North Yorkshire County Council

Planning and Regulatory Functions Sub-Committee

17 April 2015

Land at Earls Orchard, Richmond
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 for the registration of an area of land at Earls Orchard, Richmond as a Town or Village Green.

2.0 Background and Procedural Matters

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

2.2 The application, received by the County Council on 26 February 2010, was considered by this committee on 25 November 2011. A copy of the report to that meeting and the related minutes is attached to this report at **Appendix 1**.

2.3 It was resolved in accordance with the officers' recommendation to appoint an Inspector to hold a non-statutory public inquiry to hear the evidence and to make a recommendation to the County Council in its role as Commons Registration Authority.

2.4 Consequently Stephen Morgan of Landmark Chambers, London, a barrister with considerable knowledge and experience of this area of the law and who has often acted as an Inspector in such matters across England, was instructed and a three day inquiry was held at Catterick Leisure Centre on 16/17/18 July 2014. There was some delay in organising a suitable timing for inquiry initially in order to allow the Applicant to recover from illness and latterly in finding a mutually convenient date for all those concerned.

2.5 The Inspector's report dated 20 October 2014 is attached to this report at **Appendix 2**. The Committee will note that he recommends that the application is refused, on the basis that it fails to meet all the relevant legal tests.

2.6 Following receipt by the County Council of the Inspector's report it was circulated to the applicant and the affected landowner (Richmondshire District Council) for comment. The applicant responded under cover of a letter dated 28 November 2014 raising a number of queries. That submission in full is attached as **Appendix 3**. The District Council advised that had it no comments and was satisfied with the conclusions reached by the Inspector (**Appendix 4**).

2.7 Determining such an application is a strict question of whether or not all the relevant legal tests have been met. It is not for the Commons Registration

Authority to concern itself with perceived merits or otherwise of land becoming registered.

3.0 Legal Tests

3.1 The relevant legal tests are set out in Section 15(3) of the Commons Act 2006 which provides that land be registered as a town or village green where :-

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) they ceased to do so before the time of the application but after the commencement of this section

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

Failure to meet any single one of the tests is fatal to an application succeeding.

AS OF RIGHT

3.2 Most strikingly the Inspector concludes at para 5.66 of his report that persons using the land for recreational purposes had been using it "*by right*" in exercise a legal right that they already had to use it. Their use had therefor not been "*as of right*".

3.3 In considering this point he takes into account the background of the purchase of the site and came to a conclusion regarding the legal basis on which the land is held by the district council. In doing so he acknowledges the significance of a covenant contained in the conveyance of the land to Richmond Rural District Council in 1968 at paras 5.63(1) & 5.63(2) of his report.

3.4 He identifies that this ties in with a contention made by the applicant that essentially local inhabitants have a right to use the land. That contention is maintained by the Applicant in comments accompanying his letter of 28 November 2014 particularly on page10 of those comments :-

"*The covenant also makes it clear that the field should be used as a football field or sports field it does not discriminate in favour of one or the other, it also states that it is to be used for the benefit of the inhabitants of Richmond and the rural area and should remain an open field for the same.*"

3.5 The Inspector does not rely solely on the said covenant for arriving at his view on the point but rather on a number of factors (paras 5.55 - 5.67 incl) including in particular "*clear guidance in Barkas*" (para 5.65). This is reference to the decision of the Supreme Court last year in the case of Barkas v North Yorkshire County Council which concerned the County Council's decision not to register land at Helredale, Whitby.

3.6 It is perhaps ironical that on this point the Applicant and the Richmondshire District Council, in its role as Objector, are actually making the same argument – that the public had a right to use the land during the relevant 20

year period. If they did then in particular following the clear theme of the Barkas judgment the use must have been "*by right*" and not "*as of right*".

3.7 The Inspector recognises at para 1.11(ii) of his report that the Applicant is "*highly critical of certain actions of the Council (the District Council) relating to the Council's proposals for the use of the land*". Similarly the Applicant is critical of the District Council's past management of the land (e.g. at p10 of his November 2014 comments). However, as the Inspector recognises, such matters are outside the remit of the County Council in its role as Commons Registration Authority. In the event of refusal of the village green application this may remain an issue for the district council to resolve. It is not though material to the County Council's decision in this matter.

3.8 If this committee is satisfied that public use of the site during the relevant 20 year period has been "*by right*" and so not "*as of right*" that alone would be reason for the application to be refused.

REMAINING LEGAL TESTS

3.9 Further to concluding that use during the relevant 20 year period had not been "*as of right*" the Inspector in considering the remaining legal tests concludes that :-

i) the claimed neighbourhood lacks sufficient cohesiveness

ii) lawful sports and pastimes have not been exercised across the whole of the land

iii) use for lawful sports and pastimes had not been "*as of right*" on the further grounds to those described in paras 3.2 – 3.8 above

3.10 The Inspector was though satisfied that the application had demonstrated that "*significant number*" of residents from the claimed neighbourhood had been shown to have indulged in "*lawful sports and pastimes*".

3.11 Each of these remaining conclusions is considered below.

LACK OF COHESIVENESS OF NEIGHBOURHOOD

3.12 From his November 2014 representations the applicant is clearly unhappy with the conclusions reached by the Inspector on this point. He is particularly concerned at the Inspector's apparent expectations to see in evidence what the applicant considers are outdated features for a neighbourhood. However the Inspector's Report at para 5.40(top of page 64) states that "*Although the absence of these is a factor, in my view their absence is not in itself conclusive against the finding of a neighbourhood*". He makes similar comment in reference to shops and services in the following sentence.

3.13 The Inspector does not question the applicant's evidence of the previous existence of various businesses and services that he detailed to the inquiry. He does though recognise that evidence of "*some cohesive quality is required*" during the relevant 20 years.

3.14 His most significant conclusion on the point is at para 5.43 of his report in which he finds the inclusion and exclusion of streets in what ultimately formed

the extent of the claimed neighbourhood to be "*somewhat arbitrary*". Which streets were to be included or not had been altered over time though the Inspector did reflect that in itself was not fatal on the point.

3.15 It is incorrect of the applicant to suggest as he does in his November 2014 submission that the Inspector "changed his mind" on the issue of what was or was not acceptable as a neighbourhood – particularly in reference to the inclusion or otherwise of Sleegill. At Inquiry the Inspector merely sought clarification from the applicant as to what he was putting forward as the neighbourhood for the purposes of the application. His report is where we first learn of his conclusions on the issue.

3.16 The concept of neighbourhood in the context of applications of this nature is not straightforward. The Inspector recognises this at the end of para 5.32 of his report. :-

"*Indeed, these issues often involve detailed debated even between those who are experienced TVG practitioners.*"

It is understandable how an applicant might become frustrated at a view which challenges an area put forward as a neighbourhood. It can though be tempting for applicants to include in their claimed neighbourhood areas from which it is known people came to use a claimed village green in the belief that will benefit the application by evidencing more use that would otherwise be the case. That can result, sometimes unknowingly, in something of a manufactured area being put forward as the neighbourhood. Whilst the Inspector has not suggested as much in this case he does identify finding it difficult to identify cohesiveness "*beyond the streets and properties immediately surrounding*" what is already registered as TVG (that grassed area known as "The Green"). What was finally settled on by the Applicant goes beyond that.

THAT LAWFUL SPORTS AND PASTIMES BY A SIGNIFICANT NUMBER OF INHABITANTS OF A NIGHBOURHOOD WITHIN A LOCALITY HAVE NOT BEEN EXERCISED ACROSS A THE WHOLE OF THE LAND

3.17 The Inspector concludes that there was qualifying use of the land by a significant number over the whole of the relevant 20 year period. In addition to his view on the issue of neighbourhood he is not convinced that such use was consistent enough during that time and he cites in particular times when use by inhabitants will have been excluded from a significant part of the site. He does not suggest exclusion entirely at any time nor that physically the football field was fenced off.

3.18 In his November 2014 submission the Applicant expressed concerns about the weight given to District Council witnesses on this point at Inquiry. However, clearly the Inspector gave little weight to evidence provided by a number of those witnesses :-

"*I found some of the Objector's evidence on this aspect not to be entirely consistent.*"

"*Although some of the Objector's witnesses referred to there being no open access to the land, in my view clearly there was..*"

"*In so far as Mr Marshall gave the impression of a wider exclusion of people form the land I find that hard to accept.*"

"*I was not persuaded that generally either Mr Marshall or Mr Conway would have asked members of the public to leave.*"

Your officers are satisfied as to the Inspector's experience and capacity to weigh such evidence accordingly and that he dealt with all SUCH evidence objectively.

FURTHER GROUNDS FOR FINDING THAT USE HAD NOT BEEN "*AS OF RIGHT*"

3.19 The point in question, raised at Inquiry by the District Council in its Closings, is somewhat secondary for the Inspector on the "*as of right*" point given that he is already satisfied that use had been "*by right*" by following the approach taken by the Supreme Court in Barkas.

3.20 That said his finding is based on relating the circumstances at Earls Orchard as evidenced to him to judgment in the case of R(Mann) v Somerset [2012]. He is clearly of the view that the circumstances at Earls Orchard are even more compelling on the relevant point than they were in that case itself. He distinguishes the scenario from that which existed in the Lewis v Redcar [2010] case in which uses were held to coexist as opposed to being consecutive.

3.21 The Applicant understandably makes reference to the Redcar case in his November 2014 submission but the Inspector in arriving at his view has considered that case and distinguished the circumstances at Earls Orchard and finding comparison with the circumstances of the Mann case and indeed a firmer basis than existed in the case itself :-

"*the evidence is compelling and consistent with much of the Applicant's case.*"

4.0 Haltwistle Case

4.1 The Applicant has submitted by way of comparison with the Earls Orchard application copy of an Inspector's Report to Northumberland County Council in respect of The Old School Playing Field, Haltwistle. Whilst undated the report concerns a matter which was the subject of a similar Non Statutory Inquiry which was held on the 18 July 2011 and 22/23 September 2011. There is no indication of the decision that the County Council ultimately reached but that is not significant for our purposes.

4.2 In that case the land concerned had been acquired by the County Council in 1939 and had over time been used in connection with neighbouring schools. From May 1990 the land was transferred to the local Town Council subject to a covenant that it be used as public open space. The Haltwistle Inspector notes:-

"*What is clear is that use from 18th May 1990 was by right rather than as of right*"

4.2 The significance of this is that only from that date was the status of the application land in that case analogous to the status of the land at Earls

Orchard in all the time it has been own by Richmondshire District Council. It is clear that Inspector, similarly to the Inspector at Earls Orchard, concluded that any use of the land in those circumstances could not be considered as qualifying user because it would be a use by right.

4.3 The Haltwistle report is undated it almost certainly was written prior to judgment in R (Mann) v Somerset [2012]. There is every chance the Inspector at Haltwistle would have reached a different view had he been considering the matter subsequent to the decision in Mann.

4.4 The Applicant has suggested that the Inspector in Haltwistle questioned apparent duplicity in witness statements. However, he actually acknowledges "similarity of phrasing" and does NOT consider that in itself raises doubt about the content of the statements that were before him (ref "X" page 38 of that report).

5.0 Financial Implications

5.1 There may be financial implications for the authority in the event of any subsequent challenge to its decision which may arise from application for a judicial review of its decision through the courts. How to respond to any such challenge would be a matter for further consideration at that time in accordance with the relevant provisions of the Council's Constitution.

6.0 Equalities Implications

6.1 It is considered that the outcome of the County Council's decision in this matter in exercising its role as Commons Registration Authority will have no impact on the protected characteristics identified in the Equalities Act 2010.

7.0 Conclusions

7.1 The application to register land at Earls Orchard as town or village green was the subject of a three day inquiry providing opportunity for the relevant evidence to be fully examined before an independent expert acting as Inspector to the inquiry.

7.2 For the application to succeed it would need to meet all the statutory tests set out in section 15(3) of the Commons Act 2006

7.3 The Inspector's view is that the application does not meet all those relevant statutory tests and has provided the County Council with a full and reasoned report on how that view has been reached.

7.4 The decision on the application ultimately rests with the County Council and there is no apparent reason why that decision should not follow the recommendation expressed by the Inspector in his report.

8.0 Recommendation

8.1 That the Application be refused because the Registration Authority is not satisfied that it meets all the criteria set out in section 15(3) of the Commons Act 2006 for the reasons set out in the Inspectors Report dated 20 October 2014 which is attached as **Appendix 2** to this report.

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Corporate Director - Business & Environmental Services

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

Appendix 1

ITEM 5

NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS SUB-COMMITTEE

25 NOVEMBER 2011

LAND AT EARL'S ORCHARD FIELD, RICHMOND
APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN

1.0 PURPOSE OF REPORT

1.1 To report on an application ("the TVG Application") for the registration of an area of land at Earl's Orchard Field, Richmond (identified on the plan comprising **Appendix 1** – "the TVG Application Site") as a Town or Village Green.

2.0 BACKGROUND

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

2.2 Section 15(1) of the Act sets out that

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

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

(a) a significant number of the inhabitants of a locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years

and

(b) they ceased to do so before the time of the application but after the commencement of this section;

and

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

2.3 A commons registration authority needs to be satisfied that on the balance of probabilities all the elements of section 15(3) have been demonstrated by an application for it to be approved. The onus of proof rests with the applicant.

3.0 APPLICATION

3.1 The TVG Application, submitted by Derek George Clark ("the Applicant"), was received by the County Council on 26 February 2010 and relies on the criteria contained in section 15(3) the Act as having been met. A full copy of the Application and evidence submitted by the Applicant is attached as **Appendix 2.**

3.2 The initial application included :-

i. a completed Form 44 in the standard format (including statutory declaration)
ii. a covering letter from the Applicant
iii. copy of a lease between Richmond District Council and Richmond Town AFC
iv. copy of minutes of a meeting on 23 September 2008 between various parties interested in TVG Application Site
v. a letter of support from County Councillor Stuart Parsons
vi. correspondence from 53 witnesses
vii. various photographs
viii. press cuttings
ix. a plan identifying both the application site itself and the alleged neighbourhood (the County Council's Commons Registration Officer confirmed with the applicant at the time the application was submitted by hand the extent of the application site on a plan of the scale used at Appendix 1)

3.3 The County Council followed due procedure by offering the Applicant the opportunity to comment on objections received and in the course of this further representation was received from the Applicant dated 29 November 2010 . This included covering correspondence from the Applicant and further pro forma evidence from 27 witnesses four of whom had previously submitted evidence. Due to issues of timing a response from the Applicant to the Parish Councils representation had not been sought by the time of writing this report. Should one subsequently be received it shall be presented to the Committee at the meeting.

3.4 Determining an application this kind is a matter of assessing evidence to determine whether or not the criteria set out in section 15(3) the Act have been met. Representations (e.g. submitted by supporting witnesses) relying on alleged merits of the TVG Application Site being a village green or objections based on the merits of it not so being are immaterial and must be ignored in considering the application.

3.5 By way of example but by no means exhaustive in this case arguments

should be disregarded that rely on claims of a lack of local football facilities or lack of open space locally or that suggest lands elsewhere may be more suitable for use as village green or as a football pitch.

4.0 APPLICATION SITE

4.1 The TVG Application Site comprises flat grassland accessed to the west from the C129 road which leads from Richmond toward Hipswell Moor. It is bounded on the north by the River Swale. The long distance Coast to Coast public footpath runs along the riverside boundary from the road leaving the TVG Application site at its north east corner as shown on the plan at Appendix 1.

4.2 A large part of the site has been fenced off around a football pitch which is marked out on the land. To the west of the football pitch is a building comprising the changing rooms and storage for Richmond Town Football Club the occupiers of the site. In total the TVG Application site extends to approximately 1.592 hectares (3.9acres).

4.3 A comprehensive group of indexed photographs of the site taken in March 2010 will be displayed on screen at the committee meeting.

5.0 OWNERSHIP

5.1 The TVG Application site is owned Richmond District Council having been purchased by the then Rural District Council of Richmond in 1968.

5.2 The whole of the application site is currently the subject of a lease to Richmond Town Football Club.

6.0 OBJECTIONS

6.1 Objections to the TVG Application have been received from the parties listed below.:-

- Richmond District Council (landowner) - **Appendix 3**
- Richmond Town Football Club (tenant) - **Appendix 4**
- Mrs. L. Blackburn (a former chairperson of the football club) - **Appendix 5**
- Mr. and Mrs. J. Clarke - **Appendix 6**
- Mr J.Conway (former Ranger for R.O.S.A.) - **Appendix 7**
- St Martins Parish Council - **Appendix 8**

6.2 In accordance with due process copies of the objections were forwarded to the Applicant for comment (see para. 3.3 above).

6.3 Issues raised in the objections from Richmond District Council and Richmond Town Football Club are referred at various relevant points throughout this report.

6.4 Submitted with the objection from Richmond Town Football Club were 12 further letters of objection. Except for one case those letters focussed largely either on issues of merit of the football club facilities being where they currently are and/or issues of conflict between use of the land for football and the presence of dogs (i.e. issues which are immaterial to the TVG Application). The exception is a letter from James Conway(who also wrote separately – see para 6.7 below) who includes reference to people found on the TVG Application Site being repeatedly challenged by himself and members of the football club.. This could be relevant on the issue of whether or not claimed use has been by force and so not "*as of right*".

6.5 Mrs Blackburn's objection whilst focusing largely on issues of merit includes reference to local organisations first seeking permission to use the TVG Application Site. Such use would not be qualifying use relevant to the TVG Application. The letter does include acknowledgement of dogs having been on at least that part of the TVG Application Site comprising the football pitch though it is unclear to what degree they may have been straying from users of the Coast to Coast Footpath.

6.6 Mr & Mrs Clarke's objection is entirely based on issues of the merit or otherwise of the TVG Application Site being exclusively a football ground or not. With their letter they submitted 82 signed proforma statements from residents of Richmond and but also beyond. Again the points raised in those pro-forma deal entirely with issues of merit only and not evidence of use or other relevant points. Whilst volumous this objection should be disregarded for the purposes of assessing the TVG Application.

6.7 Mr J.Conway includes in his objection the querying of the evidence of one of the witnesses and questions whether the Applicant has produced any evidence to back up his claim. Otherwise the points raised in are not relevant to the TVG Application relating ether to issues of merit concerning the suitability of the site and the availability of other sites in the local area or dealing with other issues relating to the Applicant and the site but not relevant as evidence for the purpose of assessing the TVG Application.

6.8 The Parish Council's objection largely addresses questions of the merits as to whether or not the land concerned should be registered. In particular it draws attention to dog fouling. Such matters are not relevant to the assessment of an application of this type. On the one hand the Parish Council claims there to be shortcomings of evidence as to how much of the site has been used by those claiming use. On the other hand it does also infer that there is some dog walking still taking place across the field ("...early morning dog walking, or dog running, continues to take place across the field,...") though it is not clear to what extent. Dog walking is as a general rule a qualifying "lawful sport and pastime".

6.9 With regard to the a further issue raised by the parish council it is not necessary that the neighbourhood or locality (which may be a parish) from which users originate is the same one in which the land concerned is situated.

7.0 EVIDENCE REVIEW

7.1 significant number of the inhabitants of a locality, or of any neighbourhood within a locality

7.1.1 neighbourhood within a locality

7.1.2 In its objections the landowner queried whether the application is relying on claim of use by inhabitants of a "*locality*" or inhabitants of a "*neighbourhood within a locality*". The further representations of the Applicant have indicated that it is the latter of these two that he is relying on as being demonstrated.

7.1.3 In considering what constitutes a "neighbourhood" for the purposes of section 15(3) the courts have ruled that.:-

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

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

7.1.4 In the recent case of Leeds Group PLC v Leeds City Council Behrens.J referred to imprecision of the term "neighbourhood".

"*The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TVGs*"

In that case the judge considered that he could attach considerable weight to the view of an inspector on the meaning of "neighbourhood" quoted below :-

"*It seems to me that the 'cohesiveness' point cannot in reality mean much more in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of making a town or village green claim.*"

7.1.5 The Applicant is relying on use by inhabitants of an area he refers to as "*The Green and surrounding streets*". It is not entirely surprising that as a layman he has strayed at times in correspondence between referring to the area as both a "locality" and a "neighbourhood".

7.1.6 There has been and continues to be technical debate in legal circles on the meaning of "neighbourhood" and "locality" both within and beyond the courts.

Given this it is common for there to be opposing views on whether or not an area does or does not constitute a "neighbourhood" for the purposes of an application to register land as town or village green. In the light of the inspector's observations quoted above it foreseeable on the face of it that the "*The Green and surrounding streets*" could constitute a "*neighbourhood*".

7.1.7 Government guidance sets out that a "locality" should comprise a recognised administrative unit. However in judgement the courts have recently been accepted that an area will not necessarily have lost the attributes of being an administrative unit in the event that it no longer is because of historical boundary changes. It has also been held that an ecclesiastic parish could constitute a "*locality*".

7.1.8 It is ultimately for a commons registration authority to determine, on the evidence, what "locality" (if any) a village green application relates to or if indeed one exists at all. That the alleged neighbourhood lies within something that constitutes a "locality" in the case of the Earls Orchard site seems likely. If for instance the local electoral ward were not held to constitute a "locality" then the local ecclesiastic parish or indeed the township of Richmond presumably would. The Applicant has indicated his view that the neighbourhood he relies on is "well known as such in Richmond".

7.1.9 significant number

7.1.10 What constitutes a "*significant number*" in any one case does not need to be considerable or substantial. The characteristics of the neighbourhood concerned determine what is likely to be considered to constitute being a significant number from that neighbourhood. To constitute use by a significant number the usage needs to signify evidence of general use by the local community. Any use there may have been by persons that are not resident in the neighbourhood concerned should be disregarded. There is no formula as to precisely what number of users will constitute a significant number in any one case.

7.1.11 In its objections the landowner forms the view that the weight to be attached to the evidence of use claims is limited as it is not in the form of a statutory declarations or statements of truth and because the statements and letters submitted do not include an appended plan. Whilst there is some merit in this argument in the context of suitability to fully test such claims where disputed the submitted evidence is typical of the form of written evidence accompanying an application of this type.

7.1.12 Particularly where there are opposing views it is difficult for a commons registration authority to rely on that evidence to reach a final decision. That said in the interests of fairness to all sides it is appropriate for an authority to allow interested parties opportunity both to prove and test that evidence to assist the authority in reaching a decision. In this case in the event that a majority of the claims submitted by the Applicant were demonstrated to be qualifying use then it seems likely that they would amount to claim from a

"*significant number*" but further examination and testing of the evidence is necessary to be clear on this point.

7.2 **as of right**

7.2.1 A large proportion of the claimed usage appears to relate to walking both with and without dogs. It is difficult without fully testing those claims to be clear how much if any of the said walking has been a consequence of use of the Coast to Coast public footpath. Use of the footpath would comprise the exercise of a legal right and so be use "by right" rather than "as of right". For example dogs straying from owners using the path is unlikely to comprise qualifying use for the purpose of the TVG Application. Similarly, claims of picnicking, sunbathing, book reading and nature studies may have been consequent upon the use of the public footpath. In its representations Richmond Town Football club alleges that the presence of dogs on the TVG Application Site (or at least that part of the site marked out as a football pitch) originates from users of the Coast to Coast footpath.

7.2.2 The courts have interpreted "as of right" to be use which has not been by "*force, stealth nor with the permission or licence of the owner*".

7.2.3 Whilst not yet fully tested in the courts use by the public of land owned by a local authority has the potential for being a use to which the public has a right and so give rise to that use being effectively by "*permission or licence*". This can be dependant upon which legal powers the land is owned (this may be consequent upon the powers relied on to purchase the land or any appropriation to another purpose which the land may have subsequently been the subject of). In its initial objection the landowner reserved the right to provide evidence "in due course" of the power under which the land was purchased and is now held. To date no further submission has been made by the landowner on this point. This is an important point for applications relating to publicly owned land which can be critical to determining the application.

7.2.4 Copy correspondence submitted by Richmond Town Football Club in its submission indicates that uses of the Application Site arising from organised events such as The Richmond Meet will have been use with the permission of the football club and/or their landlord Richmond District Council and so would not amount to qualifying use for the purpose of assessing the TVG Application. That said little of the evidence submitted with Application appears to refer to use made of the site during the course of organised events.

7.3 **lawful sports and pastimes**

7.3.1 The courts have interpreted what constitutes "*lawful sports and pastimes*" widely. Most of the types of uses referred to in the letters and pro forma submitted with the TVG Application on the face of it comprise "lawful sports and pastimes". That said a large proportion of the claimed usage appears to relate to walking both with and without dogs. It is difficult without fully testing those claims (eg through cross examination) to be clear how much if any of

the said walking has been a consequence of use of the Coast to Coast public footpath and so to be disregarded for the reasons set out in para 7.2.1 above. Similarly claims of picnicking, sunbathing, book reading and nature studies whilst in themselves likely to be lawful sports and pastimes may all have been consequent upon the use of the Coast to Coast footpath even where perhaps the people concerned strayed off the precise route and so despite meeting this criteria fall to be disregarded in this case.

7.3.2 In its objections the landowner whilst appreciating the that the informal playing of football would in itself constitute a lawful sport and pastime the playing of formal matches(by Richmond Town FC or other formal matches that it might allow to take place) would not amount to a use to be taken into account. This is correct but it is not apparent that the TVG Application places any reliance on the playing of formal matches as evidence. Informal football is indicated as claimed by many of the witnesses but like much of the evidence it is not possible to form a clear view on the intensity, extent and consistency of the use across the application site and over the relevant 20 year period based on the witness claims in their current format.

7.3.3 The landowner raises the issue that it is not possible to determine whether or not the claimed birthday parties do or do not amount to a lawful sport or pastime in the absence of detailed evidence. The number of claims referring to birthday parties is not particularly significant and so the issue of whether or not overall the "*lawful sports and pastimes*" criteria is satisfied by the TVG Application is unlikely to hinge on the issue of the claimed birthday parties.

7.4 **period of at least 20 years**

7.4.1 The uses claimed in the TVG Application are said to have ceased in 2008 following the erection of timber rail & mesh fencing on the site (this should not to be confused with metal barrier fencing around the marked out football pitch within the TVG Application Site). It appears to be common ground between the Applicant and the landowner that the fence was completed in December 2008.

7.4.2 Consequently it would appear that the TVG Application must demonstrate that the criteria set out in section 15(3) of the Act have all been satisfied at least in respect of the twenty years dating back to December 1988.

7.4.3 A spreadsheet summarising the user evidence submitted by the Applicant is attached as **Appendix 10**. Taken at face value the witness letters and pro forma indicate a broad familiarity with the TVG Application Site by a large proportion of the witnesses over the relevant twenty year period. There is however only very limited information contained in the letters and pro forma on the claimed frequency and consistency of use during that time. This prevents reaching a fully informed conclusion on whether or not the claimed use has been satisfactorily consistent and intense over the 20 years. The landowner challenges whether it has been.

8.0 DECISION MAKING

8.1 The decision whether or not to approve the TVG Application and so register the land concerned rests with the County Council in its role as a commons registration authority. In doing so it must act impartially and fairly.

8.2 It is not relevant to consider the merits or otherwise of the land being (or not being) registered. The County Council must direct itself only to whether or not all the criteria set out in section 15(3) have been met.

8.3 Any challenge by an interested party to the way the County Council reaches its decision would be by way of a Judicial Review.

8.4 Government guidance contained in the DEFRA "Guidance Notes for the completion of an Application for Registration of Town or Village Greens outside the pilot implementation areas" advises intending applicants that a commons registration authority may decide to hold an inquiry into an application to establish and properly test evidence. Such inquiries have become known as "non statutory inquiries". The Guidance points out points out :

"*the Court of Appeal has ruled that in determining applications where there is a dispute the registration authority should consider convening such a hearing or inquiry.*"

and goes on to say :-

"A hearing or inquiry is particularly likely if the registration authority or another local authority owns the land, so that the evidence may be tested impartially."

In the case of the land at Earls Orchard the application site is owned by "another local authority".

8.5 Further, the Courts have suggested that where there is serious dispute the procedure of conducting a non statutory inquiry through an independent expert should be followed "*almost invariably*".

8.6 The procedure is widely used by commons registration authorities across the country. In summary an inspector (usually a barrister with recognised specialist knowledge of in this area of law) is appointed to hold an inquiry. Having conducted an inquiry the inspector will prepare a report including recommendation.

8.7 Inquiries provide opportunity for interested parties on all sides to fully explain, explore and test relevant evidence and so ultimately help an authority to arrive at a fully informed decision.

8.8 The decision as to whether or not an application is approved ultimately rests with the commons registration authority. At the end of the day discretion as to how to proceed in the case of land at Earls Orchard, Richmond rests with the

County Council.

9.0 RECOMMENDATIONS

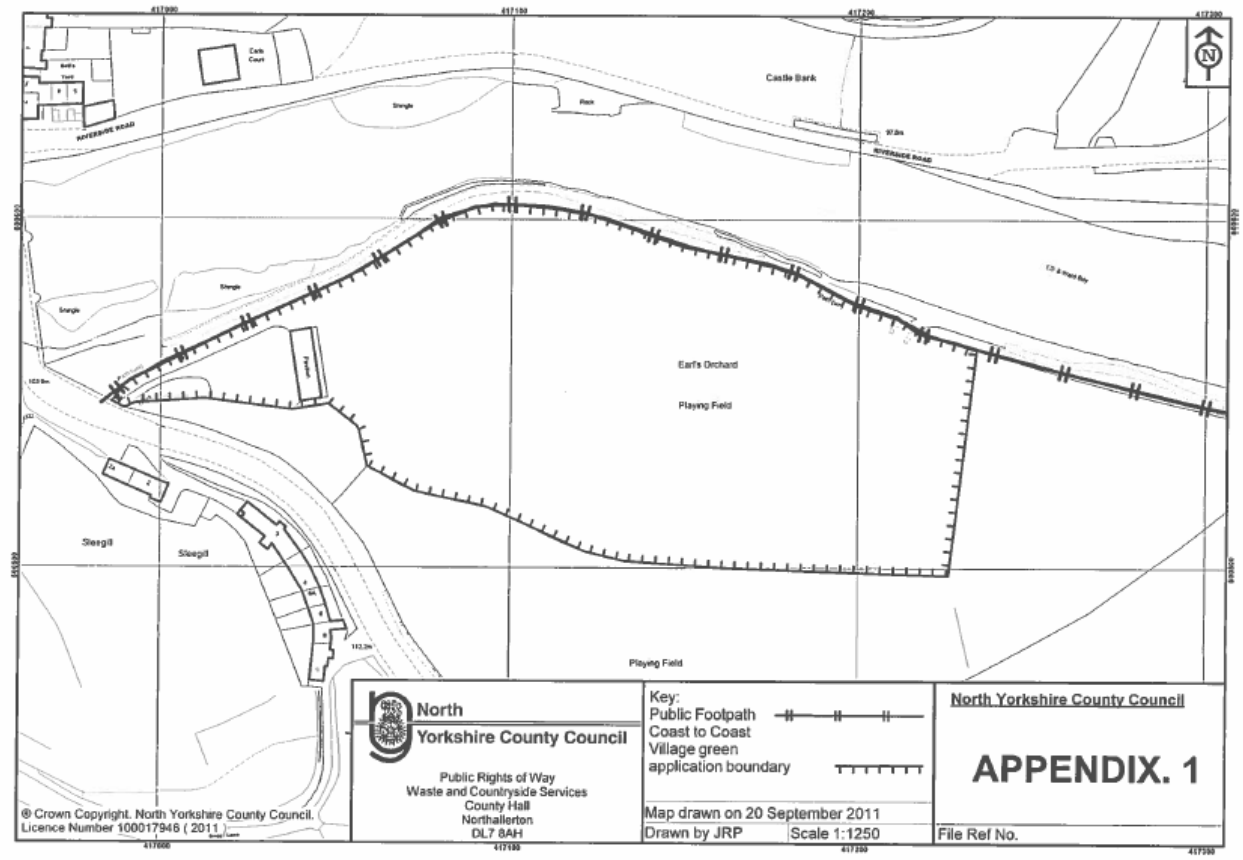
9.1 In view of the serious dispute that exists between the interested parties and with particular reference to the approval of the courts to the practice by commons registration authorities of holding inquiries in cases not suitable for a determination by reliance on written submissions alone and also with reference to the government guidance concerning applications affecting land owned by a local authority it is recommended that the Corporate Director (Business & Environmental Services) with advice and guidance from the Assistant Chief Executive (Legal & Democratic Services) be authorised to appoint an independent expert to conduct a non-statutory inquiry and to then prepare a report to assist the County Council in determining the application.

9.2 Following receipt of the expert's report, that a further report be presented to this Committee to enable it to determine the application.

DAVID BOWE
Corporate Director Business & Environmental Services

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

Contact: Doug Huzzard / Chris Stanford


Castle Bank
Earl's Orchard
Playing Field
Sleegill
Sleegill
Playing Field
North
Yorkshire County Council
Public Rights of Way
Waste and Countryside Services
County Hall
Northallerton
DL7 8AH
Key:
Public Footpath
Coast to Coast
Village green
application boundary
Map drawn on 20 September 2011
Drawn by JRP
Scale 1:1250
File Ref No.
North Yorkshire County Council
APPENDIX. 1
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NORTH YORKSHIRE COUNTY COUNCIL

PLANNING AND REGULATORY FUNCTIONS COMMITTEE SUB- COMMITTEE

Minutes of the meeting held on 25 November 2011, commencing at 10.00 am at Catterick Leisure Centre, Catterick Garrison.

PRESENT:-

County Councillors John Blackburn, Robert Heseltine, Bill Hoult and Cliff Trotter.

Officers Jane Wilkinson, Simon Evans and Lee Humphrey (Legal and Democratic Services and Doug Huzzard (Business & Environmental Services).

Also present County Councillor Melva Steckles and Martyn Richards (Head of Legal Services Richmondshire District Council).

20 members of the press and public were present.

45. APPOINTMENT OF CHAIRMAN AND VICE-CHAIRMAN FOR THE MEETING

RESOLVED –

That for the purposes of this meeting County Councillor Bill Hoult be appointed Chairman and County Councillor Cliff Trotter be appointed Vice-Chairman.

COUNTY COUNCILLOR BILL HOULT IN THE CHAIR

COPIES OF ALL DOCUMENTS CONSIDERED ARE IN THE MINUTE BOOK

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46. MINUTES

RESOLVED -

That the minutes of the meeting held on 7 October 2011, having been printed and circulated, be taken as read and be confirmed and signed by the Chairman as a correct record.

47. PUBLIC QUESTIONS OR STATEMENTS

County Councillor Bill Hoult said that 12 people had formally registered to speak at the meeting on the Earl's Orchard Field application. He confirmed that he was aware that County Councillor Melva Steckles would also like to speak on this item. The Chairman indicated that each speaker would be limited to three minutes and be given the opportunity to speak following presentation of the report by County Council Officers.

48. LAND AT EARL'S ORCHARD FIELD, RICHMOND - APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN

CONSIDERED –

The report of the Corporate Director Business & Environmental Services informing Members of an application to register an area of land at Earl's Orchard Field, Richmond as a Town or Village Green. The application site owned by Richmondshire District Council is subject to a lease to Richmond Town Football Club. A location plan was attached to the report. The County Council is the Commons Registration Authority and therefore responsible for determining the application.

Also appended to the report was a full copy of the application, together with supporting evidence submitted by Applicant and the objections received in response. The relevant legislation and the determining criteria to be applied under the Commons Act 2006 were outlined in the report. Because of the conflicting evidence that had been submitted and on account of the serious dispute that existed between the parties the report recommended that a non-statutory public inquiry be held.

The matter had been reported to the Richmondshire Area Committee for information and the report had been noted.

Introducing the item County Councillor Bill Hoult explained that he would first call upon Doug Huzzard the County Council's Highway Asset Manager to speak to outline the report before hearing speakers from the floor who had given advance notice of their intention to speak at the meeting.

Doug Huzzard gave a powerpoint presentation comprising of photographs of the application site. He then summarised the application, supporting evidence and objections received. He emphasised to Members the strict criteria that had to be applied to all of the evidence when making a decision. He said it was difficult to ascertain with any certainty if those people claiming to have walked dogs had been doing so as a consequence of using the public footpath along the riverside edge of the field. He confirmed that many of the claimed activities did on the face of it constitute 'lawful sports and pastimes'. Correspondence from Richmondshire District Council and Richmond Town Football Club indicated that use of the land had been 'by right'. Members were directed that where evidence was immaterial and should be disregarded and where it was based on the merits of the land being used either as or as not a village green. The conflicting views and lack of clarity of evidence was the reason officers were recommending the appointment of an independent expert who would then conduct a non-statutory inquiry. Members were told that an independent expert would be able to examine the evidence in detail and cross-examine witnesses.

The Chairman then invited County Councillor Melva Steckles to address the meeting.

County Councillor Melva Steckles declared a prejudicial interest in the application as it affected the financial position of Richmondshire District Council and she was also a district councillor of that local authority. She stated that she would use her right to address the Committee as a member of public for three minutes and would then withdraw from the room and take no further part in the proceedings.

County Councillor and Richmondshire District Councillor Melva Steckles addressed the Committee and spoke in opposition to the application. She said that the appointment of an independent expert would result in the County Council and Richmondshire District Council having to pay legal costs of approximately £20,000 at a time when both authorities faced significant budget cuts. She invited the Sub-Committee instead to determine the application that day and to reject the application.

Mr Derek Clark, Mr Raymond Clark, Mr Arthur Smith, Mr Ian Short and Mr Barry Denny addressed the Sub-Committee and spoke in favour of the application. Comments included:-

- Outlined details about the history of the application site.
- Details of their personal activities on the application site for a period in excess of 20 years.
- Not opposed to the playing of football on the site but objected to being denied access.
- Alternative walking route not suitable for the elderly and/or disabled.
- Statements that before the fences were erected, access to the site was not challenged.
- Don't class fences as temporary as only removed one month in year.
- Claims that a significant number of local inhabitants have used the site as community open space.
- When river is in flood the width of the public footpath is reduced.
- Concerns about the safety of children playing in close proximity to the river.
- Local inhabitants are responsible dog owners and problems with dog fouling on the site are due to visitors and outsiders.
- Invited the sub-committee to approve the application that day based on the evidence in the report and oral evidence given at the meeting.

Simon Evans, legal officer reminded Members that the criteria stipulated that 'use must be as of right for a period of at least 20 years'. The events that had occurred after the fences had been erected on the site were not relevant nor were issues surrounding dog fouling. Members were advised that it was possible that where the relevant criteria had been met on some but not all of the application site then a commons registration authority could determine to register only that part of the site. In the past there had been instances where an application had resulted in only partial registration of the land applied for because it had been held there was no evidence to support registration of the entire site.

Mr Martyn Richards, joint Head of Legal Services, Richmondshire & Hambleton District Councils addressed the Sub-Committee and spoke in opposition to the application. He said that as the landowner, Richmonshire District Council objected to the application. He referred the Sub-Committee to the written representations submitted by the District Council, and said that the District Council did not support all of what was said in the review of evidence in the County Council's report but was however satisfied with the recommendation. Richmondshire District Council did he said support the appointment of an independent expert to conduct a non-statutory public inquiry because the application required a quasi judicial setting in which to test the evidence. The application was clearly contentious and limiting members of the public to only three minutes speaking time was insufficient. The cost of instructing an independent expert was not relevant.

The Chairman asked Mr Richards if Richmondshire District Council was now able to confirm the power under which the land was purchased and now held. Mr Richards replied that a search of the District Council's records had to date revealed no information on this point and he was not optimistic of anything coming to light.

Mr James Conway, Mr Stephen Andrew, Ms Linda Blackburn, Parish Councillor Shirley Thurbon and Mr Oliver Blease addressed the Sub-Committee and spoke in opposition to the application. Comments included:-

- Statements that prior to the village green application being lodged they had challenged people regarding access to the site.
- Confirmed support for the stance adopted by Richmondshire District Council.
- Invited the Sub-Committee to dismiss the application that day.
- Richmond Town Football Club very keen to engage with the local community.
- Confirmed that fences erected due to problems with dog fouling and in order to comply with football league rules and to stop pitch from being damaged.
- In past application site used for grazing sheep and public had no access.
- The remains of a stone wall on the site demonstrated the historic separation of public access.

The Chairman then read out a letter from Emma Gruffyd (not present at the meeting) in support of the application that had been handed to the clerk. Copy placed in the Minute Book.

Members asked a number of questions and sought clarification of the evidence they had heard from speakers both for and against the application.

The Chairman said that after listening to the speakers that day it was clearly an emotive subject and he was in no doubt about the strength of public feeling. The crux of the matter was usage of the land in the period December 1988-2008. A lot of the oral evidence given that day was he said not relevant. The Chairman read out the determining criteria and sought comments from other Members.

County Councillor Robert Hesletine said that the evidence was far from clear. He had read the documentation and listened to the oral submissions and there were clearly conflicting views. He referred to the report and precedent set by previous decisions which recommended the appointment of an independent expert to conduct a non-statutory inquiry. He said that it was important that justice was seen to be transparent and efficient. The use of an independent expert and the cost of that expert whilst not material to the application did come at a cost. He said he was unable to determine with any accuracy what rights existed in the relevant period and urged all parties to try and come to a mutual agreement. County Councillor Hesletine moved the recommendation and in so doing noted that there was no right of appeal to the Council's ultimate only application for Judicial Review.

County Councillor John Blackburn supported the comments made by County Councillor Hesletine. He said that he would have like to have made a decision that day but after listening to the evidence and reading the papers was unable to do so and agreed that the appointment of an independent expert was correct in the circumstances.

The Chairman said that the application was not about the merits of dog walking or football. Determination of the application would require a thorough exploration of all relevant issues which was why he supported the report recommendation.

RESOLVED –

That the Corporate Director (Business & Environmental Services) with advice and guidance from the Assistant Chief Executive (Legal & Democratic Services) is authorised to appoint an independent expert to conduct a non-statutory inquiry into the application to register land at Earl's Orchard Field, Richmond as a Town or Village Green.

That following receipt of the report from the independent expert, a further report inviting the County Council to determine the application to register land at Earl's Orchard Field, Richmond as a Town or Village Green is referred to the NYCC Planning and Regulatory Functions Sub-Committee.

The meeting concluded at 11.40 am.

JW/ALJ

Appendix 2

APPLICATION BY DEREK GEORGE CLARK UNDER SECTION 15(3) OF THE COMMONS ACT 2006 TO REGISTER LAND AT EARLS ORCHARD, RICHMOND, NORTH YORKSHIRE AS A TOWN OR VILLAGE GREEN

INSPECTOR'S REPORT TO THE COMMONS REGISTRATION AUTHORITY

Commons Registration Authority
North Yorkshire County Council
County Hall
North Allerton
North Yorkshire
DL7 8AD
Ref: 103023/SE

CONTENTS

SUMMARY

S1. The Applicant, Mr. Derek George Clark, seeks registration of Earls Orchard Field ("the Application Land") as a town or village green ("TVG") under section 15(3) of the Commons Act 2006. The Applicant has to demonstrate on the balance of probabilities that the criteria within section 15(3) are met.

S2. The Application Land consists of an open grassed area (now permanently fenced along one side) lying to the south of and adjacent to the River Swale, with Richmond Castle situated to the north. The Coast to Coast path (a public right of way) lies between this fence and the river.

S3. The Application Land, over which the Applicant claims there has been use for lawful sports and pastimes ("LSP"), has been and remains used as a football pitch (with a pavilion) by Richmond Town FC, which leases the Land from the freehold owner, Richmondshire District Council ("the Objector").

S4. The Applicant has not demonstrated that the claimed neighbourhood is of a sufficiently cohesive quality to satisfy section 15(3).

S5. It has been sufficiently demonstrated that a significant number of people have used the land for LSP. However, even if the neighbourhood criterion had been satisfied, it has not been demonstrated that a significant number of inhabitants from that neighbourhood have used the whole of the Application Land throughout the relevant period for LSP. That is because of the regular exclusion from parts of the Land by other activities during the relevant period, in particular those of the Football Club.

S6. Moreover, and in any event, any qualifying use for LSP has not in the circumstances been "as of right".

S7. Accordingly, this Report concludes that the Application does not satisfy the criteria within section 15(3).

S8. The recommendation to the Registration Authority is, therefore, that Mr. Clark's Application to register Earls Orchard Field TVG should be refused.

1. INTRODUCTION

1.1 I am instructed by North Yorkshire Council in its capacity as the Registration Authority ("the Registration Authority") for the purposes of the Commons Act 2006 in respect of the application by Derek George Clark under section 15 of the Commons Act 2006 (the Application). The Application was dated 15th December 2009 but date stamped as received by the Registration Authority on 26 February 2010. By the Application Mr. Clark seeks to register land, stated in the application form to be usually known as Earls Orchard, Richmond as a town or village green (TVG).

1.2 My instructions from the Registration Authority were to hold a non-statutory public inquiry to consider the evidence and submissions relied upon by the Applicant and the Objector and to report on these with a recommendation as how to determine the Application.

The Inquiry

1.3 Accordingly, I held an Inquiry in the Catterick Leisure Centre, Gough Road, Catterick Garrison on 16th, 17th and 18th July 2014. Directions were provided prior to the Inquiry, giving guidance on the submission of evidence and documents and on the procedure proposed for the Inquiry. The parties provided the evidence (including supporting documentation) in advance of the Inquiry as required by those Directions, for which I am very grateful. Some additional documents were provided by each party at the Inquiry, as recorded later in this Report.

1.4 The Applicant, who gave evidence, was assisted at the Inquiry by his brother, Mr. Raymond Clark, who also gave evidence. They called seventeen other witnesses in support of the Application. The Applicant also relied upon other witness statements and documents, as detailed in section 3 of this Report.

Objections

1.5 The Application was originally objected to by:

(1) Richmond District Council, the freehold owners of the land.

(2) Richmond Town Football Club the lessees of the land.

(3) Mrs. L Blackburn, who gave evidence at the Inquiry on behalf of the District Council.

(4) Mr. and Mrs. J Clarke.

(5) Mr. J Conway, who also gave evidence on behalf of the District Council at the Inquiry.

(6) St. Martin's Parish Council.

The District Council was the only party that appeared as an objector at the Inquiry. Consequently, this Report focuses mainly on the Council's objection to the Application. However, the other original objections have been taken into account, as has the Applicant's response to the objections.

1.6 The District Council was represented by Jonathan Easton of Counsel. Mr. Easton called six witnesses, as detailed in section 4 of this Report. He also relied upon other witness statements and documentation.

Site Visits

1.7 I visited the site and the surrounding area prior to and during the Inquiry. I carried out an accompanied site visit after the close of the Inquiry on Friday 18th July 2014. Those visits re-enforced the historical context of this site, which lies adjacent to the River Swale and to the south of the impressive Richmond Castle, which is of course steeped in history as well as being a key element in this part of Richmond. As one leaves the main part of Richmond on its southern aspect and crosses over the Swale on the Richmond Green Bridge, the Application Land lies to the left and can be accessed off Sleegill.

The Statutory Basis of the Application

1.8 There was some initial confusion over whether Mr. Clark's application was made under section 15(2) or (3) of the Commons Act 2006. Although section 4 of the Application Form ticks the section 15(3) box, the supporting statement (as pointed out in paragraph 2 of the District Council's Outline Submissions) relies upon section 15(2). However, it seems clear to me, and this was not disputed by the District Council at the Inquiry, that it was only appropriate in the circumstances to deal with the Application as made under section 15(3). That is the basis upon which the Application was considered at the Inquiry and is considered in this Report. In my view, no one has been prejudiced by dealing with the Application on that basis and I would advise the Registration Authority to do so also.

1.9 The statutory framework is dealt with more fully in section 5 of this Report. However, at this stage it should be noted that section 15(1) provides (as applicable to this application) that:

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

Subsection (2) applies where-

(a) A significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) They continue to do so at the time of the application.

Essentially this provision allows for the registration of land as a TVG where an Applicant can demonstrate qualifying recreational use of the land for at least the twenty-year period up until the date of the application.

Subsection (3) applies where -

(a) a significant number of the inhabitants of any locality, or of any

neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

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

The Scope of the Inquiry

1.10 As I made clear at the Inquiry, there are two important characteristics of public inquiries considering TVG applications. First, the Inspector's role is to consider whether the Applicant can demonstrate on the balance of probabilities that the statutory criteria within section 15 of the Commons Act 2006 are met by the Application. The relative merits of the claimed recreational use relied upon by the Applicant and the use for football and the fencing erected are not relevant as to whether section 15(3) is complied with and I have not taken that consideration into account.

1.11 Secondly, my role is limited to considering the evidence and submissions against the statutory criteria and making a recommendation to the Registration Authority as to the determination of the Application. That is important for two reasons:

(i) The actual decision of whether to register the land or not is for the Registration Authority, taking into account my Report and recommendation. However, I recognise that the role of a non-statutory inquiry held by an independent Inspector is important in assisting the Authority in objectively assessing whether the statutory criteria are met by the Application.

(ii) I am conscious that the Applicant is highly critical of certain actions of the Council relating to the Council's proposals for the use of the land and how in certain respects the Objector has responded to the TVG application. However, those matters lie outside my remit and the remit of the Registration Authority under the statutory regime applicable.

The Structure of the Report

1.12 The remainder of this Report is now set out as follows:

2. THE APPLICATION & APPLICATION SITE
3. THE CASE FOR THE APPLICANT
4. THE CASE FOR THE OBJECTOR
5. ASSESSMENT AND CONCLUSIONS
6. RECOMMENDATION

1.13 However, before addressing those matters, I would like to record my thanks to the Applicant, to his brother and to Mr. Easton. I am grateful for the way in which they conducted themselves, presented their cases and the courtesy shown, and the unstinting assistance given, to me by all. I also extend that gratitude to each of the witnesses who gave evidence at the Inquiry. Of necessity, a certain amount of probing of their evidence is required in an Inquiry of this nature but I am aware that, particularly for those unused to such questioning, this can sometimes feel intrusive. So, I appreciate the assistance provided by all of the witnesses, as that has helped me to understand the evidential basis of the cases being presented on behalf of the Applicant and Objector. In addition, the parties and I were very greatly aided by Mr. Simon Evans and Mr. Chris Stanford on behalf of the Registration Authority. Their assistance to all of us was very much appreciated and greatly assisted in the preparations for, and efficient running of, the Inquiry.

2. THE APPLICATION

2.1 The Application (reference NEW VG52) was made by Mr. Derek George Clark of 3 Bridge Street, Richmond pursuant (as clarified above) to section 15(3) of the Commons Act 2006. It was stated that the use as of right ended in December 2008.

2.2 The Application was made on Form 44, dated 15 December 2009 and stamped as received by the Registration Authority on 26 February 2010.

2.3 In section 5 of the Form, it is stated that the name by which the land is usually known is Earls Orchard Field. Its location is given as:

"Adjacent to Richmond Bridge and Sleegill Richmond South Bank of River Swale, St. Martin's parish, Hipswell Ward."

The Application site is stated to extend to approximately 1.59 hectares (3.9 acres).

2.4 Section 6 of the Application Form asks for the locality or neighbourhood within a locality in respect of which the application is made. This is given as:

"Bridge Street
The Green
Bridge Terrace
Bargate
The Bar
New Road
Sleegill
Riverside Road
The streets are shown in red on the accompanying map."

2.5 The justification for the Application is set out in a covering letter. The main relevant points in that letter are in summary:

(1) Generations of people have used this field for recreation, sports and pastimes (a photograph from 1885 showing the access to the area and two men greeting each other is referred to). There is also a photograph taken in 1988 showing Mr. Clark playing on the field with his son and a friend. The Applicant also refers to a photograph from the same year showing organised events (the

Richmond Whitsuntide Meet Sunday and an Army Display) and says that this shows that this field has always been used as a community facility which itself encourages others to use the area.

(2) The current leaseholders of the field, Richmond Town Football Club, have been rather ambiguous in their reasons for fencing off the field. The excuse they are relying on is alleged dog fouling on the field. However, this is unsubstantiated. The original reason for the fencing-off the of the field was that a scaffolding fence was required for crowd control and to comply with the league rules, however this is totally untrue as the league only requires "the pitch to be roped off".

(3) Football has always taken place on this field (during the applicant's lifetime) and there has never been any problem.

(4) Use of the land by local people "as of right", can be established by referring to statements 1 to 53, the authors of which make it very clear that they have taken part in lawful pastimes, leisure activities, lawful sports etc for a minimum of 20 years and continue to do so by some of those people up to the date of this Application.

(5) The demographic of the area may have prevented more statements from being submitted, as it has typically been inhabited by an ageing population and has increasingly become populated by younger families and those commuting to nearby urban areas, who may not therefore have enjoyed the use of the field in the same manner as many other local inhabitants. Many local people who enjoyed the field for 20 years or more have moved away, are very elderly and in care homes or are sadly no longer with us. Others however, with nearly 20 years of use of the field, have moved in and continued to use it and will do so again, if this application is successful.

(6) Football can co-exist with other pastimes as it has for many years and does in other areas, the issue of dog fouling is not the problem they are making it out to be.

(7) The lawful sports and pastimes ("LSP") that have been carried out on the land include – football, golf practice, kite flying, bicycle riding, picnics, jogging, tennis, daily walking for exercise, model aeroplane flying. Family cricket matches, throwing Frisbees, exercising and training dogs, sunbathing and snowballing. These uses have taken place without the need for any prior permission.

(8) Earls Orchard Field has always been a place where people would meet and pass the time of day and has always been a safe place for children to play. For approximately three hours football a week the local residents have been denied a public facility.

(9) The field has been used without permission, or the need to climb fences or open gates. The field has just been open for use.

(10) The Earls Orchard Field Study Centre (run by Durham Education Authority) overlooks the field and the children from there have used the field for study and recreation for over thirty years "as of right".

2.6 The Application was also supported by:

(1) A football club lease dated 11 April 2006
(2) Statements in support
(3) Note of Earls Orchard Sports Field Meeting held on 23 September 2008
(4) 15 sheets of photographs
(5) Press cutting from the Darlington Stockton Times and The Northern Echo and related correspondence and an archaeological study of Richmond by A. Tyler

2.7 The Applicant replied to the objection made by the landowners on the 29 November 2010. The reply was supported by letters of support/statements of truth and photographic evidence. The main points arising from this reply are:

(1) The locality or neighbourhood has been clarified with the Registration Authority. "The Green" as a locality is well known in Richmond both as a locality and also as a neighbourhood; historically it is the oldest part of the town – it is seen in the Archaeological Study of Richmond by A Tyler. "The Green" and surrounding streets form part of a locally accepted neighbourhood. It includes the streets connecting to it i.e. Bridge Street, Bargate, New Bargate, The Bar, Cravengate, Riverside Road, Sleegill. Located outside of the ancient castle outer bailey, it is in the base of the town's river valley, adjacent to the river Swale. It makes up the outskirts of the south-west of the town, flanked on one side by woodland, another by open farmland and the river to the south. The only paved pedestrian access to the centre of Richmond is via one road, Bridge Street.

(2) It would seem inconsistent to believe that the land was being used "by right" if the landowner did not know whether the land was owned at the time or not, and wholly inconsistent to believe that members of the local community would know who owned it at that time either. Therefore, those using the land must have used it "as of right".

(3) Formal football has only been undertaken by the leaseholders, Richmond FC and other recognized football clubs, by their permission. It forms no part of the Application.

(4) The use for any other activity over the years is "as of right" - "No gates to open, no fences to climb or break down, just an open space for use by local people and visitors to the area, from a variety of access points around the field".

(5) All activities, including dog walking have taken place across the whole field and not just along the footpath.

(6) Referring to *Alfred Mcalpine Homes Ltd v Staffordshire County Council*, the number of statements presented with the Application show that a high proportion of the local community did indeed use the field for lawful sports and pastimes and therefore would qualify for that particular part of the application. Additionally, there were a number of other people who did not give statements (council tenants scared of repercussions and others who work for the council and were worried about submitting anything against the council).

2.8 The Application was considered by the Planning and Regulatory Functions Sub-Committee of the County Council on 25 November 2011. This resolved that in view of the serious dispute that exists between the parties the Application should be considered at a non-statutory inquiry held by an independent expert, who would then prepare a report to assist the County Council in determining the application.

3. CASE FOR THE APPLICANT

3.1 At the Inquiry the Applicant clarified the claimed neighbourhood by yellow shading on an OS plan (Applicant's Inquiry Document 1). He also provided:

(1) A calendar picture for October 1998 showing the Application Land against the backdrop of Richmond Castle (this had been included in the documentation with the Applicant's reply to the Objector).

(2) A photograph taken from the east looking west with the Bridge in the middle ground and the western part of the site to the left (this had been included with the Applicant's reply too). This photograph was stated to have been taken in the "very early 1970s" and that would be prior to the erection of the existing pavilion (in 1975), as

it shows the previous farm buildings on that part of the Application Land.

(3) Photograph sheets A to E showing the celebration of the Queen's Silver Jubilee taking place on the Application Land in 1977. I note that some of these show the pavilion.

3.2 In the previous section of this Report, I have summarized the Applicant's justification for registration of the Land that accompanied the Application and his reply to the Objectors. In his Inquiry Bundle ("the Applicant's Bundle") the Applicant also provided:

(1) Fifty-eight statements (behind the Yellow Tab), together with a list of these with an indication of which ones had been updated from the previous version supplied with the Application.

(2) Twenty-eight letters of support (behind the Green Tab).

(3) Additional photographs (behind the Pink Tab).

3.3 In his Outline of the Case and Opening Speech, the Applicant made the following points:

(1) For the last forty years plus, the Applicant and his family and many other local people have had unrestricted access to Earls Orchard field as far back as when it was still a farm field in the 1950s and grazed by cattle. As children, they would play there with bows and arrows, fly model aeroplanes, fly kites, shoot air guns, play ball games. Use of the field was a normal daily activity for the children and people of the area; it is not a recent thing.

(2) The use of the field for leisure activities has gone hand in hand with football being played there without any problems and on many occasions they have had conversations with members and officials of the club and never at any time have they been asked to leave nor had any problems. Indeed local people would often clean up the mess after football matches.

(3) The field itself was originally the jousting field for the Castle. It is the only flat area in the locality.

(4) The Coast to Coast walk is a relatively new activity brought into being by Alfred Wainwright in the mid 1970s, so is not really a relevant point. The right of way was established hundreds of years ago as it led from St. Martin's Priory to the river crossing somewhere near to where the bridge stands today.

(5) The transfer of the land includes a covenant that clearly states that the purchasers should not allow any building on the field and that they should preserve the field as OPEN (the Applicant's emphasis) field for use as a football field or a sports field for the benefit of the inhabitants of Richmond and the Rural District of Richmond. The Applicant is convinced that when the covenant was put in to the document it would have been intended to allow football to carry on being played and also any local inhabitants to carry out any type of sporting activity, hence the "OPEN FIELD" statement (again, the Applicant's emphasis).

(6) The Green was originally called Bargate Green and the locality or neighbourhood encompasses The Green, Bridge Street, Bridge Terrace, Cornforth Hill, New Road, Bargate, Cravengate and Riverside Road. Many people living in Sleegill see themselves as part of the community also. There were many businesses in and around the Green - there was a public house called the Brewery, so called because there was also a local brewery, a fish and chip shop, two general dealers, a coal merchant, a fish monger, a cake shop, an antique shop, a grocers shop half way up Bridge Street, another public house above that, a shoe shop, another general dealers shop, with a public house attached. It is modernity that has altered the way people shop and so caused the demise of these businesses; it has not however destroyed the neighbourhood.

(7) Earls Orchard has been a social meeting place for many elderly people, people who find it difficult to walk in the woods or are too

afraid to walk alone in the woods. Earls Orchard has offered a safe haven for recreation.

(8) We intend to prove with this hearing that people have used this land as of right for more than 20 years for the purpose of lawful pursuits and pastimes, and if successful will demand the removal of those ugly fences and restore that lovely field to what it was before it was vandalized and defaced by RTFC and Richmondshire District Council.

3.4 The following witnesses gave evidence at the Inquiry in support of the Application:

Mr. B Nash of 10 The Green
Mrs. Elisabeth Kluz of 8 Conforth Hill
Mr. Arthur Smith of 20 New Road
Mr. Richard Almond of 3 Lombards
Mr. Dan Gracey of 4 Bridge Street
Mr. Derek Clark (the Applicant)
Mr. J Smith, Sleegill
Ms Nicola Clark of 1 Bridge Street
Ms. Sarah Clark (Mrs. Salonga)
Mr. Gordon Golding of 2 Bridge Street
Mr. John Embleton of 9 Holly Hill for 13 years (previously in Reith Road)
Mr. Mark Humble of 30 The Green
Mr. Raymond Clark (the Applicant's brother) of 1 Bridge Street
Mrs. C Donaldson of 13 Tower Street
Ms Emma Gruffydd of 11 The Green
Mrs. Vera Holmes of 5 Alan's Court
Mrs. Karen Tiller of 20 Bargate
Mr. Ian Short of 8 The Green
Mrs. E P Bagley of 3 Cornforth Hill

3.5 Given the relatively narrow scope of the factual issues, I do not consider it necessary in this case to provide a detailed record or analysis of each of the witness' evidence. For the reasons set out in section 5 below, I largely accept most of that evidence and indeed rely upon much of it to reach the conclusions that I do on the issues. The key features of the evidence in support of the Application are the following:

(1) None of the witnesses was asked to cease using the land before the fence went up at the end of 2008 e.g.

Mr. Nash, a miner from Nottingham – he had retired in 1987, although he hasn't lived permanently in the area, but has used his cottage at 10 The Green as a second home since 2001 (which he and his wife visit every month for at least a week at a time) – prior to that he bought a property which they owned from 1987-2000 and visited at Christmas and other times, 2 or 3 times a year for at least a week at a time.

Mr. A Smith of 20 New Road said that he had never been asked to leave the Land by any "official".

None of the Applicant's witnesses said that their use of the land was challenged. The only exception was that the Applicant himself was faced by a man who tried to stop him going through the stile on the left hand side of the gate as you go onto the field (when no game was taking place). However, the man relented when Mr. Clark told him that this was a public right of way.

Mr. Golding who said his children played on the Land – football, kites.

(2) Many of the witnesses said that they used the whole of the Land for recreational purposes (e.g. **Mrs. Kluz, Mr. Almond, Mr. J Smith,** who lives on Sleegill opposite the entrance to the "football field"). **The Applicant** gave evidence that he had used it for 50 years – before the conveyance came to light. **Mrs. Bagley** said that she used all of the land and she was never challenged in doing so or asked to leave.

(3) Many of the witnesses referred to seeing others using the Land – e.g. **Mrs. Kluz** referred to children and to picnics taking place; **Mrs. Salonga** (under cross-examination), **Mr. Almond** referred to picnics and families on the land. **Mr. J Smith** referred to informal football, Frisbee, golf played by others. He referred to divots caused by the golfers. He also referred to his son, who played as a junior for the Club, riding his bike on the land. **Mr. Short** referred to the playing of rounders on the Land. He also said that he used the land all year round, although he said (in re-examination) it was busier in the summer.

(4) There were no signs prohibiting or purporting to prohibit their recreational use of the land during the relevant 20-year period. Various activities were referred to – e.g. **Mr. Almond** referred to a preponderance of picnics; children and parents in the summer outside the football season. Mr. Almond said the use was very seasonal. **Mrs. Salonga** referred to walking on the land, riding bikes, tennis (especially after Wimbledon). **Mrs. Donaldson** (who lived at 13 Tower Street since 1999, outside the claimed neighbourhood, having lived in Millgate from 1992) said that the land was always wide open; she was never challenged; she walked all over the whole field, mainly exercising the dog; and never had to climb a fence to get in. She used the field as part of a walk that included the meadows. She occasionally saw Mr. Marshall but was never challenged. **Ms Gruffydd** also said that she would see Mr. Marshall but he had never asked her to leave – she said that she always picked up her dog's mess.

(5) Many of the witnesses said that they would walk around the pitch and avoid interfering with the game or, in some cases, not go onto the Land if a football match was taking place.

Mr. J Smith who said under cross-examination that he wouldn't go onto the field and disrupt training or a football match;

Mrs. Salonga who said that she would avoid matches by going around the edge of the field. Indeed, it became clear as the evidence

proceeded that the pitch would often be roped off, with ropes on posts about a metre from the edge of the pitch. Mrs. Salonga said that it would depend upon how many spectators there were watching a match as to whether she would walk her dogs on the Land at that time – the more spectators there were the less likely it was. She could use the Landscape trust land. **Mr. R Clark** (under cross-examination) confirmed that ropes were used – he thought that they followed the white lines but agreed that they would map out the area where spectators were not supposed to go. Mr. Clark agreed "absolutely" that he would respect the ropes and not take his dog onto the pitch – Mr. Clark said that he had a dog all his married life i.e. 42 years. **Mrs. Donaldson** said that she would stick to the path and go around the ropes when they were in place – she said (when the Inspector sought clarification) that it wasn't an actual path but part of the field and that it had become more of a path since the fence had been erected. **Mrs. Bagley** agreed (under cross-examination) that ropes were placed all the way around the pitch during matches.

The Applicant (under cross-examination) said that he had helped Mr. Marshall put ropes around the pitch "for crowd control", which was a league requirement.

Mrs. Kluz said that she wouldn't go onto the land at all if football was taking place. She said that as she recalled this was reasonably regularly (and even when she moved away from the immediate area at the end of 1986 she still used the Land at least three times a week until they moved back in 2007 to her current address). She said (under cross-examination) that she imagined matches were on a Saturday and she didn't regularly go to the Land on a Saturday.

Mr. A. Smith referred to matches on two days a week – every Saturday afternoon and on some Sundays. He also referred to the pre-season matches for example with Darlington – but he couldn't remember whether one had to pay to go in.

Mr. Almond, who has lived in Richmond for 40 years, (but currently outside of the claimed neighbourhood – since 1984) said (under cross-examination) that he had seen many matches since 1974 and that he would keep out of the way of a match that was going on (by going around the perimeter) "out of good manners". He said that traditionally the land was referred to as "the football field", although other games took place on it. He said that there was usually one match per week in the football season.

Nicola Clark said that she wouldn't have avoided the field, if there was a match going on, but would take a different route, including the Landscape Trust Land. Usually when walking the dogs she would take a longer route – at least half of her walks were on Earls Orchards and the other half on the other field.

Mr. Mark Humble (whose use of the land was limited to the period 2004-2008) said he had never had a problem with the football – if the Club said don't walk on the pitch we wouldn't have".

Mr. Short said that he would sometimes go and watch a match on the Land but did not pay to do so.

(6) Some witnesses referred to sponsored pre-season matches (e.g. **Mr. A. Smith** who referred to watching Darlington there in a pre-season match).

(7) Prior to the fencing at the end of 2008, there was nothing that fenced off the coast-to-coast footpath from the Land. This Public Right of Way ("PROW") is marked on OS maps. However, some witnesses (e.g. **Mrs. Kluz**) said that there was no clearly defined footpath.

Mr. A. Smith said that prior to the fencing at the end of 2010 people went "their own way".

The Applicant said in his evidence that there was nothing original about the coast-to-coast walk and this had been identified by Arthur Wainwright in the 1970s but prior to that it was already an ancient footpath used by the monks going down to St. Martin's Priory. The

Council said that the metal fence was put in to guide Coast to Coast walkers down the field. Later on, the Applicant said, it emerged that the true reason was to keep people and dogs off the land.

(8) No one recalled any real change in the way the Land was used over the 20-year period (see e.g. **Mr. Nash's** answer to the Inspector).

(9) All of the witnesses appeared to be aware of the Richmond Meet events, even though some of them avoided it.

Mrs. Kluz accepted (under cross-examination) that if the event was going on she would have avoided it and would have exercised her dog elsewhere.

Mr. Almond staid that he attended events on the Land – Army displays and the Richmond Meet – he said he didn't pay but may have given a donation. He later said (under cross-examination), with regard to the rides, that one probably had to give a donation.

Mr. J. Smith referred to the Army attending the Richmond Meet and being on the Land days before the event "erecting certain things".

Nicola Clark referred to there being a donation bucket for the Meet but not a "fee" to enter. You would pay for refreshments and the funfair part. The Army displays included an inflatable assault course, which she tried years ago.

(10) Some witnesses used or saw others using a diagonal route across the land from the north-west to the south-east, where there was a gate and steps upwards beyond this (e.g. **Mr. A Smith** who moved back to New Road in the middle of the 1980s and was there until he moved away in 2009/10).

(11) **The Applicant** (under cross-examination) said that his impression was that on an average weekday, during the qualifying period, there were more users on the field (walking dogs, "kids playing") than on the PROW – those recreational users (not the walkers on the PROW) were predominantly prior to the fence going up, said the Applicant. **Mrs. Salonga** remembered riding her bike on the Land with her

father. She remembers others on the field. **Mrs. Tiller** referred to her boys having a football kick about on the Land – she said Ronaldsway Park (where she had taken her children too) was a bit restrictive in comparison. She said that Earls Orchard was the only flat area and was precious for the children to play on. **Mr. Short** said that he considered Earls Orchard to be a community facility because so many people used it. He also referred (under cross-examination) to the many events organised by the Council – the Meet, the Army displays.

(12) **Mrs. Kluz**, when asked (by the Inspector) where she lived, said "Cornforth Hill" and when asked where that was added "just up from The Green towards town". **Mrs. Bagley** said under cross-examination that if asked where she lived she would have said Cornforth Hill. **The Applicant** in his evidence in-chief explained in full his reasons for relying upon the area he called "the Green' as his neighbourhood. He explained all the previous businesses that had been in this area and explained that a lot of them are now gone because of the rise of supermarkets as part of modernisation. He said that it had been a thriving suburb. He said that The Green itself was designated a TVG in 2005/6. The Applicant's brother, **Mr. R. Clark**, also detailed the shops there had been on the Green and in the claimed neighborhood – he agreed (under cross-examination) that the allotments were closed when the lady, who owned them, died. He said that they re-opened perhaps 6 years ago or may be longer. He thought the Board Inn was open in 2008 and that it was the last pub to close, maybe some 4 years ago. He also referred to Sleegill and Holly Hill as another neighbourhood. He referred to there being plenty of businesses in the area now. Although there is no Neighbourhood Watch or residents' association or other such organisation, Mr. Clark said that the people of the area look after each other. **Mr. J. Smith** moved to Sleegill some 15 1/2 years ago. **Nicola Clark** referred to the corner shop on the Green closing in the 1990s and she could distinctly remember going into it.

(13) When asked whether he would ever pay to go onto the field, **Mr. A Smith** said that he may have paid for the stalls when there were general fund raising events, but he couldn't remember.

3.6 I address, as appropriate, the points made by the Applicant in his Closing Submissions when I assess the issues in section 5 below.

4. CASE FOR THE OBJECTORS

4.1 Objections to the Application were received from:

(1) Richmond District Council as the landowner.
(2) Richmond Town Football Club as the tenant who also submitted 12 further letters of objection including one from Mr. J. Conway who also objected separately.
(3) Mrs. L Blackburn, a former chairperson of the football club.
(4) Mr. and Mrs. J. Clarke
(5) Mr. J. Conway (former Ranger for R.O.S.A.)
(6) St Martin's Parish Council.

4.2 As previously noted, only the landowner, Richmondshire District Council, took active part at the Inquiry as an objector, although some of the other parties gave evidence in support of the Council's objection. Thus, I have referred to the Council as "the Objector".

4.3 From the Objector's original objection[1], I note the following points:

(1) To the extent that the Application relies upon s.15(3) of the Commons Act 2006, the relevant date appears to be December 2008. In the alternative, the Applicant could rely on this slightly different 20-year period i.e. December 1998 - December 2008.

[1] Objector's Bundle at Section 1A.

(2) The Application fails to meet the necessary requirements in respect of locality or neighbourhood. It is not clear whether the area referred to in Part 6 of the Application is being referred to as a "locality" or a "neighbourhood". There is no evidence that the area identified in the Application is a distinct and identifiable community, in the context of a locality. The Applicant does not assert that the claimed area is a neighbourhood within a wider locality. No such wider locality is identified for the purposes of such an argument.

(3) There is an insufficiency of qualifying use evidence. Non-qualifying use includes:

(i) The exercise of a public right of way. Whilst a large number of the user evidence statements refer to use of the site for walking and dog walking, the area over which such use took place is not made clear. In particular, no distinction is made between use of the public footpath and use of other areas of the application site.

(ii) Use of the site for the informal playing of football could be qualifying use. However, use for formal football is pursuant to the lease and is not "as of right". Further, those watching games are not involved in a lawful sport or pastime. The use of the site for warming up and training would also be permitted.

(iii) There is no evidence as to the nature of the activities that took place as part of the birthday parties (or Bonfire Night parties) referred to by some of the witnesses in support of the Application.

(4) The use of the football pitch is not "as of right" because either (in the case of formal football matches) it was use by permission or (in the case of any informal recreational activity on the pitch) it was not such as to give the outward appearance to the reasonable

landowner that the use was being claimed and asserted "as of right".

(5) Referring to *R (oao Alfred McAlpine Homes Ltd.) v Staffordshire County Council* [2002] EWHC 76 (Admin), it is stated that there is currently limited evidence (as distinct from assertion) in support of the Application. Only limited weight should be attached to the supporting statement and fifty-three statements. The Applicant has failed to demonstrate that the whole, and not merely part or parts of the site, had probably been used for lawful sports and pastimes for not less than 20 years. The statements allow no judgment to be made about whether the claimed use took place on one area as distinct from another. Many of the statements:

(i) Do not identify the period of user

(ii) Do not identify the nature of the user

(iii) Do not identify the frequency of the user

(iv) Do not identify the area and frequency for each individual use.

(6) Whilst the statements refer to "others" using the site, it is not clear whether they lie within or without the claimed locality.

(7) There is very limited photographic evidence to corroborate the nature and extent of the claimed uses, for an application such as this.

(8) Two leases have been signed and this suggests that over a substantial part of the 20 years prior to the making of the Application the Council did assert a right to charge football teams for use of the pitch and that they also asserted the right to allocate parts of the field for the use of those teams. During the playing of matches, those areas were exclusively used by the teams pursuant to the licence granted to them by the Landowner for that purpose. Furthermore, the licensees maintained the pitches for the football club use.

(9) As the English theory of prescription is concerned with how the matter would have appeared to the owner of the land, the maintenance and renting out of the football pitch was inconsistent with acquiescence in the assertion of a right by local people to use the land as a TVG.

4.4 The Objector also responded to the Applicant's letter dated 29th November 2010 in response to the Objection (summarized at section 2.7 above)[2]. In summary, the main points made by the Objector were:

(1) With regard to the correct 20-year period, the Application is dated 15 December 2009. Accordingly, qualifying use must persist throughout a period beginning no later than 15 August 1989. If qualifying use began earlier, then it must continue until 15 December 2009. However, the Application relies on section 15(3) and the relevant date appears to be December 2008. In the alternative, the Applicant could rely upon this slightly different 20-year period i.e. December 1988 to December 2008.

(2) With regard to the locality and neighbourhood issue, it is clear now that the area set out in Part 6 of the Application ("The Green") is relied upon both as a "locality" and/or a "neighbourhood". The area relied upon is not a distinct and identifiable community such as might reasonably lay claim to a TVG as of right. The Applicant merely asserts that the Green is "well known" as a locality. Such an assertion is not relevant to the Application of the correct legal test. A neighbourhood need not be a recognized administrative unit but it cannot be any area that an applicant chooses to delineate upon a plan. The registration authority has to be satisfied that the claimed neighbourhood has a sufficient degree of cohesiveness. The Applicant has merely identified an area on a plan and asserted that it is a neighbourhood without providing any (or any adequate) explanation.

[2] Objector's Bundle at Section 1B.

4.5 At the Inquiry, in addition to the witness statements and documents relied upon[3], the Objector produced the following documents:

(1) Map of Richmond and Hipswell Ward Boundaries

(2) Google Earth image of the Application land.

(3) Office Copy Entry of title plan, title number NYK363434

4.6 In its Outline Submissions, the Objector made the following points:

(1) There are supporting statements in the Applicant's Bundle, only a fraction of which are confirmed by a statement of truth. Not all the questionnaires cover a twenty-year period or the relevant period.

(2) If any of the elements of the statutory requirement under section 15(3) are not demonstrated by the Applicant as met, the Application must fail.

(3) The quality of the land and/or the motivation of the Objector are not relevant considerations for the TVG application. Nor are:

(i) The aesthetic attributes of the Application Land;

(ii) The planning status of the land;

(iii) The requirements of league football;

(iv) The behaviour of representatives of the Football Club;

(v) The suitability of alternative locations for public recreation.

(4) Having regard to *R (oao Cheltenham Builders Ltd.) v South Gloucs DC* [2003] EWHC 2803 (Admin) and *Leeds Group plc v Leeds City Council* [2010] EWHC 810 (Ch), the Applicant's case on "locality" and/or "neighbourhood" lacks the sufficient clarity to the statutory test.

(5) Given the difficulties with the Applicant's case on locality, one struggles to make any proper assessment of whether the land has been used by a significant number of its inhabitants (applying the approach of Sullivan J. (as he then was) in *R (McAlpine Homes Ltd.)*

[3] Objector's Bundle at Sections 3 & 4.

v Staffordshire County Council [2002] EWHC 76 (Admin) at [71] & [72]). However, it is clear beyond any question that the evidence fails to discharge the burden of proof imposed upon the Applicant.

(6) It is accepted that activities such as football, kite flying and dog walking can properly be described as lawful sports and pastimes. However, without any particularity as to the areas used, the RA cannot be satisfied as to the user of the whole of the Application land, which is what the Applicant must demonstrate. Exercise of public rights of way must also be excluded - and some of the evidence is more consistent with the use of the land as a right of way. At the very least, the Applicant's evidence on those issues is vague. A relevant question is whether the activities took place across the whole of the Application land for the relevant 20-year period. Thus, where part or all of the land becomes inaccessible and/or is not used for lawful sports or pastimes, either the Application must be refused or the inaccessible/unused part removed from the Application site.

(7) To be as of right, any qualifying use has to be sufficient to bring home to the Objector that the local inhabitants were asserting a public right to use the land. Referring to the decision of the Supreme Court in *R (Barkas) v North Yorkshire CC* [2014] UKSC 31 at [24] & [65], it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land.

(8) On numerous occasions (as seen from the witness statement of Gary Hudson) different bodies sought permission to use the land for various events and there is evidence of the football club granting permission subject to certain requirements. It is thus contended that:

(i) It was clear to the public at large that the use of the land for LSP was by express licence.

(ii) When the relevant events were taking place, the Application land was not available to be used by the public at large.

(9) Without prejudice to the existence of express licences for the use of the land, the evidence shows that the very purpose for which the land has been held is for the purpose of public recreation. Where land is held as public open space that has been acquired under one of the Public Health Act 1875 or the Open Spaces Act 1906, the public's use of the land is "by right" rather than "as of right" or merely by virtue of the fact that the land is publically held as Public Open Space (POS).

(10) Land owned and held by a local authority for the very purposes of public recreation is not used as of right by the public but, rather, is used pursuant to the right the public have to use land either under the statutory trust under which the local authority hold for the public or otherwise - *R (Barkas) v North Yorkshire CC* [2014] UKSC 31 at [24] & [65].

(11) Where land is held as POS, users are not tolerated trespassers at all using the land as of right. It is clear that the land was acquired originally and has been held ever since for the purpose of a recreation ground or POS - it is clear that the land has always been used as a recreation facility. No other alternative statutory purpose or object of the local authority, which has owned or controlled this land, has been suggested.

(12) Whichever 20-year period is relied upon, it is unlikely to make a material difference to the outcome of the TVG Application.

4.7 The Objector called the following witnesses:

Oliver Blease

Linda Blackburn

James Conway

David Venables

Gary Hudson

Peter Marshall

I now summarise the main points from the evidence of these witnesses.

Oliver Blease[4]

Mr. Blease was the secretary of Richmond Town Football Club between 1968 – 1987. He said (both in his statement and confirmed under cross-examination) that in 1975 the Council built the pavilion that remains on the site today. He has had very little association with the Club between 1988-2008. He said however that he walked around the land a lot and still does.

Mr. Blease referred to applications to hold various one day events on the ground such as jazz band competitions, shows and hot air balloon displays. He said (in his written statement) that to his mind none of those events have been held without either the permission of the Football Club or Richmondshire District Council.

Mr. Blease referred to the Richmond Meet – the involvement started in the 1970s. He said that you would sometimes pay to go in – there was a bucket collection. However, he said that activities were by and large all free and were done voluntarily – such as a dog show and a baby show. What was left over from the costs of running the event went to local causes.

[4] Objector's Bundle – OBJ 27-30.

Although Mr. Blease referred to charging for watching football matches previously, he said that they stopped charging as it was not worth it. Only half a dozen people would pay, as anyone could watch from outside.

Mr. Blease referred to the stone wall along the edge of the land having crumbled - he said the main culprits were young boys who removed the stones to throw into the nearby river.

Under cross-examination Mr. Blease said that he had no knowledge of the covenant. He also said that you can't have a village green and arrange regular football matches. Mr. Blease also accepted that anyone could go onto the land and that he would have objected if people had to have permission to do so.

Under cross-examination, Mr. Blease was taken to p. 147 of the Applicant's Bundle and agreed that was the sign posted by the Club after the fences were erected. He agreed that this was very intimidatory but said that he had nothing to do with it.

Mr. Blease was asked about payment going to the Club for the events, which he said the Club kept. He wasn't sure what rent was paid to the Council. In re-examination, Mr. Blease was taken to the licence dated 18 April 1989 granted by the Council to the Club and in particular clause 6(10) on p.175 of the Objector's Bundle – this stated that "*...nothing in this sub-clause shall prevent the Association and the Licensees with the prior consent of the Grantor from sub-licensing the premises to other organisations and any income received from such sub-licensing shall be retained by the Association and the Licensees-*". He said that he didn't remember any legal agreement when he was in control.

When I asked Mr. Blease about whether he saw people using the land apart from the football matches, he said that it was always used – he

referred to children from the Durham CC; ballooning; the Richmond Meet; someone practising golf on the land.

Linda Blackburn[5]

Mrs. Blackburn said that prior to 1990 she only had knowledge of the land as a member of the local community. At that time, she went to the Richmond Meet over the Whitsun weekend and passed the land by car. She became the manager of the Club's Junior Team U11's in 1990.

She was Chairperson of the Club from 1995 to 2001. During that time, she granted permission to various organisations such as the Richmond Meet, Billingham Synthonia FC (no entry fee) and Richmond Town Council to use the land for events. Richmond Meet, Mrs. Blackburn said, used the field and pavilion each May Bank Holiday for a three day event of festivities, which included a football competition. A fun day was held on Whit Sunday, which included stalls, events and a dog show. Arrangements were made with the Meet for the Council to hold a bond of £500 to cover any damage incurred.

English Heritage used the perimeter of the field (but no part of the playing area) for camping when staging re-enactments in the Castle Grounds. Occasional school cups finals (for Richmond School) and area games took place during April/May each year. Richmond Road Runners also trained on the land. The educational establishment at Earls Orchard (the Outdoor Activity Centre) also used the non-playing area for ball games with the Club's permission until problems with dog excrement prevented this. She said that the understanding was that they could use the area immediately in front of the pavilion but not the pitch area. The Centre use had already started by the time she took up her post with the Club. This had been organised with the previous Secretary, Mr. Geoff Hunter. Mrs. Blackburn

[5] Objector's Bundle – LB23-26.

said that they had written about the dog excrement problem in 1988 but they had used the field again after that letter.

Mrs. Blackburn referred to numerous people golfing on the land and "taking divots out of the pitch". She said that she spoke to them, describing herself as Chairperson of the Club. She said that she never asked anyone to leave but asked them to respect the playing area and they usually went away.

During 1990-2001, she went to the land everyday between May-August when painting (the pavilion). Between August – May, she went there twice a week. She said that she challenged people almost every time. She didn't consider those on the premises, who she had to speak to, as trespassing but treating the land disrespectfully. She confirmed that with respect to clause 6(10) of the lease, which was for the period from 1988-1993, (on p.175 of the Objector's Bundle), any payment from other organisations using the land would go to the Club.

Mrs. Blackburn referred to there being a fire in the middle of the field when the land was used by the Meet and Cllr. Metcalfe (who was then the Mayor) mediating between the Club and the Meet Committee.

She also said that she could recall several occasions when she challenged people for using the pitch i.e. kicking the ball in the goalmouth or dog owners who did not clean up after their dogs left mess on the playing area.

Mrs. Blackburn also said that when erecting the fence on the riverside boundary of the field the Council was merely reinstating the public right of way, which historically existed on the river side of the trees. She referred (as did Mr. Blease) to the stone wall falling into disrepair and a new path being worn away on the side of the field. She said that without a physical barrier this would have caused some confusion for walkers.

Mrs. Blackburn (in her evidence in-chief) was referred to document OBJ. 2 (the Google Earth Aerial photograph put in by the Objector), and said that the path that exists now is far more worn than it was but was in about the same place.

She said that before the fence was put up she saw people regularly using the coast-to-coast footpath. There were lots of people walking dogs –she said all over the field and all over the playing field and she would keep an eye on them to see if they cleared up. If they didn't, she would offer them a plastic bag to clean up but they didn't often do so.

Under cross-examination, Mrs. Blackburn was asked about her statement in para. 11 of her witness statement that at no time during her period as Chairperson was she aware of open access to the land. She said that they kept no log books but they did talk about this issue at committee. She said that, given the right of way down the riverside, it was very hard to expel people from the land. It was suggested to her that there was no evidence of a footpath there prior to the fencing being erected. She replied that there was a worn area – and she could see quite clearly where the footpath was worn.

She accepted that she did not chase people off the land – Mrs. Blackburn said that "she had more manners than that".

Mrs. Blackburn said that the fencing was discussed at the meeting on 23 September 2008, where the Council agreed to the Club's request for fencing to be erected and a gated entrance to the field – as referred to in paragraph 13 of Mr. Marshall's statement (on p. 52 of the Objector's Bundle). The barrier around the pitch was also sanctioned on the basis that it was taken down at the end of each season (in May).

Mr. Clark also referred Mrs. Blackburn to the letter from Mr. F Burns dated 9 February 2010 (at p. 22 of the Applicant's Bundle). Mr. Burns was the head of the Field Studies Centre from 1971 to 1994. He said in that letter that the children used the land for supervised games in the evening and also from time to time for the study of flowers and plants. Mrs. Blackburn said that permission had been given by the previous Secretary.

With respect to open access, Mrs. Blackburn said, when cross-examined, that she never saw any picnics, kite flying or sledging. She said the use (apart from football) was walking, and mostly with dogs. Under re-examination, she said that with regard to open access she said her understanding was that the Club held the lease for the purpose of playing football.

James Conway[6]

Mr. Conway was an assistant groundsman at the Club from 1995-2009; this was a voluntary position and was not paid. He said that his duties included cutting the pitch and keeping off anyone causing damage or any inappropriate behaviour. He said that if damage had been done, he would ask people to leave. During that time local residents constantly complained to Mr. Conway that the groundsman, Peter Marshall, told them that they are not allowed on Earls Orchard Field for the activities that they were engaging in (dog walking etc) without permission. Mr. Marshall said that he had himself informed them that the Club had every right to ask them to leave the area and they only have a right of way through Earls Orchard (the Coast to Coast walk). He said that he had been present on many occasions when Peter Marshall had told local residents to keep off the area.

Mr. Conway said that he himself had been told by Peter Marshall on many occasions to keep himself and his dogs off the field whenever he strayed

[6] Objector's Bundle – JC31-33.

onto it from the Coast to Coast footpath. He also said that he had received permission from Mr. Marshall to take his dogs into the area, while he was carrying out maintenance (he clarified later that he was a professional dog walker and did not have dogs of his own). He said that he had also applied officially and unofficially to use the football area for sporting activities – he said his applications had been accepted and also rejected.

In re-examination, Mr. Conway was taken to the Objector's Bundle at p.88 (the minutes of the Earls Orchard Sports Field Meeting, Swale House Council Chamber on 23 September 2008) where it was stated, under "Access", that the Club had no objections to others using the field as long as the main football pitch is not used or any damage is caused. It was further stated that the Club have no problem with anyone using the sports field as long as the sports field is respected and no dog walkers use the sports field, given the concerns and problems with dog waste on the sports ground. Mr. Conway said that the notice (shown on p.147 of the Applicant's Bundle) did reflect what was said at the meeting.

Mr. Conway was also taken to the sign for Richmond Town FC (on p. 137 of the Objector's Bundle) and said that it had been in place since the 1990s but had now been replaced by a new sign. He also referred to the sign saying "No Camping. No Caravanning", which he said had been there his entire life.

David Venables[7]

Mr. Venables is employed by the Objector as grounds maintenance operative. He started his employment with the Council in 1979 and that included Earls Orchard Sports Field. He did so until about 2005, when the Club started maintaining the site themselves. The Club starting cutting the grass from about 1995. However, the Council continued to maintain the boundary hedges until about 2005 when the licence agreement was

[7] Objector's Bundle – DV 59-61

renewed so that the Club would undertake all the maintenance, including that of the boundary hedges. He assisted with the repair of the field, in he believed round May 2001, after the grass area was set on fire when the Army had held a special event.

He noted individuals walking dogs and walking along the Coast to Coast footpath that runs adjacent to the River Swale. He said that on occasions he did also witness individuals walking dogs on the sports field.

When asked by Mr. Clark whether he had written the statement himself, Mr. Venables said yes. He was then asked to explain why his paragraphs 4, 5, 6 and 7 were identical to those in Mr. Lodge's statement. Mr. Venables said that he probably asked Mr. Lodge what the dates were and he agreed that he would not have known if he had not asked.

Gary Hudson[8]

Mr. Hudson is the Open Spaces and Amenities Manager of the Council. He started his employment with the Council in April 1994.

He referred to Council's records showing a meeting of the Richmond RDC on 13 October 1967 reporting an approach by the Club regarding the purchase of the land. The field was transferred in a conveyance dated 16 October 1968. The conveyance (see GH9) stated that the purchaser (the Richmond RDC) covenants with the vendors that the purchasers will not within 80 years allow any building to be erected on that part of the field no. 337 and they will for that period preserve the field as an open field area for use as a football field or a sports field for the benefit of the inhabitants of Richmond and the Rural District.

The field has been licensed and/or leased to the Club since 1974. The current lease dated 11 April 2006 is due to expire in 2016 (GH6).

[8] Objector's Bundle – GH 38-45.

The grass would be cut (until 1995 when the Club took over this responsibility) on a regular basis throughout the growing season - once every 10-14 days depending upon the weather conditions. The boundary hedge (until 2005 when the Club took over this responsibility) would be cut once a year anytime from September – December depending upon workload.

At the meeting held on Tuesday 23 September 2008, the metal barrier around the pitch and the erection of the proposed 1m high timber and mesh fencing around the sports field to restrict the dogs access the field were discussed. Mr. Hudson confirmed that what he was reported as saying (under Access on the minutes of the meeting, GH5 – p.88) was accurate. The sign was put in for the metal fence around the perimeter of the sports field.

He said that it was his understanding that the Club has exclusive rights to use the field for the playing of sports. Mr. Hudson referred to the incident when the Army burnt the grass accidentally in 2001. He also referred to the Richmond Meet, which had been operating from 1888 in Richmond and had used the land from around 1974 and before, using the land in 2001, with the Council being consulted on the use of the site as landowners to ensure that the event was managed in a safe manner. He referred to concern that the public toilet facilities could not cope with the volume of visitors at the Meet event and a meeting in June 2001 was held to discuss this. As a consequence, an application form (GH12) was created for the use of all facilities and introduced in 2001.

The field is in the Parish of St Martin's in the Hipswell Ward. He said that they received only two concerns from residents from this ward, with the majority of the letters of support for a TVG from Richmond West Ward and further wards in Richmond and beyond (see GH1-GH4).

The small green area, locally called "the Green" has no local shops, schools, public house or community centre. It has limited community cohesion with the limited facilities in this area. The nearest community area is at Ronaldsway Play Park, in the centre of Richmond.

The Coast to Coast path is well walked but has never crossed the football pitch. It is the only permitted access across Earls Orchard Sports Field (see GH4 – public rights of way map).

The wooden and mesh fence was installed before Christmas 2008 (about two weeks before). The contractor was, Mr. Hudson said under cross-examination, supplied and paid for by the Club.

In re-examination Mr. Hudson was taken to GH1 (on p.79 of the Objector's Bundle) and to the Applicant's Plan showing the claimed neighbourhood. He said that the claimed neighbourhood excluded 13 of the Objectors listed in GH1.

He said in re-examination that he couldn't remember the camping referred to by Mr. Gracey. He said that tree works on the land took place on a regular basis until 2005.

Peter Marshall[9]

Mr. Marshall has an association with the Club that goes back to 1975 when he started with the Club as a player. There was a period away from the Club between 1987-1992 but he used to watch matches on Saturdays. He is presently the Club's Secretary. When he became a player, the Club was using Earls Orchard – but that was originally on an annual basis. The first lease was in 1983 and the leases have been continually renewed, with the current lease expiring in 2016. The pavilion (which cost the Council in excess of £30,000, to which the Club contributed £840) was constructed and opened by Jack Charlton in 1975 (see PM1).

[9] Objector's Bundle – PM 49-58

The Club entered the Jack Hatfield Teesside League, considered to be more senior, in 1987. One of the requirements of that league was that the playing area was fenced off but the Council turned down that request. The Club wished to progress through the Leagues and entered the Wearside League in 2013.

The Club now maintains the whole site and is responsible for grass cutting, hedge cutting, maintaining the Pavilion and security of the site. In 2008 the Club asked the Council whether it would be possible to erect a fence along the side of the river where previously there had been an old stone wall. They also asked for a gated entrance to the field. The barrier around the pitch itself was also "sanctioned" on the basis that it would be taken down at the end of each season (in May). The barrier would then be erected in August for the start of the new season. That would bring the ground to the appropriate standard for the Wearside League. The Club also felt that the fence would also assist in so far as identifying the public right of way on the Coast to Coast route, alongside the river. Prior to that, walkers wandered onto the site unsure of their rights. It also provided a safe environment for those using the site, especially the junior teams.

Dog fouling has long been a problem on site. This is seen in the Council minutes as long back as 1987. Exhibit PM4 is a letter dated 11 February 1998 from the Council to Mrs. Blackburn the then "Chairman" rejecting the Club's request for permanent fencing around the playing area and also addressing the dog-fouling concerns (Objector's Bundle PM4 181-2).

There has been a vendetta against the Club by certain residents since the fence was erected – the vast majority of these do not, as Mr. Marshall understands, live in the parish of Hipswell where the ground is situated. He acknowledged that some of them do live within the parish.

The association of the Club with the land and is control over it is also evidenced (see also PM5), said Mr. Marshall, by permission granted to Swaledale Outdoor Club, Richmond School, Swaledale Road Runners, Richmond Hockey Club, Green Howards Yorkshire Slalom Club, the Retired Caravanners Association, the Tees Kayak Club and Richmond Meet. Mr. Marshall provided (at paragraph 21 of his statement – Objector's Bundle at PM54) a list of information relating to the use of the land between 1982 and 2010.

Mr. Marshall denied that there had been "open access" to the land as he had on many occasions challenged people with regards to trespassing on the site. He said that over the period 1990-2009 Coast to Coast walkers, for example, unsure of where the right of way was, would make their way (diagonally) straight across the field instead of sticking to the correct right of way that follows the river. Mr. Marshall also referred to challenging Mr. David Kearus and his partner, who were training their dogs in the centre of the pitch. He told them they had no right to be on the site. They then made a complaint against him to the then Manager and Teacher Lee Warden. He also spoke to Mr. Smith's son who was kicking a football against the pavilion wall in 2008 – his father then confronted him.

In his evidence in-chief Mr. Marshall referred to the roping off of the pitch, by reference to the plan of the ground at exhibit GH2 and the Google aerial photograph (Inquiry Document GH2). He said that when the Club went into the Teesside League (in 1987) they would rope off the area during matches – this was set at 2m out from each line around the pitch to keep the spectators away from the linesmen. You would have to dip under the rope to pass it. Stakes were set about 10m apart. In the right-hand corner (nearest the pavilion and nearest the river) metal scaffold poles were dropped into sleeves. On the far side of the pitch there was already a stake in the hedge. The far end was done with metal stakes. If there was a 2pm kick off, he would put the ropes up at 12 noon and then take them down 30 minutes after the match finished.

The under 16s and under 8s or 9s played on the land. Matches were played on Saturdays and sometimes on Tuesday evenings. Juniors would play matches on Sundays. The Under 16s used the big pitch – but it was not roped off. The juniors played in the shadow (as seen on the aerial photograph) at the far end – they played five-a-side – a rope was placed along the near edge of the five-aside pitch. He said that teams also played elsewhere as the turf couldn't take any more matches.

Mr. Marshall referred to Darlington FC playing a fund raising game in acknowledgement of being allowed to train on the land. Payment was asked for outside the toilets – where there was a table with a cash box. If someone wanted to walk down the right of way, there was nothing that could be done but the gateman would keep an eye on anyone there who had stopped to watch – Mr. Marshall said that he had also known it to happen from the other side of the field. That happened during his time at the Club between 1978-1988. It happened in the 1990s/2000 for six years.

Mr. Marshall said that they did contact the Council from time to time – e.g. with respect to parking for the Darlington games. With regard to the Richmond Meet, they talked to the Council about damage to the facilities – a bungee jump truck got stuck in the middle of the field.

When asked by Mr. Clark about the introduction of the metal barrier in 2008, Mr. Marshall said that they left the rope up once and it was cut into pieces. When asked why there was resentment for the rope, Mr. Marshall said that he didn't know. With regard to the metal barrier, Mr. Marshall said that there should have been more communication – he didn't say people couldn't go onto the land but you couldn't go with a dog. There were "no dog" signs on the post in front of the pavilion and on the wooden fence when it went up.

When asked under cross-examination about the number of matches, he said the first team has five pre-season matches. The League starts at beginning of August and finished in middle of May. They start pre-season training in middle of June on Monday and Thursday evenings (Tuesday and Saturday mornings for the Juniors).

Under cross-examination, Mr. Marshall also said that, apart from those playing or watching the football, he didn't see anyone outside the pitch but not off the right of way.

Mr. Marshall confirmed that the notice went up when the metal barrier did. He said that it lasted just 3 days. The notice related to keeping dogs off and didn't relate to trespass.

4.8 The objector also relied upon the witness statements of Councilor Paul Cullen and David Lodge. These are included in the Objector's Bundle but I would just note the following:

Paul Cullen[10]

Councillor Cullen has been a district councillor since 1983. He became ward member for Hipswell and St. Martins Ward in 2003. Councillor Cullen referred to having to sweep up dog mess but never having seen picnics on the land. He referred to chairing a meeting in 1995 where the Club was concerned that there needed to be some control over how the field was used. This followed a burning of the grass incident. He also referred to the absence of many complaints regarding the land (and none from anyone in his ward).

David Lodge[11]

Mr. Lodge is employed by the Council as Grounds Maintenance Supervisor. He started employment with the Council in May 1984. He confirms the responsibilities for the maintenance of the land and these

[10] Objector's Bundle – PC34-37.
[11] Objector's Bundle – DL 46-48.

changed in 1995 and 2005, as dealt with by other witnesses. He also states that he was of the understanding that the Club has exclusive rights to use the land for the playing of sports. He also refers to giving advice on repairing the grass after the burning incident involving the Army in 2001.

5. ASSESSMENT AND CONCLUSIONS

5.1 This section is set out as follows:

(1) The Legal Framework

(2) Assessment of the issues arising against that framework

(3) Conclusions

THE LEGAL FRAMEWORK FOR DETERMINATION OF AN APPLICATION UNDER SECTION 15 OF THE COMMONS ACT 2006

5.2 As noted in section 1 above, section 15(1) provides (as relevant to this Application) that:

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

Subsection (2) applies where-

(a) A significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and

(b) They continue to do so at the time of the application.

Subsection (3) applies where -

This subsection applies where–

(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;

(b) they ceased to do so before the time of the application but after the commencement of this section; and

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

5.3 The burden of proof lies on the Applicant to demonstrate that the statutory criteria are satisfied. The standard of proof is the civil one – that is "on the balance of probabilities" or, put simply, that it is more likely than not. However, where an Objector seeks to rely upon a vitiating factor, such as that the land has been appropriated for open space use and the claimed use is "by right", then the burden rests with the Objector. It is then for the Objector to demonstrate on the balance of probabilities that an application, which otherwise has been demonstrated by an Applicant to meet the statutory criteria is not compliant with section 15.

5.4 From section 15(3)(a) and the relevant case law, it can be seen that an application has to satisfy the following elements:

(1) The application land has to have been used for lawful sports and pastimes.

(2) The use has to have been by a significant number of people who come from:

A locality; or

Any neighbourhood within a locality.

(3) That use has to have been carried out for at least 20 years up to the date of the application.

(4) That use has to have been "as of right" throughout that period.

The land which forms the basis of the application has to have been used for lawful sports and pastimes

5.5 The expression *"lawful sports and pastimes"* was considered in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 A.C. 335. It was held that "sports and pastimes" is not two classes of activities but a single composite class, so an activity that was a sport or

pastime falls within it. It was further held that dog walking and playing with children are, in modern life, the kind of informal recreation, which may be the main function of a village green[12]. Flying kites, picking blackberries, fishing and tobogganing have been considered to fall within "sports and pastimes".

5.6 Not all use that falls within the meaning of "lawful sports and pastimes" is sufficient, however. In *White v Taylor* (No.2)(1969) 1 Ch 160 at 192 Buckley J held:

...But the user must be shown to have been of such a character, degree and frequency as to indicate an assertion by the claimant of a continuous right, and of a right of the measure of the right claimed.

The use must be to a sufficient extent; use which is *"so trivial and sporadic as not to carry the outward appearance of user as of right"* is to be ignored: *Sunningwell* [2001] 1 A.C. 335, 375D-E.

5.7 It is important to distinguish the use of footpaths from use for sports or pastimes. That distinction is important in this case, where there is a public right of way over the land. In *Oxfordshire County Council v Oxford City Council* [2004] EWHC 12 in the High Court Lightman J stated that where the public use defined tracks over land this will generally only establish public rights of way unless the user is wider in scope or the tracks are of such character that user of them cannot give rise to a presumption at common law as a public highway, but user of such tracks for pedestrian recreational purposes may qualify. Both the Court of Appeal and the House of Lords on appeal held that it would not be appropriate to give any guidance on the evidentiary matters relating to the use of tracks and the other land.

[12] [2000] 1 A.C. 335, 357A-D.

5.8 Not every part of the application land has to have been used. However, the evidence must be such so as to indicate use as of right for lawful sports and pastimes of the land as a whole. In *R (Cheltenham Builders) v South Gloucestershire Council* [2003] EWHC 2803 at [29] Sullivan J. stated that a "common sense approach is required when considering whether the whole of a site was so used". However, as referred to below, this does not preclude the possibility of a village green being established on land where other uses (e.g. golf, agriculture) also taking place.

The use has to have been by a significant number of people who come from:
A locality; or
Any neighbourhood within a locality

Significant Number

5.9 In *R (Alfred McAlpine Homes Ltd) v Staffordshire County Council* [2002] EWHC 76 at para. 71 Sullivan J held that a "significant number" need not be considerable or substantial. It was held that it was a matter of impression for the decision-maker on the evidence and what mattered was that the number of people using the land in question had to be sufficient to indicate that their use of the land signifies that it is a general use by the local community for an informal recreational use, rather than occasional use by individuals as trespassers.

5.10 This is often referred to as part of the issue of "the quality of user" and has been addressed in several authorities since then. In the Court of Appeal decision in *Leeds Group plc v Leeds City Council* [2011] 2 WLR Sullivan LJ, as he had by then become, held:

Quality of user

28. I agree with Mr. Laurence that this ground of appeal is better described as the quality of user point. It is based on certain passages in the speeches of Lord Walker of Gestingthorpe JSC and Lord Hope of Craighead

DPSC in R (Lewis) v Redcar and Cleveland Borough Council (No 2) [2010] 2 AC 70. In para 30 Lord Walker JSC referred to the general proposition that had been relied on by Mr. Laurence:

"that if the public (or a section of the public) is to acquire a right by prescription, they must by their conduct bring home to the landowner that a right is being asserted against him, so that the landowner has to choose between warning the trespassers, or eventually finding that they have established the asserted right against him."

In para 36 Lord Walker JSC said that in the light of the authorities he had "no difficulty in accepting that Lord Hoffmann was absolutely right, in Sunningwell [2000] 1 AC 335, to say that the English theory of prescription is concerned with 'how the matter would have appeared to the owner of the land' (or if there was an absentee owner, to a reasonable owner who was on the spot)."

Any Locality or any Neighbourhood within a Locality

5.11 As seen above, section 15(2)(a) provides:

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

This repeats the insertion of "neighbourhood within a locality" into section 22 of the CRA 1965 (by section 98 of the Countryside and Rights of Way Act 2000), and was intended to apply more flexibility to the issue of "locality" and mitigate the strict legal test that had been applied in some cases. The Court of Appeal confirmed in *Leeds Group Plc v Leeds City Council* [2011] EWCA Civ 1447 (the second Leeds Group Plc case) that:

(1) It was common ground that Parliament's intention in enacting s.98 was to remove the evidential difficulty posed by the need for users to be predominantly from an administrative area known to the law.

(2) The enactment of s.98 was to strike a balance between two competing interests; users who wished to apply for the

registration of land as a TVG and landowners whose land might be the subject of such application.

(3) The new policy contained in s.22(1A) of the 1965 Act applied in its entirety to all applications made on or after January 30, 2001, when s.98 came into force.

5.12 A "locality" is not an arbitrary line on a map; it means an administrative unit and a "neighbourhood" within a locality means an area with a sufficient degree of cohesiveness, as held by Sullivan J in *R (Cheltenham Builders Ltd) v South Gloucestershire DC* [2003] EWHC 2803 (Admin). The only element of Sullivan J's approach that the House of Lords, in the *Oxfordshire* case, disagreed with was that the neighbourhood must be within a single locality[13].

5.13 Hence, although the law has been amended to avoid an over technical approach to locality and neighbourhood, an applicant is required to identify an area or areas that is/are sufficiently cohesive to satisfy section 15 of the Commons Act 2006.

5.14 However, a "neighbourhood" need not be a recognised administrative unit; a housing estate can be a neighbourhood, as held in the *McAlpine* case. As stated by Sullivan J., as he then was, in *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin):

85. It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under "locality", I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the

[13] Oxfordshire County Council v Oxford City Council [2006] EWCA Civ 175, at para [27].

word "neighbourhood" would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so.

That use has to have been carried out for at least 20 years up to the date of the application

5.15 The House of Lords in *Oxfordshire County Council v Oxford City Council* [2006] 2 WLR 1235 confirmed that under the previous provisions, sections 13 and 22(1A) of the Commons Registration Act 1965 (as amended by the Countryside and Rights of Way Act 2000), the user as of right had to continue to the date of the application. As noted above, section 15 of the Commons Act 2006 provides for this situation but also situations where the recreational use has ceased (sections 15(3)-(7)).

That use has to have been as of right throughout that period

5.16 To be "as of right" the use must have been carried out:

(i) Without force (*nec vi*)

(ii) Without secrecy (*nec clam*)

(iii) Without permission (*nec precario*).

The phrase *"as of right"* is based upon the acquisition of rights by prescription. The whole law of prescription and the whole law that governs the presumption or inference of a grant or covenant rest upon acquiescence by the land owner: as held by Fry J in *Dalton v Angus & Co.* (1881) 6 App. Cas, 740, 773 as cited by Lord Hoffman in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335 at 351B-C.

5.17 *Sunningwell* related to an application to register 10 acres of glebe land. The House of Lords decided that, where a use had to be established *as of right*, user that was apparently *as of right* could not be discounted merely because many of the users over a long period were subjectively

indifferent as to whether a right existed, or even had private knowledge that it did not. It was also held that toleration of the recreational use was not inconsistent with user *as of right*.

5.18 In *R (Beresford) v Sunderland City Council* [2004] 1 A.C.889 the House of Lords held that the actions of the Council in installing and maintaining double rows of wooden benches around the sides of the sports arena did not in the circumstances defeat the claim to use of the land being *as of right*. However, in the light of the recent Supreme Court decision, involving this Registration Authority, in *R (oao Barkas) v North Yorkshire County Council* [2014] UKSC 31, this approach in Beresford should no longer be relied upon.

5.19 In *Barkas* the land in question was laid out and maintained by the Urban Development Corporation as a recreation ground under section 80(1) of the Housing Act 1936 which provided in part:

> **"80 (1) The powers of a local authority under this Part of this Act to provide housing accommodation, shall include a power to provide and maintain with the consent of the Minister and, if desired, jointly with any other person, in connection with any such housing accommodation, any building adapted for use as a shop, any recreation grounds, or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided."**

5.20 This provision was replaced to similar effect by section 12(1) of the Housing Act 1985, which was in force during the relevant 20-year period in that case. The Court of Appeal held[14]:

(1) Land held and used for recreational purposes pursuant to section 10 of the Open Spaces Act 1906 is held on trust for that purpose and thus its use for that purpose is not "as of right" but "by right".

[14] See in particular [2012] EWCA Civ 1373 at paragraphs [29] – [35].

(2) There is no sensible reason for drawing a distinction between land held under section 10 and land that has been appropriated for recreational purposes under some other enactment.

(3) There is no practical distinction between land that is initially acquired for open space purposes and land that has been appropriated for open space purposes from some other use.

(4) Accordingly, there is no basis for distinguishing between open space that is provided under section 10 of the 1906 Act and open space that is provided under section 164 of the Public Health Act 1875.

(5) The Court of Appeal were uneasy about the conclusion of the House of Lords in *Beresford* but recognized that they were bound by it – it was difficult to understand, they held, why there had not been considered to be an "appropriation" for recreational purposes in that case. However, the decision turned very much on its own facts and the House of Lords deliberately left open the wider issue of when will user by the inhabitants of a locality be pursuant to a statutory right to do so and not as of right.[15]

(6) On the facts in *Barkas,* while the UDC was not under any obligation to lay out the land as a recreation ground, the enabling enactment expressly gave it power, with the consent of the Minster, to provide a recreation ground in connection with the housing. With the Minster's consent having been obtained and the Field having been laid out and thereafter maintained as a recreation ground under the statutory powers, it was held that it would be wholly unreal to conclude that the Field had not been "appropriated for the purpose of public recreation" in the sense in which Lord Walker referred to "appropriation" in paragraph 87 of his opinion in *Beresford*.[16]

(7) The distinction between user pursuant to a statutory right and user as of right was expressly recognized in *Beresford* and there is no suggestion in *Lewis v Redcar* that *Beresford* was wrongly decided.

[15] [2012] EWCA Civ 1373 at paragraph [37].
[16] [2012] EWCA Civ 1373 at paragraph [38].

(8) Whether trespass is a necessary characteristic of a use "as if of right" is unclear, given the facts in *Beresford*.[17]

(9) The local inhabitants can fairly be said to have a statutory right to use land that has been "appropriated" for lawful sports and pastimes. That is because the local authority, having exercised its statutory powers to make the land available to the public for that purpose, is under a public law duty to use the land for that purpose until such time as:

(i) It is formally appropriated to some other statutory purpose under section 122; or

(ii) In the case of a recreation ground provided and maintained under Housing Act powers, until a formal decision is taken that it shall be used for some other housing purpose.[18]

(10) While there is no general exclusion of local authorities from the scope of the Commons Act 2006, local authorities holding land for a particular statutory purpose are not in the same position as private landowners who may, subject to planning controls, change the use of their land at will. A local authority holding land for a particular statutory purpose may not use it for any other purpose unless it has been formally appropriated to that purpose, and if it simply ceases to use land for the statutory purpose for which it was held it must be able to justify its decision to do so on public law grounds.[19]

5.21 The Applicant for the TVG appealed against that decision. The Supreme Court [2014] UKSC 31 dismissed that appeal and held as follows:

(1) The legal meaning of the expression "as of right" applied where land was used without the landowner's permission. It was almost the converse of "by right" or "of right"; which applied where the landowner permitted the use. The significance of the word "as" was therefore crucial. Where the public had a statutory right under

[17] [2012] EWCA Civ 1373 at paragraph [41].
[18] [2012] EWCA Civ 1373 at paragraphs [35] & [42].
[19] [2012] EWCA Civ 1373 at paragraph [43].

s.12 of the 1985 Act to use land for recreational purposes, their use of it for such purposes was "by right", not as trespassers.

(2) Therefore, unless and until the land was removed from the ambit of s.12(1), the 20-year period referred to in s.15(2) of the 2006 Act would not start to run, and "user as of right" could not arise. In the classic tripartite formulation in *R. v Oxfordshire CC Ex p. Sunningwell Parish Council* [2000] 1 A.C. 335, the criterion of "licence for a limited period" included the situation where a local authority gave permission for an indefinite period. The word "limited" was meant to be contrasted with "permanent".

(3) A local authority was entitled to place restrictions upon, or withdraw, its licence, whether permanently or temporarily, but where it had not taken such action, the presence of members of the public on the field was lawful. It could not be said that they were using the land "as of right" just because the local authority had not objected to the use; third parties either had a right to be there or they did not. If they had a right to be there, they could never be trespassers, and there was no room for the concept of toleration of, or acquiescence in, trespass, *Sunningwell, R. (on the application of Lewis) v Redcar and Cleveland BC* [2010] UKSC 11, [2010] 2 A.C. 70 and *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13, [2014] A.C. 822 applied, *Hall v Beckenham Corp* [1949] 1 K.B. 716 and *Lambeth Overseers v London* CC [1897] A.C. 625 considered (see paras 14-16, 20-30, 51, 58-61 of judgment).

(4) *Beresford* was a problematical decision. Lord Scott's speech contained points which were valid and important, as well as analysis which was at best questionable and at worst, plainly wrong. He concluded that there could be cases where a person used land with the permission of the landowner but was nonetheless using the land "as of right" rather than "by right". That was wrong in principle and inconsistent with other opinions and with well-established authority.

(5) While it was sufficient for the disposal of the instant case to merely distinguish *Beresford*, it had been wrongly decided, and was not to be relied upon in future, *Beresford* distinguished (paras 36-38, 44-50, 58-61, 69-70, 74-86).

(6) However, each Justice went further and held that the decision and reasoning of the House of Lords in *Beresford* should no longer be relied upon (paras. 48, 49, 51 and 86).

5.22 In *Mann v Somerset BC* [2012] EWHC B14 (Admin) the Court upheld the Inspector's finding that the charging of a fee by the owner for entrance to a beer festival on a few occasions on part of the application land was an unequivocal exertion of the owner's right to exclude and thus not consistent with mere inaction or tolerance on the part of the owner. It was held that the recreational use was thus by implied permission and not as of right. Although the Claimant contended, relying upon *Regina (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] UKSC 11, [2010] 2 W.L.R. 653, that the use of the local inhabitants and owners were harmonious and a classic case of co-existing uses, the High Court held:

80. The claimant's case is that the local inhabitants' use existed concurrently (or perhaps simultaneously) with the owner's use and did so harmoniously over the years as appears from the absence of any dispute or complaint from either side. That is, just as the golfers and recreational users adopted a 'give and take' approach to the joint use of the land in Redcar so too did, and should, the local inhabitants and the owners in the present case argued Mr Chapman. Hence, he submitted, this is a classic case of co-existing uses of the field. (see earlier)

81. In my judgment the flaw in the claimant's argument is, as I have indicated, that it fails to recognize the nature or effect of the owner's use and the significance of their act of exclusion. In Redcar there was no such overt act (or relevant or demonstrable circumstance). In the present case the inspector was entitled, and right, to distinguish this

case from Redcar for this reason. (see the supplemental report at paragraph 2.39; see earlier).

5.23 If the user has been by coercion or if the user is contentious in the sense that the owner continually and unmistakably protests against it, there is no acquiescence and the user is considered to be by force and cannot be "as of right"[20]. This will apply if the circumstances are such as to indicate to the user, or to a reasonable user with the user's knowledge of the circumstances, that the owner actually objects and continues to object and backs his objection by physical obstruction or by legal action. Signs can, depending on the wording and circumstances, have a similar effect. Physical obstruction includes fencing and gates; the legal effect will in any case depend upon the nature and circumstances of such obstructions and actions.

5.24 The *Redcar* case related to the relationship of the use of land both as a golf course and for recreational purposes in the context of the acquisition of rights to use the land as a village green. The land was owned by the local authority. For at least 80 years until 2002 it had formed part of a golf course. It was also used by the local inhabitants for informal recreation such as walking their dogs, children's games and picnics. They did not interfere with or interrupt play by the golfers. They would wait until the play had passed or until they were waved through by the golfers. The two activities appeared to have co-existed quite happily during that period. The Inspector concluded on the evidence that application land had been used continuously from as far back as living memory goes both as a golf course (until 2002) and extensively by non-golfers for informal recreation such as dog walking and children's play. It was concluded that local inhabitants had regularly and in large numbers continued to cross the area covered by the golf course in order to pursue sports and pastimes.

[20] *Smith v Brudenell-Bruce* [2002] 2 P&CR 4 at [12].

5.25 The Supreme Court, in supporting the application for registration of the land as a village green, held on the facts of the *Redcar* case that:

(i) Registration as a village green neither enlarged the inhabitants' rights nor diminished those of the landowner, who retained the right to use the land as he had done before.

(ii) Although the English theory of prescription was concerned with how matters would have appeared to the landowner, the tripartite test of *nec vi, nec clam, nec precario*, was sufficient to establish whether local inhabitants' use of land for lawful sports and pastimes was "as of right" for the purposes of section 15 of the Commons Act 2006. It was unnecessary to superimpose a further test as to whether it would appear to a reasonable landowner that they were asserting a right so to use the land or deferring to his rights.

(iii) That if the user by local inhabitants for at least 20 years were of such amount and in such manner as would reasonably be regarded as the assertion of a public right so that it was reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration, the landowner would be taken to have acquiesced in it, unless he could show that one of the three vitiating circumstances applied (i.e. *nec vi, nec clam and nec precario*).

5.26 Lord Brown stated in *Redcar*:

100.....If, however, as I would prefer to conclude, the effect of registration is rather to entrench the previously assumed rights of the locals, precluding the owner from thereafter diminishing or eliminating such rights but not at the expense of the owner's own continuing entitlement to use the land as he has been doing, then I would hold that no more is needed to justify registration than what, by common consent, is agreed to have been established by the locals in the present case.

101. This is not merely because in my opinion no other approach would meet the merits of the case. Also it is because, to my mind, on the proper construction of section 15 of the Commons Act 2006, the only consequence of registration of land as a green is that the locals gain the legal right to continue to "indulge" in lawful sports and pastimes upon it (which previously they have done merely as if of right) - no more and no less. To the extent that the owner's own previous use of the land prevented their indulgence in such activities in the past, they remain restricted in their future use of the land. The owner's previous use ex-hypothesi would not have been such as to have prevented the locals from satisfying the requirements for registration of the land as a green. No more should the continuance of the owner's use be regarded as incompatible with the land's future use as a green. Of course, in so far as future use by the locals would not be incompatible with the owner continuing in his previous use of the land, the locals can change, or indeed increase, their use of the land; they are not confined to the same "lawful sports and pastimes", the same recreational use as they had previously enjoyed. But they cannot disturb the owner so long as he wishes only to continue in his own use of the land.

5.27 There is, however, an important qualification to the above principles and approach. The claimed recreational use has to be *"as of right"*, often described as *"as if of right"*. As was discussed in the *Beresford* case (but not finally determined) and determined in *Barkas* as set out above, if the use is pursuant to a statutory right of public recreation then that use is "by right" and not "as of right". Such a right of public recreation arises under for example section 164 of the Public Health Act 1875 and sections 9 and 10 of the Open Spaces Act 1906. Section 164 applies to any land, whatever its use at the time of purchase. Section 9 however applies to land that is open space at the time of acquisition. The relevant provisions currently provide as follows:

Public Health Act 1875

164. Urban authority may provide places of public recreation.

Any local authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever.

Any local authority may make byelaws for the regulation of any such public walk or pleasure ground, and may by such byelaws provide for the removal from such public walk or pleasure ground of any person infringing any such byelaw by any officer of the local authority or constable.

Open Spaces Act 1906

9. Power of local authority to acquire open space or burial ground

A local authority may, subject to the provisions of this Act,—

(a) acquire by agreement and for valuable or nominal consideration by way of payment in gross, or of rent, or otherwise, or without any consideration, the freehold of, or any term of years or other limited estate or interest in, or any right or easement in or over, any open space or burial ground, whether situate within the district of the local authority or not; and

(b) undertake the entire or partial care, management, and control of any such open space or burial ground, whether any interest in the soil is transferred to the local authority or not; and

(c) for the purposes aforesaid, make any agreement with any person authorised by this Act or otherwise to convey or to agree with reference to any open space or burial ground, or with any other persons interested therein.

10. Maintenance of open spaces and burial grounds by local authority.A local authority who have acquired any estate or interest in or control over any open space or burial ground under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a) hold and administer the open space or burial ground in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose: and
(b) maintain and keep the open space or burial ground in a good and decent state
and may inclose it or keep it inclosed with proper railings and gates, and may drain, level, lay out, turf, plant, ornament, light, provide with seats, and otherwise improve it, and do all such works and things and employ such officers and servants as may be requisite for the purposes aforesaid or any of them.

12. Powers over open spaces and burial grounds already vested in local authority.
A local authority may exercise all the powers given to them by this Act respecting open spaces and burial grounds transferred to them in pursuance of this Act in respect of any open spaces and burial grounds of a similar nature which may be vested in them in pursuance of any other statute, or of which they are otherwise the owners

Open Space is defined by section 20 the 1906 Act as:
The expression "open space" means any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied:

THE ISSUES

5.28 It is of course necessary for the Applicant to demonstrate that, on the balance of probabilities, each of the criteria within section 15(3) are satisfied, as set out above.

5.29 The following matters are not in dispute:

(1) The Applicant is entitled to rely upon section 15(3) of the Commons Act 2006 and upon a 20-year period from December 1988 to December 2008.

(2) An electoral ward is capable of being a "locality" for the purposes of s.15(3).

(3) The Objector accepts that activities such as football, kite flying and picnicking can properly be described as LSP.[21] It is also accepted that recreational dog walking could fall within that statutory expression. However, the Objector contrasts this with walking (without or without a dog) along a defined route as part of a longer walk.[22]

5.30 Having regard to the evidence and the submissions of the parties, I consider that the following issues arise:-

(1) Has the Applicant satisfied the requirement of a "locality or neighbourhood within a locality"?

(2) If so, has the Applicant satisfied the requirement to demonstrate that a significant number of inhabitants from that locality or neighbourhood have used the land for LSP? If so, has the Applicant demonstrated sufficient use of the whole land (applying a common sense approach as referred to in paragraph 5.8 above) by those inhabitants continuously over the relevant 20-year period? Such use to be taken into account is only qualifying use and not uses that are permitted/licensed. Further, the sufficiency of use of the whole land needs to take account of the fact that the land consists of a playing pitch (as well as a smaller area for younger players as explained by Mr. Marshall) which, when in use, would not be used for qualifying recreational use.

(3) Is any qualifying use "as of right" or:

[21] Objector's Closing Submissions p.7 at para. 12.
[22] Objector's Closing Submissions p.7 at para. 13.

(i) Is it "by right" by reason of the land being held under a statutory trust by the Council or on any other basis?

(ii) Or has any qualifying use been by permission?

I now set out my assessment of each of these issues. I provide my overall conclusions at the end.

ASSESSMENT

The Locality and Neighbourhood Issue

5.31 The Applicant relies upon the neighbourhood called "The Green" and as shown on the plan submitted to the Inquiry (Inquiry Doc. Appl. 1) and the locality of Richmond West electoral ward.

5.32 It is correct to say that the Applicant's case on this aspect was somewhat unclear at the outset and has changed in some respects since the original Application, as set out in Part 6 of the Form. However, that is not entirely surprising as these concepts of "locality" and "neighbourhood" are difficult for those not experienced in these matters to understand. Indeed, these issues often involve detailed debate even between those who are experienced TVG practitioners.

5.33 The fact that there has been a change in the Applicant's case on this should not, however, prevent this aspect being considered upon its merits. I say that being very aware that it is important that the Objector has had a fair chance to respond to the Applicant's final case on this issue. I am satisfied that there has been no prejudice and the Objector did not suggest otherwise in its Closing Submissions.

5.34 Nonetheless, these criteria have to be given a correct meaning and the Applicant has to demonstrate on the balance of probability that they are

met, having regard to the relevant legal authorities set out above and relied upon by the Objector. I therefore now consider these criteria.

The Locality Issue

5.35 With regard to "Locality" the Objector contends[23]:

(1) Earls Orchard lies within the Hipswell Ward, a different locality to that relied upon.

(2) In order for land to be registered as a TVG, it is axiomatic that it falls within the same locality as the population claiming to use it.

(3) This itself is sufficient to defeat the Application.

5.36 The Applicant contends that, whilst Richmond West Ward is not in the same ward as Earls Orchard, it is in extremely close proximity and is where the majority of the local inhabitants reside.[24]

5.37 In my view, this issue has to be addressed by considering the wording of section 15(3)(a). That only requires, on the face of the provision, that the inhabitants of a neighbourhood within a locality have indulged as of right in LSP on the land.

5.38 If The Green is accepted as a neighbourhood, then there is no dispute that it falls within the Richmond West electoral ward and the site within Hipswell Ward (see Objector's Bundle – Exhibit GH3 at p.83). In turn, as noted above, it is not disputed that an electoral ward is capable of being a "locality" for the purposes of section 15(3).

5.39 I fully acknowledge that it is unusual for the land to fall outside of the locality relied upon. That could indicate that a different wider location is the appropriate one. If I were to be satisfied that the neighbourhood requirement is met by this Application (and the other criteria under

[23] Objector's Closing Submissions p.3 at para. 5.
[24] Applicant's Closing on 5th page.

section 15(3)), I would be reluctant to recommend dismissal of the Application without further consideration of this aspect. I say that because it would seem to me a rather artificial basis upon which to reject an Application that had otherwise been made out.

The Neighbourhood Issue

5.40 The Objector contends that[25]:

(1) *Mr. R Clark, the Applicant's brother and representative at the Inquiry, under cross-examination excluded Sleegill and Holly Hill from his claimed neighbourhood. However, each of these areas falls within the same electoral ward as Earls Orchard. On any basis therefore the Applicant's claimed neighbourhood (which is centred around the Green on the other side of the River Swale) is within a wholly different locality from the Application Land.*

It seems to me that this point relates perhaps more to the point above about locality than to the "neighbourhood" issue as such and so my comments above are relevant to this point. However, I do note that, notwithstanding the evidence that Mr. R Clark gave,[26] in the Applicant's Closing Submissions,[27] it was stated that it has been agreed to include Sleegill and Holly Hill in the claimed defined neighbourhood.

(2) *In any event, and relying upon the Cheltenham Builders case (referred to above), the claimed neighbourhood does not meet the requirement of a socially cohesive identity capable of definition. Reference is also made to the absence of shops and services which had all gone by 1988 and only the allotments (which were closed for a period of time and have only recently become available again) and the now closed Board Inn were present between 1988 and 2008.*

[25] Objector's Closing Submissions p.4 at para. 6.
[26] See also page 21 above at (12).
[27] Applicant's Closing on 5th page, 3rd. para.

I acknowledge, as the Objector contends, that there was no residents' association, no neighbourhood watch and no community organization that identified "The Green" as a neighbourhood. Similarly, there was no place of worship, school or other community uses such as cubs and brownies. Although the absence of these is a factor, in my view their absence is not itself conclusive against the finding of a neighbourhood. Similarly, the absence of most shops and services is a factor but again not, in my view, conclusive against the finding of a neighbourhood. I see no reason in principle for example why a housing estate, without any such facilities, can't be lawfully considered to be a neighbourhood.

(3) *Mrs. Bagley, who gave evidence in support of the Application, indicated under cross-examination that she considered herself to live on "Cornforth Hill".*

Alone, the view of one person, although important, would not be conclusive in itself against the finding of a neighbourhood. However, as returned to below, I do find that there is a lack of evidence to support any real cohesive quality to the claimed neighbourhood. I say that taking into account the Applicant's submissions at the various stages and in particular the reference to the various shops and facilities in the recent past.

5.41 However, my overall impression of the Applicant's evidence and contentions on this issue was that it is not convincing is respect of people identifying the claimed area as "the Green" and/or any particular characteristics of the claimed area. The Applicant contends that in the past this neighbourhood has been a fairly enclosed, self-sufficient suburb with many vibrant and varied businesses. He has detailed these businesses/services and contends that they have shaped the construction and cohesiveness of the neighbourhood. Most of these however had gone by the start of the relevant 20-year period. Whilst that is not, as indicated above, conclusive, there still needs to be sufficient evidence of some cohesive quality of the claimed neighbourhood during the relevant 20

year period (see the legal authorities at paras. 5.11-5.14 of this Report above). Referring just to "The Green" in the circumstances of this case does not assist in justifying the actual area claimed, which has fluctuated somewhat.

Conclusions on the Locality and Neighbourhood Issue

5.42 The fact that the streets the Applicant has identified as part of the claimed neighbourhood, The Green, have changed is not itself fatal to the Applicant's position on this. I also recognise the references to The Green by some locals and in some documentation, as relied upon by the Applicant.[28]

5.43 However, even applying a flexible and non-technical approach in the spirit of the amendments that were made to this element of the TVG legislation (as referred in paras. 5.11 and 5.13 above), I find it very difficult to actually identify any real cohesiveness either physically or in terms of identity of the extent of such an area beyond the streets and properties immediately surrounding the actual designated (as I was told) village green area itself. I do find that some of the streets included and excluded did seem somewhat arbitrary to me. That is particularly so with regard to the eastern and southern extent of the claimed neighbourhood. With regard to the latter, the late suggestion that Holly Hill (which had not been referred to in the original Application) and Sleegill (which had been included in the original Application) should be included, in my view only served to raise further questions as to the appropriateness of the area that Applicant identified as the neighbourhood. That was notwithstanding that Mr. D Clark had indicated that Holly Hill and Sleegill were another neighbourhood.[29]

[28] See e.g. the Applicant's Bundle at p. 160
[29] See page 21 above at (12).

5.44 The difficulties with the claimed neighbourhood are also in my view reflected in the fact that the Applicant hadn't seemed to realise the relevance of the fact that several of those supporting the Application (both orally and in writing) were from outside the claimed neighbourhood. Although again that is not in itself conclusive, it re-enforces my overall impression that the Applicant has not demonstrated on the balance of probabilities that the legal requirement for sufficient cohesiveness of the claimed neighbourhood is satisfied in this case.

The Significant Number of Inhabitants Use of the Whole of the Application Land Issue

5.45 As indicated above (in section 3 of this Report), I largely accept the accounts of the use of the land given by the Applicant and the other witnesses in support of the Application, as well as set out in the supporting statements.

5.46 During the relevant period, the Land was open and readily accessed. I find the accounts given in support of the Application, that no one was ever challenged on the land and they were able to use any part of the land freely, to be convincing. That is save when the acknowledged permitted activities were taking place (such as football matches, training, the Richmond Meet) the significance of which I deal with below.[30]

5.47 In contrast, I found some of the Objector's evidence on this aspect not to be entirely consistent. For example, Mrs. Blackburn clearly did not see any reason why people shouldn't be on the land, providing that they weren't causing damage or allowing their dogs to leave a mess without the owners clearing up after. Thus, although some of the Objector's witnesses referred to there being no open access to the land, in my view there clearly was. Indeed the Objector in fact relies upon this in its Closing Submissions, where for example it is stated that it was made clear at the

[30] See para. 3.5(5) on pp. 17-19 above.

2008 meeting that neither the Club nor the Council objected to the use of the Land for LSP – it was the potential health hazards caused by dog fouling that was objectionable.[31]

5.48 However, Mr. Marshall referred to asking people to leave and this was supported by Mr. Conway [32] I can again understand that might have been so in relation to people who were not behaving well in respect of the pitch, particularly with regard to dog fouling. However, in so far as Mr. Marshall gave the impression of a wider exclusion of people from the land, I find that hard to accept on the overall evidence.[33] Both Mrs. Donaldson and Ms. Gruffydd referred to seeing Mr. Marshall when on the Land but never being challenged by him. Therefore, I was not persuaded that generally either Mr. Marshall or Mr. Conway would have asked members of the public to leave the land, save in exceptional circumstances.

5.49 Thus in my view people did go freely onto the land for the purposes of LSP and save perhaps in exceptional cases of misbehaviour were not asked to leave. Therefore, I agree with the Applicant's submission on this aspect.[34] The Applicant nonetheless has to demonstrate that the use for LSP was by a significant number of inhabitants from the neighbourhood relied upon.

5.50 That first requires discounting the following:

(1) Those who do not reside within the neighbourhood relied upon. This relates to both the oral evidence and written evidence.

(2) Those crossing the land in exercise of a right of way or akin to such a right. That applies to people whether with or without a dog, I recognise that there is a grey area where people crossing the land

[31] Objector's Closing Submissions para. 31 on pp.15-16.
[32] Objector's Closing Submissions para. 45 on p.20.
[33] Ditto.
[34] Applicant's Closing Submission- on 2nd page.

in such a way let their dogs off the lead and allow them to run around the land. However, I do not consider that aspect is in any sense determinative in the circumstances of this case.

(3) Anybody on the land with the permission of the Council or the Club, who had possession of the land.

5.51 This discounting of non-qualifying use is not an altogether easy exercise to carry out in order to obtain a fair impression. The onus is upon the Applicant to demonstrate compliance with this requirement. I also have to take into account that the law of prescription is based upon how it would have appeared to the owner (or the person entitled to possession of the land). Acquiescence by the owner is the foundation of prescription.[35]

5.52 In approaching this issue on that basis, I have therefore taken into account the Objector's contentions on that evidence which should be excluded.[36] I also take into account the fact that no one has sought to estimate the number of inhabitants of the claimed neighbourhood. Further, I have taken into account the Objector's point about the "overwhelming majority" of witnesses referring to the use of field for the exercising of their dogs. [37]

5.53 Notwithstanding these contentions on behalf of the Objector, I have based my conclusion on my overall impression of all of the evidence. I am satisfied that the Applicant has demonstrated on the balance of probability there was use of the land for qualifying LSP by a significant number of inhabitants over the whole of the relevant 20-year period from addresses within the area the Applicant identifies as "The Green" neighbourhood. As detailed in section 3.5 above, although dog walking was clearly a main LSP use, it was by means the only such use on which

[35] See *Barkas* [2014] UKSC 31 at [17] – [19].
[36] Objector's Closing Submissions pp. 6-7 at paras. 8-11.
[37] Objector's Closing Submissions p.8 at para. 14.

convincing evidence was given. However, as stated above that area identified as the claimed neighbourhood does not in my opinion satisfy the requirement for cohesiveness. Thus the requirement that there be a "significant number of inhabitants of a locality, or of any neighbourhood within a locality" is not in my view satisfied by this Application.

5.54 Moreover, notwithstanding my conclusion that LSP use of the Land has been demonstrated during throughout the 20-year period, the Application faces the difficulty that regularly throughout the 20-year period local inhabitants would have been excluded from a significant part of the land. This is particularly so with regard to the use of the land by the Club but also with regard to the other events such as the Richmond Meet. This "exclusion" relates both to whether the Applicant has demonstrated that the whole of the land has been used throughout the 20-year period and as to whether the use for LSP was "as of right". So, I now consider whether the use of the land for LSP was "as of right".

The "as of right" issue

5.55 In my view, this issue requires consideration of the following matters:

(1) Was the land held under a statutory trust as a result of which any use for LSP was "by right" and not "as of right" under the approach upheld by the Supreme Court in *Barkas?*

(2) If not, given that it is publically owned land used for recreational purposes, as the Objector contends, is any use for LSP "by right" rather than "as of right". The Objector relies upon *Barkas* in this respect.

(3) Whether, by reason of exclusion of use for LSP from the land or parts of the land on different occasions, any LSP use at other times is by permission and therefore cannot not be "as of right",

I now address each of these matters in turn.

Statutory Trust

5.56 The land was transferred to the Council's predecessor, Richmond Rural District Council, by a conveyance dated 16 October 1968. Although that conveyance did not specify the statutory basis upon which the land was being acquired or the purpose for which it was to be put, a covenant restricting its use for 80 years was included (in clause 3).[38]

5.57 That covenant requires that the part if the land used then as a football field be used as an *"open field area for use as a football or a sports field for the benefits of the inhabitants of Richmond and the Rural District of Richmond aforesaid"*.

5.58 The Objector refers to the minutes of the Committee Meeting of the Rural District Council on 13 October 1967 where it was stated that with regard to land at Sleegill *"The Clerk reported that he had been approached by the Richmond Amateur Football Club regarding the purchase by the Council of land in Sleegill adjoining the River Swale. The Council considered the purchase of this land for recreational and other purposes"*.[39]

5.59 The Objector accepts that there is no express reference to a statutory provision and that the land is not held under an express statutory trust.[40]

"By right" by reason of the Application Land being publically owned land

5.60 Notwithstanding the Objector's acceptance that there is no express statutory trust, the Objector contends that as the land was held for the purpose of public recreation it could not be used "as of right". The

[38] Objector's Bundle – p.121.
[39] Objector's Bundle – Exhibit GH7 at p. 108. See also the minute at p.115 of the Objector's Bundle which refers to the land being preserved as an open area for use as a football field for the benefit of the inhabitants of Richmond and the rural District.
[40] Objector's Closing Submissions p.11 at para. 24 – see also p.13 at para. 27.3.

Objector refers to both *Beresford* and *Barkas* (at para. 49 of the Judgment) to support this.[41]

5.61 The Objector relies upon the Minute of the RDC referred to above, as well as the covenant restricting the use of the land for 80 years.[42] It is contended that these make it "abundantly clear" that the purpose for which the land was purchased and has been held subsequently was for public recreation.

5.62 This contention has to be considered having careful regard to the two judgments given in *Barkas*, and in particular that of Lord Carnwath, with whom the three remaining Justices agreed and didn't give separate judgments. In particular, I note the following:

(1) Lord Carnwath said that where there is room for ambiguity, the user by the inhabitants must be such as to make clear, not only that a public right is being asserted, but the nature of that right. (para. 61).

(2) Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there may be no reason to attribute subsequent public use to the assertion of a distinct village green right. (para. 64)

(3) Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to "warn off" the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of village green rights. (para. 65)

(4) However, Lord Carnwath said that this does not mean that land in public ownership can never be subject to acquisition of TVG rights, as demonstrated by the "Trap Grounds" case – *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674. Lord Carnwath said

[41] Objector's Closing Submissions pp. 11-12 at paras. 25 & 26.
[42] Objector's Closing Submissions p.13 at para. 27.

that that land had not been laid out or identified in any way for public recreational use, and indeed was largely inaccessible.

5.63 These judicial comments are clearly very significant and would appear to indicate that the circumstances in which publically owned land is capable of being subject to TVG rights are likely to be limited. Nonetheless, it is important to apply the principles set down in *Barkas* to the circumstances of this case:

(1) Although the RDC minute referred to "recreational" use, the covenant in the conveyance restricts the use to a limited form of this, namely use as a football or a sports field.

(2) However, that does not seem to me to be necessarily inconsistent with a general recreational use of the land by the wider public as well, as would be the case for land to which section 10 of the Open Spaces Act 1906 applies.

(3) Although, several of the Objector's witnesses referred to their understanding that the Club had the exclusive right to use the land as a sports field, that does not in my view go beyond its use for formal sports activities and training and other activities related to that. That is not inconsistent with a more general public recreational use being permitted as well and thus by right. Indeed, the Applicant contended that, when the covenant was put included in the document, it would have been intended to allow football to carry on being played and also any local inhabitants to carry out any type of sporting activity, hence the "OPEN FIELD" statement (the Applicant's emphasis).[43]

(4) This is entirely consistent with the use being "by right". As indicated above, I accept that the evidence of the Applicant, and those in support, of the free and open access to the land for LSP,

[43] See section 3.5(5) on p. 14 above.

save when other "formal" activities by the Club or permitted by the Club were taking place.

5.64 In contrast to the *Trap Grounds* case, which Lord Carnwath specifically referred to as an example of a TVG on publically owned land, the Application Land does have the characteristic of being accessible open space. As I have concluded above, the only attempt to stop or limit LSP use has been where this is considered harmful to the playing pitch or the health of those using the pitch. Those actions seem to me to be entirely consistent with the LSP use being "by right".

5.65 It seems to me that the reluctance of the Council to allow permanent fencing around the pitch in 1987 was also consistent with the Council "permitting" or facilitating wider open space use than just football.[44] Although that was prior to the start of the relevant 20-year period, it nonetheless seems relevant to me. Similarly, the support for the fencing is on the basis of excluding dogs from fouling the pitch rather than excluding people generally. That stance is consistent with a wider recreational use, in addition to use by the Club, being "by right". LSP use in those circumstances, following the clear guidance in *Barkas*, cannot in my view properly be considered to be "as of right".

5.66 I therefore conclude that as the land is publically owned land, subject to the Club's lease, held and used for recreational purposes, the LSP use relied upon is "by right" and not "as of right".

5.67 For the avoidance of doubt, I should make it clear that the fact that the covenant in the conveyance does not apply to the blue or white land (see Objector's Inquiry Document 3) is of no significance in my view. A very significant majority of the Land is subject to the covenant. So, in practical terms the area not subject to the coventant would be of little significance. Further, in my view it would be artificial not to consider that the use of

[44] Exhibit PM4 181-2 in the Objector's Bundle.

the whole of the land within Title NYK362434 has not been held for the same recreational use purpose.

Permission

5.68 Alternatively, the Objector contends that even if it were concluded that the use is not "by right" by reason of the approach in *Barkas*, the LSP use has been permitted and is thus not "as of right".

5.69 The Objector relies upon the case of *R (Mann) v Somerset* referred to above (at paragraph 5.22) to support this contention. The Objector contends that there is "a wealth of documentary evidence" throughout the relevant period which shows that a wide range of community and other organisations have expressly sought and obtained permission. There appears to be no real dispute on this and in my view there cannot be, as the evidence is compelling and consistent with much of the Applicant's evidence.

5.70 The Objector draws from this that it was known that use of the field was not "as of right" but required permission. In my view the important conclusions to draw from this are:

(1) On a regular basis throughout the 20-year period there were other activities, in particular by the Club, but also by other organisations, being carried out with the Objector's permission on the Application Land.

(2) These other activities would physically have excluded local people from parts, often a substantial part, of the land. With regard to football matches, when matches were going on (which was a regular occurrence at least once a week during August to about the middle of May each year), others were excluded. In addition, the clear evidence was that ropes were put up as detailed by Mr. Marshall prior to and during matches in the Teesside League. Even

if people could have stepped over or under the rope, there was a clear indication that, other than players and officials from the club and officiating in the game, everyone else was excluded from the roped off area. No witness for the Applicant said that they would do other than respect activities taking place on the land and would avoid that area of the Application Land when matches were taking place. Mrs. Bagley's evidence stated as much. There were also the pre-season fund-raising friendlies that Mr. Marshall gave details of and Mr. A Smith also referred to. Money appears to have been taken at the gate on some occasions. It was clearly intended that people should not enter onto the Land during these fund raising matches with Darlington and other Northern League teams. Mr. Marshall said that happened, as he was aware, for a period of 6 years during the late 1990s. With regard to other activities, such as the Richmond Meet, the public would be excluded from certain parts of the Land.

(3) One consequence of this is that, in my view, as a matter of fact and degree the extent of these permitted uses was plainly such as to the lead to the conclusion that it has not been demonstrated that the whole of the Application Land has been used for LSP throughout the 20-year period. I reach that view looking at the land as a whole rather than every single part of that land (see para. 5.8 above). As I saw on my visits and from the aerial photograph, the senior pitch takes up a very significant proportion of the Application Land.

(4) The second consequence is that these regular acts of exclusion were consistent with any LSP use at other times being by the permission of the owner or the person in possession of the Land, namely the Club. Either way, such use is by right and not as of right. This is the case, in my view, whether there was a charge to enter the land, or part of it, or not. It is the physical exclusion itself that has legal consequence.

5.71 Whilst I recognise that it is possible for a TVG qualifying use to co-exist on publically owned land at the same time as other activities, as in the *Redcar* case, that case can be distinguished from this Application. In *Redcar,* the question of implied permission did not arise. As set out above (at para. 5.22) in *Mann* Owen J. held:

> *81. In my judgment the flaw in the claimant's argument is, as I have indicated, that it fails to recognize the nature or effect of the owner's use and the significance of their act of exclusion. In Redcar there was no such overt act (or relevant or demonstrable circumstance). In the present case the inspector was entitled, and right, to distinguish this case from Redcar for this reason. (see the supplemental report at paragraph 2.39; see earlier).*
>
> *82. ..... this is not a case of concurrent competing uses, but consecutive uses in which following exclusion there is, at best, tolerated use by the local inhabitants as permitted by the owner. That is, this is not a case of mere inaction or passive toleration but one involving a period of active exclusion. (see Redcar, at paragraph 27 per Lord Walker).*

5.72 In my view, as set out above, there have been periods of exclusion on a regular basis by the Objector of the local residents from not insubstantial (and often substantial) parts of the Application Land. I note that, in contrast, access in the *Mann* case was denied to only a relatively limited proportion of the total area of the application land and on only a few occasions, while local people continued to use the remainder of the land. In my view in the case of Earls Orchard Field, and unlike in *Redcar*, there has been active exclusion by the landowner on a regular basis of people using the land for recreational purposes from part of the land for its own purposes. So, as found on the facts by the Inspector in *Mann* and upheld by the Court, this is not a case of mere inaction or passive toleration but one involving periods of active exclusion.

5.73 In conclusion, on this issue, it is my view that the exclusion of local residents carrying out informal recreational use from parts of the land when matches were taking place results in the use of the land for such

recreational uses being by implied permission. Thus, any such use cannot in any event be use "as of right".

OVERALL CONCLUSIONS

5.74 In my view, the Application does not satisfy the requirements of section 15(3) of the Commons Act 2006 for each of the following reasons. For the avoidance of doubt, it is my view that each of these reasons independently has the consequence that the Application does not meet the statutory requirements for registration of the Land as a TVG:

(1) The Applicant has not demonstrated that the claimed neighbourhood has a sufficient cohesiveness to satisfy the statutory requirements. Even if that requirement was met, I acknowledge that there would still be an issue over the locality. However, I am not persuaded at this stage that the locality issue would itself be a reason for rejecting the Application.

(2) I find the evidence of use of the Land for LSP on behalf of the Applicant to be convincing. In my view there has been open access to the Land and those using the land in that way have not, save possibly exceptionally, been asked to leave the land or otherwise challenged. I am also satisfied that a significant number of residents from the area claimed as a neighbourhood have used the Land for LSP. However, in addition to the failure to meet the "neighbourhood" requirement, that LSP use has not been of the whole of the land throughout the relevant 20-year period. That is a consequence of the regular use of the land by Richmond Football Club in particular and also by other organisations, including the Richmond Meet.

(3) The Land has been held and used for recreational purposes and in accordance with the approach of the Supreme Court in *Barkas* any LSP use has been "by right" and not "as of right".

(4) The permitted uses by the Club and the other organisations have another important consequence. In my view the regular exclusion of local inhabitants from the Land, or part of the Land, has the consequence that the use for LSP is permitted and cannot be "as of right" and qualify for TVG registration.

6. RECOMMENDATION

6.1 For the reasons set out in section 5 of this Report, I recommend to the Registration Authority:

That the Application by Mr. Derek Clark under section 15(3) of the Commons Act 2006 to register land known as Earls Orchard Field, Richmond as a town or village green is refused.

STEPHEN MORGAN
Landmark Chambers
180 Fleet Street
London
EC4A 2HG

20 October 2014

Appendix 3

Mr C Stanford
Commons Registration
County Hall
Northallerton
N.Yorkshire
DL7 8AH
Your reference: GEN / CNS 31st October 2014
Ref: Inspectors Report regarding Earls Orchard
28th November 2014.

Dear Sir,

Many thanks for your letter regarding the above and the opportunity to reply to the Inspectors conclusions, I have to say at the outset that I and many other people are shocked and very disappointed at the recommendation to refuse the application

It is not within my capabilities as a layman and my limited knowledge of the law to be able to contradict the inspector in his reference to various laws and cases or to contradict him on his interpretation of those laws, what troubles me with his conclusions is his interpretation of the evidence given at the Public hearing I was there as were you and Mr Evans so I am fully aware of what was said and what was proven.

Over the last 6 years I have acted in an honest and open way in dealing with this application, I strongly oppose some of the conclusions drawn by the Inspector, having lived in this neighbourhood for the whole of my life I see things differently to him and I am very disappointed at his conclusions .

I apologise if my response is rather long and drawn out but I feel strongly that attention has to be focused on many of the elements of the inspectors conclusions, I enclose with my response a copy of a report relating to a very similar None Statutory Enquiry held at Haltwhistle, for Northumberland County Council, dated July 2011 whereby the inspector has shown a far more modern and enlightened approach. I would be most grateful if the Registration Authority can consider this document fully before making any decision based on the inspectors report for Earls Orchard.

Yours faithfully,

Mr D Clark

Report from Non Statutory Public Hearing held at Catterick Garrison Leisure Centre 16th 17th & 18th July 2014

Applicant's response to the Inspectors report. (Mr D G Clark,3 Bridge Street Richmond)

1. With regard I think to the most important point in the report, the Inspector states that he can see no cohesiveness to call the area put forward a neighbourhood, I am to say the least offended by this remark my family along with many other families have lived in this neighbourhood for generations and we see it as a neighbourhood and it is us the inhabitants that matter. The inspector seems to be basing his conclusions on outdated criteria that was determined 40 or 50 years ago and I think in the 21st century this is a very sad indictment of the whole process, the inspectors lack of vision in these modern times to take account of how things have changed has made him reach the conclusion he has. The criteria that a neighbourhood should have to have a public house, shops, community centre, neighbourhood watch, a school, a park, a doctors surgery etc seems to give the impression that all neighbourhoods are the same and are built around an ideology that has long since gone, I would make reference to the case of ***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.*** (The Green and neighbouring streets certainly did have pre existing cohesiveness as described below it is modernity that has changed it, THE GREEN has been known for centuries as a suburb of Richmond therefore giving it a meaningful description*") if a housing estate is capable of being a neighbourhood then it would only be the rarest of neighbourhoods that would have every feature of a locality, whilst there might very well be shops, often there will not be any shop, rarely would there be a doctors surgery, even many villages these days of centralisation might not have a doctors surgery, and if it did then if we were relying upon an electoral ward a village might have two such wards, but only one might have the doctors surgery, shops and other features, are those that live in the ward where there are no such facilities really to be so disadvantaged over the other villagers ,I think not, therefore in my submission far too much reliance is placed on such criteria.* "If a judge can think like that and I can think like that is it unreasonable to expect an inspector in the year 2014 to also think like that?
   Lord Hoffman in that case is hinting as to the correct approach when he says that the question of size and criteria that make up a neighbourhood is wide open to various interpretations, in our submission the CORRECT formula is that of the state of mind of the residents as to what constitutes their neighbourhood, in other words a neighbourhood need not be seen to be described by any legal or physical division or even legal definition but a social concept the evidence of which is given by those who live there.(I do not think there is a defined legal interpretation of a Neighbourhood) It is purely as seen by the person viewing it and the interpretation that individual puts to it as to whether evidence of a neighbourhood exists, every individual will have a differing opinion. Why is it that the thousands of visitors that flock to Richmond seek out The Green as one of THE destinations to view, it is simply a beautiful place to live and is a recognised neighbourhood of the town.

It was clearly pointed out at the hearing by my brother Mr R Clark speaking on my behalf that this neighbourhood did have all of those things mentioned in the criteria in the past,(pre existing as previously mentioned)In fact during the 20 year period we are talking about there was "The Restaurant on the Green" closed in 2007 but carried on as a B & B until 2009 there were 3 public houses all of which were open for business during the 20 year period, The Oak Tree closed in 1995 and the Board Inn closed in 2006 just 2 years before the fences were erected, unfortunately only one remains open, that being the Holly Hill public house, there was also the Earls Orchard Field Study Centre in Sleegill an educational establishment run by Durham Education Department, there is the Swaledale Outdoor Centre in New Road (still open) used for a variety of outdoor and social events and still thriving, there is the Richmond Operatic Society in Bargate (still open) an antique shop in The Bar, a sowing shop in The Bar allotments in Bridge Terrace we have Rodbers builders merchant off New Road, Rodbers DIY shop off New Road, we have The Old Brewery Guest House on The Green and since the hearing we found 4 other businesses operating from The Green, all of which are on the internet, Sds Design consultants,No14 The Sherpa Van Project (Tour Operator) No 29, Richmond Architectural Services No 15 and Pat Gale Associates (Schools Foundation) No9 Dan Gracey Architect No 4 Bridge Street, and of course we have a ***local football club and field for recreation***, this was one of the most used social meeting places by local residents taken away overnight after 50 years of constant use by the local inhabitants, this must be relevant to the application, many local people enjoyed socialising on the field as part of everyday life, it is a community asset including for the residents of Sleegill who also use the field as part of the neighbourhood, the inspector who accepted Sleegill as part of the neighbourhood seems to have changed his mind at some stage as to the legality of this meeting the criteria:-

Lord Hoffman in the Trap Grounds case stated that a any locality or neighbourhood within a locality need not be wholly within a single locality and concluded that it means "within a locality or localities" It would seem reasonable therefore to conclude that although Sleegill lies within a separate electoral ward from The Green (Hipswell Ward) being part of the neighbourhood within a locality or localities it would satisfy the criteria as required and not weaken the integrity of the application, rather it would strengthen the validity of the application, on this point the inspector seems to agree that, in his report he says ***"he is not persuaded that the locality issue would itself be a reason for rejecting the application".***

A neighbourhood is made up of people who live side by side, interact with each other and look out for each other (a communal neighbourhood watch) one neighbour will take another to a hospital appointment or take in their parcels, call in for tea or coffee, keep an eye on neighbours property when they are away, do odd jobs to help out ,loan out ladders and tools etc that is what a neighbourhood is about, Pubs and corner shops are not sustainable in this modern age even though we have had all of

these things in the past, they are a symbol of the past, a very nostalgic and pleasant memory. ***At what stage in time do the criteria get looked at in order to take into account the modernisation of society and the changing face of our streets and high streets?*** It has to have a revue at some stage to take account of the changes in society; it cannot remain the same forever. An example is our town centres and high streets, they have changed beyond recognition over the last thirty years with thousands of empty shops and the decline of many others, many household names like" **Woolworth**" have gone from our towns forever it must surely have an effect on criteria being used to decide such very important issues such as Village Green applications.

Technology over the last thirty years has changed the face of the whole country, people pick up their phone or go on their computer and order their weekly shop and it is delivered to their door or they jump in the car and go to Tesco or Sainsbury or any of the other big shops, this has been the case for much more than 20 years, the **corner shop died long ago my family owned a corner shop on the Green and the decline set in during the 1970's** statistics show that over 2000 corner shops per year were closing and the trend continues to the present day. People also buy their alcohol when they buy their shopping and drink at home as it is more convenient and cheaper, that is why the public house has also seen a massive decline in recent times with over 1300 public houses a year closing down, It is neither reasonable nor morally correct **NOT** to take these facts into account. **I would quote as an example the village of Skeeby just 2 miles from Richmond there is no public house (now closed) and no shop (now closed) the school closed years ago it has no doctors surgery or children's park therefore would not qualify,** t is grossly unfair and unreasonable to apply outdated criteria to a modern society.

Consideration should also be given when deciding the application that The Green itself was designated a Village Green in 2006, it must surely add some weight to this application even though the criteria for the 2006 designation may have been slightly different, it is a very identifiable neighbourhood, it would not have taken place if residents had not got together as neighbours to oppose the Council's plans when it was suggested the Green could become a car park.

It cannot be stressed to strongly that The Green has a history as a unique suburb/neighbourhood of Richmond long recognised as an industrial suburb of the town, this fact is proven beyond doubt by the town Council as shown on many of the visitor information signs around the town, (photo enclosed) and many historical articles, books and town maps going back hundreds of years again adding weight to the argument that it is indeed a neighbourhood.

Richmond has several very distinguishable neighbourhoods that any local resident would recognise as a neighbourhood of the town if one were mentioned to them, however none of them have a pub and only three have one shop therefore none of

these areas would meet the criteria set out for neighbourhoods. In the statement from Mr Hudson the Council Open Spaces Officer he says that only Ronaldshay park has the criteria to meet the requirements of a neighbourhood as it has a play Park, a Cricket Club a bowls club and a Scout hut, unfortunately it has very few houses and few inhabitants rather an odd reference to make but when attempting to defeat a very honest application such as this they seem willing to say anything to help the objectors case. This statement it would seem has been prompted by his reading of the barristers report or at someone's suggestion.

2. The inspector states quite clearly he has accepted the evidence from the applicant that there has been open access to the land and also he is satisfied that people using the land have not save for the odd exception been asked to leave the land or have been challenged. This acknowledgement therefore would suggest that statements made by witnesses for the objector (RDC and RTFC) have not convinced the inspector that their claims to have challenged people as stated in those statements have any truth in them, this could be the only conclusion as no records, diaries etc were produced to substantiate their claims. The inspector goes on to say that he is satisfied that a significant number of residents from the claimed neighbourhood have used the land for LSP.
He then goes on to say that he is not satisfied that use has been on the whole of the land for the 20 year period and that this is as result of regular use of the land by RTFC in particular and other organisations using the field.

All of the witnesses FOR the application made statements that they had used the whole of the land and not just a section of it, this was again confirmed when cross examined by Mr R Clark by stating that the whole area of the plan of the land provided in the objectors file and pointed out to them was indeed the area they had used, Mr R Clark provided photographs showing him and his son using the field at various times, one photograph shows his two daughters at a very early age (both now in their 30's) sitting in the middle of the field with other users openly visible at the far end of the field. There was also a photograph of a football match taking place with all players wearing wellingtons, this match was organised as a charity match between local pubs in the 1970's Mr R Clark is one of the players and also helped organise it, no permission was asked for this to take place it simply went ahead.

All statements given by the witnesses for the application were sworn in front of a solicitor as statements of truth and should not be disregarded or interpreted as anything but true statements. This is in stark contrast to the statements provided by **Mr Venables** and **Mr Lodge** (not present at the hearing) who had both signed as *statements of truth*, when cross examined by **Mr R Clark, Mr Venables** was asked ***"did you write this statement yourself?*** His reply was ***yes***, he was then asked ***"did you write this statement at home on your own"***? again he replied **YES**, he was then asked "did you type it out yourself" he replied **NO** when put to him ***"was it typed in the council office and you went in to sign it"*** he replied **YES**, he was then asked "why ***much of his statement was word for word the same as his supervisors Mr Lodge"***, he made the reply that ***"they may have talked about it"***, it was obvious the statements had been rehearsed and choreographed to benefit the objector using either templates or encouragement from others, throughout all of the statements from the Council employees there was an abundance of paraphrasing which suggested they were not statements of truth, had my brother **Mr R Clark** had previous experience of being an "Advocate" would have made more probing questions into those statements during the hearing, however this particular point referring to **Mr Venables WAS** highlighted at the time to the inspector in the hope that he would have questioned vigorously why the witness statements were so alike but he completely ignored it, it suggest to me that these statements have been completed using some form of template and the witnesses encouraged to use words or phrases they would normally not use or be aware of.

Hudson:- Paragraph 1, Same as Lodge & Venables
Paragraph 8, Same as Lodge & Venables
Paragraph 9, Same as Lodge and Venables
Paragraph, 16, Same as Lodge and Venables

Lodge Paragraph:-1, 2, 3, 4, 5, 6, 7 same as Venables

It is quite amazing how three individuals sitting in their own homes miles apart can write statements that are so alike in so many ways with such accurate dates and information, these statements are in my opinion not statements written individually but concocted to strengthen the objectors case, it was a travesty that these statements were accepted as evidence, I do not accept them as statements of truth and they should be removed from the evidence. The inspector must surely have noticed this collusion going on but he did not question him about it at all during the hearing, I feel very let down by his inaction on this particular point.

It may also be worth pointing out at this point that one witness for the objector Mr Conway has been harassing me the applicant since 2008 (**proof of this from the Police**) he has also intimidated and threatened my witnesses (**proof again from the police, Sgt Helen Blocklkley**) and in so doing frightened them off attending the

hearing, this was made clear to the inspector prior to Conway giving his evidence who has clearly ignored my complaint and allowed Conway who has lied throughout (we know that) in his statement he states that he has had many conversations with Mr Clark,(meaning me the applicant) that itself is a complete and utter LIE I have never had any conversations with that man at any time, during cross examination he proved himself to be a complete fool and not a credible witness, however the inspector appears to have believed everything he said as truthful, I am appalled.

The inspector in his summaries has suggested that a large section of the field was taken up by the playing area as shown in an aerial photograph, he seems at this point to have in his mind that the fences have always been in position to prevent use of the playing area by the public, this is totally incorrect, the playing area has not always been in the position it is now, it has been moved a number of times to various parts of the field and was never fenced or roped to prevent full use of the land by local residents. As stated in my evidence the playing area has only ever been roped off since RTFC entered the Teesside League which would be in the 1990`s and only the perimeter of the playing area was roped (along the white lines) and the rope was only in position from about an hour before the match started and was taken down immediately the match finished it did not prevent local people from using the field or walking around the playing area. It was clearly stated by all other witnesses that this was the situation and there was no exclusion from the field at any time, nobody left the field when the rope was being put up people simply showed good manners/courtesy (**Haltwhistle** and ***Lewis v Redcar***) and avoided the pitch area as anyone would, these were sworn statements of truth.

The inspector also claims that as other organisations had used the field for other events and had sort permission from RDC and RTFC our use could then only have been as **"by right"**, there is no evidence to show (and none provided) that RDC had any documentation showing any organisation had applied to them for use of the land, any applications that had been made were made to RTFC who are the lease holders and not the landowners. It is accepted that other events did take place on the field, however none of these events ever prevented local inhabitants from entering the land and using it as they normally would,(***Haltwhistle & Lewis v Redcar***) it was Mr Blease when giving his evidence (for the objector) who has a long association with both RTFC and The Richmond Meet that vigorously pointed out when questioned by the inspector that people were not charged to enter the event "it would not have been right people had a right to be there, they gave a donation to the Meet if they wanted to" those were his words. Richmondshire District council have never asserted their right to prevent any of the local inhabitants from using the land in any way, no signage of kind or by any other means, local use for LSP has coexisted along with football for over 50years and registration would neither enhance the public use nor lesson the Councils use of the land.

Mr Hudson the Open Space and Amenities Officer for the council stated that anyone seeking permission to use the land for extra events would fill in a questionnaire supplied by the council, the example produced at the hearing was a new questionnaire showing the Brand New Council logo and new address this questionnaire was conveniently produced on the first morning of the hearing by Mr Easton their barrister. When cross examined by **Mr R Clark** and asked to produce these documents where people had requested permission he could not do so and could not produce a copy of an old questionnaire, this would suggest that no questionnaires existed prior to the council moving to their new offices and that none had been completed in the past by anyone seeking use of the field, (none in the bundle) it was untrue to say that questionnaires had been used when no proof was provided. It also must raise the question "does the local authority **OWN** the land as landlords"? ***In Hall v Beckenham Corporation 1949***, it was held that the local authority were not in occupation of the recreation ground in question but merely it's custodians or trustees on behalf of the public to whose use it was dedicated, they were **NOT** the owners of the land. There are many areas of land that are publicly owned **(adjacent to Homebase in Northallerton as an example)** that have open public access where football is also played and LSP take place daily.

Lewis v Redcar: when people show good manners and decent behaviour when golf was taking place or in this case when football is taking place by avoiding the area being used and until such use ends then this is not as the inspector states exclusion from the land, merely god manners. The time element for football taking place at Earls Orchard in terms of **REAL TIME** takes up only a small amount and usually only at weekends, **(Haltwhistle)** people do not turn around and leave the field because football is taking place they merely avoid the playing area, it should be pointed out that many female members of the community avoided the field when football was taking place in order avoid the foul language used by the players and the fact that these players would often urinate in public on the field and still do.

Mr Marshall also stated that junior teams use a different section of the land for play and training, that was not the case during the 20 year period we are concerned with, juniors did not use the field during that time they have only used the field since the fences were erected, junior teams played on **school** fields and many continue to do so. The inspector has believed this statement but does not believe his earlier account of challenging people, both statements are untrue I know that for a fact.

With regard to other events taking place on the field,(inspectors report page 78 (4) it is stated that "regular exclusion of local inhabitants from the land or part of the land has the consequence that use of the land is **"not as of right."** The Richmond Meet

has been mentioned regularly, this was held one weekend per year and other events included overnight camping for canoe clubs and re-enactments groups, other events were rare and mainly consisted of other football clubs using the playing area, local inhabitants would not interfere and would carry on as normal using the rest of the field, none of the events stopped continued use by the local inhabitants, indeed when these other users were on the field I and many other local people would get into conversation with them no restrictions were put in place, why the inspector has conclude that local people were excluded is a mystery to me it was never confirmed at the Hearing.

He further concludes that because the football club lease the land for formal football then the land is being used "by right" it may well be the case for RTFC but the local inhabitants continued use and assertion of their rights without any formal permission or licence and continuing to do so would be "as of right" no attempt to restrict the use of the local inhabitants has ever been made, by either the Council or RTFC until the erection of the fences, I would refute the inspectors conclusion, ***Lewis V Redcar*** again. The case at Haltwhistle is a mirror image of Earls Orchard and was successful many of the conclusions against the Earls Orchard application by Mr Morgan have been accepted in the Haltwhistle case by reference to precedents held in law by ***QC Mr D E Manley***

Village Green status for the land at Earls Orchard would neither enhance the public's rights of use nor diminish the Councils use, co existence would continue. We would urge the Registration Authority to analyse the enclosed document which is a report from the Non Statutory Hearing held at Haltwhistle for an application for Village Green Status conducted by *D.E Manley QC* the similarities are almost a mirror image of my application.

I have spoken to many people in the town who were shocked to hear that local people had been prevented from using Earls Orchard as they had also made use of this public piece of land for various activities and were now prevented from doing so.

It is government policy to encourage the public to get involved in more outdoor activities whatever the age they may be, Richmondshire District Council only seem interested in encouraging football and have restricted use of many recreational areas by the public in favour of RTFC, why this group of people require so many of these fields I don't know, elderly, disabled and partially disabled people need these areas to enhance their quality of life yet every obstacle is put in their way. Earls Orchard is now locked up for 5 days per week and no member of the public can indulge in LSP as

they did before, this is public land bought with public money and should be used by all, Village Green status would allow co existence between football and general use, without that status our democratic rights will be lost.

The geography of the land around Earls Orchard whereby the river divides the electoral wards is quite unique, the bridge over the river is actually called Richmond Bridge and is a grade 1 listed building however the council refer to the bridge in all there information literature as The Green Bridge so that the area in which it stands is easily identifiable to all, it is in our neighbourhood.

To conclude I would appeal to the registration authority to look thoroughly into my reply to consider thoughtfully and with consideration of modernity the question of "Neighbourhood" and "locality" and to compare the enclosed Haltwhistle case with the Earls Orchard application, there are so many anomalies to consider regarding these issues, it would be unfair I think not to give further consideration to them in more depth than the inspector appears to have done.

I feel that the inspector has failed in his duty of care to me to give 100% attention to many of the issues, he never questioned the duplicity of the statements mentioned earlier in this reply as the QC in the Haltwhistle case has done, to question the statements from the objector where so much has been duplicated was critical, it is obvious that more than just "some assistance" has been given to those witnesses mentioned, words and sentences of exactly the same content do not appear in statements of truth purported to have been written by the witnesses themselves.

I feel let down by the complacency shown in the inspectors lack of action on these statements and his lack of reference to them in his report, I feel that allowing these statements together with allowing Conway to give evidence after it was known by the inspector that he had intimidated witnesses and frightened them off attending the hearing, the inspector should have contacted the police to confirm my complaint and rejected Conway as a witness together with his so called evidence.

The integrity of my application has been totally compromised; The inspector has made conclusions that local people were excluded from the field with no evidence whatsoever, that is outrageous and wrong, he has concluded that people had been prevented from walking around the pitch on the word of Mr Marshall when every other witness said the opposite, the inspector could find no sign of the so called posts that the rope was attached to on his site visit yet still accepted Marshall's word for it, something is not right about this, the police do not work that way and a public hearing should not work that way, conclusions should be made on EVIDENCE not

speculation and hearsay, had people been allowed to swear an oath I am sure the outcome would have been different.

I think it is a matter of great significance to make the point that had Richmondshire District Council fulfilled their obligations in law with regard to the statutory requirements put up upon them by the 1875 Public health act and the wording of the covenant included in the transfer of land /sale document which they signed up to and agreed to at the time of purchase of the land we would not be in this position now. They have acted appallingly and illegally for years showing total disregard for their legal responsibilities, the covenant clearly states that there should be no building on the land for 80 years from the date of purchase, within 5years they had built the pavilion, it was stated at the hearing that the piece of land where this pavilion stands was bought from a different landowner, the section was coloured blue on their map, you could colour this pink and say you bought it off Father Christmas but you would still be required to provide proof of purchase, the council did not do that and have not proven that whole area of land including the section coloured blue is anything other than one parcel of land, this again as far as the law is concerned is an untruth, how many more untruths have they made or implied. This could be validated by my request to the Council prior to the enquiry requesting under the freedom of information Act copies of all documents appertaining to the transfer and purchase of the land at Earls Orchard from the Rural Council to the District Council, I was told there was no documentation available, however documentation was produced for the hearing in the objectors file, they lied again on this point. The covenant also states that the use of the land should be as a football or sports field for the benefit of the inhabitants of Richmond and the rural area, the covenant also does not discriminate against one activity or for the other yet RDC give exclusivity to one group in breach of the covenant, it also states that the field should remain an open field for 80 years yet they have fenced it off, it does not allow also from one selective group like RTFC to control and make a profit from a public asset that should be free to all.

Richmondshire District Council cannot be relied upon to tell the truth or have proved that they act within the parameters of the law of the land, I fail to see why such an eminent and much praised barrister as the inspector simply takes what they and their representatives say as being the truth without any documentation to prove what they say is the truth, it is not acceptable.

The covenant also makes it clear that the field should be used as a football field or sports field it does not discriminate in favour of one or the other, it also states that it is to be used for the benefit of the inhabitants of Richmond and the rural area and should remain an open field for the same 80

I have not been in the best of health over the last year and I am not getting any better, this application has caused me great stress and I have been harassed since the application went in, the inspectors lack of analysis and blatant disregard of witness statement has only added to that stress, how do I and the local inhabitants get any justice.

It is very frustrating for me and those supporting this application to be told that we are not being believed in our sworn statements, that we do not live in a cohesive neighbourhood, how would anyone know that who did not live here, to be told that we should not venture into a neighbouring parish to enjoy a beautiful piece of land purchased with the help of our rates and council tax, simply because some outdate feudal piece of law suggests this, yet the very people using the land have on the whole paid no taxes (they are mainly single young men) towards the purchase and do not reside in the same parish. How stupid is the law in that respect ?

I feel strongly that my application has been compromised by the behaviour of Conway and his intimidation of witnesses and the fact that I feel the inspector has not given 100% consideration to my witness statements or the objector's statements and he seems to be at odds with legal decisions made in other cases.

If on the basis of the inspectors report and his recommendation my application is refused then based on my comments above, if another enquiry or a new application could be requested then there would be justification in my opinion for that to happen.

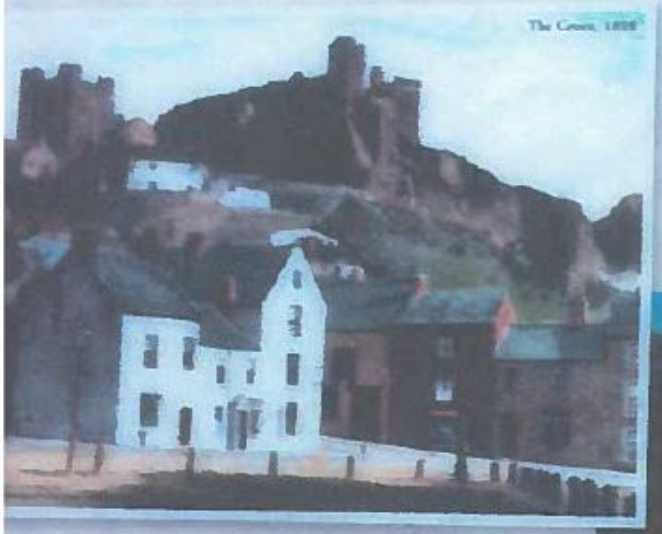
Signed,

Public Hearing Relating to:

Village Green application at Earls Orchard Richmond, N Yorks During 16th 17th 18th July 2014

Having given a statement at the above hearing that I have never been denied access to the above mentioned field on any occasion, have never paid an admission to enter the field or have ever been prevented from walking fully around the perimeter of the pitch when football was taking place, I hereby state once again that that is a true statement. Date : [redacted]

18 objectors signed this document; their details are redacted to protect their personal data.



Culloden Tower

Culloden Tower, which can be seen in the distance, was built as a folly by Richmond MP, John Yorke. It commemorates the Hanoverian victory over the Jacobites at the Battle of Culloden in 1746

The Green

Below and to your left, just out of sight lies The Green. This picturesque area was once an industrial centre, housing tanneries, a brewery and corn and cloth mills. The attractive bridge leads on to the old turnpike road to Lancaster.

IN THE MATTER OF AN APPLICATION TO REGISTER LAND KNOWN AS THE OLD SCHOOL PLAYING FIELD, HALTWISTLE AS A NEW VILLAGE GREEN AND A NON-STATUTORY INQUIRY HELD ON 18TH JULY 2011 AND 22ND AND 23RD SEPTEMBER 2011 AT HALTWISTLE LIBRARY, MECHANICS INSTITUTE, WESTGATE, HALTWISTLE

REPORT

of David Manley QC

to Northumberland County Council

as Commons Registration Authority

I) By Form 44 signed by Jean Belger as Chair of the Fairfield Park and Willia Road Neighbourhood Action Group application has been made to register, pursuant to S15(2) of the Commons Act 2006, land known as The Old School Playing Field as a Village Green. Form 44 paragraph 6 identified Haltwistle Town as either the locality or neighbourhood within a locality relied upon. Miss Allan's closing submissions confirm that Haltwistle Town is relied upon as a locality. Mr Pike in his closing submissions acknowledges that Haltwistle Town is capable in law as being a locality. I agree and shall therefore proceed on that basis.

II) The Field lies on the northern edge of the town albeit only a few minutes walk from the centre of town. The town is of modest size having circa 4,000 inhabitants. The Field leads to Haltwistle Burn and the route of a public footpath runs along the eastern side of the Field and it is accessed by a gate. The path ultimately leads to Hadrian's Wall. The Field has historically been connected with school use; originally Haltwistle Senior School which relocated in 1960 and thereafter Haltwistle Infants and Junior School which relocated in 1985. The school buildings were to the immediate south of the field and following the 1985 relocation the site was redeveloped for housing.

III) The Field had originally been acquired by the County Council in 1939. On 13th July 1988 planning permission was granted for its use as public

open space and around this time it appears that the Swimming and Leisure Centre took over responsibility for looking after the land ie. maintaining it and booking in football matches in particular. The Field was transferred to Haltwistle Town Council on 18th May 1990 and they hold the land as custodian trustee for the Haltwistle Social Welfare Centre which is a registered charity under registered reference no. 522067. The Field was transferred subject to a covenant that the land be used for public open space.

IV) I pause here to deal with a preliminary point. S15 of the Commons Act 2006 provides, so far as is relevant as follows:

> **"15 Registration of greens**
>
> (1) Any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies.
>
> (2) This subsection applies where -
>
> (a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and
>
> (b) they continue to do so at the time of the application.
>
> .....
>
> (7) For the purposes of subsection (2)(b) in a case where the condition in subsection (2)(a) is satisfied -

(a) .....

(b) where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right"."

V) In this case the question arises as to whether the grant of planning permission in July 1988 or the transfer of the land in the terms noted on 18th May 1990 triggered S15(7)(b) ibid. Both Mr Pike and Miss Allan acknowledged that the provisions of S15(7)(b) ibid have been brought into play but Mr Pike relies on 18th May 1990 as the trigger while Miss Allan relies on the earlier date ie. July 1988. Neither suggest that much turns upon this difference and I agree that the evidence does not suggest that the use of the land was materially different between the periods 1968 - 1988 or 1970 - 1990. However, it is desirable for the purposes of the report that a period is identified. In this case I recommend that the appropriate date for the purposes of S15(7)(b) ibid is 18th May 1990. There is no clear evidence that the planning permission in 1988 was ever actually implemented. What is clear is that use from 18th May 1990 was by right rather than as of right. Certainly the owner would have been unable to stop public use for recreation as it was duty bound to permit it and any prohibition would have placed it in breach of trust. In these circumstances the 1990 date seems most sensible and therefore this report concerns itself with usage over the period 18th May 1970 - 18th May 1990. This in itself

causes difficulties in that people move away or die and memories become severely taxed. I have had this very much in mind in writing this report.

The Law

VI) I have set out the relevant statutory provisions above. These provisions have been the subject of an unusual amount of judicial comment and I shall deal with this as far as it is strictly relevant.

"Significant Number"

This criterion is inextricably bound up with the concept of "locality" which in this case is agreed to be Haltwistle Town. In ***R v. Staffordshire ex parte Alfred McAlpine Homes Ltd*** [2002] AC 63 the Court rejected the notion that "significant number" necessarily implied a larger number and said that whether the criterion was met was very much a matter of impression for the decision maker. Clearly there has to be some broadly proportional relationship between the amount of usage and the size of the locality and plainly more than occasional trespass is required to satisfy the criterion. In broad terms the decision maker should be asking whether the evidence reveals usage of the land by the community comprising the locality.

"Locality"

This is agreed and therefore I do not propose to dwell on it further.

"Indulged in Lawful Sports and Pastimes"

It is clear that there is no requirement for organised games but lawful informal recreational activities such as dog walking, children playing and so on are enough.

"As of Right"

Given the way that the case has been argued in the present application it is useful to make reference to ***R (Lewis) v. Redcar and Cleveland BC (No.2)*** [2010] UKSC 11. The headnote, inter alia provides as follows:

"*Held*, allowing the appeal, that, although "sports and pastimes" in section 15 of the 2006 Act denoted a single composite class and land registered as a town or village green could be used generally for sports and pastimes, registration neither enlarged the inhabitants' rights nor diminished those of the landowner, who retained the right to use the land as he had done before, and in practice it was possible for the respective rights of the owner and of the local inhabitants to coexist with give and take on both sides; that, although the English theory of prescription was concerned with how matters would have appeared to the landowner, the tripartite test of nec vi, nec clam, nec precario, was sufficient to establish whether local inhabitants' use of land for lawful sports and pastimes was "as of right" for the purposes of section 15, and it was unnecessary to superimpose a further test as to whether it would appear to a reasonable landowner that they were asserting a right so to use the land or deferring to his rights; that, if the user by the local inhabitants for at least 20 years were of such amount and in such manner as would reasonably be regarded as the assertion of

a public right so that it was reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration, the landowner would be taken to have acquiesced in it unless he could show that one of the three vitiating circumstances applied; that, in any event, a reasonably alert landowner could not have failed to recognise in the present case that the user by the local inhabitants, who had regularly and in large numbers continued to cross the area covered by the golf course in order to pursue their lawful sports and pastimes, was the assertion of a right to use the land which would mature into an established right unless he took action to stop it, and he would not have concluded that they were not doing so merely because they showed servility or deference towards members of the golf club when play was in progress; that, therefore, the Inspector's assessment constituted an error of law in that he had misdirected himself as to the significance of perfectly natural behaviour by the local inhabitants; and that, accordingly, the local authority was required to register the disputed land as a town green."

At p666 ibid Lord Walker of Gestingthorpe said:

"*Deference or civility?*

36 In the light of these and other authorities relied on by Mr Laurence I have no difficulty in accepting that Lord Hoffmann was absolutely right, in *Sunningwell* [2000] 1 AC 335, to say that the English theory of prescription is concerned with "how the matter would have appeared to the owner of the land" (or if there was an absentee owner, to a reasonable owner who was on the spot). But I have great difficulty in seeing how a reasonable owner would have concluded that the residents were not asserting a right

to take recreation on the disputed land, simply because they normally showed civility (or, in the inspector's word, deference) towards members of the golf club who were out playing golf. It is not as if the residents took to their heels and vacated the land whenever they saw a golfer. They simply acted (as all the members of the Court agree, in much the same terms) with courtesy and common sense. But courteous and sensible though they were (with occasional exceptions) the fact remains that they were regularly, in large numbers, crossing the fairways as well as walking on the rough, and often (it seems) failing to clear up after their dogs when they defecated. A reasonably alert owner of the land could not have failed to recognise that this user was the assertion of a right and would mature into an established right unless the owner took action to stop it (as the golf club tried to do, ineffectually, with the notices erected in 1998)."

At p679 Lord Hope of Craighead stated:

"75 Where then does this leave deference? Its origin lies in the idea that, once registration takes place, the landowner cannot prevent use of the land in the exercise of the public right which interferes with his use of it: *Laing* [2004] P&CR 573, para 86. So it would be reasonable to expect him to resist use of his land by the local inhabitants if there was reason to believe that his continued use of the land would be interfered with when the right was established. Deference to his use of it during the 20 year period would indicate to the reasonable landowner that there was no reason to resist or object to what was taking place. But once one accepts, as I would do, that the rights on either side can co-exist after registration subject to give and take on both sides, the part

that deference has to play in determining whether the local inhabitants indulged in lawful sports or pastimes as of right takes on an entirely different aspect. The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his land may be taken as an indication that the two uses can in practice co-exist.

76 Of course, the position may be that the two uses cannot sensibly co-exist at all. But it would be wrong to assume, as the Inspector did in this case, that deference to the owner's activities, even if it is as he put it overwhelming, is inconsistent with the assertion by the public to use of the land as of right for lawful sports and pastimes. It is simply attributable to an acceptance that where two or more rights co-exist over the same land there may be occasions when they cannot practically be enjoyed simultaneously:"

VII) The burden of proof in this case lies on the Applicant and that burden involves establishing each and every element of the statutory test on a balance of probabilities.

VIII) Finally in reference to matters of law, there is no general express or implied exclusion of local authority land from the scope of S15 ibid and no such proposition has been advanced in this case.

<u>The Evidence</u>

IX) My notes of the evidence are set out as contemporaneously taken:

Mr Powell - (Statements at p55 and 73 Applicant's Bundle). Moved in to address in September 2003. I have helped collate the statements - people have moved away but I think the statements submitted give a clear picture of what went on on the land. From speaking to people the use has been there since 1939 and even longer.

NB Fairfield Park is to the immediate south of the site ie. in the relatively new housing built on the old school site.

XX by Mr Pike - I did know the site prior to 2003 - I visited the area occasionally to see my mother-in-law and sister-in-law. The visits were probably once per year. I think the population of Haltwistle is approximately 4,000 people. I walk the dog daily on the site - I throw balls and sticks and so on for ½ hour or so. I enter the land via the public footpath. We move around the field. I use the whole area of the land including the area of the BMX track. The BMX track was created in 2005 - I am not sure who was behind it - I think the partnership were involved. Prior to that it was unkempt land. I objected to the BMX application - it was spoiling the general usage of the land. The Slaters Funfair visits twice pa - I don't know how it is organised. I can accept that post-1990 it was organised by the Leisure Centre and a rent is paid. The Fair is on the flat part of the field - where the pitches are. I am not aware of anyone objecting to the presence of the Fair itself - it doesn't stop using the land for walking. I acknowledge it restricts activity in the area of the Fair itself.

There is one pitch (football) laid out at the present time - I understand it is maintained by the Conservative Club team. The grass is cut - I am not sure who has the job of doing it; either the Leisure Centre or the football club. Re Mrs Belger's survey - p59 - 61 of Applicant's Bundle - I was not with her when she carried it out. I can't help you with it (Miss Allan points out that Mrs Belger will be called later.) Carnival Week occurs once pa - it is a series of concerts. I don't know who organises it. It went on long before I moved in. I have never heard of anyone complaining about it - there has to be "give and take" if you like. Just like football - obviously I wouldn't walk across a pitch when there was a game on.

Miss Allan ReX - Fairfield Park was built 89/90 - I think planning permission was 1988. I saw tug of war at the Carnival but it only takes up a limited area - it doesn't take up that much space.

Mrs Wray (p84 Bundle) - I confirm this is my statement; it is true. When I was a child I lived at Holly Cottage, Burdon Mill. Married in 1968 - we were in Blenkinsop Castle for about one year and then moved to Haltwistle and built a house in Townfoot. We were there 4 years. When I was a child we went on the school field in the summer holidays. People respected each other - so dog walkers and kids playing football or people playing rounders all got on. I was born in 1949 and I lived with my parents in Haltwistle until 1968. Used to see kids on there from Coombe Hill.

In the mid-70's I was part of a group of women (8 or 9) who used to play rounders on the field every Wednesday evening. I moved to Croft Head Farm in 1988 ie. next to the site. There was a football pitch on it. From my field there is a gate into the site via FP. In summer my daughters (born 1970s and 74/83) rode their horses in the field - so did the Murray girls who lived up by the burn.

XX - If school children were on the field people would keep a respectful distance and use other parts of the field. People respected football - but I have seen dogs run onto the pitch and chase the ball. The Carnival is organised by the Carnival Committee made up from people from Haltwistle. I can't recall the Circus on the land. Re your husband's statement (p81): re para 8 - I have heard of the initiation. He drives across the field to take hay across and access stock - it is the only route. He walks the field regularly with the dogs to check stock.

Q. Your para 17 and husband's para 19 - very similar wording and same formulae.

DM Did anybody help you with the wording - in any way.

A. No - I wrote it with my husband.

Mr Pike - were you provided you with any templates or forms of words - which you were told you were free to change. You sent off a handwritten statement - did you receive a template.

A. No - I did get in contact with Mr Powell and said I wanted to help.

Q. OK but before you wrote your statement were you given any suggestion as to the words to used.

A. No.

Q. Your husband's wording is the same.

A. Yes we wrote them on the dining-room table next to each other.

ReX by Miss Allan - My husband doesn't walk the field just to check stock - he walks every day even if there is no stock there.

To DM - We moved to Croft Head Farm in 1988 - he has working dogs - he has always gone on daily - he walks along the edge and up to the Burn. But if he is training he will put things on the flat for the dogs to fetch. There is always stock in the field.

Mrs Pape (p38 and 69 - 72 Applicant's Bundle) - Confirms statement. When I was a child I lived on the Fell to the north of Haltwistle - beyond the settlement. When married I went to Crags Cottage - it doesn't exist now. That was about 4 years. Then I moved to Fairhill. I used the field as a

child from when I was about 10. We used to leave the school yard via a gate into the field and across to a track. The people I saw on it as a child were schoolchildren. But when I was still at school the wall on Willia Road broke down and people used to get on the land and walk the dogs. I left school at 15 years of age. My brother used to cut the land - initially it was hay - but by the time I was 25 - 30 ... [very confused]. When the Hopping's Fair was on I would keep away - I might use the bottom part. In those days there wasn't a lot of use - it has slowly built up and got more and more. "Those days" I mean the 60's and 70's [DM asks for further clarification but Mrs Pape cannot assist and is struggling to be in anyway precise with dates]. I don't recall when the football started but they have been playing on Sundays for a very long time. We have had dogs since I was born -I walk them 2 or 3 times a day - I see other people - they are walking their dogs or crossing from (A) - (B).

XX Mr Pike - To some people the field is a shortcut (Mrs Pape describes 3 route across the field). This was at the beginning - people now go on there to exercise their dogs. Re Slaters - I was aware they had consent from the swimming pool committee. I'm not sure when the fair started - I think it started in the late 1970's and 80's. I have never seen any arguments between users of the field and football. I don't know who typed out my statement - I think it was taken verbally. I am unsure as to who it was. I think it was done at a meeting - I'm not sure - but I can hardly remember

- I think it was in a public house. I am unsure as to how I gave my statement. It wasn't suggested I should discuss certain things. I can't recall the names of the people at the meeting. "I have a hopeless memory". I don't want to say things about people. Billy Cowan and Joan Cowan were not there; Mr Powell was; I don't know who Mr and Mrs Williams are; the Wrays weren't there; I'm not sure about the Battys; the Fields and Fosters were not there. Mrs Belger and her son were there - I don't know everybody. Re para 18 of my statement - it is right - that is the way I have said it. I don't know how those words have appeared in other persons' statement. They are everyday words.

DM Para 16 - my brother cut it - I had left school by then. It was a way of getting a bit more hay. The top part of the field was used more - the flatter bit - the Hoppings went on; games - football. I am not sure when that was. Not many used the bottom part until it was made a cycle track. When I say the land was being used by more people I mean the top part - it was well used by people with dogs. That has been going on for quite a while. In the 1960's starting to build up - in the 70's and from 70's and 80's. The bonfire was held and it was used more than ever.

ReX by Miss Allan -

Q. p106 - ie. Statement of Mr Grant - para 14.

A. I agree with it ie. that the fact area was cut from 1962.

Joan Cowan - Bundle p66 - I have lived at Cowanburn since I was born - all my life. As a child I played on the field in nice weather - so when I was 5 I was allowed to play on it. We were usually allowed on the top part. I don't really know why I was allowed only on the top part. That was school time. When it was night time and school holidays we went all over the field. Used to see quite a lot of other children - playing I would see adults who would walk down the field to get to the Burn - there was a variety of routes. This was when I was a child (ie. early 1950s). In the 1960's/early 70's the fair that was by Crown Paints - it was later on it came into the old school field. The Carnival has been on the field a few times - there are times it hasn't been on - it hasn't been on the field much. I can't really recall if I took my son to a carnival on the field. Loads of kids played on the field. Kids came from all over Haltwistle. People now stay clear of the BMX track because it is hilly but otherwise use the field. The football matches - there has always been someone kicking a ball about on there. It has only been in the last 10 - 15 years that it has been formally maintained for football. Before that it was less tidy than it is now. I have always gone on to it.

XX Mr Pike - Re para 14 - I have never seen any problems between people and footballers or the carnival or funfair. I did play on the field at school in breaks and so on - I recall people were always on it. I don't recall people wanting to recreate where schoolchildren were playing. At para 4 - that is not my crossing out. I am aware that there was a meeting but I didn't go - I knew about it but I didn't go. It was about July (2011). I don't know where it was held. It was about the field. I talked to my friends - some of them on the committee - and then they wrote it down and I signed it. I have spoken to the committee - Mr and Mrs Williams; Mrs Wray. Para 15 - I didn't dictate those words - the statement came to me drafted in because I was OK with it I signed it. It is however true.

ReX - If, as a schoolchild, I saw someone else then I would probably just say "hello" to them. I saw boys playing football with jumpers for goals and I would walk around them. Lots of people played on it and did their own thing.

PM - Mr Belger (no statement) - Here to support mother who lives at Fairfield Park. I coordinated the collection of statements and organised peoples attendance here. Re Sadie Pape - first statement taken at my mother's house. Admin has had to be done in-house for cost reasons and elderly people have limited computer skills. The committee listened to SP's statement which was compiled and word processed and my mother

took it to SP to have it signed. Having done it with Sadie - ie. the first - we understood the process and couldn't afford Miss Allan to take all and so we circulated a questionnaire to those who supported us (the questionnaire at A1). The responses then were converted into statements by me. I accept there is similarity of phrasing in some regards but I left the statements with people overnight - there was no coercion. Some of the statements do come from people who have not sent in earlier letters - that is because I would be told of people who had found out about the application and expressed an interest. The fact the dates are all similar is because I live in the south and therefore attended to these issues on visits to my mother. I am aware that there have been various committee meetings in connection with this and there have been roundtable discussions. The dates are from a long time ago and therefore discussion has helped. I noted Sadie's hesitancy re disclosing information re meetings but this issue has divided the community. I believe the statements are generally factually correct - there will be some errors due to the fact we are delving into history.

XX Mr Pike - I have never lived in Haltwistle - my mother moved in 5½ years ago ie. after my father's death.

Q. You said Mrs Pape's first statement was taken at your mother's house -- is that p38?

A. No it is the one at p69.

Q. Hvae there been any meetings in public houses.

A. None.

Q. Re p69 - when was it taken.

A. It was a few months ago.

Q. Who is the committee at that meeting.

A. Its a loose term - it is the people who run the action group. Mr Powell is the leading light.

Q. His statement does not contain the two sentences I have been asking about.

A. ?

Q. Did the two sentences appear in the first statement transcribed from Mrs Pape's words - did she use those words herself?

A. [Looks puzzled and is unsure] - the wording came up during discussion with Sadie.

Q. The phraseology was then inserted into other people's proofs.

A. Yes - I thought it was expedient - I felt it was a fair representation of what they said.

Q. So insofar as the phrase is in the statements of people not being called - we cannot know if it does or does not reflect their experience.

A. True.

Q. Are you on the committee.

A. No - but there is no committee - it is a casual association of people.

Q. Mrs Cowan? How many questionnaire is did you send out.

A. I didn't hand those out - I was engaged in providing statements - but 100% the EQ's were returned. We sent EQ's to those who had expressed an interest in supporting us.

ReX - ReA1?

A. People would write on it - possibly going over the page. I told everyone not to sign it unless they were happy with it and believed in it. If I was on oath I would say the same.

Jean Belger (p30 - 32, 40, 43 - 46, 57 - 61) - A2 handed in ie. set of colour photographs. I live at Fairfield Park - been there 5½ years to be near my daughter. The A2 pictures are taken from my conservatory window - I have a clear view of the site. A2 is 2009. Last year the field grew long and became a meadow. In 2010 the football club moved it. The lower part of the field has never been mown. The upper part has only been mown during the season.

XX

Q. Bundle p59 and 61 - are both the same day.

A. Yes.

Q. p59 is Bank Holiday and p60 Sunday.

A. I have a good view from the conservatory but I also see the site from the drawing-room.

Q. Method.

A. I didn't sit there all the time - I recorded what I saw so I wasn't watching over lunchtime.

Q. What is unclear is how much double counting there is.

A. There will be.

DM

I can't move in my house without seeing the field. The majority are dog walkers. I see a couple of dozen - even if the weather is pouring. Most are from Haltwistle. I see the children - same groups - from Haltwistle - they kick a ball about - I'm seen 18 bikes and seen tree climbing and kite flying.

Mr Cowan

Husband of Mrs Cowan. Married in 1965 and lived since then at same address - Cowanburn. I used it at school. I did not use it out of school time. Some of my classmates did -

DM Where they live - was it in the vicinity of the site.

WC Yes - Around it. We used the flat bit for football and PT lessons. The Slaters haven't always had a fair on the field - they have for

quite a while more recently - they have used field for the last 10 years - I'm guessing - they use the football field part. I recognise local people when I'm out with the dog - I walk the dogs daily and have done so for 40 years. I chat on the field. I come down the path by the school wall and go into the middle and across and up the Bum - I see other people - a lot from where I live but also from all over Haltwistle - so I have seen people from Park Road from where I used to live when I was a boy. Until I was married I only knew of the field from use at school.

Mrs Williams - p77 Bundle - I was at the Infants School 1957 - 60 - then 60 - 63 I was at the Church School ie. near the Willia Road turning ie. aged circa 8 -11. Children played all around the school field. We used the whole field taken as a whole - climbing trees etc. This was outside school time. At Infants School we were only allowed onto the field when it was hot and sunny. I was at Haydon Bridge Secondary School until 1969 - I used to train for my athletics on the field regularly. Other kids played on the field - from the town generally. My brother and his friends used it. I saw adults - often saw people walking the dogs - they were from [identifies areas to the west of the site ie. proximate estates/the southwest/south and southeast]. My mum had a dog in 1959 for 17 years. The carnival came to the school field in the 1990's - prior to that it was near the paintworks site. My mum walked her dog on the field every day.

My father taught my brother to fly a kite on the field. I can recall fireworks in the 1980's - the village annual bonfire was held there and refreshments were served in the Scout hut.

XX Mr Pike - No XX

Mr Williams - p34 - 36; 53 - 54; 74 - Lived in Haltwistle since 1975. I see a lot of use - the people are from Haltwistle. I moved to Fairfield Park in 1993 (houses started in 1992 on the estate). Prior to that I was on Castle Hill. I used the whole field when I walked. Organised events did not interfere with your walking. Slaters was twice May and October. The Carnival was revived around 1990. The bonfire took place from the middle of/late 70's - mid/late 80's.

I played football from 1975. I played at the paintworks. The applicant's site became used circa 1991 for Sunday morning football - prior to this it wasn't used for football - just occasionally when other pitches were fully booked. From 1988 - 91 I ran a youth team at Haltwistle Middle School - I have been involved in local football for years - I'm sure - I know - that the application site was not used for football until 1991. Then in 1991 it was in a fairly poor condition - nothing like now.

p31 Objectors Bundle - it is a local pub team - picture must be taken around 1991 - I know one of the lads. The Conservative Club using now - it is a Sunday league.

DM In 1968 - I went on the field to play with my children - a couple of times pw - weekend; school holidays and so on. I saw other people - playing games and dog walking. The people I recognise were from Haltwistle - Colne Hill and Castle Hill - that is where people were from (identifies, Colne Hill to west and Castle Hill to southwest). Over the last few years it has changed - last 10 or 15 years so that people come from the wider area ie. wider area of Haltwistle

No XX by Mr Pike.

Day 2 - 9.00am start

* Information re availability of Community School Playing Fields given to DM - DM marks up Proposal Map with information.

Objectors' Case

Mr Fleming - makes an amendment to his statement - left Haltwistle in 1971/2 and did not return to live until about 10 years ago but visited relatives in Haltwistle most weekends. I started school in 1950 and went through the 3 schools. Re the application land: school football was an extensive thing with inter-house school games. We played against visiting teams from schools. Post-1960 when I left I think school football continued on the Field VF12 re Mr Colling's letter ie. 1960 -1990 the Old

School Field was used for school and youth matches during school time and weekends. The matches were part of league fixtures.

DM frequency - When I was at school there would be 2 matches during the week and sometimes a game at the weekend. The pub teams and others would tend to play on Sunday. In the 50's there was a long jump pit and a running track marked out.

Mr Pike - In the period up to 1971 (when I left) I would play from time to time as a "ringer" at the weekends ie. on Sunday. Also at that time and after I left - I spoke to people at the weekends and it was clear that the field was certainly being used for Sunday football. VF10 taken by Mr Weeks so they show football being played with posts and nets late 80's - 90's. The photo was taken from PF looking across and down into the dip where the BMX track is. Football was never played on the BMX area.

VF19 - When Carnival was resurrected ie. late 1980's and 1990's. You can see behind the tug of war the goalposts in the background - football was therefore still clearly being played. School did have an Old Boys Team - I played once in about 1962/3 - again the game was on the Old School Field.

VF13 - ie. School as marked on Proposals Map. Opened in 1961. When that school opened their playing fields were not playable for some time -

I cannot be sure as to when they came into use. Until they were playable the South Tynedale School used the Old School Field.

Re the Old School Field - I can recall a circus on the field.

XX - I accept I signed my statement. I cannot explain why para 4 is so wrong. I read the statement before I signed it. The only other errors relate to the number of the documents. As a child I lived at 2 Mill Cottages (identifies). When I was at school we had after school football. I did climb the trees - lots of kids played on the field after school and so on. I suppose people walked their dogs - I didn't take any particular notice. I can't explain why I haven't referred to other use other than football - football was my thing. Of course other things went on - I used to ride my bike over the field. Re para 6 of my inquiry statement - obviously I have no personal knowledge. My knowledge came from my grandmother, my family had been involved in football, I am firmly of the view that the 2 teams played on the Field. It was a farm at the time owned by Mr Keen - I accept I am going off what information was given to me. VF8 - the date of 1959 came from the brochure. This is the only evidence I have produced of the Carnival taking place with the permission of the school. I might have other information at home. The Carnival always went on the Old School Field until 6 years or so ago when it moved because of lorry sizes. The Carnival did not take place in the 60's or 70's - it was revived in the late 1980's - I would accept that. VF19 - these pictures are post-1992/93 as Fairfield

Park is built. The Slaters Funfair took place on a variety of sites. I can't be clear as to where it was in the late 70's - it moved around. I have heard people talking about their use yesterday - I don't dispute those uses. I don't know if they had permission - I never asked permission to play on it. Nobody ever told me off. The restrictions were there when it was in use for an actual match or sports day. There was always walling around - yes I did go over the wall as did others and there was a gate. If there was a match going on people kept off the pitch - yes it was just good manners.

Re p27 - VF12. Letter from Mr Colling - he is now very old and infirm. He taught me geography and PE. In 1961 the new school opened so that only infants were left at the Old School - the kids were moved slowly across. I do not know if the younger children left at the Old School played organised football matches. I understand the older children from the "Top School" (South Tyneside Secondary) used it for football for some time ie. post-1961. The problem at the Top School was that the pitches were wet. I don't know when the problem was sorted out - it might be said it still hasn't been.

In 1985 the Infants and Juniors moved to the new Infant and Junior School. I know that my original statement (A3) said that the land was handed over to the Leisure and Swimming Paul to manage in 1988 (see para 11). Since then I have spoken to people and it seems it could have been earlier.

Q. [Puts in TC Minutes of 04/11/02 [A4]] - This minute suggests that the handover when side by side with the purchase ie. 1990.

A. 1990 was the land registry date.

Q. The only events that were controlled were the bonfire, Slaters Fair as and when it occurred, the Carnival for a period and some organised football.

A. Yes.

Q. You don't know how permission was given or if it was paid for.

A. No - not personally.

Q. p89 - Mr Thompson's letter - para 2 - he says as Chair of the Haltwistle Swimming and Recreation Centre he had responsibility for management of the Old School Field 1968 - 70 - that cannot be right?

A. I accept on those dates we had been discussing that is wrong.

Q. VF16 - Applicants' bundle 109 - must be in 1980's.

A. I don't know - he said he bought it in 1989.

Q. You don't know about the frequency of matches 1968 - 90.

A. True - I had moved on.

Q. The Crown Paints pitches were available until 1990.

A. Yes - that is correct.

Q. So the pubs actually had the Crown Paints pitches available until 1990.

A. It was my understanding they used the Old Field.

Q. You don't know - you weren't here - the fact is that football on this field has increased post-1990.

A. That is true.

Mrs Garrow - Confirms accuracy of statement. Head of Infants/Junior School in 1964 - we did have football team. They played on my field. Team played regularly - once pw and thereafter school matches. We practiced during the day. We didn't really like to have weekend matches. I am unclear as to when I retired - I was there after we moved to the new school in 1985. We had sports days on the field and other open-air activities. The field was marked out for football. The children went up to 8/9 years of age. Matches were played about once pw - or once per fortnight if we had away matches. The Working Men's Club would ask to play - we had full-sized goalposts. The school had weekend matches maybe 2 or 3 times per term. We had sports day on the field. The girls played rounders on the field. We had to share it with the Middle School. Also the Scouts had a team, the Working Men's Club had a team, Crown Paints had a team and sometimes these teams played at the weekend. They did not pay. They would tell me they had a game and I would say "right I'll book it in". The Working Men's Club normally played on Saturdays. The Middle School had their own facilities - they didn't come down. Re Mr Colling's letter (VF12) - I knew him - he didn't have anything to do with us at all - yes during 1960 - 1990 I would accept the

Old School Field was used for school and youth matches - yes until I moved he made the arrangements with me. In 1975 we had the 100th anniversary - we invited former pupils - I thought it would be a nice little party but it became apparent it would be a big affair. Got a lot of food … [DM terminates narrative as not relevant.]

XX

Q. Other people used the field?

A. No - no other people used the school field; it was for the school only. People would walk down the Burn side.

Q. Do you think it could have occurred and you didn't know.

A. There was a big wall - what happened after school I would not know about.

Q. Boys being pushed off the wall initiation ceremony.

A. It didn't occur in school time.

Q. Did you ever see people walking dogs on the field.

A. Never - dogs make a mess.

Q. Younger children - where did they do PE.

A. The Hall or school yard.

Q. Football - it was a junior pitch.

A. No - I thought it was full size. I don't recall it being marked out as a junior pitch.

Q. Age of children.

A. 5 - 9 and nursery.

Q. The 5 year olds didn't play neither the girls.

A. Correct.

Q. So the boys played in the winter.

A. Yes.

Q. Team age.

A. 8/9 - and we had to put bags down for the children's goalposts - this was the practice - when we had matches we used the adult posts. It put us at a disadvantage.

Q. Did you always have a football team at the Old School.

A. We always had a team - we built it up. We didn't bother with cricket - they were no good at it. We played down the Tyne and so on - we went as far as Stocksfield and Hexam - we didn't cross the border into Cumbria.

NB Stocksfield is 25 miles away (approx).

Q. Do you recall the field being cut for hay.

A. No - I have lapses of memory - yes I now recall Mr Grant cutting the field. Dogs did leave mess on the field - I did ask people to walk their dogs down the Burn - you see children otherwise fall in the mess and stink.

Q. Carnival.

A. In my time it was on down by the A69.

Q. Bonfires.

A. Never when I was head - it was always the other side of the river.

ReX

Q. Slaters.

A. They did not have a fair ever on the school field when I was there are ie. 64 - 85.

Mrs Bell - Confirms statement - teacher at the Infants/Junior School 49 - 59. Returned in 1967 and retired in 1984. A match was played about once pw on the field. I've known people walk dogs during school time but they stayed well away when the school was using it - they used the path. I never had to tell anyone to get off the field - dog mess was an occasional problem. I know children went back to play on the field after school. I know nothing of boys being pushed off the wall.

XX

I would go out with my children ie. pupils at playtime, lunchtime, and sports - whenever weather permitted. I wasn't out everyday - there were lunch and break rotas. Occasionally we had games lessons on the field - less scraped knees. Our staffroom overlooked the field. My classroom was away from the field - I couldn't see it if I was teaching. I don't think the school would be bothered if for example a young mother was playing on it with pre-age children. Haltwistle people would probably use it if we

weren't on it. There was nothing to stop anyone going on and using it. Sports day was once a year but we did have some practices.

Q. Your evidence does not address post-1960.

A. Yes - I wasn't back in until 1967.

Mr Brown - letter at p40. I was Deputy Head of the Tynedale Middle School 1984 - 2007. I joined the school in 1984. It converted to a Middle School from a standard secondary in the mid-1970s. It had 2 pitches marked out. These pitches at my school were in use when I joined - they were good pitches. There was a lot of authorised organised usage but there was no casual usage - no dog walking. The Old School Field - I call it the Burn Field - was well used. We had six teams playing and training and we couldn't accommodate it at the Middle School and the Middle School pitches were quite small. There were the Crown Paints fields as well. In the period of 1984 - 90 usage of the Old School Field became more significant as the 1980's progressed - by the end of the 1980's a team would use the Old School Field once pw. There wasn't any use of the Old School Field by youth teams until late 1980's - after 1998 youth team would use it once pw. Our under 18's organised it through the Swimming and Leisure Centre and pub teams used it as well. Once the Old School closed the annual bonfire went to the Burn - the spectators were on the field. In 1984 it was used still by the Old School itself. From about 1988 onwards there was a booking system for the field which was organised by

the Swimming and Leisure Centre - there had been a period of difficulty 86 - 88 with double booking etc so it was all done through the Swimming Centre. Our games were never interrupted by any member of the public. The LA maintained it until the Old School moved in 1985 - then there was a lot of community involvement in maintenance of it.

XX by Miss Allan

The Working Men's Club had used the Old Field for years to the best of my knowledge. I thought it was 88/89 when formal booking started taking place - I don't wish to overstate it - it could have been 1990 - I don't have it in a diary. I live in Haltwistle - if people were walking their dogs they would be on the FP - I personally did not see people with dogs on the pitch. It occurred because there was a dog fouling issue - before any match the pitch had to be cleared. I personally saw dog walkers in the rough part of the site - using the path. I recall a wood sculpture day in the late 80's - the sculptures were placed on the pitch area. When I first arrived Crown Paints had 2 teams - I am not aware they used the Old School Field - I would have thought they used their own pitches.

Mr Stobbart - (Noon) - Confirms statement. Manager of new Swimming/ Leisure Centre in 1975. Para 6 of my statement - I say we took over running the field pre-1988 because once the school moved ie. in 85 the Town Council took over the bookings. Ian McMin was dealing with it. He

got a bit sick of it and so he asked me to take it on. It could not have been as late as 1990 - there had been problems in 1985 when the school closed with bookings - it didn't drag on for 5 years. I am sure of that. We had a calendar booking system. Sunday morning was a popular time. They had to book in advance. There were no fees charged initially ie. circa 1988. No later than 88/89 fees were charged - I think I took over the bookings in circa 87. Various pubs used to book it. Crown Paints occasionally used it. There were 2 regular users and they alternated with each other's away games - the Black Bull Team and I can't recall the other. Very limited play on a Saturday. We cut and maintained the grass post-86/87ish - we paid for it. The TC paid for until they handed it over. If teams wanted it cut closer they might do it. Slaters used it once or twice per year - they used it for years. They paid the Town Council. Once we took it over I took the payment. They would be on for a week at time. It was under £100 when it started but it increased over time. The Carnival used it - they were given priority. Re 01 (Leger) 96/97 and 97/98 - middle shows income from the Field. The £84 will be football ie. 7 x 12. I can't explain the smaller amounts; getting money out of footballers is difficult and therefore we got it in dribs and drabs.

XX

I think I took the bookings 1987 rather than 88. I can't recall when the carnival was revived - I don't disagree with the 90's. Nobody asked for

permission save Slaters, Footballers, Carnival and on one occasion a mini circus. Slaters haven't always come to the Burn Field - I am retired and old ledgers would be destroyed. Slaters were on the field prior to 1988 and they used the field post-88 - but not every year.

I can recall going to the field when I was a little boy with my Dad - there was a rope around the pitch - it was the 1950's.

Councillor Sharp (p7) - Confirms statement. Born 1964 in Haltwistle - attended the infant school. Lived at same address all life. I never played football on it 1970 - 1990. However I often walked up the Burn to visit my grandmother - we would walk across the land and I saw many football matches taking place. I organised the bonfire - it started in 1985 re Young Farmers - and I actually organised it from 1987 onwards. The bonfire is on the rough area just to the north of the football field - just to the east of the BMX track - before the land falls way. I confirm Mr Stobbart's evidence in respect of the transfer of bookings from the Town Council to the Centre – it was in 1988 - I joined TC in 1987 and we were discussing it in 87 - it actually occurred in 88.

XX

[A5] - First witness statement distributed.

Objectors bundle p42 - Objection Letter from TC - p43 (2nd TC objection letter). I accept the letters 08/01/2010 is worded as having "strong

reservations" rather than as having an objection. I am not objecting on my own part - the TC do object.

Q. What authority do you have to appear here today to object - is there a minute.

A. The members are aware of this meeting today. It may not be minuted - I can't say. We haven't had an agenda meeting to discuss this application.

Q. When go to NCC to ask for legal advice.

A. About 5 months ago.

Q. Was there a meeting of TC which resolved to discuss it with NCC.

[Mr Pike objects]

DM rules - can make submissions re status of witnesses vis-à-vis TC and whether or not the TC do actually object BUT the issue does not go to the heart of whether the Applicant satisfies the statutory criteria.

We have never stopped or given permission for recreational activities on the land. I have seen informal recreation on the land and I saw it pre-1987. In my first statement I did say "We have not objected to people walking across the field or using the land for casual play as it is a nice idea for people to use ..." (para 12). I took it out because football takes precedence - I felt the wording was wrong. The TC has never objected ever to any public recreational use. I did sign the original statement as being true. In para 5 of your first witness statement you said it was known as "the

Burnfield" but in paragraph 14 of your second statement you said it was known as the "Burn Football Field" - I haven't changed it to try and paint a picture favourable to my case. My first statement reference was an error. In 1987 when I organised the bonfire - I don't know if permission was sought or given. All the locals would attend. Local people were free to use the rest of the field if they wished. [A6] - what did you mean Slaters hadn't been given permission? It had been given by the Swimming Centre - we leave day-to-day management to them.

X) In addition to the oral evidence the Application was supported by a large number of written material. Mr Pike submits that very little weight should be attached to the statements due to the fact of the manner of statement preparation (see Mr Pike's closing para 15). I am afraid I am unable to accept this admission. Mr Belger gave evidence and explained that he had converted questionnaire responses into statements and that the statements were left with deponents overnight for them to read prior to signing. He said there was no coercion and I fully accept his evidence as the evidence of a witness of truth. It must be remembered that a number of deponents are of advanced years. There is some similarity of phrasing but this simply reflects the fact that the same person is converting the raw data of the questions into narrative form; I do not accept that this throws any material doubt on the substantive content of the statements.

Analysis

"Significant Number"

XI) Mr Pike in his closing submissions has submitted that no reasonable authority could conclude that the criterion is met. He argues that only 5 witnesses give direct evidence of user between 1968 and 1990 and that between them they only give evidence of a handful of people - perhaps no more than a dozen - that had used the application land over the period and that these people were predominantly from Coombe Hill, Castle Hill and Town Foot. This is an oversimplification and in my any event ignores the written material which I attach significant weight to.

XII) Mrs Wray was born in 1949 and as a child saw a great deal of recreational use of the land in the summer holidays. In the mid-1970s she was part of a group of local women who play rounders on the field. Mrs Wray recalled 8 or 9 women were involved (Mrs Batey in her written statement speaks of a group of 20 women "all living in Haltwistle", playing rounders). Mrs Cowan has lived to the southeast of the site all her life and as a child in the 1950s played on the field; she said "kids came from all over Haltwistle". No reason has been advanced as to why the pattern of use by children would have been different in the 60's or 70's or even 80's. She regularly observed adult use. Mr Cowan was aware some of the local boys used the site out of school time - he thought these boys lived around the site. He has walked dogs on the land for 40 years and has seen people

from all over Haltwistle. Mrs Williams played in the field as a child and trained on it until 1969 - she saw children "from the town generally" using the field. She saw adults walking dogs - principally from the southwest, south and southeast. She recalled the village bonfire being held on the field - it was seen from the evidence that the local Young Farmers organised it for a number of years from the mid-1970's but that in the mid-1980's the Town Council took over its organisation. Mr Williams has known the site since 1968 and saw general recreational use - he said that the people he recognised were from the areas to the west and southwest of the site. It is also apparent from the written material that the local Scout group used the field from time to time over the relevant period.

XIII) I am satisfied that there was, over the relevant 20 year period, recreational use of the land by a significant number of the inhabitants of Haltwistle. It is quite clear children played on the land both after school, at the weekends and after the school holidays. There has been some direct evidence that these children were drawn from the village as a whole and that makes sense ie. over the relevant period the school was the Infant/Junior School for the village and it would be familiar to most children from the village. I also note that the community school fields were not available for public use and generally kept secure with non-school use being positively discouraged. This would tend to heighten the attraction of the site which is, and no doubt was, a sizeable and

attractive area for a variety of play activities. The attractions of the field for the Scouts, whose members would have been drawn from the village, are also obvious.

XIV) It is also clear that there was regular adult use of the area over the relevant period - principally for walking with and without dogs and also in connection with children's play. It is not surprising that the clearest evidence of user relates to those who lived to the west, southwest and south of the site but there is evidence of people who were not from these areas being seen using the site. The site is attractive; it is only a few minutes walk from the centre of town and it leads to the Burn - it would be very surprising indeed if use were to be confined to the adult occupants of proximate streets. In this context I do not overlook use by Haltwistle ladies for rounders and attendance at bonfires which again, must surely have attracted attendance from Haltwistle as a whole.

XV) In a case such as this when one is looking back at a period commencing over 40 years ago a great deal of commonsense is required in order to form an overall impression of the pattern of user over the relevant period. For the reasons indicated commonsense, based firmly on the evidence of what people did and saw, combined with an understanding of the site's attractions and relationship to the town, firmly lead to the conclusion that

use of the land over 1970 - 1990 far from being occasional trespass, can properly be characterised as community use.

"As of Right"

XVI) As of right simply means use without force, secrecy or permission. If this was the character of use then that is sufficient - there is no additional test of deference. The objectors in this case appear to be attempting to run the very type of case that was rejected in the ***Redcar*** ibid case. Over the relevant period and until 1985 the Infant/Junior School used part of the field for a variety of activities ie. outdoor lessons and play when weather permitted; sports day and football and rounders. However the overall impression was of limited use. Football was played once per week but very rarely at weekends (2 or 3 occasions per term). The Mid-School used the field for football about once per week from the late 1980s. In addition and over the period there was some limited use on a Saturday for either the Working Men's Club team and/or one or two local pub teams. The evidence is not entirely clear on this but the impression given is that weekend use was not heavy over the relevant period with an overall total of about 2 games at most played at weekends during the season. No other organised sport was played.

XVII) It is quite clear from the evidence that when matches were on, or when children were occasionally on the field in school time, recreational users

did not interfere. This was no more than common courtesy and reveals that the formal use (which on any view amounted to a small percentage of the use by reference to time) and the informal use could easily coexist. This courtesy did not negate use as of right. Use was not at any stage prohibited (or permitted) by signage and while Mrs Garrow did say the land had never seen third-party use of the field in school time her evidence was a little confused and inconsistent with all the other evidence heard by the Inquiry.

XVIII) Similarly I note that a carnival appears to have been held on the field on one or 2 days during the period but people were not excluded from the site and could use it for recreation. Similarly some unspecified use by Slaters Fair occurred but the same points are made. None of these issues negate a clear pattern of lawful recreational use by right of the inhabitants of Haltwistle over the relevant 20 year period.

I accordingly recommend that the Application be approved and the Commons Register amended to enter the Application Land as a Village Green.

D E MANLEY QC

Appendix 4

From: Laura Venn [mailto:Laura.Venn@hambleton.gov.uk]
Sent: 14 November 2014 11:17
To: commons Registration
Subject: RE: Inspectors Report for Earls Orchard

Dear Mr Stanford,

Thank you for your email with attachment dated 13th November 2014, of which I acknowledge receipt. The District Council has no further comments to make save as to only repeat that the District Council endorses the Inspector's conclusions.

Regards,

Laura Venn
Legal Manager
Legal Services
Tel: 01609 767004
Email: Laura.Venn@hambleton.gov.uk
Website: www.hambleton.gov.uk