IN THE MATTER OF THE APPLICATION
FOR THE REGISTRATION AS A NEW TOWN OR VILLAGE GREEN
OF LAND AT FOXWELL DRIVE, HEADINGTON, OXFORD

INSPECTOR'S REPORT

I. Introduction

1. This Report is concerned with an application for registration as a new town or village green, pursuant to the provisions of section 15 of the Commons Act 2006, of an area of land adjoining Foxwell Drive in Headington in the City of Oxford. It was submitted to, and falls to be determined by, Oxfordshire County Council in its capacity as the commons registration authority for the area for the purposes of those provisions ("the Registration Authority").

2. The Report is divided into thirteen parts, as follows:

II. The legislative framework

3. Section 15 of the Commons Act 2006[1] provides, insofar as relevant to this application:

> *"(1) Any person may apply to the commons registration authority to register land to which this Part applies[2] as a town or village green in a case where subsection (2), (3) or (4) applies.*
>
> *(2) This subsection applies where –*
>
> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application.*
>
> *(3) This subsection applies where –*
>
> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years;*
>
> *(b) they ceased to do so before the time of the application but after the commencement of this section; and*
>
> *(c) the application is made within the period of two years beginning with the cessation referred to in paragraph (b)."*[3]

Subsection (4) applies to cases where qualifying user ceased not only before the time of the application, but also before the commencement of section 15.

4. Provision for the establishment and maintenance of registers of common land and town or village greens was originally made by the Commons Registration Act 1965 ("the

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[1] In what follows, I shall refer to the Commons Act 2006 as "the 2006 Act", and to section 15 simply as "section 15".

[2] Part 1 of the 2006 Act applies to all land in England and Wales except the New Forest, Epping Forest, and the Forest of Dean: section 5.

[3] Section 14 of the Growth and Infrastructure Act 2013 amended section 15(3) by reducing the period of two years to one year in relation to land in England (new subsection (3A)), with effect from 1 October 2013: article 6 of the Growth and Infrastructure Act 2013 (Commencement No 2 and Transitional and Saving Provisions) Order 2013 (SI 2013/1488). However, article 6 is subject to article 8(2), which provides that the amendment has no effect in relation to any cessation of qualifying user that occurred before 1 October 2013.

1965 Act"). Section 13 of that Act provided for the amendment of those registers "*where … (b) any land becomes common land or a town or village green"*. Procedural provisions for the addition of land to the registers by the local authorities responsible for their maintenance were enacted in the Commons Registration (New Land) Regulations 1969 ("the 1969 Regulations").

5. The original definition of "town or village green" in section 22(1) of the 1965 Act was as follows:[4]

> *"land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years."*

That definition was amended by section 98 of the Countryside and Rights of Way Act 2000 with effect from 30 January 2001. As amended, it read:

> *"land [a] which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] which falls within subsection (1A) of this section."*

Land fell within section 22(1A) if it was

> *"land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either*
>
> *(a) continue to do so, or*

[4] The letters [a], [b], and [c] did not appear in the statute itself, but have been interpolated by me to reflect the common practice of referring to the three distinct categories of land registered under the 1965 Act as, respectively, "class a", "class b" and "class c" greens.

(b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."

No regulations were ever made for the purposes of the subsection.

6. All applications for the registration of land as a town or village green made since 6 April 2007 are governed by section 15.[5] That was the date of commencement of the section (as referred to in subsections (3) and (4)). However, the criteria for the registration of new greens in section 15 are largely based on those in section 22(1A) of the 1965 Act, which were in turn derived from the original definition of a class c green. It follows that case law relating to the section 22(1) definition of "town or village green", both as originally enacted and as amended in 2001, applies or may apply by analogy to section 15. I summarise the case law relating to the interpretation and application of the provisions in the 1965 and 2006 Acts for registration of land as a new town or village green, with particular reference to the legal issues raised in this case, in Part IX of this Report (paragraphs 100-130 below).

7. Applications made under section 15 in respect of land in England have been governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 ("the 2007 Regulations"), save in the seven pilot (or pioneer) areas specified in Schedule 1 to the Commons Registration (England) Regulations 2008, which did not include Oxfordshire. The provisions of the 2007 Regulations are similar, albeit not identical, to those of the 1969 Regulations. The application has to be in the prescribed form (Form 44) and supported by a statutory declaration made by the applicant.[6] A registration authority receiving such an application is required, if satisfied that it is "duly made", to notify affected landowners and other potential objectors and take other steps to publicise the application; if it is not so satisfied, the authority must give the applicant a reasonable opportunity to take action to put the application in order, but may simply reject the application if the

[5] See the Commons Act 2006 (Commencement No 2, Transitional Provisions and Savings) (England) Order 2007 for the relevant commencement and saving provisions.
[6] Regulation 3.

opportunity is not taken or no such action is possible.[7] The authority is then to proceed to further consideration of the application and any statements in objection.[8]

8. The 1969 Regulations contained no provision for the holding of an oral hearing before the authority disposed of an application to add land to a register of town or village greens by accepting or rejecting it. However, many such applications gave rise to material disputes of fact which could only fairly be resolved by hearing oral evidence which was tested in cross-examination. A practice accordingly developed among registration authorities of appointing an independent inspector to conduct what is often called a non-statutory[9] inquiry and report back to the authority on the evidence and the law, with a recommendation as to how it should determine the application. That practice received express judicial endorsement in several cases,[10] and was impliedly approved by the House of Lords in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335 ("*Sunningwell"*) and *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 (*"Oxfordshire"*). The position is the same under the 2007 Regulations. The decision remains the registration authority's to make. The duty to determine the application is not delegable to anyone outside the authority and it is the duty of the authority to assess the submitted evidence and consider the arguments on both sides for itself when performing the duty of determining the application.[11]

9. Like the 1969 Regulations, the 2007 Regulations are silent as to whether the registration authority has power to allow amendments to applications, or to accept an application in part. However, the House of Lords held in *Oxfordshire*[12] that in response to an application for registration of land as a green made under the 1965 Act and 1969

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[7] Regulation 5.
[8] Regulation 6.
[9] The inquiry is "non-statutory" not in the sense that the authority has no power to hold it (for section 111 of the Local Government Act 1972 confers power to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions, including determining a section 15 application), but in the sense that there is no provision for it in the particular legislation specifically governing such applications.
[10] *R v Suffolk County Council, Ex p Steed* (1995) 70 P&CR 487 ("*Ex p Steed*"), pp 500-501; *R (Cheltenham Builders Ltd) v South Gloucestershire Council* [2004] JPL 975 ("*Cheltenham Builders*"), paragraphs 34-40; *R(Whitmey) v Commons Commissioners* [2005] QB 282, paragraphs 28-30, 62.
[11] *Ex p Steed* in the Court of Appeal (1996) 75 P&CR 102, pp 115-116.
[12] See in particular Lord Hoffmann's speech, at paragraph 62.

Regulations, the registration authority was entitled, without any amendment of the application, to register only that part of the land the subject of the application which the applicant had proved to have been used in the requisite manner for the necessary period. There was no rule that the lesser area should be substantially the same as, or bear any particular relationship to, the whole area originally claimed. It was also held in *Oxfordshire* that registration authorities had power to allow amendments to 1965 Act applications, provided that no prejudice would be caused by an amendment, or any prejudice could be prevented by an adjournment to allow the objectors to deal with points for which they had not prepared.[13] There would seem to be no reason why the courts would adopt a different approach to applications under the 2006 Act in either respect.

10. The burden of proof that the applicable criteria are satisfied rests on the applicant for registration. It has been said that it is "no trivial matter"[14] for a landowner to have land registered as a green, having regard to the consequences. As confirmed in *Oxfordshire* by the House of Lords, registration gives rise to rights for the relevant local inhabitants to indulge in lawful sports and pastimes on the land, and attracts the protection of section 12 of the Inclosure Act 1857 and section 29 of the Commons Act 1876 ("the 19th century legislation") which, in summary, make it a criminal offence to build or do anything on the land which interferes with local inhabitants' enjoyment of their rights.[15] It was also said that all the ingredients of the 1965 Act definition had to be "properly and strictly proved", and careful consideration had to be given by the decision-maker to whether that was the case.[16] However, there was no suggestion that the standard of proof was anything other than the usual civil standard, i.e. the balance of probabilities.

11. A section 15 application can only succeed if (or to the extent that) the land the subject of the application is proved to satisfy the criteria set out in section 15(2), 15(3) or 15(4).

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[13] Ibid, paragraph 61.
[14] *Ex p. Steed* (1996) 75 P&CR 102, at p 111 per Pill LJ, approved by Lord Bingham in *R (Beresford) v Sunderland City Council* [2004] 1 AC 889 ("*Beresford*") at paragraph 2.
[15] Those rights may, however, be qualified so as to permit the landowner to continue activities carried on by him before registration: *R (Lewis) v Redcar and Cleveland Borough Council* [2010] 2 AC 70 ("*Lewis*"). See further paragraph 125 below.
[16] See the references at footnote 14 above, and also *Beresford*, paragraph 92, per Lord Walker.

Conversely, if those criteria are met, the application must be granted. No regard can be had to considerations of the desirability of the land's being registered as a green on the one hand, or of its being developed or put to other uses on the other hand. All such considerations are wholly irrelevant to the statutory question which the registration authority has to decide, namely whether the land (or any part of it) is land which satisfies the specified criteria for registrability.

III. The Application

12. The application with which this Report is concerned ("the Application") was made by Miss Georgina Gibbs ("the Applicant") in the prescribed form, accompanied by the requisite statutory declaration. It was submitted to the Registration Authority on 14 December 2012 and allocated reference number NL Reg 33. The area of land the subject of the Application ("the Application Land") is an elongated strip, comprising approximately 5.6 acres[17] of grassland (with some areas of scrub), lying between the Northern Bypass Road and Foxwell Drive for most of its length. It is described in more detail in Part IV of this Report (paragraphs 17-22 below). The boundaries of the Application Land are highlighted red on the composite map provided by the Applicant. The Application was supported by 15 user evidence questionnaires and various other documents.

13. The justification for the Application was stated in part 7 of the Form 44 to be that "*the land has been continuously used for 61 years by a significant number of inhabitants of the locality and neighbourhood*". The Applicant relied upon use by a significant number of the inhabitants of a neighbourhood within a locality, identifying as the neighbourhood "*the Northway Estate*", and as the locality, the City Council electoral ward of Headington Hill and Northway. The boundaries of the claimed neighbourhood are highlighted in green on the Applicant's composite map.

[17] On the Registration Authority's calculations.

14. The Application was expressed (in part 4) to be made under section 15(3), that is on the basis that qualifying use had ceased before the time of the Application (see paragraph 3 above). However, the Applicant responded to the instruction "*If section 15(3) or (4) applies please indicate the date on which you consider that use as of right ended*" by writing "*N/A*". The Registration Authority raised that anomaly with the Applicant in the course of its preliminary consideration as to whether the Application had been "duly made", and accepted that the ticking of the section 15(3) box was a mistake and the Application was in fact intended to be, and was to be treated as, made under section 15(2), that is on the basis that qualifying use was continuing at the time of the Application. It is to be noted that the time of the Application for section 15(2) purposes is the date on which the Application was received (that is, 14 December 2012), even though it was not treated as duly made until a later date: see *R(Church Commissioners for England) v Hampshire County Council*.[18]

15. The Application was accepted as duly made on 9 May 2013, and notice of it was given as required by the 2007 Regulations. A written objection (with appendices) was received from Oxford City Council, the freehold owner of the Application Land ("the Objector"). The grounds of the objection were, in summary, as follows:

- the Application was defective, in as much as particulars of the date on which qualifying use was claimed to have ceased for section 15(3) purposes had not been given; the Objector withdrew that ground of objection at the inquiry, when it was clarified that the Registration Authority had accepted the Application as made under section 15(2);

- until 1 March 2012, the majority of the Application Land had been held by the Objector for open space purposes and laid out and maintained for recreational purposes, and as such, any use of it for recreational purposes would have been by right and not as of right; the Objector relied in particular on minutes of a meeting of the full Council dated 1 December 1952 as evidence of an appropriation of that

[18] [2014] EWCA Civ 634, especially at paragraphs 44, 71, 75.

land to open space purposes, to be held under either the Open Spaces Act 1906 or the Public Health Act 1875;

- there was insufficient evidence of user to support the Application specifically in respect of the residue of the Application Land;

- there was insufficient evidence of user generally;

- the Applicant's evidence did not demonstrate a qualifying neighbourhood;

- on 1 March 2012, a substantial part of the Application Land had been appropriated to planning purposes, and since its registration as a town green would not prevent its development in accordance with planning permission by reason of section 241 of the Town and Country Planning Act 1990, that part should not be registered as a green in any event.

16. A written response to the objection dated 18 October 2013 was sent to the Registration Authority on the Applicant's behalf by a firm of solicitors, Deighton Pierce Glynn. The Registration Authority decided that it would be appropriate to hold a public inquiry. I was appointed as inspector to conduct it and to report thereafter with my recommendation as to whether the Application should be granted or rejected. The inquiry took place at St Columba's United Reformed Church in Alfred Street, Oxford over six days (29 and 30 September and 1, 2, 3 and 7 October 2014), with a formal site visit accompanied by representatives of the parties during the afternoon of 6 October. The case for the Applicant was presented at the inquiry by Miss Gibbs in person; Mr Douglas Edwards QC represented the Objector. I am grateful for their assistance and for the support provided by the Registration Authority's officers Mr Richard Goodlad, Ms Lisa Gray-Wright, Mrs Anita Coughlan and Miss Katie Skinner.

IV. The Application Land

17. As previously mentioned, the Application Land is an elongated strip, consisting principally of grassland, which for most of its length lies between the Northern Bypass Road (on its north-eastern side) and Foxwell Drive (on its south-western side). Foxwell Drive is one of the residential roads making up a housing estate that was developed in the 1950s by the Objector under Housing Act powers (see further below) and has been known variously as the North Way Estate and the Northway Estate. The pavement along its north-eastern side abuts the Application Land without any physical barrier between them. There are houses along the south-western side of Foxwell Drive, with several other residential roads leading off it in a generally south-westerly direction (going from west to east they are Westlands Drive, John Buchan Road, Meaden Hill, Upway Road, Grunsell Close and Steep Rise). In the vicinity of the junction with Westlands Drive, Foxwell Drive curves west and runs into Borrowmead Road. That road runs in a generally westerly direction and is separated from the north-western end of the Application Land by (going from west to east) a row of houses and a block of flats on its northern side. The Application Land is separated from the rear garden of the flats by high hedging, and from the rear gardens of the houses by wooden fences. A handful of the houses have gates opening onto the Application Land. Between the first and second pairs of houses (gong east-west) there is a funnel-shaped, fully grassed, access from the Application Land to Borrowmead Road.

18. Approximately opposite that access, the boundary of the Application Land changes direction from north-westerly to westerly and diverges from the Bypass. Between the Bypass and that short section of the Application Land lies part of an open space area owned by the Objector which was formerly part of Court Place Farm. It was used for a while as an adventure playground but is now the Court Place Farm Nature Park. The Application Land is bounded along the majority of its northern/north-eastern side by a continuous iron railing fence, but there is a narrow gap in the fence with a wooden sign indicating an official entrance to the Nature Park. More or less opposite the access to Borrowmead Road there is another break in the railings which (in combination with a worn line across the grass) is suggestive of an unauthorised short cut from the estate to the Bypass. Beyond the Court Place Farm Nature Park entrance, there is no other way

out of (or into) the Application Land; the rear garden fencing of 31 Borrowmead Road runs along the whole of its narrow western boundary.

19. At the other end of the Application Land, the railing fence stops some way short of its eastern boundary, and although there is quite a lot of scrub in that area, a clear point of access to the Bypass exists. The Application Land widens at its eastern end, where Foxwell Drive curves round first to the south and then to the west, and leads into Dunstan Park, a large area of grassland encircled by trees and brambles which is also owned by the Objector. Dunstan Park is neither as level, nor as closely mown, as the Application Land, and is divided roughly into two halves by a wet ditch. There is a large farm gate made of metal that gives the impression of being disused in the south-eastern corner, leading to the adjacent field, from which the Application Land is otherwise divided by dilapidated fencing.

20. Alongside the north-eastern boundary, screening the Application Land from the Bypass, are mature trees and undergrowth which extends quite a distance into the Application Land. About halfway along the Foxwell Drive frontage the Application Land widens, following a curve in the road, and in that semi-circular wider area is situated a children's play area containing swings, a slide, a climbing wall, and other items of play equipment. The area is surrounded by green mesh fencing with two yellow metal gates. Fixed to the fencing is a colourful sign stating

> "*Welcome to this PLAY AREA*
> *Oxford City Council regularly inspects this play area*
> *We welcome comments about this play area and can be contacted on 0800 0521 455 or email parks@ oxford.gov.uk*
> *Please show consideration to other people and dispose of your litter carefully*
> *Dogs are not allowed inside this play area*
> *www.oxford.gov.uk*"

Additional metal signs mounted on posts on the perimeter of the play area warn

> "*Dog free area*

No dogs are allowed in this children's play area in the interest of health and hygiene."

There is a litter bin inside the play area, and two wooden benches outside and facing it from opposite directions. Just to the west of the play area are metal football goalposts with crossbar (but no net). They look as if they have been in situ for some considerable time, certainly much longer than the play equipment. Of rather more recent origin is a tall, free-standing metal mesh fence erected behind the goalposts for the protection of the play area.

21. Other signage on the Application Land comprises:

- three metal signs mounted on posts reading

  "*City of Oxford*
  Horse riding is not permitted on this site",

  one opposite Westlands Drive, one opposite Upway Road, and one at the south-eastern end facing the Dunstan Park entrance;

- a well-weathered metal sign on a post which originally warned "*Rubbish dumping prohibited*", on the north-eastern side of the Application Land not far from the access to the Bypass;

- signs on red metal dog bins mounted on concrete posts warning "*Clean it up! This area is designated under the Dogs (Fouling of Land) Act 1996*".

22. The only building on the Application Land is a small brick construction with a flat roof and padlocked metal doors bearing a sign that identifies it as a gas installation belonging to Southern Gas Networks. It stands towards the north-eastern boundary of the Application Land, not very far east of the Borrowmead Road flats.

V. History of the Application Land

23. The Objector is the registered proprietor of the Application Land with freehold title absolute under title no. ON 291789. It was acquired by the Objector in two parts from two different vendors, by separate conveyances each of which also related to an extensive area of adjoining land. The majority was comprised in a conveyance dated 30 June 1948 from Henry Edward Berry of Lower Farm, Dunstan Road, Headington to the Mayor, Aldermen and Citizens of Oxford ("the Berry Conveyance") of 21.8 acres of land. The smaller part of the Application Land, at the north-western end, was comprised in a conveyance also dated 30 June 1948 from the President and Scholars of Corpus Christi College in the University of Oxford to the Mayor, Aldermen and Citizens of Oxford ("the Corpus Christi Conveyance") of 41.714 acres to the west of the land comprised in the Berry Conveyance.

24. The Corpus Christi Conveyance did not specify the purpose for which the land was being acquired, and neither party suggested that its content had any bearing on the issues arising on the Application. The Berry Conveyance, on the other hand, was relied upon by the Applicant, and it is necessary to quote extensively from its provisions.

Recital (2): "*The Vendor has agreed with the Purchasers for the sale to them at the price of Eight thousand pounds of the said property subject to the conditions and to the reservations hereinafter mentioned.*"

Clause 1: "*In pursuance of the said agreement and in consideration of the sum of Eight thousand pounds … the Vendor as beneficial owner hereby conveys unto the Purchasers All those several pieces or parcels of land situate in the Parish of Headington comprising in area 21.800 acres or thereabouts and being part of property known as Lower Farm Old Headington in the said City of Oxford and lately in the occupation of the Vendor … for the purposes of identification only more particularly delineated on the plan annexed hereto and thereon coloured pink … To hold the same unto the Purchasers in fee simple Provided always that the Purchasers shall not be entitled to any easement or right of light or air or other easement or right*

which would restrict or interfere with the free use for building or any other purpose of any adjoining or neighbouring land retained by the Vendor."

Clause 2: "*The Purchasers … hereby covenant with the Vendor that the Purchasers and those deriving title under the Purchasers will at all times hereafter observe and perform the stipulations set out in the Schedule hereto …*"

Clause 3: "*There is reserved to the Vendor for the benefit of the Vendor's adjoining property shown coloured green on the said plan annexed hereto a right of way in common with the Purchasers and their successors in title at all times and for all purposes with or without vehicles and animals from and to the public highway called the Oxford Northern By-Pass aforesaid over and along a twelve feet wide accommodation road to be constructed by the Purchasers as hereinafter mentioned along the eastern boundaries of … the property hereby conveyed and shown coloured yellow on the said plan hereto annexed.*"

Schedule: "*3. To construct to the reasonable satisfaction of the Vendor a twelve feet wide accommodation road along the eastern boundary … from the property retained by the Vendor to the Oxford Northern By-Pass.*"

The property retained by Mr Berry coloured green on the conveyance plan lay to the south of the land conveyed. The yellow strip depicting the intended accommodation road ran up the eastern boundary of the land conveyed and continued a short way along the north-eastern boundary, beside the Bypass. That corresponds with a twelve feet wide strip around the perimeter at the eastern end of the Application Land.

25. It is not in dispute that the purpose for which the land in the Berry and Corpus Christi Conveyances was acquired was the construction of a council housing estate, or that such an estate was constructed and encompasses the roads in the Applicant's claimed neighbourhood. How the Application Land was dealt with is however a matter of controversy, up to the point at which all of the Application Land to the east of the

Borrowmead Road flats was appropriated to planning purposes pursuant to section 226(1) of the Town and Country Planning Act 1990 and section 122 of the Local Government Act 1972. That took place on 1 March 2012. The reason given in the relevant officer's report[19] was that an as yet unidentified part of that land was likely to be required to support access and infrastructure improvements in connection with a major residential-led development at Barton. The then proposal was to create a public transport link across the land. The appropriation was conducted by the Objector on the basis that the land was held by it as public open space and used as such, and that compliance with the requirements for prior public advertisement and consideration of responses received was accordingly necessary.[20] The fact of that appropriation is not in dispute, although its implications for the Application are.

VI. The Applicant's evidence

Oral evidence

26. The following is a summary of the evidence given by the witnesses called by the Applicant, in the order in which they were called.

Mrs Jane Cox

27. Mrs Cox had completed an evidence questionnaire (with accompanying letter) on 7 October 2012, and made a written statement. She introduced herself as Chairman of the Northway Estate Residents Group, which had been formed a few years ago after the Objector closed the previous tenants and residents' group, and expanded in response to the access road proposal.

[19] There is a copy in the Objector's inquiry bundle: O70-74 (references in the form "O[no]" are references to pages in that bundle).
[20] Under section 122(2A) of the Local Government Act 1972 (see paragraph 122 below). A copy of the public advertisement is at O68 and a copy of the report dated 17 November 2011 recommending commencement of the appropriation process is at O62-65.

28. Mrs Cox had lived at 1 Meaden Hill since January 1971 with her husband (now deceased), their three children, born in 1963, 1965 and 1967, and their Boston terriers. The children spent hours on the Application Land when they were small, looking at the trees, wildflowers and birds and playing games and sports. Over the years they had had nine Boston terriers, all of which had been walked on the Application Land. Mrs Cox still walked her current dog there every day, and always saw other dog walkers while doing so. The Application Land had been used for recreation by people from all over the estate since she had known it. Joggers – sometimes as many as 15 – regularly ran across the Application Land on their way from Headington to Marston. She would say that although the Application Land was not exclusively used by residents of the Northway Estate, some dog walkers and joggers probably coming from Old Headington and Old Marston, most of the users were drawn from the estate. She recognised them from having lived on the estate for 43 years. It was a narrow strip not conducive to organised sport, but was a lovely place to walk. The north-western end was very nice, but there was nothing to do there and she did not go there often. The Application Land was also an ideal place for children to play, being overlooked by the houses on Foxwell Drive and adjoining roads; parents could keep an eye on them from their front gardens or kitchen windows. It was enclosed by trees and fencing, so they could not get out on to the Bypass, and there was little traffic passing along Foxwell Drive. Dunstan Park was hilly and surrounded by trees, and not safe for children to go on their own.

29. The land had never been fenced off from the estate, only against the Bypass. There had been no signs restricting use. She had never sought permission to use the land, or been asked to leave it. She said that she had been unaware of the owner until the appropriation process began in March 2012, and did not accept in cross-examination that the land's being known locally as "the rec" (as stated in her questionnaire and letter) connoted an open space provided by a local authority. She said that there had been times when there was not very much mowing, but it had been regularly done recently, perhaps for the past five or six years; it was difficult to say how long. Further back in time, she had not been very interested. There had always been one or two swings in the play area. Her grandson was an enthusiastic user of the current equipment.

30. In around 1981, she had entered a national competition and won trees for planting along the boundary next to the Bypass to reduce noise and pollution from passing traffic and provide a wildlife habitat. She and her son had been helped to plant the trees by local schoolchildren and the Objector's tree officer, John Thompson, who thought it an excellent idea and provided advice, support, and assistance.

31. Mrs Cox said that she had seen and agreed with the content of the Applicant's statement dealing with the neighbourhood issue. In her experience, the Northway Estate had its own identity and a great deal of cohesion. Many residents had lived there since the estate was built. Residents shared the surviving communal facilities and met at community functions such as church meetings, bingo sessions and the computer group. Although it was a council estate, it was very much like a village.

The Applicant

32. The Applicant had completed an evidence questionnaire (with accompanying letter) dated 22 October 2012, and made a written statement. She said that she had lived at 12 Saxon Way since February 2002. It was due to the proximity of the green space comprised in the Application Land and Dunstan Park that she had accepted the offer of that house. When she moved there she was recovering from post-natal depression, and the Application Land was very important for her mental health. She used to walk there with her 6-year-old daughter and 2-year-old son and let them play and explore the area. It was a safe haven for her and her children, with very little traffic using Foxwell Drive. Subsequently she had another daughter (now aged 10) and took all three children to play on the Application Land several times a week. Her two youngest children still went by themselves to play football on the Application Land and use the refurbished play area. She agreed that it had been refurbished in 2009, but recalled it having been enclosed by a fence ever since she had lived on the estate. The peaceful environment was suitable for her son, who had moderate autistic spectrum disorder. They went up to twice a day, depending on the weather. The Applicant produced several photographs of them playing on the Application Land in February 2012. Her twelve nieces and nephews had also played on the land, and her mother had regularly walked there with her. She had jogged and walked a friend's dog on the land.

33. The Application Land was widely used by many of the children and adults living on the Northway Estate and their relatives. The Applicant had seen many and varied activities take place there, freely and openly and without permission. Children and adolescents often played football there, and she had also seen games of cricket played. She had seen running groups from Marston and Headington using it as part of a circular route. She had attended picnics and parties in the summer months with other mothers and their children, especially when her own children were toddlers. Her children still had occasional picnics there. During the winter months, when there was snow (which in recent years had been almost every year), she had seen children and parents building snowmen, and pulling sledges across the Application Land. People regularly walked their dogs there. There was an abundance of wildlife to see, including foxes, moles, deer and birds. Hedgehogs were known to live on the land; her daughter had counted them for a school project, and left cat food for them. The whole of the Application Land was used by residents, right up to the north-western tip.

34. The Applicant explained that she had made the Application because she felt deeply about preserving an important green space which was widely used by her and by other residents of the estate. Breaching the wildlife corridor would be extremely environmentally detrimental and ruin the green space. The importance of open spaces was emphasised in the Objector's own draft Green Spaces Strategy document 2012-2026. It would also endanger the children on the estate. She had had the support of 132 residents who attended meetings of the residents' group and decided that they should protect the Application Land. She was elected Treasurer of the group.

35. The Applicant produced photographs of some key buildings in the claimed neighbourhood:

- Plowman Tower, its most prominent landmark, a 14-storey block of flats which was the first tower block to be built in Oxford, named after Harry Plowman (Town Clerk of Oxford 1940-1965);
- the parade of shops on Westlands Drive;
- the Northway Community Centre on Dora Carr Close;
- the Northway Evangelical Church on the corner of Sutton Road.

She incorporated by reference into her oral evidence the document entitled "*History of Northway Estate in support of Town Green Status Applicatio*n" appended to the Application. The principal points made in that document with regard to the claimed neighbourhood are as follows.

36. Northway was originally a small outlying hamlet to the Royal Village (or Royal Borough) of Old Headington, and the Royal Peculiar Parish of St Andrews Church. The original hamlet consisted of cottages which fell derelict after the population was decimated by the Black Death, and were razed to the ground some time before 1950. Northway is part of Headington (postcode OX3), which lies in the north-east sector of the City of Oxford. It lies in the City Council electoral ward of Northway and Headington Hill, with the Northway part of the ward comprising 580 houses and flats and 4 blocks of lock-up garages most of which were constructed in 1951-1952. In 2011 a street party was held in Foxwell Drive to mark the sixtieth anniversary of the Northway Estate and the fiftieth anniversary of the Evangelical Church. The streets in the claimed neighbourhood are a tight, contiguous, rectangular block of streets, clustered around the shops and church which, together with the Community Centre, give it the character of a neighbourhood. The current Community Centre building was purpose-built; formerly, the centre was based in the building on the corner of Sutton Road and Westlands Drive which is now occupied by the Emmaus Second Hand Furniture Store. There was for many years a local youth club at The Saxon Centre at the junction of Saxon Way and Westlands Drive. The community is served by the PARASOL social project, working out of a small facility at the base of Plowman Tower. The ten shop units in the parade were first listed in Kelly's Directory (a forerunner of Yellow Pages) in 1958. One of the first to open was a pharmacy. However, it recently moved to the corner of Copse Lane and Cherwell Drive, near the doctor's surgery on Cherwell Drive. One of the shop units is used by the local Northway Police Community Support Officer beat team. Another is a newsagent's, with a small Sub-Post Office at the back, a letter box outside and a public telephone

box nearby.[21] There is a public notice board in Elizabeth Place, with several recycling bins. The area's only public house, The Cavalier, built in 1957 on Copse Lane, was demolished recently to make way for a block of student accommodation. The area is served by buses (which was not the case in 1950).

37. The Applicant was not cross-examined.

Mrs Jane Smith

38. Mrs Smith had completed an evidence questionnaire on 22 October 2012 and made a written statement on 10 September 2014. She said that she had been born at 16 Upway Road in 1952, when the estate was newly built and full of families with young children who used the Application Land daily. She was probably about 8 years old when she began to use the land herself and she could remember there being a rocking horse, a seesaw and swings there. In the 1970s a small fair used to visit every year. The children met on the land in all weathers; she could recall snowball fights and trying to build an igloo.

39. After getting married in 1979, she moved to Copse Lane (just outside the estate) with her husband, but used to visit her widowed mother daily and walk along the Application Land with their dog, meeting many other dog walkers and children. In 1988 she and her husband purchased 16 Upway Road and moved back with their two small children, building a "granny flat" for her mother. They had a third child two years later. One of their reasons for the move was that they felt it was a safer and friendlier place to raise a family, with space for the children to play and socialise with their peers. She taught them to ride bikes on the Application Land. She produced photographs of her children and friends' children using the then play equipment in the mid 1990s. The goalposts had been present when her children were young. They were always excited to spend time at the park, playing on the swings, chasing each other, and

[21] There are also a pizza parlour, a hairdresser's, a Chinese takeaway, a grocery store, a wine store, a fishing tackle shop and a shop specialising in doors and security.

so on. As they grew into teenagers they were allowed to meet their friends there. When family friends visited, they would always go for a trip to the park, look at the trees and collect pine cones, acorns or blackberries. Every day she took the dog for a walk on the Application Land. Her children (now grown up) still lived at home and used the land to take the dog for a walk or go running. Use by other residents for a variety of recreations continued to the present day including frequent use by children playing games such as football and cricket.

40. She could not recall the "no horse riding" signs being there for a long time, but could not say how long they had been there; they did not apply to her. She did not feel that they gave residents permission to use the land. She had seen council workers on the land, but they had never said anything to her. When she was young, Farmer Berry used to walk his cows across the Application Land to Court Place Farm. He never said children could not play on it. It was believed that he had donated it to the residents of Northway so that the children had somewhere safe to play.

Mrs Pamela Bleach

41. Mrs Bleach had completed an evidence questionnaire on 24 July 2013 and made a written statement on 29 September 2014. She said that she had lived at 17A Halliday Hill since July 1980. She had a son and a daughter, aged 9 and 2 at the time, who both used the Application Land to play. Her son now lived next door to her and walked a dog on the land. The land was extensively used for dog walking. Other activities she had seen there were rounders, tug of war matches, football, cricket, picnics, running, sledging and snowballing, bird watching, kite flying, walking, general relaxation and a street party. She walked on the land once or twice a week for exercise by herself or with a friend's son. It was unspoiled, like being in the countryside. She agreed in cross-examination that she had not walked beyond the Nature Park access, but changed her mind in re-examination and said that she used the whole of the Application Land.

42. She said that the Application Land was an important part of the estate and its loss would have a massive effect on the residents. She had never been prohibited from using it, or seen any restrictions on its use. She had learned that it had been donated by

Mr Berry to the residents for community use. She had never seen any council workers on the land. She accepted in cross-examination that the grass had always been cut, and that the play equipment had been replaced, but could not remember when that happened, or when the goalposts were erected. She assumed that the Objector had been responsible.

Mr Brian Coates

43. Mr Coates had completed an evidence questionnaire (with supplementary comments) on 4 November 2012, and made a written statement on 15 September 2014. He said that he had moved to 21 Upway Road with his family in 1957, when he was 10 years old. He described the Application Land as a magical place to play for children from all over the Northway Estate. It was also used by people of all ages for recreations such as dog walking. Football was a particularly popular pastime. Teams from different parts of the estate would play against each other. There was no change in the use of the land during the 14 years that he lived there before getting married and moving away. His parents had remained at the property and enjoyed taking his children to play on the Application Land when visiting.

44. In November 2007 he and his wife had returned to 21 Upway Road, and they had lived there ever since. They used the Application Land for walking, and now took their grandchildren over to play. Mr Coates had sometimes jogged down Halliday Hill, along the Application Land and through to the nature reserve, although arthritis prevented him from doing so any more. He had had a dog until a few years ago and taken it for daily walks on the Application Land. He had gone to the far north-western end of the site, particularly with the dog, but probably not very often.

45. Mr Coates said that there had been an unbelievable transformation in the land between 1971 and 2007, mainly due to the intensive planting of trees and bushes alongside the Bypass. This had provided a welcome barrier to noise and pollution and a feeling of security, and encouraged wildlife. To his recollection there had always been swings, roundabouts and a slide when he was a boy, but they had not been enclosed as they were now and there was no soft surface. The Application Land continued to be used

for children's play, football and cricket, running, walking and dog walking, picnics in summer, bird watching, kite flying, bicycle riding and community celebrations.

46. He had never seen any signs giving permission to use the land, or the "no horse riding" signs. They were superfluous in his opinion, since no one would ride there. No attempt had ever been made to discourage or prevent use; rather, local people had been encouraged to use it, for example by the recent refurbishment of the children's play area.

Mrs Gladys Glover

47. Mrs Glover had completed an evidence questionnaire on 7 November 2012 and made a written statement. She said that she was 80 years old and had lived at 18 Halliday Hill since September 1971, when she moved in with her late husband and 12-year-old daughter Kim. Kim was a tomboy who enjoyed playing football and other games there with the boys on the Northway Estate. She went there every day after school. Mrs Glover had taken a walk there every evening with her husband until he passed away in June 1981. Since then she had continued to walk there as many times a day as she could. Her grandchildren too had used the land when visiting her. She felt safe there; there were neighbours nearby, people to talk to, and seats to sit on. Others used the land for walking, dog walking, children's play, football, cricket, rounders, picnics, kite flying, running, snowballing, blackberry picking, and community celebrations. Everyone had fun down there. No one had ever approached her to ask what she was doing there; there had been no permissive signs. Mrs Glover was not cross-examined.

Mr Frank Chesman

48. Mr Chesman had completed an evidence questionnaire and made a written statement on 22 August 2014. He said that he had lived at 9 Broadhead Place and used the Application Land since he was 7 years old in 1955. The Application Land was used for ad hoc sporting activity, mainly football and cricket, at that time; there were no formal facilities on the estate and the other green spaces were too rough. A neighbour was fined for playing football in the street and told to use the Application Land instead. He

could not recall when the original swings and roundabouts arrived, but agreed that they had been present for decades. The goalposts would have been there for more than a decade. Children used to play behind their own houses in the early days; his regular play area was at the north-western end of the Application Land. Nowadays there was nowhere near as much activity there.

49. Mr Chesman's own use had declined since his youth. He had played games and sports on the Application Land with his nephew and picked blackberries. Now he took leisurely walks there occasionally, and looked at the birds. He still saw others use the land for children's play, walking, walking dogs, playing football and cricket, running, bird watching, picking blackberries, riding bicycles and playing snow games.

Miss Pamela Mooring

50. Miss Mooring had completed an evidence questionnaire dated 22 August 2014 and made an additional written statement on the same day. She said that she had lived at 1 Broadhead Place and used the Application Land frequently since 1950. Firstly she had played there as a child; it was the only available playspace on the estate, which was in the process of being built. There was no play equipment then, but it had been installed by the time she took her nephews and nieces there to play some 40 years ago. She did not like to say when the goalposts were erected; it must have been at least 15 years ago. She used to go running on the Application Land; nowadays, she used it for leisurely walking, and picking blackberries in season.

51. There were no restrictions on activities or signs of which she was aware. People used the land for walking, dog walking, children's play, football, cricket, bird watching, picnicking, blackberry picking and running. The majority of use was between the play area and the access to Court Place Farm. She could not recall herself going beyond the access to Court Place Farm. The grass had been kept mown but the hedgerow needed some tidying and she had recently noticed some fly tipping.

Mrs Emma Sabzalieva

52. Mrs Sabzalieva had completed an evidence questionnaire on 4 November 2012 and made a written statement. She said that she had lived at 9 Gouldland Gardens since August 2007 with her husband and two children (the younger of whom was born there). She used the Application Land with her children about once a week, now that they were aged 8 and 6 and both in school. Formerly they had used it about three times a week, which they still did during the holidays. They played in the newly refurbished play area and played football on the grass; if it was windy enough, they would fly kites. They socialised with friends and other local residents using the land for leisurely walks with and without dogs. Mrs Sabzalieva also jogged on the land to keep fit, going through to Court Place Farm. Every time they went to the Application Land they saw others using it: children playing ball or frisbee or just running round having fun, teenagers playing football, people walking with and without dogs, picnics in the summer. The Application Land was a lovely and safe place for the residents and their visitors to use, and had been a consideration in her choice of house. She had never asked for or been given permission to use it, and had never noticed the "no horse riding" or any other signs prohibiting use. There were no limitations on use of which she was aware.

Mr John Raymond Mutton

53. Mr Mutton had completed an evidence questionnaire (with accompanying letter) on 23 November 2012 and made a written statement on 16 September 2014. He also produced a further manuscript statement dated 30 September 2014 at the inquiry. Mr Mutton said that he had known the Application Land from 1936, when he lived in Old Marston as a child. He and his friends used to cycle down and play on the land, which was then used for grazing by Mr Berry (known to locals as Harry) who had a mixed dairy and beef herd. Following a period of service in the Royal Navy as a stoker, he returned to Oxford and got married. He came to live at 26 Foxwell Drive in August 1952 with his wife Lillian and young children, a son aged five years and a daughter aged six weeks. He had lived there continuously ever since.

54. His house, like many others on Foxwell Drive, had kitchen windows facing the Application Land, and he had witnessed use of the land by several generations. Over the years he had seen and participated in children's parties and family gatherings, and friendly games of football, cricket and rounders, as illustrated by photographs he produced. The land was increasingly used for dog walking, running, and jogging as people became more health-conscious. He had also seen children building snowmen and using sledges, fireworks, picnics, blackberry picking and community celebrations on the land. He had even seen people trying to ski there.

55. He saw the Application Land as an extension of his front garden. It was lovely and peaceful, and had always been accessible without hindrance. He used it most days, weather permitting, for walking and getting fresh air. The chestnut fencing which originally separated the land from the Bypass was easily breached, but the sturdy steel railings that replaced it had rendered the land safe. It had also allowed the hedge to grow in density to such an extent that it had become home to wildlife such as foxes, squirrels, and numerous birds. Muntjac deer appeared from time to time.

56. Mr Mutton's children, grandchildren and great-grandchildren had all used the land to play. His grandchildren and great-grandchildren liked to play in the refurbished play area. The original equipment had been there for decades, but he could not recall exactly how long. While he had a full time job as well as a large garden to cultivate, he had been unable to spend as much time on the land as his children.

57. He could not recall noticing any signposts on the land. He had only seen horses there twice; on the second occasion, he had telephoned the local riding school to complain about the potential for damage to the land and injury to children, and no horse had been seen on the land since to his knowledge.

Mr Angelo Cassettari

58. Mr Cassettari had completed an evidence questionnaire dated 29 September 2014 and made a written statement. He said that he had lived at 2 Grunsell Close with his wife for the past 53 years, since June 1961. Theirs was one of the first families to live on the

Northway Estate. They had five children who had grown up on the estate. From an early age they were allowed to walk over to the Application Land where they could play safely. The local children used to get together and play friendly games of football and cricket there. From the 1960s to 1975, he acted as assistant manager and manager of a Northway Estate football team for boys between 5 and 15 years of age, and they used the Application Land as their training ground. Now the designated football field at Dora Carr Close is used for training purposes. Mr Cassettari had thirteen grandchildren and five great-grandchildren, all of whom used the Application Land when they came to visit. He would accompany them and play football with them. They loved flying kites in windy weather and made use of the formal play area. In winter they played snow games, as did other children on the estate. He had seen other people walk, walk dogs, and pick blackberries on the land, as well as children playing, continuously and without hindrance from 1961 to the present day. Mr Cassettari said that the family had never been given permission to use the Application Land by either the Objector or Mr Berry, who continued to use it by walking his farm animals from Lower Farm through Dunstan Park across the Application Land to Court Place Farm.

Mr Douglas Robinson

59. Mr Robinson had completed an evidence questionnaire dated 23 October 2012 and made a written statement. He had lived at 30 Foxwell Drive since April 2007, and before that at 33 Plowman Tower from July 1998. He used the Application Land at least once or twice a day to walk his dogs and play with his children, particularly football. He had three children, aged 12, 7 and 2 at the date of the inquiry. His wife walked on the Application Land with their youngest child, who had Downs Syndrome, and took her to the children's play area. He enjoyed its calm, peaceful environment, which was very beneficial for his youngest child. They had seen foxes and deer there. The trees made Foxwell Drive a more attractive place to live, and the trees and hedges provided protection from noise, exhaust fumes and light from the Bypass. The Application Land had always been freely accessible and freely used by residents of the Northway Estate for playing in safety and walking dogs. He often saw children riding bicycles on the land, local residents flying kites in summer and picking blackberries in autumn. He had seen people bird watching and, on occasions, drawing and painting on

the land. Local community celebrations had been held there, the most recent being a street party in 2011. When it snowed, children sledged and built snowmen on the land. Adults could often be seen jogging and running there, and sometimes he saw people in wheelchairs using the land. Children played there all the time at weekends, after school, and during school holidays. He had never seen any prohibitive notices of any kind. Mr Robinson added that he believed that the Application Land had been left to the people of Northway for recreational purposes and the driving across of cattle, by virtue of a covenant which stood to the present day.

Written evidence

60. The Applicant also relied on a body of written evidence of user, in a variety of formats: evidence questionnaires, written statements, letters, and emails. Their content can be summarised as follows. It was the evidence of their authors (as it was of the Applicant's oral witnesses) that no one had challenged their use of the Application Land or done anything to prevent them from having access to it, and that they had never been given permission to use it; and I shall not duplicate those points in every one of the individual summaries below.

Mrs Maria Elizabeth Barrett

61. In an evidence questionnaire and accompanying letter dated 18 November 2012, Mrs Barrett wrote that she had moved with her parents to Upway Road in March 1951 when she was 5 years old. At that time the Northway Estate was being built. She produced an extract from a book entitled "*The Origins of Oxford Street Names*" according to which Foxwell Drive had been officially so named in July 1949 "*after an old field name spelt Longe Foxwelle in 1605*". She had played on the Application Land from 1954 with friends from primary school and other children living on the estate. Her parents had walked and exercised their dogs on it. After marrying she had moved to 1 Gouldland Gardens in January 1968 and lived there with her husband ever since. Her children and grandchildren had played on the Application Land, running around generally, playing football and using the play area. Currently she and her husband walked their dog there three times a day, enjoying looking at birds and other wildlife

such as deer, foxes and rabbits. They took photographs of the birds. Many people had used the land over the years and continued to do so, for informal games of football and cricket, running, jogging, children's play, dog walking, walking, blackberry picking, bird watching, kite flying, bicycle riding, letting off fireworks and playing in snow. It was a free recreation area and no permission was needed to use it, but the Objector had erected notices banning horse riding.

Ms Mavis Elsom

62. Ms Elsom had completed an evidence questionnaire, dated 17 July 2013, in which she stated that she had known and used the Application Land since 1962. During that period she had lived at 24 Halliday Hill and 22 Upway Road (her present address). The land had been used throughout for walking, dog walking, children's play, blackberry picking, football, cricket, bird watching, picnics and kite flying. The Headington Road Runners used it. She herself had played with or supervised her children and grandchildren on the land, and gone there a couple of times a week for the pleasure of walking and chatting to fellow walkers.

Ms Michelle Francis

63. In an evidence questionnaire with accompanying letter dated 11 November 2012, Ms Francis stated that she had known and used the Application Land since March 2001, living firstly at 3 Saxon Way and thereafter at 14 Gouldland Gardens (although she also mentioned having used it as a teenager in the 1990s). She said that she used the land regularly with her three children (aged 14, 6 and 2 at the date of her questionnaire), up to three times a week, using it for football, frisbee, bicycle riding and picnics. Her children and nephews also used the updated play area. In the past they had walked dogs, looked at wildlife and used the land for homework purposes. She felt that the Application Land was a very safe place to take the children, and that she could let her son play there with his friends unaccompanied by adults. It was situated in a family based community and a good place to socialise with other parents. It was used by other people for children's play, walking with and without dogs, football, cricket, picnics, kite flying, bicycle riding, golf, snowballing, and drawing and painting. She had not

thought that permission was needed to use the land, as it was free to use Oxford City Council green space.

Mr Frank Gurden

64. Mr Gurden had completed an evidence questionnaire on 26 October 2012. He stated that he had lived at 4 Ingle Close and used the Application Land since 1952. He gained access to it from Dunstan Park. He used to take his children there to play; subsequently he took his grandchildren and great-grandchildren. In summer they had picnics. Currently he went there three times a day for exercise and to walk his dog. From 1952 onwards, the land had been used for playing football, running, jogging, picnics, children's and street parties, snowman building, general children's play, dog walking, walking, cricket, picking blackberries, bird watching, kite flying and bicycle riding. He had seen, but not spoken to, council workers on the land. No permission had been needed for use of the land, as it was open green space.

Ms Sheila Hessey

65. Ms Hessey had completed an evidence questionnaire on 22 July 2013. She stated that she had known and used the Application Land since August 1963 while resident at 10 Meaden Hill. She had regularly taken her children and grandchildren to the swings and for ball games. When the family came to visit, they used the land for dog walking, bird watching, and picking wild flowers and blackberries. She had seen other people use it for walking, dog walking, children's play, rounders, football, cricket, ball games, running, kite flying, picnics, blackberrying, bird watching, photography and community celebrations.

Mr Keith Long

66. In an evidence questionnaire completed on 19 September 2014, Mr Long stated that he had known the Application Land since 1953 and used it from 1956 to 1970 (presumably during his childhood and teenage years) and from 1974 to the present day while living at 12 Upway Road and 26 Upway Road (his current address). He had used

it on a daily basis, for playing cricket and football, walking, and dog walking. He had ridden his first bicycle there. His immediate family used the land for the same purposes, as did others. It had been used for children's play ever since the estate was built in the early 1950s. The only attempt made to prevent or discourage use had been "no horse riding" notices.

Mr Phillip Oliver

67. In an evidence questionnaire completed on 22 July 2013, Mr Oliver stated that he had known and used the Application Land since May 1993 while living with his wife Janet at 13 Meaden Hill. He went there every day to walk the dog and take his grandchild to the play park. He had seen the Application Land used for walking, dog walking, children's play, football, cricket, picnics in summer, snow games in winter, kite flying, blackberry picking and street parties, and by the Headington Runners.

Mr Derek Phillips

68. Mr Phillips had completed an evidence questionnaire dated 23 November 2012. He stated that he had lived at 21 Maltfield Road and used the Application Land since November 1970. Throughout that period, the general pattern of use of the land had remained constant: a children's playground and open space for ball games, dog walking and just walking. His personal usage of the land was for walking with his wife, family members and visitors, dog walking, and taking his granddaughter to the playground. He had originally had dogs of his own, but now took a friend's dogs instead. He had replanted and taken care of young trees that had been damaged by vandals. He had seen football, cricket and rounders played on the land, joggers and runners, snow games in winter and picnics in summer, blackberry picking, bird watching, kite flying and bicycle riding. He had encountered council workers on the land, both in his official capacity as a local policeman, when he had discussed police matters with them, and while off duty, when he had passed the time of day. He had not sought or been given permission for activities on the land, or been prevented from using it. It had always been an open green space for the free use of residents for recreation.

Miss Maria Pitson

69. Miss Pitson had completed an evidence questionnaire dated 22 November 2012. She stated that she had lived at 1 Upway Road and used the Application Land since May 2003. She walked her dogs on the Application Land three times a day, and had played games on the grass and in the play park with her children (aged 17 and 23 at the date of her questionnaire). Her children still sometimes walked the dogs on the land, and played football there with her nieces and nephews (as did she). She had seen the land used for social games of football and cricket, snow games in winter, children's play, walking and dog walking, bird watching, picnics, kite flying, drawing and painting, bonfire parties, and carol singing. She had had friendly conversations with council workers on the land. Nobody had given her permission to use it; it was free green space for residents and visitors.

Mr Spencer Shields

70. Mr Shields had completed an evidence questionnaire on 2 November 2012. He stated that he had lived at 14 Foxwell Drive and used the Application Land since January 1992. He took his dog for twice daily walks, and his grandchildren to play when they visited. In the past he had played football and cricket there with friends. Adults and children played games of cricket, football and rounders there; in summer there were picnics and in winter snowmen were built. Other activities he had seen there were walking, dog walking, children's play, blackberry picking, kite flying and community celebrations. He had seen council workers there, but not conversed with them. The Application Land was open green space for use of which no permission was needed.

Mrs Hazel Sholl

71. Mrs Sholl had completed an evidence questionnaire on 24 July 2013, in which she stated that she had lived at 24 Meaden Hill and used the Application Land since 1963. She had gone for daily walks, weather permitting, and to walk the dog, and to take her children and visiting grandchildren to play games and use the playground. She had seen the land used by other children playing (including in the playground), other

walkers and dog walkers, and the Headington running club. She had seen football, cricket, bird watching, picnicking and kite flying.

Mrs Barbara Smith

72. Mrs Smith had completed an evidence questionnaire on 14 September 2014 and supplied a witness statement dated 29 September 2014. She stated that she lived opposite the Application Land at 46 Foxwell Drive and had previously lived at 43 Plowman Tower and 65 Westlands Drive. She and her family had used the Application Land without hindrance or interference since 1981. She had three grown up daughters aged 40, 36 and 26, who had used the Application Land as children and continued to do so. Two of her daughters still lived on the Northway Estate and her grandchildren and great-grandchild played games such as football and rounders on the land, as her own children used to do. They also used the newly refurbished play area. She walked her dog there several times a day throughout the year, and every day saw it being used for play, walking and running. It was a lovely area for picnics in the summer and sledging and snowball fights in the winter.

Mrs Barbara Stone

73. Mrs Stone had completed an evidence questionnaire on 23 October 2012. She stated that she had known and used the Application Land since 30 December 1981, while living at 2 Meaden Hill. She had used it for walking and for watching her nieces and nephews and great-nieces and nephews play during their visits, either on the grass or in the play area. Her brother-in-law had walked dogs there. Other people had used the land for children's play, football, cricket, rounders, walking, dog walking, bird watching, picnicking, kite flying, drawing, painting and photography. Groups of runners and joggers used it. A fair had been held there once, in 1979. She described the land as very photogenic, especially in autumn, and by way of illustration she produced several photographs taken in October 2011. She also sent some additional photographs during the inquiry.

VII. The Objector's evidence

74. The Objector called two witnesses, whose evidence can be summarised as follows.

Mr Michael Newman

75. Mr Newman had made a written statement with exhibits. He said that he had worked for the Objector since 1980 in a number of different posts; currently he was Corporate Secretariat Manager. From 1980 to 1993, he had held responsibilities in the Objector's property department, one of which was to ensure that its property records were kept up to date and that acquisitions, disposals and appropriations were properly recorded. In or around 1981, in performance of that duty, he had conducted a detailed scrutiny of the Objector's archives and records for the purpose of drawing up detailed plans showing those areas of the city in which the Objector held its major estates.

76. One of the plans that he had drawn up related to the Northway area, which he produced, together with its key headed "*Northway Estate Appropriations*".[22] The majority of the Application Land (that is to say, all of it to the east of the Borrowmead Road flats) was combined with Dunstan Park in an area shaded green on the plan and labelled (in three places) "1A". (The words "Recreation Ground" were printed on that area on the OS base map, also in three places.) In the key, "1A" appeared next to the words "*10.8 acres DV Report 31.10.52 £6,300 (N&E Recreation Ground area*)", under the heading "*Appropriated to Parks and Cemeteries*". For convenience, I will adopt Mr Newman's terminology and refer to that plan as "the Northway Plan". In answer to a question from me, Mr Newman accepted that the area shown on that plan as the Northway Estate roughly equated to the area of the Applicant's claimed neighbourhood. He said that it was originally developed as a council housing estate consisting primarily of council housing.

[22] There is a reduced-size copy of the plan at O32 (the original is much larger and easier to read), and a copy of the key at O34.

77. Mr Newman produced a copy of a District Valuer's Report dated 31 October 1952 and a series of copy extracts from the official records of proceedings of the full Council and some of its Committees[23] which, he said, demonstrated that area 1A on the Northway Plan was acquired for housing purposes and later appropriated to open space purposes. In summary, they showed as follows.

78. It was resolved at a Housing Committee meeting on 24 October 1946 (item heading: "*Land at North Way*") to recommend the making of a compulsory purchase order "*for the purpose of Part V of the Housing Act 1936*" in respect of the land described in the schedule to the order (which was the land subsequently comprised in the Berry and Corpus Christi Conveyances).[24] At a full Council meeting on 28 October 1946 it was resolved to receive, approve and adopt the report of the Housing Committee dated 24 October 1946 and the recommendations contained therein.[25] Mr Newman commented that it was his understanding that in the immediate post-war period, the Objector was urgently seeking to acquire land for the construction of new housing, but that – as the Berry and Corpus Christi Conveyances showed – statutory compulsion was unnecessary in this particular case, the land being acquired by private treaty instead.

79. The District Valuer's letter to the Town Clerk dated 31 October 1952[26] was headed

> "*Ministry of Housing and Local Government*
> *Oxford City Corporation*
> *North Way Housing Estate*
> *Appropriation from Housing to Open Spaces Purposes*"

and continued:

[23] The original minute books were available for inspection at the inquiry.
[24] O39-40.
[25] O36-37.
[26] O60.

"*I understand that you require my report for submission to the Ministry in connection with the proposed appropriation from Housing to Open Spaces purposes.*

The land has been inspected and I have to report as follows:

Situation and Description	*Land on the east and northeast fringes of the Corporation North Way Housing Estate, Headington. The land on the east fringe has a frontage to Dunstan Road and Foxwell Drive, and on the north fringe lies between Foxwell Drive and North Way. ... The land is more particularly shown coloured pink on the attached plan.*
Area	*Approximately 10.8 acres.*"

He went on to value the land at £6,300. Os. Od. In a postscript, he wrote

"*This report, together with the attached plan should accompany your application to the Ministry*".

80. The report of an Estates Committee meeting on 18 November 1952 recorded (under the heading "*North Way Estate*") that:[27]

"*On the proposal of the Housing Committee and with the concurrence of the Parks and Cemeteries and Finance Committees, it is* ***recommended*** *that land amounting in total to 10.8 acres at the North Way Estate, as shown on Plan No. 4/20 now submitted, be appropriated from housing to open spaces purposes, at the District Valuer's valuation.*"

[27] O55.

Minutes of the full Council meeting on 1 December 1952 recorded a resolution to receive, approve and adopt the report of the Estates Committee dated 18 November 1952 and the recommendations contained therein (subject to an unrelated amendment).[28] Mr Newman said that despite an extensive search of the Objector's archives, Plan No. 4/20 could not be found. He maintained that he could nevertheless be confident that the 10.8 acres referred to in the above documents corresponded to area 1A on the Northway Plan. The reasons he gave were that (1) an analysis using modern area measuring techniques recently carried out by the Objector calculated the combined area of Dunstan Park and that part of the Application Land to be almost 10.7 acres (a difference falling within any reasonable margin for error); and (2) not only was the verbal description of the 10.8 acres in the District Valuer's letter entirely consistent with its being area 1A, but there was simply no other area of land on the North Way Estate to which that description could possibly apply; "North Way" was a name by which the Bypass used to be (and sometimes still is) known (a point with which the Applicant concurred).

81. Minutes of an Estates Committee meeting on 3 February 1953 recorded (under the heading "*North Way Estate*") that:[29]

> "*With reference to the minutes of the 18th November, 1952, the Town Clerk reported that the Minister of Housing and Local Government had issued formal consent to the appropriation of the 10.8 acres of land at the North Way Housing Estate from housing purposes to those of Section 164 of the Public Health Act, 1875.*"

82. Mr Newman said that at the material time, full Council was the ultimate decision-making body; specialist Committees would make recommendations to full Council for its consideration and, if thought fit, approval. Once the Council had approved and

[28] O57-58.
[29] O79U-V.

adopted the recommendation of the Estates Committee to appropriate the 10.8 acres from housing to open space purposes, the appropriation was effected. No other deeds or documents were required on the part of the Council. At that time Ministerial consent was needed, but – although no copy of it had been able to be found – the February 1953 minutes showed that it had been granted, and also under what statutory provision the land was to be held.

83. Mr Newman said that the section of the Application Land within area 1A on the Northway Plan had continued to be held under section 164 of the Public Health Act 1875 until its appropriation to planning purposes on 1 March 2012 (see paragraph 25 above). He produced copy extracts from other property records of the Objector which he said confirmed the position. Large ledgers[30] contained a sheet referable to each piece of land or property purchased over the years, which was updated to take account of changes such as sales, leases or appropriations, and there was a vellum book of corresponding plans. One sheet contained the following details:[31]

> "*Premises: Foxwell Drive*
> *North Way Estate*
> *Approximate dimensions and area of site: 10.8 acres*
> *Purchase Price: Pt North Way Estate appropriated to open spaces. £6,300 – Oct 1952*
> *Description of premises: Land*
> *Use of premises: Recreation Ground.*"

The cross-reference to the vellum book (33-12 C/17) led to an OS base map with a transparent overlay[32] that, read together, showed the "premises" to correspond to area 1A on the Northway Plan. The entries were written in three different hands. Mr Newman identified the authors of *"£6,300-Oct. 1952*" and "*Recreation Ground*" (as a

[30] Again, the originals were available for inspection at the inquiry.
[31] O79Q.
[32] O79G-H.

Mr Luck and a Miss George) and said that additions would have been made in the interests of creating as comprehensive a record as possible.

84. Mr Newman said that he personally had drawn up manuscript lists of disposals and appropriations affecting the Northway Estate[33] from documents that he had examined. The list of appropriations included "*10.8 acres from Housing to Parks and Cemeteries £6,300. Est 21.10.52. DV 31.10.52. Council 1.12.52 (Open Space on North and East edges of the Estate).*"

85. He said that the relevant part of the Application Land had been laid out and maintained by the Objector for recreational purposes, and referred to reports of proceedings of the Parks and Cemeteries Committee after February 1953 as follows:

- In the report dated 10 February 1959, paragraph 1475 (headed "*North Way (Foxwell Drive) Open Space*") read:[34]

  "*With reference to the question asked by Councillor Renshaw at the meeting of Council on 2nd February, 1959, Council is informed that as the North Way (Foxwell Drive) Open Space provides lovely views of Elsfield and the surrounding country and is also somewhere quiet where the public can go to rest or picnic, the Committee prefers it to be left in its natural state. The Committee will, however, consider next year the provision of some playing equipment elsewhere which would serve the Northway Estate as it has no money in the estimates for this at present.*"

- An item in the report dated 10 March 1959 stating that paragraph 1475 was referred back for further consideration at the 2 March Council meeting, and the

[33] O79R-S.
[34] O790.

Committee would report again when it had further information from the City Engineer.[35]

- On 13 September 1960 (item heading "*North Way Recreation Ground*") the Committee recommended (subject to the agreement of the Finance Committee, which was forthcoming) acceptance of the second lowest of four tenders for the provision of fencing, received from Hill and Smith Ltd.[36]

- On 14 March 1961 (item heading "*Northway Recreation Ground*") the Committee recommended (subject to the agreement of the Finance Committee, which was given) acceptance of a quotation submitted by H Hunt & Son Ltd for the supply of playground equipment in the sum of £247.17s.9d, and authorising the City Engineer to arrange incidental works at an estimated cost of £100.[37] That recommendation was approved and adopted by the full Council on 17 April 1961.[38]

86. Mr Newman said that he was not aware of any covenant that restricted development on the Application Land, and did not read the Berry Conveyance as imposing any such restriction.

87. With regard to the residue of the Application Land, acquired by the Corpus Christi Conveyance, Mr Newman noted that in the key to the Northway Plan (on which it was edged yellow and shaded pink), it was described thus:

> "*1.54 acres DV 21.7.53 £200 (Borrowmead Rd)*
> *Later Re-appropriated to HOUSING £230. DV 8.10.59.*"

[35] O79P.
[36] O79Zd.
[37] O79Ze.
[38] O79Zf-g.

He produced copy extracts from the official records of Council and Committee proceedings, which he said related to that area:

- The report of an Estates Committee meeting on 21 July 1953 recorded (under the heading "*North Way Estate*") a recommendation (on the proposal of the Housing Committee, and with the concurrence of the Allotment and Finance Committees) that "*an area of land approximately 1.54 acres at the rear of the houses and flats in Borrowmead Road, North Way Estate, be appropriated from housing to allotments purposes at the District Valuer's valuation.*"[39]

- Minutes of a full Council meeting on 27 July 1953 recording a resolution to approve and adopt that recommendation.[40]

- Minutes of an Estates Committee meeting on 7 July 1959 recording (under the heading "*Northway Estate*") a proposal "*by arrangement between the Allotments and Housing Committees … to re-appropriate the 1.54 acres of unused allotments land at the rear of Borrowmead Road to housing purposes, so that the land could be brought into use as a public open space*", and a resolution to obtain the District Valuer's report with a view to formally recommending it to Council.[41]

- Minutes of an Estates Committee meeting on 20 October 1959 recording (under the heading "*North Way Estate*"):[42]

  > "*With reference to the minutes of the 7th July, 1959, the Town Clerk reported that the District Valuer's valuation of the 1.54 acres of allotment land at the rear of Borrowmead Road and Foxwell Drive, North Way Estate, was £230.*

[39] O79B-C.
[40] O79D-E.
[41] O79W-X.
[42] O79Y-Za.

Resolved, subject to the approval of the Finance Committee and the issue of any necessary ministerial consent, to recommend that the land be appropriated from allotments to housing purposes at the District Valuer's valuation."

- Minutes of a full Council meeting on 2 November 1959 recording a resolution to approve and adopt the report and recommendations of the Estates Committee dated 20 October 1959.[43] (What the report of the Estates Committee said was:

  "*North Way Estate*

  The 1.54 acres of land at the rear of Borrowmead Road and Foxwell Drive appropriated to allotments purposes in 1953 .. .has not been used for this purpose, and it has been agreed between the Housing and Allotments Committees that the land should be returned to the Housing Committee for use as a children's playground. It is accordingly recommended that, subject to any ministerial consents, the land be appropriated from allotments to housing purposes at the District Valuer's valuation.")[44]

  The approval of the Finance Committee for that appropriation was given on 23 October 1959.[45] Mr Newman said that the requirement for ministerial consent to appropriation had been removed by that time and none was sought or given.

88. Mr Newman referred to a sheet in the property ledgers[46] on which the particulars were as follows:

  "*Premises: Borrowmead Road North Way Estate*
  Approximate dimensions and area of site: 1.54 acres

[43] O79J-K.
[44] O79I.
[45] See Estates Committee minutes of 3 November 1959 at O79Zb.
[46] O79F.

Purchase price: Re-appropriated to Housing from Allotments for £230 Nov. 1959
Description of premises: Appropriated new Housing Estate
Use of premises: Children's Playground".

Mr Newman identified the entry under "*Purchase price*" and the words "*Children's Playground*" as being in Mr Luck's writing. The cross-reference to the vellum book of plans (33.12C/15) showed correspondence between those "premises" and the north-western part of the Application Land.[47] In his manuscript list of Northway Estate appropriations,[48] Mr Newman had written

"*1.54 acres. RE-APPROPRIATION from Allotments to Housing £230 Est. 7.7.59 DV 8.10.59 C2.11.59 (Borrowmead Road – allotments to housing purposes).*"

89. Finally, Mr Newman said that he had investigated the planning records relating to the Northway Estate in order to ascertain the dates on which planning permission had been granted for the Borrowmead Road houses and flats, which were 29 September 1950 and 15 February 1951 respectively. He said that they had been built by 1959. He also produced a copy of a plan that he said he had found on file entitled "*Borrowmead and Engle Close Allotments*" on which the north-western end of the Application Land was marked as "*Area available for allotments*".[49]

Mr Ian Thompson

90. Mr Thompson had made a written statement with exhibits. He said that he had been employed in the Objector's Parks Department since October 1988 in various capacities, currently as Parks Operational Manager. He was able to confirm from his own knowledge that the entirety of the Application Land had been maintained, and maintained solely, by his department throughout that 26-year period. That had entailed regular cutting of the grass, maintenance of the tree stock and shrub areas, litter

[47] O79G-H.
[48] O79R-S.
[49] O79Zj.

picking, emptying of litter and dog bins, and general ongoing maintenance of the play area and surrounding fence. He understood from colleagues that those responsibilities had been discharged by the Objector for many years prior to October 1988. In the early 1990s, the Parks Department had had to tender for all the grounds maintenance work under compulsory competitive tendering, but had managed to win the contract. Maintenance schedules had been drawn up for every ground in the City at that time, and the specifications were still in place today. A written specification of the works done on the Application Land from then on was therefore available; he did not know whether there had been documentary evidence of previous maintenance. The maintenance work was funded from the department's revenue budget, while expenditure on new equipment was funded from the Objector's capital programme (with external grant assistance where possible).

91. Mr Thompson confirmed from his own knowledge that a children's play area had existed on the Application Land for a period in excess of 25 years, and that it was completely refurbished in 2009/10 as part of the Objector's Play Area Refurbishment Programme, which had involved consulting local residents and users as to what – if any – equipment was wanted. In this case there was a public demand for it. The kickabout area with the goalposts was already there when he joined the Parks Department; he understood from colleagues that the Objector had provided and installed them. They had been there ever since; a proposal to relocate them to the playing fields had been resisted by the residents.

92. Mr Thompson produced a set of byelaws, sealed by the Objector on 8 July 1996 and confirmed by the Secretary of State for the Home Department on 2 September 1996 to come into operation on 23 September 1996 ("the 1996 Byelaws"),[50] together with associated documentation including correspondence with the Home Department. They were expressed to be "*made by Oxford City Council under section 164 of the Public Health Act 1875, section 15 of the Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906, with respect to pleasure grounds, public walks and open*

[50] O87-98.

spaces." The pleasure grounds, public walks and open spaces to which they applied were listed in Schedule 1 to the byelaws. They included "*Court Place Farm, Oxford*", "*Dunstan Road Park, Oxford*" and "*Foxwell Drive, Oxford*". No plan was attached. Mr Thompson said that the byelaws applied to the whole of the Application Land. The byelaws prohibited various activities such as bringing motor vehicles on the land (3), erecting structures (6), trading (7), entering flowerbeds (10), golf (15), and intentionally obstructing council officers or other users (18). Byelaw 9 prohibited wheeling or parking of vehicles on flowerbeds, shrubs or plants. Byelaw 12 provided that where the council had by notice set apart an area for playing specified games, no person should play any other games in that area, or play any specified game in any other part of the ground in such manner as to exclude persons not playing the game from using it. Byelaw 14 prohibited the playing of games so as to give any other person in the ground reasonable grounds for annoyance, or in a manner likely to cause damage to any tree, shrub, or plant in the ground. Byelaw 16 prohibited ball games in the grounds listed in Schedule 3 (which did not include "*Foxwell Drive*").

93. Mr Thompson said that there was evidence of earlier byelaws which would also have applied to the Application Land, and byelaw 22 of the 1996 Byelaws revoked byelaws "*made by the Council on 25 January 1983 and confirmed by the Secretary of State for the Home Department on 24 March 1983 relating to pleasure grounds and open spaces*". However, no copy was produced.

94. Mr Thompson said that the 1996 Byelaws were published on the Objector's website, which had been the case for at least four years. He also said that they had been relied upon on a number of occasions to deal with incidents of anti-social behaviour on the Application Land: youths racing on mini-motor bikes, local residents storing building materials and skips, unauthorised parking of vehicles, and horse riding. They had also been used to remove an encampment of travellers at the eastern end and (twice) rough sleepers at the Borrowmead Road end. There was no documentary evidence of enforcement. Park Rangers dealt with breaches when they came across them by explaining to the offenders that they were contravening the byelaws, giving them a copy of the byelaws, and warning them that appropriate action would be taken if the behaviour continued. In the nature of things, there would be no documentary proof of

that. Sometimes unauthorised vehicles were moved. Mr Thompson agreed in cross-examination that there were no signs on the Application Land giving notice of the byelaws. He said that such signage was only erected at the City Parks. There was no legal requirement for it. No one was prosecuted without prior warning.

95. In 2007 Mr Thompson was involved in licensing an external building contractor who wanted to set up a compound on the Application Land in connection with a large refurbishment project on the Northway Estate. The compound was in place for several months (November 2007 – May 2008) and the Parks Department was responsible for ensuring that the affected area was left in an acceptable condition. Mr Thompson produced a copy of the licence[51] and pointed out that the land was described in it as "*Northway Recreation Ground*".

96. Signs prohibiting dog fouling were placed on the Application Land by the Parks Department or the Objector's Dog Warden. They had taken a variety of forms over the years, but tended to be stuck on posts and relatively easily peeled off. There was no record of their being put up. Nowadays they were enforced by means of Dog Control Orders.

VIII. Evidence from members of the public

97. The only member of the public to take the opportunity to give oral evidence independently of the parties was *Mr Alan Ludlow*, a supporter of the Application. He said that he had lived at 42 Foxwell Drive with his family for 22 years, and in Stanfield Road before that. His wife had previously lived at their present property with her parents and sisters from the time when the houses were built. They had played on the Application Land as had all the other children. It was an area of well used green space, safe and free from pollution, of which the proposed access road would deprive local residents (as well as adversely affecting their quality of life and the value of their houses). In addition to children playing, people walked along its length. The parks

[51] O102-103.

department had done nothing but cut the grass and replace the equipment on the so-called children's play area. Mr Ludlow was not cross-examined.

98. The following members of the public submitted written statements to the inquiry:

Miss Caroline Gibbs, of 28 Meaden Hill, wrote that she had a physical disability which made walking difficult, and the Application Land was accessible and suitably flat for her personal use, as well as a nice place for her young son to play several times a week.

Mr Carl Hibbins, of 12 Meaden Hill, wrote that the Application Land was a vital part of the Northway Estate, much loved and used by all the community free of charge for various activities: walking pets, sitting enjoying the summer sunshine, family picnics, looking at wildlife, and children's play. The proposed access road would stop people enjoying this lovely green space.

Ms Jane Robinson, of 21 Meaden Hill, wrote in terms of an objection to the proposed access road, but described the Application Land as "*one of the more peaceful and quieter spaces in the Northway estate ... used daily by dog walkers, and as an exercise space by both children and adults alike*".

Mr Peter Smith, of 16 Upway Road, wrote that he had lived at that address since 1988 with his wife[52] and three children. As a family they had always used the Application Land. The children had learned to ride their bikes and played football and generally had a good time in the fresh air. They now took their dog for a walk there between two and four times a day, and met many other dog walkers. He had never been told not to use the land.

99. Additional material was submitted to the Registration Authority in support of the Application by the following persons:

[52] Mrs Jane Smith: see paragraph 38 above.

Chris Harvey, who sent an email to say that he (or she) had lived in Foxwell Drive from 1952 to 1975 and with others frequently used the open space to play cricket and football.

Mr Alan Kerry, now resident in Littlemore, who sent a copy of a letter of his that the Oxford Mail had printed in 2012, and noted that over the years he had observed that the land was still well used by local residents and thought of as recreation land for the estate. The enclosed letter stated that he had lived at Meaden Hill from the very early 1950s for many years with his parents and five siblings. There were many large families on the estate during the 1950s and 1960s and the Application Land was used extensively by the children for recreation, dog walking and camping in summer. The Objector cut the grass regularly, but extra preparation was needed to obtain a good playing surface for football, cricket, rounders, archery, marbles and an "*unofficial speed cycle track*". Many children learned to ride their first bikes there. Residents attended annual Guy Fawkes Night celebrations on the land.

Mrs Vicky Ludlow,[53] who wrote that she had grown up living on Foxwell Drive, in a house that had been in her family since the Northway Estate was built. Many generations of her and other families had enjoyed the open green space for dog walking, general walking, jogging, football and other sports. It was very popular not only with local residents, but also with their visiting families and friends. As a new mother, she took her little girl for walks there and to the play park, which had also been used for many years. She wanted the Application Land to remain as it was for the benefit of future generations. The proposed road link would be dangerous, increase pollution, and cause house prices to drop.

[53] The wife of Mr Alan Ludlow (see paragraph 97 above).

IX. The law

100. The criteria for registrability in section 15(2) can be broken down into the following elements, each of which must be satisfied on the evidence:

- a significant number of
- the inhabitants of any locality, or any neighbourhood within a locality
- indulged ... in lawful sports and pastimes
- as of right
- on the land
- for a period of at least twenty years
- and continued to do so at the time of the application for registration.

However, sight should not be lost of the fact that - as Lord Hoffmann put it in *Oxfordshire*[54] - there is a (single) clear statutory question which has to be answered in each case on its own particular facts: have a significant number of the inhabitants of a locality or neighbourhood indulged in [sc. lawful] sports and pastimes [sc. as of right] on the relevant land for the requisite period?

"a significant number"

101. The meaning of "a significant number of the inhabitants" was addressed by Sullivan J (as he then was) in *R(Alfred McAlpine Homes Ltd) v Staffordshire County Council (McAlpine Homes),*[55] as part of the *ratio decidendi* of that decision. He said that it did not mean a considerable or substantial number, because a neighbourhood might have so limited a population that a significant number of its inhabitants could not properly be so described:

[54] At paragraph 68.
[55] [2002] 2 PLR 1, at paragraph 71.

"*…whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the meadow for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment, the correct answer is … that what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers*."

102. In *Leeds Group plc v Leeds City Council* ("*Leeds Group*"),[56] Sullivan LJ (as he now is) repeated the above passage in the context of a submission on behalf of the appellant landowner that use had to be "*of such amount and in such manner as would reasonably be regarded as being the assertion of a public right*" (a formulation derived from the judgment of Lord Hope DPSC in *Lewis*).[57] He accepted the counter-submission of counsel for the respondent registration authority that, at least since the decision of the House of Lords in *Sunningwell*, any reasonable landowner would be put on notice that those using his land for recreational purposes might well be asserting a public right to do so if their user of his land for that purpose was more than trivial or sporadic.[58] Tomlinson LJ and Arden LJ expressed themselves to be in complete agreement with Sullivan LJ on the "quality of user point" as they called it.[59]

103. Under the 1965 Act definition of a class c town or village green as originally enacted,[60] the user had to have been predominantly by the inhabitants of the relevant locality: *Paddico (267) Ltd v Kirklees Metropolitan Council ("Paddico")*.[61] No predominant user requirement is to be read into the amended version of section 22 of the 1965 Act: *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v*

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[56] [2011] Ch 363, at paragraph 31.
[57] See *Lewis* [2010] 2 AC 70, paragraphs 67 and 75.
[58] Based on the remark of Lord Hoffmann in *Sunningwell* [2000] 1 AC 335, at p 357, that "*It may be … that the user is so trivial and sporadic as not to carry the outward appearance of user as of right.*"
[59] *Leeds Group*, paragraphs 46, 59.
[60] See paragraph 5 above.
[61] [2011] LGR 727, upheld by the Court of Appeal [2012] LGR 617 on that point, as to which the Supreme Court refused permission to (cross) appeal.

Oxfordshire County Council[62] ("the *Warneford Meadow* case"), or by analogy into section 15. The High Court held that there was no implicit requirement for most of the users to have lived in the relevant locality or neighbourhood. The provision was clear in its terms: so long as a significant number of the inhabitants of the locality or neighbourhood were among the recreational users of the land, it did not matter if many or even most users came from elsewhere.

"the inhabitants of any locality, or of any neighbourhood within a locality"

Locality

104. Vos J held in *Paddico* that "locality" was to be understood in both the 1965 and 2006 Acts as meaning an administrative district, or an area within legally significant boundaries. The Court of Appeal agreed but took a more restrictive view in that they (unlike Vos J) rejected a conservation area as a possible locality despite its having legally significant boundaries. Sullivan LJ's explanation was that its boundaries were legally significant for a particular statutory purpose and defined by reference to its characteristics as an area "*of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance*" rather than by reference to any community of interest on the part of its inhabitants.[63] Carnwath LJ said that it was "*not a description of a community*".[64] So legally significant boundaries are necessary, but not sufficient, to constitute a locality. Electoral wards of course have legally significant boundaries, and it seems to me that an electoral ward falls on the other side of the dividing line from a conservation area. Its inhabitants elect a councillor (or councillors) to represent their interests as a community. In *R(Mann) v Somerset County Council* ("*Mann*")[65] HH Judge Robert Owen QC rejected an argument that polling districts (which are of course sub-divisions of electoral wards) were incapable in law of constituting a "locality" in the context of the second limb of the amended section 22

[62] [2010] LGR 631, paragraph 71.
[63] See paragraph 29.
[64] At paragraph 62.
[65] [2012] EWHC B14 (Admin).

definition, "neighbourhood within a locality" (albeit in contemplation of the possibility that the word might not have exactly the same meaning in the first limb).[66]

Neighbourhood

105. The concept of a "neighbourhood" is more flexible than that of a "locality", having no connotation of legally recognised boundaries. This was confirmed by Lord Hoffmann in *Oxfordshire*:[67]

> " *'Any neighbourhood within a locality' is obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries.*"

Lord Hoffmann went on in the same paragraph to disagree with the obiter dictum of Sullivan J in *Cheltenham Builders* that "neighbourhood within a locality" meant a neighbourhood lying wholly within a single locality, saying that such an interpretation would introduce the kind of technicality which the amendment to section 22 of the 1965 Act was clearly intended to abolish, and there was nothing in the context to preclude the phrase being construed as meaning "neighbourhood within a locality or localities"[68] albeit that "locality" by itself was strictly singular - as was subsequently confirmed by the Court of Appeal in *Leeds Group* and *Paddico*. Further, in *Leeds Group* a majority of the Court of Appeal upheld the decision of the High Court[69] that "neighbourhood" could be read as meaning "neighbourhood or neighbourhoods", and that the challenged registration had been justified by evidence of qualifying use by a significant number of the inhabitants of each of two separate neighbourhoods adjoining the claimed green.

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[66] At paragraphs 94-98.
[67] At paragraph 27.
[68] Applying section 6(c) of the Interpretation Act 1978, which provides that in any statute, the singular includes the plural unless the contrary intention appears.
[69] [2010] EWHC 810 (Ch).

106. While a neighbourhood does not need to have legally defined boundaries, it is not just "*any area of land that an applicant for registration chooses to delineate upon a plan"*; the registration authority has to be satisfied that the claimed neighbourhood *"has a sufficient degree of cohesiveness*" (per Sullivan J in *Cheltenham Builders).*[70] According to Judge Behrens in *Leeds Group*, the cohesiveness issue should be approached in the light of "neighbourhood" being an ordinary English word, and of judicial dicta to the effect that Parliament's intention in introducing the "neighbourhood" alternative was clearly to avoid technicalities and make registration of new greens easier.[71] In *Cheltenham Builders*, Sullivan J said that a housing estate might well be described in ordinary language as a neighbourhood.[72]

"indulged in lawful sports and pastimes"

107. "Lawful sports and pastimes" is a composite class which includes any activity that can properly be called a sport or pastime: *Sunningwell*.[73] There is no requirement for organised sports or communal activities to have taken place; solitary and informal kinds of recreation, such as dog walking and children playing (whether by themselves or with adults), will suffice. Lord Hoffmann expressly agreed with what Carnwath J had said in *Ex p. Steed* about dog walking and playing with children being, in modern life, the kind of informal recreation which may be the main function of a village green. Nor is it necessary for local inhabitants to have participated in a range of diverse sports and pastimes. The majority of the House of Lords in *Oxfordshire* held that the rights to which registration as a town or village green gives rise are rights to indulge in all kinds of lawful sports and pastimes, however limited the range of activities proved to have taken place during the period of user leading to registration. However, in *Lewis*,[74] Lord Walker rejected the possibility of land qualifying for registration on the basis of a bonfire every Guy Fawkes Day; that, he said, would be "*far too sporadic to amount to continuous use for lawful sports and pastimes*".

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[70] At paragraph 85.
[71] At paragraph 103.
[72] At paragraph 85.
[73] At pp 356-357.
[74] At paragraph 47.

108. In the *Warneford Meadow* case[75] the court interpreted the word "lawful" as meant to exclude any activity which would be illegal in the sense of amounting to a criminal offence, such as joy-riding in stolen vehicles or recreational use of proscribed drugs. A submission that all tortious activities were also excluded was rejected, on the basis that if that were so, no land would qualify for registration since all "as of right" use is trespassory in character, and that could not have been the legislative intention. It may be that sports and pastimes which are likely to cause injury or damage to the landowner's property do not count as "lawful", whether or not they involve the commission of a criminal offence: see the obiter dictum of Lord Hope in *Lewis*.[76] However, the case he cited in support of that proposition was *Fitch v Fitch*,[77] where the court held that a customary right to play at lawful games and pastimes in a field did not entitle local people to trample down the grass, throw the hay about, and mix gravel through it so as to render it of no value - conduct which would seem to amount to the modern day offence of criminal damage. Activities in breach of byelaws constitute criminal offences and so are not "lawful": *R (Newhaven Port & Properties Ltd) v East Sussex County Council* ("*Newhaven*").[78]

109. Use of a track situated on or traversing land claimed as a green for pedestrian recreational purposes may not qualify as user for a lawful pastime if it would appear to a reasonable landowner to be referable to the assertion of a public right of way rather than a right to indulge in lawful sports and pastimes across the whole of his land: see *Oxfordshire* at first instance,[79] and *R(Laing Homes Ltd) v Buckinghamshire County Council* ("*Laing Homes*").[80] In that case, an inspector appointed by the Secretary of State had recently confirmed modification orders adding to the definitive map of public rights of way a number of footpaths three of which ran around the edges of the fields to which the application for registration as a green related. Sullivan J held that the inspector had failed to deal with the landowner's analysis of the user evidence, the

[75] At paragraph 90.
[76] At paragraph 67.
[77] (1797) 2 Esp 543.
[78] [2012] 3 WLR 709; [2013] 3 WLR 1389 in the Court of Appeal.
[79] [2004] Ch 253, at paragraphs 102-105.
[80] [2004] 1 P&CR 573.

principal point of which was that walking had been the principal activity and it had been largely confined to the perimeter footpaths, or to discount the use of the perimeter footpaths for walking on the basis that it was referable to the assertion of public rights of way.[81]

"as of right"

110. Indulgence in lawful sports and pastimes on the land which is the subject of the application must have been "as of right" throughout the period of user relied on. In *Sunningwell* it was held that use is not "as of right" unless it is *nec vi, nec clam, nec precario,* translated by Lord Hoffmann[82] as meaning not by force, nor stealth, nor the licence of the owner; and that it is irrelevant whether the users believe themselves to be entitled to do what they are doing, or know that they are not, or are indifferent as to which is the case. Lord Hoffmann said that:

> "*The unifying element in these three vitiating circumstances [i.e. vi, clam, and precario] was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right - in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period.*"

He then referred to *Dalton v Angus & Co*[83] where Fry J had rationalised the law of prescription (the acquisition of rights by user) as resting upon acquiescence, saying[84] that the English theory of prescription is concerned with "*how the matter would have appeared to the owner of the land*". In *Lewis*, the Supreme Court emphasised that the

[81] See paragraphs 92, 100-110.
[82] At p 350.
[83] (1881) 6 App Cas 740, 773.
[84] At pp 352H-353A.

tripartite test of *nec vi, nec clam, nec precario* was exhaustive of the "as of right" issue, Lord Walker saying that that proposition was established by high authority.[85]

nec vi

111. The concept "*vi*" includes, but is not limited to, use involving physical force (e.g. where access to the relevant land was gained by cutting through a barrier). There is a line of authority, starting in private easement cases, to the effect that use does not have to involve force to be *vi;* it is enough for it to be contentious. Lord Rodger endorsed the principle in *Lewis*[86] (albeit obiter), observing that in Roman law (where the expression originated) "*it was enough if the person concerned had done something which he was not entitled to do after the owner had told him not to do it*", and going on to instance English cases where the expression was interpreted in much the same way. Those and other earlier authorities were reviewed and applied in *Betterment Properties (Weymouth) Ltd v Dorset County Council* ("*Betterment*").[87] It will be a question of fact in any given case whether the landowner has done enough to make his opposition known to reasonable users of the land, whether by the erection of suitably worded notices or by alternative means - summed up by Patten LJ[88] as "*the giving of reasonable notice in the particular circumstances of that case*".

nec precario

112. Permission can be granted expressly (in writing or orally), or it can be implied from the landowner's overt conduct. In *Beresford*, the House of Lords refused to rule out the possibility of an implied licence to use land for lawful sports and pastimes as a matter of law. Lord Bingham said:[89]

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[85] At paragraph 20.
[86] At paragraphs 88-90.
[87] [2010] EWHC 3045 (Ch); [2012] EWCA Civ 250. The Supreme Court refused leave to appeal on the issue of *vi.*
[88] At paragraph 52.
[89] At paragraph 5.

"*I can see no objection in principle to the implication of a licence where the facts warrant such an implication. To deny this possibility would, I think, be unduly old-fashioned, formalistic and restrictive. A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use.*"

Lord Rodger said:[90]

"*I see no reason in principle why, in an appropriate case, the implied grant of such a revocable licence or permission could not be established by inference from the relevant circumstances*."

Lord Walker said:[91]

"*In the Court of Appeal Dyson LJ considered that implied permission could defeat a claim to user as of right, as Smith J had held at first instance. I can agree with that as a general proposition, provided that the permission is implied by (or inferred from) overt conduct of the landowner, such as making a charge for admission, or asserting his title by the occasional closure of the land to all comers. Such actions have an impact on members of the public and demonstrate that their access to the land, when they do have access, depends on the landowner's permission.*"

[90] At paragraph 59.
[91] At paragraph 83.

113. The House of Lords stressed, however, that permission cannot be implied from mere inaction on the part of a landowner with knowledge of the use to which his land is being put; that is acquiescence or tolerance which will not prevent the use being as of right.[92] There must be "*a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass*" (per Lord Walker).[93] Permission must be communicated either by writing, by spoken words, or by "*overt and unequivocal conduct*" (again, per Lord Walker).[94] However, their Lordships held that the council's having mown the grass and left in place seating which spectators could use was not sufficient: "*The mere fact that a landowner encourages an activity on his land does not indicate … that it takes place only by virtue of his revocable permission*" said Lord Rodger.[95]

114. In *Mann*, the judge held that the landowner had made it sufficiently clear that the land claimed as a green was used by its implied permission by holding beer festivals on part of the land for a few days a year and charging members of the public for entry to the marquee, which he described as "*a manifest act of exclusion*" that could be taken as an assertion of the right to exclude referable to the whole of the land.[96]

115. In *Newhaven*, one of the grounds upon which the port authority disputed the registrability of the land in question (a tidal beach in Newhaven Harbour) was that the byelaws to which it had been subject not only prohibited specified recreational activities (fishing and bathing) in the harbour, but gave the public an implied revocable permission to carry on others, subject to conditions:

> "*70. No person shall engage in or play any sport or game so as to obstruct or impede the use of the harbour, or any part thereof, or any person thereon…*

[92] See paragraph 6 per Lord Bingham, paragraph 59 per Lord Rodger and paragraph 79 per Lord Walker.
[93] At paragraph 75.
[94] At paragraph 79.
[95] At paragraph 60.
[96] See paragraphs 72-76.

71. No person shall bring any dog within the harbour, or permit it to be within the harbour, unless it is securely fastened by a suitable chain or cord, or is otherwise under proper and sufficient control."

The Court of Appeal unanimously agreed with that submission as a matter of construction of the byelaws,[97] but held by a majority[98] (Lewison LJ dissenting),[99] in agreement with the inspector and Ouseley J at first instance, that it failed for want of any overt act of communication of the byelaws to the public during the relevant 20 year period. No byelaw signs had been displayed, nor was there any evidence of their enforcement such as to alert the public to their existence. Lewison LJ saw no necessity for communication after the byelaws were made and published. Richards and McFarlane LJJ took the view that *Beresford* dictated otherwise. However, the Court of Appeal's rulings in *Newhaven* are being challenged in the Supreme Court.

Statutory right

116. In *Beresford*, the Judicial Committee invited supplementary submissions on the question whether the local inhabitants might have used the land not as of right, but pursuant to a statutory right to do so. In the event, they concluded that none of the statutory provisions appearing to be potentially relevant could be relied on as conferring a right to indulge in lawful sports and pastimes.[100] However, in *R(Barkas) v North Yorkshire County Council* ("*Barkas"*),[101] the Supreme Court not only held that on the facts of that case the local inhabitants had used the land pursuant to a statutory right and so not as of right; they also held that *Beresford* had been wrongly decided on its own facts. It is not necessary for the purposes of the Application to consider the particular circumstances and statutory provisions in play in *Beresford*, but the facts of *Barkas* are more closely analogous and the principles enunciated by the Supreme Court are directly applicable.

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[97] See paragraphs 74, 100, 136.
[98] See paragraphs 87, 102.
[99] At paragraphs 137-138.
[100] See paragraphs 9, 62, 88-90 in particular.
[101] [2014] UKSC 31; [2014] 2 WLR 1360.

117. With regard to the facts, the claimed green had been acquired as part of a larger parcel of land by a local authority acting pursuant to section 73(a) of the Housing Act 1936, which empowered it to acquire land as a site for the erection of houses. Most of the land had been developed for housing, but the claimed green had been laid out and maintained as a recreation ground pursuant to section 80(1) of the Housing Act 1936 and its successor provisions in section 93 of the Housing Act 1957 and section 12 of the Housing Act 1985. Section 80(1) of the 1936 Act provided (insofar as material):

> "*The powers of a local authority under this Part of this Act to provide housing accommodation shall include a power to provide and maintain with the consent of the Minister ... in connection with any such housing accommodation ... any recreation grounds ...*".

118. The Supreme Court held, in the words of Lord Neuberger of Abbotsbury PSC:

> "*So long as land is held under a provision such as section 12(1) of the 1985 Act ... members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land 'by right' and not as trespassers, so that no question of user 'as of right' can arise.*"[102]

He went on to say that although such a right was principally enforceable by public law proceedings, and conditional on the council continuing to devote the land to the purposes of section 12(1), there was no reason in terms of legal principle or public policy to differentiate it from a private law right rendering use *precario.*[103]

> "*If that were not so, members of the public using for recreation land held by the local authority for the statutory purpose of public recreation would be trespassing on the land, which cannot be correct.*"[104]

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[102] Paragraph 21.
[103] Paragraph 22.
[104] Paragraph 23.

Lord Carnwath JSC (who delivered the only other judgment, Lady Hale, Lord Reed and Lord Hughes JJSC agreeing with both) said:

> "*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.*"[105]

He said of the acts of maintenance and encouragement which had been held in *Beresford* not to warrant the implication of a permission that, when done by a public authority, they gave rise or lent force to the inference that the land had been committed to public use under statutory powers.[106]

119. Other statutory provisions of potential relevance to this case are as follows:

- Section 107 of the Housing Act 1957:

> "*A local authority may lay out and construct public streets or roads and open spaces on land acquired or appropriated by them for the purposes of this Part of this Act …*"

This provision came into force on 1 September 1957 (in place of the similarly worded section 79(1)(a) of the Housing Act 1936) and was substantially re-enacted in section 13 of the Housing Act 1985.

- Section 164 of the Public Health Act 1875:

[105] Paragraph 65.
[106] Paragraphs 81-84.

"*Any local authority*[107]*may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds …*

Any local authority may make byelaws for the regulation of any such public walk or pleasure ground …"

- Sections 9 and 10 of the Open Spaces Act 1906, which respectively empower local authorities to acquire any "*open space*", and require them to hold and administer any open spaces so acquired "*in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose*" and to maintain them in a good and decent state. Section 10 also confers additional powers of improvement including draining, levelling, laying out, turfing and planting. "Open space" is defined[108] as

  "*any land, whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole of the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied*".

  Note should also be taken of sections 15(1) ("*A local authority may, with reference to any open space … in or over which they have acquired any estate, interest, or control under this Act, make byelaws for the regulation thereof …*") and 12 ("*A local authority may exercise all the powers given to them by this Act respecting open spaces … transferred to them in pursuance of this Act in respect of any open spaces … of a similar nature which may be vested in them in pursuance of any other statute, or of which they are otherwise the owners*").

[107] The words "local authority" were substituted for "urban authority" by the Local Government Act 1972.
[108] In section 20.

Appropriation

120. A local authority is a statutory body, and can only act for such purposes as statute empowers it to do. Appropriation is the process by which land that has been acquired by a local authority for one statutorily permitted purpose is transferred to be held by it for a different statutorily permitted purpose. Local authorities have not always had a power of appropriation. Section 163 of the Local Government Act 1933 first introduced a general power of appropriation, in the following terms:

> *"(1) Any land belonging to a local authority and not required for the purposes for which it was acquired or has since been appropriated may be appropriated for any other purpose approved by the Minister for which the local authority are authorised to acquire land:*
>
> *Provided that -*
>
> *(i) the local authority shall not on any land so appropriated –*
>
> *(a) create or permit any nuisance; or*
>
> *(b) sink any well for the public supply of water, or construct any cemetery, burial ground, destructor, sewage farm, or hospital for infectious diseases, unless, after local inquiry and consideration of any objections made by persons affected, the Minister, subject to such conditions as he thinks fit, authorises the work or construction;*
>
> *(ii) the appropriation of land by a local authority shall be subject to any covenant or restriction affecting the use of the land in their hands.*"

121. The requirement for Ministerial consent in all cases was abolished by section 23 of the Town and Country Planning Act 1959 in relation to any exercise of the power to appropriate after the commencement of that Act in August 1959. However, the requirement was retained by section 23(2)(a) in relation to "*land which consists or*

forms part of an open space (not being land which consists or forms part of a common or of a fuel or field garden allotment)", which was not to be appropriated without the consent of the Minister of Housing and Local Government. (There were also other exceptions which are not relevant here.) The terms "open space" and "fuel or field garden allotment" were defined by reference to the Town and Country Planning Act 1947, which in turn referred to the meanings attributed to them in the Acquisition of Land (Authorisation Procedure) Act 1946.[109] "Open space" meant "*any land laid out as a public garden, or used for the purposes of public recreation, or land being a disused burial ground*". "Fuel or field garden allotment" was defined as "*any allotment set out as a fuel allotment, or a field garden allotment, under an Inclosure Act*". In *R v Doncaster Metropolitan Borough Council, ex p Braim*[110] it was held that for the purposes of the successor provision in section 123(2A) of the Local Government Act 1972, the words "*used for the purposes of public recreation*" in the definition of "open space" meant "*lawfully used"* (i.e. in the exercise of a right or licence).

122. The general power of appropriation was re-enacted in section 122 of the Local Government Act 1972 (which came into force on 1 April 1974). The restrictions on the power to appropriate "*open space*" have been further modified; what the authority now has to do is to advertise its intention to appropriate and consider any objections received (section 122(2A)).[111] Compliance with those requirements frees the land from any statutory trust for enjoyment by the public under section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875: section 122(2B).

123. Section 158(1) of the Local Government Act 1933 empowered a local authority with the consent of the appropriate Minister to acquire by agreement any land for any purpose for which it was authorised to acquire land, notwithstanding that the land was not immediately required for that purpose, and section 158(2) provided that

[109] See section 57(3)(a) of the 1959 Act, section 119(1) of the 1947 Act and section 8(1) of the 1946 Act.
[110] (1987) 85 LGR 233.
[111] As introduced by section 118 of and Schedule 23 to the Local Government, Planning and Land Act 1980.

"*Any land acquired under this section may, until it is required for the purpose for which it was acquired, be held and used for the purpose of any of the functions of the local authority.*"

Section 120(2) of the Local Government Act 1972 contains a similar provision, but without any requirement for Ministerial consent.

124. Section 241(1) of the Town and Country Planning Act 1990 provides that:

"*notwithstanding anything in any enactment relating to land which is or forms part of a common …, such land which has been … appropriated by a local authority for planning purposes … (b) … may be used by any person in any manner in accordance with planning permission.*"

"Common" includes a town or village green.[112]

In *BDW Trading Ltd (t/a Barratt Homes) v Spooner* ("*Spooner*")[113] the claimant landowner obtained a ruling that notwithstanding registration of its land as a green under section 15, section 241 of the 1990 Act would permit development in accordance with the planning permission that had been granted, because the county council which had sold the land to the claimant had first appropriated it for planning purposes. In other words, section 241 would override the prohibitions on development in the 19th century legislation (see paragraph 10 above).

Concurrent user by landowner

125. In *Laing Homes,* the claimed green had been used for growing a hay crop by a licensee of the landowner in more than half of the 20 years relied on. Sullivan J held that the land did not qualify for registration because the recreational users had always given

[112] Section 336.
[113] [2011] EWHC 1486 (QB).

way to the licensee when carrying out his agricultural activities, and so had not used the land in such a manner as to suggest to a reasonable landowner that they were exercising or asserting a right to use it for lawful sports and pastimes. He took a similar approach in *Lewis*, where the inspector had advised that recreational users who had "*overwhelmingly deferred*" to the golfers while the land claimed as a green was in use as a golf course had not used it "as of right". The Court of Appeal agreed, but the Supreme Court did not, holding that the former golf course ought to be registered as a green. They held that there was no more to "as of right" than the tripartite test (see paragraph 110 above). They overcame what the Court of Appeal had perceived to be an insuperable obstacle to registration in such a situation, namely that it would confer on local inhabitants a priority over the landowner's own use of the land which they had not asserted or enjoyed during the 20 year period, by holding that the rights of recreation which the local inhabitants would acquire would be restricted to the extent that the owner's own previous use of the land had prevented their indulging in such activities in the past, while the owner would remain entitled to continue his use of the land as before.[114] It followed that the conduct of local inhabitants in abstaining from interference with the owner's activities was not inconsistent with their using the land in the way in which they would use it if they already had the rights which registration as a green would confer.

"on the land"

126. In *Cheltenham Builders*[115] Sullivan J said that, in discharging the onus upon them of proving on the balance of probabilities that the application site had become a village green, the applicants:

> "*had to demonstrate that the whole, and not merely a part or parts of the site had probably been used for lawful sports and pastimes for not less than 20 years. A common sense approach is required when considering whether the whole of a site*

[114] See, in particular, paragraphs 70-75 per Lord Hope, 99-105 per Lord Brown and 114-115 per Lord Kerr.
[115] At paragraph 29.

was so used. A registration authority would not expect to see evidence of use of every square foot of a site, but it would have to be persuaded that for all practical purposes it could sensibly be said that the whole of the site had been so used for 20 years."

127. In *Oxfordshire* Lords Hoffmann, Rodger and Walker expressed the opinion (obiter)[116] that there was no requirement for land to be grassed or conform to the traditional image of a town or village green in order to qualify for registration under the 1965 Act. Any land could be registered as such provided that it had been used in the appropriate manner for a sufficient period. In that case, the inspector recommended registration of an area of scrubland consisting of trees and a great deal of high scrubby undergrowth interspersed with paths, glades and clearings, only about 25% of which was reasonably accessible to the hardy walker. Lightman J said that the existence of inaccessible areas did not preclude an area being held to be a green.[117] Ponds might form part of the scenic attraction and provide recreation in the form of feeding ducks or sailing model boats. Overgrown and inaccessible areas might be essential habitat for birds and wildlife, attracting bird watchers and others. Lord Hoffmann said that he for his part would be very reluctant to express a view on the inspector's conclusions without inspecting or at least seeing photographs of the site, continuing:[118]

"*If the area is in fact intersected with paths and clearings, the fact that these occupy only 25% of the land area would not in my view be inconsistent with a finding that there was recreational use of the scrubland as a whole. For example, the whole of a public garden may be used for recreational activities even though 75% of the surface consists of flowerbeds, borders and shrubberies on which the public may not walk.*"

128. In *Newhaven*, the question whether there are any limitations on the kinds of land which can qualify for registration as a town or village green arose directly for decision. The

[116] Paragraphs 37-39, 115, 124-128 (Lord Scott dissented at paragraphs 71-83).
[117] [2004] Ch 253, at paragraph 95.
[118] Paragraph 67.

Court of Appeal agreed with Ouseley J that there are not, Richards and Lewison LJJ expressing the view that the arguments against the implication of any such limitation are even stronger in the case of the 2006 Act than in respect of the 1965 Act.[119] Accordingly, there was no reason why the tidal beach which comprised the application site could not be registered under section 15, even though the whole beach was not available for lawful activities[120] for significant periods each day due to the tidal cycle.

"for a period of at least twenty years"

129. There must be evidence of qualifying use for a period of at least twenty years. That does not mean that any particular individuals must have used the land for the full period of twenty years. Guidance as to how to approach the evidence of witnesses who can only claim shorter periods of use is to be found in *McAlpine Homes.*[121] In a case where relevant circumstances have changed during the twenty years (such as ownership of the land, or its physical condition, or where gates have been locked, or fences erected) more caution will have to be exercised in taking account of evidence of recreational use during one part of that period when considering what was happening at other times. Sullivan J went on to say[122] that while the written evidence had to be treated with caution because it was not subject to cross-examination, the inspector was entitled to conclude, having looked at the totality of it, that it was largely consistent with and supportive of the oral evidence given by the applicant's witnesses to the effect that many local people had been using the land for informal recreation for more than 20 years without permission or objection.

130. In *Betterment* the judge found that, in the course of major drainage works, part of the land of which deregistration was sought had been fenced off for about four months during the 20 year period. He held that even if the remainder of the land had been registrable (contrary to his principal finding that user of the whole had been contentious

[119] See paragraphs 38-42, 105.
[120] Swimming and fishing being prohibited by the byelaws.
[121] At paragraphs 73-74.
[122] At paragraph 75.

and not as of right), that part would not have been. Although it was not strictly necessary for the Court of Appeal to decide whether he was right on that point (having upheld his principal finding), Patten LJ addressed it in some detail and agreed with the judge that there had not been 20 years' user of the fenced area, as time had stopped running while it was fenced off. [123] He identified the issue as being whether the physical disruption to public use caused by the fencing off was sufficient to interrupt user of the works site for the purposes of section 22 of the 1965 Act. He answered in the following terms:

> "*It seems to me that for the actions of a third party to be taken into account there must be a physical ouster of local inhabitants from the land and the disruption must be inconsistent with the continued use of the land as a village green. If the two competing uses can accommodate each other (as they did in [Lewis]) then time does not cease to run. But here the exclusion was complete and the use of the land for the drainage scheme was not compatible with it remaining in use as a village green. The judge was therefore correct in my view to hold that there had not been twenty years' user of the works site.*"

X. The case for the Objector

131. Mr Edwards began his closing submissions on behalf of the Objector by saying that, having heard the evidence tendered by the Applicant, the Objector was adopting the position that most of the elements of the statutory criteria for registration were no longer in issue, namely:

    (a) that the Application Land had been used for lawful sports and pastimes throughout the 20-year period ending on 14 December 2012;

    (b) that such use had been made by a significant number of inhabitants of a qualifying neighbourhood, the Northway Estate, which was located within a

[123] Paragraphs 65-71. Sullivan LJ expressed himself to be in complete agreement: paragraph 91.

qualifying locality, the electoral ward of Headington Hill and Northway; the boundaries as drawn by the Applicant were accepted to be correct in each case.

132. However, he continued, the evidence showed that at no point during that 20-year period had any part of the Application Land been so used as of right, and therefore the Application must as a matter of law fail.

133. For the purposes of seeking to make good that submission, Mr Edwards divided the Application Land into two parts, starting with that part fronting Foxwell Drive which was included in area 1A on the Northway Plan together with Dunstan Park. The Objector's case with regard to that part was that it had been held and maintained pursuant to section 164 of the Public Health Act 1875 for the purpose of public recreation for many decades, including almost all of the relevant 20-year period, i.e. up to 1 March 2012 when it was appropriated for planning purposes. In respect of the period from 1 March 2012 to the submission of the Application on 14 December 2012, either use for lawful sports and pastimes continued not to be as of right because the land continued to be held on a temporary basis for public recreation until it was required for development, pursuant to section 120(2) of the Local Government Act 1972[124] or on the basis referred to in paragraph 143 below, or use for lawful sports and pastimes ceased to be as of right for that small proportion of the 20-year period.

134. In respect of the earlier part of the period, the evidence all pointed one way. Particular reliance was placed on the District Valuer's letter of 31 October 1952 and the records of proceedings of the Estates Committee on 18 November 1952, the full Council on 1 December 1952 and the Estates Committee on 3 February 1953.[125] Those documents demonstrated that:

[124] See paragraph 123 above.
[125] See paragraphs 79-81 above.

(a) the Objector had in 1952 resolved to appropriate this part of the Application Land and Dunstan Park from housing purposes to open spaces purposes under the responsibility of the Parks and Cemeteries Committee;

(b) by 3 February 1953, Ministerial consent had been given for that appropriation;

(c) the specific statutory power to which the land was appropriated with such consent was section 164 of the Public Health Act 1875.

There was no evidence of any subsequent appropriation before 1 March 2012.

135. On the basis of the Supreme Court's decision in *Barkas* (in particular paragraphs 21-22, 52 and 65),[126] use for public recreation of the land so appropriated had been by right and not as of right. The ratio of *Barkas* was that if land was made available to the public by a local authority in the exercise of a statutory power to make it available for public recreation, use of it by the public for that purpose was by right, not as of right. It mattered not what the land was like, or what facilities were provided on it (if any).

136. The Applicant's suggestion that some legal instrument was required to effect the appropriation was predicated on a misunderstanding of what was involved in appropriation of land by a public authority. Appropriation was effected by resolution and not the execution of an instrument such as a deed. The Objector's inability to find a copy of the Ministerial consent which was required by section 163 of the Local Government Act 1933 was unsurprising after the passage of over 60 years, and it was fanciful to suppose that the Town Clerk might have been misleading the Estates Committee by reporting that it had been given.

[126] See paragraphs 116-118 above.

137. In light of the 3 February 1953 Estates Committee minutes, it was unnecessary to invoke the evidential presumption of regularity, but in the absence of direct evidence of Ministerial consent, that presumption would have applied, just as it did in *Barkas.* Mr Edwards referred to the report of the inspector in that case,[127] paragraph 122 of which said in relation to the Ministerial consent required under section 80 of the Housing Act 1936[128] "*It is true that there is no evidence, one way or the other, as to whether the Minister gave his consent. However, I consider that I am entitled to apply the usual presumption of regularity*." No criticism of that approach was made by any of the nine judges by whom Mrs Barkas's claim was heard. On the issue of how the presumption of regularity operates, Mr Edwards referred to the decision of Sir Nicolas Browne-Wilkinson V-C in *Calder Gravel Ltd v Kirklees Metropolitan Borough Council*[129] where he said that the presumption

> "*can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved. The presumption is that the statutory authority has acted lawfully and in accordance with its duty. ...Having resolved to grant the application for planning approval ... the [defendant] council was under an immediate statutory duty to notify its decision to the applicants ... I do not think that the law should start from the position that the local authority failed to perform its statutory duty. On the contrary, one must start from the position that one assumes that it did perform its statutory duty unless and until shown to the contrary*."

He accordingly held that a written grant of planning permission had been issued in 1946 although there was no evidence of the existence of such a document; it was for the persons against whom the presumption was made to show on the balance of probabilities that it was incorrect, and they had failed to do so.

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[127] Report of Mr Vivian Chapman QC dated 28 July 2010.
[128] See paragraph 117 above.
[129] (1990) 60 P&CR 322, at p 365.

138. There could be no doubt about the identity of the land the subject of the 1952 appropriation resolution against the background of the description in the District Valuer's report. Further, the Applicant's suggestion that it applied to some other land on the estate was inconsistent with subsequent events, in particular:

(a) the provision of children's play equipment on the Application Land, pursuant to the recommendation of the Parks and Cemeteries Committee as adopted by the Council in 1961;[130]

(b) the making of byelaws (pursuant inter alia to section 164 of the Public Health Act 1875) which applied to the Application Land;

(c) the Objector's longstanding practice of maintaining the Application Land as open space;

(d) the contents of the Objector's property records.[131]

139. There was no evidence anywhere (including in the Berry Conveyance, where one would expect to find it) of a covenant applying to the Application Land and preventing its being built upon or used otherwise than as open space, or providing for its use for grazing purposes. Clause 1 of the Berry Conveyance protected the vendor's retained land and did not substantively affect use of the land conveyed. But even if such a covenant did exist, its enforcement would be a private law matter. It would not affect the status of the land or of its use for public recreation.

140. With regard to the residue of the Application Land at the rear of the Borrowmead Road flats and houses, the Objector's records irrefutably demonstrated that it was acquired for housing; appropriated to use as allotments in 1953; and then re-appropriated to housing purposes "*so that it could be brought into use as a public open space*" in

[130] See paragraph 85 above.
[131] See paragraphs 76, 83-84 above.

November 1959.[132] The requirement for Ministerial consent for appropriation had been abrogated in August 1959 (save in respect of "open space", which at that time this land was not). No subsequent appropriation to any other purpose had taken place.

141. The Objector was entitled under section 107 of the Housing Act 1957[133] (re-enacted in section 13 of the Housing Act 1985) to lay out public open spaces on land acquired or appropriated for housing purposes, and the evidence was indicative of its having exercised that power in relation to this piece of land. The Objector's property records, its maintenance of the land, and the application to it of the 1996 Byelaws (which had not been challenged in cross-examination) all pointed that way. Sections 12 and 15 of the Open Spaces Act 1906 enabled byelaws to be made in respect of open spaces vested in the Objector under any statute. If that was correct, then a statutory power to make the land available to the public for recreation had been exercised, and by virtue of *Barkas* use of it by the public for recreation could not be as of right.

142. Alternatively, the Objector relied on the 1996 Byelaws as a whole (and nos 9, 12, and 16 in particular, as being the clearest examples)[134] for the grant of an implied permission to the public to use the land for recreation. The majority of the Court of Appeal in *Newhaven* had held that either communication of byelaws to the public, or their enforcement, was necessary if they were to give rise to a licence.[135] The Objector had done both in this case; publishing the byelaws on its website was a reasonable means of communication in the modern age, and Mr Thompson had given evidence of active reliance on them. (Mr Edwards made clear that the Objector was not seeking a delay in determination of the Application while the Supreme Court decided whether Lewison LJ's dissenting judgment was correct and the existence of byelaws was by itself sufficient to render use *precario.*)

[132] See paragraph 87 above.
[133] See paragraph 119 above.
[134] See paragraph 92 above.
[135] See paragraph 115 above.

143. Mr Edwards submitted that the Supreme Court also held in *Barkas* that use was not as of right unless it was trespassory, and where a local authority made land available for public recreation, members of the public who recreated on it were not trespassing and their use was not as of right regardless of the statutory power under which it was held. He referred in particular to paragraphs 21-23 and 27 of Lord Neuberger's judgment.

144. Finally, Mr Edwards said that the Objector had not withdrawn the contention contained in its statement of objection that the Application Land, even if otherwise registrable, should not be registered to the extent that it had been appropriated to planning purposes, relying on section 241 of the Town and Country Planning Act 1990 and *Spooner*.[136]

XI. The case for the Applicant

145. The Applicant submitted that all the requirements for land to be registered as a green under section 15(2) had been met.

146. Her witnesses' testimonies proved that the Application Land had been used extensively and continuously for a wide range of lawful sports and pastimes: children playing inside and outside the play area; cricket; football; rounders; frisbee; golf; kite flying; bike riding; walking; dog walking; jogging; running; blackberry picking; bird watching; picnics; sledging; building snowmen; snowball fights; photography; drawing and painting; street parties, and even a fair. User had been proved not only during the 20-year period leading up to the Application but also continuing to the present day, and extending backwards to the 1930s when Mr Berry still owned the land.

147. All her witnesses came from her chosen neighbourhood, as did most users of the Application Land. The Northway Estate had the distinctive character of a neighbourhood, including a cluster of facilities around the shops and church. The claimed locality was an administrative unit known to the law.

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[136] See paragraph 124 above.

148. The residents of the estate had used the Application Land in broad daylight for anyone to see. Their use had never been challenged or interrupted by the owner. There were no fences or locked gates to keep them out, no restrictions imposed on their use by notice or otherwise, no opening and closing hours. They had not been given permission to use the land. There were no signs to inform them that it was held by the Objector for recreational purposes; nor were the byelaws, or notice of the byelaws, posted on the land. There was no documentary evidence of enforcement of the byelaws and the residents did not know if it had occurred. The Objector could not rely on the byelaws as granting permission. The "no horse riding" notices were not relevant. Mowing grass and putting seats on land was not enough to prevent user from being as of right: *Beresford.* The play area might be different, but there was no signage there until 2009/10. If there was implied permission to use the play area, the Registration Authority was asked to register the remainder of the Application Land as a green and exclude just that area.

149. *Barkas* was distinguishable from this case for a number of reasons, and should not be applied.

150. First, that part of the Application Land which was acquired from Mr Berry was acquired as farmland, used by him for grazing, and left as farmland. Following the Berry Conveyance, Mr Berry continued to use Dunstan Park and that part of the Application Land. By the terms of the conveyance, the Objector agreed that it should be left as green space farmland for the use of the owner of Lower Farm for the time being. Mr Berry walked his animals from Lower Farm through Dunstan Park across the Application Land to Court Place Farm up to 1957, when he sold Lower Farm. The Objector was bound not to build on the land or do anything on it that would interfere with use by Mr Berry or his successors in title to Lower Farm. What was meant by the reference to leaving the Application Land in its "*natural state*" in the Parks and Cemeteries Committee minutes of 1959[137] was leaving it as agricultural land. The Application Land was never formally set out as a recreation ground for that reason, in

[137] See paragraph 85 above.

contrast to *Barkas.* The creation of the playing area was a breach of covenant. It followed that the Application Land was not used as of right by residents. The Objector needed the vendor's consent to change the use of the land from farmland, in addition to the Minister's, and it had not been obtained. An appropriation that interfered with third party rights was invalid. But as the reference to leaving the land in its natural state showed, there had never been an appropriation from farmland.

151. Further or alternatively, the Objector had been put to strict proof that due statutory process had been followed in all respects to achieve appropriation under a relevant Act; and had failed.

- The minutes did not identify a specific statutory power authorising appropriation in the case of either part of the Application Land.
- The minutes went no further than saying that the land *should be* appropriated, not saying that it actually *was* appropriated.
- Without production of Plan 4/20, the Objector could not prove that the 10.8 acres referred to in the minutes included any part of the Application Land.
- There was no official document appropriating either part of the land to be held under a relevant statutory provision.
- No copies of the correspondence with the Ministry had been produced. The reference in the February 1953 minutes to Ministerial consent was not good enough.
- There was no evidence at all of the Borrowmead Road end of the Application Land being appropriated to open space, as opposed to allotments and housing.
- The Objector's property records were unsatisfactory and not even written in the same handwriting; nor did they identify a particular statutory power under which the Application Land was held.

152. As to the argument based on section 241 of the Town and Country Planning Act 1990, *Spooner* was a questionable decision on which no one relied. The Applicant referred to a passage in *Gadsden on Commons and Greens* (2nd ed), at paragraph 14-70, in which the authors described the judgment as "*highly unsatisfactory"* and said that it did not

appear to provide a sound precedent for the proposition that following the appropriation of local authority land to a planning purpose, notwithstanding the subsequent registration of the land as a green under section 15, section 241 of the 1990 Act had the effect of permitting development on the land in accordance with the subsequent grant of planning permission. Apart from the problems with its reasoning, the decision did not in any event authorise the Registration Authority to refuse a properly made application. *Spooner* concerned the *effect* of registration, not whether land *should be registered.* That was not a matter of discretion.

153. Other themes of the Applicant's witnesses' evidence, and of the copious written representations included in her inquiry bundle (although, to be fair, not of her oral closing submissions, which she sought to confine to matters relevant to the Application) were that the Application Land needed protection from wholly inappropriate development, in the form of the proposed link road, and that the Northway Estate is under-provided with green space even as matters stand. Those are clearly matters of significant concern to the local residents. However, as they do not bear on the fulfilment of the statutory criteria for registration as a green, they are not matters to which the Registration Authority can have any regard in determining the Application, and I will not elaborate on them or refer to them further.

XII. Findings and conclusions

154. On the basis of the totality of the oral and written evidence tendered to the inquiry (bearing in mind that the written evidence of witnesses who did not attend for cross-examination has to be treated with caution), I have arrived at the following findings and conclusions.

155. To begin with the Objector's argument based on section 241 of the Town and Country Planning Act 1990 (paragraph 124 above), it is not for the Registration Authority to enter into a debate as to the soundness of the judge's reasoning or the satisfactoriness of the *Spooner* decision. Unless and until there is judicial authority to the contrary, it should accept and apply the ruling. However, I do not interpret the judgment as requiring, or even permitting, a registration authority to reject a registration application

that would otherwise succeed on the sole ground that the land has been appropriated for planning purposes, paving the way for reliance on section 241. If it finds that the section 15 criteria are satisfied, it should register the land, and allow section 241 (if and insofar as applicable) to take its course. In any event, section 241 only bites if the land "*is or forms part of*" a green, and land only becomes a green upon being registered as such.[138] It is not inevitable that planning permission will be granted, or as the case may be implemented, in respect of land that has been appropriated for planning purposes: an ensuing development might not be inconsistent with some of the land being used as a green. As the judge put it in *Spooner*:[139]

> "*If the contention by the Claimant is correct, applications for registration of land under the [2006 Act] will not be pointless in every case whenever there has been appropriation under section 241… but in very many if not most of those cases registration will be deprived of substantial useful effect.*"

Clearly he was envisaging that registration could and would be effected in such cases if the evidence justified it, but that its benefit to local inhabitants might be largely or wholly negated.

156. Accordingly, I advise the Registration Authority that if it were to be satisfied that the section 15(2) criteria are met in respect of that part of the Application Land which was appropriated to planning purposes on 1 March 2012, it should not refuse registration on the ground of its having been so appropriated.

157. Turning to the section 15(2) criteria for registrability, the Registration Authority's task is simplified by the substantial concessions made on behalf of the Objector in closing submissions (paragraph 131 above), and also by there being no significant conflicts between the evidence given on behalf of the parties and by members of the public. In my opinion, on the basis of the evidence, the Objector's concessions were rightly made.

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[138] See *Oxfordshire*, paragraph 43.
[139] At paragraph 48.

In light of the concessions, I can set out my reasons for so concluding rather more shortly than would otherwise have been necessary. I will address the criteria in a slightly different order than that in which they are set out in paragraph 100 above.

A significant number of the inhabitants of any locality, or of any neighbourhood within a locality

158. Applying the authorities discussed at paragraphs 101-102 above, it is my clear impression on the evidence that there were throughout the 20-year period to 14 December 2012 a sufficient number of Northway Estate inhabitants using the Application Land for lawful sports and pastimes to signify that the land was in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers, and to give the appearance to a reasonable landowner that a right for inhabitants of the area to use the land for recreation was being asserted.

159. The inquiry heard evidence of personal use from thirteen[140]witnesses of whom ten had resided on the estate for the entirety of that period or longer. And of the persons who provided written user evidence on which the Applicant relied, or supplied user evidence in support of the Application, thirteen had lived on the estate and used it for the whole period and two more had lived on the estate and used the land for part of the period.[141] Most of the witnesses spoke or wrote of use by their families as well as themselves, and there was a great deal of evidence (oral and written) about use by other inhabitants of the estate. The only evidence of use by persons identified as outsiders related to use by runners/joggers (in particular the Headington running group) and, of course, use by visiting relatives and friends who lived elsewhere. Use by non-inhabitants of the neighbourhood would not defeat the Application, however extensive, by reason of the abolition of the original predominant user requirement (paragraph 103 above). But given the location of the Application Land, sandwiched between the Northway Estate and the Bypass, it is inherently probable that user was in fact predominantly by

[140] Including Mr Ludlow (paragraph 97 above).
[141] Those figures do not include Miss Gibbs, Mr Hibbins and Ms Robinson (paragraph 98 above) because they did not specify particular user periods.

inhabitants of the estate (and their guests), and that matches the picture that emerged from the evidence.

160. There is no reason not to accept that evidence, which was unchallenged by the Objector.

161. The Objector did not dispute that an electoral ward could qualify as the relevant "locality" and for the reasons given in paragraph 104 above, I think that it was right not to do so. The Objector also confirmed that the Applicant had correctly defined the electoral ward of Headington Hill and Northway and that the claimed neighbourhood lies within it.

162. I am satisfied on the evidence that the "Northway Estate" does constitute a neighbourhood for section 15 purposes. The Objector so conceded, and it would have been difficult for it not to do so given that its own documents have consistently identified the "North Way Estate" or "Northway Estate" (which seems to have become the accepted term in place of "North Way Estate", although for a while they were used interchangeably)[142] as a distinct self-contained entity, more or less corresponding to the claimed neighbourhood in extent.[143] The land was simultaneously acquired from Mr Berry and Corpus Christi College and developed as one council housing estate. Its history, geography, and socio-economic circumstances provide the necessary cohesiveness, and although as a matter of law it is not necessary for a neighbourhood to have any particular – or indeed any – communal facilities, this area does, as described at paragraphs 35-36 above. There have been no substantial changes in its composition since it was developed, and on the Applicant's evidence it has a strong sense of identity and community, with families choosing to remain through several generations. Mrs Cox described it as "*very much like a village*".

[142] See paragraphs 85, 87 above.
[143] As agreed by Mr Newman (paragraph 76 above).

Indulged in lawful sports and pastimes

163. Although walking, with and without dogs, and children playing, were the most commonly mentioned recreational activities undertaken on the Application Land, the Applicant's oral evidence disclosed a broad range of other sports and pastimes: informal games of football, cricket and rounders; frisbee; jogging; running; golf; kite flying; bicycle riding; blackberry picking; plant and wildlife observation, including bird watching; picnics and family parties; building snowmen and general playing in the snow; sledging; photography; drawing and painting. It was used in connection with the 2011 street party to celebrate the sixtieth anniversary of the estate and fiftieth anniversary of the Evangelical Church. Mr Mutton mentioned seeing fireworks, but did not specify how often or how long ago. There were a couple of other references in the written evidence to fireworks/bonfire parties/Guy Fawkes celebrations and one reference to carol singing. I would accept all of those activities as "lawful sports and pastimes" within the meaning of section 15, subject to the following qualifications.

164. First, activities which may qualify as lawful sports and pastimes may not do so if the manner and context in which they are carried on are such that they would appear to a reasonable landowner to be referable to the exercise of an existing public right of way or the potential establishment of a new public right of way (paragraph 109 above). Sullivan J and Lightman J focused on walking (with and without dogs), but similar considerations would apply to other linear activities such as running, jogging and cycling. It would seem probable that a proportion of the user of the Application Land by inhabitants of the estate would have fallen into that category and should be discounted accordingly: for example, a resident cutting across or along the Application Land to get to Court Place Farm, or in the course of a circular run. However, I am satisfied that the majority by far of recreational use of the Application Land (including walking and dog walking) would not have appeared to a reasonable landowner to be highway-type use. The absence of any worn paths on the land (save between Borrowmead Road and the unauthorised access to the Bypass - paragraph 18 above) supports that finding.

165. Secondly, activities that might qualify as lawful sports and pastimes may not do so if they are carried on in a way or in circumstances which involve the commission of a criminal offence, or are likely to cause injury or damage to the landowner's property (paragraph 108 above). I am concerned about the potential for causing injury/damage of holding bonfires on the land, but there is very little evidence of that having been done. More important is consideration of the question whether any of the activities infringed the 1996 Byelaws (paragraph 92 above) and strictly speaking involved the commission of a criminal offence on that account. Byelaw 3(1) provided inter alia that "*No person shall, without reasonable excuse, ride or drive a cycle … in the ground … except in any part of the ground where there is a right of way for that class of vehicle*", and "cycle" was defined in byelaw 3(4) as meaning "*a bicycle, a tricycle, or a cycle having four or more wheels, not being in any case a motor cycle or motor vehicle*." Driving, chipping or pitching a hard golf ball was prohibited by byelaw 15. However, bicycle riding and (in particular) golf were also relatively little mentioned in the evidence and their being discounted would not affect the overall picture or detract from the satisfaction of this particular criterion.

On the land

166. The Application Land is plainly all "land" within the broad meaning of section 15 (paragraphs 127-128 above). The presence of trees and scrubby undergrowth along the north-eastern boundary and at the south-eastern end is not inconsistent with a finding that there was recreational use of the Application Land as a whole (paragraph 127 above), and I find that there was recreational use of the whole, save for the (admittedly small) area occupied by the footprint of the gas installation building. That area is exclusively occupied by a third party's building for a purpose wholly unrelated to and inconsistent with recreational activity. It is analogous to the area fenced off for drainage works in *Betterment* (paragraph 130 above) (there being physical ouster of local inhabitants from that area and a use of it which is incompatible with use as a town/village green); but it being a permanent rather than a temporary work of construction, there is an *a fortiori* case for holding that so long as it has been in position, there can have been no qualifying use of that area.

167. In contrast, the trees and undergrowth form part of the scenic attraction and in themselves afford and enhance recreational opportunities (e.g. for observing birds and other wildlife, blackberry picking, photography, and children's play). Access to the formal children's play area has been available at all times, before and after its being enclosed with fencing and gates, and local inhabitants have taken full advantage of that access.

168. There is less to do at the north-western end of the land, in particular that part beyond the Court Place Farm access, and it is no doubt correspondingly less used. However, it is a level, grassy area suitable (or, in Mrs Cox's words, "*very nice*") for walking and playing on, and I accept (as did the Objector, after cross-examination of the Applicant's witnesses on the subject) that it has been used for recreation as part and parcel of the whole.

For a period of at least twenty years

169. On the evidence and my above findings, there was use of the Application Land (gas installation apart) for lawful sports and pastimes by a significant number of Northway Estate inhabitants throughout a period of at least 20 years preceding 14 December 2012 and continuing as at 14 December 2012. The Applicant was in the fortunate position of being able to call five witnesses whose personal knowledge and usage of the Application Land extended back throughout not just that critical 20-year period but all or most of the way to the building of the estate in the early 1950s (Mrs Smith, Mr Coates, Mr Chesman, Miss Mooring, Mr Mutton) and a further four witnesses whose knowledge and user commenced before and continued throughout that period (Mrs Cox, Mrs Bleach, Mrs Glover, Mr Cassettari). Between them they were able to and did paint a picture of continuous use by a significant number of the estate's inhabitants from the 1950s to the date of the inquiry, which was consistent with and corroborated by the written evidence. There was no material change in the circumstances of the land during the 20-year period other than the refurbishment of the children's play area in 2009/10, and its enclosure at some time before that. No one suggested that either of those events diminished or materially changed use of the Application Land, and there is no reason to suppose that they might have done so.

As of right

170. The Application Land was freely open to public access throughout the key 20-year period (and long before that), in particular along the Foxwell Drive frontage and from Dunstan Park. There was no evidence of any attempt on the ground to prohibit or prevent access or recreational activity. The only prohibitory notices now (or, according to the evidence, formerly) on site relate specifically to horse-riding (an activity in which inhabitants of the Estate do not wish to indulge there) and dog-fouling (not a lawful sport or pastime). In other words there was nothing to render any other recreational activity *vi.*[144]

171. Nor was there any basis on which to find the inhabitants' recreational user *clam.* Any reasonable landowner "*on the spot*"[145] would have been aware of it.

172. All the findings that I have so far made are, of course, entirely consistent with the Objector's case – namely that the Application Land was deliberately made available to the public (in practice, the inhabitants of the Northway Estate) for the very purpose of recreation, and maintained and equipped accordingly, in exercise of its statutory powers. If that is right, then on the authority of *Barkas* (paragraphs 116-118 above) the recreational use was *precario* (insofar as not prohibited by byelaw) and the Application must fail.

173. For the purpose of resolving that issue, it is necessary to consider the Application Land in two parts, the part which is included in area 1A on the Northway Plan, and the remainder (at the north-western end).

174. The starting point for both is that they were initially acquired for the purpose of Part V of the Housing Act 1936. That much is clear from the proceedings of the Housing Committee and full Council in October 1946, when it was resolved to proceed with the

[144] See paragraph 111 above.
[145] A phrase used by Lord Walker in *Lewis.*

compulsory purchase of the land in the Berry and Corpus Christi Conveyances for that purpose (paragraph 78 above), although in the event, compulsion proved unnecessary. All the subsequent documents produced by the Objector are consistent with that having been the purpose of the 30 June 1948 acquisitions, as is the fact of the land so acquired having been developed as a housing estate.

Area 1A on the Northway Plan

175. By way of preliminary, there is nothing in the Berry Conveyance to prevent or restrict the development of the land conveyed for housing or for any other purpose, or the appropriation of the land conveyed from housing to other statutory purposes. The only right reserved by Mr Berry over the land conveyed was the right of way over the twelve feet wide accommodation road to be constructed by the Objector around the eastern boundary, including the perimeter of the eastern end of the Application Land as shown on the conveyance plan: see clause 3 and paragraph 3 of the Schedule to the Berry Conveyance (paragraph 24 above). That would explain Mr Berry's continuing to take his animals through Dunstan Park and around the Application Land for a while following the purchase, as recalled by some of the Applicant's witnesses. It may be that he did not in practice always keep to the agreed route. However, he did not retain any right to graze on the Application Land or elsewhere on the land conveyed, nor did he impose any restriction on its use. The Applicant appears to have misunderstood the proviso to clause 1 of the Berry Conveyance, which protected the neighbouring land retained by Mr Berry from claims to easements over it for the benefit of the land conveyed that would restrict or interfere with the free use of his retained land.

176. The reference in the report of the Parks and Cemeteries Committee meeting on 10 February 1959 to the North Way (Foxwell Drive) Open Space being "*left in its natural state*" (paragraph 85 above) appears, in context, to mean refraining from putting playing equipment on it. It cannot mean that the land was in agricultural use, as suggested by the Applicant (paragraph 150 above), or it would not have fitted the description "*somewhere quiet where the public can go to rest or picnic*". That the Parks and Cemeteries Committee were debating whether to site playing equipment on

the Application Land, or leave it for the public to rest and picnic and enjoy the view, goes to show that it had been appropriated to recreation, rather than that it had not.

177. Nor did the Berry Conveyance subject any part of the Application Land to a trust for the inhabitants of the estate to use for recreation, as some of the Applicant's witnesses thought. It drew no distinction between the Application Land and the remainder of the land conveyed, which no one has suggested should not have had houses built upon it. (Compare and contrast *Attorney-General v Poole Corporation* [1938] 1 Ch 23, which concerned land conveyed to the corporation "*to hold in fee simple to the intent that the same may for ever hereafter be preserved and used as a pleasure or recreation ground for the public use*" and subject to a covenant to preserve the land as an open space or pleasure ground or recreation ground for the use of the public – although it is to be noted that the Court of Appeal saw no inconsistency between the conveyance and the corporation's holding the land under section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875, and held that the covenant was only enforceable in private law, and by the covenantees.)

178. However, the evidence clearly demonstrates that the land in area 1A on the Northway Plan was subjected to a statutory trust for recreation under section 164 of the Public Health Act 1875.

179. I do not think that there can be any reasonable doubt about the identity of the 10.8 acres of land referred to in the District Valuer's Report of 31 October 1952 and the records of the Estates Committee meetings on 18 November 1952 and 3 February 1953 (paragraphs 79-81 above), even in the absence of Plan No 4/20. The Applicant did not challenge Mr Newman's evidence about area measurements (paragraph 80 above), and his point about there being no other land on the estate to which the verbal description in the District Valuer's Report could have applied seems to me to be unanswerable. In particular, only the Application Land lay on the north fringe of the Northway Estate between Foxwell Drive and North Way (the Bypass).

180. That being so, that part of the Application Land in area 1A fell within the ambit of the Estates Committee's resolution of 18 November 1952 to recommend that it "*be*

appropriated from housing to open spaces purposes" and the approval and adoption by full Council of that recommendation on 1 December 1952 (paragraph 80 above). The Committee's resolution was framed in terms of a recommendation rather than an operative decision to appropriate because it did not have power to take that decision by itself, but the formula of approval and adoption by the Council (which did have that power) signified an operative decision at the requisite level. I agree with Mr Edwards's submission that the resolution of the full Council was sufficient to effect appropriation from one statutory purpose to another, without the Council having to execute any deed or other instrument to that end. The official record of the Council's proceedings is the best possible evidence available of an appropriation.

181. The appropriation was, however, subject to the requirement for Ministerial consent in section 163(1) of the Local Government Act 1933 as originally enacted (paragraph 120 above). In my opinion the minutes of the 3 February 1953 Estates Committee meeting (paragraph 81 above) provide satisfactory evidence of the grant of such consent. The District Valuer's Report was obtained for the purpose of submission to the Ministry, according to its terms (paragraph 79 above), so the necessity to apply for consent was understood and an application was intended to be made in October 1952, and there is no basis for supposing that the Town Clerk's report that consent had been issued was incorrect. The formal record in the minutes of his report to that effect constitutes direct evidence of the grant of consent and there is therefore no need to invoke the presumption of regularity (paragraph 137 above). The Objector has proved on the balance of probabilities that the requisite consent was sought and given.

182. The 3 February 1953 minutes also prove that – in the words of section 163(1) of the 1933 Act – the "*other purpose approved by the Minister for which the local authority* [was] *authorised to acquire land*" to which area 1A was appropriated was that of section 164 of the Public Health Act 1875, i.e. "*being used as public walks or pleasure grounds*" (paragraph 119 above).

183. There was no further appropriation of any land in area 1A until the appropriation to planning purposes on 1 March 2012 (paragraph 25 above).

184. Applying the Supreme Court's reasoning in *Barkas* (paragraph 118 above), that is the end of the matter so far as concerns this part of the Application Land. Members of the public (including the inhabitants of the Northway Estate) had a statutory right to use it for recreational purposes, and used it "by right" and not as trespassers so that no question of user "as of right" could arise, so long as it was held under section 164 of the 1875 Act. The only ground of distinction between this case and *Barkas* is that the provision under which the land was held for the purpose of public recreation was different. But section 164 of the 1875 Act is a provision analogous to section 12(1) of the Housing Act 1985. Indeed Sullivan LJ, delivering the leading judgment in the Court of Appeal in *Barkas*,[146] said that:

> "*Land which is held under section 164 of the 1875 Act for the purpose of being used as public walks or pleasure grounds is, in my view, the paradigm of land which has been appropriated for public recreation.*"

Both he and Lord Neuberger PSC relied in support of their approach on the case of *Hall v Beckenham Corporation*,[147] in which Finnemore J had said that the defendant council could not stop a member of the public doing what he liked in a recreation ground held under that section, so long as he committed no criminal offence and observed the byelaws. Although the section does not in terms impose a trust for public recreational use on the local authority, unlike section 10 of the Open Spaces Act 1906 (paragraph 119 above), its substantive effect was expressly assimilated to that of section 10 of the 1906 Act by Parliament in enacting section 122(2B) of the Local Government Act 1972:

> *"Where land appropriated by virtue of subsection (2A) above is held –*
>
> *(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or*

[146] [2012] EWCA Civ 1373, at paragraph 34.
[147] [1949] 1 KB 716.

(b) in accordance with section 10 of the Open Spaces Act 1906… ,

the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10."

185. Accordingly, I find that the recreational use of this part of the Application Land by inhabitants of the Northway Estate was not "as of right" from 1953 to 1 March 2012 by reason of its being held for the purposes of section 164 of the Public Health Act 1875 throughout that period.

186. The treatment of the land in the Objector's property records (paragraphs 76, 83-84 above), is consistent with and corroborative of that finding, but not necessary for it. The same applies to the Objector's having maintained the land, laid out and equipped and re-equipped the children's play area, and installed the benches and the goalposts, all of which the Applicant and her witnesses accepted it had done over the years; and its having made byelaws in respect of the land (paragraph 92 above). The Objector was also involved in the planting of the trees won by Mrs Cox (paragraph 30 above). Powers to lay out, plant, improve and maintain and to make byelaws are all expressly conferred by section 164 (paragraph 119 above).

187. It is unnecessary to decide whether recreational use during the short interval between 1 March 2012 and the date of the Application (14 December 2012) was or was not as of right. It does seem counter-intuitive to regard inhabitants of the estate as trespassing on this part of the Application Land when the Objector has in practice continued to make it available for that purpose pending resolution of this Application and progress of the Barton development proposals. If section 120(2) of the Local Government Act 1972 does not apply so as to authorise the land's being held on a temporary basis for public recreation as Mr Edwards submitted it did (paragraph 133 above) – which on its face it does not, the land having been acquired a long time ago – I would nonetheless be inclined to think that there might be a case for implying a licence from the Objector's conduct in continuing to maintain the land exactly as before, including by leaving in place the signage on the play area (paragraph 20 above), in circumstances where the

local residents had been made aware of the appropriation to planning purposes and the precarious nature of their continued use of the land. But since nothing turns on it, I will not explore the question further.

The residue of the Application Land

188. With regard to the north-western end of the Application Land, outside area 1A on the Northway Plan, the official records of proceedings of the Estates Committee and full Council in July 1953 (paragraph 87 above) read together show that there was a Council resolution to appropriate from housing to allotments purposes at the District Valuer's valuation "*an area of land approximately 1.54 acres at the rear of the houses and flats in Borrowmead Road, North Way Estate*". I do not think there can be any reasonable doubt but that the resolution related to the north-western end of the Application Land. The verbal description fits that area and the plan produced by Mr Newman (paragraph 89 above) identified it as "*Area available for allotments*". The Applicant did not put forward any credible alternative candidate for that appropriation. The Objector did not, however, produce any direct evidence that Ministerial consent was sought or given for that appropriation, so it would be necessary to have recourse to the presumption of regularity (paragraph 137 above) in this instance. Its application would be consistent with the direct evidence of compliance with the requirement to obtain Ministerial consent in respect of area 1A; it is unlikely that the council would have been mindful of the requirement in one case and not in the other, when the appropriations were more or less contemporaneous. But in practice it probably does not matter all that much whether or not Ministerial consent was given, because of the resolution to appropriate the self-same area back to housing purposes in November 1959 (paragraph 87 above). By that time Ministerial consent was no longer required for all appropriations (paragraph 121 above) and although the terms of the resolution suggest some uncertainty about the position, the land did not fall into any of the excepted categories. Albeit it may in practice have been used for recreation by inhabitants of the estate (and there was evidence to that effect from Mr Chesman: paragraph 48 above), that was not pursuant to any right or licence.

189. As *Barkas* holds, there is no necessity for an appropriation as such in order to make land held by a local authority for housing available for public recreation "by right". There are two provisions in the Housing Acts themselves which enable land held for housing to be put to recreational use without an appropriation. The first is the power to provide and maintain recreation grounds with Ministerial consent (paragraph 117 above) which is the power that the inspector found to have been exercised in *Barkas*. The second is the power to lay out public open spaces on land acquired or appropriated for housing purposes (paragraph 119 above). In the present case, the inference that best fits the documentary and factual evidence is that the latter power was exercised.

190. First, according to Mr Newman, no Ministerial consent was sought or given. There is nothing wrong in that. Where a council has two separate statutory powers which overlap such that either could apply, it is open to the council to rely on either power, even if the conditions for its exercise are less onerous, e.g. if that enables it to avoid paying compensation for which it would be liable if it exercised the other.[148] So, here, if the same objective can be achieved without Ministerial consent – as appears to be the case – there is no reason why a council should not do so. "Open space" is undefined in the Housing Acts, but it is commonly understood to mean land that can be used for public recreation, and there would be little point in laying out public open space which the public could *not* lawfully enter or use.

191. Second, the minutes of the Estates Committee of 7 July 1959 expressly identified the objective of re-appropriation to housing purposes to be "*so that the land could be brought into use as a public open space*" (paragraph 87 above). That follows the wording of section 107 of the Housing Act 1957, rather than section 93. The minutes of its next meeting on 20 October 1959 show no departure from that intention. There is a *prima facie* discrepancy between the wording of those minutes and the report of the latter Committee meeting in the Council minute book, which refers to "*use as a children's playground*" (a form of wording that was later reproduced in the Objector's property records – paragraph 88 above). But I do not think that it would be *ultra vires*

[148] See e.g. the Supreme Court's decision in *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022.

for a public open space to be used as a children's playground, or to have children's play equipment sited on it. That, of course, was never done. The area has been mown and maintained as a simple grassed area with no equipment or furniture at all. An obvious inference is that the area was under consideration as an alternative location for the playing equipment which in 1959 the Parks and Cemeteries Committee was reluctant to have on the other part of the Application Land, in area 1A (see paragraph 1475 in the 10 February 1959 report – paragraph 85 above), before giving way and allowing it in 1961 (see minutes of 14 March 1961, also quoted in paragraph 85 above).

192. I therefore accept Mr Edwards's submission that, applying *Barkas*, this part of the Application Land has not been used for recreation "as of right" from 1960 onwards.

193. On that footing, the question whether the 1996 Byelaws gave rise to an implied permission on the authority of *Newhaven* (paragraph 142 above) does not arise. I will, however, make the following observations.

194. As a matter of construction of the 1996 Byelaws (paragraph 92 above), read as a whole and with particular reference to byelaws 12 and 14, a reasonable reader would in my view understand them to mean that the playing of games was permitted on land to which they applied subject to the specified conditions, and (as a matter of necessary and/or reasonable inference) more general recreational activity was also permitted, subject to the specified exclusions and restrictions. The express categorisation of the land as a pleasure ground, public walk or open space would reinforce that understanding. By analogy with the byelaws in *Newhaven* (paragraph 115 above), they could be interpreted as permissive. I also think that any reasonable reader would read the byelaws as applying to the whole of the Application Land albeit that the north-western end is not physically contiguous to Foxwell Drive. There is no dividing line on the ground between the two parts, albeit that they are held under different statutory provisions and the byelaw-making power would have its source in different statutory provisions (sections 12 and 15 of the Open Spaces Act 1906 – paragraph 119 above – in the case of the north-western part, as opposed to section 164 of the Public Health Act 1875). Local people did not make any distinction between them in terms of user or

otherwise. The Applicant referred to the whole as "Foxwell Drive Green Open Space" in the Application.

195. However, the Objector did not establish on the evidence that the content or existence of the byelaws was communicated to the residents of the Northway Estate who used the Application Land on a day to day basis. It was not contended that there had ever been any signage on the land that intimated their existence. Reliance was placed on publication on the Objector's website. However, there being nothing on the land to advise or warn users to search for byelaws on the website, I do not think it reasonable to treat the website as equivalent to a notice posted on the land. Subject of course to the possibility of the Supreme Court's reversing or modifying the majority decision in *Newhaven*, it seems to me that Richards and McFarlane LJJ were holding that what was required was actual, rather than constructive, communication. For that reason I do not accept Mr Edwards's submission that enforcement was seen as an alternative basis for attributing permissive effect to the byelaws, rather than an alternative method of communicating them to the public. I refer in particular to the following passages from their judgments:-

> "*I take the view that the situation is governed by the principles laid down in Beresford as to the need for some overt act communicating permission. The mere making and publication of the byelaws back in 1931 was not sufficient to meet that requirement. On the inspector's findings of fact, there was nothing by way of display or enforcement of the byelaws during the relevant 20-year period to indicate to the public that use of the beach was subject to the permission of the landowner. The inspector was therefore right to find that the byelaws did not have the consequence that such use was precarious and not use as of right.*"[149]

[149] Per Richards LJ at paragraph 87.

"*I agree with Richards LJ that some positive or overt act of communication during the relevant 20-year period is necessary and, on the inspector's findings, no such communication took place.*"[150]

196. It is of course a question of fact and evidence in any particular case whether acts of enforcement of byelaws become sufficiently notorious to draw the existence of the byelaws being enforced to general public attention (as opposed to the attention of the individuals against whom they are enforced). However, in the present case, the Objector did not set out to demonstrate that such was the case, and I do not think that such a finding is open on the evidence before the Registration Authority. Accepting Mr Thompson's evidence (which there is no reason to reject) does not lead to that conclusion, since it is consistent with many if not most of the persons warned about breaching the byelaws being outsiders on isolated visits to the estate who would not have passed on the information.

XIII. Recommendation

197. My overall conclusion on the totality of the evidence presented at the inquiry is that the Applicant has failed to prove her case and that none of the Application Land qualifies for registration as a town or village green under section 15(2) of the Commons Act 2006. It has not been shown that a significant number of the inhabitants of any locality or any neighbourhood within a locality indulged in lawful sports and pastimes as of right on the Application Land or any part of it for a period of at least twenty years, and continued to do so at the time of the Application. Leaving aside the gas installation (paragraph 166 above), the Application fails because use of the Application Land for lawful sports and pastimes by the inhabitants of the Northway Estate (and other members of the public) has not been "as of right", due to the land having been held and made available to them for the very purpose of public recreation pursuant to, respectively, section 164 of the Public Health Act 1875 and section 107 of the Housing

[150] Per McFarlane LJ at paragraph 102.

Act 1957/section 13 of the Housing Act 1985 (subject only to the restrictions imposed by the 1996 Byelaws and any applicable predecessor byelaws).

198. My recommendation is that the Registration Authority should reject the Application for the reasons set out in this Report.

Ross Crail
New Square Chambers
Lincoln's Inn
11 November 2014

IN THE MATTER OF THE APPLICATION FOR THE REGISTRATION AS A NEW TOWN OR VILLAGE GREEN OF LAND AT FOXWELL DRIVE, HEADINGTON, OXFORD

INSPECTOR'S REPORT

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