APPLICATION (NO. TVG 001/2012) BY MELANIE JANE LEWIS UNDER SECTION 15 OF THE COMMONS ACT 2006 TO THE LONDON BOROUGH OF HARROW COUNCIL TO REGISTER LAND KNOWN AS THE WHITCHURCH PLAYING FIELDS AS A TOWN OR VILLAGE GREEN

INSPECTOR'S REPORT TO THE REGISTRATION AUTHORITY

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Ref: KAH/EC-009304

28 October 2013

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S. SUMMARY

S1. The application should be considered under section 15(2) of the Commons Act 2006 (and not under s.15(3) as it was made) and I would recommend that the Registration Authority accepts an amendment of the application accordingly. That would mean that the relevant 20-year period is that from 6 December 1992 to 6 December 2012.

S2. There is not sufficient evidence to support an implied appropriation of the land for open space purposes such as to make any use for lawful sports or pastimes (LSP) "by right" as opposed to "as of right".

S3. There has been regular use throughout the 20-year period by local inhabitants of the Application land for LSP. However, when the permitted uses and use by force are taken into account there is serious doubt as to whether that use is sufficient to demonstrate qualifying use by a significant number of local inhabitants. The Applicant has therefore not demonstrated sufficient quality of user throughout the 20-year period.

S4 There has been regular and significant use over the relevant 20-year period by the Objector's licensees for formal sports and training and community uses. The permitted sports activities have displaced those local inhabitants on the land for informal activities from those parts where and when the permitted activities were carried out.

S5 This displacement has two consequences. In the circumstances it has resulted in the whole land not being used for LSP, particularly in the 1990s when the permitted uses were more intensive. In any event, the Objector's action in permitting parts of the land on a regular basis to be used for formal sporting activities, including training, was in the circumstances an overt act such that any use for LSP by local inhabitants was way of an implied permission.

S6 Further, in any event the actions of the Council in the locking of entrances from time to time, as I find, alone and in the context in particular of the repairing of

the Abercorn Road fence, have been sufficient to have the consequence that the use of the land for informal recreation by local inhabitants (LSP) is in the circumstances by way of an implied permission and therefore cannot be *as of right*.

S7 If the statutory criteria were otherwise met, the locality requirement would be met and should not of itself lead to a rejection of the Application to register Whitchurch Playing Fields as a TVG.

S8 Accordingly, I recommend that the application to register Whitchurch Playing Fields as a town or village green be refused by the Registration Authority.

1. INTRODUCTION

1.1 I am instructed by the Harrow London Borough Council as the Registration Authority for the purposes of the Commons Act 2006 (CA 2006) in respect of the application by Mrs. Melanie Jane Lewis under section 15 of the Commons Act 2006 ("the Application"). The Application was received by the Registration Authority on 6th December 2012. By the Application Mrs. Lewis seeks to register land, stated in the application form to be usually known as Whitchurch Playing Fields, 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.

1.3 Accordingly, I held an Inquiry in the Council Chamber of the Civic Centre, Station Road, Harrow on 11th, 12th, 13th and 14th June 2013 and then, to consider closing submissions, on 2nd July 2013. I had previously provided written Directions, dated 24th April 2013, providing guidance on the submission of evidence and documents and on the procedure proposed for the Inquiry. The parties provided the evidence in accordance with those Directions, for which I am very grateful.

1.4 The Applicant was represented by Mr. Chris Maile, Director of the Campaign for Planning Sanity. Eighteen witnesses, including the Applicant, gave evidence in support of the Application. Mr. Maile also relied upon other witness statements and evidence, as detailed in section 3 of this Report.

1.5 The Application was objected to by the Harrow London Borough Council as landowner. The Objector was represented by Douglas Edwards QC. Mr. Edwards called three witnesses, as detailed in section 4 of this Report. He also relied upon the witness statement of Mr. P Dickinson, who was unable to give evidence at the Inquiry.

1.6 I visited the site and the surrounding area prior to the Inquiry. I carried out an accompanied site visit after the close of the Inquiry on Wednesday 2nd July 2013.

The application land is a grassed area lying to the north and west of Whitchurch School. It is largely open but with some trees, including two groups of trees across the middle section between and close to the larger and smaller western and eastern areas respectively of the site. To the south of the application land is Wemborough Road, adjacent to which Whitchurch School is situated; to the north are the residential properties in Old Church Lane and the MOD playground; to the east is Marsh Lane; and to the west is Abercorn Road, the western side of which is made up of residential properties and Stanburn school. Thus, the land use adjacent and close to the Application site consists predominantly of a significant number of dwellings and the two schools. There are a significant number of dwellings in the wider area as well.

1.7 Mrs. Lewis' application was originally made pursuant to section 15(2) of the CA 2006. However, as addressed later in this Report, it was amended so as to be made under subsection (3) of section 15. The statutory framework is dealt with more fully in section 5 of this Report below. 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)

1.8 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 CA 2006 are met by the Application. The relative merits of the claimed recreational use relied upon by the Applicant and any alternative use are not relevant to whether section 15(2) or (3) is complied with and I have not taken that consideration into account.

1.9 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 where, as in this case, the application land is owned by the Council that is also the Registration Authority, the role of a non-statutory inquiry held by an independent Inspector is particularly important.

(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 very largely outside my remit under the statutory regime applicable. However, I acknowledge that some aspects may be relevant to the credibility of some of the evidence relied upon by the Objector and I have taken it into account to that extent.

1.10 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

1.11 However, before addressing those matters I would like to record my thanks to Mr. Maile and Mr. Edwards, for the way in which they conducted themselves, presented their cases and the courtesy shown and the unstinting assistance given to me by both. I also extend that gratitude to the Applicant and all of the witnesses who gave evidence to 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 local residents unused to such questioning, this can sometimes feel intrusive. So, I appreciate all the assistance provided by the witnesses as that has helped me to understand the evidential basis of the cases being presented for the Applicant and Objectors. In addition, the parties and I were very greatly aided by Ms Katherine Hamilton, on behalf of the Registration Authority. Ms Hamilton's 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 was made by Melanie Jane Lewis of 23 Abercorn Road, Stanmore on Form 44 in accordance with the The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007.

2.2 The Application was originally stated in part 4 of the Form 44 to be pursuant to section 15(2) of the CA but was amended to be made pursuant to section 15(3).

2.3 The land was stated to be usually known as Whitchurch Playing Field and the location given as Belmont Ward. In section 6 of the Form 44 the locality or neighbourhood within a locality was stated as:

BELMONT WARD – WHITCHURCH PLAYING FIELD MARKED IN RED ON THE ATTACHED MAP MARKED "A"

However, plan A is a red line plan of the application land itself. That plan was amended at the Inquiry to include, so far as is material, the trees between the western and eastern parts of the Application land shown as T1 on the amended plan, document AD:1A. The Objector has raised no objection to the Application being determined on the basis of amended plan AD:1A.

2.4 The justification for the Application was set out in part 7 of the Form 44 Application. In summary, the Applicant claims that a significant number of the locality and neighbourhood have indulged as of right in lawful sports and pastimes on the land for an uninterrupted period of more than 20 years and that they continue to do so. It is claimed that the use has taken place *"nec vi, nec clam, nec precario"* since at least 1967.

2.5 The Application was supported by 19 evidence questionnaires (some which were accompanied by photographs) and newspaper cuttings and articles dating back to August 3, 1961 relating to the use of the Application land.

3. CASE FOR THE APPLICANT

3.1 The details of the Application and supporting documentation are set out in section 2 above.

3.2 In response to the statement of objection to the Application from the Council in its capacity as the owner of the application land, the Applicant in a letter dated 8 February 2013 from Mr. Maile, responded:

(1) In *R (Staffordshire County Council) ex parte Alfred McAlpine Homes Ltd* [2012] EWHC 76 (Admin) it was held that significant need not mean a great number.

(2) In itself the use of the land for formal sports and pastimes is not sufficient justification for rejection of an application. The Applicant referred to and relied upon the Supreme Court decision in *R (on the application of Lewis) v Redcar and Cleveland Borough Council* [2010] UKSC 11. In any event it will be demonstrated that the use of the Council for a limited period during an average year was not sufficient to prevent access to the land by inhabitants for lawful sports and pastimes (LSP). If any such significant formal use was demonstrated, for part or parts of the land then, but only in those circumstances, would an application be made that all such other areas that have been demonstrated to have passed the statutory tests should be registered.

(3) There is no statutory trust for the land to be held as public open space. The *Barkas* case related to the Housing Acts and land provided for public open space for the use of the residents. The words of Lord Scott in *Beresford* are at best obiter and offer no comfort either.

(4) *Mann* is of little or no help as the land in question was in private ownership, was completely fenced off and only allowed access by payment on very clear terms and conditions – that criteria does not apply in the present case. It is a matter of evidence as to whether the use was by licence express or implied.

(5) The Applicant refutes any suggestion that any part or parts of the land were locked against public access. Whilst it is accepted that vehicular access was locked, there are a number of pedestrian access points.

(6) An Applicant only has to demonstrate a single qualifying use. There are a number of other uses that have been demonstrated which will be further highlighted through oral evidence.

(7) It is not accepted that there is a requirement to demonstrate a sufficient spread across the locality/neighbourhood (see paragraphs 81, 82 and 90 of *Leeds Group PLC v Leeds City Council* [2010] EWHC 810).

(8) Therefore, none of the submitted objections gives rise to a valid ground for rejecting the Application and the Registration Authority should put in place a local inquiry at the earliest opportunity.

3.3 At the Inquiry the Applicant relied upon 15 witnesses, namely[1]:

- Margaret Allen
- Robert Blackman MP for Harrow East
- Carole Copeland
- Jennie Doble
- Abraham Hayeem
- Felicity Joyce
- Melanie Lewis, the Applicant
- Councillor Barry Macleod-Cullinane
- Councillor Amir Moshenson
- Mathew Mountford-Brock
- Adolphus J. Pais
- Natalie Pillay
- Raymond Read
- Elvin Samson
- Michelle Stern

A further three people wished to speak in support of the Application and I suggested that they should, in the circumstances, be treated as the Applicant's witnesses. They were:

- Stephen Lewis
- John Joannou
- Surendra Radia

I summarise the main points of the evidence of all these witnesses in Appendix A to this Report.

[1] The statements for these witnesses are found behind Tab 3 in Volume 1 of the Applicant's Bundle.

3.4 In addition the Applicant has produced and relies upon:

(1) 101 written witness statements[2]. Some of these were for individuals who gave evidence, and some were from the same household.

(2) An additional 55 evidence questionnaires[3]. These include a questionnaire from Mr. John Joannou and Cllr. Moshenson, who both gave evidence at the Inquiry in support of the Application.

(3) Photographs of the Application land, the dates of some of which are given[4].

(4) Other documents[5]:

(i) Density in terms of heads per hectare in Harrow's 21 wards. To support the Applicant's claim that the Belmont ward is already heavily populated.

(ii) A table to support the Applicant's claim that the use of the Application land as open space is well used for more informal forms of exercise.

(iii) A table to support the Applicant's claim that the Belmont ward is already the second most active ward in the Borough and the contribution made by the Application land to this.

(iv) Plan of the flood zones within the Borough.

(v) Plan of the leisure facilities within the Borough. Whitchurch Playing Fields is identified as number 49 and the type of facility stated to be "Football Pitch". The Whitchurch First and Junior School (as well as the nursery) are listed (numbers 46 & 47) as Primary Schools as well as Stanburn First and Junior Schools (numbers 38 & 39).

(5) The Applicant also provided a volume (Volume 2 of the Applicant's Bundle) titled "Various Planning Documents". As I made clear at the Inquiry (and as noted in section 1 of this Report above), the merits of the Council's proposals for the land are not relevant. Only a few references were therefore made to this bundle during the Inquiry. However, I noted

[2] These are included behind Tab 4 of the Volume 1 of the Applicant's Bundle.
[3] These are included behind Tab 5 of the Volume 1 of the Applicant's Bundle.
[4] These are included behind Tab 6 of the Volume 1 of the Applicant's Bundle.
[5] These are all included behind Tab 7 of the Volume 1 of the Applicant's Bundle.

the Applicant's reliance to the statement in the Cabinet Report for the meeting on 22 November 2012 where within section 2.5 (at page 257 of Volume 2) it was stated:

The playing fields are not reserved for school use and it is understood that any use by schools has been only occasional to supplement other playing field provision.....

(6) The Applicant provided a set of precedents and legislative provisions (in Volume 3 of the Applicant's Bundle).

3.5 At the Inquiry the following additional documents were produced by the Applicant:

AD1A: Amended Application Land Plan (replacing the original and AD1)
AD2: Aerial Photograph
AD3: Flood Defence Works – information leaflet from Harrow Council
AD4: St. Joseph's 88 YFC – Whitchurch Fundraising Bid
AD5: St. Joseph's Pitch Allocation Matrix
AD6: Plan of area
AD7: Land Registry title information for title no. MX308363
AD8: Land Registry title information for title no. MX426214
AD9: Land Registry extract for MX308363
AD10: Inspector's Report in respect of Quinta POS at Mays Lane, Barnet

4. CASE FOR THE OBJECTOR

4.1 The Objector provided a statement of objection to the Application in a letter dated 8 February 2013 to the Registration Authority. In summary the main points relied upon in that statement were:

(1) As the application was amended to be made under section 15(3) and received by the Registration Authority on 6 December 2012, the end date for qualifying use advanced by the Applicant is 6 December 2010. The statement of objection will proceed on that basis.

(2) Thus the qualifying period for all practical purposes comprises the 20-year period between 6 December 1990 and 6 December 2010.

(3) The burden rests with the Applicant to prove that each and all of the statutory qualifying requirements are met. In accordance with the guidance given by Lord Bingham of Cornhill in *R v Sunderland City Council, ex parte Beresford* [2004] 1 AC 889 the Applicant is put to strict proof of each and every element of the qualifying requirements.

(4) The application is supported by 19 user forms and the volume comes nowhere close to amounting to evidence of use by a "significant" number of local inhabitants. Much of the claimed use was expressly authorised (e.g. school sports days, football, cricket, general school use) and when so discounted the evidence of use in support of the application becomes even more insubstantial.

(5) The land has throughout the qualifying period, and for a substantial period before, been laid out by the Council with formal pitches for team sports and other games and has been hired or otherwise formally made available to external organizations for such uses. That use has been intensive by schools and external clubs and organizations pursuant to formal hire or through express permission or licence of the Council. At no time has that use been interrupted by local inhabitants seeking to use the land for general recreation. Given those significant interruptions of any use for qualifying sports or pastimes, the whole of the land cannot sensibly be claimed to have been used through the relevant qualifying period for qualifying purposes (see *R (Cheltenham Builders Ltd.) v South Gloucestershire Council* [20003] 4 PLR 95).

(6) Any use of the land for LSP cannot be "*as of right*" as the land is held pursuant as recreation space to the Local Government (Miscellaneous Provisions) Act 1976, section 19. Reliance was placed on the *Beresford* case and on *R Barkas) v North Yorkshire County Council* [2012] EWCA Civ 1373.

(7) Alternatively, if any use for LSP was not by right such use was nevertheless with the implied permission of the Council in any event. Through the operation and management of the land for the provision of

formal playing pitches, which were made available through hire or with express permission of the Council, local inhabitants were in practice excluded from the whole or substantial parts of the land for regular and substantial periods. Any access and use of the land for LSP when the land was not in use for team games or formal sports use is deemed to be with the implied permission of the Council following *R (Mann) v Somerset County Council* [2012] EWHC B14 (Admin).

(8) Further or alternatively, the access points onto the land have for parts of the qualifying been locked or otherwise controlled and that gives rise to implied permission to local inhabitants for the use of the land for LSP.

(9) The application does not specify whether "Belmont Ward – Whitchurch" is advanced as either a neighbourhood or locality so the Objector reserves its position on this. In any event the Applicant has failed to demonstrate a geographic spread of users throughout the neighbourhood or locality relied upon and therefore failed to demonstrate use by a significant number of the inhabitants of the qualifying area relied upon.

(10) For these reasons the application should be refused.

4.2 At the Inquiry the evidence relied upon three witnesses:
Mr. Michael Cassel, the Honourable Secretary of St. Joseph's Youth '88 FC (St. Joseph's), which has been leasing Whitchurch Playing Fields for the last 15 yrs.

Mr. Stephen Dimmock, the Horticulture and Countryside Officer in the Parks and Open Spaces Team of the Council.

Mr. David Corby, the Service Manager of the Public Realm Service Area, a post that he has held since October 2004.

I summarise the main points of their evidence in Appendix B.

4.3 In addition the Council were unable to call Mr. Paul Dickinson as he was unwell. Mr. Dickinson is a Grounds Maintenance Specialist in the Council's Parks and Open Spaces Team. His written statement is found at Tab D of Vol. 2 of the

Objector's Bundle. I have taken this into account but cannot given his evidence as much weight as that of the oral witnesses as his evidence was not tested under cross-examination.

4.4 At the Inquiry the Objector produced the following additional documents:

OD1: Belmont Ward Boundary Plan
OD2: Plan showing location of the Applicant's verbal and written witnesses
OD3: Answers by Michael Bradshaw Senior Engineer Contract Management & Drainage Team
OD4: Plan of pitch layout
OD5: Harrow eruv approved to aid Jewish families – article from Harrow Observer, June 6 2013
OD6: Plan showing access points and track (Exhibit DIC4 on p.221 of Vol. 1 of Objector's Bundle)
OD7: A Brief History of Whitchurch Playing Fields
OD7A: Land Registry Plan for title no. MX426214
OD7B: Land Registry Plan for title no. MX308363
OD7C: Land Registry extract for title no. MZ424214
OD8: Booking Grid
OD9: Service Enquiry Details – WK/000098327

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)

Further, in the circumstances of this application, subsection (6) is also potentially relevant:

In determining the period of 20 years referred to in subsections (2)(a), (3)(a) and (4)(a), there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment.

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, as Mr. Maile for the Applicant in my view rightly pointed out, 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(2)(a) (and (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.

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

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[6]. 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:

[6] [2000] 1 A.C. 335, 357A-D.

...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. 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.

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.

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

<u>Significant Number</u>

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[7].

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. That cohesion probably has to be something more than the simple fact that recreational users of the application land live in the area.

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

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 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.*

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

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)).

<u>*That use has to have been as of right throughout that period*</u>

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.*

5.19 From *Beresford* it is clear that permission can be granted either expressly or by implication but not all implied permissions are inconsistent with a use as of right. It was held that permission must be revocable or time limited: permission that is unlimited and irrevocable amounts to acquiescence and thus does not defeat a claim for village green rights.

5.20 In *Mann v Somerset BC* (at paragraph 68), reference was made to Lord Walker (at para. 83) in the *Beresford* case:

"In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or

asserting his title by the occasional closure of the land to all-comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends upon the landowner's permission. But I cannot agree that there was any evidence of overt acts (on the part of the City Council or its predecessors) justifying the conclusion of an implied licence in this case".

In *Mann* 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's contended, relying upon *Redcar*, 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).

5.21 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"[8]. 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.

5.22 The case of *Regina (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] UKSC 11, [2010] 2 W.L.R. 653 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.

5.23 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.

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

(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*).

5.24 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.

5.25 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), if the use is pursuant to a statutory right of public recreation then it is now generally accepted that the 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:

5.26 In *Beresford* Lord Scott stated:

28 It was, as I understood it, suggested by Mr. Laurence that if the "open space" land had achieved the status of a 1965 Act town or village green, then, notwithstanding the disposal of the "open space" land by a principal council, the section 123(2A) procedures having been duly complied with, the land would retain its status as a town or village green under the 1965 Act. Mr. Petchey did not contend that this was wrong. Your Lordships do not need to decide the issue on this appeal but, speaking for myself, I regard the proposition as highly dubious. An appropriation to other purposes duly carried out pursuant to section 122 would plainly override any public rights of use of an "open space" that previously had existed. Otherwise the appropriation would be ineffective and the statutory power frustrated. The comparable procedures prescribed by section 123 for a disposal must surely bring about the same overriding effect.

29 Finally I should refer to section 10 of the Open Spaces Act 1906. Section 10 provides:

"A local authority who have acquired any estate or interest in or control over any open space ... 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 ... 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 ... in a good and decent state ..."

"Open space", as defined in section 20, includes "land ... which ... is used for purposes of recreation ..." Section 123(2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust.

30 *It is, I think, accepted that if the respondent council acquired the sports arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965. But Mr. Petchey accepted that Mr. Laurence was correct in contending that the sports arena had not been acquired "under the [1906] Act" and that section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr. Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney General v Poole Corpn [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation "in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use". There was no express reference in the conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were used for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (cf*

counsel's argument in the Poole Corpn case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case.....

52. *For these reasons I would, on the basis on which the case has been argued before your Lordships, allow the appeal. I am, however, for reasons which will have appeared, uneasy about this conclusion. Where "open space" land comes into the ownership of a "principal council", I think there to be strong arguments for contending that the statutory scheme under the Local Government Act 1972, whether or not the Open Spaces Act 1906 or section 21(1) of the New Towns Act 1981 are applicable, excludes the operation of section 22(1) of the Commons Registration Act 1965. But these arguments have not been addressed to your Lordships. I think also, as at present advised, that the power of disposal of "open space" land given to principal councils by section 123 of the 1972 Act will trump any "town or village green" status of the land whether or not it is registered. But this, too, if the council wish to take the point, must be decided on another occasion.*

5.27 Lords Bingham (at [9]) and Rodger (at [62]) also stated that a use pursuant to a statutory right to use the land for recreational purposes would be inconsistent with use as of right. Lord Walker (at [87]) stated that where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation. Lord Hutton (at [11]) agreed generally with Lords Walker, Bingham and Rodger.

5.28 The approach of the House of Lords to the "by right" issue has more recently been considered by the Court of Appeal in *Barkas v Nottinghamshire County Council and Scarborough Borough Council* [2012] EWCA Civ 1373. (This case is subject to an appeal to the Supreme Court which is, I understand, scheduled to be heard in the Spring of 2014.) In that case the land in question was laid out and

maintained by the UDC 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."**

5.29 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[9]:

(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".

(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

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

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.[10]

(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.*[11]

(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.

(8) Whether trespass is a necessary characteristic of a use "as if of right" is unclear, given the facts in *Beresford.*[12]

(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.[13]

(10) While there is no general exclusion of local authorities from the scope of the CA 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

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[10] [2012] EWCA Civ 1373 at paragraph [37].
[11] [2012] EWCA Civ 1373 at paragraph [38].
[12] [2012] EWCA Civ 1373 at paragraph [41].
[13] [2012] EWCA Civ 1373 at paragraphs [35] & [42].

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.[14]

5.30 Section 19 of the Local Government (Miscellaneous Provisions) Act 1976, which the Objector relies upon, provides in part:

> **(1) A local authority may provide, inside or outside its area, such recreational facilities as it thinks fit and, without prejudice to the generality of the powers conferred by the preceding provisions of this subsection, those powers include in particular powers to provide—**
>
> **(a) indoor facilities consisting of sports centres, swimming pools, skating rinks, tennis, squash and badminton courts, bowling centres, dance studios and riding schools;**
>
> **(b) outdoor facilities consisting of pitches for team games, athletics grounds, swimming pools, tennis courts, cycle tracks, golf courses, bowling greens, riding schools, camp sites and facilities for gliding;**
>
> **(c) facilities for boating and water ski-ing on inland and coastal waters and for fishing in such waters;**
>
> **(d) premises for the use of clubs or societies having athletic, social or recreational objects;**
>
> **(e) staff, including instructors, in connection with any such facilities or premises as are mentioned in the preceding paragraphs and in connection with any other recreational facilities provided by the authority;**
>
> **(f) such facilities in connection with any other recreational facilities as the authority considers it appropriate to provide including, without prejudice to the generality of the preceding provisions of this paragraph, facilities by way of parking spaces and places at which food, drink and tobacco may be bought from the authority or another person;**
>
> **and it is hereby declared that the powers conferred by this subsection to provide facilities include powers to provide buildings, equipment, supplies and assistance of any kind.**
>
> **(2) A local authority may make any facilities provided by it in pursuance of the preceding subsection available for use by such persons as the authority thinks fit either without charge or on payment of such charges as the authority thinks fit.**

THE ISSUES

5.31 It is of course necessary for the Applicant to demonstrate that, on the balance of probabilities, each of the criteria within section 15(2) (or subsection (3) as

[14] [2012] EWCA Civ 1373 at paragraph [43].

appropriate) are satisfied, as set out above. In summary, from the matters that the Objector relies upon the following issues arise:-

1. What is the relevant 20-year period?

   (1) The Application has been made under s.15(3), relying on the end date of 6th December 2010, although received by the Registration Authority on 6 December 2012.

   (2) However, any meaningful works were not carried out until around February - April 2013.

   (3) I raised the question at the Inquiry as to the effect of s.15(6) even if the use ceased prior to 6 December 2012.

   (4) If the appropriate subsection to consider the application is in fact s.15(2), would it prejudice the Objector if the Registration Authority considered Mrs. Lewis' application under that provision despite the amendment made to her original application for the reasons explained by Mr. Maile in his Closing Statement on behalf of the Applicant?[15]

2. Has the Applicant demonstrated sufficient use of the whole land (applying a common sense approach as referred to in paragraph 5.8 above) continuously over the relevant 20-year period? Such use to be taken into account is only qualifying use and not those uses that are permitted/licensed. Further, the sufficiency of use the whole land needs to take into account of the fact that the land consists of playing pitches which when in use would not be used for qualifying recreational use.

3. Is any qualifying use "as of right" or:

   (1) Is it by right at any time during the relevant 20-year period? Or

   (2) Has such use been by force having regard to:

      (i) The holes in fence along the western boundary, adjacent to Abercorn Road;

[15] See paras. 2-7 on pp. 1-5 of the Applicant's Closing.

(ii) The holes in fence at access point C into the MoD Playground.

(3) Or has any qualifying use been by permission having regard to:

(i) Gate at A

(ii) Gate at D

(iii) Gate at E

(iv) Locking of gates at night.

4. Has the Applicant shown that any qualifying recreational use has been by a significant number of the inhabitants of the locality? Does the spread issue relied upon by the Objector have any relevance and, if so, has the Objector demonstrated a sufficient spread of users from the locality?

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

ASSESSMENT

The Relevant 20-Year Period

5.32 I received a further response from the Applicant after the close of the Inquiry with regard to the correct subsection of section 15 and I have taken that into account, although it didn't add anything in substance to the arguments that the parties had already presented to me.

5.33 The Applicant contends that there would be no prejudice to the Objector whether the application is determined under section 15(2) or 15(3). The Applicant further contends that, whilst it was clear that the work to the stream was carried out by the Council, it was uncertain as to what legal authority under which the works were undertaken. Thus, contends the Applicant, it cannot be said that section 15(6) was triggered.

5.34 Nonetheless, the Applicant formally applied to "amend" the Application to be considered under section 15(2) (i.e. with the end-date for the 20-year period as 6 December 2012) but only "strictly in the following terms"[16]: whilst the application should first and foremost be determined under the provision of s.15(3), if the Registration Authority considers that the application should have been made under s.15(2) (and the relevant grounds under s.15(3) are not made out) then the Applicant applies to amend the application to be under section 15(2).

5.35 The Objector contends that by section 15(3) of the Commons Act 2006 it must be demonstrated that qualifying use (a) has ceased before the time of the application and (b) the application was made within a period of two years of such use ceasing. I agree with the Objector's contention that these are part of the range of qualifying requirements for an application made under section 15(3) which the Applicant must demonstrate has been met.

5.36 The cessation can be a "complete" cessation in the sense of the claimed recreational activity coming to an end. Alternatively, it can be where the use has been otherwise challenged and is no longer "as of right"; that can for example be by the putting up of notices or erection of fencing. To that extent, I don't accept the contention by the Applicant that there is in the circumstances no requirement for a tangible event that triggers the date of cessation and that it was the state of mind of the Applicant looking at the potential start of works that mattered rather than the physical start of those works.[17] Notwithstanding that contention, the Applicant contends that it was the works to the stream that triggered the date for the purpose of section 15(3).[18]

5.37 The fact is that no works took place on 6 December 2010.[19] At most there was an indication of future works. There were, it appears, minor trees works in February/March 2012 and the ditch works were carried out in about

[16] As set out in para. 4 on p.3 of the Applicant's Closing Submissions.
[17] Para. 2 on p.2 of Applicant's Closing.
[18] Para. 3 on p. 3 of Applicant's Closing.
[19] See AD3 and OD3.

March/April 2013, with a digger, JCB and 2 conveyers being used. The replacement bridge was installed in the summer of 2013. The Objector says that the works were carried out by the Council, with the consent of the Environment Agency, pursuant to the EU Floods Directive 2007, the Flood Risk Regulations 2009 and the Flood and Water Management Act 2010. [20]

5.38 It is not necessary in the circumstances for me come to a conclusion on whether section 15(6) would have in any event been engaged so as to discount any period during which the public would have been prohibited from access to the land and whether that was by reason of any enactment. The Applicant contends that this provision is not engaged[21] and the Objector did not rely upon it.

5.39 However, I don't accept that the Applicant has not produced evidence to demonstrate use of the land for recreational purposes during the 20-years up to 6 December 2012. Nor do I accept that the Objector has not been in a position to test that evidence. Thus, whilst I understand that there was uncertainty over the terminating date for the 20-year period, I don't accept in the circumstances that the Objector has been prejudiced by this. In reaching this view, I take into account, as should the Registration Authority, the guidance given by Lord Hoffmann in the case of *Oxfordshire CC v Oxford City Council* [2006] 2 AC 674 at [61]:

> 61 *There remain, however, more general questions about the power of the registration authority (acting by its inspector) to allow amendments to the application form and to register an area of land different from that originally claimed. It is clear from the New Land Regulations that the procedure for registration was intended to be relatively simple and informal. The persons interested in the land and the inhabitants at large had to be given notice of the application and the applicant had to be given fair notice of any objections (whether from the land owner, third parties or the registration authority itself) and the opportunity to deal with them. Against this background, it seems to me that the registration authority should be guided by the general principle of being fair to the parties.....*

[20] See OD3, which is information provided at my request by Michael Bradshaw, Senior Engineer Contract Management and Drainage Team.
[21] Para. 3 of the Applicant's Closing Statement.

5.40 In conclusion on this issue, it is therefore my view that the application should be considered under section 15(2) of the CA and that I would recommend the Registration Authority to accept an amendment of the application accordingly. That would mean the relevant 20-year period is that from 6 December 1992 to 6 December 2012.

Quality/Sufficiency of User

5.41 The Application land is, and was during the relevant period, a grassed, relatively flat, relatively large area (referred to as 25 acres in the Cabinet Report 22 November 2012)[22] in close proximity to extensive housing. Whilst there are issues regarding access from certain points and at certain times, overall I have little doubt that local residents were able to and did access the land and use it for a variety of recreational purposes including dog walking, kite flying, blackberry picking, learning to ride bikes, golf practice, informal games, playing in the snow. This use was detailed in the oral evidence in support of the Application (summarized in Appendix A to this Report) and I have also taken into account the supporting statements and evidence questionnaires relied upon by the Applicant.

5.42 However, some of that access is said by the Objector to by force (particularly that through the fence along Abercorn Road and through access point C) and some was clearly permitted (e.g. the use of the field by the Baptist Church). Also, in assessing whether the claimed use was of sufficient quality to satisfy section 15, as referred to above, it is necessary to discount any elements of formal sports and related training use and school use, the levels of use of which are disputed by the Applicant.

5.43 Thus, in determining whether the qualifying recreational use was sufficient for the purposes of section 15, it is necessary to apply the following approach:

(1) Only to take into account those uses that are properly considered to be LSP uses.

[22] Para. 2.1 on p. 250 in Vol. 2 of the Applicant's Bundle.

(2) To exclude uses which are permitted. That would cover not only those who are partaking of such a permitted activity but also those in support of the activity (e.g. coaches, trainers etc). There is a dispute between the Applicant and the Objector as to whether you should also exclude those who are spectators of those permitted activities. I note the Applicant's reliance on *Beresford* where benches were placed on the edge of the land for people to watch activities on the land. However, in the circumstances of the formal use of Whithcurch Playing Fields, as set out below, in my view any person who comes onto the land primarily to watch a match or game is doing so pursuant to the licence allowing the clubs to use the land for the playing of such matches and games and for training.

(3) The permitted uses relied on by the Objector are, in so far as they are made out on the evidence, those by the local schools, football clubs (both for matches and training), cricket clubs and by other local organizations, in particular the Stanmore Baptist Church. As noted above, the extent of use by the schools and sports clubs is strongly disputed by the Applicant and I deal with this below.

(4) I also accept, as the Objector contends, that where there is evidence that use has been a result of forcible entry (in this case making and going through holes in fences) such use should discounted.[23]

5.44 Having considered all of the evidence, as indicated above I conclude that there has clearly been use of the land for LSP for the relevant 20-year period (i.e. the 20 years up to 6 December 2012). That use has taken place predominantly in the mornings (with dog walkers in particular) and after school and work and at weekends and the level will depend upon the time of the year and weather conditions. That pattern is common to uses of the type claimed and was well described by the Applicant herself and is reflected in the evidence of other witnesses.

5.45 However, the issue is whether, taking into account those normal variations, the Applicant has demonstrated on the balance of probabilities significant use for

[23] Para. 6 on p.2 of the Objector's Closing Submissions.

LSP of the whole of the land throughout that period, consistent with the approach set down by Sullivan J. as he then was in the *Cheltenham Builders* case referred to above. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is a general use by the local community for an informal recreational use, rather than occasional use by individuals as trespassers. Thus, 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.

5.46 Although the Applicant and her witnesses accept that some of the use of the land has been by permission, the extent and implications of that use are strongly contested. In particular, the following aspects are at issue.

School Use

5.47 With regard to any use by the schools, the Applicant contends that, given the Council's own reliance on section 77 of the School Standards and Framework Act 1998 in its Cabinet decision dated 22 November 2012, the schools can only have been making occasional use of the land from 2002.[24] The Applicant also relies upon the alleged conflict between paragraphs 5 and 7 of Mr. Corby's statement with regard to whether the school usage reduced in the early 2000s or 2010.

5.48 The Applicant acknowledges that some witnesses for the Applicant recall school usage.[25] Mr. Joannou has seen a group of school children over there.[26] Mr. Hayeem said that during weekdays he would see children – just today whole group of children playing cricket. He assumed it was schools (Whitchurch or Stanburn) using it as it was within school hours but he had no particular

[24] See paras. 9-10 On pp. 5-6 of the Applicant's Closing Statement.
[25] Para. 12 on p. 7 of the Applicant's Closing Statement.
[26] Appendix A on p. 52.

knowledge.[27] Mr. Mountford-Brock said that he went to Whitchurch Primary School and did football training in yr 6. In yr 7 he only played 1 game. They trained on a small section of the land to the north of the school. When he was at Park High School (in 2006-2010), Mr. Mountford-Brock said that 5 or 6 teams for each school at a time would play on the middle of the largest field.[28]

5.49 Even though, as Mr. Dimmock confirmed, the use by schools has declined, Whitchurch School still has two bookings a week (on Mondays and Tuesdays).[29] The Applicant points out that Stanburn Junior School state in their letter 7 May 2013 that they have not used the land for the last 5 years. The Applicant has suggested that the head teachers (and others) may have been influenced by the facilities being offered by the Council and the consequences of TVG registration as expressed inconsistently, as the Applicant contends, in the Council's letters. Doubt has also been cast of the use of the land by Harrow School.

5.50 I am not persuaded by the reliance on any "undue influence" or "conspiracy theory" such that this would have led people to be untruthful or even "distort" their account of usage. I have to make my assessment on the evidence before me but being sensitive to credibility and consistency of any evidence. After the close of the Inquiry the Registration Authority was sent, by Ms Stern on behalf of the Applicant, a statement from Whitchurch School which was stated to prove that witnesses were misinformed by Council Officers. However, even assuming that to be the case (which is not a matter for me to determine) what is relevant is whether the school wishes to change what they said about their use of the Application land. There was no suggestion in that respect and therefore it does not alter my assessment of the use of the land. Looking at the evidence as whole in all the circumstances I find the Objector's evidence on the school use as set out in the letters from the schools and booking records to be more convincing than the position taken by the Applicant on this issue. Also I note the reference to

[27] Appendix A on p.11.
[28] Appendix A pp. 34-5.
[29] Appendix B on p.

school use in the evidence of for example Mr. Mountford-Brock, who gave evidence in support of the Application.

5.51 It is not perhaps surprising that Whitchurch School in particular, and Stanburn School previously, did and does still to some extent make use of the land, given its proximity and the fact that it owned by the Council. That is reflected by the availability of the pitches so close by also the running track that is paid out regularly. Although of course not a neighbouring school, I also do not consider it is likely that the headmaster of Harrow High School would provide anything other than an honest account of that School's usage of the land. I consider that also applies to Hatch End High School.

5.52 However, it does seem to me that there have been variations in the levels of use of the land by the local schools with use in the 1990s and early 2000s probably being greater than after that, although there may well have been variations in the 2000s. That may explain the observations or perceptions of some of the witnesses on behalf of the Applicant who didn't recall use by the schools. I also take into account that school use would take place when generally informal recreational use would be lower as many people (but by no means all) would for example be at work. However, it is not my impression that the use would have been "sporadic" as alleged by the Applicant in that it seems to me that the use is likely to have been regular, particularly in the 1990s/early 2000s, in term time when the weather and ground conditions were appropriate.

Use By Sports Clubs

5.53 The Applicant contends that the evidence of bookings for formal sports had to be seen in the context of there being no record of cancellations or whether it was the intention to actually play any given game on any given date.[30] Similarly, the Applicant says that the block bookings of St Joseph's doesn't reflect the fact that they would then play matches on the land and other land as appropriate and the need to use the fields. The evidence generally of the local inhabitants, the Applicant contends further, was that at best on any given date there would be a

[30] See paras. 18-20 on pp.9-10 of Applicant's Closing Statement.

maximum of two games in play, and that would be on a Saturday or (as became the emphasis) Sunday morning. However, it is necessary to consider the position throughout the 20-year period and these comments have to be seen in the context of some of the Applicant's own evidence, for example the evidence of Mr. Pais. He said that Until 1990/5 the use of the eastern side of the land was rather intensive – sometimes in evenings and at weekends with both pitches being played on. Also, Mr. Lewis referred to the fact that there could be two games going on at one time on a Sunday morning and then after those there may be another two games.

5.54 Following the close of the Inquiry, I received further representations from the Applicant on the booking records submitted by the Objector near to the close of the Inquiry. The Applicant is concerned about the late submission of these records and expresses various criticisms of them and says they cannot be relied upon. I am asked to dismiss them. However, the Objector's volume 5 was not in my understanding new evidence, save possibly to a limited degree. The evidence was to demonstrate how records are kept. I found them useful to put into context the evidence I heard on the general level of use but they are in no way necessary for the conclusions I have been able to make on the other evidence. I fully acknowledge that bookings don't automatically translate into use but my overall impression is that at times, as for the school use, the assessment of the position on behalf of the Applicant has not been entirely realistic.

5.55 Even without any reliance on the bookings, my clear impression of the evidence is that the pitches on the Application land were well used at weekends pursuant to bookings. There would be training on Saturdays and matches on most, if not all Sundays. Consistent with that was Mr. Blackman's evidence regarding parking problems when matches were taking place. He said that he had complaints about this regarding parking on Saturdays and Sundays and his impression was that the number of cars indicated more than one match was taking place. I also found the evidence of Mr. Cassel to be in nearly all respects be very clear and convincing and I had no reason, having regard to his evidence and the evidence

as a whole, to consider that he had been unduly influenced or persuaded, consciously or otherwise, to do other than give as accurate evidence as he could.

5.56 The Applicant in her post Inquiry submission (at lines 120-127) suggests an inconsistency ("stark contrast") between the oral evidence at the Inquiry of Mr. Cassel and the booking records in that in neither tab were there bookings for football pitches on weekdays. However, the evidence at the Inquiry was clear. The weekday usage (Tuesday- Thursday, outside of winter) was for training and there are no formal bookings for training. Mr. Dimmock said that the Council does not require clubs to make express bookings for football training, as it is implicit in their agreements for use of the pitches. I have no doubt from the evidence that training by St. Joseph's took place on a regular basis outside the winter months and that this was a use permitted by the Council as an integral part of their use of the pitches. I also expect that a casual observer may well consider that training, certainly some aspects of it, was not a "formal" activity" but more of a kick-about. However, it is not an activity that contributes to qualifying user and my impression was that some of the witnesses in support of the Application may have confused that permitted use for an "informal recreational use" i.e. qualifying use.

5.57 With regard to the use between 2008-2010 by the Belmont Club, whom Mr. Corby said used the North London Pitch, the Applicant contends that the evidence of this was at best speculative and little weight can be placed on the degree of use they as a fact made of the land.[31] However, my impression was that it very is likely that they did make meaningful use of two of the pitches pursuant to the agreement dated 20 March 2008 with the Council,[32] whilst their ground in Camrose Avenue, Edgware was undergoing redevelopment. Mr. Cassel told the Inquiry that Belmont have an under 15 team that train on Saturday mornings and a younger team that train there on Saturday mornings. When asked whether there was a period when Belmont had exclusive use of part of the site, Mr. Cassel said that was on the smaller pitch. Mr. Cassel further explained that when

[31] Applicant's Closing Statement at para. 20 on p.10.
[32] See Mr. Corby's Exhibit DIC1 in Vol.1 of Objector's Bundle.

Belmont were using the playing fields (until about the 2010 season) St. Joseph's definitely used two junior pitches JFB1 and 2 (in the south-western part of the land) and SFB2 (in the western part of the land) and he thought either SFB1 (also on the western part) or another SFB pitch and the soccer sevens pitch in the far right (on the eastern part of the land), which is a smaller pitch. So, although neither the Applicant nor any of her supporting witnesses appeared to be aware of the use by Belmont, I have no reason to doubt Mr. Cassel's or Mr. Cork's evidence for the Objector on this. As I said above, I found Mr. Cassel's evidence convincing and with his interest in St. Joseph's use of the land as a coach and father he is likely to be aware of other clubs using Whithurch Playing Fields.

5.58 The Applicant relies upon the evidence of Mr. Pais to support her contention on the level of use.[33] However, Mr. Pais said that his view of the western side of the land was not so clear as for the eastern side. Nonetheless, he confirmed that there were two football pitches on the eastern side that were replaced in the summer with one big cricket circle in the middle. Under cross-examination he also referred to seeing a cricket circle on the western side of the field (which he saw through gaps in the trees). As noted above, he also said that until 1990/5 the use of the eastern side was "rather intensive" – sometimes in evenings and at weekends with both pitches being played on, although these days the use is not so intensive. Mr. Pais referred to practice games on Tuesday evenings or on a Thursday. On Saturday mornings (but not afternoons) there are one or two games – he couldn't recall this on Sundays but he said that he wasn't discounting that (and indeed others have witnessed this e.g. Mr. Lewis referred to matches on Sunday mornings {at 10am and at 12 noon} as did Ms. Stern and Mrs. Allen). Mr. Pais also said that these days there was just one football match, whereas they used to be on both pitches. He also referred to a lot of informal activity – groups of boys kicking a ball around. As noted above that could be permitted training use, although not necessarily so. In my view Mr. Pais' evidence was more consistent with the Objector's position on general usage than the Applicant is contending, although he certainly had the impression of reduced usage in the last 5-10 years.

[33] Applicant's Closing Statement at para. 21 on p.10.

5.59 The Applicant also relies on the evidence of Mrs. Copeland in this respect.[34] She certainly said that she had never been aware of "lots and lots" of formal use – although she acknowledged matches at the weekend but, she said, not in the quantity that had been referred to. She had seen the land marked out for formal sports but more often she would see "kids having a kick about".

Use by the Baptist Church

5.60 Less contentious is the degree of use by the local Church, which lies very close to access point D onto the land. There seems no doubt at all that the Stanmore Baptist Church has with the permission of the Council used parts of the land on a regular basis. The Applicant herself accepted the Baptist Church use the land "an awful lot". Mrs. Lewis said that it was nice to see an organization using the land and producing documentation to say that they do.

Summary

5.61 Assessing the position overall on this aspect, the LSP use that has taken place over the relevant 20-year period has taken place "alongside" at many times what I consider to be on all the evidence to be unquestionably overall extensive permitted uses by local sports clubs, the local schools and the Baptist Church. With regard to the use of the pitches I would add that the above evidence is supported by the layout plans for 1997-2008 (Exhibit DIC 9, [behind Tab C] at p.322 of Vol. 1 of the Objector's Bundle) and since 2008 (Exhibit PJD1 [behind Tab D] in Vol. 2 of Objector's Bundle), and by the aerial photographs produced by the Objector (see DIC10) and the Applicant (see AD2).

5.62 I accept that this use, together with the school use, may be less intensive at later times than at earlier times within the 20-year period. However, my clear impression is that it has been a regular and very material element of the use of the land throughout that period and particularly significant in the 1990s as Mr. Pais' evidence supported.

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[34] Applicant's Closing Statement at para. 21 on pp.10-11.

5.63 I am aware of the flooding issues relating to the land and surrounding properties. However, there is no evidence before me that leads me to conclude that it is likely that this precluded regular use of the land by St Joseph's and others or any undue level of cancellations other than what might be normally expected particular during the winter. Indeed, I don't really see much force in this point on behalf of the Applicant in the circumstances in any event since, as Mr. Cassel said, cancelled matches would be re-scheduled and this could lead to an extension to the season. The picture given of the land by some residents was that if it wasn't suitable for formal activities it wouldn't have been suitable for much informal activity either. So, again I don't see how that is of much assistance in any event to he Applicant's reliance on this aspect.

5.64 Although the land is a large area, it is my view that as a consequence of the above activities in combination, but even as a consequence of the sports club's use alone, the qualifying recreation use, which I do find has taken place, has been displaced on a regular basis throughout the 20-year period from significant parts of the land. I consider the implications of this below.

5.65 Nonetheless, discounting those permitted uses my impression of the evidence of the witnesses in support of the Application (as summarised in detail in Appendix A to this Report) and the evidence questionnaires and statements was that there was still a degree of regular usage of the land or parts of it for the claimed recreational uses. That level however was less than the impression given from some of the Applicant's witnesses as in my view they have included certain permitted activities, particularly training, as informal qualifying uses. However, whether any remaining qualifying use is sufficient to satisfy the statutory criteria depends also upon other factors, which are dealt with below.

Is the Use as of Right?

5.66 The Objector contends alternatively:

(a) Any recreational use is "by right" and not "as of right"; alternatively

(b) If any recreational use is not by right it is by permission in light of:

(i) the practice during parts of the qualifying period of locking gates to the land at night; and

(ii) by reason of the effect of use of the land by permission of the landowner such that at times when not so used any recreational use will be deemed to be by implied permission (applying the principle in *R (Mann) v Somerset CC.*)

Use By Right

5.67 Reliance is placed by the Objector upon the decision of the Court of Appeal in the *Barkas* case, the principles arising from which I have detailed above. The Objector accepts that the application land was first held for educational purposes.[35] It is also accepted by the Objector that there has to have been an appropriation from the educational purpose to public open space purposes for it to be concluded that the land has been held for open space purposes and thus any recreational would be by right.[36]

5.68 The Objector relies upon the transfer of responsibility of the land from education to the Council's Public Realm Department in 2003/4 and the way in which the land was managed and funded being consistent only with the appropriation of the land from educational purposes to the purposes of section 19 of the Local Government (Miscellaneous Provisions) Act 1976.

5.69 The Objector accepts that there is no evidence of an express appropriation of the land for public open space uses.[37] However, the Objector contends that an appropriation may be implied. Three legal authorities are relied upon to support this:

Beresford (para. 30)

Oxy-Electric Ltd v Zainuddin Ch. Div 22 October 1990

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[35] See para. 29 on p.6 of the Objector's Closing Submissions and the evidence of Mr. Corby. See also Cllr. Moshenson's evidence as referred to in the Applicant's Closing Statement at para. 16 on pp. 8-9.

[36] Para. 30 on p.6 of the Objector's Closing Submissions.

[37] As made clear by Mr. Edwards QC during the Inquiry and confirmed in para. 31 of his Closing Submissions.

AS- v Poole Corporation [1938] Ch 23 cited by Lord Scott in *Beresford*

In the *Oxy-Electric* case it was argued that there need be no express appropriation nor an implicit appropriation. The Deputy Judge held "*...I am quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it if it had made an appropriation, then the resolution need not record such appropriation."*

5.70 In terms of evidence to support an implied appropriation, the Objector relies upon the responsibility for the land and for its management becoming that of the Council's Public Realm Department from 2003/4 as explained by Mr. Corby (paras. 3.5-3.8 on pp. 1-2 of his Witness Statement).[38] However, there is no direct evidence to indicate that was done for some other reason than for example administrative/management expediency. It is my understanding that land held by one department of a local authority for a particular purpose can be, and sometimes is, maintained by another section of the authority. I see nothing necessarily inconsistent between the playing fields held by the education authority adjacent to a school being let to local sports clubs.

5.71 However, as the Applicant and some of her supporting witnesses pointed out, the application land in contrast to other public open space/parks has no signs making it clear that it is a public open space or park. Further, any "trail" of appropriation is in my view largely lacking, in contrast to the *Barkas* case. 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 evidence of 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

[38] See paragraph 33 on p.7 of Objector's Closing Submissions.

recreation" in the sense in which Lord Walker referred to "appropriation" in paragraph 87 of his opinion in *Beresford*.[39]

5.72 The CA in *Barkas* held that the local inhabitants could in the circumstances fairly be said to have a statutory right to use land that has been "appropriated" for lawful sports and pastimes. That was because the local authority, having exercised its statutory powers to make the land available to the public for that purpose, was under a public law duty to use the land for that purpose.

5.73 For the use to be "by right" it therefore seems to me that, applying the approach of the Court of Appeal in *Barkas*, the use of the land by the local residents as public open space would have to have been enforceable by way of judicial review proceedings. I take this into account when considering whether there is sufficient evidence to imply an appropriation in the circumstances of Whitchurch Playing Fields.

5.74 Furthermore, the statutory basis upon which the land is said to have been held since 2003/2004 is that pursuant to s.19 of the Local Government (Miscellaneous Provisions) Act 1976. However, that provision does not appear to me to require an authority to hold the land on trust for the public. The authority's powers under that provision appear to me to be entirely discretionary and thus in my view there would need to be clear evidence, as in *Barkas*, that the land was held for recreational purposes in a way that was enforceable under public law principles.

5.75 Therefore, in conclusion on this aspect, I consider that the issue is a difficult one to determine and is in the circumstances of this case finely balanced. I can understand why in the circumstances the Objector may feel that there has been an appropriation in a practical sense, given the way the land is administered. However, my view is there is not sufficient evidence in the circumstances to enable the Registration Authority to conclude on the balance of probabilities that the open space use was enforceable in that way and therefore that any qualifying

[39] [2012] EWCA Civ 1373 at paragraph [38].

recreational use was "by right" and "not as of right". In my view, therefore, the recreational use during the relevant period was not "by right" as contended by the Objector.

Use as of Right: Forcible Use

5.76 The Objector does not appear to suggest that any forcible use (making and using the gaps in the Abercorn Road fence from point C) disqualifies all use of the land from potentially (subject to the other issues raised by the Objector) satisfying the requirements of section 15 of the CA 2006. The Objector does rely upon the approach of Patten LJ in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 in respect of the evidence from some of the Applicant's own witnesses in respect of forceful entry onto the land.

5.77 The Applicant accepts that as a fact people did at different times access the land via broken fences.[40] However, the Applicant contends that the intention of those that caused damage to fences is unclear and that there is no tangible evidence that the fences were ever broken as a deliberate attempt to gain entry onto the land, as opposed to it being mere mindless vandalism.

5.78 It is not being suggested by the Objector that all of the access was by force. However, given the evidence of the Applicant herself and some of her witnesses in my view the use by force is an important factor and cannot be overlooked. It is therefore necessary to make a judgment as to how much of any recreational use of the land was likely to have been by force. That is by no means an easy judgment to make on any quantitative basis. However, in my view, and applying the principles from *Taylor v Betterment Properties (Weymouth) Ltd* such clear evidence of forceful entry requires that caution is applied in evaluating whether there were a significant number of residents using the land for LSP *"as of right"*.

5.79 The forcible entry relied on by the Objector relates to holes made in the fencing along Abercorn Road, which some of the local residents themselves referred to. Mr. Hayeem (who said that he did not himself go through the holes) referred to

[40] Para. 39 on p. 21 of the Applicant's Closing Statement.

the "constant process" of the holes being repaired and then others appearing.[41] Ms Joyce referred to there always being broken fences with the gaps being repaired.[42] Ms Stern gave similar evidence. She confirmed that she normally accessed through point D. It might in the beginning have been locked, she said, but she could always access through a hole in the fence or go through Whitchurch at A. Ms Stern said that the gaps she saw in 2004 would be repaired and then another hole would appear elsewhere.[43] The Applicant herself said that there had always holes between access points D and E and she had climbed through the holes.[44] Mr. Read said that he has seen the holes in the fence along Abercorn Road – he said this was just vandals.[45] He hadn't seen holes big enough for people to walk through. The place where there are large holes is along Wemborough Road, by the substation (to left, west). He spoke to person doing repairs.

5.80 Therefore, with respect to access from Abercorn Road, there was clear evidence from some of the Applicant's own witnesses and the Applicant herself that some entry was made by them and others through holes made in the wooden fence. There may have also been an element of vandalism as Mr. Read suggested but that doesn't alter the implications of the clear evidence of forcible entry. Although there is some conflict in the Applicant's evidence it seems to me that there is highly likely to have been repairs as Mr. Hayeem and Ms Stern in particular gave very strong evidence of (cf. Mr. Samson who couldn't recall the holes being repaired but said others would just walk through them).

5.81 The Applicant contends that these holes were not the only access points and that there was no evidence that any of the gates were locked at a time when only access through broken fences could take place.[46] However, that is not entirely consistent with Ms Stern's evidence in terms of people accessing from Abercorn Road. It is also contended that there were in reality access points A, D and E.

[41] Appendix A at p. 12.
[42] Appendix A at p.12.
[43] Appendix A p.46 & 48.
[44] Appendix A p.23 and her Statement.
[45] Appendix A p.42.
[46] Para. 39 on p.21 of the Applicant's Closing Statement.

Many used access point A and didn't witness the locking of the gates there that prevent their entry. Any locking at point A was primarily of the overhead barrier and at no time were the inhabitants prevented from accessing the land using point A.

5.82 The Applicant says (relying on *Field Common v Elmbridge BC* [2005] EWHC 2933 (Ch)) that there was no protest from the owner to the informal use, nor was any attempt made to stop such use.[47] The Applicant also relies upon *Redcar* in this respect and in particular the warning to land owners of the need to take appropriate steps if they see a risk of the circumstances arising in which a TVG application could be made and their land could become registered as a green.[48] The Applicant says that such steps were not taken by the Objector since known and well-used entrances to the fields were left open. Any attempt to lock from time to time, if it did take place, was in any event lax. However, with regard to the fencing along Abercorn Road the evidence of the Applicant's own witnesses indicates to me that the Objector did take reasonable steps to repair the holes encapsulated by the "constant process" of repairing holes.

5.83 The Objector's reference to forcible entry also relates to the Ministry of Defence fencing (around the playground adjacent to the application to the north/north-east) where access point C, being a forced hole in the wire fence, is located. There is a dispute as to whether and when this was repaired. Mr. Pais said (as I saw on my site visit) that the MoD fence was adjacent to his house and that chain link fence overlaps with his property. The MoD told him, he told the Inquiry, that it is their fence but they are not repairing it because as soon as it is repaired a new hole is made. Mr. Pais said (in his evidence in chief) that the fence was last repaired some 20 years ago (I note that under cross-examination he said 15-20 years). Mrs. Pillay said that the broken chain link fence at point C was always like that, although the hole varied and you had to lie down sometimes to get through. She said that there has been some process of trying to mend it which is consistent to a degree with the Council's position on this, notwithstanding that I

[47] Para.63 on p.29 of the Applicant's Closing Statement.
[48] Para.64 on p.29 of the Applicant's Closing Statement.

accept the Applicant's point that the Council's evidence that they carried repairs to a fence that wasn't theirs was not supported by the documents they had referred to.

Implied Permission

Permission by reason of locking the gates at night

5.84 The Applicant contends that with regard to gate locking that was at best spasmodic and of very short duration, with no accompanying action to demonstrate that the gates were locked in order to prevent the inhabitants use.[49]

5.85 The Applicant also contends that the Council state they locked the gates not to prevent or control inhabitants use of the land, but merely to prevent unsocial behaviour.[50]

5.86 The Applicant contends that there was conflict in the evidence between Mr. Corby and Mr. Dimmock on gate locking, with the latter referring to the locking team driving across the fields to gate D. The Applicant thus questioned the entirety of Mr. Dimmock's evidence, at least in so far as his evidence on locking, but then went on to say that if that is correct then that questions whether there is any credibility in any aspect of the evidence of the Council.[51] However, my strong impression was that both Mr. Corby and Mr. Dimmock gave their evidence to the best of their knowledge and in good faith, even if I do not necessarily accept all aspects of the evidence as I have indicated as relevant. The Applicant points out that neither Mr. Corby nor Mr. Dimmock had ever themselves witnessed the process for gate locking and the objector had failed to present a statement or witness to state that they themselves had locked the fields.[52] With regard to the incident of the person locked in, that was because the overhead barrier at access point A was locked (see OD9).[53]

[49] See para. 18 on p. 9 of the Applicant's Closing Statement.
[50] See para. 25 on p.12 of the Applicant's Closing Statement.
[51] Para. 38 on pp. 20-1 of the Applicant's Closing Statement.
[52] Para. 48 on p.24 of the Applicant's Closing Statement.
[53] Para. 50 on pp. 24-5 of Applicant's Closing Statement.

5.87 The evidence on the locking of the gates is not entirely clear. However, what does seem clear to me is that there were locks, at times at least, on gates D (Ms. Stern, Mr. Joannou) and E (as recalled by Mrs. Copeland, Cllr. Moshenson as well as at point A (Mr. Joannou).

5.88 It is difficult to conceive why locks were put in place if they were not intended to be used for the purpose of controlling access to the land, although of course that does not necessarily mean they were used or used all the time or even regularly. My clear impression from the evidence was that entrance E was likely to have been for allowing Stanburn School onto the land. The fact that people made holes in the wooden fence would indicate that the gate at E and/or D was locked or otherwise unusable as the holes were used, as some of the Applicant's witnesses told the Inquiry, to access the land.

5.89 Ms Stern's evidence on this aspect was that D was definitely locked at times in the early days to 2006-2008 when the gate stopped being locked. If locked, she would use holes between D and E. That seems entirely consistent with the Church being given a key to access D.

5.90 In my view, therefore, it is very likely that the gates at D and E were locked from time to time during the relevant 20-year period, although gate E was not the responsibility of the Council's locking team. Mr. Dimmock said that he had seen gate E locked .[54]

5.91 The position with regard to access point A is less clear. Although there are locks on the gates, including currently the pedestrian gates (which I saw on the site visit, although that doesn't necessarily mean they were there within the relevant period), there is no direct evidence of these being locked. I find it surprising that there were no warning notices about the gates being locked at night because of the danger of locking people in. I also find it surprising that if a whistle warning was given that no resident gave evidence of that being heard. However, it was my impression, notwithstanding recollections of local residents to the contrary, that

[54] Appendix A at p.10.

it is likely that the gates have been locked at times during the 20-year period. In particular, I have taken into account the items of charging for the unlocking of gates in the 1990s.[55] I also note the service enquiry detail on 1 September 2009 referred to by Mr. Corby.[56] I take into account that recent locking (but not of gate E, which is as noted above not the locking team's responsibility) is said to have between 2007 to 3 months into 2010 to address anti-social behaviour.

5.92 Therefore, I consider that the locking of gates E and D on occasions is an example of an implied permission to those using those entrances for the use the land at other times. Their use of the land through those entrances cannot be said to as of rights throughout the 20-year period and should in any event be discounted. I also take some account of occasional locking at A but given the uncertain on this aspect give it in itself limited weight. However, in my view it still needs to be taken into account with regard to the other actions by the Objector, namely with regard to access points D and E and the fencing along Abercorn Road.

Implied permission by reason of the effect of use of the land by permission of the landowner such that at times when not so used any use was permitted

5.93 The Objector contends alternatively that the an implied permission to use the land also arises from the fact that local inhabitants are excluded from substantial parts of the Application land during the period in which those parts are used with the express permission of the land owner. The Objector relies upon *R (Mann) v Somerset CC* to support this proposition.

5.94 However, the Applicant contends that the *Mann* case does not assist the Objector since it related to private land that was totally fenced with access strictly controlled with an admission charge applied during the event that was the key to the case.[57] I acknowledge those differences. However, it is the applicability of underlying principles upheld in that case that need to be considered.

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[55] Appendix A at p.14.
[56] Appendix A p.14.
[57] Paragraphs 67 & 68 on pp.30-32 of Applicant's Closing Statement.

5.95 The Applicant contends that with regards to the use of the fields for organised sports that at all times sufficient use of the land was available to the inhabitants in the context of the *Redcar* case. The Applicant contends that it is a case of co-existing uses on publicly owned land as in *Redcar*. However, in *Redcar* the question of implied permission did not arise. In *Mann* Owen J. 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).*
> *82. If it were necessary to go further I would agree with the submission of Mr Blohm that given the nature of the owner's conduct and use of their land whereby the local inhabitants were excluded (and certainly excluded from part of the land in circumstances where no steps were taken to limit by physical marker or otherwise a precise area of exclusion), 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).*

5.96 In my view, as set out above, there has been regular periods of exclusion by the Objector of the local residents from not insubstantial 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 on a few occasions, while local people continued to use the remainder of the land. In my view in the case of Whitchurch Playing Fields, 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 a period of active exclusion.

5.97 The Applicant also places heavy reliance upon the decision of the House of Lords in the *Beresford* case, which I have detailed above. For example the passage in Lord Walker's speech where it is stated that the fact that the City Council were willing for the land to be used as an area for informal sports and games, and provided some minimal facilities (now decaying) in the form of benches and a single hard cricket pitch cannot be regarded as overt, communicating permission to enter.[58] However, that is not what the Objector is relying upon in this case to imply permission, which was not found on the facts of the *Beresford* case.

5.98 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.*

Locality/Neighbourhood

5.99 The Objector accepts that the Belmont Ward relied upon as a locality does in principle amount to a locality for the purposes of s.15 of the CA 2006.

5.100 However, the Objector contends that the Application does not demonstrate a sufficiency of use from inhabitants of Belmont Ward to allow a conclusion that the land has been used by a significant number.[59]

5.101 However, the issue is whether there are sufficient users from that locality to indicant to an owner significant use.

5.102 The Objector further argues that the Applicant has to demonstrate a geographic spread of users throughout the qualifying area relied on.[60] I take into account the legal authority and Inspector's decisions referred to but I consider the "spread" issue is more of an evidential consideration than a strict legal requirement in itself. Based on that approach and the representation of the spread shown on

[58] Applicant's Closing Statement at paragraph 28 on p.15.
[59] Paragraph 44 on p.10 of the Objector's Closing Submissions.
[60] Paragraphs 45-48 on pp. 10-11 of the Objector's Closing Submissions.

OD2, if I had considered that the Application should otherwise registered I would not have recommended that it should nonetheless be refused because of a lack of spread of local inhabitants.

OVERALL CONCLUSIONS ON THE KEY ISSUES

5.103 I do not accept that there is sufficient evidence to support the Objector's contention that there has been an implied appropriation of the land for open space purposes such as to make any use for LSP "by right" as opposed to "as of right".

5.104 In my view there has been a level of regular use of the land by local inhabitants for recreational use throughout the 20-year period. However, it is necessary to determine whether that use was of sufficient quality to satisfy section 15. When the permitted uses (including those that some witnesses have referred to as 'informal" recreational use) and use by force are taken into account, in my view there is serious doubt as to whether the Applicant has demonstrated sufficient quality of user throughout the 20-year period.

5.105 The expressly permitted uses were more intensive in the 1990s but still significant in later periods. With regard to use by force, that relates in particular to those who have accessed the land through holes in the fence along Abercorn Road. The evidence is clear, and from the Applicant's own witnesses, that there has been a "constant process" of repairing that wooden fence following the making of holes in it to allow access onto the land.

5.106 With regard to access C there has also been access through the hole in the chain fence between the MoD playground and the Application land. The position on repair is less clear than for the Abercorn Road fencing but there does seem to have been some repairs. I except that these repairs may not have continued on a regular basis but nonetheless in my view the forcible nature of at least some of the use of that access can't be overlooked. Indeed the nature of the hole and the difficulty in accessing through it, as testified to by one of the Applicant's

witnesses in particular, to my mind would as a matter of common sense indicate to someone going through it that the use is contested.

5.107 I acknowledge that access has also be made by many residents through access points A, in addition to C, D and E, but in my view the forceful entry brings seriously into question whether a significant number of local inhabitants have used the land as a whole for LSP *as of right*. I don't accept the Applicant's ready overlooking of this use by force for the reason's explained above. In my view when the permitted uses and use by force are taken into account the Applicant has not demonstrated that on the balance of probabilities the quality of use is sufficient to satisfy the statutory criterion throughout the 20-year period.

5.108 Moreover, the circumstances that led to people breaking down the fence along Abercorn Road and it being constantly repaired can't be considered in isolation. They are consistent with there being attempts by the Objector as owner of the land to control access and use of the land certainly at some periods during the 20-years up until 6 December 2012. That is particularly so with regard to the accesses at D and E. Although the position is less clear to me with regard to the pedestrian gates at A, in my view it more likely than not that at stages during the 20-years there has been some locking of those gates at night time. However, I acknowledge some of the difficulties of the Council's evidence on this aspect, as pointed out by the Applicant and do not consider that the locking of the gates at A was a regular occurrence throughout the 20-year period but I do consider it more likely than not to have taken place at times.

5.109 Thus, in my view the actions of the Council in locking of entrances from time to time in the overall context of repairing the Abercorn Road fence have been sufficient to have the consequence that the use of the land for informal recreation by local inhabitants (LSP) is in the circumstances by way of an implied permission and therefore cannot be *as of right*.

5.110 Further, even without taking into account the booking records which the Applicant has contested, the evidence overall strongly supports the regular use

of the Application land for use by sports clubs, the local Church and local schools. This has two further potential consequences. Firstly, it seriously questions whether the Applicant is able to demonstrate use of the whole land throughout the 20-year period. Although that is not an easy judgment to make, in my view that is more likely than not to be the case and in my view particularly so in the 1990s when the evidence is that the use for formal sports was more intense. The school use was also, it seems clear on the evidence, more intense then. Secondly, in any event I consider that the actions by the Objector in permitting the use of the land on that regular basis to be used for formal activities was in the circumstances an overt act such that any use for LSP by local inhabitants was by way of an implied permission.

6. RECOMMENDATIONS

6.1 For the reasons set out in section 5 of this Report I recommend:

(1) That the Application by Mrs. Melanie Lewis to register land known as Whitchurch Playing Fields as a town or village green is considered as made under section 15(2) of the Commons Act 2006 and that I would recommend that the Registration Authority accepts an amendment of the Application accordingly. That would mean that the relevant 20-year period for the Registration Authority to consider is that from 6 December 1992 to 6 December 2012.

(2) That the Application is refused.

6.2 For the avoidance of any doubt, but as will be clear from my reasoning in section 5 of this Report, my recommendation would be to refuse the Application whether it is considered to be made under section 15(2) or section 15(3).

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