IN THE MATTER OF AN APPLICATION TO REGISTER LAND AS A TOWN OR VILLAGE GREEN DESCRIBED IN THE APPLICATION AS 'MURRAY HOUSE PLAY AREA' AT PALMER CRESCENT, OTTERSHAW, SURREY

– APPLICATION NUMBER 1868 –

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

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 one acre parcel of amenity open space located at Palmer Crescent in Ottershaw ('the application land'). The application is made pursuant to the provisions of section 15(3) of the Commons Act 2006 ('the CA 2006') on the footing that qualifying user had ceased by the time the application came to be made in November 2012.

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2. The application land is shown edged and hatched red on the plan at B10 in the registration authority bundle (RA/B10). It is also shown edged brown on the applicant's neighbourhood plan which will be found at Appendix/1 ('App/1') together with photos (aerial and street view) at Appendix/2 ('App/2'). There are photos in the objector's bundle (OB) at OB/102-111 but I have included those within App/2 as I do not have the objector's bundle in an electronic format and it will also make the site clearer to understand for those reading this report without access to the inquiry bundles.

3. The application in Form 44 was made by Mrs Susan Lewis who lives at 22 Palmer Crescent, Ottershaw ('the applicant') and is dated 19/11/2012 (RA/B1). The registration authority acknowledged receipt of the application and accompanying documents on 20/11/2012. It was accompanied by the

original neighbourhood plan which comprised the whole of the area shown on the map at RA/B10. 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. In other words, the application was made under section 15(2). The application (which was supported by the evidence of those who completed the 38 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').

4. After being instructed by the registration authority I gave directions on 15/04/2014 dealing with the procedure at a public inquiry on 30/06/2014 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 that the application failed to fulfil two of the statutory requirements for section 15(2), namely (a) the *'as of right'* requirement, and (b) the *'locality/neighbourhood'* requirement.

5. At the inquiry, however, the objector accepted that the locality/neighbourhood requirement was made out. It did so on the basis of the amended neighbourhood plan at App/1.

6. At the inquiry the applicant also amended the basis of the application on the footing that qualifying user had in fact ceased on 20/11/2010. The necessity for the amendment arose from a late amendment which the objector made to its summary of legal arguments in which it claimed that recreational use of the application land had been permissive and not *'as of right'* since permission had been impliedly granted by the byelaws which, it claimed, had been prominently displayed on the application land for many years on one side of

the blue sign shown in the photos in App/2 and at OB/106 (which the applicant did not accept). To overcome this objection, the applicant was contending that the termination date of qualifying use had been on or about 20/11/2012 otherwise the applicant was not going to be able to prove that qualifying use had continued to the date of the application.

7. I found the applicant's choice of termination date for qualifying use rather vague. However, no objection was taken to the application to amend to ensure that the application proceeded under section 15(3) rather than section 15(2). It seemed to me that the amendment and the objector's agreement to this course of action was reasonable since the byelaws had undoubtedly been on display before the application was made. At any rate, this explains the somewhat random choice of termination date in order to bring the application under section 15(3).

8. I am content to recommend to the registration authority that it should allow the applicant: (a) to amend her claim to show that she is relied on section 15(3) instead of section 15(2) CA 2006, and (b) to amend her locality / neighbourhood claim to show that she relied on neighbourhood A or neighbourhood B as shown on the plan at App/1, both of which fall within the locality of Foxhills Ward of Runnymede Borough Council. I will deal with this later as although the objector does not dispute either of the claimed neighbourhoods, the registration authority still has to be satisfied that all the relevant qualifying criteria under section 15(3) CA 2006 are met. The situation is the same in relation to the objector's concession on qualifying lawful sports and pastimes and I will similarly have to deal with this later but the fact that the objector has chosen to withdraw its objection to all save the *'as of right'* issue means that I do not have to over-elaborate on such matters.

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9. Following the public inquiry I also visited the application land and the claimed neighbourhood(s) and I am confident that I am as familiar as I need to be with both in light of the central issue which is whether the applicant is able to show that use of the land by local inhabitants for informal recreation had been (as is required by section 15(3)) *'as of right'* and not *'by right'*.

10. The public inquiry duly took place on 30/06/2014 at the Runnymede Centre. Representation at the public inquiry 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 also taken from three witnesses in relation to the byelaws. I will deal with this later. 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.

Legal framework

11. Section 15(3) 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.

12. Section 15(3) applies where -

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'(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.

14. One then looks at the various elements of the statute.

'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*). In the *'Trap Grounds'* case (*Oxfordshire County Council v Oxford City Council [2006] UKHL 25*) Lord Hoffmann pointed out the *'deliberate imprecision'* of the expression.

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*) (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.

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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] and *Paddico (267) Ltd v Kirklees Metropolitan Council [2011] EWHC 1606 (Ch)* at para 97(i).

'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.

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.

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:

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'… 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').

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'.

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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 the *'Trap Grounds'* case (namely that of *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'.*

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 November 1990 – November 2010.

Procedural issues

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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.

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.

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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 is 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*).

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 the application land has the benefit of an outline planning permission for development granted on 15/02/2012. The permission provided for a replacement play area and kick-about area and although a purchaser has been selected, contracts have not been exchanged owing to the intervention of the application to register.

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Description of the application land and neighbourhoods

44. As previously indicated, the application land is the area edged in brown on App/1. There are also photos at App/2 and at OB/102-111. The application land is grassed and is a little under one acre. Although open on its road frontage it is fenced elsewhere. I counted nine trees, two bins for dog faeces and a single rubbish bin. Within the central area there is an enclosed play area with benches and children's play facilities. The fencing is wire mesh which is held in place by concrete posts. There is a blue sign close by the road frontage. On one side of the sign the objector welcomes users to the application land (which is named) and a contact number is given in case problems are encountered. There is a plea that the *'park'* should not be misused and for the byelaws to be observed, a copy of which is said to be displayed on the reverse which they were, both at the time the photo at OB/107 was taken on 29/01/2013 and at the time of my inspection at around

6pm on 30/06/2014. The sign is merely stuck on and can be removed fairly easily. I shall come back to these byelaws later.

45. The application land is a custom-built recreation ground. There were a number of children playing there when I visited and I have no doubt that it is a valuable local amenity in what is a heavily built-up area.

46. I visited the claimed neighbourhoods shown on App/1. The area includes a number of recent housing developments of varying styles and sizes surrounded by roads. Slade Road and Brox Roads are distributor roads whereas Murray Road is the B3121 which intersects the A320 Guildford Road at the roundabout just beyond the north-west corner of neighbourhood A. At the northern end of Brox Road there are shops on both sides of the road (including restaurant, takeaway, dentist, hairdressers, chemist and social club). Neighbourhood B lies within neighbourhood A and consists only of Palmer Crescent, Escott Place and Tucker Road which, I gather, was built as an estate by Laing Homes in 1988 (see A/29). The applicant, who used to live opposite the application land at 22 Palmer Crescent but who now lives at 218 Brox Road (since 23/05/2014), describes neighbourhood B as *'a safe cohesive micro community'* (A/31).

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47. In my view, the objector's concession on neighbourhood was rightly made. Having seen the area for myself, I am satisfied that the larger neighbourhood A is cohesive, identifiable and recognisable as a community in its own right whereas the smaller neighbourhood claimed is very probably too small to be a neighbourhood in law and was probably only included merely because most, if not all, of the applicants witnesses live within these three streets. In my view, it is probable that the application land is being regularly used by local people living away from the three streets comprising neighbourhood B although I readily accept that it is, in all probability, mainly those living close by who are using it the most since the open space provision locally is somewhat limited (I gather that the busy A320 has to be crossed to access to Memorial Fields).

48. I also bear in mind the contents of the statements at A/25-35 which very sensibly focus on the neighbourhood issue without which there would be no evidential basis for the amended neighbourhood claim. Without descending

into unnecessary detail these witnesses deal with the importance of the application land to their local community and, having visited the area myself, I am satisfied that it is probable that neighbourhood A is a qualifying neighbourhood in law and that the objector's decision not to dispute this issue was correct.

Applicant's evidence

49. The written evidence comprises (a) the 38 completed questionnaires that were lodged by the applicant with her application and (b) the 9 additional witness statements provided by witnesses whose evidence also dealt with the neighbourhood issue and included statements from the applicant and her husband. As the application land is and has for many years been a dedicated public play area it is hardly surprising that the objector is not disputing that it has been used for qualifying informal recreation throughout the claimed qualifying period. Put shortly, I am quite satisfied that the application land has been used for lawful sports and pastimes during the qualifying period.

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50. Oral evidence was, however, called by the applicant from two witnesses on the byelaws. The central issue here was one of public notification.

51. **Patricia Simes**, who has lived at 9 Palmer Crescent for around 13 years (ie since 2001) (her statement is at A/35) said in chief that the current byelaws shown on the notice on OB/107 has not always looked like this. She said that there had been an earlier notice but it had been so weathered that you were unable to read its contents. She said that the new rules shown on OB/107 are in stark contrast to this. She thought that the current notice was put up in 2012. She did not think that it had been there for as long as two years.

52. When cross-examined, she accepted that for as long as she had lived in the area she had known that byelaws applied to the application land (she was referred to the reference to the byelaws on the photo showing the reverse side of the same blue sign on OB/108 – *'Please Observe the Bylaws'*) although she had been unable to read the old notice until the new one had been put up. She certainly did not accept that byelaws' notices had been replaced *'from time to time'*. She was though referred to OB/96 (which is a

maintenance report on the condition of the application land that was completed by the objector's Parks Manager on 18/02/2002 in which he noted: *'New byelaws stuck on sign'*) but she was unable to reconcile this with her evidence in chief. At any rate, she seemed sure that the byelaws' sign had not been replaced in 2002 as she claimed that she had been unable to read the byelaws until the present notice was put up.

53. I was told by the objector that the 2002 record is all they have when it comes to the actual posting of byelaws' notices on the application land. There is, for instance, no record of when the current sign was put up or, for that matter, whether it replaced the sign that was put there in 2002;

54. I have no doubt that Ms Simes was a genuine witness who was doing her best to assist the inquiry. The concern I have is that a record actually exists showing that a new byelaws' notice was on display in 2002 and it seems to me that if, as she claims, she was a regular user of the application land then she is bound to have seen it. She did, after all, say that *'my dog likes that sign'*. She speculated on the possibility that the 2002 sign might have been defaced or torn down by vandals but there is no evidence that the application land had suffered through the activities of vandals.

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55. Oral evidence was also given by **Stephen Henderson** who, since December 2009, has lived at 24 Palmer Crescent. His written statement will be found at A/27. In chief he said that he was very familiar with the blue sign at OB/106 although he accepted that he did not generally look at the byelaws notice which he said was *'quite weathered'*. He was though aware that the notice contained *'a list of restrictions'* which were *'not very legible'*. He thought that the current byelaws' notice was put up *'in the first few months of 2012'*. He only glanced at the previous notice which he said was not very legible.

56. It emerged in cross-examination that Mr Henderson had never really studied the words on the byelaws' notice (that is, when it was legible). He could not say whether the notice was legible when he moved to Palmer Crescent in December 2009. He did though say that he did look at it but not in any detail before March 2011. He was more interested in his dogs (he had two dogs) whom he walked around the application land and the neighbourhood. Mr

Henderson said, however, that the idea of the local community opposing any development on the application land only really began after the issue of the objector's notice (under section 123 of the Local Government Act 1972 – 'LGA 1972') stating that it intended to dispose of such land for development, which had been issued in March 2011. He said that it was only at this point that *'local people became more interested in the land and any signage on it'*. It seemed to me that he implied that this was the position in his case. In a broad sweep at the end of his cross-examination he accepted that in 2009 the byelaws' notice was weathered and that it was only when the new notice went up that he noticed it although he cannot say that he read it all from start to finish. He was though aware of some of the restrictions in the use of the application land.

57. Mr Henderson was clearly a genuine witness. On the face of it, his interest in the byelaws only really began once he learned, in around March 2011, that the objector was proposing to sell the application land for development. He would though have been aware, albeit in general terms, that the application land was subject to byelaws and that he could have read them if he wished.

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58. The objector called Mario Leo, its Corporate Head of Law and Governance, to give oral evidence in addition to tendering his helpful and extremely comprehensive statement which begins at OB/17 (Mr Leo has only been with the objector since 2009). At this stage, I propose to deal only with what Mr Leo said about the byelaws. On the photo at OB/108 he noted that the telephone number of the objector's offices at Addlestone had been changed and that the number shown is the old switchboard number which was changed in 2008 before the main offices moved. Whether this may be material or not, he thinks that the current byelaws signs could have been put up in 2012 and is likely to have been replaced from time to time whenever the existing signs became too worn to be legible or were defaced. He takes this to be the case from the 2002 internal report at OB/96 although there are no other documents dealing with this.

59. Mr Leo added that the choice between the references to the enabling powers for such byelaws contained in the PHA 1875 and the OSA 1906 (and the

enabling powers in this instance were expressed to be sections 12/15 of the 1906 Act – see OB/86) depended on the basis on which the application land had been acquired).

60. On the basis of the available evidence, my findings relevant to the issue of the communication of the byelaws are as follows:

(a) that new byelaws' notices were displayed on the blue sign shown in OB/106 in or about (i) February 2002 and again (ii) in or about 2012;

(b) it is impossible to say for certain whether any new notice would have been posted between 2002 and 2012 but this is a distinct possibility;

(c) there is no evidence of vandalism or of any interference with the byelaws' notices;

(d) the byelaws' notice posted in 2002 is bound to have weathered and become less easy to read over time, as was the case before 2012 when the notice in place at that time had become so badly weathered that it needed to be replaced;

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(e) the objector took reasonable steps in 2002 to communicate the existence of the byelaws to the public – it was under no obligation to do other than prominently display a new byelaws' notice whenever the previous notice had become so damaged or weathered that it would have been difficult to read, as is likely to have been the case in 2012;

(f) because of the prominent position of the blue sign shown OB/105-9/11 and to the painted references to the byelaws on both sides of the sign, reasonable users of the application land would or ought have been aware of the fact throughout the qualifying period that the application land was subject to byelaws and thus to regulation in the manner of its use even if they did not actually choose to read the byelaws' notice which, for a prolonged period during the qualifying period, would have been legible.

Objector's evidence

61. The evidence is comprised within Mr Leo's statement dated 10/06/2014 and the accompanying exhibits.

62. The application land was formerly within the hospital grounds of a nurses home known as Murray House which was redeveloped by Laing Homes in the late 1980s/early 1990s under a detailed planning application dated 19/12/1985 bearing the reference RU.85/1121 (there was in fact a further planning application RU.85/1122 which involved fewer dwellings but it is not relevant as the open space provision was included within RU.85/1121). The scope of the planning application is to be found at the top of OB/22 and involved a substantial mixed residential development which included what was described as *'play areas and open space'*.

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63. The objector agreed to grant planning permission subject to (amongst other things) *'(iii) the provision and future maintenance of the incidental open space, play areas, 'kick about' area and the landscape/ planting within the communal areas of the estate'* (see OB/26). There then followed an agreement dated 5/02/1986 made under section 52 of the Town and Country Planning Act 1971 (the *'section 52 agreement'*) under which (see third schedule at paragraph/6) Laing Homes agreed to lay out play areas totalling 0.25 acres and what was described as a *'kick-about'* area of approximately one acre *'such areas to be equipped in accordance with a specification to be provided by the objector's Borough Engineer and Surveyor after submission of a detailed planning application'*. The relevant paragraph within the section 52 agreement went on to provide that the specific location of both areas was to be agreed with the objector's Borough Planning Officer and that Laing Homes was to be responsible for the maintenance of these areas until they were transferred to the objector (see OB/35).

64. A second section 52 agreement superseded the earlier agreement on 19/06/1986 under which Laing covenanted as follows: (at cl/2) to comply with the obligations (which were expressed to be permanent) contained in the third

schedule which, at paragraph/5, required Laing Homes *'To lay out the Play Areas (totalling approximately 0.25 acres) The Open Space Area (of approximately 1 acre) and all other communal areas forming part of the Development the location of the Play Areas and the Open Space Area to be in accordance with Plans A and B annexed to the Specification Details'* (see OB/41). At paragraph/6 Laing Homes also covenanted to be responsible for the maintenance of these areas until such time as the objector took a transfer of the Open Space Area which it had agreed to accept under cl/3.

65. The specification details for the amenity areas will be found at OB/44 (dated April 1986) and we are concerned with what is shown on Plan B at OB/58 which contains an outline of the application land. What we find is a plan showing the intended location of an enclosed play area within which there are benches and play facilities (swings, slide and steamer) with open space elsewhere and associated landscaping works depicting what looks like shrubs and tree planting which were required to be undertaken to the satisfaction and approval of the Borough Engineer. As it turned out, the enclosed play area was centrally located and not as shown on Plan B but nothing turns on this.

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66. A detailed planning permission duly followed on 19/06/1986 which was accepted on 19/12/1986. Mr Leo says that the open space area was laid out *'as a recreational area as part of the development'* within the curtilage of Brox Road, Slade Road and Murray Road.

67. There was, however, an unexplained delay of some ten years before the application land (now registered under title number SY661879) eventually came to be transferred to the objector for a nominal consideration on 7/05/1996 (OB/74). At cl/2 the following was stated: *'It is declared that this Transfer is made pursuant to Section 120 Local Government Act 1972'*.

68. The next development was the making of the byelaws by the objector on 6/06/1997 (OB/78) which were confirmed by the Secretary of State with effect from 1/10/1997 (OB/89). The byelaws were in a standard form and appear to have applied to all of the objector's recreational open space. The application land is named in the byelaws under Schedule A at No.44 as *'Murray House Open Spaces, Ottershaw')* under a heading which states that byelaws in such

case are made under sections 12/15 OSA 1906 (OB/86-87). Schedule B of the byelaws identifies those *'Parks and Open Spaces'* which contained play equipment and include at No.15 the application land (OB/88).

69. The remaining documents are advanced by the objector as being consistent with its holding of this land for the purposes of public recreation.

(a) Firstly, we have the annual playground inspection report of Ash Reid Design Ltd dated 21/06/1997 (OB/91) on the application land (under the heading: *'Parks'*).

(b) Secondly, there is an extract from the objector's *'Property Terrier Details'* in which the application land is described as a *'Play area and open space purchased from Laing Land Ltd'* in respect of which committee responsibility was said to be vested in *'Leisure Services'*.

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(c) Third, we have the reports of the Parks Manager dated 18/12/2002 and 20/06/2002 which are clearly consistent with the status of the application land as recreational open space.

(d) Fourth, we have the notice of intended disposal dated 10/03/2011 under section 123(2A) LGA 1972 to which a plan of the application land is attached. This provision requires a local authority to serve notice, by way of public advertisement in a local newspaper, of their intention to dispose of land which forms part of an open space and to consider any objections to the proposed disposal which may be made to them. As indicated, outline planning permission for the disposal of such land was granted by the objector on 15/02/2012 and a prospective purchaser has been found.

(e) Fifth, we have the photos at OB/102-11 showing signs which appear to have been in position for some years (note, for instance, the change of telephone number on OB/108).

Objector's submissions

70. A local authority is a creature of statute. It can only acquire land under some statutory power. Where the instrument by which the land is acquired does not specify the statutory power under which the land is acquired then the relevant

power must be identified by studying all the surrounding circumstances, including those occurring after the date of acquisition: *R (Malpass) v Durham County Council [2012] EWHC 1934 (Admin)*. I have considered *Malpass* and have no doubt that the law is correctly stated by Mr Chapman.

71. Applying *Malpass* it is necessary to identify the statutory power under which the application land was acquired. The Transfer itself says that the land was acquired under what is the general power contained in section 120 LGA 1972 but this section has two limbs either of which, Mr Chapman submits, is potentially applicable. He cites section 120(1)(a) which involves an acquisition for any of the objector's functions, and he also cites section 120(1)(b) which involves an acquisition for the benefit, improvement or development of the objector's area.

72. Mr Chapman submits that *'there is an irresistible inference'* that the application land was acquired under section 120(1)(a) since the planning arrangements in 1986 envisaged the use of such land as recreational open space and the subsequent history has been entirely consistent with this. It is accordingly submitted that as the application land was acquired for the purposes of public recreation it has been held on the statutory trusts of section 10 OSA 1906 which confer a statutory right or entitlement on the public to use the land for recreation (the so-called recreational trust).

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73. On this analysis, Mr Chapman submits that the public's use of the application land will have been *'by right'* since 1996 (when the land was transferred to the objector) and not *'as of right'* and thus non-qualifying within the meaning of section 15(3) CA 2006. Mr Chapman argues that in light of the decision of the Supreme Court in *R (Barkas) v North Yorkshire CC [2014] UKSC 31* it is now established that where land is acquired 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'*.

74. Alternatively, Mr Chapman contends that the land was acquired under section 120(1)(b), namely for the purposes of the benefit, improvement or development of the objector's area. In short, the objector would be authorised

by section 120(1)(b) to use the land as recreational open space if it considered that such use was for the benefit or improvement of its area, and since the land was in fact used as public open space pursuant to statutory powers the reasoning in *Barkas* was thereby engaged.

75. Mr Chapman's examination of *Barkas* proceeded under three heads:

(a) one needs to be *'very cautious'* before ascribing the public's use of land in public ownership as the assertion of a TVG right (see Lord Carnwath at [64], [82]-[84]) – this arises from the inference that the public's use of the land stems from the fact that the land has in fact been committed to their use under statutory powers rather than that the public had no right to be on the land; in other words, it is difficult to see how users can be trespassers in circumstances where the land has been allocated for public use;

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(b) it is enough if the enabling statute confers a power to permit recreational public use (Mr Chapman says that this is the *'core part'* of the decision in *Barkas*);

(c) it is enough if the authority *'facilitates and acquiesces'* in the use of the land for public recreation – there is no requirement for the authority to make some express recorded decision to authorise such use (it was enough in *Barkas* that the recreation ground was laid out and maintained in a way which meant that it was open to the public under powers which had nothing to do with the acquisition of TVG rights – see *Barkas* at [65] and at [73], [74] and [80] where Lord Carnwath expressly approved the approach of the Sunderland CC director of administration;

76. Mr Chapman says, therefore, that it is enough that, in this instance, the objector maintained the land and play equipment, encouraged its use for recreation and controlled its use by byelaws. Mr Chapman does not contend that there had been an express or implied appropriation under section 122 LGA 1972 (on which I pressed him) as he contended that the objector has always held the application land for the same purpose. However, he submitted that if the acquisition was made under section 120(1)(b) then there

may have been an appropriation in the loose *Barkas* sense of a decision to exercise its power to make the application land available for public recreation.

77. In the result, Mr Chapman submits that whichever limb of section 122(1) applies, the application to register must fail as since 1996 the land has been used *'by right'* and not *'as of right'*.

78. Somewhat late in the day, Mr Chapman contended that public use of the land had been permissive. He contends that by displaying the byelaws on signs the objector had impliedly given permission to the public to use the application land for informal recreation. He submitted, in my view correctly, that the permission argument only failed in *R (Newhaven) v East Sussex County Council [2013] EWCA Civ 276* for lack of an overt act communicating permission to the public. Mr Chapman cited extensively from *Newhaven* at [69]-88 (esp. paras [74] and [86]-[87]) (Richards L.J), [98]-[100] (McFarlane L.J) and [135]-[136] (Lewison L.J).

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79. It is then the objector's case that the application land was subject to byelaws (or communicated regulation) which were sufficient to render use of the land precarious and therefore not *'as of right'*. What I understand the objector to be saying is that a reasonable reader of the byelaws would understand them to mean that they were only permitted to use the land for harmless recreation as long as they did not infringe the byelaws which prohibited a number of specified activities.

80. In summary, the objector contends that both limbs of section 120 LGA 1972 are potentially applicable in the case of the 1996 Transfer. It is said that at the time of development in the late 1980s it was always envisaged that the application land would be set out and eventually held and managed by the objector as recreational open space, from which it follows that the use of the land since 1996 has been *'by right'* and thus non-qualifying. Alternatively , it is argued that since the making of the byelaws in 1997, the public's use of the land has been permissive and thus not *'as of right'*.

Applicant's submissions

81. The applicant accepts that use of the application land pursuant to a statutory right to recreate is not qualifying use. It means that if the application land had been acquired or later appropriated onto the purposes of the OSA 1906, any subsequent use of the land by local inhabitants for informal recreation would be non-qualifying in the sense that it would be *'by right'* and not *'as of right'*. The main question, therefore, is whether the application land had been acquired (or later appropriated) for recreational purposes?

82. The applicant also rightly contends that land is still available for registrable even if it is in public ownership and is used by the public for qualifying activities. However, this is to be contrasted with *Barkas* where the land had been acquired and maintained by the local authority as public recreation grounds under the Housing Acts which meant that members of the public used the land for recreation *'by right'*.

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83. Although this is not entirely clear, I believe that the applicant very probably rejects the objector's contention that it would be permissible to examine the surrounding circumstances in order to ascertain the purpose for which the application land was acquired.

84. The applicant raises the case of *R (Naylor) v Essex CC [2014] EWHC 90* but I do not see that it is in point and has nothing to do with the statutory powers of acquiring land.

85. The applicant is, I think, saying that the application land was acquired for no particular purpose or, at any rate, that the objector is unable to show what, on the balance of probabilities, that purpose is likely to have been. It is argued, for instance, that the transfer itself makes no reference to play or kick-about areas.

86. The applicant rejects the contention that the application land was acquired pursuant to section 9 OSA 1906. It is said that there is no evidence that the OSA 1906 was engaged on this transaction and that the reference to *'Main*

Play Area and Open Space' on the plan accompanying the Transfer is simply a means of identifying the relevant land to be transferred and does not operate to assist in identify the underlying acquisition purpose.

87. The applicant points to the fact that there is no minute, resolution, report or other document to indicate the purpose or purposes underlying the acquisition of the application land by use of the general enabling power contained in section 120 LGA 1972.

88. As the applicant is at pains to emphasise, there is simply no evidence on the face of the transfer or in the surrounding circumstances to show that the land was being acquired as open space within the meaning of section 9 OSA 1906. The applicant says that it is not open to the registration authority to plug that gap by resorting to an inference or presumption that it was. In short, it is submitted, since the purpose for which the land was acquired is unclear on the face of the Transfer, it cannot be said that the land was acquired for recreational purposes. It is on this basis that, as I understand it, the applicant is rejecting the contended for reference to the surrounding circumstances from which to ascertain the meaning or evident statutory purpose underlying a Transfer which, on its face, is unclear.

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89. In the circumstances, the applicant argues that the objector is unable to show that, as Mr Chapman puts it, there is an irresistible inference that the application land was in fact acquired under section 120(1)(a) LGA 1972 on the basis that the planning arrangements in 1986 envisaged the use of such land as recreational open. Mr Bowes argues that in the 10 years, or thereabouts, which elapsed before the land was eventually transferred to the objector it is perfectly possible that other reasons for the transfer may have supervened in place of those which had existed in 1986.

90. Mr Bowes also rejects the case of the objector under section 120(1)(b) LGA 1972 (which involves an acquisition for the benefit, improvement or development of the objector's area). It appears to be the applicant's case that section 120(1)(b) involves an acquisition for one purpose and the land's subsequent appropriation onto recreational purposes. However, because it is the objector's case that the application land was acquired for recreational

purposes then I cannot see how an appropriation under section 122 LGA 1972 (either express or to be implied from what would, in my view, need to be an explicit decision or other decisions of the authority – there can be no formal appropriation in the looser sense) onto these purposes comes into it. The objector's case on section 120(1)(b) is that this provision authorises the objector to use the land as recreational open space if it considered that such use was for the benefit or improvement of its area, and since the land was in fact used as public open space pursuant to statutory powers the reasoning in *Barkas* was thereby engaged. I think the applicant may have misunderstood the objector's case under this head.

91. Mr Bowes also pointed out to me that for the application land to have been lawfully allocated or appropriated in the *Barkas* sense there needed to be an express decision made by the authority as to its status as recreational open space yet there was no evidence of this. Mr Bowes also argued that the fact that the land came to be laid out, used and managed as recreational open space is not conclusive, nor was the making of byelaws which (as I understand the argument) concerned merely the authority's superintendence over the land as opposed to the basis in law on which such land was held.

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92. The applicant therefore argues that that the objector has not shown to the required civil standard that the land had been acquired or otherwise lawfully allocated for public recreation under statutory powers in the *Barkas* sense (see para/29 above).

93. Mr Bowes also rejected the objector's point on *precario* (arising from the byelaws). He says that even if I find for the objector on the issue that, for a material period during the relevant qualifying period, the byelaws had been communicated to local inhabitants by virtue of their having been on display on the land, they are insufficient to justify the inference of a license. He says that a number of the restrictions are not even relevant and that, when the byelaws are looked at as a whole, they do not operate to communicate a license, let alone a license to use the application land.

Discussion

94. As previously explained, I am satisfied that the applicant has established that a significant number of the inhabitants of the claimed neighbourhood identified on the Appendix/1 plan used the application land for lawful sports and pastimes for a period of at least 20 years ending on 20/11/2010. The only issue is whether they did so *'as of right'* within the meaning of section 15(3) CA 2006. The *'as of right'* issue falls under two separate heads and I shall deal with my conclusions on each in turn.

95. It is plain that the application land was transferred to the objector in 1996 under the general power contained in section 120 LGA 1972 which has two limbs either of which, in my view, are potentially applicable to support the objector's case that the application land was acquired for the purposes of public recreation such that it would be held on the statutory trusts of section 10 OSA 1906.

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96. It is common ground that this section confers a statutory right or entitlement on the part of the public to use the application land for informal recreation the effect of which in law of which would preclude the registration of the land as a TVG.

97. It seems to me to be inescapable from the planning history which I have outlined in paras 62-66 that the application land was transferred to the objector as public open space. This is clearly contemplated (a) in the scope of the planning application (b) in the committee report and minutes (c) in the two section 52 agreements (d) in the specification details with which the second of these agreements must be read and (e) the grant of planning permission in which the provision of *'play areas and open space'* is mentioned. For instance, see Plan B to the specification and works' details at OB/58 showing the intended layout of what was therein described as the *'Main Play Area and Open Space'* and the same plan was also used to identify the land on the Transfer to the objector at OB/76. The land edged in red on both plans is clearly identifiable as the application land with only inconsequential changes.

98. The gap of 10 years between 1986 and 1996 is not explained but I doubt very much whether it makes any difference as the application land was duly laid out and equipped as public open space and has been used and managed as such for nearly 30 years and, of course, since 1996 this would have been the responsibility of the objector which took over from Laing Homes. In other words, the history of the matter since 1996 is entirely consistent with the transfer of the application land to the objector for the purposes of public recreation and Mr Bowes was unable to suggest an alternative use for such land. It was not, for instance, as if the application land had been acquired for planning purposes and was being used in the interim as public open space. The land has clearly been landscaped, equipped and used for one purpose and one purpose alone and that is as public open space.

99. I think Mr Chapman's analysis of the legal position is correct in the case of section 120(1)(a) LGA 1972 where, it will be recalled, a local authority is authorised to acquire land for *'any of their functions under this or any other enactment'.* It seems to me to be an irresistible inference from the surrounding circumstances that an acquisition for the purposes of the OSA 1906 would be the only logical candidate for this. Nor do I see any objection either to Mr Chapman's argument that, in the case of section 120(1)(b), the application land would have been acquired for the purposes of *'the benefit, improvement or development'* of the objector's area.

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100. In my view, the application land was acquired for the purposes of public recreation and has been held on the statutory trusts of section 9 of the OSA 1906. This outcome arises on an analysis of the power of acquisition utilised in the case of the 1996 Transfer and is, as I find, the only sensible conclusion in view of the all the surrounding circumstances to which I am entitled to have regard (*Malpass*), including those occurring after the date of acquisition not least the making of byelaws in 1997 under the provisions of the OSA 1906 which is, of course, wholly incompatible with the holding of such land by the objector for other purposes.

101. I now turn to the second *'as of right'* issue concerning 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 cites from *R (Newhaven) v East Sussex County Council [2014] QB 186* (see para 78). The byelaws in this instance were, as already indicated, made under ss.12/15 OSA 1906. Although a standard form and thus will only apply as appropriate (those byelaws in relation to waterways, boats, fishing and aircraft and are, for instance, obvious examples of byelaws which would not apply to the application land), 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.

102. It is clearly relevant, for instance, 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). One also observes at byelaw/19 that the authority are 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.

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103. The point is not an easy one but it does seem to me 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'*. In my view, 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.

104. The question then is whether these byelaws were sufficiently communicated to the public during the qualifying period. In *Beresford* the House of Lords concluded that a license to use land must comprise a *'positive act'* 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. In my view, no one could reasonably think that these byelaws did not apply to the application land and because I have already found (see para/60) that the objector took reasonable steps in 2002 to communicate the existence of the

byelaws to the public for what is likely to have been a prolonged period during the qualifying period, it seems to me that the issue of communication of the byelaws is made out.

Summary

105. 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'*. This is, firstly, because the application land had been acquired by the objector in 1997 for the purposes of the OSA 1906 and, secondly, because the claimed use of the land was permissive and again not *'as of right'*.

106. The acquisition for the purposes of the OSA 1906 meant that the application land has been held on the statutory trusts of section 9 OSA 1906 which operates to confer an entitlement on the public to use the land for informal recreation, albeit subject to regulation by the byelaws. The fact that the public have a right to use the application land for informal recreation will preclude user *'as of right'* within the meaning of the law as it is now to be applied following the decision of the Supreme Court in *Barkas*.

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107. 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 during the qualifying period.

Recommendation

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

109. 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 18th July 2014'*.

William Webster

12 College Place

Southampton

Inspector **23rd July 2014**

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APPENDIX 1

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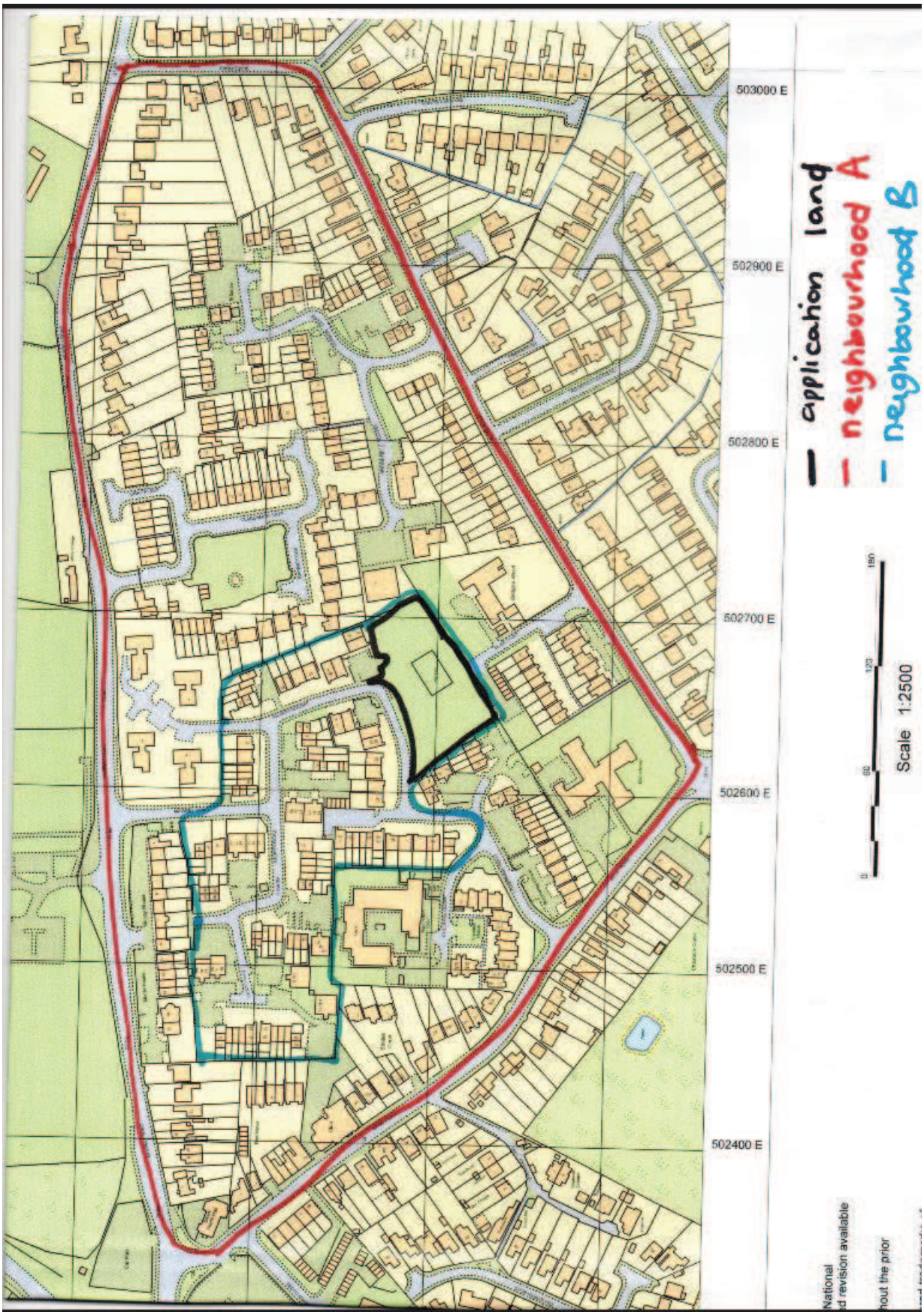
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APPENDIX 2

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