IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT BYRD ROW, NORTON, EVESHAM, WORCESTERSHIRE AS A TOWN OR VILLAGE GREEN

REPORT

of Miss Ruth Stockley

13 May 2013

Worcestershire County Council

County Hall

Spetchley Road

Worcester

WR5 2NP

Ref: FM/273/76/AH

Application Number: 273/76

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT

BYRD ROW, NORTON, EVESHAM, WORCESTERSHIRE

AS A TOWN OR VILLAGE GREEN

REPORT

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1. INTRODUCTION

1.1 This Report relates to an Application ("the Application") made under section 15(1) of the Commons Act 2006 ("the 2006 Act") to register land at Byrd Row, Norton, Evesham, Worcestershire ("the Land") as a town or village green. Under the 2006 Act, Worcestershire County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 2 days, namely on 20 and 21 February 2013. I also undertook an accompanied site visit on 21 February 2013, together with an unaccompanied visit around and within the locality.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicant produced a bundle of documents containing her supporting evidence questionnaires, witness statements, photographs and other documentary evidence in support of the Application and upon which she wished to rely, which I shall refer to in this Report as "AB". The Objectors produced a bundle of documents containing their witness statements, letters and other documentary evidence in support of their Objection and upon which they wished to rely, which I shall refer to as "OB". In addition, each Party provided a skeleton argument setting out an outline of their case. I have read all the documents contained in the bundles and each of the skeleton arguments and taken their contents into account in this Report.

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

2. THE APPLICATION

2.1 The Application was made by Mrs Barbara McLaren of Windholme, Lenchwick, Evesham, Worcestershire WR11 4TG ("the Applicant") and is dated 11 November 2010.[1] It was received by the Registration Authority on 12 January 2011. Part 5 of the Application Form states that the Land sought to be registered is usually

[1] The Application is contained in AB page 1.

known as “*Football Field / Pitch*”, and its location is “*Adjacent to the Playing Field on RHS of Byrd Row, opposite the Village Hall*”. A map was submitted with the Application attached to the Statutory Declaration which showed the Land subject to the Application outlined in green.[2] In part 6 of the Application Form, the “locality or neighbourhood within a locality” in respect of which the Application is made is stated to be “*Norton and Lenchwick Parish including Chadbury and Twyford Bank*”, and maps were submitted with the Application attached to the Statutory Declaration showing the Land in relation to Norton and Lenchwick.[3]

2.2 The Application is made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying criteria. The justification for the registration of the Land is set out in Part 7 of the Form.[4] The Application is verified by a statutory declaration in support made on 11 November 2010. As to supporting documentation, evidence questionnaires, photographs and other documents in support as identified in Part 10 were submitted with the Application.

2.3 The Application was duly advertised by the Registration Authority as a result of which an objection was received dated 18 November 2011 (“the Objection”)[5] on behalf of the freehold owners of the Land, namely Mr T.J.F. Smith and Mr A.M. Wadley (“the Objectors”). The Objection included a witness statement from Mr Wadley together with letters and other documentary evidence.

[2] At AB page 158.
[3] At AB pages 159 & 160.
[4] A typed copy of the contents of Part 7 is at AB pages 155-157.
[5] The Objection is at OB pages 1-49.

2.4 I have been provided with copies of all the above documents in support of and objecting to the Application which I have read and the contents of which I have taken into account in this Report.

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

2.6 At the Inquiry, the Applicant was represented by Mr Tadjrishi, and the Objectors were represented by Mr Johnson of Thomson & Bancks Solicitors. Any third parties who were not being called as witnesses by the Applicant or the Objectors and wished to make any representations were invited to speak, but no additional persons did so.

3. THE APPLICATION LAND

3.1 The Application Land is identified on the map submitted with the Application on which it is outlined in green.[6]

3.2 It comprises a flat area of open grassland which is largely rectangular in shape. The grass in the centre is currently un-maintained and overgrown, but there is a visible worn path round the perimeter which appears to have been mown. The eastern part of the Land in front of the Village Hall is well maintained and closely mown. To the north of the Land is a well maintained and equipped children's play area known as Phoenix Park. There is a row of wooden posts and a hedge between the two areas. To

[6] At AB page 158.

the south and west of the Land are open fields. In the south eastern corner, the Land bounds the Village Hall which has a car park to its north. Byrd Row runs north easterly from the north eastern corner of the Land. There are no signs on the Land itself nor any benches, but one set of old goal posts remains in situ.

4. THE EVIDENCE

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

4.2 The evidence was not taken on oath.

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

CASE FOR THE APPLICANT

Oral Evidence in Support of the Application

4.4 **Mrs Kim Davies**[7] has lived at 12 Kings Lane, Norton since August 1997. Prior to that, she lived outside the Parish. She has been a Parish Councillor for Norton and Lenchwick since July 2012. When she came to Norton in 1997 with her 3 year old daughter, neighbours informed her that the Land, known as "The Field" or as "The Football Field", was a good place to walk, play and relax, and had been used for recreational purposes for as long as they could remember. Over the past 16 years, she, her daughter, and her husband from 1999, have used the Land regularly for many recreational activities, including walking, berry picking, nature walks, kite flying, birdwatching, picnicking, and playing games. Her daughter attended the Village Youth Club, and the children would often spill out of the Village Hall and onto the Land to play. When she walked on the Land, she did not follow a particular route. When she used the Land, she almost always met neighbours walking or children from the Village playing there. She and her family have never sought permission to use the Land and their use has never been challenged. It has never been fenced and there has been no signage to indicate that it is private property.

4.5 When she came to the Village, she used the Working Men's Club, but she went with others as their guest as she was not a member. Villagers could use it. She did not watch the football matches on the Land that were run by the Working Men's Club that took place around once each weekend for an hour or so. There are posts in situ to prevent vehicles accessing the Land, but they do not prevent pedestrians accessing it. She agreed that the Land forms an "apron" round the Village Hall, but pointed out that it is open land with no signs stating that people cannot go onto it. There is no information in the Village Hall about it to suggest that people cannot go

[7] Her evidence questionnaire (joint with her Husband) is at AB page 11, and she provided a separate witness statement at the Inquiry.

onto it. The adjacent land, Phoenix Park, has play equipment on it, football pitches and the grass is mown. She disagreed that Phoenix Park was the main area for children's play. She recalled that the Land and the adjacent Phoenix Park were effectively one area of land when she came to the Village as shown on the photograph taken in June 1998,[8] and her and her family had used the entire area. She is not a dog walker, but sees others dog walking on the Land. They tend to walk everywhere on the Land rather than merely round its boundary. There is a Dog Club which meets in the Village Hall, but she has not attended any of its events.

4.6 **Mr Lynn Davies**[9] has lived at 12 Kings Lane, Norton since 1999 when he moved to the Village. He met his Wife prior to that at the Village Hall drama club. Some of their practices took place on the Land. He also attended a rounders training event on the Land. He spent time kite flying on the Land with his Step Daughter. His neighbours regularly walked their dogs on the Land, and he sometimes accompanied them. They cut through into the adjoining area from the Land as part of a longer walking route. He had walked on the paths shown on the Objectors' photographs.[10] His personal usage of the Land has been varied and fairly regular, namely on average a couple of times a week, and he has seen others using the Land on most occasions. Its most popular use is for dog walking.

4.7 There is a play area for younger children on the adjacent land, but that was a relatively recent development. Prior to the equipment being brought onto that adjacent land approximately 3 or 4 years ago, there was no differentiation between the two areas, and Villagers did not distinguish between them but regarded them and used

[8] At AB page 191.
[9] His evidence questionnaire (joint with his Wife) is at AB page 11.
[10] At OB pages 207 and 208.

them as part of one stretch of open space. He had used all that area. He recalled the Land previously being clearly a football pitch, but that is no longer particularly apparent. It now has the appearance of waste land as it is overgrown, although it is not impassable by any means. The Land, together with the adjacent area, was previously all open and reasonably well maintained. The adjacent park area is still very well maintained. There are no defined footpaths on the Land. The only access point now between the Land and Phoenix Park is via the footpath. The fence posts along the boundary of the Land were erected approximately 7 years ago. He had used the Working Men's Club, which was effectively "*the Village Pub*". It had never occurred to him that the Land was owned by the Club. When he came to the Village in 1999, there were no longer large events held by the Club. The Dog Training Club used the Village Hall and the part of the Land outside the Hall, but he had not participated in any of their activities. The Village Hall is owned by trustees for a registered charity, and is used for many events.

4.8 **Mr Mark Coleman**[11] has lived at 2 Byrd Row since 2006. That property is across the road from the Land and is one of the new properties built by the Objectors. He mainly uses the Land with his family and relations, mainly with children, when they come to visit approximately a couple of times a month. The children live outside the Parish. He has played ball games and Frisbee on both the Land and on the adjacent play area with the children. He has seen others using the Land, mainly for children's play and for dog walking, but also for kite flying. Dog walkers walk both round the perimeter of the Land and over it. The overgrown grass on the Land has not stopped any of the recreational activities from taking place on it. The Land has fence

[11] His evidence questionnaire is at AB page 29.

posts around it which prevent vehicular access onto the Land, but not pedestrian access. He has seen the Dog Training Club using the Land, but he is not a member.

4.9 **Mrs Maureen Malvern Grinter**[12] has lived at 3 Byrd Row since 2006 which she bought from the Objectors. She is retired, and is able to see all the Land from the windows of her house. She has seen many people walking on the Land, and particularly dog walkers who throw balls for their dogs as well as general walkers. They use all the Land. Children enjoy the excitement of being in longer grass. She has also seen kite flying on the Land, and a large group playing rounders on one occasion although she was unaware of their names. The Dog Training Club uses the Land approximately twice a week which continues for most of the day. They use the mown area closest to the Village Hall, but then spill out onto the rest of the Land when the session has finished. Due to her poor health, she is unable to walk far, but she enjoys watching others using the Land. She did use the Land when she moved into the Village in 2006 approximately a couple of times a week until around 2 years ago. The grass on the Land was then kept much shorter. She has also seen people using the adjacent land, namely the equipped play area. It is mostly younger children who play there, and there is insufficient space on that adjacent land for older children to play football and so they use the Land. She has not seen organised football matches on the Land, but she was not living in the area prior to 2006. She is not a member of any Club or Society which has used the Land.

[12] Her evidence questionnaire is at AB page 23.

4.10 **Mrs Barbara McLaren**[13] is the Applicant and has lived at Windholme, Lenchwick for 43 years. She made the Application in order to protect an area of open space. She was concerned that subsequent planning applications for further development on the Land may be made. She represents the Village Hall in her capacity of Chairman, the Parish Council and the Villagers.

4.11 As to her use of the Land, her Children attended the Village School and they played on the Land with their friends. Such use was prior to 1991. Subsequently, her Son owned a dog, and she walked the dog on the Land quite regularly. She was amazed over the number of people she met when she was on the Land. She mostly saw dog walkers using the Land, also children playing there and some general walkers. Dog walkers had their dogs off the lead when on the Land. However, she confirmed that her use of the Land ceased once her Children had left home which was prior to 1991.

4.12 She was not a member of the Working Men's Club. However, she had been able to obtain extracts from minutes of their meetings as quite a few people in Norton were members. She acknowledged that those minutes showed that organised activities on the Land required the Club's permission. By way of example, the minutes from 9 July 1990 noted that ground rent was paid for use of the Land by football teams, and so she accepted that organised football was played on the Land only with the Club's permission.[14] Similarly, the minutes of 24 July 1991 indicated that permission was agreed to be given and insurance paid to enable a fete to be held on the Land by a

[13] She completed the Application Form, but did not complete a separate evidence questionnaire.
[14] The minutes are at OB pages 185-186. The minutes dated 7 July 1991 at OB page 194 were accepted as making a similar point.

football team.[15] The Village Hall was previously located at the top of Kings Lane. It was sold for social housing sometime between 1993 and 1997. The Village Hall Committee sought to raise funds to purchase a piece of land from the Working Men's Club on which a new Village Hall could be built. Various fund raising events took place for that purpose, some of which took place on the Land. The Dog Training Club had permission to use the part of the Land closest to the Hall. That involved a group training on the Land on a formal basis. She was not a member.

4.13 She acknowledged that she and the Village Hall Committee were content with part of the Land being developed that was further away from the Hall, as evidenced by the Village Hall Minutes of 6 July 2012 and shown on the attached plans, as that was "*suiting the Hall*".[16] However, it subsequently became apparent that residents of Byrd Row objected to such development. That placed her in a difficult position as she represented both the Hall and the Villagers.

4.14 The Land was used as a football pitch from the 1930's to 2003 during which it was well maintained. The current Owners continued to keep the Land mown until 2008 after which it became overgrown. Since then, volunteers have mown it in front of the Hall. Phoenix Park adjacent to the Land is maintained by the Parish Council. It is well used. The photographs taken in June 1998[17] show that there was very little play equipment on that area then. The focus of playing sports was then on the Land rather than on Phoenix Park. It was not until 2008 that new play equipment was installed. The two areas were then one large space with a rough hedge between them, and Villagers used the entire space. Dog walking was a favourite activity, and

[15] At OB page 195.
[16] At OB pages 80-82.
[17] At AB page 191.

children played in both areas. She acknowledged that there was a worn path around the edge of the Land which had been there for quite a long period of time as people did walk around it, but she pointed out that they also walked over the Land. The wooden posts around the Land were erected by the present Owners to stop vehicular access onto the Land, but not pedestrian access, and most of them remain in situ. The gates were erected to secure the car park area serving the Village Hall and not to prevent access to the Land.

4.15 She confirmed that the "*locality*" relied upon is the Parish of Norton and Lenchwick as shown on the Plan attached to the Application.[18] Prior to making the Application, she sent out a flyer to the entire Parish which comprises between around 350 and 400 households. A public meeting was also held. She accepted in cross examination that there were only two evidence questionnaires from people in the northern part of that area where the Conservation Area is shown as that area was so far away from the centre of the Village. Very few people from that area were involved with the Village Hall. The location of witnesses who had completed questionnaires in support of the Application was shown on the plan produced by the Applicant.[19] She agreed that 20 years ago, there would be no users of the Land from Byrd Row.

4.16 **Mr Jason Edwards**[20] has lived at 13 Kings Lane since 1999. He is able to see the Land from the bedroom window of his property. He has two Children who are Twins born in April 1998 and he has used the Land with them. He has also used the Land to exercise his two dogs twice a day over the last 7 years, during the early

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[18] At AB page 161.
[19] At AB page 154. The Applicant identified a correction required to that Plan in that number 14 should be on 15 Evesham Road and not on St Egwin's Close as shown.
[20] His evidence questionnaire is at AB page 17.

morning and at the end of the day. He uses the Land with his family and/or dogs virtually every day. His Children and the dogs enjoy the longer grass, and dogs are not allowed off the lead on the Phoenix Park area. There is a notice saying dogs to be on a lead in that area, and he would not take his dogs there in any event with young children around. He sees a lot of dog walkers using the Land as it is a "*dog community*". He usually walks through the middle of the Land. He has seen others in the centre of the Land and others walking around its perimeter. Children use both the Land and Phoenix Park. The Park is well maintained and is accessible at all times. The wooden posts around the Land are not a barrier to pedestrian access, and he has never seen any vehicles on the Land. He recalls some old football posts being on the Land when he arrived in the area, but he never saw any formal football games being played there. The Working Men's Club was still in operation when he came to the area, but he was not a member. He did not recall them raising any objections to his use of the Land. He is not a member of the Dog Training Club. His family have had two private parties on the Land, namely to celebrate his Daughter's 21st last year and his Wife's 40th three years ago.

4.17 **Mrs Melanie Penrose**[21] has lived at 7, Heathfield Road since 1986 and she has used the Land since then. Her two Daughters, born in 1990 and 1992, played on the Land and cycled on it virtually every day. It is her Daughter shown cycling on the June 1998 photographs,[22] which also show that the Land and the current Phoenix Park were then one large piece of land. The family played rounders on the Land. There were several parties and events held at the Village Hall which spilled out onto the Land. She had used both the Land and the adjacent Phoenix Park. She recalled it

[21] Her evidence questionnaire (joint with her Husband) is at AB page 35.
[22] At AB page 191.

being one large field. She has seen others using the Land for playing, cycling, dog walking and kite flying. She stopped using the Land in 2003, but started using it again in 2006 since when her main use has been for dog walking. She has looked after a friend's dog since then when they are away during which times she takes the dog for a walk on the Land around three times a day. She walks with the dog on a lead down one side of Phoenix Park, and then lets the dog off the lead on the Land. She walks through the middle of the Land, throwing the ball for the dog. She has never noticed the trodden area round the perimeter of the Land. Children have always played on the Land.

4.18 She had been a member of the Working Men's Club, but was not on any of its committees. As a member, she had access to the building where she played darts. The Club did not raise any objection to its members using the Land. She recalled fetes and other events being held on the Land and there were no protests from the Club. She was involved with organising Parish rounders on the Land. She had seen organised football matches on the Land when the Club was still in operation. She was not a member of the Dog Training Club. The present Landowners erected posts around the Land to prevent vehicular access, but they were not an obstacle to pedestrian access as they were merely posts with no fencing between. There were never any signs on the Land restricting access to it or restricting its use.

4.19 **Mr Steve Penrose**[23] has also lived at 7, Heathfield Road since 1986. His family used the Land much more when the Children were young. With the Children, they played football, rugby, tennis and flew kites. They regarded the entire area as one

[23] His evidence questionnaire (joint with his Wife) is at AB page 35.

communal piece of land that was part of the Village. There was then nothing to distinguish between the Land and the area now known as Phoenix Park. Their use of the Land was never restricted. They never sought permission to use the Land and they never saw any signs on the Land. He was previously a member of the Working Men's Club where he played darts. As a member, he had free access to the Club, but the Club was not regarded as connected to the Land. He recalled watching organised football matches on the Land over several seasons when home games were played there every other week, mainly at weekends. Others did not use the football pitch whilst matches were being played. When dog walking, he walked across the Land as part of a longer route and then back across the Land on his return. He would spend around 10 or 15 minutes on the Land in each direction. The overgrown grass has not stopped him from using the Land. He was not involved with the Dog Training Club. He recalled construction works taking place on Byrd Row and saw builders on site, but he never saw either of the Objectors on site. The posts around the Land were erected to prevent vehicular access and do not prevent pedestrian access.

Written Evidence in Support of the Application

4.20 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Application in the form of additional evidence questionnaires and other documents which are contained in the Applicant's Bundle.

4.21 However, whilst the Registration Authority must also take into account all such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with oral

evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

CASE FOR THE OBJECTORS

Oral Evidence Objecting to the Application

4.22 **Mr Anthony Wadley**[24] is a joint freehold owner of the Land and is one of the Objectors. He confirmed that the Objection related to all the Application Land and not merely that part which was subject to an extant planning permission for residential development. In October 2001, Smith Wadley Homes Limited, a Company owned by the Objectors, purchased Norton & Lenchwick Working Men's Club from the Liquidator with a view to carrying out some residential development. The Company acquired a building, car park, a football field and allotments. The Land had been in regular use in the past as a football pitch as the Club ran two teams, a senior and junior one, which were in a Sunday league. The teams were very active, playing regular home and away games, and they also used the Land for training. Other local football teams used the Land with the Club's consent and for a payment.[25] The Club was the hub of the Village where many people socialised. It also ran numerous other teams, such as darts and skittles, and organised many social events. Consequently there was much animosity when it closed. Some 5 years previously, a new Village Hall had been built on land owned by the Club, access to which was over the Club's car park. Planning permission was granted for five houses which were subsequently built and then sold in 2006. The football field, namely the Land, was no longer being

[24] His two witness statements are at OB pages 8 and 51.

[25] Reference was made to the written statement of Mr Ivan Poole in support of the Objection in which he refers to the Norton Rangers Football Club using the Land for payment and with the Club's consent for their three teams at OB page 59.

regularly used when the Company purchased it, and shortly afterwards its use for organised football matches ceased. The Land was not then maintained.

4.23 He was a regular visitor to the area between 2003 and 2006 when the construction works were being carried out for the residential development in Byrd Row. He was on site daily between 8.30am and 4.30pm with Mr Smith supervising the building works, although they would come and go. They were also sometimes on site at weekends and in the evenings. They saw 2 or 3 people who regularly walked their dogs on the Land, and they spoke daily to them. They saw them walking round the perimeter of the Land and they would usually continue through to the next field at the back as part of a longer walk. They realised that a few people were using the Land for dog walking on a regular basis, and they gave them their permission to continue to do so. At that time, they were still actively attempting to bring the Land back into use as a football pitch, so they made it clear to such dog walkers that they could no longer use the Land if it was brought back into such use. After a few months, they had spoken to all the dog walkers they saw regularly. He could not recall having seen any of the witnesses who gave oral evidence in support of the Application on the Land. He did not see any other form of activity on the Land other than dog walking during that period of time. However, he saw people regularly using the play area on Phoenix Park.

4.24 Around 2006, they replaced the fence between Byrd Row and the area known as Phoenix Park, and they had the Land mown every 6 weeks during the growing season until 2008 when they ceased maintaining it. Around 2006, they also installed timber posts around part of the Land to prevent vehicles and caravans from accessing

it. They did not wish to prevent pedestrians from having access to the Land as they acknowledged that people walked their dogs on the Land and preventing such use would be unpopular. In May 2009, the Village Hall erected gates at the entrance to the car park on the Objectors' land. In 2009, planning permission was granted for three dwellings on the Land alongside the car park. That development has not been implemented.

4.25 He pointed out that only 30 residents submitted evidence questionnaires in support of the Application. Of the 16 from Norton, he contended that they all live in close proximity to the Land. Only 2 questionnaires had been submitted from the older part of the Village near to the Church and further north along the main road. He agreed that the Applicant's Plan showing the general spread of users who had completed questionnaires was correct.[26] Norton & Lenchwick is one Village, albeit two separate areas. During the Objectors' ownership of the Land, they have granted permission for several organisations to use the Land, including the Camping and Caravanning Club for a Folk Group in August 2003, the Dog Training Club for events in June 2008 and May 2010, and for the Cycling Time Trials in January 2008 and September 2009. The members of such clubs were not all from the locality of Norton and Lenchwick. He acknowledged that the Land was not closed off during such events. He was not aware of people being charged to come onto the Land for such events. He was unable to indicate how such uses were administered by the organisers to ensure that they were "closed events". Since the Objectors acquired the Land, the land adjacent has been refurbished as a children's playground. There is no fencing preventing movement of pedestrians from that area to the Land. A public footpath

[26] At AB page 154, subject to the Applicant's correction referred to at footnote 19 above.

ends close to that adjacent area. However, dogs are not welcome there, so some dog owners skirt around it and also pass along the boundary of the Land itself on their way to other places, fields and paths. It is very likely that such dog walkers pass through the Land but do not stay to play on it.

4.26 Pedestrian access to the Land has never been prevented. Signs have never been displayed preventing the use of the Land. Permission has been given to people to use the Land for recreational purposes if they requested it. However, he was unaware whether any of the 49 local residents who had submitted evidence questionnaires in support of the Application had been given such permission.

4.27 **Mr Timothy Smith**[27] is the other joint freehold owner of the Land and is the other Objector. He expressed the view that the Applicant had not intended to include the area of land that was subject to the most recent planning permission as part of the Application Land. That planning permission is for 4 dwellings on the part of the Land adjacent to Byrd Row and the Village Hall car park and is dated 15 October 2012.[28] The Applicant supported that planning application. However, he acknowledged in cross examination that in the Application itself, reference had expressly been made to the Owner having outline planning permission for a small part of the Land.[29] He confirmed that the Objection relates to the entirety of the Application Land.

4.28 He confirmed the evidence given by Mr Wadley. At the time they purchased the Working Men's Club, it was badly vandalised and had been boarded up. It was an eyesore. The Village Hall had also been subject to vandalism. When the properties on

[27] His witness statement is at OB page 55.
[28] The planning permission is at OB page 107. The approved plan is at OB page 82.
[29] Box 11 of the Application Form at AB page 7.

Byrd Row were being constructed between 2003 and 2006, he was on site regularly. He saw the Land being used spasmodically by dog walkers, around 2 or 3 a day. Such dog walkers he saw were mainly heading for the larger adjacent field which has a public footpath across it. He had not seen any organised activities on the Land nor any other recreational activities on the Land save dog walking. He did not recall having seen any of the witnesses who had given oral evidence in support of the Application using the Land. He acknowledged that the activities carried out by the witnesses who had given evidence of their use to the Inquiry must have taken place when he was not present as he would have noticed had they been taking place. Prior to the relevant 20 year period, he had played football on the Land for a football team he played for.

Written Evidence Objecting to the Application

4.29 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to the written witness statements of Mr Ivan Poole, Mr Robert Knight and Mr Maurice Sandalls submitted in support of the Objection.[30] However, in relation to such written evidence, I refer to and repeat my observations in paragraph 4.21 above that whilst such written evidence must be taken into account, I and the Registration Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with any oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to cross examination.

THIRD PARTY EVIDENCE

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[30] Their witness statements are at OB pages 59-61.

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

5. THE LEGAL FRAMEWORK

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

Commons Act 2006

5.2 The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

5.3 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-

> "*(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application.*"

5.4 Therefore, for the Application to succeed, it must be established that:-

(i) the Application Land comprises "land" within the meaning of the 2006 Act;

(ii) the Land has been used for lawful sports and pastimes;

(iii) such use has been for a period of not less than 20 years;

(iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;

(v) such use has been as of right; and

(vi) such use continued at the time of the Application.

Burden and Standard of Proof

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

5.6 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in ***R. v Sunderland City Council ex parte Beresford***[31] where, at paragraph 2, he noted as follows:-

"*As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green …". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for*

[31] [2004] 1 AC 889.

indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met."

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

Statutory Criteria

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

Land

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

5.9 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***[32] that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

Lawful Sports and Pastimes

[32] [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

5.10 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***[33] that "*lawful sports and pastimes*" is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children's play.

5.11 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***[34], Sullivan J. (as he then was) noted at paragraph 102 that:-

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

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

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

[33] [2000] 1 AC 335 at 356F to 357E.
[34] [2003] EWHC 1578 (Admin).

5.12 More recently, Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council***[35] at paragraph 102:-

> "*Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green).*"

He went on area paragraph 103 to state:-

> "*The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user*

[35] [2004] Ch. 253.

confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."

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

Continuity and Sufficiency of Use over 20 Year Period

5.13 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: ***Hollins v. Verney***.[36]

5.14 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: ***R. (on the application of Lewis) v. Redcar and Cleveland Borough Council***.[37]

Locality or Neighbourhood within a Locality

[36] (1884) 13 QBD 304.
[37] [2010] UKSC 11 at paragraph 36.

5.15 A "*locality*" must be a division of the County known to the law, such as a borough, parish or manor: ***MoD v Wiltshire CC***;[38] ***R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC***;[39] and ***R. (Laing Homes Limited) v. Buckinghamshire CC***.[40] A locality cannot be created simply by drawing a line on a plan: ***Cheltenham Builders*** case.[41]

5.16 In contrast, a "*neighbourhood*" need not be a recognised administrative unit. Lord Hoffmann pointed out in ***Oxfordshire County Council v. Oxford City Council***[42] that the statutory criteria of "*any neighbourhood within a locality*" is "*obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries*". Hence, a housing estate can be a neighbourhood: ***R. (McAlpine) v. Staffordshire County Council***.[43] Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: ***Cheltenham Builders*** case.[44]

5.17 Further clarity was provided on that element recently by HHJ Waksman QC in ***R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council***[45] who stated:-

> "*While Lord Hoffmann said that the expression was drafted with "deliberate imprecision", that was to be contrasted with the locality whose boundaries*

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[38] [1995] 4 All ER 931 at page 937b-e.
[39] [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.
[40] [2003] EWHC 1578 (Admin) at paragraph 133.
[41] At paragraphs 41 to 48.
[42] [2006] 2 AC 674 at paragraph 27.
[43] [2002] EWHC 76 (Admin).
[44] At paragraph 85.
[45] [2010] EWHC 530 (Admin) at paragraph 79.

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

Significant Number

5.18 "*Significant*" does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: ***R. (McAlpine) v. Staffordshire County Council***.[46]

As of Right

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

[46] [2002] EWHC 76 (Admin) at paragraph 71.

Oxfordshire County Council ex parte Sunningwell Parish Council[47] that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.20 "Force" does not merely refer to physical force. User is *vi* and so not "*as of right*" if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: ***Newnham v. Willison***.[48] Further, Lord Rodger in ***Lewis v. Redcar*** stated that "*If the use continues despite the neighbour's protests and attempts to interrupt it, it is treated as being vi…user is only peaceable (nec vi) if it is neither violent nor contentious*".[49]

5.21 "Permission" can be expressly given or be implied from the landowner's conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: ***R. v. Sunderland City Council ex parte Beresford***.[50]

6. APPLICATION OF THE LAW TO THE FACTS

Approach to the Evidence

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

6.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the

[47] [2000] 1 AC 335.
[48] (1988) 56 P. & C.R. 8.
[49] At paragraphs 88-90.
[50] [2004] 1 AC 889.

relevant statutory criteria being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered, or the merits of any development on the Land that has been granted planning permission being implemented or not implemented.

6.3 In addition, it is similarly inappropriate for me or the Registration Authority to take into account any negotiations that may have taken place between the Parties with a view to reaching an agreement to resolve the matter, which negotiations often occur in practice. Such negotiations that have apparently taken place in this instance, and any agreements that may or may not have been reached between the Parties, will consequently have no influence or effect upon my findings as to whether the relevant statutory criteria have been satisfied in relation to the Application Land on the basis of all the evidence adduced, and the Registration Authority should take the same approach.

6.4 I shall now consider each of the elements of the relevant statutory criteria in turn as set out in paragraph 5.4 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the relevant statutory criteria must be established by the Applicant on the evidence adduced on the balance of probabilities.

The Land

6.5 There is no difficulty in identifying the relevant land sought to be registered. A map was submitted with the Application attached to the Statutory Declaration which showed the Land subject to the Application outlined in green,[51] and that is the definitive document on which the Land that is the subject of the Application is marked. The Land has clearly defined and fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises "land" within the meaning of section 15(2) of the 2006 Act and is capable of registration as a town or village green in principle and I so find.

Relevant 20 Year Period

6.6 Turning next to the identification of the relevant 20 year period for the purposes of section 15(2) of the 2006 Act, the qualifying use must continue up until the date of the Application. Hence, the relevant 20 year period is generally the period of 20 years which ends at the date of the Application. The Application Form and the accompanying statutory declaration are dated 11 November 2010, and the Application was received by the Registration Authority on 12 January 2011. In my view, the relevant date of the Application is the date when the Application is received by the Registration Authority. It follows that the relevant 20 year period for the purposes of section 15(2) is January 1991 until January 2011.

Use of Land for Lawful Sports and Pastimes

6.7 Turning next to whether the Land has been used for lawful sports and pastimes in principle during the relevant 20 year period, it is contended by the Applicant that the Land has been used for various recreational activities during that period.

[51] At AB page 158.

References were made in both the oral and the written evidence in support of the Application to recreational activities such as children's play, general ball games, football, rounders, cycling, dog walking, general walking, berry picking and kite flying having been carried out on the Land. Each of the witnesses who gave evidence in support of the Application referred to their own and/or their family's and/or other people's varying recreational uses of the Land over different periods of time. Such evidence is supported by a material amount of written evidence. Although people's recollections may fade over time, particularly in relation to details, I accept the evidence of each of those witnesses that they did in fact use the Land for the stated purposes.

6.8 In so finding, I also take into account the following. The Land is located close to a number of residential properties and is immediately adjacent to another open area known as Phoenix Park. Indeed, the undisputed evidence was that the Land was previously an integral part of one larger piece of land comprising it and the area of Phoenix Park with no division or obstacle or separation on the ground between the two. That is particularly well illustrated by the June 1998 photograph I have seen.[52] It is thus apparent that people would use the two areas as one at that time. The Land is flat and open grassland and is adjacent to other open fields. Access to it is unrestricted. It was previously well maintained. Even in its current overgrown condition, I saw from my site visit that it remained a pleasant area of open space. In such circumstances, I would expect the Land to be used by local residents for recreational purposes to some extent.

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[52] At AB page 191.

6.9 Further, I note that it is no part of the Objectors' case to contend that no recreational activities have taken place on the Land. Instead, the main disputes relate to whether such activities have been carried out "as of right" and the extent of any qualifying recreational use which I address below. Both Mr Wadley and Mr Smith referred in their evidence to having seen dog walkers "*daily*" on the Land when they were involved in the construction works for the properties on Byrd Row between 2003 and 2006. Mr Sandalls also refers in his written statement to seeing dog walkers on the Land when he was working on that same development between 2004 and 2006. In addition, the Objectors erected wooden posts round the Land to prevent vehicular access, but specifically did not fence it so as to prevent pedestrian access as they were aware that dog walkers used it.

6.10 Moreover, all such activities referred to in paragraph 6.7 above are lawful, and they are all capable of being recreational pursuits in principle. Therefore, I find that some lawful sports and pastimes have been carried out on the Land during the relevant 20 year period. I shall address below the extent and degree to which they have been carried out as of right throughout the entirety of the relevant period by the inhabitants of the claimed locality.

Locality or Neighbourhood within a Locality

6.11 I turn next to the identity of the relevant locality or neighbourhood within a locality for the purposes of section 15(2). The Applicant confirmed at the outset of the Inquiry, and again during the course of the Inquiry and in her evidence, that the area relied upon for the purposes of the Application was as stated in the Application Form,

namely the locality of Norton and Lenchwick Parish. That area is identified on the Plan of the locality submitted with the Application.[53]

6.12 In my view, the Parish of Norton and Lenchwick is capable of being a locality within the meaning of section 15(2) of the 2006 Act. It is a recognised and established administrative area, namely the administrative area of the Parish Council, with fixed and identifiable boundaries and is an area known to the law. I therefore find that it amounts to a locality within the meaning of the statutory criteria.

Use as of Right

6.13 Before turning to the extent of the qualifying user by the inhabitants of the locality throughout the relevant 20 year period, I shall consider next whether the use of the Land has been "as of right" during that period. There was no suggestion in any of the evidence that any of the use was by stealth. On the contrary, it was carried out openly during daylight hours and without any element of secrecy. The use of the Land has thus been *nec clam*. Similarly, none of the use was carried out with force. Although use need not involve physical force to be *vi*, such as accessing land by breaking down fences, there was no evidence of anyone having been challenged by the Landowners or having been requested to leave the Land or using the Land contrary to any signs. Instead, the evidence of witnesses in support of the Application was that they had never been prevented from using the Land nor been requested to leave the Land nor been informed that they should not be on the Land. Therefore, I find that the use of the Land was *nec vi*.

[53] At AB page 161.

6.14 As to whether the Land has been used *nec precario*, it was a significant element of the Objectors' case to the Inquiry that the use of the Land had been either with express permission or with implied permission and was consequently *precario*.

6.15 Starting with express permission, the material evidence in that regard was largely undisputed. In terms of the element of the relevant 20 year period when the Land was owned by the Working Men's Club, namely between January 1991 and October 2001, documentary evidence in the form of minutes from their meetings that the Applicant had been able to obtain demonstrated that the Club granted express permission on various occasions during that period for organised activities to take place on the Land, often imposing a charge for such use. That included the regular football matches that occurred on the Land by various teams, but also social activities, such as the holding of fetes and concerts. It seems to me to be very clear from such documentary evidence that the Land was regularly used during that period by different football teams as a football pitch and that express permission was given by the Club for such use, together with permission for other more infrequent organised activities on the Land. Indeed, that was accepted by the Applicant.

6.16 As to the later part of the relevant period during the Objectors' ownership of the Land from October 2001 until January 2011, it seems to me that an element of the use during that time was also subject to express permission having been granted. Again, that related in the main to organised activities on the Land, and to that extent, the Applicant did not dispute that such use was carried out with express permission. Hence, permission had been given by the Objectors for the Dog Training Club to use

the Land and for other specific events to be held on the Land from time to time, such as Cycling Time Trials and a Folk Concert.

6.17 Therefore, I find that the organised events and activities that have taken place on the Land have, for the most part, been carried out with the express permission of the Landowner and have accordingly been *precario*. It is consequently necessary to discount them from the qualifying use.[54]

6.18 Nonetheless, there remain the informal activities on the Land, and it was on the basis of such activities that the Applicant specifically relies. The Objectors contended that an element of such was subject to their express permission, namely the dog walking use by a few individuals they had seen regularly walking their dogs on the Land between 2003 and 2006 and whom they had spoken to and granted such permission. There was no detailed evidence of such in terms of names of each of the individuals or numbers of them. Nonetheless, I accept that some such express permission was given. That permission would have the effect of discounting from the qualifying use the dog walking by those un-named particular individuals after the permission had been so granted.

6.19 As to the remainder of the informal use of the Land, there was a serious dispute between the Parties as to whether that was carried out "as of right" in that the Objectors contended that it was carried out with implied permission. I note in relation

[54] It is likely that many of the participants in such activities were not inhabitants of the Parish and so their use would not be qualifying in any event for that additional reason. However, I heard no specific evidence on that issue to enable me to make a finding, which it is unnecessary to do given my finding that such use was *precario*.

to that particular issue that the onus shifts to the Landowners to show that the use was pursuant to implied permission.[55]

6.20 In terms of implied permission, it was made clear in ***Beresford*** that an implied permission could arise where a landowner's conduct was such that it made it clear to inhabitants that the use of his land was pursuant to his permission. However, permission cannot be implied from the mere inaction of the landowner with knowledge of the use to which his land was being put. Instead, the landowner has to do something positive to make the public aware that their use of his land is by his licence so that they ought to know that the land is being used by them only with his permission and not as of right. Conduct amounting to positive encouragement to use the land is not in itself sufficient to amount to an implied permission. Instead, examples given in that case of circumstances where an implied consent may well arise on the facts included where the landowner made a charge for entry to the land or where the owner occasionally closed the land to the general public or where appropriate signs were erected. Each of those examples would amount to an overt act communicating to the public that their use of the land was subject to the landowner's permission and was not as of right.

6.21 Hence, Lord Bingham stated at paragraph 5 that:-

> "*A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes,*

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[55] See HHJ Robert Owen QC in ***R. (on the application of Mann) v. Somerset County Council*** [2012] EWHC B14 (Admin) at paragraph 24.

or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.".

Lord Rodger stated at paragraph 59:-

> "*The grant of such a licence to those using the ground* ***must have comprised a positive act by the owners****, as opposed to their mere acquiescence in the use being made of the land.*" (My emphasis).

Lord Walker said at paragraph 75 that there must be:-

> "*a* ***communication by some overt act*** *which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass.*" (My emphasis).

He further stated at paragraph 83:-

> "*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 on the landowner's permission.*" (My emphasis).

6.22 In ***Mann***, having considered the relevant passages in ***Beresford***, HHJ Robert Owen QC went on to say at paragraph 71:-

"*From these observations, which I take as authoritative guidance on conduct by an owner which may count as an overt act or as a relevant or demonstrable circumstance sufficient in law to allow an inference of permission, it appears that the owner must make it clear that the public's use of the land is with his permission and that that may be shown by excluding the public on occasional days (per Lord Bingham, para 5; and see para 79 per Lord Walker); he must do something on his land to show that he is exercising his rights (as owner) over his land and that the public's use is by his leave (para 6); there must be a positive act by owner qua public though a notice is not necessary provided the circumstances relied on allows the inference to be drawn (para 59); implied consent by taking a charge for entry or similar overt act communicated to the public is sufficient without the need for express explanation or notice (para 75); such conduct need only occur from time to time (I should add, perhaps once only during the period under scrutiny) (para 76); such conduct will be expected to have an impact on the public and show that when the public have access (I should add, to all or part of the land) they do so with the leave or permission of the owner (para 83).*"

6.23 Applying that legal position to the evidence, I am not satisfied that it has been demonstrated by the Objectors that the informal activities were undertaken pursuant to the Landowners' implied permission for the following reasons. Although I accept and have found that express permission was given for formal events and activities on the Land, including the regular football matches prior to the Objectors' purchase of the Land, often subject to a charge, I have seen no evidence that the public were excluded from using any part of the Land at such times, whether subject to a charge

being paid or otherwise. The public may well not have walked their dogs over the football pitch whilst a match was taking place, but such conduct is merely akin to the "give and take" attitude referred to in ***Redcar*** where the activities of the Landowner and of the inhabitants were found to be able to co-exist. That is very different from a positive and demonstrable act of exclusion as was found to have occurred in ***Mann***. In that case, it was found that the acts of the landowner in holding beer festivals on the application land constituted "*a manifest act of exclusion by the owner*".[56] Everyone was excluded from a certain part of that land where the festival was taking place subject to the payment of an entrance charge. It was thereby apparent to local inhabitants that they had no right to be on that land.

6.24 In contrast, I have seen no evidence of such exclusion of local inhabitants from any part of the Land during the relevant 20 year period, whether subject to a payment or by access to the Land being occasionally closed. Instead, the evidence suggests that local inhabitants continued to use the Land during such times, albeit with the "give and take" attitude evidenced in ***Redcar***. It thus seems to me from the available evidence that the factual circumstances are akin to those that arose in ***Redcar*** rather than in ***Mann***.

6.25 Further, none of the other conduct by the Landowners seems to me to have resulted in such an overt act as to infer permission. I accept and find that the Objectors erected posts around the Land with the specific objective of preventing and thereby controlling vehicular access onto the Land. However, that did not, and was not intended to, restrict pedestrian access, and there is no evidence that any of the

[56] Per HHJ Robert Owen QC at paragraph 72.

informal recreational activities were affected, or intended to be affected, by such actions. That would not, in my view, have demonstrated to inhabitants that their use of the Land was subject to the Landowners' permission. Nor would the express permission given to individuals have such effect as there would be no reason that others would know about such permissions having been granted and there was no evidence that they did so. Similarly, the Landowners' other general acts of ownership and control in terms of being generally responsible for activities taking place on the Land were not, in my opinion, sufficient to communicate an implied permission to local inhabitants to use the Land.

6.26 Therefore, I find that, with the exception of the dog walking by those individuals who were given express consent to use the Land by the Objectors, the remaining informal activities on the Land were not carried out with permission and were accordingly undertaken "as of right" within the meaning of section 15(2) of the 2006 Act.

Sufficiency of Use

6.27 Turning next to the fundamental issue of whether there has been a sufficiency of use of the Land for lawful sports and pastimes throughout the relevant 20 year period by a significant number of the inhabitants of the locality to establish village green rights over the Land, it is necessary to identify the relevant qualifying use and, in particular, to identify the elements of the use of the Land which must be discounted. As indicated above, the question for determination is whether the qualifying use of the Land for lawful sports and pastimes has been of such a nature and frequency throughout the relevant 20 year period to demonstrate to the

Landowners that recreational rights were being asserted over the Land by the local community.

6.28 In terms of the elements of the use which must be discounted from the qualifying use, I have already referred above to the dog walking carried out by individuals who had been given permission to walk on the Land by either of the Objectors. Secondly, I exclude from the qualifying use any use of the Land carried out outside the relevant 20 year period. Although such use may be relevant as an indicator as to the extent of the use within that period, and I have taken that factor into account, I am unable to regard such use as part of the qualifying use itself. Thus, I have excluded the recreational uses of the Land referred to in the evidence above that was undertaken prior to January 1991 and post January 2011. I have also taken the same approach with the written evidence. Thirdly, I have excluded such use by persons who were not inhabitants of the Parish of Norton and Lenchwick, such as the use of family and children when visiting from outside the Parish and the use of those seen on the Land whose residency was unknown.

6.29 Fourthly, it is necessary to discount the use of the Land that was more akin to the exercise of a public right of way than to the exercise of recreational rights over a village green for the detailed reasons set out in paragraphs 5.11 and 5.12 above. That includes walking both with and without dogs, where the walk was of such a nature that it would suggest that the user was exercising a right of way over specific routes rather than exercising a recreational right over the land generally.

6.30 From the evidence, it is my impression that a material amount of walking and dog walking took place around the perimeter of the Land as well as over the Land generally. Hence, by way of example, Mr Davies had walked along the worn perimeter path; Mr Coleman noted that dog walkers walked both round the perimeter of the Land and over it; and Mr Edwards similarly pointed out that he had seen dog walkers in the middle of the Land and others walking round its perimeter. I accept such evidence. Indeed, it is apparent from the photographic evidence and from my site visit that a worn path exists, and existed during the relevant 20 year period, around the perimeter of the Land. That appears to me to have resulted from its use, and there was no other explanation for its existence provided in any of the evidence. On the contrary, in the Application Form itself at Part 7, it is expressly stated that:-

> "*There is a well-worn path round the pitch where dog walkers regularly exercise their pets.*"

I also note the consistent evidence of both Objectors that they had seen dog walkers walking round the perimeter of the Land, as had Mr Sandalls. Such use of the Land was more akin to the exercise of a right of way rather than of recreational rights over the Land generally and must also be discounted from the qualifying use.

6.31 Having discounted such elements of use from the qualifying use, it is next necessary to assess whether that qualifying use was carried out to a sufficient extent and frequency throughout the relevant 20 year period to establish town or village green rights over the Land. In doing so, the impression I gained from the evidence was that the primary recreational uses of the Land were for dog walking and for children's play. Indeed, aside from walking on the Land with or without dogs, few adults have used it informally other than when playing with their children. Moreover,

there was no specific evidence of any community events or formal events having been organised on the Land during the relevant 20 year period aside from those which were granted express permission.

6.32 In terms of walking and dog walking, it is necessary to discount that which was more akin to the exercise of a public right of way. In that regard, the written evidence fails to indicate whether particular routes were taken whilst walking on the Land, and I am unable to assume that the Land was not so used by the authors of such evidence given that the burden of proof lies upon the Applicant.

6.33 Having carried out the appropriate discounts, it is my view on the basis of all the evidence that the qualifying use of the Land has not been demonstrated to have been carried out to a sufficient extent and frequency throughout the whole of the relevant 20 year period to satisfy the statutory criteria for the following reasons.

6.34 In terms of the oral evidence in support of the Application, I note the following. Mrs Davies's qualifying use of the Land commenced in 1997 and her Husband's in 1999; Mr Coleman's qualifying use only commenced in 2006, as did Mrs Grinter's; the Applicant's use of the Land did not take place during the relevant 20 year period but only prior to it; and Mr Edwards' use was from 1999. Only Mr and Mrs Penrose gave oral evidence of qualifying use for the earlier part of the relevant 20 year period. However, I note and accept the observation of Mr Penrose that their use of the Land in the earlier years was largely focused on their Children and playing with them on the Land. As their two Children were only born in 1990 and 1992, they

would not have been playing on the Land to any material extent at the start of the 20 year period in January 1991.

6.35 Although it is not necessary for any particular individual to have used the Land for the full 20 year period themselves, it is necessary for the totality of the evidence to establish a sufficiency of use throughout the entirety of that period. It seems to me that the oral evidence in support of the Application fails to establish any material qualifying use during the earlier part of that period in the 1990's but, instead, indicates merely a sporadic qualifying use of the Land at that time.

6.36 In addition, I have taken into account the written evidence in support. However, relatively few in number give evidence in relation to that earlier period. Moreover, from the written information provided, I am unable to ascertain in many instances the extent to which the uses referred to are part of the qualifying use, where on the Land the uses took place, and the frequency of such uses being carried out throughout the relevant 20 year period. I am therefore unable to attribute significant weight to them. Thus, such evidence, taken together with the oral evidence, does not seem to me to demonstrate that the qualifying recreational use of the Land was carried out more than sporadically during the early part of the relevant 20 year period.

6.37 Further, it seems to me from the evidence that the position is similar in relation to the later part of that period. Around 2007/2008, new children's play equipment was installed in Phoenix Park. That is a well maintained area and the consistent evidence was that it is well used. From that time, it has been physically separated from the Land in the sense that it is no longer one area on the ground, albeit

access can still be gained from one to the other. In contrast, the Land itself has not been maintained for the most part during that later period. It appears that much children's play has taken place on Phoenix Park rather than on the Land, particularly in the more recent years, thereby reducing the amount of children's play on the Land. Indeed, that view is supported by some of the written evidence in support of the Application. Dr Dishart refers to the Land having "*become more difficult to use since it has not been mown*" and to it no longer being used for football by children due to the overgrown grass and the lack of posts.[57] Similarly, Mr Staite, Mr and Mrs Johns and Ms Cuss each refer to their use of the Land having ceased as they are "*not able to play football because the grass was not cut*".[58]

6.38 Instead, the impression I gained from the evidence is that in the more recent years, the majority of the use of the Land has been for dog walking, and particularly around the worn path, although I accept that some dog walkers have continued to use all the Land. I note the written addendum to the questionnaire of Ms Leonard and Mr Bennett which states:-

> "*The owners of the pitch only cut the grass once in early 2008. The longer grass made it more difficult to use the pitch but the dog walkers kept a well worn path around the circumferenc*e*...In 2010 the dog walkers have even had their path around the pitch mowed.*"[59]

That is also consistent with the Objectors' evidence that they had only noticed dog walkers using the Land, and particularly round its perimeter, when they were regularly in the area between 2003 and 2006. The Land could of course been used more frequently when they were not present, whilst some of the use may well have

[57] See her evidence questionnaire at AB page 54.
[58] At AB pages 69 – 76.
[59] At AB page 60.

gone unnoticed by them whilst they were focused on their work. Nonetheless, in general terms, their evidence supports the view that the Land was not being used on a regular and frequent basis for qualifying uses by significant numbers of local people at that time.

6.39 Taking the oral and written evidence as a whole from both Parties, and from my visit to the Site, it is my impression that over the latter part of the 20 year period, the Land has been used primarily for dog walkers. Moreover, although I accept the evidence that some dog walkers have walked over the Land generally, I find that the majority of dog walkers in that later part of the relevant 20 year period have used the visible worn path around the perimeter, albeit no doubt allowing their dogs to run in the longer grass off the lead. Once that right of way use is discounted, I find that the remaining qualifying use of the Land in that latter part of the relevant period, and particularly since 2008, has been merely sporadic and insufficient to demonstrate the assertion of recreational rights over the Land.

6.40 Consequently, for all the above reasons, I find that it has not been established on the balance of probabilities that the qualifying use of the Land has taken place to such an extent and with such a degree of frequency throughout the entire relevant 20 year period to demonstrate to a reasonable landowner that recreational rights were being asserted over the Land.

Use by a Significant Number of the Inhabitants of the Locality

6.41 Turning to whether the Land has been used by a significant number of the inhabitants of the Norton and Lenchwick Parish, for the reasons given above, I find

that it has not been so used for lawful sports and pastimes as of right throughout the relevant 20 year period.

6.42 However, in addition, in order to establish that element of the statutory criteria, I accept the Objectors' submission that there must be a reasonable spread of users across the identified locality rather than the users being confined to a particular part of it. The user must have been of such a nature to bring it to the attention of the reasonable landowner that a right of recreation was being claimed by the inhabitants of the particular identified locality, namely by that identified local community. Thus, it seems to me that it is not merely the number of users that are significant, and I have addressed the extent of the use above, but also their geographical distribution. The number of inhabitants whose use is proven must be distributed in such a way as to indicate that the right is vested in the locality claimed and not simply a part of it.

6.43 Applying that to the evidence, I find that the requisite geographical distribution of users has not been established. Instead, it seems to me that the vast majority of users of the Land during the relevant 20 year period have been from the southern part of the locality in the Lenchwick area as evidenced by the Applicant's plan showing the spread of users.[60] Only two users from all the oral and written evidence were identified from the northern part of the locality in the Norton area. As the Applicant explained, that area was far away from the centre of the Village and from the Village Hall. That being so, I regard it as unsurprising that those inhabitants are not regular users of the Land. Nonetheless, it is my view that the absence of evidence of use during the relevant period by the inhabitants of that northern part of

[60] At AB page 154.

the locality save for two individuals results in there not having been established a sufficient geographical spread of users across the locality as a whole to satisfy that element of the statutory criteria. Therefore, on that further basis, I find that the Applicant has failed to establish that the Land has been used by a significant number of the inhabitants of the identified locality.

Continuation of Use

6.44 The final issue is whether the qualifying use continued up until the date of the Application, namely 12 January 2011. The Land remains unfenced and open and no signs have been erected restricting its use to date. Witnesses gave evidence that they continue to use the Land. Therefore, subject to the other elements of the statutory criteria, I find that the qualifying use was continuing as at the date of the Application and that that particular element of the statutory criteria has accordingly been satisfied.

7. CONCLUSIONS AND RECOMMENDATION

7.1 My overall conclusions are therefore as follows:-

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

7.1.2 That the relevant 20 year period is January 1991 until January 2011;

7.1.3 That the Parish of Norton and Lenchwick is a qualifying locality;

7.1.4 That the use of the Application Land for lawful sports and pastimes has been as of right throughout the relevant 20 year period;

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

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

7.1.7 That the use of the Application Land for lawful sports and pastimes continued up until the date of the Application.

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

7.2.1 The Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green ; and

7.2.2 The Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

8. ACKNOWLEDGEMENTS

8.1 Finally, I would like to thank the Applicant and the Objectors for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear,

succinct and frank manner. I would further like to express my gratitude to the representatives from the Registration Authority for their significant administrative assistance prior to and during the Inquiry.

8.2 I am sure that the Registration Authority will ensure that both Parties are provided with a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

RUTH A. STOCKLEY

13 May 2013

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