IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN DESCRIBED IN THE APPLICATION AS 'ONGAR HILL BRICK FIELD' AT MARLEY CLOSE, ADDLESTONE, SURREY

– APPLICATION NUMBER 1867 –

INSPECTOR'S REPORT AND RECOMMENDATION TO THE COMMONS REGISTRATION AUTHORITY – SURREY COUNTY COUNCIL

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Introduction

1. I am instructed by Surrey County Council in its capacity as the commons registration authority ('the registration authority') to advise on an application to register as a new town or village green ('TVG') a parcel of amenity open space amounting to some 0.87 acres which is located at the end of Marley Close in Addlestone ('the application land'). By way of amendment, the application is made pursuant to the provisions of section 15(3) of the Commons Act 2006 ('the CA 2006') on the ground that qualifying user had ceased by the time the application came to be made in October 2012.

2. The application land is shown edged red on the plan at A/24 which will also be found at Appendix/1.

3. The application in Form 44 was made by Mrs Joanna Reilly who lives at 15 Marley Close, Addlestone ('the applicant') and is dated 4/10/2012 (RA/B1). The registration authority acknowledged receipt of the application and accompanying documents on 18/10/2012. The neighbourhood plan will be found at A/25 and at Appendix/2. The area edged in purple on this plan is the claimed neighbourhood of Row Town which falls within the electoral ward of Chertsey South and Row Town which is edged in red on the same plan.

4. Put shortly, the grounds on which such application was made were that local inhabitants had used the application land for informal recreation for a period of

at least 20 years and that such user was continuing at the time the application was made. However, at the start of the inquiry the application was amended to show that it was made, not under section 15(2) of the CA 2006, but under section 15(3) on the basis that qualifying use had ended on 18/10/2010. I am content to recommend to the registration authority that it should allow the applicant to amend her claim on this basis to which no objection was taken by the objector at the inquiry.

5. The application (which was supported by the evidence of those who completed the 42 statements / questionnaires which accompanied it) was duly publicised by the registration authority in accordance with the regulations (The Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007). The publicity notice invited objections and a single objection was received from Runnymede Borough Council in its capacity as freehold owner of the application land ('the objector').

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6. After being instructed by the registration authority I gave directions on 15/04/2014 dealing with the procedure at a public inquiry which took place on 16/07/2014 at the Runnymede Centre, Chertsey Road, Addlestone in Surrey. The duration of the inquiry was limited owing to the fact that, in its objection statement dated 19/02/2013, the objector did not dispute that the application land had been used by the public for lawful sports and pastimes for the relevant period. However, the objector contended nonetheless that the application failed to fulfil two of the statutory requirements, namely (a) the 'as of right' requirement, and (b) the 'locality/neighbourhood' requirement.

7. At the public inquiry representation was as follows: Ashley Bowes acted for the applicant and Vivian Chapman QC acted for the objector. I heard submissions (written and oral) from both counsel. Oral evidence was taken from Mario Leo who is employed by the objector as Corporate Head of Law and Governance and who clarified certain matters contained in his helpful statement dated 12/06/2014 which annexed a number of documents (OB/15-89) to which further documents were added at the inquiry (OB/89A-K). I am indebted to both counsel for their assistance and helpful submissions. I am

also grateful for the administrative support provided by Helen Gilbert of the registration authority.

8. Following the public inquiry I also visited the application land in the company of the applicant and representatives of the objector.

9. Before turning to other matters, I should mention that Mr Chapman indicated at the start of the inquiry that he was taking issue on the sufficiency of the claimed user. The point he makes is that the use of the application land has not been sufficiently distributed throughout that area in order to establish that the application land has been used by a significant number of the inhabitants of that neighbourhood.

10. Although this issue had not been specifically advanced by Mr Chapman in his written submissions it was obviously one which came into play in relation to the 'locality/neighbourhood' requirement. This presented a difficulty for Mr Bowes who had not anticipated that the point on spread would be taken with the result that he had not attended with witnesses whose evidence he expected would be able to deal adequately with this point. As I was not prepared to recommend that the inquiry be adjourned it seemed to me that the way forward would be to proceed on the issue of 'as of right' as if the applicant failed on this then her application could go no further anyway and would have to be rejected by the registration authority which has to be satisfied that all the relevant qualifying criteria under section 15(3) CA 2006 are met.

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11. Neither party raised any objection to the inquiry proceeding on this basis.

Legal framework

12. Section 15(1) of the CA 2006 enables any person to apply to register land as a TVG in a case where subsections (2), (3) or (4) applies.

Section 15(3) applies where -

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

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

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

13. It is not in dispute that user 'as of right' ceased before the application was made and that the application to register was made within two years of the cessation of such use (this being an old law case – under section 15(3A)(a) CA 2006 the period is now one year).

14. One then looks at the various elements of the statute and with the exception of 'as of right' I will take them shortly.

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'a significant number'

15. 'Significant' does not mean considerable or substantial. What matters is that the number of people using the land 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 (see *R (McAlpine) Staffordshire CC [2002] EWHC 76 at [71] (Admin).*

'of the inhabitants of any locality or of any neighbourhood within a locality'

16. A 'neighbourhood within a locality' need not be a recognised administrative unit. A housing estate can be a neighbourhood (*McAlpine*). However a neighbourhood cannot be any area drawn on a map: it must have some degree of cohesiveness (*R (Cheltenham Builders Ltd) v South Glos DC [2003] EWHC 2803 para 85*).

17. The statutory test is fulfilled if a significant number of the users come from any area which can reasonably be called a 'neighbourhood' even if significant numbers also come from other neighbourhoods (see *R (Oxfordshire & Bucks NHS Trust) v Oxfordshire County Council [2010] EWHC 530 (Admin*) (known as the 'Warneford Meadow' case). In short, the claimed neighbourhood must be an area which is cohesive, identifiable and recognisable as a community in its own right. Only the inhabitants of the relevant neighbourhood have recreational rights over the land.

18. A ‘locality’ for these purposes means an administrative district or an area with legally significant boundaries and will include a town, parish or ward. See Warneford Meadow at [69].

‘have indulged as of right’

19. I deal with matters more fully under this head as it is now the central issue.

20. The traditional formulation of the requirement that user must be ‘as of right’ is that the user must be without force, secrecy or permission. The rationale behind ‘as of right’ is acquiescence. The landowner must be in a position to know that a right is being asserted and he must acquiesce in the assertion of the right. In other words, he must not resist or permit the use.

21. ‘Force’ does not just mean physical force. Use is by force if it involves climbing or breaking down fences or gates or if it is contentious or under protest. Nothing of the kind arises in this instance.

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22. Use that is secret or by stealth will not be use ‘as of right’ because it would not come to the attention of the landowner.

23. ‘Permission’ can be express eg by erecting notices which in terms grant temporary permission to local people to use the land. Permission can also be implied but not by inaction. In this case it is argued that byelaws impliedly granted permission to the public to use the application land for lawful sports and pastimes (*R (Newhaven) v East Sussex CC [2014] QB 186*).

24. In *R (Beresford) v Sunderland City Council [2004] 1 AC 889* the House of Lords concluded that a license to use land must comprise a *‘positive act’* (Lord Rodger at [59]) or amount to the communication of an *‘overt act’* which is intended to be understood as permission to do something which would otherwise be an act of trespass (Lord Walker at [75] and [83]), as opposed to mere acquiescence in the use being made of the land.

25. The requirement for an overt act does not mean that permission can only be communicated expressly. In *Beresford* it was said by Lord Bingham at [5] that:

'… a landowner may so conduct himself as to make clear, even in the absence of an express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission'.

26. 'As of right' means 'as if by right'. It is, as Mr Chapman rightly says, now established in the Supreme Court in *R (Barkas) v North Yorkshire County Council [2014] UKSC 31* that where land is provided by a local authority under a statutory holding power which authorises the authority to allow the land to be used by the public for recreation then the public's use will be 'by right' and not 'as of right'.

27. *Barkas* involved the use of recreational open space under the Housing Acts but the principle is applicable whenever land is held, for instance, for the purposes of the statutory right of public recreation under section 164 of the Public Health Act 1875 ('PHA 1875') or section 10 of the Open Spaces Act 1906 ('OSA 1906').

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28. Lord Neuberger said this in *Barkas* at [24]:

'I agree with Lord Carnwath JSC that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land to public use (whether for a limited period or an indefinite period), it is impossible to see how, at least in the absence of additional facts, it could be appropriate to infer that members of the public have been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to public use: it would be positively inconsistent with their allocation decision if they had done so'.

Also at [46] he said this:

'The field was, as I see it, "appropriated", in the sense of allocated or designated, as public recreational space, in that it had been acquired, and was subsequently maintained, as recreation grounds with the consent of the

relevant Minister, in accordance with section 80(1) of the 1936 Act: public recreation was the intended use of the Field from the inception'.

At [66] Lord Carnwath said this:

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

This was to be contrasted with *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674*) where, although the land was in public ownership,

(per Lord Carnwath at [66] in *Barkas*)

'it had not been laid out or identified in any way for public recreational use and indeed was largely inaccessible' where *'It was held that the facts justified the inference that the rights asserted were rights under the 1965 Act'.*

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29. The question then, arising from the decision of the Supreme Court in *Barkas*, is whether the land has been *'lawfully allocated'*, *'designated', 'validly and visibly committed'* or otherwise *'laid out or identified'* by the authority for public recreation under statutory powers?

'in lawful sports and pastimes on the land'

30. The expression *'lawful sports and pastimes'* form a composite expression which includes informal recreation such as walking, with or without dogs, and children's play provided always that those activities are not so trivial or intermittent so as not to carry the outward appearance of user 'as of right' (see *R v Oxfordshire County Council ex parte Sunningwell Parish Council [2000] 1 AC 335 at p.356F-357E*).

' … for at least 20 years ..'

31. The relevant period in this case is October 1990 – October 2010.

Procedural issues

32. The regulations which deal with the making and disposal of applications by registration authorities outside the pilot areas make no mention of the machinery for considering the application where there are objections. In particular no provision is made for an oral hearing. A practice has, however, arisen whereby an expert in the field is instructed by the registration authority to hold a non-statutory inquiry and to provide an advisory report and recommendation on how it should deal with the application.

33. In *Regina (Whitmey) v Commons Commissioners [2004] EWCA Civ 951* Waller L.J suggested (at para 62) that where there is a serious dispute, the procedure of *'conducting a non-statutory public inquiry through an independent expert'* should be followed *'almost invariably'.* However the registration authority is not empowered by statute to hold a hearing and make findings which are binding on the parties by judicial process. There is no power to take evidence on oath or to require the disclosure of documents or to make orders as to costs. However the registration authority must act impartially and fairly and with an open mind. It was, in my view, rightly accepted by the registration authority that a non-statutory inquiry was warranted in this instance.

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34. The only question for the registration authority is whether the statutory conditions for registration are satisfied. In its determination there is no scope for the application of any administrative discretion or any balancing of competing interests. In other words, it is irrelevant that it may be a good thing to register the application land as a TVG on account of the fact that the land has been long enjoyed by locals as a public open space of which there may be an acute shortage in the area.

35. The onus lies on the applicant for registration and there is no reason why the standard of proof should not be the usual civil standard of proof on the balance of probabilities.

36. The procedure is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007. The 2007

Regulations follow closely the scheme of The Commons Registration (New Land) Regulations 1969 which governed applications to register new greens under section 13 of the 1965 Act. In a number of small pioneer authorities The Commons Registration (England) Regulations 2008 apply.

37. The prescribed procedure is very simple: (a) anyone could apply without fee; (b) unless the registration authority rejected the application on the basis that it was not 'duly made', it proceeds to publicise the application inviting objections; (c) anyone can submit a statement in objection to the application; and (d) the registration authority then proceeds to consider the application and any objections and decides whether to grant or to reject the application.

38. I should make the further point that it is no trivial matter for a landowner to have land registered as a green and all the elements required to establish a new green must be *'properly and strictly proved'* (*R v Suffolk CC ex p Steed (1996) 75 P&CR 102 at p.111* per Pill LJ, and approved by Lord Bingham in *R (Beresford) v Sunderland City Council [2004] 1 AC 889, at para 2*).

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Consequences of registration

39. Registration gives rise to rights for the relevant inhabitants to indulge in lawful sports and pastimes on the application land.

40. Upon registration the land becomes subject to (a) s.12 of the Inclosure Act 1857, and (b) s.29 of the Commons Act 1876.

41. Under s.12 of the Inclosure Act 1857 it is an offence for any person to cause damage to a green or to impede *'the use or enjoyment thereof as a place for exercise and recreation'*.

42. Under s.29 of the Commons Act 1876 it is deemed to be a public nuisance (and an offence under the 1857 Act) to encroach or build upon or to enclose a green. This extends to causing any *'disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green'*.

43. Under both Acts development is prevented and the land is effectively blighted. This is clearly critical in this case as if the application to register is rejected the application land will, in all likelihood, be sold to a developer.

Description of the application land

44. The application land is surrounded by development but is nonetheless easy to get into. To the north, there are the rear gardens of dwellings in Ledger Drive, to the west there are the rear gardens of dwellings in Furze Road, to the east there is the site of Hare Hill Social Club and the western boundary of No.20A Marley Close and, on the southern side, there is No.26 Marley Close and the turning circle at the end of this street.

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45. The site slopes gently downhill from the access at the end of Marley Close (where the opening is between substantial concrete posts with wire mesh fencing attached on both sides) to the rear gardens of a number of houses in Ledger Drive. It is mainly grassed but there is a good deal of scrub and brambles on the western side. There are mature trees at the lower end of the field as well as a handful of smaller trees which are likely to have been planted in recent years. There is also an earth bund and ditch close to the rear boundaries of the houses in Ledger Drive which are no doubt intended to protect these properties from run-off from the application land during prolonged wet weather although conditions were dry at the time of my visit. In general, however, the site appears to be well-managed and the grass is kept short.

46. There is a narrow path running part way along the northern side of the social club boundary which leads into Ledger Drive. There is also a single bin for the collection of dog faeces and a none too conspicuous byelaws' sign which looks to be recent. The byelaws are printed on a metal sign which is attached to a metal post which is set at a fairly low level so that one has to bend over to read the small print. The post and fixings looked to be new or newish and it is, I think, a sign that one could easily miss (as I did) on a stroll around the site (in fact the sign had to be pointed out to me). The sign is, I think, poorly located and should have been displayed in more prominent position at the two entry points. The byelaws will be found at OB/48-59 and a photo of the sign is

at OB/81. The photo is apt to mislead as the sign is actually fixed to a post in front of the fence.

47. The application land gives every impression of having been landscaped or otherwise made available for public recreation. Although a sloping site, the ground is level and easy to walk on. The scrub is fairly dense but there are places for children to run around and play in these areas and, as I observed, there are brambles which will produce a bumper crop of blackberries this year.

48. The site is an attractive one and is undoubtedly a valuable local amenity in a heavily built-up area where there is, I believe, limited open space available for dog-walking or for children to play in safety away from traffic. There are, for instance, railings at the Marley Close access point which are presumably intended to deter children from running straight out into the road. On the whole, I would say that the application land is plainly identifiable as a dedicated place of public recreation although it has, of course, none of the play facilities which one finds elsewhere in custom-built recreation grounds.

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49. Generally the circumstances as I found them on my accompanied inspection are entirely consistent with the contentions of the applicant's witnesses that people have been using the application land for informal recreation and that this activity has been encouraged by the landowner over many years. (I might at this point mention that I have looked at the very useful photos at B58-64 which accompany the written evidence of Michael Ledger at 42 Ledger Drive.)

Applicant's evidence

50. As previously indicated in para 5, the written evidence comprises some 42 statements / evidence questionnaires to which has been added the 7 statements at A/26-33 which also deal with the neighbourhood issue.

51. It is hardly surprising that the objector is not disputing that the application land has been used for qualifying informal recreation throughout the claimed qualifying period and I readily make this finding in light of the applicant's written evidence and from what I observed on my own inspection of the site.

52. I should perhaps deal with those elements of the applicant's written evidence which help to piece together the history of the application land from the early days.

53. At RA/B45 and at A/28 Anthony Davis says that when, as a child, he moved with his parents to 26 Marley Close in 1955 (Mr Davis's home – which he purchased from his mother in 1971 – adjoins the application land at the end of the cul de sac) the application land consisted largely of a stagnant pond where the old brickworks clay pit had been located. He says that to the east of the land, where the social club and car park are now located, there was a series of shallower lagoons. He says that local inhabitants were nonetheless able to access the area for informal recreation. Mr Davis goes onto say that in the early 1960s the area was used for landfill before being covered with topsoil and left as *'rough grassland'* for several years. He says that in the mid-1980s *'the area was subject to more formal landscaping … which made it a safe and enclosed play area for small children …'*.

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54. In her statement at A/30, Gillian Ellis (who lives off Ongar Hill) says that when she was a child she could remember the application land being used as a rubbish tip until *'it was eventually landscaped to what we see today'*.

55. Michael Everett (who has lived at 42 Ledger Drive since 1983) says that in around 1985 *'the area was more formally landscaped'*. Prior to that time, he says that the application land, although still a sloping site, *'was undulating and very uneven. In general ground was open scrubland consisting of briar patches, various types of wild shrub – such as hawthorn, dog rose and elder, interspersed by fern patches, wild flowers, stinging nettles and long uncut grass. Seven mature oaks lined the north boundary, there were also a few trees at the east and south edges'*. He says that the result of the landscaping was that *'Most of the scrub was removed and the area was levelled and grassed although brambles and ferns remain on the western and part of the southern borders and there is a clump of hawthorn in the southwest corner. Some tree panting took place, notably there are three fine Hornbeams standing parallel to the Oak trees at the north end. Since the landscaping took place the open space has been regularly maintained'*. Mr Everett also says

that after the landscaping work had been carried out in 1985 a ditch was dug at the bottom of the site adjacent to the rear gardens of Nos.40, 42 (Mr Everett's home) and 44 Ledger Drive in order to prevent (evidently with limited success) run-off into these properties.

56. Mr Everett has also been making enquires of the objector of the earlier history. He has been able to discover from documents produced that the north-west and central areas of the site were covered by a disused clay pit which, by 1934, was partially filled with water. The ponds on the site were no longer present by 1966 having by that time been infilled. Mr Everett also produces a photo dated *'circa 1986'* at RA/B58 which shows the slope behind his back garden up to Marley Close. The annotation to this photo says this: *'Circa 1986 – Site is levelled and grassed and to the left of the open gate 2 young Rowan trees show above the fence and to the right beside the Oak tree trunk is a small Hornbeam tree'*. The 1986 photo shows an opening onto the application land in the Everetts' fence. There appears to be much less scrub and brambles on the west of the application land than exists today although by 2001 the growth appears to be increasing.

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Objector's evidence

57. As previously indicated, the objector called Mario Leo, its Corporate Head of Law and Governance. I shall deal with his evidence in some detail.

58. Mr Leo produces a conveyance dated 25/03/1948 between Frederick Bell and the objector's predecessor, the Urban District Council of Chertsey (OB/23). The conveyance plan is at OB/25 on which there is a reference (which is only partially complete – the objector did not have a better copy) on which (and the applicant did not challenge this) it is noted that the pink land was being acquired for housing purposes. The acquisition power in this instance would have been section 73(a) Housing Act 1936 under which a local housing authority is authorised to acquire land for public housing.

59. The pink land on the 1948 conveyance extends to a little over 10 acres between the rear of housing in Marley Close (which by then had already been developed) and Spinney Hill. In other words, land was being acquired for the

development of what would later become Ledger Drive, the whole of Copperfield Rise, Rudge Rise and a number of houses fronting onto Spinney Hill. The 1948 conveyance plan shows that the area was already in the course of development.

60. Mr Leo also produces a batch of older maps ending in mapping for 1934/35 showing barely any development at all. There are, however, what appear to be two ponds within what is described as *'Ongar Brick Field (disused)'*. If one looks at the map for 1914 one can see what is presumably intended to represent the old clay pit from where the clay was dug, to the south of which was 'Ongar Brick Field' where two kilns are clearly marked, as they are on the later map.

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61. From the outline of existing development in 1948, the pink land included most of the former disused clay pit (within which, in 1934/35, there were two ponds) and the undeveloped northern portion of the site known as *'Ongar Brick Field'*, the remainder of which had, by that time, become Marley Close. There is, however, one curiosity and that is that the pink land does not appear to extend the whole way up to Marley Close whereas, of course, the application includes the whole of the field adjoining Marley Close. The land falling outside the objector's registered title can be seen on the copy of their registered plan at OB/89 on which the objector's title is edged in red which shows those parcels edged in green which have been sold off over the years. I cannot see that anything turns on this in practice (the land in question is far too small to be registered as a TVG in its own right) even though the objector's holding powers would not extend to such land and, in the circumstances, I propose to deal with the application as though the whole of the application land belonged to the objector. No one knows who owns the land falling outside the objector's title and no one is claiming ownership of it.

62. Mr Leo produces planning application details for a grant dated 21/11/1949 for a *'Council housing site'* in Ledger Drive and Spinney Hill (OB/28). The plan for such grant (under planning ref: CHE.6460) shows no part of the application land and only the first part of Ledger Drive (OB/29). The deemed planning permission, albeit subject to approval of layout plans (for what is described as

a *'Municipal Housing Site'* – which required the authorisation of a government department), will be found at OB/30-32.

63. There is a layout plan produced by the authority's Engineer and Surveyor dated October 1949 on which there is a helpful outline of the remnant of the old brickworks' site which extended to what is now the site of Hare Hill Social Club and the whole of the application land (OB/37).

64. There is a letter of authorisation from the Ministry of Health dated 24/03/1950 at OB/33 (and it would have been a retrospective approval) which is given in relation both to the acquisition and development of what is described as a 3.2 acre parcel of land at Spinney Hill, Addlescombe for the purposes of the Housing Act 1936.

65. There is a further letter from the Ministry of Health dated 19/09/1951 (OB/34-35) which operates as an authorisation (again retrospective) for both a borrowing by the acquiring authority and the development (again subject to approval of layout plans) of what is described as 3.947 acres of land at Spinney Hill plus one dwelling which suggests a development in phases.

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66. There was a further planning consent in 1952 and, although the planning reference is different (CHE.7848), the development in question looks to be the same as that under application reference CHE.6460 in 1949. It is, of course, possible that it might have been a revised planning application or that the records are inadequate from which to plot the full history of the development of this site. Nothing turns on this.

67. However, Mr Leo does say in his statement at paras 12/13 (OB/17) that the whole of the land comprised within CHE.6460 had been developed *'as a council housing estate'* in 1948-51 and that the development comprised within application CHE 7846 involved another 32 houses for sale in the private sector.

68. At any rate, by 1967 the mapping history shows that, with the exception of the application land, the area acquired in 1948 had been developed (OB/41). There was also a structure on the site of Hare Hill Social Club which appears to have been enlarged by 1979 (OB/44) and one also sees that the garage

block had been built within the curtilage of the club site by this stage. The club site had also been fenced off from the application land by 1979 which, with the exception of the access point at the end of Marley Close (where a gap is shown on the map), seems to have been wholly enclosed by this stage. However, the two ponds shown on the 1960 map (OB/40) had gone by 1967 (OB/41).

69. Mr Leo then refers to the byelaws made in 1997 (OB/48 and 74). The application land is referred to under Schedule A at item 41, namely as *'Ledger Drive Open Space, Addlestone'* and in the case of this site and other open spaces the byelaws are stated to have been made under sections 12/15 of the OSA 1906). Although Mr Leo was unable to say when the current byelaws' notice was put up, he said in his oral evidence that regular inspections are carried out and included within such inspection would be any signs erected on site by the objector. Reference was made to the report of the Parks Manager dated 18/02/2002 on what is termed *'maintenance and inspection data including special problems'*. Under the sub-heading *'Signs – Seats and Bins'* the entry is *'Byelaws OK'*. These records were maintained by the Borough Secretary's and Leisure Services Department (see OB/89A). Curiously the same record dated 7/12/2001 states only *'N/A'* in the case of the same sub-heading which implies that the byelaws would have been posted on this site sometime between the two entries. I certainly do not accept the objector's submission that *'N/A'* meant no action was required in the sense that the byelaws were in fact on display. The same entry appears under *'Paths'* and *'Play Equipment'*, neither of which would be applicable in the case of the application land.

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70. Byelaws are undoubtedly posted on the application land now and they are highly likely to have been on display in 18/02/2002. There is also evidence of their existence in 2012 when, on 30/01/2012, the Campaign to Protect Rural England wrote to the objector indicating at OB/89C (at (vii)) that the *'Land at Marley Close, Rowtown'* was a *'public open space managed under the Public Health Act 1875 and the Open Spaces Act 1906. As long as residents respect the byelaws and otherwise don't break the law, anyone can use the land …'.* The same was said in a letter to the objector from a Mrs Hannah Lane dated

13/02/2012 (OB/89H at (vii)). What was said in both cases implies that the byelaws would have been on display in early 2012.

71. On the basis of the available evidence, my findings relevant to the issue of the communication of the byelaws are that the byelaws were on display on the application land in February 2002 and in early 2012. Although I am prepared to find that the byelaws are likely to have been on display for a prolonged period after February 2002 there is insufficient evidence for me to be able to find that byelaws were on display for the whole period between February 2002 and the relevant termination date under section 15(3) CA 2006, namely 18/10/2010. It was surprising that the objector has produced such limited evidence under this head but the evidence I have is, I think, all that was available from the objector on the issue of communication of the byelaws. For instance, no more reports like those at OB/89A-89AA have been found. 12

72. At paragraph 12 of his statement Mr Leo states that the objector has decided to sell the application land and a notice under section 123 Local Government Act 1972 ('LGA 1972') was duly advertised on two dates in January 2012 (OB/70-73). We are told that a developer has been chosen but because of the pending TVG application a contract has not been issued.

Objector's submissions on 'as of right'

73. Mr Chapman's closing submissions will be found at OB/13A.

74. He firstly submits that the application land (with the exception of the very small area abutting Marley Close which was not included within the 1948 conveyance) was acquired under the housing legislation (specifically section 73(a) of the Housing Act 1936 ('HA 1936') (which was superseded by the Housing Acts of 1957/1985 which are substantially identical for these purposes) which authorised a local authority to acquire land as a site for the erection of houses for the working classes) for housing purposes (section 72(1)(a) authorised a local authority to provide housing accommodation on any land acquired by them for the working classes). He says that this outcome arises from (a) the annotation on the conveyance plan (b) the planning history and (c) the fact that the majority of the land conveyed in 1948 was in

fact developed as a council housing estate pursuant to planning application ref: CHE 6460.

75. Mr Chapman cites *R (Malpass) v Durham CC [2012] EWHC 1934 (Admin)* for the proposition that where the conveyance does not expressly identify the statutory power under which the land was acquired then the relevant statutory power has to be identified or inferred on the balance of probabilities from the available evidence which, in this instance, points to the acquisition of land for housing purposes.

76. Mr Chapman then contended that the land, having been acquired for housing purposes, was made available by the objector during the 1980s as a public open space known as Ledger Drive Open Space. As the HA 1985 came into force on 1/04/1986 (section 625(2)), it is probable that the works undertaken to render this site available as a recreation ground or open space would have been authorised under the statutory regime contained in the HA 1957 which is to be found in section 93(1) (in the case of recreation grounds, albeit with the consent of the Minister) and section 107 (in the case of open spaces for which the consent of the Minister is not needed).

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77. Mr Chapman submits that the delay between 1948 and the date in the 1980s when the relevant landscaping works were undertaken is not material. He cites the fact that section 120(2) LGA 1972 (and before it section 158(1)/(2) of the 1933 Act) authorises (a) the purchase of land for housing purposes notwithstanding the fact that it is not immediately required for those purposes and (b) also authorises the use of the land for other purposes until it was required for housing purposes. It is not without significance either that in *Malpass* (see [15]) the land had been filled in and used as a reclamation site which was not thought to be inconsistent with an acquisition under the PHA 1875 or the OSA 1906. HH Roger Kaye QC said in *Malpass* that using the site for reclamation *'was merely preparing the land to be levelled and landscaped for use for recreational purposes'* as permitted under section 64 PHA 1875.

78. Mr Chapman argues that section 93(1) HA 1957 and section 12(1) HA 1985 authorises a local authority to provide and maintain in connection with any such housing accommodation, and with the consent of the Minister, recreation

grounds which, in the opinion of the Minister, would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided. This, he argues, empowered the objector to set out and maintain a recreation ground open to the public (*HE Green v Minister of Health [1948] 1 KB 34*). Mr Chapman accepts that there is no evidence one way or the other whether the Minister's consent was in fact obtained and he relies on the presumption of regularity. (I myself referred the parties to *R (The Noble Organisation Ltd) v Thanet District Council & Others [2005] EWCA Civ 782* in which at [42] and [43] the Court of Appeal addressed what was described as the principle of 'legal certainty' which will prevent administrative acts from being challenged long after they have been taken and acted upon.)

79. Alternatively, Mr Chapman relies on section 107 HA 1957 and section 13(1) HA 1985 which empowers a local authority to set out an open space on land acquired for housing purposes without ministerial consent. Mr Chapman argues that the principle in *HE Green v Minister of Health* must apply equally to an open space set out for public recreation under the housing legislation. The principle in *HE Green v Minister of Health* is that the fact that land may be used by those other than those for whose principal benefit the statutory power existed did not invalidate the exercise of that power. The objects of the statutory power in *Barkas* were those for whom the housing accommodation was to be provided who were described in Part V of the HA 1936 as *'the working classes'*. However, the fact that the general public also benefitted from land laid out as recreation grounds under section 80 of that Act did not make it any the less a beneficial purpose for the occupants of the relevant housing estate.

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80. Curiously the term *'open space'* is not defined under the HAs 1936/1957/85 but I fail to see why, in principle, sections 107 or 13(1) of the HAs of 1957/1985 respectively could not extend to land laid out as recreational open space in which case the principle of *Barkas* (see para/81 below) would also apply to relevant open space set out under the housing legislation for which the consent of the Minister is not required.

81. One then turns to *Barkas* and the principle that where, under statutory housing powers, a local authority creates and maintains a recreation ground (or open space) which is open to the public, then the public have a legal right to use the land in which case such use will be 'by right' and not 'as of right'. See Lord Neuberger at paras [12], [20] and [21] and Lord Carnwath at paras [64] and [65]. The principle is one which extends to any statutory holding power which authorises a local authority to allow land to be used by the public for recreation.

82. In *Barkas* the issue before the Supreme Court was where land is provided and maintained by a local authority pursuant to section 12(1) Housing Act 1985 or its statutory predecessors, is the use of that land by the public for recreational purposes 'as of right' within the meaning of section 15 CA 2006? In the event, the Supreme Court ruled that it was not. Mr Chapman says that *Barkas* is on all fours with the present case.

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83. Mr Chapman also contends that the 1997 byelaws impliedly granted permission to the public to use the application land for qualifying activity provided they were not prohibited by the byelaws and he relies on *Newhaven* – see Richards L.J at [69], [70], [73] and [74]. It is argued that the byelaws were made under sections 12/15 of the OSA 1906 which empower the making of byelaws in respect of recreation grounds or open spaces held under housing powers. He says that the byelaws in this instance were stronger than the byelaws in *Newhaven* in that (a) according to their heading they deal with pleasure grounds, public walks and open spaces (b) their contents are concerned with the protection of land which is being used for harmless recreation, and (c) power is reserved (i) by byelaw 2 to close the land to the public and (ii) by byelaw 19 to set aside areas for the playing of games.

84. Mr Chapman argues that the implied permission was communicated to the public by the fact that the byelaws were displayed on the application land which, as I have already found, was likely to have been the case in February 2002 (see OB/89A) and in early 2012 (see OB/89C-89H) which falls, of course, after the relevant termination date for the purposes of section 15(3) CA 2006, which is 18/10/2010. He therefore argues that the use of the

application land was permissive and therefore not 'as of right'. In his oral submissions he argued that there was no evidence that the byelaws were not displayed on the land during the qualifying period.

Applicant's submissions on 'as of right'

85. The applicant accepts that recreational use of the application land pursuant to a statutory right to recreate is not use 'as of right'. It is conceded by Mr Bowes that if the application land had been (a) acquired for housing purposes under section 73(a) HA 1936 and (b) was laid out as a recreation ground with the consent of the Minister and (c) was subsequently held under section 12 HA 1985, then the use of the application land would be 'by right' and not 'as of right'.

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86. Mr Bowes rightly submits that the mere fact that land in public ownership is used for recreation is not enough to take it out of the CA 2006. *Oxfordshire County Council v Oxford City Council [2006] 2 AC 674* (the 'Trap Grounds' case) is in point. In *Barkas* Lord Carnwath said at [66] that the difference was that the Trap Grounds had not been *'laid out or identified … for public recreational use'.*

87. For his part, Lord Neuberger (at [46] and [47]) distinguished *Barkas* from *Beresford* on the basis that in *Beresford* the land had (at least as the House of Lords concluded) been acquired for no particular use and had never been appropriated for public recreational use, whereas in *Barkas* the land had been 'appropriated' in the sense of having been allocated or designated as public recreational space under a specific statutory power, namely section 80(1) HA 1936, now of course section 12(1) HA 1985 (see [46] and [47]).

88. Mr Bowes submits that in *Barkas* the land in question was laid out and maintained as a recreation ground with the consent of the Minister. It appears that at the time of the original non-statutory inquiry in *Barkas* this had been assumed by Mr Chapman (who had been the inspector) but in point of fact evidence that the Minister had in fact consented to the use of the land at Helredale Road in Whitby for these purposes was actually found. In contrast, he argues, the application land was not originally laid out or allocated as a

recreational open space from its former use as a clay pit and indeed for a substantial period ending in the early 1980s prior to the commencement of the relevant 20 year period, the land had been used as a rubbish tip, which use is plainly inconsistent with recreation. Mr Bowes says that it is only where land is held for public recreation under the housing legislation and used for that purpose, that the use is 'by right'.

89. Mr Bowes argues that the crucial question in this case is whether the land has been 'allocated or designated' for public recreation in the *Barkas* sense or whether it has been held for an inconsistent purpose of for no particular purpose at all yet has merely been used for recreation without any formal or (as I understand him to be saying) implied appropriation for this purpose arising from some formal step or resolution of the authority.

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90. There is no suggestion that the application land has ever been the subject of an express appropriation under section 122 LGA 1972. Whether there is any scope in law or on the facts of this case for an inferred (or informal) appropriation is now academic in view of the fact that Mr Chapman made it clear that he does not rely on appropriation, whether express or implied. It is his case that the land was acquired and has always been held for housing purposes. The question for decision in this case is whether the application land had been (as it was variously put in *Barkas*) *'lawfully allocated'*, *'designated', 'validly and visibly committed'* or otherwise *'laid out or identified'* by the authority for public recreation under statutory powers (see para/29 above)?

91. In order to prove that the application land had been used for recreation under the housing legislation, Mr Bowes argued that the objector had to show that a positive administrative step had been taken by the local authority that the land would be made available for such purpose. Mr Bowes cited Sullivan L.J at [43] in *Barkas* in the Court of Appeal where he spoke of *'a formal decision'* being taken that the land should be used *'for some other housing purpose'*. Indeed, in the Supreme Court at [24] Lord Neuberger also referred to land which had been *'lawfully allocated'* for public use which Mr Bowes argued was consistent with the necessity for the objector to point to an express decision of the

authority which clearly indicated an intention that the land should be held for public recreation. Anything less than this would not do if the objector was going to rely upon an informal appropriation in what I understood him to mean the looser or *Barkas* sense.

92. Mr Bowes argued that that the objector could point to no decision of the authority as to how such land would be held, nor had it supplied any minutes, notes or officer's reports which might have provided a commentary upon which a necessary intention might be implied. Mr Bowes says, I think, that the facts of this case are analogous with those cases already mentioned where user 'by right' was not inferred merely from the management and use of land for recreation. As Mr Bowes puts it, to draw an inference without such a positive administrative step being taken on the part of the authority would be to read into subsequent conduct an intention that is simply not there.

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93. As I understand Mr Bowes's argument, what is required is a resolution or decision of the authority or, at the very least, documents from which to infer the exercise of statutory powers under the housing legislation in order to justify a finding that the application land had been (as explained in *Barkas*) *'lawfully allocated'*, *'designated'*, *'validly and visibly committed'* or otherwise *'laid out or identified'* by the authority for public recreation. The fact that the authority had powers to do these things is not enough. There must be evidence that it had in fact taken a decision to exercise these powers ie for there to have been a *'lawful allocation'* of such land for recreation. In the result, what we are left with, Mr Bowes argues, is land which is owned by the objector which has previously been held for a purpose inconsistent with recreation, which has merely been used for public recreation and the authority has merely acquiesced in such use. He says that there is no evidence that the application land has ever been appropriated in the formal or looser sense onto public recreation (still less that the Minister ever consented to the use of the land as a recreation ground) and, as a consequence, the situation is, as he says, on all fours with the Trap Grounds case and not with *Barkas*.

94. Mr Bowes speculates that the improvement of the application land for recreation may have been to make the land safe as opposed to the deliberate

exercise of Housing Act powers. At any rate, he argues, there has been no administrative decision from which to apply the principle of legal certainty in order to overcome the absence of an express consent from the Minister. Mr Bowes also argues that the decision in *HE Green v Minister of Health* is not even applicable as it does not (as I understand his argument) impact on the basis on which land is held.

95. Mr Bowes says that there is no evidence that the application land was ever laid out or allocated as a recreation ground at the time it was acquired. Thereafter it was used as a refuse site after which it was never lawfully allocated as a recreation ground or as recreational open space from which it follows that the public's use has been 'as of right' and not 'by right'.

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96. In relation to the issue of implied permission arising from the display of the 1997 byelaws (ie as an overt act of communication to local inhabitants), Mr Bowes contends:

(a) that they were not made under section 23(2) HA 1985 (in fact they are inconsistent with the land being held as housing land insofar as they purport to have been made under sections 12/15 OSA 1906);

(b) they are of little relevance in determining whether the application land had in fact been provided and maintained by the objector pursuant to section 12(1) HA 1985 or its statutory predecessors;

(c) that it is unclear that the byelaws even apply to the application land (he says that a number of byelaws would not even apply to the land);

(d) that it is unclear what the reference to the byelaws in 2002 in OB/89A actually means;

(e) there must have been a time when the byelaws were not adequately communicated; and

(f) byelaws 2/19 require a further decision to be taken by the objector whereas the prohibitions in *Newhaven* had immediate effect.

Discussion

97. I am quite satisfied that the applicant has established that the application land has been used for lawful sports and pastimes for a period of at least 20 years ending on 20/11/2010. The issue at this stage is whether they did so 'as of right' within the meaning of section 15(3) CA 2006. If they did then there will have to be a resumption of the inquiry in order to deal with the issue of locality / neighbourhood which the objector still disputes.

98. The 'as of right' issue falls under two separate heads. Firstly, that arising under *Barkas* and, secondly, the issue of permissive use. I shall deal with my conclusions on each in turn.

99. It is plain and obvious, in my view, that the application land was acquired by the objector's predecessor under the housing legislation, namely section 73(a) HA 1936, under which a local housing authority is authorised to acquire land for public housing. It was, I think, common ground at the inquiry that the land had been acquired in 1948 as housing land which, as Mr Leo told us, was, with the exception of the application land, developed as a council housing estate in the period 1948-51.

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100. There is no evidence that the land was acquired for any purpose other than for housing and the notation on the conveyance plan, the planning history and the fact that the majority of the land conveyed in 1948 was in fact developed as public housing is entirely consistent with the land (which included the application land) having been acquired for housing purposes.

101. In my view, the application land has always been held for housing purposes and will remain so held until such time as it is either formally appropriated on to some other statutory purpose under section 122 LGA 1972 or otherwise sold as being surplus to requirements. Mr Chapman was, in my view, right not to advance an alternative argument that the application land had been impliedly appropriated onto the purposes of section 10 OSA 1906 as a result of its management and use for the purpose of public recreation, not least the fact that byelaws had been made in relation to such land under powers contained in the OSA 1906.

102. The crucial question is whether the objector exercised its statutory powers to make the land available to the public for the purposes of informal recreation. This is it could do under section 93(1) HA 1957 and (after 1/04/1986) section 12(1) HA 1985 which authorises a local authority (with the consent of the Minister (1957 Act) or Secretary of State (1985 Act)) to provide and maintain in connection with any such housing accommodation, recreation grounds which, in the opinion of the Minister, would serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided.

103. These provisions empowered the objector to set out and maintain a recreation ground open to the public. Although there is no evidence one way or the other whether the necessary consent was in fact obtained, the objector is, in my view, entitled to rely on the presumption of regularity or of legal certainty which operates to preclude administrative acts from being challenged long after they have been taken and acted upon (*Thanet* at [42] and [43]).

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104. Alternatively, Mr Chapman is, in my view, entitled to rely on section 107 HA 1957 and (after 1/04/1986) section 13(1) HA 1985 which empowers a local authority to set out an open space on land acquired for housing purposes without obtaining ministerial consent. I agree with him that the principle in *HE Green v Minister of Health* must apply equally to an open space set out for public recreation under the housing legislation.

105. Although the term 'open space' is not defined under the HAs 1936/1957/85, I fail to see why sections 107 or 13(1) of the HAs of 1957/1985 respectively could not extend to land laid out as recreational open space in which case the principle of *Barkas* (which I address below) would also apply to public open space set out under the housing legislation for which consent is not required. I see nothing in the legislation which requires me to construe the term 'open space' where it appears as not applying to recreational open space. On the face of it, the term is, I think, capable of applying to all manner of open spaces, whether used by the public for recreation or not.

106. The principle in *Barkas* is clear. It is that where under statutory housing powers, a local authority creates and maintains a recreation ground or, as I find, an open space which is open to the public, then the public have a legal right to use the land in which case such use will be 'by right' and not 'as of right'. The principle clearly extends to any statutory holding power which authorises a local authority to allow land to be used for public recreation.

107. *Barkas* was concerned with land which was provided and maintained by a local authority pursuant to section 12(1) HA 1985 or its statutory predecessors. In my view, Mr Chapman is right when he says that *Barkas* is on all fours with the present case.

108. The evidence, not least of the applicant's witnesses (Anthony Davis, Michael Everett and Gillian Ellis), shows that before the area was developed, the application land, with other land close by, had been the site of a disused clay pit which, by the mid 1930s, contained one large and a smaller pond on what is now the site of social club and car park. By the time Mr Davis came to live at Marley Close in 1955 the application land consisted, as he put it, largely of a stagnant pond to the east of which was a series of shallower lagoons. Even then, he says, local inhabitants were still able to access the area for informal recreation.

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109. Mr Davis then says that in the early 1960s the area was used for landfill before being covered with topsoil and left as rough grassland for several years. This is consistent with a report prepared for the objector in 2011 (which Mr Everett obtained) in which it is stated that the ponds on the site were no longer in existence by (as it is put in Mr Everett's statement at A/33 – the report itself was not before the inquiry) *'1960 to 1966 and it is considered likely that infilling may have occurred in this time'*. Indeed, no ponds are shown on the 1967 map at OB/41.

110. Mr Davis also says that in the mid-1980s the area was landscaped. Gillian Ellis also says that when she was a child she could remember the application land being used as a rubbish tip until it was eventually landscaped. Mr Everett says that in around 1985 the area was more formally landscaped. He says that the result of the landscaping was that most of the scrub was cleared

(although some remained on the western side) and the area levelled and grassed. Some tree planting also took place. He says that since the landscaping took place the area has been regularly maintained. Mr Everett also mentions the excavation of a ditch (and bund) at the bottom of the site in order to prevent run-off into properties in Ledger Drive.

111. It seems clear that the application land was landscaped sometime in the mid-1980s (most probably before 1986 – see RA/B58) in order that it would be suitable for public recreation in the longer term. Before that time the application land was, as Mr Everett describes, still a sloping site but it *'was undulating and very uneven'*. In general, he says, the ground *'was open scrubland consisting of briar patches, various types of wild shrub – such as hawthorn, dog rose and elder, interspersed by fern patches, wild flowers, stinging nettles and long uncut grass'*. The landscaping works and the subsequent maintenance of the land by the objector seem to me to have transformed this site into the valuable local amenity that it is today. As I discovered on my own inspection of the site, the ground is level and easy to walk on and although the scrub / brambles on the western side are fairly dense this is very much a feature on the land rather than evidence of its neglect.

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112. At para 29 I indicated that the question arising from the decision of the Supreme Court in *Barkas*, was whether the land had been (as it was variously described in that case) *'lawfully allocated'*, *'designated', 'validly and visibly committed'* or otherwise *'laid out or identified'* by the authority for public recreation under statutory powers? In my view, the answer to this is clearly that it must have been. It is, I think, inherently unlikely that the application would have been used for recreation since the 1980s without a conscious decision being made by the authority which resulted in it being landscaped and thereby visibly committed for public recreation. The maintenance of such land and its use as public open space over the last 30 years or thereabouts, its enclosure and the making of the byelaws in 1997 are, in my view, entirely consistent with the allocation or designation of this land for public recreation under Housing Act powers.

113. It is not unreasonable for Mr Bowes to question the absence of an express decision by the objector that the application land would be allocated for public recreation in the form of, for instance, minutes, notes or officers' reports dealing with the status of this land and/or of decision-making which concerned its wholesale improvement and the object of such works. In my view, there is bound to have been a budget earmarked for the cost of these works and I can scarcely imagine that a sizable tract of land such as this would have been landscaped without any reference to this fact in the minutes of the responsible committees, yet no documents were produced by the objector.

114. I was not told, for instance, whether there had been a trawl of the available minute books for the period in question and that that had come up with nothing of interest. All I was told, in effect, was that the contents of the objector's bundle was all that the inquiry had to work with. This was unfortunate as I simply cannot accept that what occurred here in the 1980s, not least in view of what it is bound to have cost the objector and the time which it is likely to have taken, was not the result of a conscious decision on the part of the objector to improve the application land in order that it might become a place for public recreation in the *Barkas* sense. I am, therefore, forced to make assumptions about what is likely to have occurred on the balance of probabilities. The decision of the objector to make byelaws in 1997 as to the regulation of the application land as a place for public recreation is clearly very significant and consistent with my finding on the status of this land from at least the 1980s.

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115. The case on 'as of right' also fails on the ground of permissive use. Mr Chapman argues that the 1997 byelaws impliedly granted permission to the public to use the application land for lawful sports and pastimes which were not prohibited by the byelaws and he relies on *Newhaven.* The same argument was advanced by the objector in the Murray House Play Area TVG application (ref: 1868) which involved the same byelaws and I repeat what I said in my report on that application.

116. The byelaws were made under ss.12/15 OSA 1906 and although a standard form will only apply as appropriate. The byelaws have as their object, when

looked at collectively, the protection of land for informal recreation by forbidding activities which are harmful to such recreation.

117. It is clearly relevant that byelaw/2 impliedly reserves power to close the application land if a suitable notice is put up which surely implies a license to permit access whenever it is not closed. One also sees that the use of the children's play area is restricted to those under the age of 14 and to those in charge of such children (byelaw/11). At byelaw/19 the authority are also in a position to regulate the use of the land for games, including the setting apart of an area for the playing of specified games, which implies that various activities might be restricted in these and other areas.

118. I think that Mr Chapman must be right when he argues that the application land was subject to byelaws which were sufficient to render use of the application land permissive and therefore not 'as of right'. As I said in the Murray House Play Area application, I consider that the effect of the byelaws is that the objector is impliedly permitting the use of its land in the case of those activities which are not prohibited or otherwise constrained by regulation.

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119. The question then is whether these byelaws were sufficiently communicated to the public during the qualifying period. In my view (a) no one could reasonably think that these byelaws did not apply to the application land, and (b) because I find that the objector must have taken reasonable steps in 2002 to communicate the existence of the byelaws to the public for what is likely to have been a sufficiently prolonged period during the qualifying period, it seems to me that the issue of communication of the byelaws is made out.

120. The objector does not have to show that these byelaws were displayed on the application land for the whole of the period between 1997 (when they were made) and the time when qualifying use under section 15(3) is alleged to have ended, namely on 18/10/2010. It is enough, in my view, if there was evidence that the byelaws were on display and, in view of the entry in the note of the report of the Parks Manager dated 18/02/2002, it is, I think, probable that they must have been on display for a long enough period sufficient to stop time running when it came to qualifying user for the remainder of the

qualifying period for which, as it seems to me, a period of only a few months would probably suffice.

Summary

121. I find that the applicant has failed to prove that use of the application land for lawful sports and pastimes during the whole of the qualifying period (1990-2010) had been 'as of right'.

122. Put shortly, my reasons for this are as follows:

(a) the application land was acquired by the objector's predecessors in 1948 for housing purposes;

(b) sometime in the early to mid-1980s the objector had, in relation to the application land, used its statutory powers under either:

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(i) section 93(1) HA 1957 and section 12(1) HA 1985 which empowers a local authority to provide and maintain recreation grounds on land held for housing purposes, or

(ii) section 107 HA 1957 and section 13(1) HA 1985 which empowers a local authority to set out an open space for recreation on land acquired for housing purposes.

(c) The absence of the consent of the Minister (1957 Act) or the Secretary of State (1985 Act) under (b)(i) is not fatal to the objector in view of the presumption of regularity or of legal certainty which will prevent administrative acts from being challenged long after they have been taken and acted upon.

(d) The exercise of the foregoing Housing Act powers engages the decision of the Supreme Court in *Barkas* which is that where land is provided by a local authority under a statutory holding power which empowers the authority to allow the land to be used by the public for recreation then the public's use will be 'by right' and not 'as of right'.

(e) As a result of *Barkas*, the public's use of the application land during the qualifying period was such that it could not qualify for registration as a TVG.

(f) The 1997 byelaws impliedly granted permission to the public to use the application land for activities which were not prohibited or otherwise subject to regulation. The implied permission was communicated to the public by the fact that the byelaws were displayed on the application land in February 2002 for a period sufficient to stop time running when it came to qualifying user (even if this had been possible) 'as of right'.

Recommendation

123. In light of the above discussion, I recommend that the application to register the application land (being application no.1868) should be rejected.

124. Under reg.9(2) of the 2007 Regulations, the registration authority must give written notice of its reasons for rejecting the application. I recommend that the reasons are stated to be *'the reasons set out in the inspector's report dated 24th July 2014'*.

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William Webster

12 College Place

Southampton

Inspector **24th July 2014**

APPENDIX/1

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Scale: 1:1250, paper size: A4

APPENDIX/2

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Chertsey South & Rowtown
CSRT2
CSRT3
CSRT1
Row Town
CHERTSEY SOUTH AND ROWTOWN WARD
ROWTOWN NEIGHBOURHOOD -25-

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