed uses need to continue up until the date of registration. The site was fenced off in March 2005 preventing access to the land concerned and so this couldn't have happened.
 - b) many of the statements in support of the Application relate to use of the public right of way and do not evidence that the remainder of the application site has been used
 - c) the evidence submitted in support of the application does not demonstrate use of the land by a "*significant number*"
 - d) use of the land has been interrupted and restricted by grazing and the building compound which was present when adjoining land was being developed
 - e) there is implication from one of the user statements that the land was used with "*consent*" of the landowner rather than "*as of right*"
 - f) a letter from Mayfield Residents Action Group dated 23 October 2006 to the solicitor for the landowners sought permission to access the land to collect litter suggesting it was recognised that any use of the site required their permission
- 5.2 The son of a former tenant of the field has also objected by letter citing grazing as having been the predominant use of the land.

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.
- 6.2 In common with many applications across the country consideration of the application was placed on hold pending the outcome of the "Trap Grounds" case which was the subject of appeal to the House of Lords. The issue of whether or not the exercise of sports and pastimes had to be demonstrated right up until the date of land being registered as a green was primarily at issue. The Lords decided it was not necessary to demonstrate use up until registration thus overturning a previous decision of the Court of Appeal. If it had been necessary it would have had a profound effect in that the majority of applications would probably have been doomed to failure. It was thus important to be clear of the legal position before proceeding with the application.
- 6.3 In accordance with Regulations governing procedures for such applications the Mayfield Residents Action Group was permitted later to put their application "*in order*" by completing a statutory declaration that should have been included when submitted
- 6.4 In accordance with due procedure copies of the objections have been forwarded to the Applicants for comment

7.0 LEGAL ISSUES

7.1 The question of whether or not sports and pastimes have been undertaken on the site “as of right” is probably the most complex of the legal issues to be addressed in determining this application.

7.2 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”

7.3 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 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”

7.4 Thus in order to determine an application where there are apparently competing uses and contrasting statements of a landowner and the content of an Application the issue becomes complex requiring full inquiry into and assessment of the respective claims and an assessment of the impression that a reasonable landowner would take from activities that have taken place on the land. “Deference” (where claimed uses are considered to defer to an overriding use of a landowner) and “Interruption” (where claimed uses might be said to be disturbed) will be relevant to determining the issue. Reaching a conclusion is a matter of fact and degree in each case.

7.5 The circumstances in this case are complicated by the existence of the public footpath. In objection the Owner has raised this as an issue in objection (see 5.1(b)) above. Close inquiry will be required to determine what elements, if any, of the usage referred to in support of the application may have amounted simply to use of that right of way. The issue of dealing with circumstances where a right of way affects an application for green status was addressed in judgement of the “Trap Grounds” case :-

In this situation the starting point must be to view the user as referable to the exercise (and the occasional excessive exercise) of the established right of way and only as referable to exercise as of right the rights incident to a green if clearly referable to such a claim and not reasonably explicable as referable to the existence of the public right of way”

7.6 Additionally the question of whether or not what amounts to a “significant number” of users have taken part in sports and pastimes is a matter which needs to be assessed in particular reference to the circumstances of each case. It is clearly not an exact science. In judgement in the case of R v Staffordshire County Council, ex parte Alfred McAlpine Homes Ltd [2002] Sullivan, J was satisfied that an Inspector was right to conclude that :-

“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”

The landowners suggest in objection that this requirement has not been met by the Application. Full inquiry to confirm the nature and extent of the claimed uses will necessary to reach a conclusion on this issue.

8.0 **NON STATUTORY INQUIRY**

8.1 In this case there is a serious conflict of evidence and cases put forward and received from the interested parties particularly on the question of whether or not activities have taken place on the site "*as of right*" although the landowner is also questioning that the "*significant number*" criteria requirement has been satisfied (see 3.1 above)

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*". Government guidance reflects this view.

8.3 Use of "*non statutory inquiries*" to assist registration authorities determining 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 Mayfield Residents Action Group 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



This plan should be read in conjunction with result A03FVCB

KEY : ● ● ● ● ● ● ● ● (PUBLIC FOOTPATHS)

APPENDIX 2

SUMMARY OF EVIDENCE SUBMITTED IN SUPPORT OF THE APPLICATION

- 24 typed statements and a petition of 21 names all including a reference that “the land has been used by myself (and my family)” and always relating to a period of usage in excess of 20 years but not specifying when that took place (ie between which dates) and to there being no restrictions whatsoever on the use and enjoyment of the land
- 13 parties who completed statements are also named on the petition - resulted in duplication of evidence – allowing for this 32 separate parties have submitted written evidence
- the following range of activities is claimed :-
 - dog walking
 - bird nesting
 - blackberry picking
 - accessing a pond to observe frogs, spwan, newts
 - observing wildlife
 - picnics
 - playing with children
 - placing bat boxes in trees
 - visiting goats, lambs, ducks and ducklings
 - collecting conkers
 - collecting horse manure
 - bird watching
 - educating children about historical features on site
 - training gun dogs
 - making childrens dens in trees
 - picking daisies
 - tree climbing
 - botonizing
 - snowballing

summarised (totals allow for duplication) :-

- Walking – 17(statements) / 13(petition) – total 20
- Wildlife observation – 20(statements) / 15(petition) – total 25
- Picnicking – 6(statements) / 4(petition) – total 6
- Dog walking – 11(statements) / 10(petition) – total 14
- General playing -7(statements) / 5(petition) – total 1
- Fruit picking - 3(statements) / 0(petition) – total 2

Appendix 3

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT PROSPECT
HILL, WHITBY, NORTH YORKSHIRE AS A
TOWN OR VILLAGE GREEN**

REPORT

of Miss Ruth Stockley

06 February 2012

North Yorkshire County Council

County Hall

Northallerton

North Yorkshire

DL7 8AD

Ref: 15345

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT PROSPECT
HILL, WHITBY, NORTH YORKSHIRE AS A
TOWN OR VILLAGE GREEN**

REPORT

1. INTRODUCTION

1.1 This Report relates to an Application made under Section 13 of the Commons Registration Act 1965 (“the 1965 Act”) to register land at Prospect Hill, Whitby, North Yorkshire (“the Land”) as a town or village green (“the Application”). Under the 1965 Act, North Yorkshire County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 2 days, namely on 26 and 27 July 2011. I also undertook an accompanied site visit on 27 July 2011.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicants produced a bundle of

documents containing their witness statements and other documentary evidence in support of the Application and upon which they wished to rely, which I shall refer to in this Report as “AB”. The Objector, the Trustees of the Bagshawe Will Trust, also produced a bundle of documents containing its witness statements and documentary evidence in support of its Objection and upon which it wished to rely. I shall refer to that bundle as “OB”. In addition, each Party provided a skeleton argument setting out an outline of its case, and the Objector provided a bundle of supporting authorities, which I shall refer to as “OB2”. I have read all the documents contained in the bundles and each of the skeleton arguments and taken their contents into account in this Report.

1.4 I emphasise at the outset that this Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application nor any substantive matters relating thereto. Therefore, provided it acted lawfully, the Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

2. THE APPLICATION

2.1 The Application was made by Janet Peake and Jennifer Spence on behalf of Mayfield Residents Action Group of 16 Pembroke Way, Whitby YO21 1NT (“the Applicants”) and is dated 5 January 2005. It is made on the requisite Form 30. Part 3 of the Application states that the land to be registered is usually known as “*Land at Prospect Hill*”, and that its “Locality” is at the “*Rear of Upper Bauldbyes, Prospect Hill, Whitby*”. Part 4 of the Application states that the Land became a village green on “*the date of the Application, if not before*”. In relation to how it is alleged the Land became a village green, it is stated in Part 5 to be by its “*use for a period in excess of 20 years immediately prior to Application*”. The Application was accompanied by a Petition, 25 statements in support, photographs, an index

plan and a location plan as referred to in Part 8. It is verified by a statutory declaration in support dated 22 November 2005.

2.2 The Application was advertised by the Registration Authority as a result of which two objections were received, namely from Mr J. A. Holmes dated 14 September 2005, and from the Trustees of the Bagshawe Will Trust, the Owner of the Land, dated 7 October 2005. It was confirmed at the start of the Inquiry that both those objections had been subsumed into the one Objection and, indeed, Mr J. Holmes gave oral evidence in support of the Objection.

2.3 I have been provided with copies of all the above documents in support of the Application and copies of both objections, all of which I have read and the contents of which I have taken into account in this Report.

2.4 Having received such representations, the Registration Authority determined to arrange a non-statutory inquiry prior to determining the Application which I duly held.

2.5 At the Inquiry, the Applicants were represented by Mr Sam Healy of Counsel and the Objector was represented by Leading Counsel, Mr Douglas Edwards QC. Any third parties who were not being called as witnesses by the Applicants or the Objector and wished to make any representations were invited to speak, but no additional persons did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on the Index Map Plan submitted with the Application on which it is outlined in pink.

3.2 It comprises a triangular area of an open and undeveloped agricultural field which is currently somewhat overgrown (“the Field”) with evidence of ridge and furrow. It is bound to the east and south by hawthorn hedgerows, whilst part of the paved Monks Trod public right of way on foot (“the Footpath”) runs along the length of its north western boundary. In the south western corner of the Land is a former coach wash pond (“the Pond”).

3.3 There is a fence running along the southern side of the Monks Trod with wooden signs in place indicating that the Field is private. There is also a field gate in the south western corner of the Land. At the north eastern part of the Land, there were remnants of a broken wooden fence on the ground at the time of my Site Visit enabling access to be gained onto the Land. Access to the Footpath along the Land’s northern boundary is gained via a kissing gate at each end. At the south western end of the Footpath, it meets a farm track running north to south leading from the road to the allotments. There is also a horse chestnut tree to the north of the Footpath at the south western corner of the Land which is located just outside the Land.

3.4 At the south eastern corner of the Land is an opening in the hedge leading to the former allotment field to the south. There is a worn path along the eastern boundary of the Land leading to that opening. A gap in the hedge is also present at the south western corner of the Land leading to that same field.

3.5 To the north of the Land is residential development consisting of the extended Yuill Estate, and beyond that Mayfield Road. To the east is a railway embankment. On the southern side of the Land is the former allotment site, and to the east is the remainder of the Yuille Estate.

4. THE EVIDENCE

4.1 Turning to the evidence, I record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the evidence given by any witness, and I regard each and every witness as having given credible evidence.

4.2 The following is not an exhaustive summary of the evidence given by every witness to the Inquiry. However, it purports to set out the flavour and main points of each witness's oral evidence. I assume that copies of all the written evidence will be made available to those members of the Registration Authority determining the Application and so I shall not rehearse their contents herein in detail. I shall consider the evidence in the general order in which each witness was called at the Inquiry for each Party.

CASE FOR THE APPLICANTS

Oral Evidence in Support of the Application

4.3 **Mrs Jennifer Spence** is one of the Applicants and she has lived at 16 Pembroke Way with her husband for over 31 years since March 1980. Prior to that, they resided in Pocklington for 8 years. They have two children born in 1973 and 1975. They have used the Land throughout their period of occupation of 16 Pembroke Way. She and her family used the Footpath through the field for access to schools and town. They would walk from their home via Anchorage Way and then walk along the track alongside the allotments to the Pond where they would turn right and walk along the Footpath and then turn left onto Mayfield Road. Her children attended the Airy Hill Primary School until 1984 and 1985 respectively, and there were occasional school visits onto the Land. They subsequently attended Caedmon School. After her children left school in the early 1990's, she used the Monks Trod less

frequently, namely around 2 or 3 times per week when she went into town. Dog walkers used Monks Trod, and she noted that she had never seen a dog that was off the lead.

4.4 When the children were young, they brambled round the edge of the Field along the southern and eastern boundaries; watched birds on the Land which particularly tended to nest in the northern hedge along the Trod; watched other wildlife particularly round the Pond located in the south west corner; and collected conkers from near the Pond. They would observe the Pond from the fence along that Footpath on their way to school. The Pond can be seen whilst walking along the Monks Trod Footpath and is in very close proximity to the Footpath. Her children also made dens in the tree belt round the Pond. There were no restrictions on any of their use of the Land. However, she pointed out in cross examination that she had very little reason to use the Land herself other than the Footpath after her children had left school. She produced some photographs taken in May 2009 showing the worn path along the eastern boundary of the Land, which she indicated was used by dog walkers and was probably the path also used by allotment holders to access the allotments to the south as there was an access point to the allotments in the south east corner of the Land. There is also a defined path along the southern boundary which meets the Monks Trod at its western end. Those defined paths remain on the Land to date and she regarded them as consistent with walking use. They were a regular route used by dog walkers that had been created by such use. The predominant use of the Land in recent years has been dog walking as it has become so overgrown. She acknowledged that trees and wildlife could be observed whilst walking along those worn paths. She had only been on the Land once since February 2005 which she accessed through a gap in the fencing that had deteriorated.

4.5 In terms of the agricultural use of the Land, she recalled Mr Holmes keeping goats on the Land during the early 1980's. It was not a huge herd, and they were mainly out on the

Land around lunchtime. Mr Holmes was always with them. She did not recall him shouting at anyone. However, she pointed out that if he was on the Land with his goats, people would ensure that they did not go off the Footpath as they respected what was in the Field. Given the narrowness of the Footpath, it was inevitable that if people were walking in a group, some would have to walk at the side of it. Nonetheless, children knew that they were not to go off the Footpath when stock was in the Field.

4.6 She recollected the coach house that was recently destroyed by fire being on the Land in the location shown on the October 2005 photographs 9 and 10 produced by the Objector, and the front of that building was as shown on photograph 1 with a sign on the door with the wording as shown on photograph 2. That sign was erected by Mr Holmes and stated “THIS IS A PRIVATE FIELD PLEASE KEEP TO THE PATH AND PLEASE KEEP YOUR DOG ON A LEAD THANK YOU”. It was obvious by that sign that Mr Holmes was informing people to keep to the Monks Trod Footpath, and she indicated that her own experience was that people did keep to the Footpath for the most part. In her view, that was largely due to there being a good Footpath through the Land. She did not recall Mr Holmes minding if children ran off the Footpath, though.

4.7 Fencing was put up along the northern boundary of the Land adjacent to the Monks Trod in February 2005. The Objector’s photographs taken on 7 October 2005 show that fencing that was erected in February 2005, which included fencing turning southwards at the coach house in order to block off that gap. Although she stated in her evidence in chief that when such fencing was initially erected, it was broken down within a few weeks and the signs disappeared, and no attempts were made to replace or repair it, she acknowledged in cross examination that as of 7 October 2005, the fencing appeared intact and “*as it is now*”. Further, she accepted that she did not recall the notices on the fencing shown in the

Objector's photographs being erected and was unaware whether they had been replaced on two occasions after being taken down. However, she recalled the permanent ones being erected by Barratts in December 2005 and accepted that such signs were clear. Further, the 7 bar metal gate currently on the Land has been padlocked since it was put up in February 2005. In May 2009 after the destruction by fire and subsequent demolition of the brick building in the corner of the field, additional fencing was erected to fill the gap left by the building. That fencing was broken down within a very short period and was not repaired. The present gap in that location is where the fencing was broken and the remnants of that fencing remain on the Land. The Field has since become overgrown, thereby limiting its use.

4.8 She was the appointed Secretary of the Mayfield Residents Action Group, whilst the other Applicant, Mrs Peake, was the Chairman. There was a Committee of around 6 or 8 of the members. It formed when Barratts made a planning application to construct a pumping station on the Land. The Group ceased to formally exist after the village green Application had been made. Geographically, it mainly covered the Mayfield Road area, namely the area of the Yuill Estate, including Pembroke Way and the roads off it, and those who lived on the other side of Mayfield Road. She had written a letter to the Objector's Solicitors dated 23 October 2005 on behalf of the Mayfield Residents Action Group requesting permission to access the Land to clear litter. That letter was written after the Application had been submitted and after the fences and notices had been put up. It was written as a matter of courtesy rather than because it was felt that permission was required. Barratts had a site compound on the Land in the location shown on the Objector's plan during its residential development involving the extension of Shackleton Close around 2003 and 2004. However, the padlocked gate and fencing were not in situ at that time. She confirmed that "Prospect Hill" is merely the name of the road to the north and north east of the Land and not the name of an area.

4.9 Mrs Sylvia Brewster has lived at 9 Canterbury Close for 27 years. Prior to that, she resided at St Andrews Road for 14 years, and before that at Falcon Terrace for over 14 years. She has 3 children who were born in 1956, 1958 and 1964. Hence, by 1985, all three of them were grown up. They played in the hedges on the Land and round the Pond. She used the Land herself throughout her occupation of each of those properties for dog walking, bird watching and enjoying the local wildlife in the Pond. She and her family frequently walked down to Ruswarp along the Monks Trod as it avoided the road. It was a popular leisure walk. Most people used the Monks Trod to get to Ruswarp. It is a very well used Footpath at all times of the year, and people use it to avoid the road. When she walked there with her children during the 1960's and 1970's, she tended to walk on the Path and her children would go a bit off the alignment of the Path. She regularly used the Field to exercise her dog from around 1983 onwards, and many use the Field now for that purpose. That use of the Land “*snowballed*” once the old building was removed and there was a means of access through onto the Land. She looked out for local wildlife whilst she was walking along the Monks Trod, and birds were generally in the hedges alongside the Footpath and along the southern boundary hedge that she walked through after the allotment use had ceased in that field in 1998. She could see the Pond from the Monks Trod. She had also walked round the Pond. There has never been any restriction on her use of the Land and the Field was not fenced off until 2005.

4.10 She recalled goats being on the Land until Mr Holmes ceased using it around 1996. She did not use the Land for dog walking when the goats were out. She would go onto the Land to talk to Mr Holmes, but she would walk along the Monks Trod with her dog. She indicated that she would “*definitely not*” let her dog off the lead when goats were on the Land and she would not walk into the Field when animals were in it. She never saw anyone go onto

the Field when animals were in it. She recalled the sign on the old building requesting people to keep to the Footpath, and she indicated that she more or less complied with it. She regarded the whole of the Yuill Estate as the community she lived in.

4.11 **Mr Roger Pickles** has lived at 6 Anchorage Way for 34 years since 1977. Prior to that, he resided at Sleights for 5 years. He used the Land throughout that period for activities which included walking along the Footpath between Whitby and Ruswarp, exercising his dog, playing with children, enjoying the wildlife in the Pond and teaching school children about the historical features of the Land. There had never been any restrictions on his use of the Land.

4.12 More specifically, he exercised his dog on the Land between around 1988 and 2002, although he usually exercised his dog on the lower fields rather than on the Application Land. He used the Monks Trod to go to and from town, and if the dog was with him it would normally be on the lead then. He had seen dogs on the Field. He had two children, and his youngest was born in 1979. They used the Land to get to and from school via the Monks Trod. They attended Airy Hill Primary School, then Caedmon School and then Whitby Community College. They also played on the Land, particularly around the Pond. Between 1972 and 1994, he taught history at Whitby School. He took a class of schoolchildren onto the Land approximately once a year to explain the features of history that were apparent in the local landscape, such as the medieval ridge and furrow in the Field, the history of the paved Trod and the historical value of the Pond. They would congregate near to where Mr Holmes's building had been and then walk along the Trod to the Pond. The children would not walk far onto the Field, but if there was a group of youngsters, they would not walk in single file but would encroach onto the Field a little. They would also encroach a little further to view the ridge and furrow. The Pond is close to the Trod and so they would go to the edge

of the Pond via the Trod. He did not seek Mr Holmes's permission in advance of such school trips. He never saw Mr Holmes on the Land during such a trip.

4.13 **Mrs Christine Vasey** has lived at 7 Prospect Hill since 1975. She has four daughters born in 1965, 1967, 1969 and 1971. In 1985, the youngest would have been 14, and the elder three would have stopped playing on the Land by then. She discovered the Land in 1974 when walking around the area whilst renting a property on Mayfield Road. Her family has used the Land for activities including dog walking, bird watching, picnics, blackberry picking, pond watching, observing wildlife, tree climbing and collecting conkers. There has never been any restriction on their use of the Land.

4.14 They have always had a dog since 1975. Prior to 1996, she recalls Mr Holmes's goats being on the Land, and subsequently sheep for a short period. She would not go onto the Land if the goats were in the Field and she would keep her dog on a lead. Mr Holmes would shout if her dog was not on a lead. They were keen bird watchers which mainly took place around the Pond. Her daughters went onto the Field for picnics, but that was prior to 1985. She knew Mr Holmes, and he never said anything to them. However, if his goats were in the Field, her children would have kept off the Land. He was always on the Field when his goats were out, and he would shout at anyone if their dog was not on a lead. She also noted that she was aware of him occasionally having indicated to individuals that they should not be on the Field. There was a blackberry hedge along the southern boundary of the Land, along the eastern boundary and also along the Monks Trod. They would go onto the Land a few times a week during the season to pick blackberries and did not then stick to the Path. They had also seen deer on the Land. The only conker tree on the Land was the one near to the Pond. She recalled the sign on Mr Holmes's shed. On occasion, she did not comply with it. She acknowledged in cross examination, though, that she was an exception in that regard from

others who had given evidence. She remembered the fencing and notices being put up in 2005 and that such fencing served to prevent access onto the Land. It was initially a huge disincentive to access the Land, but it was swiftly breached and she indicated that it was clear that wire cutters had been used to cut it. The Land then continued to be used again, especially by dog walkers. She was aware of one attempt to repair the fence, but it was not repaired properly and was soon pushed over again.

4.15 **Mr David Vasey** has also lived at 7 Prospect Hill since 1975 with his wife and four daughters until they left home. He is a practising G.P. He accessed the Land from the northern most point from where the brick barn was demolished and followed the path down to the former allotments. When that barn was demolished, it left a gap of approximately 15 feet. A wooden fence was then erected. It was that wooden fence which was breached shortly after its erection. The metal fence which had been erected in February 2005 and is shown on the Objector's photographs was still in situ in October 2005 as shown on the photographs of that date. That same metal fencing was still in place as of June 2007, and remains in situ today. That fencing has not been breached since it was erected in February 2005. The building was demolished the following day when the gap was closed by a wooden post and rail fence as shown on the photographs produced by Mrs Spence. It was that wooden fence which was damaged. The worn track down the eastern boundary of the Land developed after that opening had been created from the demolition of Mr Holmes's building.

4.16 Prior to 2005, there was no impediment to accessing the Land. Between February 2005 when the Land was fenced and June 2007 when the building was demolished, he accessed the Land only infrequently as it involved climbing over a locked gate near to the Pond which he described as not being an easy access. He has used the Land more frequently over the last 9 years; prior to that, he mainly used it at weekends. During the weekends, he

mainly used the Footpath and may have deviated from it in order to inspect the Pond. There was a specific route that dog walkers tended to follow on the Land. Over the latter years, he had frequent encounters with people with dogs on the Land. He often went bird watching on the Land. He recalled a site compound being on the Land. When it was removed, the diverted path that had been used still continued to be used prior to the fence being erected in 2005. It remained a beaten path even after 2005. That path was used again when the wooden fence was breached. The Land was cleared only the week before the Inquiry took place and looked as though it had been mown.

4.17 **Mrs Carole Holmes** resides at 4 Waterstead Crescent in Whitby where she has lived since 2004. Prior to that, she resided at 23 Prospect Hill for 30 years between 1974 and 2004. She has 4 children born in 1959, 1960, 1962 and 1964. By 1985, her youngest child was 21 years old. She also has grandchildren born between 1977 and 1981 who come to stay with her about once a month, but they do not live locally. She has used the Land since 1974 particularly for dog walking, bird watching, blackberry picking, watching wildlife, having picnics and playing with her children.

4.18 She had a dog from 1974 onwards until the late 1990's which she walked on the Field. She knew Mr Holmes well, and his goats were never out on the Land without him being close by. They were not out all the time, though. He kept goats on the Land until around 1996, and then he had sheep on the Land for a short period. Sometimes she would just walk along the Monks Trod; other times, she would walk around the perimeter of the Field, especially when blackberries were in season. Others would take that particular route round the perimeter of the Field too. She had her dog on a lead when she was on the Field, and if she saw Mr Holmes on such occasions, he was fine. When the goats were out, people generally kept their dogs on a lead. She indicated that he would shout at those who let their dogs loose on the

Field or at children who were on the Field unaccompanied by an adult. He was concerned about his goats and that litter would not be left. However, she never saw anyone herself on the Field with their dog off its lead when the goats were out, although many local people still used the Land at those times. She was aware of the sign on Mr Holmes's building, and agreed that it was clear what the sign meant, namely that he did not want anyone to have their dog off a lead when stock was in the Field. She also acknowledged that she and others using the Field were ignoring a clear sign that they should keep to the Footpath. Nonetheless, she pointed out in re-examination that the sign could not be read from any distance away as shown on the Objector's photograph. She recalled a previous sign being on the building which had the word "Field" mis-spelt. She was of the view that Mr Holmes did not particularly enforce the point that the Field was private as sometimes people would approach him on the Field to look at his goats. There was a grassy area on the Land where she and her family would picnic, but they ceased that activity before her youngest left home. She was no longer using the Land by 2005. After the building compound had been on the Land, the condition of the Land was so bad that she no longer wished to go there. There have never been any restrictions on her use of the Land. She knows the area as "*the Prospect Hill/Mayfield Road area*".

4.19 **Mr J. Sullivan** also resides at 4 Waterstead Crescent where he has lived since 2004. Prior to that, he resided at 23 Prospect Hill for 7 years from 1997, and he has lived in Whitby since 1970. He has used the Land quite regularly from 1997 onwards. Before that, he used it up until 1978 when he was running a pub. He then went to live in Church Square in West cliff. He first started to use the Land when he was told about the walk to Ruswarp which he did on Sunday afternoons with his dog. He walked along the Footpath down to Ruswarp. He did not take much notice of the Field at that time, but he recalls seeing two children throwing ball to each other on the Field. He subsequently threw a ball for his dog in the Field for

around 5 or 10 minutes during his morning walk to buy a newspaper as he walked along the Footpath, apart from when the goats or any other animals were out. He has also used the Land for taking his grandchildren on walks to Ruswarp, gathering conkers and watching wildlife in the Pond. His grandchildren played all over the Field, picking daisies, and they enjoyed seeing the goats. There have never been any restrictions on his use of the Land. He was involved with clearing the Pond out, and he was involved in the successful objection to the development of the Land for a pumping station.

4.20 **Mr Rodney Nattris** has lived at 4 Shackleton Close since 1978. The Estate on which he lives was built on part of Prospect Farm. There is a children's play area on the Yuill Estate, but there are no shops or other facilities. He would describe where he lives as "land at Upper Bauldbyes". He has 2 children born in 1967 and 1969, who were aged 18 and 16 in 1985. However, they would still play out on the Land at that age. His grandchildren were born in the mid to late 1990's and live locally. They go onto the Land with him when he takes the dogs. He has used the Land from 1978, particularly for exercising and training his dogs; educating his children and grandchildren by watching frogs and newts round the Pond; collecting conkers from round the horse chestnut tree just to the north of the Pond; and walking. There have never been any restrictions on his use of the Land.

4.21 Between 1985 and 2005, he exercised his gun dogs on the Land, having obtained the verbal permission of Mr Holmes to do so. He stated that he sought such permission as the Land was not his and he felt that he should not just go onto such land. He taught his dogs to walk in a straight line which he could not do on the Footpath. There was no fence along the Footpath at that time, but he continued to use the Land for that purpose after the fence went up in February 2005, accessing the Land from the former allotment field which was used for allotments until around 1998. He got to know Mr Holmes quite well, and pointed out that "*he*

used to patrol the area quite strictly". Children played in the area regularly, especially round the Pond, and they also used the Field, as did his children. Mr Holmes did not object provided they behaved themselves. However, if walkers were wandering all over the Land, that would be a problem when there was stock on the Land. Mr Holmes would challenge people if they let their dogs off the lead when goats were around.

Written Evidence in Support of the Application

4.22 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Application in the form of additional witness statements and a petition which are contained in the Applicants' Bundle.

4.23 However, whilst the Registration Authority must also take into account all such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

CASE FOR THE OBJECTOR

Oral Evidence Objecting to the Application

4.24 **Mr John Holmes** is the son of Mr George Harold Holmes, who rented the Land from Mr George Bagshawe, the owner of the property known as Upper Bauldbyes, for agricultural purposes from the mid 1950's until 1996 and who sadly died some 2 years ago. Mr John Holmes lived with his parents at 32 Prospect Hill until 1993, and was then at home with them during his holidays from university over the next 3 years until he left home in August 1996. He still visited them then most days as his parents kept his dogs in the stable block. He would

take his dogs out for about 15 miles per day for exercise, and he was on the Footpath regularly then. He had dogs until 2006. He continues to visit his mother most days who still lives there.

4.25 Initially, the Land was used by his father to keep ponies and then goats. When ponies were in the Field, the houses to the west had not been built. Livestock was also occasionally brought onto the Land in the autumn, which practice continued until the late 1980's. Each year during the summer, the grass was grown and it was then cut, dried and baled. Some of the bales of hay were sold and others were stored and used to feed the livestock. The hay cropping took place every year up until 1996. His father also rented another field to the north identified on the plan at JAH1 which he used for the same purposes of grazing and cutting hay. He assisted his father in maintaining the Land. During the period his father had goats on the Land, which continued up until 1996, they were taken out onto the Field twice a day throughout the year save when it was raining. They would be out in the Field for 1 or 2 hours at a time and his father would always be around, such as in his allotment, keeping his eye on them. His father gave up his occupation of the Field around 1996. In the north east corner of the Land there was a brick shed that was occupied by his father for the animals and to store materials. His goats were kept indoors at night.

4.26 He was aware that people would walk along the Footpath, or along the separate worn track from the north east corner of the Land down along the railway fencing to a gate in the south eastern corner that was for use by allotment holders. That gate was approximately 8 feet wide for vehicular access with a separate kissing gate at the side. There had always been a worn path down the eastern boundary of the Land leading to the allotments. If someone was on the Footpath or its immediate environs, his father would not object. However, he was not aware of any other use of the Land by the local community. The hedges around the Land are

hawthorn and so have no blackberries on them. He never witnessed anyone picnicking on the Land or playing ball games on the Land. The conker trees were not in the Field but were alongside the track leading northwards from the Field. He did not see people walking on the Field generally. If his father saw anyone on the Land and off the Footpath, he would shout across or walk across to inform the individual where the right of way was as he did not want his livestock disturbed by dogs chasing them. His father adopted that same approach when the ponies were in the Field and when hay making was taking place. In relation to the latter, his father was concerned to stop people from trampling over the crop and dogs from fouling on it. He would not have tolerated people playing ball games on the Field. If his father had seen blackberry picking on the Land, he would have challenged such people. He accepted in cross examination that he was unable to say that his father told everyone to get off the Field if they were not on the Footpath as he was not on the Land all day every day. He could only challenge them when he saw them, which he did. His father did not regard the problem with people trespassing as such as to justify fencing the Land from the Footpath. He put up signs and told people to leave. He recalled the two signs that were put up by his father on the building during the 1980's when his father was a tenant of the Land and were maintained in position while his father was a tenant. They were put up to tell people to stick to the Footpath. He was on the Land on a fulltime basis from when hay was being cut around July until it was baled. In addition, he was responsible for looking after his father's animals when he was away on holiday, which he did annually after his retirement in the mid 1980's.

4.27 The various gates that were on the Land are identified on his plan at JAH1. There was a vehicular gate in the south west corner near to the Pond that was used to take manure or machinery onto the Field and was also used by allotment holders. That gate was kept locked with a chain over it. There was a further vehicular gate in the south eastern corner of the Land at the southern end of a worn track used by allotment holders together with a kissing gate for

pedestrian access to the allotments. They did not provide public access, but only access for allotment holders. In relation to fencing, he found that the wooden fencing at the north east corner of the Land had been broken and the wire fencing had been cut during his visit to the Land on 17 July 2011. That fencing had all been intact when he had last visited the Land in February 2011, and there were freshly damaged pieces of wood on the ground.

4.28 **Mrs Joan Pickering** has lived at 29 Guisborough Road since 1983, which Road is an extension of Mayfield Road to the west. She worked for Mr Bagshawe, a Solicitor who lived at Upper Bauldbyes, from 1959 until 1963, and then again from 1969 to 1991 as his PA and doing probate casework for him. She also collected rent from the allotment holders for him. She worked for him on a private unpaid basis between 1991 and 1994. Upon his death, she became and remains a trustee of his estate. There are three trustees of the estate which is held in trust for Mrs Bagshawe's daughter. She confirmed that there are no known intentions as to the future use of the Land, and no-one currently has an option on the Land.

4.29 Mr Holmes had a tenancy of the Land and kept goats on it. They were out on the Land most of the time grazing on the grass, and he was on the Land daily. He also had allotments and so was in the area most of the time. He had use of the stables and garage for storage of his tools and equipment. It was well known that you could not go onto the Land or let your dog off its lead as Mr Holmes would shout at you. He would challenge anyone who strayed off the Path or its immediate environs. Children were never allowed to go into the Field. It was a "*known thing*" that you did not go into "*that Field*". She noted that she was taught that as a child and she so taught her children. On one occasion when she had an allotment, she came out of the gate by the Pond and her daughter let her dog off the lead and ran after it over the Land causing Mr Holmes to give her a lecture. She disagreed with Mr Nattris that Mr Holmes only challenged people if they were misbehaving, such as if their dogs were off the

lead. He would also challenge them if they went onto the middle of the Land, even if their dog was on a lead. He was happy for people to remain on or just off the Monks Trod. She spoke to him about the Application in June 2007 and his use of the Land, and provided a note of their telephone conversation at JP3. Upper Bauldbyes was sold in 1996, and thereafter Mr Holmes's tenancy came to an end. Once he had left, people continued to use only the Footpath.

4.30 She has seen children collecting conkers from the horse chestnut trees which are situated outside the Land, and people looking at the Pond from the Footpath. She has never seen anyone picking blackberries from the Land, and there were none in the hedgerow between the Land and the former allotment site unless they have grown up since the 1940's and 1950's. She has never seen anyone picnicking on the Land nor any other activities taking place on the Land. The only dog walking she saw on the Land until around 2000 was along the Monks Trod which is very well used. When she had an allotment up until 1984, she accessed the former allotment land via the kissing gate at the north eastern corner of the Land and then walked down the eastern boundary of the Land along the worn path to the gate in the south eastern corner which led to the allotments. That path went nowhere other than to the allotments gate. There was a "Private" sign on that gate. Most of the people using that worn path were going to the allotments and were entitled to use it. They paid rent to the Bagshawe Estate for the allotments. Mr Holmes would challenge anyone who used that path if they were not an allotment holder. When the fencing was erected in February 2005, that path stopped being used. Between 1985 and 1996, she went to the Land infrequently, although she had a dog then until 2002 and walked along the Monks Trod 2 or 3 times per week. From 1996, she was there approximately once a month. She is still involved with the allotments and goes regularly to inspect them on behalf of the Trustees.

4.31 In 1998, the allotment holders moved from the land to the immediate south of the Field to the present allotment site. After then, in around 1999/2000, a gap in the hedge was created into the old allotment site from which people could then access the Land. She identified that gap as being on the western boundary of the former allotment site near to its south western corner. It was from then onwards that people started to walk their dogs on the Land and to use the Land more generally. An allotment holder put some wire fencing up to close the gap in the hedge around 2001/2002, but it was torn down within a couple of hours. There were quite a few attempts to close the gap with fencing, but it was always removed. She was informed about that in her capacity as trustee. Since the allotments moved, a number of people have said to her that they feel that they have a right to use the Land and they have used it since then. In 2003, the Trustees sold land to Barratt Homes for the development of Shackleton Close which they had obtained planning permission for in May 2002. Barratts used part of the Land as a site compound whilst Shackleton Close was being built, having obtained the requisite licence to do so. The Footpath had to be diverted round the compound into the Field for an 18 month period as a result.

4.32 She was responsible for organising the fencing in February 2005 which had the effect of enclosing the Land that had previously been unfenced. Barratts put up notices shortly after the fencing had been erected. After the fencing had been erected, there was no physical access to the Land other than by climbing over the fence. That position continued until 2007 when the garage was burned down and subsequently demolished. She received a letter from Mayfield Residents Action Group dated 23 October 2005 seeking permission to access the Land in order to clear litter. Following the demolition of the garage, the Land was open to access for a time from that point, but it was subsequently fenced off. That fencing has recently been damaged.

4.33 Part of the adjacent housing estate was built on land that previously comprised Mayfield Farm, including Shackleton Close and Canterbury Close. Further to the south was Prospect Hill Farm on which the bottom part of the estate was built, including Anchorage Way. All the estate became known as the Yuill Estate. She pointed out that “*everyone in Whitby knows what is referred to as the Yuill Estate*”. Prospect Hill and Mayfield Road are not part of the Yuill Estate. The Yuill Estate was built in the late 1970’s save for the recent Shackleton Close extension. Therefore, there was then an influx of people into the area, including young families. There is a play area on the Estate near to Shackleton Close and another one off Canterbury Close.

4.34 **Mrs Barbara Drummond** is the youngest daughter of Mr Edward Bagshawe, the eldest of the three Bagshawe brothers. Her Uncle, George Bagshawe, became the owner of Upper Bauldbyes in 1947 following the death of her Grandmother. Although she has never lived in Whitby, she spent many weeks staying at Upper Bauldbyes with her family. As a child, she would sometimes visit for the entirety of the summer holidays. Subsequently, she visited with her husband and two children, born in 1963 and 1964, every summer up until 1994 for around a fortnight. Thereafter, she visited only rarely. She recalled walking along the Monks Trod as a child, and looking at the Pond from the Monks Trod. She also walked along it when she visited as an adult when she would walk her Uncle’s dog during the evening. The Land adjacent to the Monks Trod was known to her as “the goat field” as Mr Holmes kept his goats there. He was proud of his goats and enjoyed showing them to people. There were kissing gates at each end of the Monks Trod and hedging round the boundaries of the Land so that the goats were in a controlled area. She did not recall horses being on the Land. Although her Uncle owned the Field, the family were never allowed to play in it; they were told to “stick to the slabs” in the grounds of Upper Bauldbyes. She never saw people using the Land other than the Footpath when she visited as a child and subsequently as an

adult. She referred to a letter dated 18 June 2007 she sent to the Trustees' Solicitors setting out a summary of an e-mail sent to her by her cousin who lived at Upper Bauldbyes addressing her recollection of the use of the Land. Her cousin was born in June 1952, and she left Upper Bauldbyes around 1976 but visited fairly regularly thereafter. She no longer had the e-mail, although she had it when she wrote the letter.

4.35 The Land was owned by Mr George Bagshawe and then by his estate. She became a Trustee of the Trust owning the Land, and ownership of the Land remains vested in the Trustees. The Land has recently been fenced off by the Trustees. At no time has any permission been given for picnicking on the Land, sports on the Land or any other activities on the Land. Walkers and dog walkers were only permitted to use the Monks Trod. That was also the position for members of the Bagshawe family.

4.36 **Miss Rachel Williams** is a university law lecturer who previously practised as a Solicitor. She was employed by the Trustees' Solicitors, BHP Law, between 2004 and 2007 and had conduct of the relevant legal file between September 2005 and July 2007.

4.37 She visited the Land on 7 October 2005 during working hours to erect notices on behalf of the Trustees. The reason they were erected was because the Application to register the Land as a town or village green had been received. She had taken over the file in September 2005, and it was her recommendation that it would be advisable to also erect signage on the fencing to make the position totally clear. She attached 8 notices to the recently erected fence adjacent to the Monks Trod in the positions marked on the plan at Exhibit RW1 which stated "*Private Property Access is prohibited without the express consent of the owner*". They made it clear that the area was private and people were only permitted to use the Footpath. She also took photographs of the notices in situ on 7 October 2005 which

are at Exhibit RW2. She observed that the Land was completely fenced in on its north western boundary adjacent to the Monks Trod and that such fencing was intact as shown on her photograph at Exhibit RW3. The Land was bounded on its other sides by thick hedgerow, and so appeared to her to be entirely secure. She saw no one using the Land and no evidence that people had been using the Land, such as signs of litter. She also took photographs of the garage on the Land with a sign attached. Subsequently, Barratt Homes erected more permanent wooden signs on the Land, initially around 31 October 2005 in an incorrect location on the northern side of the Monks Trod rather than its southern side, and then it was moved to the correct location around 20 December 2005. They were instructed to use the same wording as the temporary signs she erected, although she has not seen them. She only visited the Land on the one occasion on 7 October 2005.

4.38 **Mr Richard Harland** has lived at 7 Anchorage Way since 1986, having lived previously near to Robin Hood's Bay. Anchorage Way is part of the Yuill Estate, which is so known as Yuill were the main building contractors. The houses had been built around 15 years when he moved in.

4.39 He has known the Land since 1953. At that time, he visited the Land mainly over the summer period at a weekend, albeit not every weekend. He would collect horses and equipment from the Land. He also visited the Land in his capacity as Highway Superintendent for North Yorkshire County Council when he was required to inspect footpaths, fences, kissing gates and other highway features. One of his workers would report any damage, and then he would attend on site to inspect the damage and determine who could fix it and arrange the repair. He covered some 1800 miles of rights of way in that capacity. In addition, his late wife used the Monks Trod virtually every day.

4.40 He recalled Mr Holmes renting the Land and grazing his goats on it. In the spring, Mr Holmes took the goats out of the Field and put them into a paddock, which was later sold to Barratts and became the extension of Shackleton Close. When the goats had been taken off the Land to enable the grass to grow, Mr Holmes applied fertiliser to the grass and later in the year it was cut and baled. Thereafter, the goats were put back into the Field. Sometimes they were tethered and at other times they were not. Save when the weather was poor, the goats were out in the Field most days. Mr Holmes ensured that the gate to the Field was always locked to prevent the goats from escaping. He never allowed gaps to occur in the fencing and would repair them if necessary to ensure that his goats were kept secure. That particularly occurred on the southern boundary where the goats would press down on the wire. He recalled the building on the Land used by Mr Holmes and that Mr Holmes put up his own sign on that building in order to keep people off the Land. Fencing was erected at the beginning of 2005 along the Footpath.

4.41 He was also an allotment holder from 1988 onwards. The allotments moved to their current position in 1998. He has attended his allotment every day since his retirement in 1993/1994. He pointed out that since he has known the Land, the only means of access to it was via the two kissing gates at either end of the Footpath and via the field gate from the track. That gate was always locked with a padlock during Mr Holmes's occupation of the Land, and he kept the key in his waistcoat pocket. As an allotment holder, he had to obtain permission to go onto the Land with a vehicle to take manure onto the allotments. Access to the Field was only by permission from Mr Holmes. The Land has only been used for agricultural purposes, and has never been used for picnicking. The only dog walking on the Land has been on Monks Trod. Mr Holmes challenged people more or less whenever he saw anyone straying off the Footpath, particularly when they had a dog, telling them to go back onto the Path and to put their dog on a lead. He would do that even if he was in the allotments

at the time. He saw him challenge people, particularly when his goats were on the Land. He also saw him challenge children playing on the Field, particularly when the hay was growing and being baled. Mr Holmes did not “turn a blind eye”. Even allotment holders were only allowed to cross the Field when the grass had been cut, and they kept to the path along the eastern boundary of the Land which they had permission to use and which was their means of access to the allotments via a gate and kissing gate. There was a sign on the field gate near to the Pond saying “Whitby and District Allotment Association Members Only”. He also used that as one of his access routes, and his route across the Field is shown by dotted lines on the plan at JAH1.

4.42 **Mr John Morley** has farmed land in Whitby all his working life and he retired around 1991. He has known the Land for most of his life, both as a farmer and in his retirement. He farmed the Land and also the field where the allotments are currently. He recalled that Mr Holmes, a retired policeman, kept goats on the Land for many years. He used to bale the hay for Mr Holmes after it had already been cut around the late 1980’s. That only took about an hour or two. He would come to the Land once a year to bale the hay. He did not take the bales away. The Land was fenced to prevent the goats from escaping. He did not recall any other person having access to the Land without Mr Holmes’s permission apart from people using the Footpath. There was a sign on the building on the Land telling people to keep off the Field. He was not aware of the Field ever being used for picnicking or dog walking or any other activity other than keeping livestock.

Written Evidence Objecting to the Application

4.43 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the objection to

the Application in the form of additional witness statements and documents which are contained in the Objector's Bundle.

4.44 However, in relation to such written evidence, I refer to and repeat my observations in paragraph 4.23 above that whilst such written evidence must be taken into account, I and the Registration Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with any oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to cross examination.

THIRD PARTY EVIDENCE

4.45 During the Inquiry, I invited any other persons who wished to give evidence to do so. There were no such other persons who gave any additional evidence.

5. THE LEGAL FRAMEWORK

5.1 I shall set out below the relevant basic legal framework within which I have to form my conclusions and the Registration Authority has to reach its decision. I shall then proceed to apply the legal position to the facts I find based on the evidence that has been adduced as set out above.

Commons Registration Act 1965

5.2 The Application was made pursuant to Section 13 of the Commons Registration Act 1965, prior to its repeal on 6 April 2007. The Commons Registration Act 1965 provided for each registration authority to maintain a register of town and village greens within its area. Section 13(b) of the 1965 Act provided for the amendment of the register to take place where any land became a town or village green. Although that provision has been repealed, by virtue of Article 4(4) of the Commons Act 2006 (Commencement No 2, Transitional

Provisions and Savings) (England) Order 2007, where an application is made to a registration authority before 6 April 2007 pursuant to Section 13(b) of the 1965 Act for the amendment of the register of town or village greens as a result of any land having become a town or village green, and the registration authority does not determine the application before that date, the registration authority must continue to deal with the application on and after 6 April 2007 as if section 13(b) of the 1965 Act had not been repealed. Therefore, as the Application was made prior to that date, it must be determined pursuant to that legislation.

5.3 “Town or village green” is defined for the purposes of Section 13(b) by Section 22(1) in three ways, usually referred to as class (a) statutory greens, class (b) customary greens and class (c) prescriptive greens. In this case, if the Land is a town or village green, it can only be because it is a class (c) green.

5.4 The definition of a class (c) green in Section 22 of the Act was amended by Section 98 of the Countryside and Rights of Way Act 2000, so that a class (c) green is now defined for the purposes of the Application in Section 22(1A) of the 1965 Act as:-

“...land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.”

5.5 No “prescribed provisions” have been made under subparagraph (b), so that part of the definition is not operative.

5.6 As to subparagraph (a), the House of Lords in *Oxfordshire County Council v. Oxford City Council* held that the requirement that qualifying use should “*continue*” was to be construed as meaning that the qualifying use had to continue up to the date of the application for registration of land as a green, and not up to the date of registration.

5.7 Therefore, for the Application to be accepted, it must be shown that:-

- (i) the Application Land comprises “land” within the meaning of the 1965 Act;
- (ii) the Land has been used for lawful sports and pastimes;
- (iii) such use has been for a period of not less than 20 years;
- (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
- (v) such use has been as of right; and
- (vi) such use has continued to the date of the Application for registration.

Burden and Standard of Proof

5.8 The burden of proving that the Land has become a village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. That is the approach I have used.

5.9 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in *R. v Sunderland City Council ex parte Beresford* where, at paragraph 2, he noted as follows:-

“As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 “it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...”. It is accordingly

necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

Statutory Criteria

5.10 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

Land

5.11 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

5.12 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in *Oxfordshire County Council v. Oxford City Council* that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

Lawful Sports and Pastimes

5.13 It was made clear in *R. v. Oxfordshire County Council ex parte Sunningwell Parish Council* that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports

and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

5.14 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***, Sullivan J. (as he then was) noted at paragraph 102 that:-

“it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”

A similar point was emphasised at paragraph 108 in relation to footpath rights and recreational rights, namely:-

“from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.”

5.15 More recently, Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council*** at paragraph 102:-

“Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined

track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).”

He went on area paragraph 103 to state:-

“The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights.”

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

Continuity and Sufficiency of Use over 20 Year Period

5.16 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: *Hollins v. Verney*.

5.17 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: *R. (on the application of Lewis) v. Redcar and Cleveland Borough Council*.

Locality or Neighbourhood within a Locality

5.18 A “locality” must be a division of the County known to the law, such as a borough, parish or manor: *MoD v Wiltshire CC*; *R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC*; and *R. (Laing Homes Limited) v. Buckinghamshire CC*. A locality cannot be created simply by drawing a line on a plan: *Cheltenham Builders* case.

5.19 In contrast, a “neighbourhood” need not be a recognised administrative unit. Lord Hoffmann pointed out in *Oxfordshire County Council v. Oxford City Council* that the statutory criteria of “any neighbourhood within a locality” is “obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries”. Hence, a housing estate can be a neighbourhood: *R. (McAlpine) v. Staffordshire County Council*. Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: *Cheltenham Builders* case.

5.20 Further clarity was provided on that element recently by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council*** who stated:-

“While Lord Hoffmann said that the expression was drafted with “deliberate imprecision”, that was to be contrasted with the locality whose boundaries had to be “legally significant”. See paragraph 27 of his judgment in Oxfordshire (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality... but, as Sullivan J stated in R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.”

Significant Number

5.21 “*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: ***R. (McAlpine) v. Staffordshire County Council***.

As of Right

5.22 Use of land “*as of right*” is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in ***R. v. Oxfordshire***

County Council ex parte Sunningwell Parish Council that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.23 “Force” does not merely refer to physical force. User is *vi* and so not “*as of right*” if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: *Newnham v. Willison*. Further, Lord Rodger in *Lewis v. Redcar* stated that “*If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being vi...user is only peaceable (nec vi) if it is neither violent nor contentious*”.

5.24 “Permission” can be expressly given or be implied from the landowner’s conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: *R. v. Sunderland City Council ex parte Beresford*.

Amendment of Applications

5.25 In *Oxfordshire County Council v. Oxford City Council*, the House of Lords addressed the extent to which a registration authority could amend an application. All of the Law Lords found that an amendment could be made at the authority’s discretion, provided that such an amendment would not occasion unfairness to an objector or any other person.

6. PROCEDURAL ISSUES

Application to Amend Application Land

6.1 At the outset of the Inquiry, the Applicants indicated that they sought to amend the area of the Application Land by excluding the strip of land running southwards from the westerly end of the Land. An amended “Index Map Plan” identifying the amended Application Land was supplied immediately following the close of the Inquiry as requested. The Objector stated that it had no objection to the Application Plan being so amended.

6.2 As stated in paragraph 5.25 above, an amendment to an application may be made at the Registration Authority's discretion, provided that any such amendment would not occasion unfairness to any objector. In that regard, the Objector confirmed that it had no objection to the amendment. Further, as the Application Land would be reduced rather than increased, with no additional area of land being added, it does not seem to me that any prejudice would be caused to any person in the circumstances. Indeed, I note that the evidence adduced by both Parties related primarily, and in relation to most witnesses, exclusively, to all or part of the amended area rather than also to that additional strip of land sought to be excluded.

6.3 Consequently, I recommend that it would be reasonable and appropriate for the Registration Authority to exercise its discretion to allow the amendment as sought so that the Application Land is reduced in accordance with the amended Application Plan. The remainder of this Report is written on that basis.

7. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

7.1 The impression which I obtained of all the witnesses called at the Inquiry is that they were entirely honest and transparent witnesses, and I therefore accept for the most part the evidence of all the witnesses called for each of the Parties.

7.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the relevant statutory criteria being satisfied. In determining that issue, it is inappropriate for me or the Registration

Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

7.3 I shall now consider each of the elements of the relevant statutory criteria in turn as set out in paragraph 5.7 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above and also to the more detailed legal position referred to below where relevant to specific issues raised. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the relevant statutory criteria must be established by the Applicant on the evidence adduced on the balance of probabilities.

The Land

7.4 There is no difficulty in identifying the relevant land sought to be registered. The amended Application Plan shows the Land shaded in pink and is the definitive document on which the Land that is the subject of the Application is marked. The Land has clearly defined and fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises “land” within the meaning of Section 22(1A) of the 1965 Act and is capable of being registered as a town or village green in principle and I so find.

Relevant 20 Year Period

7.5 Turning next to the identification of the relevant 20 year period for the purposes of Section 22(1A) of the 1965 Act, the use must continue up until the date of the Application. Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application.

7.6 Although the Application is dated 5 January 2005, there was a dispute between the Parties over whether or not that was the appropriate date of the Application for the purposes of Section 22(1A) of the 1965 Act. Three potential relevant 20 year periods were identified, namely:-

(i) 5 January 1985 until 5 January 2005 on the basis that the latter date is the actual date of the Application, which period was put forward by the Applicants;

(ii) 22 November 1985 until 22 November 2005 on the basis that the latter date is the date of the statutory declaration submitted in support of the Application and hence is the date of the Application becoming valid, which period was the secondary position put forward by the Objector; and

(iii) 5 July 1991 until 5 July 2011 on the basis that the latter date is the date when a signed plan accompanying the statutory declaration was first provided to the Objector and hence is the date of the Application becoming valid, which period was the primary position put forward by the Objector.

7.7 Before considering that issue as to the correct 20 year period, I shall firstly consider the other elements of the statutory criteria with reference to each of those identified potential 20 year qualifying periods.

Lawful Sports and Pastimes

7.8 From the evidence adduced in support of the Application, it is apparent that a range of activities have taken place on the Land. By far the most common activity referred to in the evidence, though, was walking on the Land, both with and without dogs. In addition, there were more limited references to activities including children playing on the Land, blackberry picking, bird and other wildlife watching, collecting conkers and picnicking. No formal activities were referred to as having taken place on the Land. Nonetheless, informal activities

which are in the nature of an informal sport or informal pastime are capable of amounting to lawful sports and pastimes within the meaning of the statutory criteria. I find that each of the above activities referred to most commonly in the Applicants' evidence amount to lawful sports and pastimes for that purpose. I further accept the evidence of the Applicants and their witnesses that such activities have, as a matter of fact, taken place on the Land. Indeed, I note that the Objector acknowledges that some of those activities have taken place on the Land, at least to the extent that the Footpath across its north western boundary has been well used.

7.9 However, as noted in paragraph 5.17 above, in order for that element of the statutory criteria to be established, the Land must have been used for qualifying lawful sports and pastimes to such an extent and with such a degree of frequency throughout the relevant 20 year period to show the landowner that rights were being asserted. It is insufficient for the qualifying use to have been merely sporadic in nature.

7.10 In identifying the qualifying use, I have already found that the various informal recreational activities referred to by the Applicants were lawful sports and pastimes in principle. Nonetheless, certain of the activities relied upon in the Applicants' evidence must be discounted from the assessment of the qualifying use.

7.11 Firstly, and very significantly in this case, walking on the Land which was of such a character as would be more akin to the exercise of a public right of way must be discounted. I have set out the legal position on that issue in paragraphs 5.14 and 5.15 above. In my view, that principle has considerable implications for the Application.

7.12 Within the Land along its north western boundary is part of the Monks Trod Footpath. It is a paved and well defined Footpath leading to Ruswarp. The Monks Trod is undoubtedly

a well used Footpath, as pointed out by a number of witnesses. Indeed, I note that each of the Applicants' witnesses who gave oral evidence referred to their own use of that Footpath, save for Mr Nattris. In addition, a number of signatories to the Petition made express reference to their own use of "the Footpath". More specifically, Mrs Spence referred to herself and her family using the Footpath to access the local schools and town, as well as dog walkers using it. Mrs Brewster stated that she and her family had frequently walked to Ruswarp along the Monks Trod and it was a popular leisure walk used by people going to Ruswarp as it avoided using the road. Mr Pickles walked along the Footpath between Whitby and Ruswarp and to get to and from school with his children. Both Mr and Mrs Vasey used the Path, as did Mrs Holmes and Mr Sullivan. Although such use was not the only use of the Land made by such witnesses, it was nonetheless a material part of their use that that they each specifically referred to in their oral evidence.

7.13 I also note the consistent evidence of the Objector that the Footpath was well used. Mr John Holmes noted that he was aware that people walked along the Footpath, as his father had been who had never objected to such use of the Land. Indeed, his father erected signs specifically requesting people to keep to the Footpath. Mrs Pickering stated that up until around 2000, the only dog walking she saw on the Land was along the Monks Trod. Mrs Drummond recalled walking along that Footpath, and Mr Harland noted that the only dog walking he had seen on the Land had been on the Monks Trod, which use Mr Morley also recollected.

7.14 Indeed, given the paved nature of the Footpath making it suitable in all types of weather, and given the pleasant walk along that Footpath avoiding the roads, which route led to Ruswarp and was a convenient access to the local schools, it is not surprising that the

Footpath was and remains well used. It is an attractive and safe walking route leading to local facilities and is easily accessible to the local community.

7.15 Taking all the above into account, I find that a material amount of the use of the Land involved use of that Footpath, which use was, by definition, the exercise of a public right of way. Such use must therefore be discounted from the assessment of the extent and frequency of the qualifying use of the Land for lawful sports and pastimes.

7.16 Secondly, it seems to me that a number of other uses of the Land were more akin to the exercise of a right of way than the exercise of recreational lawful sports and pastimes over a village green. Witnesses in support of the Application gave oral evidence of the use of defined tracks around the perimeter of the Field. Hence, Mrs Spence produced photographs of the worn path along the eastern boundary of the Land which she stated was used by dog walkers as well as allotment holders, and she also referred to a defined path along the Land's southern boundary linking to the Monks Trod. She noted that such a route around the perimeter of the Land was a regular route used by dog walkers. Similarly, Mrs Holmes noted that she would sometimes walk around the perimeter of the Field, especially when blackberries were in season, and pointed out that others would take that particular route round the perimeter of the Field. Although there are no other definitive rights of way over the Land other than the Monks Trod, it is my view that walking around the perimeter of the Land would amount to a use that was more akin to the exercise of a public right of way than a recreational right over a green. Indeed, that seems to me to be the very use Sullivan J. was referring to in *Laing Homes* when he noted at paragraph 102 that:-

*“it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – **to walk, with or without dogs, around the perimeter of his fields** – and use which would*

suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”(my emphasis)

and at paragraph 108 that:-

*“from the landowner's point of view it may be very important to distinguish between the two rights. **He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields,** but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.” (my emphasis).*

Thus, such uses of the Land involving walking round the perimeter of the Field should also be discounted from the qualifying use.

7.17 Further, and thirdly, it is necessary to go on to consider the extent of other activities on the Land which were merely ancillary to the exercise of a right of way and thus would not appear to the landowner to be anything more than part of the purported exercise of a public right of way. In that regard, I take into account the observations of Sullivan J. in ***Laing Homes*** when he noted at paragraph 103 in relation to dog walking that:-

“Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog’s owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?”

In relation to a dog owner straying off a footpath to retrieve his dog, he stated at paragraph 104:-

“I do not consider that the dog’s wanderings or the owner’s attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.”

He also indicated that *“the same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields”*.

7.18 That issue was specifically considered by Mr Vivian Chapman QC appointed as an inspector at a non-statutory town or village green inquiry in relation to land at Radley, Abingdon, Oxfordshire which was referred to on behalf of the Objector. He noted at paragraph 305 of his report the observations of Lightman J. in the ***Oxfordshire*** case set out at paragraph 5.15 above and stated:-

“It seems to me that the heart of the guidance given by Lightman J is that all depends on whether the use would appear to the reasonable landowner as referable to the exercise of a right of way along a defined route or referable to a right to enjoy recreation over the whole of a wider area of land. If the appearance is ambiguous, it should be ascribed to the lesser right, i.e. a right of way.”

He then went on at paragraph 306, having found that the use of the tracks in question had the objective appearance of the exercise of rights of way, to state:-

“I do not think that this perception is affected by the fact that people could and did sometimes wander off the side of path to pick blackberries, picnic, sit by the lake, watch birds on the lake and allow their children to paddle or pond-dip and their dogs to swim in the lake. To my mind, this is just the way in which an unfenced public right of way along a lakeside is inevitably used. There must be many public footpaths crossing open land where the public have stepped off the path to pick blackberries, to picnic on the banks of a lake or river or to watch wildlife. No one could suggest that this type of activity elevated the public right of way and its margins into an elongated stretch of TVG.”

7.19 I respectfully concur with Mr Chapman QC's observations. If footpath users step off a footpath from time to time to undertake ancillary activities to the exercise of a right of way, such as stopping to pick blackberries or to watch wildlife, or if they unintentionally walk on the margins of an unenclosed footpath rather than along its strict line, such use would not indicate to the reasonable landowner that the user was no longer purporting to exercise a right of way but, rather, the exercise of recreational rights over a wider area of land.

7.20 Applying those matters to the evidence, it is my view that a number of the activities referred to by users as having been carried out on the Land were uses that were ancillary to and an inherent part of the exercise of a right of way rather than the exercise of recreational rights over the entire Land. As to blackberry picking, although the Objector suggested that the Land was bound by hawthorn hedges only, I noted a number of brambles in the hedges during my site visit. I therefore accept the evidence on behalf of the Applicants that blackberry picking has occurred on the Land. Nonetheless, given the location of the brambles around the edges of the Field, such blackberry picking would have occurred around the perimeter of the Land. That was confirmed by Mrs Holmes who pointed out that she would walk around the perimeter of the Field, especially when blackberries were in season. It seems to me that walking round the perimeter of the Land and stopping to pick blackberries is merely an incidental use to the exercise of a right of way.

7.21 Similarly, much of the activity involving watching wildlife in the Pond, which I find was in fact carried out, seems to me to have been merely incidental to the exercise of the public right of way along the Monks Trod. The Pond is located in the south western corner of the Land, adjacent to and very close to the Monks Trod. It can be seen from the Monks Trod; alternatively, it could be seen by merely stepping off the Path by a few paces prior to the erection of the fencing. The evidence confirms that much of that watching wildlife use related

to the Pond was undertaken in that manner. Mrs Spence noted that she and her children would observe the Pond from the Footpath. Mr Pickles took school children to the Pond which they went to via the Trod. Mr Vasey indicated that he may have deviated from the Footpath in order to inspect the Pond.

7.22 The position was similar for other wildlife watching. Mrs Spence acknowledged that wildlife could be observed whilst walking along the Monks Trod or other worn paths around the perimeter of the Land, whilst Mrs Brewster looked out for local wildlife whilst she was walking along the Monks Trod. Indeed, given the presence of hedges alongside the Monks Trod, and alongside the remainder of the perimeter of the Field, it would be reasonable for such wildlife watching to occur whilst walking along such paths.

7.23 Consequently, it is my view that a significant element of the use which has occurred on the Land has been referable to the exercise of public rights of way rather than to the exercise of recreational rights over the entire Land, and that such elements of the use must be discounted from the qualifying use.

7.24 In doing so, I note that there are also a number of written statements in support of the Application which refer to the carrying out of similar activities on the Land. However, in the absence of cross examination of such witnesses, it is unclear whether their references to walking are references to their use of the Footpath and other paths or to walking elsewhere on the Land, and whether or not their references to other activities are incidental to their use of the paths. Given the burden of proof on the Applicants, I cannot assume that such uses are not referable to the exercise of public rights of way.

7.25 Having discounted such uses, it is my view that the evidence establishes only a limited amount of qualifying use of the Land for lawful sports and pastimes. That is aside from the extent of any further discount that is required insofar as any of the uses were not “as of right” which I consider below. There remains some use of the Land for walking other than along paths, for children playing, for picnicking, and for blackberry picking and watching wildlife that were not incidental to the exercise of public rights of way. However, the evidence fails to establish that they were more than sporadic in nature.

7.26 In reaching that view, I note the extent to which those giving oral evidence in support of the Application had used the Monks Trod or the perimeter paths round the Field and indicated that others did so as referred to above. I also take into account the relatively consistent evidence from both the Applicants and the Objector that when Mr Holmes was on the Land with his goats, people would generally stay on the Path. Mrs Spence stated that when Mr Holmes was on the Land with his goats, people would ensure that they did not go off the Footpath, and even children generally knew that they were not to go off the Footpath when stock were in the Field. Mrs Brewster similarly indicated that she would stay on the Footpath when goats were in the Field, and she never saw anyone go onto the Field when animals were in it. Mrs Vasey pointed out that she would not go onto the Land if the goats were in the Field nor would her children. That is consistent with the Objector’s evidence. Mrs Pickering, for example, expressed the view that it was a “*known thing*” that you did not go into the Field whilst Mr Holmes had a tenancy of it, and that children were generally not allowed to go into the Field. It is also of significance that Mr Holmes erected a sign on the coach house building stating that the Field was private and requesting people to stay on the Footpath and to keep their dogs on a lead. According to Mrs Spence, it was her experience that people did keep to the Footpath for the most part. Mrs Brewster also indicated that she more or less complied with the sign. Although Mrs Vasey did not always comply with it, she

acknowledged that she was an exception in not doing so, whilst Mrs Holmes who also did not comply accepted that she was ignoring a clear sign to the contrary.

7.27 Taking all the evidence into account, it is my view that during Mr Holmes's tenancy of the Land, the vast preponderance of the use of the Land was walking along the Footpath or its immediate environs, and to a lesser extent, walking along the perimeter paths, and undertaking incidental activities whilst doing so, such as watching wildlife. My impression from the evidence is that any unrelated uses, such as picnicking on the Land, children playing on the Land or people walking over the Land generally, were very limited during that period of time. Up until 1996, I regard the use of the Land for lawful sports and pastimes as no more than sporadic in nature and insufficient to indicate to a reasonable landowner that recreational rights were being asserted over the Land.

7.28 Subsequent to the cessation of Mr Holmes's tenancy in 1996, there is some evidence that the use of the Land for qualifying lawful sports and pastimes may have increased as time went by. Mrs Brewster noted that the use of the Land to exercise dogs "*snowballed*" once the old building was removed, namely in 2007, whilst Mrs Pickering for the Objector pointed out that after the allotments were moved from the adjoining field in 1998, a gap in the hedge on the southern boundary was then created around 1999/2000, and from then onwards people started to use the Land more generally. Attempts to close the gap in the hedge by fencing were continually removed.

7.29 Nonetheless, irrespective of the extent of the use of the Land for lawful sports and pastimes post 1999/2000, I find that up until 1996, it has not been established on the balance of probabilities that the Land was used for lawful sports and pastimes to the extent and for the frequency required to establish that element of the statutory criteria. Given that such period

represents a significant part of any of the identified relevant 20 year periods, I find that that element of the statutory criteria has not been established whichever is the correct 20 year period.

Use by a Significant Number of the Inhabitants of any Locality or of any Neighbourhood within a Locality

7.30 In order to determine this element of the statutory criteria, it is firstly necessary to identify the appropriate locality or, alternatively, neighbourhood within a locality for the purposes of the legislation.

7.31 During the Inquiry, the Applicants confirmed that the neighbourhood being relied upon was the Yuill Estate and the surrounding area of Mayfield Road and Prospect Hill. No specific locality was identified.

7.32 The question then arising is whether the Yuill Estate and the surrounding area of Mayfield Road and Prospect Hill is a qualifying neighbourhood. In that regard, the fundamental issue to be determined is whether that area has a sufficient degree of cohesiveness to amount to a “*neighbourhood*” within the meaning of the legislation. A neighbourhood cannot merely be an area drawn on a map.

7.33 The Applicants adduced relatively limited evidence on this issue. Mrs Brewster indicated that she regarded the whole of the Yuill Estate as the community she lived in, whilst Mrs Holmes stated that she knew the area as “the Prospect Hill/Mayfield Road area”. Mrs Pickering on behalf of the Objector acknowledged that the Yuill Estate was a recognised area in Whitby, but she stated that Prospect Hill and Mayfield Road are not part of that Estate.

7.34 In my view, there is insufficient evidence of the identified neighbourhood having any degree of cohesiveness. There was no evidence that those who lived on Prospect Hill and Mayfield Road regarded themselves as living within the same community as those living on the Yuill Estate. Indeed, the Yuill Estate was built much later than the houses on Prospect Hill and Mayfield Road in the late 1970's, save for the more recent Shackleton Close extension, and the houses on the Yuill Estate had an entirely different character. I heard and have read no evidence supporting a finding that the identified neighbourhood is a cohesive community, such as it having an identified name and/or shared community facilities and/or that it operated or was regarded as one community. Further, from my unaccompanied site visit I undertook round the claimed neighbourhood, there was nothing to suggest that the particular identified area was itself a cohesive community. On the contrary, the Yuill Estate seemed to me to be a separate area to Prospect Hill and Mayfield Road. On the basis of all the evidence, it is my view that the identified neighbourhood was chosen on the basis that it was the area within which the majority of the users resided and not for any other reason.

7.35 In the closing submissions on the Applicants' behalf, it was suggested that the Yuill Estate itself could be an alternative neighbourhood. That area does have its own identity in the sense that it comprises one residential housing estate. An individual housing estate is in principle capable of being a neighbourhood. Nonetheless, it is not the position that every residential housing estate is an individual neighbourhood. Instead, the requisite degree of cohesiveness must still be established by an applicant. In my view, no such cohesiveness has been established by the Applicants in relation to the Yuill Estate. There was no evidence adduced indicating how the Yuill Estate functioned as one community whether in the form of shared community facilities, shared community activities or otherwise. No such cohesiveness was apparent on the ground from my unaccompanied site visit. Therefore, I find that the

Applicants have failed to identify a qualifying neighbourhood within the meaning of section 22(1A) of the 1965 Act.

7.36 Even if either the area identified or the Yuill Estate did qualify as a “*neighbourhood*”, in order for the statutory criteria to be established, a significant number of the inhabitants of that neighbourhood must have used the Land. That requires a sufficient number to have used it to bring to the attention of the reasonable landowner that a right of recreation was being claimed by the identified neighbourhood. Thus, it seems to me that it is not merely the number of users that are significant, and I have addressed the extent of the use above, but also their geographical distribution. The number of inhabitants whose use is proven must be distributed in such a way as to indicate that the right is vested in the neighbourhood claimed and not simply a part of it. That has been the established approach taken by many inspectors at town or village green inquiries as pointed out on the Objector’s behalf in its closing submissions and with which approach I concur.

7.37 In my view, that requisite geographical distribution of users has not been established in any event. The Location of Users Plan produced by the Applicants during the Inquiry helpfully identifies the location of all users relied upon by the Applicants. It is apparent from that Plan that the users are very much confined to the area in closest proximity to the Land rather than the Land having been in use by the wider neighbourhood. There is only one user on the part of Mayfield Road located to the west of the Land, and only one on Prospect Hill save to the immediate north of the Land. Moreover, even if the neighbourhood is regarded as the Yuill Estate, there is only one user on the entirety of the western part of that Estate. In those circumstances, it does not seem to me that there has been a sufficient spread of users across either of the potential neighbourhoods. Therefore, on that further basis, I find that the

Applicants have failed to establish that the Land has been used by a significant number of the inhabitants of either of the claimed neighbourhoods.

Use as of Right

7.38 Turning to whether the qualifying use of the Land was “*as of right*”, there was no suggestion that any of the use was by stealth.

7.39 As to whether it was with permission, it is relevant that some of the use was with such permission and thus must also be excluded from the qualifying use. Such express permission was given to Mr Nattris by Mr Holmes to exercise his gun dogs on the Land. Hence, that particular use must be discounted in ascertaining the extent of the qualifying use. Further, it is apparent that allotment holders were given permission to walk down the eastern boundary of the Land to the gate leading into the allotments up until 1998. Their use of the Land for that purpose must also be discounted.

7.40 In addition, it seems to me that up until 1996, use of the Land was not as of right as it was with force, namely *vi*. As noted in paragraph 5.23 above, the requirement that the use be without force in order to be “*as of right*” does not merely require the use to be without physical force, such as by breaking down a fence. It must also not be contentious. As stated by Lord Walker in *Lewis*:-

“it would be wrong to suppose that user is “vi” only where it is gained by employing some kind of physical force against the owner...It was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it. In those circumstances what he did was done vi.”

7.41 Applying that principle, it is my view that the use of the Land by those who had been previously challenged for their use, or by those who knew that such use had been previously challenged, was thereby *vi*. In that regard, it appears from the evidence that Mr Holmes did challenge users of the Land up until 1996 when they were in the Field rather than on the Footpath or its immediate environs. Mrs Vasey pointed out that she was aware of him occasionally having informed individuals that they should not be on the Field, and Mr Nattris noted that Mr Holmes would challenge people if they let their dogs off the lead when goats were around. He also stated that Mr Holmes “*used to patrol the area quite strictly*”. Indeed, the considerable evidence that people would not go onto the Field when goats were out supports the view that people generally knew that they were not entitled to go off the Footpath when the Field was in such use. For the Objector, Mr John Holmes indicated that his father would tell people to stick to the Footpath, whilst Mrs Pickering noted that he would challenge anyone who strayed off the Path or its immediate environs, as did Mr Harland.

7.42 In addition, during Mr Holmes’s tenancy of the Land up until 1996, I find that there was a sign that he had erected on the building on the northern corner of the Land as shown on the Objector’s photograph. That sign was referred to by many witnesses. It stated that the Field was Private and requested people to keep to the Path and to keep their dog on a lead. In my view, that sign was clearly indicating to users that they were not to go onto the Field but were to remain on the Footpath. That was indeed the view taken by various users. Mrs Spence acknowledged that it was obvious by that sign that Mr Holmes was informing people to keep to the Monks Trod. Mrs Brewster recalled the sign and more or less complied with it. Mrs Vasey also recalled it, but she did not always comply with it. Similarly, Mrs Holmes did not always comply with it, but she nonetheless accepted that the sign was clear that people should stick to the Footpath.

7.43 In my opinion, the erection and maintenance of that sign by Mr Holmes and his challenges made to people who were off the Footpath were sufficient to result in any use of the Land off the Footpath up until 1996 a contentious one, namely contrary to the sign and the challenges, and thus *vi*. Hence, I find that the use of the Land up until 1996 was not “*as of right*” on that basis. Given that the period up until 1996 is a material part of any of the relevant 20 year qualifying periods, then the use was not “*as of right*” for the requisite 20 year period whichever of the qualifying periods is the correct one and I so find.

Continuation of Use

7.44 The final issue is whether the qualifying use continued up until the date of the Application. That in turn depends upon the correct date of the Application as noted in paragraph 7.6 above. If the Application date is properly regarded as 5 January 2005, then in my view the evidence establishes that some use of the Land was continuing as a matter of fact as of that date, subject to the other issues above over the extent and continuity of the use and the neighbourhood. However, if the Application date is either 22 November 2005 or 5 July 2011, then in my view the use had ceased before those dates, namely as of February 2005 when the Land was initially fenced along the length of the Footpath. Mr Vasey stated that between February 2005 when the Land was fenced and June 2007 when the building was demolished, he could only access the Land by climbing over a locked gate. Mr Nattris stated that he then entered the Land from the former allotment field. That fencing still appeared to be intact in October 2005 as shown on the Objector’s photographs of 7 October 2005 and as acknowledged by Mrs Spence. The unchallenged evidence of Miss Williams, which I accept, is that notices were then erected on 7 October 2005 prohibiting access to the Land without the owner’s consent. They were subsequently replaced by more permanent signs. In my view, the effect of that fencing and the signs would be such as to indicate that the Landowner did not

wish the Land to be used by the public and any use thereafter was consequently *vi* and therefore not as of right.

7.45 Although my view on the continuation of the use issue differs dependent upon the correct date of the Application, my conclusions on each of the other elements of the relevant statutory criteria are unaffected by the correct date of the Application. Given those conclusions, it is not necessary for me to reach a determination upon the correct date of the Application and I consequently do not do so.

8. CONCLUSIONS AND RECOMMENDATION

8.1 My overall conclusions are therefore as follows:-

8.1.1 That the Application Land comprises land that is capable of registration as a town or village green in principle;

8.1.2 That the potential relevant 20 year periods are:-

(i) 5 January 1985 until 5 January 2005;

(ii) 22 November 1985 until 22 November 2005; and

(iii) 5 July 1991 until 5 July 2011;

8.1.3 That the Application Land has not been used for lawful sports and pastimes throughout any of the potentially relevant 20 year periods to a sufficient extent and continuity to have created a town or village green;

8.1.4 That neither the Yuill Estate and the surrounding area of Mayfield Road and Prospect Hill nor the Yuill Estate in itself are qualifying neighbourhoods;

8.1.5 That the use of the Application Land for lawful sports and pastimes has not been carried out by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout any of the potentially relevant 20 year periods; and

8.1.6 That the use of the Application Land for lawful sports and pastimes has not been as of right throughout any of the potentially relevant 20 year periods.

8.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land to its register of town and village greens on the specific grounds that:-

8.2.1 The Applicants have failed to establish that the Application Land has been used for sufficient lawful sports and pastimes as of right throughout the relevant 20 year period;

8.2.2 The Applicants have failed to establish that the Application Land has been used by a significant number of the inhabitants of a qualifying neighbourhood throughout the relevant 20 year period; and

8.2.3 The Applicants have failed to establish that the use of the Application Land has been as of right throughout the relevant 20 year period.

9. ACKNOWLEDGEMENTS

9.1 Finally, I would like to thank the Applicants and the Objector for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear, succinct and frank manner. I would further like to express my gratitude to the representative from the Registration Authority for his significant administrative assistance prior to and during the Inquiry.

9.2 I am sure that the Registration Authority will ensure that all Parties are provided with

a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

RUTH A. STOCKLEY

6 February 2012

Kings Chambers

36 Young Street Manchester M3 3FT and
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Appendix 4



Mr Simon Evans
North Yorkshire County Council
Chief Executive's Group
County Hall
Northallerton
North Yorkshire
DL7 8AD

Date 21 June 2012
Your Ref 15345 SE
Our Ref PW/TD/71969

BY EMAIL

Dear Simon

Application to register land at Prospect Hill Whitby North Yorkshire

Thank you for the opportunity to make further comments for consideration by the Committee.

Having received the Inspectors Report the trustees have asked me to respectively point out for consideration of the Committee that the applicants failed to demonstrate the legal requirements under the 1965 Act in every respect. In particular the Inspector found that

- The application land has not been used for lawful sport pastimes on any of the potentially qualifying dates.
- Neither the Yuill Estate and the surrounding area of Mayfield Road and Prospect Hill nor the Yuill Estate itself could possibly qualify as a neighbourhood within the legal meaning of the 1965 Act.
- That use of the application land for lawful sports and pastimes has not been carried out by a significant number of inhabitants of any qualifying locality or neighbourhood within the locality for any of the potential 20 year periods.
- That the claim to use the application land for lawful sports and pastimes has not been as of right through any of the potentially relevant 20 year periods.

In addition to the above, two recent cases need to be considered by the Committee as they have a direct bearing on the issues considered by the Inspector. In particular the case of *Taylor -v- Betterment Properties (Weymouth) Limited [2012] EWCA Civ 250* determined that the 20 year use user as of right means without for secrecy or permission. The fact that Notices have been torn down does not prevent the use being contentious where correct Notices have been put up. As you will know clear Notices were put up by the objectors in this case and the use was therefore contentious.

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In other case *Adamson –v- Paddico (267) Limited [2012] EWCA Civ 262* the Court of Appeal has concluded that it is now clear that an area cannot be a “locality” for the purposes of the 1965 Act if it is not an administrative area or an area within legally significant boundaries.

Whilst the Inspector did not have the benefit of considering these legal authorities since they have come out after publication of her report, it is the view of the trustees that they serve to strengthen her findings and the trustees of the Bagshawe trust therefore urge the committee to reject formally the application to register the land as a Town or Village Green.

I will be obliged if you could acknowledge receipt of my formal letter and I look forward to hearing from you as regards the arrangements for the final determination of the matter in August. The trustees will wish to be represented and the for the Committee to be addressed.

Yours sincerely,


Philip Wills

Solicitor

BHP Law

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