AGENDA ITEM NO. 7

BRISTOL CITY COUNCIL

PUBLIC RIGHTS OF WAYS AND GREENS COMMITTEE

14th January 2013

Report of: Commons Registration Authority

Title: Application for land known as Okebourne Open Space, Brentry, Bristol to be registered as a town and village green made under the Commons Act 2006

Ward: Henbury

Officer Presenting Report: Anne Nugent, Senior Solicitor, Legal Services

Contact Telephone Number: 0117 922 3424

RECOMMENDATION

Accept the advice of the inspector and reject the application to register the land known as Okebourne Open Space, Brentry, Bristol as a town and village green.

Summary

This report relates to an application for land known as Okebourne Open Space, Brentry, Bristol made under the Commons Act 2006

The significant issues in the report are:

As set out in the report

Policy

1. There are no specific policy implications arising from this report.

Consultation

2. Internal

Not applicable

3. External

The Landowner and the Applicants have been provided with, and asked to respond to, the inspector's advice (see below).

Context

4. The Council as registration authority has received an application to register land known as Okebourne Open Space, Brentry, Bristol as a town or village green pursuant to Section 15(1) of the Commons Act 2006 from Mr John Rich on behalf of the Friends of Okebourne Open Space dated 16 July 2010.

5. The plan annexed to the application shows a large area of parkland leading off Knole Lane and Chakeshill Drive, Brentry.

6. The City Council, as landowner objected to the registration of the application land on the basis that the use of the land during the relevant 20 year period could not have been as if or right ("as of right") because the use was pursuant to a statutory entitlement to use the land under either the Open Spaces Act 1906 or the Public Health Act 1874.

7. On 25 June 2012 the Committee resolved to appoint an independent inspector to consider representations on the interpretation and legal effect of the objector's evidence.

8. The inspector has now provided written advice to the Commons Registration Authority with recommendations. The inspector's advice is attached as Appendix A.

9. The inspector has concluded that by 1972 all but a small area of the land (blue hatched and yellow areas on Objector's map) had been appropriated for public open space uses. Furthermore all but the blue hatched land has been used for such purposes throughout the 20 year period.

10. The inspector recommends that before he makes his final recommendation to the Commons Registration Authority the applicant be given an opportunity to comment. This has been done. There have been no comments.

11. As the land has been held as public open space and therefore use is "by right" rather than "as of right" the application should be rejected.

Proposal

12. This Committee on behalf of the Council (as statutory Commons Registration Authority) has a statutory duty under the Commons Act 2006 and the regulations made thereunder to determine objectively whether or not the land in question should be registered as a Town or Village Green within the meaning of the Act.

13. Officers recommend that the Committee accept the inspector's advice and reject the application.

Other Options Considered

14. The other options considered are:
    14.1 Register the application land.
    14.2 Refer the matter to inquiry

15. It is a matter for the applicant to satisfy the CRA that all the elements of the statutory test have been shown. Based on the objector's evidence they have been unable to show that the land was being used as if of right. Although the Committee may decide to follow option 14.1 or 14.2 it must have sufficient reason for reaching a conclusion different from that of the inspector.

Risk Assessment

16. The options leave the Council open to legal challenge. In spite of the fact that legal challenge in cases of this nature is the exception rather than the norm, it must be pointed out to members that there are, nonetheless, legal risks associated with this decision. There could be questions about the fairness of the proceedings. These risks are mitigated against by the Council's demonstration of a fair and transparent process in its determination of the application and a decision based on detailed consideration of the evidence.

Public Sector Equality Duties

17. Before making a decision, section 149 Equality Act 2010 requires that each decision-maker considers the need to promote equality for persons with the following "protected characteristics": age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Each decision-maker must, therefore, have due regard to the need to:

    i) Eliminate discrimination, harassment, victimisation and any other conduct prohibited under the Equality Act 2010.

ii) Advance equality of opportunity between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to --

- remove or minimise disadvantage suffered by persons who share a relevant protected characteristic;

- take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of people who do not share it (in relation to disabled people, this includes, in particular, steps to take account of disabled persons' disabilities);

- encourage persons who share a protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.

iii) Foster good relations between persons who share a relevant protected characteristic and those who do not share it. This involves having due regard, in particular, to the need to –
- tackle prejudice; and
- promote understanding.

Legal and Resources Implications

Legal

25 The City Council in its capacity as Commons Registration Authority has responsibility under the Commons Act 2006 to determine whether the land or a part thereof should be registered as a green.

The Law

26 Section 15 of the Commons Act 2006 enables any person to apply to a Commons Registration Authority (CRA) to register land as a town or village where it can be shown that:

"A significant number of inhabitants of any locality, or any neighbour within the locality, having indulged as of right in law sports and past times on the land for a period of at least 20 years"

27 In addition to the above, the application must meet the test under Section 15(2) of the Act ie. use of land has continued "as of right" until at least the date of the application.

28 The applicant must establish that the land in question comes entirely within the definition of a town or village green, in Section 15(2) of the Act. The Registration Authority must consider on the balance of probabilities whether or not the applicants have shown that:

a significant number of inhabitants of the locality or neighbourhood indulged in

lawful sports and pastimes as of right on the land for a period of at least twenty years; and they continue to do so at the time of the application.

29 In its capacity as Registration Authority the City Council has to consider objectively and impartially all applications to register greens on their merits taking account of any objections and of any other relevant considerations. Wholly irrelevant considerations such as the potential use of the land in the future must be left out.

"As of right"

30 User "as of right" means user without force, secrecy or permission (*nec vi nec clam nec precario*). User as of right is sometimes referred to "as if by right" and must be contrasted with use "by right".

"By right"

31 User "by right" means that users already have a statutory or other legal right to use the land for those purposes. Such users are not trespassers. Land is not used "as if of right" for lawful sports and pastimes if user is by right. If land is held on trust for the purpose of recreational use and enjoyment by the general public or a section of the public including the users of the land it has been suggested (although not definitively decided) that the beneficiaries of the trust are entitled to use the land for sports and pastimes and cannot be regarded as trespassers.

"Appropriation"

32 A local authority can only lawfully act for the purposes and in the ways that a particular statute permits it to act.

33 Local authorities have been given powers to appropriate, or re-allocate, land from one statutory purpose to another – see section 163 Local Government Act 1933.

34 The current provisions are those found in section 122 Local Government Act 1972, as amended by the Local Government, Planning and Land Act 1980. The Act gives a local authority power to appropriate land that is no longer required for the purpose for which it was held immediately before the appropriation.

Procedure

35 The application has been made under Section 15(2) of the Act 2006. The regulations that govern the procedure are the (Commons Registration of Town or Village Greens) Interim Arrangements

(England) Regulations 2007. The Committee has recently approved a written procedure which provides that where the Council is the landowner an independent inspector will automatically be appointed to conduct the inquiry. Once the inspector has reported on the matter his recommendations should not be rejected without reasons.

Legal advice provided by: Anne Nugent, Senior Solicitor, Legal Services.

36 Financial

(a) Revenue
In the event of any subsequent legal challenge any costs over and above those normally met from existing revenue budgets can be met from the central contingency.

(b) Capital
If the Land is registered as Town and Village Green, this will prevent a development opportunity and therefore a potential loss of a Capital Receipt.

Financial advice (Revenue) from Tony Whitlock, Corporate Finance
Financial advice (Capital) from Jon Clayton, Corporate Finance.

Land

37 There are no policy implications arising from this report.

Appendices

Appendix A– Inspector's report

Local Government (Access to Information) Act 1985
Background Papers:

Application papers/ statement of objections/ response available at the City Hall, College Green.

Section 15 Commons Act 2006

Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007

APPLICATION BY MR J RICH ON BEHALF OF THE FRIENDS OF OKEBOURNE OPEN SPACE TO REGISTER LAND KNOWN AS OKEBOURNE OPEN SPACE, BRENTRY, BRISTOL AS A TOWN OR VILLAGE GREEN UNDER SECTION 15(2) OF THE COMMONS ACT 2006

INSPECTOR'S REPORT TO THE REGISTRATION AUTHORITY

Registration Authority
Bristol City Council
P.O Box 2156
The Council House
Bristol BS99 7PH

31 October 2012

CONTENTS

SUMMARY

S1. Mr. John Rich applied on 16th July 2012 to register approximately 12 acres (4.86 hectares) of land known as Okebourne Park in Bristol as a town or village green under section 15(2) of the Commons Act 2006.

S2. The Application has been objected to by the owners of the land, Bristol City Council. The City Council's grounds of objection include an in principle objection that in the circumstances the use of the land during the relevant 20 year period could not have been "as of right", as required under section 15. This is on the basis that the use has been pursuant to a statutory entitlement to use the land, either under the Open Spaces Act 1906 or the Public Health Act 1874. The Objector thus contends that any use was "by right" and not "as of right" in accordance with the approach of the House of Lords in *R (oao Beresford) v Sunderland City* Council [2004] 1 AC 889.

S3. The Applicant has provided a detailed response on this issue. However, on the basis of the speeches in *Beresford*, which has been recently followed on this aspect by the Court of Appeal in *Barkas v North Yorkshire County Council and Scarborough Borough Council* [2012] EWCA Civ 1373, I have concluded on the documentation before me that it has not been demonstrated that on the balance of probabilities the use relied upon has been "as of right". This applies save in relation to all but a small part of the Application land.

S4. However, before finalising my recommendation to the Registration Authority to refuse the Application, the Applicant should be given the opportunity to comment on my Report and in particular on the Judgment in *Barkas.* The Objector should have the opportunity to respond to any comments by the Applicant. I will then consider any further representations and recommend accordingly.

1. INTRODUCTION

1.1 I am instructed by Bristol City Council, acting in its capacity as the Registration Authority under the Commons Act 2006, in relation to an application dated 16th July 2010 to register land known as Okebourne Park (or Oakwood Park) in Bristol as a town or village green (hereafter referred to for simplicity as "a village green").

1.2 The Application was made by Mr. John Rich of 159 Knowle Lane, Brentry, Bristol BS10 6JP under section 15(2) of the Commons Act on the basis that the Application land has been used continuously by a significant number of local inhabitants to engage in sports and pastimes for more than the required 20 year period. The details of this Application and the Applicant's case in support are set out in sections 2 and 3 respectively of this Report.

1.3 The owner of the Application land, Bristol City Council, objected to the application. The details of the objection are set out in section 4.

1.4 The Application was reported by the Commons Registration Authority to the Public Rights of Way and Greens Committee on 25 June 2012. The Committee resolved that, before arriving at a final determination of the Application, an independent Inspector be appointed to consider representations on the interpretation and legal effect of the evidence.

1.5 Accordingly, this Report assesses whether the Application satisfies the requirements of section 15. The Applicant has requested the opportunity to make oral submissions on the basis that the City Council, as both freeholder owner of the Application land and the Registration Authority, cannot decide the issue impartially. My role is to impartially assess the Application having regard to the statutory criteria. I should make it clear at the outset that the merits of the existing or any proposed use are not relevant to these criteria.

1.6 Although neither the Commons Act nor the Regulations makes provision for the procedure to be adopted for the determination of applications to register a new village green, the practice has developed whereby it is common for a non-statutory Inquiry to be held by an independent Inspector in order to provide a report and make recommendations to the Registration Authority. This approach has been endorsed by the Courts. Where there are issues of fact that need to be resolved before determination of an application, then a non-statutory inquiry is usually considered to be the fair and proportionate procedure to adopt. However, if there is an in principle legal obstacle to an application that can be resolved on the basis of agreed facts then an Inquiry to consider evidence may not be necessary; that is provided that the parties are given adequate opportunity to make representations on the issue.

1.7 One of the three grounds of objection raised in this case is that the application land cannot in any event be registered as a village green because it has been appropriated for public open space purposes and thus the claimed recreational use cannot be “as of right”. Thus, this Report is restricted at this stage to consideration of that ground of objection. If resolved in favour of the Objector, there would be no need to proceed to consider the other issues if the Registration Authority accepts my view on the “as of right” issue. However, if that is resolved in favour of the Applicant, I would advise the Registration Authority that it would be necessary to convene a non-statutory Inquiry to consider whether the statutory requirements are otherwise met by the Application, particularly having regard to the remaining two grounds relied upon by the Objector.

1.8 Applying that approach, my Report now details the Application and the cases in support of and in objection to it. I then assess the Application having regard to the relevant legal framework and assess the “as of right” issue against this. I then set out my conclusions on this issue and

finally my recommendation. I have set out a short Summary above to assist the reader.

2. THE APPLICATION

2.1 The Application was made by way of Form 44 dated 16 July 2010 and included the following details:

(1) The Applicant is John Rich on behalf of the Friends of Okebourne Open Space.

(2) The Application is stated to be made under section 15(2) of the Commons Act 2006.

(3) The name by which the application land is usually known is given as "Okebourne Park or Oakwood Park" and its location is given as "Leading off Knole Lane and Chakeshill Drive, Brentry BS10". The land is stated to be owned by Bristol City Council.

(4) The Locality or neighbourhood within a locality in respect of which the application is made is given as "Brentry, Bristol BS10" and a map showing this is attached.

(5) The Application is supported by a statutory declaration as required by The Commons (Registration of Town or Village Greens)(Interim Arrangements)(England) Regulations 2007.

(6) The justification for the Application as required by section 7 of Form 44 refers to the land being used continuously for generations by significant numbers of local children and adults for leisure activities ad pastimes, both on an informal and sometimes more organised basis, without challenge or permission from anyone. The further details of the Justification for the application are set out in the next section of this report but in summary it is stated that "….*the Land provides a major green asset for local people, and has done so continuously for generations, for significant number of local inhabitants to engage in sports and pastimes, and certainly for more than the past twenty (20) years, as evidence by the supporting information attached to this application."*

3. CASE FOR THE APPLICANT

3.1 As recorded above, the Application is based upon the contention that the land has been used for lawful sports and pastimes continuously over the 20 years and longer prior to the application under section 15(2).

3.2 There are statements, questionnaires, documents and photographs in support of the Application. The statement of J.E. Rich for example refers to the land evolving from a tip in the 1960s to a landscaped green with football pitch and children's area with swings and roundabouts in the 1970s and 80s to a part wood and play area at the turn of the new millennium.

3.3 As detailed in the next section, the owners of the land objected to the application. In its statement of objection dated 25 May 2011 the Objector relied upon three grounds:

(1) That the usage of the land by the public for lawful sports and pastimes" has not been "as of right" as required by section 15(2) of the Commons Act 2006.

(2) That Brentry BS10 is not a neighbourhood or locality within the meaning of section 15(2).

(3) That use of the land has not been by "a significant number" of the inhabitants of Brentry, Bristol.

3.4 The Applicant responded to the objection on 1 September 2011 and in summary contends:

(1) With regard to the "as of right" issue:

(i) In the case of *BDW Trading Ltd (t/a Barratt Homes) v Spooner representing the Merton Green Action Group Homes Ltd* [2011] EWHC B7 (QB) the appropriation was for "planning purposes" and not open space. No planning permission for development either benefits the Application site with a view to implementation or has been implemented. Thus, the BDW decision is limited to

a particular set of circumstances, which do not apply to this Application.

(ii) The application land was not originally appropriated for open space. Although appropriated subsequently for that purpose, this is not demonstrated to the objective observer who would reasonably believe that the land is not held on trust or appropriated for use "by right" or otherwise for use as open space by the public in perpetuity, given the recent proposals by the Objector to sell part of the land for residential development.

(iii) Notwithstanding any "appropriation", a significant number of local residents inhabitants have openly used the Application land as if "as of right" for lawful sports and pastimes without force, without permission, without payment and without challenge for at least the past twenty years to the date of the Application.

(iv) BCC, as both freehold owner of the Application Site and the Registration Authority, cannot decide the issue impartially and should provide the opportunity for the Applicant to make oral submissions.

(v) "Appropriation" is an internal accounting procedure and not a planning procedure for example to re-designate land use for another purpose. The Applicant refers to and relies upon an Opinion by Philip Petchey of counsel on the House of Lords decision in *R (oao Beresford) v Sunderland City Council* [2003] UKHL 60. The local inhabitants could not be expected to know of this appropriation, as there was no physical change in the land or presentation following the appropriation.

(vi) With regard to section 10(a) of the Open Spaces Act 1906, the Objector has not demonstrated either by signage (stating who owns the land or stating restrictions regarding entitlement to use the land), proper control and regulation, management regime or, for example planting

and landscaping, that the City Council is holding the land either “on trust’ or otherwise for the local inhabitants to sue the open space “by right” for informal leisure purposes with the consent of the Council, whether expressly or such that an objective observer would recognise or acknowledge implied consent.

(vii) The land has not been laid out as “open space”, as defined by section 336 of the Town and Country Planning Act 1990. It has been largely left to its own devices as grassed open space since it was leveled and “bulldozed” in around 1970. A pair of goal posts were erected and a small area set aside for a children’s play area which then soon fell into disrepair and neglect before it was finally removed in about 1990.

(viii) The site has never been locked or inaccessible nor has the Objector done anything to promote the notion of “permissory” use, for example by excluding local inhabitants whether on occasional days or for substantial periods of time or by charging a fee. The only exception has been “one-off temporary measures to exclude quad bikes”.

(ix) The local inhabitants have never deferred to another significant use – the Applicant refers to *R v Redcar & Cleveland BC ex p Lewis* [2010] UKSC 11.

(x) In the case of *Beresford* the mowing of grass and provision of benches was held to be consistent with the Council encouraging (but not licensing) open space user rather than an implied permission to enter. No benches have been replaced on the Application Site since about 1990. The Objector has never done anything to convey that an implied licence or statutory right is granted to local inhabitants and the use is not, as the Objector contends, either with permission or “by right”. The Applicant also

refers to paragraph 39 of *Beresford* and *Lambeth LBC v Rumbelow* [2011] ALL ERR (D) 176.

(xi) Inhabitants do not have to have to believe that they are using the land "as of right" – as held in *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [1993] 31 EG 85.

(2) With regard to the issue of locality or neighbourhood within a locality, the Applicant contends:

(i) A "local neighbourhood" for the purposes of the Commons Act 2006, can mean a locality or localities and only a sufficient degree of cohesiveness needs to be demonstrated. It need not be an administrative unit.

(ii) The local inhabitants who use the Application land for informal recreational use and pastimes are drawn from at least one if not more neighbourhoods that have distinct and cohesive identities, as demonstrated by the use of the name "Brentry" and/or in the alternative as a neighbourhood within the parish known as "Henbury or Brentry". The local residents can come from more than one neighbourhood – see *Leeds Group Plc v Leeds City Council* [2010] EWHC 810.

(iii) The Applicant does not have to define the locality in the Application (*R (Laing Homes Limited) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) paragraphs 135-137.

(iv) Case law shows that "locality" means predominantly the inhabitants of the relevant locality. The relevant locality of the Application Site is the immediate locality known as "Brentry". The name features on several road signs and road names, e.g. Brentry Lane; the nearby school s Brentry Primary School; there is also Brentry Post Office and Brentry Hospital.

(v) The Applicant produced a Polling Plan produced by the City Council, which delineates the borders of “Brentry” and “Henbury” for polling purposes.

(3) In respect of the issue of a “significant number” of local residents using the land, “significant” need not mean a majority or even a large number but merely involve use by local people in general which is demonstrably the case on the facts comprised in the evidence submitted in support of the Application. The Applicant refers to and relies upon *R (oao of McAlpine Homes) v Staffordshire CC* [2002].

4. CASE FOR THE OBJECTOR

4.1 As noted above, Bristol City Council, acting in its capacity as owner of the Application land, objected to Mr. Rich's Application and submitted a written statement dated 25 May 2011 relying on the three grounds of objection referred to in paragraph 3.3 above.

4.2 With regard to the "as of right" issue, the Objector states:

(1) The land is registered (under title number BL110040) and was originally acquired by the City and Council of Bristol in 1949 and 1950.

(2) There were two conveyances covering the whole application land dated 1 December 1949 and 3 March 1950. In each case the then Council's records note the proposed use as "Housing"[1]. Both parcels of land were acquired for the purposes of Part V of the Housing Act 1936 by virtue of the City and County of Bristol (Henbury No.1) Compulsory Purchase Order 1947, which was confirmed by the Minister of Health on the 19 January 1948.

(3) The land acquired for housing purposes by those two conveyances has been the subject of five subsequent appropriations as detailed in the Objector's May 2011 Statement. In summary these relate to:

(i) 4 acres (1.62 hectares) of land at the northern end of the Application Site were appropriated for allotment purposes[2]. The required Ministerial consent was given pursuant to section 22(1)(a) of the Land Settlement (Facilities) Act for this appropriation on 4 October 1954 [3].

(ii) All bar a very small part of this 4 acres of land, as far as it coincides with the Application Land, was appropriated in 1972 from allotment use to public open space use. Ministerial consent for this was granted on 5 September 1972 pursuant to section 22(1)(B) of the Land Settlement

[1] See Enclosure 5 to the Objector's Statement of Objection 25 May 2011.
[2] See Enclosure 8 to the Objector's Statement of Objection 25 May 2011.
[3] See Enclosure 12 to the Objector's Statement of Objection 25 May 2011.

Facilities Act 1919 and section 8 of the Allotments Act 1925.

(iii) 8.3 acres of land, forming the majority of the remainder of the Application Land, was appropriated for open space purposes in 1964. A copy of the Ministerial consent for this appropriation has not been located but the record card states that this was received on 25 May 1964[4].

(iv) An area of 11 sq. yards (9.2 sq. metres), situated in the south-west corner of the Application Land, was appropriated under section 163 of the Local government Act 1933 in 1966 for housing purposes to be used to enable the erection of a garage by a neighbouring property. Control of the land was transferred to the Housing Committee. The relevant Ministerial consent was given on 28 April 1966 pursuant to section 23(2)(a) of the Town and Country Planning Act 1959[5].

(v) In 1969 an area of 0.085 acres of land was appropriated under section 163 of the Local Government Act 1933 for a public open space use[6]. The relevant Ministerial consent was granted on 9 June 1969. This consent was pursuant to section 23(2)(b) of the Town and Country Planning Act 1959[7].

(4) It is contended by the Objector that by reason of these appropriations:

(a) The areas in (i), (ii), (iii) and (v) above were appropriated to be used for public open space under section 9 of the Open Spaces Act 1906 or alternatively to the use of a public walk and pleasure ground under section 164 of the Public Health Act 1875. The land in question is held on trust to allow the public to exercise a right of recreation over the land as seen

[4] See Enclosure 19 to the Objector's Statement of Objection 25 May 2011.
[5] See Enclosure 25 to the Objector's Statement of Objection 25 May 2011.
[6] See Enclosure 27 to the Objector's Statement of Objection 25 May 2011.
[7] See Enclosure 34 to the Objector's Statement of Objection 25 May 2011.

from section 10 of the Open Spaces Act 1906. It would be very difficult to regard such users as trespassers. The position would be the same if the land was held pursuant to section 164 of the Public Health Act 1875. The Objector refers to and relies upon the House of Lords decision in *R v Sunderland City Council ex p Beresford* [2004] A.C. 889.

(b) With regard to the small area of land in (iv), that land should not be registered as it falls within the boundary of 7 Brewton Close and could not have been used for recreational purposes as of right.

(c) Use "as of right", as required under section 15(2) of the Commons Act 2006, is to be distinguished from use "by right" where the use is pursuant to a right that already exists. Accordingly user "*as of right: cannot arise if the user does so by way of licence and the usage is referable to a pre-existing right.*"

(5) Thus, it is contended that the alleged use could not be "as of right" and the application must fail.

4.3 The Objector argues alternatively that the Application must fail because the area known as Brentry BS10 is neither a neighbourhood nor a locality. Reliance is placed on *R v Suffolk County Council, ex p Steed* [1952] 2 EGLR 233 and *R v South Gloucestershire DC ex p Cheltenham Builders Ltd* [2004] JPL 975 (at [45]). The Objector argues that a postal code area is not an area of land to which its inhabitants owe any allegiance, or with which they identify. It is not a distinct and identifiable community, it is contended, such as might reasonably lay claim to a town or village green as of right.

4.4 Further, the Objector contends that where, as here, the usage is by the public in general, then that would signify (if anything) not a town or village green, which confers rights on the inhabitants of the relevant locality only, but a public right.

4.5 In addition to this original statement of objection, the Objector wrote to the Registration Authority on 9 December 2011 referring to one further appropriation, the details of which were not previously provided. This relates to two parcels of the Application land:

(1) Area B17/1 shown shaded yellow on the plan in Enclosure 6 with the original Objection Statement; and

(2) Area B17/19 (11 sq. yards) shown hatched blue.

These were appropriated under section 122 of the Local Government Act 1972 from housing purposes to open space purposes in accordance with the section 10 of the Open Spaces Act 1906 on 30 April 2010.

5. ASSESSMENT & 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 BASIS FOR DETERMINATION OF AN APPLICATION UNDER SECTION 15 OF THE COMMONS ACT 2006

5.2 Section 15(1) provides 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.

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.

5.4 From section 15(2) 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.

Given that at this stage I am limiting my consideration to the "as of right issue", I only address below the legal position in relation to that issue, bearing in mind that the Application was made on 16 July 2010 under section 15(2). So, in this case the relevant 20 year period is that from 16 July 1990 to 16 July 2010, throughout which the use has to have been "as of right".

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

5.5 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.

5.6 In *Sunningwell*, which 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*.

5.7 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.

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

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

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

(iii) That if the user by local inhabitants for at least 20 years were of such amount and in such manner as would reasonably be regarded as the assertion of a public right so that it was

reasonable to expect the landowner to resist or restrict the use if he wished to avoid the possibility of registration, the landowner would be taken to have acquiesced in it, unless he could show that one of the three vitiating circumstances applied (i.e. *nec vi, nec clam and nec precario*).

5.9 In *Redcar* Lord Brown stated*:*

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.

5.10 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*.

5.11 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. In his speech Lord Scott stated:

41. The present case is concerned with implied permission. The installation and maintenance of the double rows of wooden benches round the three sides of the Sports Arena and the regular cutting of the grass by the owners of the Sports Area evidenced a clear enough willingness that the public should resort to the Sport Arena for recreational purposes. Indeed, it can reasonably be said that these acts encouraged the public to do so. Mr Petchey has submitted that since the public resorted to the Sports Arena pursuant to an implied permission from the landowners, their use of it during the 20 year period failed the nec precario requirement and was not "as of right".

42. Mr Laurence QC, submitted that although use pursuant to an express permission would negate use "as of right", use pursuant to a permission that was merely to be implied would not do so. Implied permission, he submitted, was to be equated with mere acquiescence or toleration on the part of the landowner. None of these, he submitted, would disqualify the use from being use "as of right". Only an express permission would render the use precario.

43. My Lords I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e. toleration or acquiescence, is consistent with the use being "as of right". That is so is accepted by Mr Petchey. But I am unable to accept either that an implied permission is necessarily in the same state as mere acquiescence or toleration or that an implied permission is necessarily inconsistent with use as of right. Indeed, I do not for the reasons I have given, accept that even an express permission is necessarily inconsistent with use as of right.

.....

48. I agree with Mr Petchey that, in the present case, the attitude of the successive owners of the Sports Arena to the public use of the land for recreation was more than mere acquiescence or toleration. There was, I agree, positive encouragement. The provision of the rows of benches was to make more comfortable the watching of the activities of others. The cutting of the grass was in order to enhance the enjoyment of the Sports Arena by those using it. I am receptive to the submission that the successive owners had impliedly consented to the recreational use of the land by the public. The users were, in my opinion, certainly not trespassers. But this does not, in my opinion, answer the question whether the use was "as of right" or "nec precario".

49. Was there any sign that the permission was intended to be temporary or revocable? There was none. The fact that the land was publicly owned seems to me to be highly material. Neither the WDC nor the CNT nor the council were, or are, private landowners. Their respective functions were and are functions to be discharged for the benefit of the public. The provision of benches for the public and the mowing of the grass were, in my opinion, not indicative of a precaratory permission but of a public authority, mindful of its public responsibilities and function,

desirous of providing recreational facilities to the inhabitants of the locality. In these circumstances there seems to me to have been every reason for the inhabitants of the locality who used the Sports Arena to believe that they had the right to do so on a permanent basis.

50. Accordingly, the nature of the implied permission from the landowners that the evidence shows to have been present was not, in my opinion, such as to prevent the use of the Sports Arena by the public from being "as of right". The positive encouragement to the public to enjoy the recreational facilities of the Sports Arena, constituted, in particular, by the provision of the benches, seems to me not to undermine but rather to reinforce the impression of members of the public that their use was as of right.

5.12 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.

5.13 There is however an important qualification to the above. The 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 has generally become accepted that the use is "by right" and not "as of right". Such a right of

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

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.

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:

5.14 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.

5.15 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.

5.16 The approach of the House of Lords to the “by right” issue has recently been considered by the Court of Appeal in *Barkas v Nottinghamshire County Council and Scarborough Borough Council* [2012] EWCA Civ 1373. In that case the field 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."

5.17 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 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

[9] See in particular [2012] EWCA Civ 1373 at paragraphs [29] – [35].
[10] [2012] EWCA Civ 1373 at paragraph [37].

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 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 Commons Act 2006, local authorities holding land for a particular statutory purpose are not in the same position as private landowners who may, subject to planning controls, change the use of their land at will. A local authority holding land for a particular statutory purpose may not use it for any other purpose unless it has been formally appropriated to that purpose, and if it simply ceases

[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].

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]

THE ISSUES

5.18 It is of course necessary for the Applicant to demonstrate that each criterion within section 15(2) is satisfied, as set out above.

5.19 Although the Objector has raised three grounds of objection, as summarised in section 4 above, if the contention that the use is "by right" rather than "as of right" is accepted by the Registration Authority, the Application must be rejected. If this "by right" issue can be determined on undisputed facts then, as it is a matter of law, it can often be possible to determine this issue without the need for an oral hearing. However, if such an approach is to be adopted it is important to ensure that the parties have the opportunity to make any representations they may wish before the Application is determined.

5.20 Accordingly, I will consider the "by right" issue first before considering whether it is necessary to resolve the "locality or neighourhood within a locality" and "significant number" issues.

"As of Right" or "By Right"

The Legal Position

5.21 As seen above, at the heart of using the land "as of right" is the acquisition of a right by prescription as a result of a landowner acquiescing in or tolerating people coming onto their land as trespassers and using it for recreational purposes. Such a use, to comply with section 15, has to be, as for all prescriptive rights, without force, without secrecy and without permission. In *Redcar* the House of Lords held that there was no further qualification on such use.

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

5.22 However, in the *Beresford* case, as detailed above, the House of Lords indicated, albeit *obiter* and therefore not strictly binding, that if the use pursuant to an express statutory right to use the land for recreational purposes then such a use was "by right". Thus, it could not satisfy the fundamental statutory requirement for registration of being "as of right".

5.23 Although *obiter,* that view was expressed by all but one of a powerful panel of the House of Lords. There is also much legal logic in that approach, which has been accepted and applied by many village green practitioners and many registration authorities. The legal logic stems from the nature of prescriptive rights, which is reflected in the phrase "*as of right"*. It is thus difficult to consider:

(a) The land owner as having "acquiesced" in a use for which there is a statutory entitlement to carry out; and

(b) It is difficult to regard a user pursuant to such a right as a trespasser, even a tolerated trespasser.

5.24 As detailed above, that approach has been followed very recently by a unanimous Court of Appeal in the *Barkas* case.

5.25 It is thus necessary to consider the factual basis concerning the entitlement to use the land to consider whether it has been pursuant to a statutory right as the Objector contends.

<u>The Factual Position</u>

5.26 It does not appear to be disputed that:

(1) All of the Application land was acquired by way of compulsory purchase under Part V of the Housing Act 1936.

(2) Since that acquisition, all of the Application land has been appropriated for open space purposes. This appropriation has been at different times for different parts of the land (as detailed in the Objector's statement as summarised section 4 above). However, for no part of the land was that appropriation later than 1972, save for what the objector refers to as parcels B17/1 and

B17/19 (11 sq. yds.) shown yellow and blue hatched respectively on the map in enclosure 6 to the original objection. These latter two areas were, as I understand it, not formally appropriated for public open space purposes until 30 April 2010. Up until that time from 1966 area B17/19 was held for housing purposes, under the control of the Housing Committee, to enable the construction of a garage on a neighbouring property. That April 2010 appropriation is specified as being pursuant to section 122 of the Local Government Act 1972 from land held for housing purposes for the purpose of providing public open space in accordance with section 10 of the Open Spaces Act 1906 to be managed by the Service Director for Environmental and Leisure Services.

(3) With regard to the appropriation of the northern 4 acres from allotment to open space, the Council records don't specify the power under which that appropriation was made. However, the records make it clear that it was appropriated for "public open space" purposes. The Secretary of State's consent was given pursuant to section 22(1)(b) of the Land Settlement (Facilities) Act 1919 and section 8 of the Allotments Act 1925. Section 22(1)(b) of the 1919 Act allows a Council to appropriate for other purposes of the Council land acquired by it for allotments. Section 8 of the 1925 Act requires the consent of the Minster for the sale of any allotments that had been purchased or appropriated by the Council.

(4) With regard to the southern 8 acres, again the Council's records do not specify the statutory basis for the appropriation of use as open space. The record card (enclosure 19 with the Objector's original objection statement) states that the proposed use is as "public open space". That is consistent with the Schedule to the Joint Report of City Treasurer and City Valuer dated 27 November 1963, which is headed "Public Open Spaces – Appropriation from Housing to Planning and Public Works

Committee and includes the 8.3 acres at Knole Lane (enclosure 15).

5.27 On the basis of the records produced, it is clear that in respect of all of the Application land, except the yellow and blue hatched areas appropriated in April 2010, the land has been appropriated and held for public open space uses throughout the relevant 20 year period.

5.28 Even though the records do not refer expressly to the Open Spaces Act 1906 or the Public Health Act 1875, the obiter approach in *Beresford* would indicate that such express references are not necessary. Further, Lord Walker (at [87]) indicated that if the land had been appropriated for the purpose of public recreation and even if not held on trust in the strict sense that would defeat a claim for the use being "as of right" as it would be very difficult to regard the users in that case as trespassers. That approach has been expressly followed by the Court of Appeal in *Barkas*.

5.29 The Applicant maintains that the claimed use has been as of right. In particular:

(1) The Applicant distinguished the *BDW* case from the circumstances of this Application. However, BDW relates to the use of powers under the Town and Country Planning Act 1990 to override village green rights by appropriating the land for development. That is not the issue in this application. The appropriations at issue are those of the land for the purpose of using it as public open space and in particular the disputed legal consequences of these appropriations.

(2) The Applicant contends that any such appropriation has not been demonstrated to the objective observer. However, it is not the belief or understanding of the user that is in question or relevant, as was clear from *Sunningwell*, which case the Applicant also refers to. The more important perspective is that of the landowner. The landowner cannot be required to take

action to make it clear to users, that that they are not entitled to use the land without the owner's permission or to charge them or put signs up or challenge their use when the land is being held for this very purpose.

(3) Based on current legal authority and judicial guidance, I see no specific requirement as claimed by the Applicant in respect of the nature and level of any regulation, landscaping or control that has to be complied with to retain a use as being "by right" rather than "as of right". Such aspects can have evidential relevance but the conclusions that they may support will depend upon all the circumstances. In this case the land was being used, as I understand it, as open space and was in a condition to be so used. There is clear evidence, as detailed above, that the vast majority of the Application land has been appropriated for public open space use. Although the landscaping and layout may or may not benefit from improvement, as the Applicant suggests, the definition of open space in section 20 of the Open Spaces Act 1906 is very broad and I see no reason why the Application land should not properly be considered to fall within that definition based on the Application and supporting evidence. Similarly the terms public walks and pleasure grounds within section 164 of the Public Health Act 1875 appear to me broad enough to include the Application land, although they often refer to recreation grounds, gardens, sports grounds.

(4) The Applicant relies upon *Beresford* but in that case, as dealt with above, the Council chose not to rely upon the argument that the use was pursuant to a statute and thus "by right". The Applicant also refers to the reference to *Beresford* in *Lambeth LBC v Rumbelow* [2001] All ER 176D. However, that reference was to the Court of Appeal decision in Beresford, which was overturned by the House of Lords.

CONCLUSIONS

5.30 By 1972 all but a small area (the blue hatched and yellow areas on the plan in the Objector's enclosure 6) of the Application land had been appropriated for public open space uses. It appears that all the Application land (save possibly for the blue hatched land) has been used for such purposes throughout the relevant twenty-year period.

5.31 On the basis of the *obiter* approach in *Beresford*, which has now been followed by the Court of Appeal in *Barkas*, the local residents were entitled to use that land as it had been appropriated for that purpose. In the absence of an appropriation of the land for another purpose, the local authority was under a duty to allow use of, at the least, nearly all of the land for recreational purposes by the public. *Barkas* has confirmed that such use is "by right" and can't satisfy the requirement under section 15 of the Commons Act that the use be "as of right" and should not be registered as a village green.

5.32 With regard to the yellow and blue hatched areas that were not formally appropriated for open space purposes until 30 April 2010, this appropriation was within the 20-year period relied upon by the Applicant. However, if this were the only issue, it would be possible in my view to treat the application as being made under section 15(3), as the application was made within 2 years of the land being appropriated for open space purposes; the 20 year period would then run up to the date of the appropriation. However, given that these areas, even together, make up only a small part of the Application site, I do not consider that it would be appropriate to register these small areas of land in the context of the current application, or indeed if at all. That is even if the use was "as of right" and all the other criteria in section 15 could be shown to be satisfied.

5.33 Accordingly it is my view on the information and representations before me that the Application to register Okebourne park as a village green under section 15(2) of the Commons Act should be refused. However,

in the interest of fairness the parties, and in particular the Applicant, they should be given the opportunity to comment upon my Report and the *Barkas* judgment. I would then taken into account those comments before making a final recommendation to the Registration Authority.

6. RECOMMENDATION

6.1 In my view, on the information and arguments before me, I would recommend that the Application made by Mr. John Rich, to register Okebourne Park as a town or village green pursuant to section 15(2) of the Commons Act 2006, be refused.

6.2 However, in fairness to the Applicant, I would recommend that he is given the opportunity to comment upon my Report and in particular the recent decision of the Court of Appeal in *Barkas* before I make a final recommendation to the Registration Authority.

STEPHEN MORGAN

Landmark Chambers
180 Fleet Street
London
EC4A 2HG

APPLICATION BY MR J RICH ON BEHALF OF THE FRIENDS OF OKEBOURNE OPEN SPACE TO REGISTER LAND KNOWN AS OKEBOURNE OPEN SPACE, BRENTRY, BRISTOL AS A TOWN OR VILLAGE GREEN UNDER SECTION 15(2) OF THE COMMONS ACT 2006

ADDENDUM TO INSPECTOR'S REPORT

1. I provided my report on Mr. Rich's Application on 31 October 2012. I recommended as follows:

   6.1 In my view, on the information and arguments before me, I would recommend that the Application made by Mr. John Rich, to register Okebourne Park as a town or village green pursuant to section 15(2) of the Commons Act 2006, be refused.

   6.2 However, in fairness to the Applicant, I would recommend that he is given the opportunity to comment upon my Report and in particular the recent decision of the Court of Appeal in *Barkas* before I make a final recommendation to the Registration Authority.

2. The Registration Authority wrote, by way of recorded delivery, to Mr. Rich on the 2nd November 2012 inviting him to comment upon my Report, as I recommended, by the 26th November 2012. I am instructed that Mr. Rich as not commented upon the Report.

3. Provided that the Registration has no reason to doubt that the letter was received by Mr. Rich, then I have to assume that he wishes to make no comment

on my report. I can confirm that I see no reason for altering the recommendation in paragraph 6(1) of my Report.

STEPHEN MORGAN
Landmark Chambers
180 Fleet Street
London
EC4A 2HG

7 January 2013