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DR/03/13

Committee DEVELOPMENT AND REGULATION

Date 25 January 2013

VILLAGE GREEN
APPLICATION TO REGISTER LAND KNOWN AS POUND LANE RECREATION GROUND, POUND LANE, LAINDON, BASILDON AS A TOWN OR VILLAGE GREEN

Report by County Solicitor

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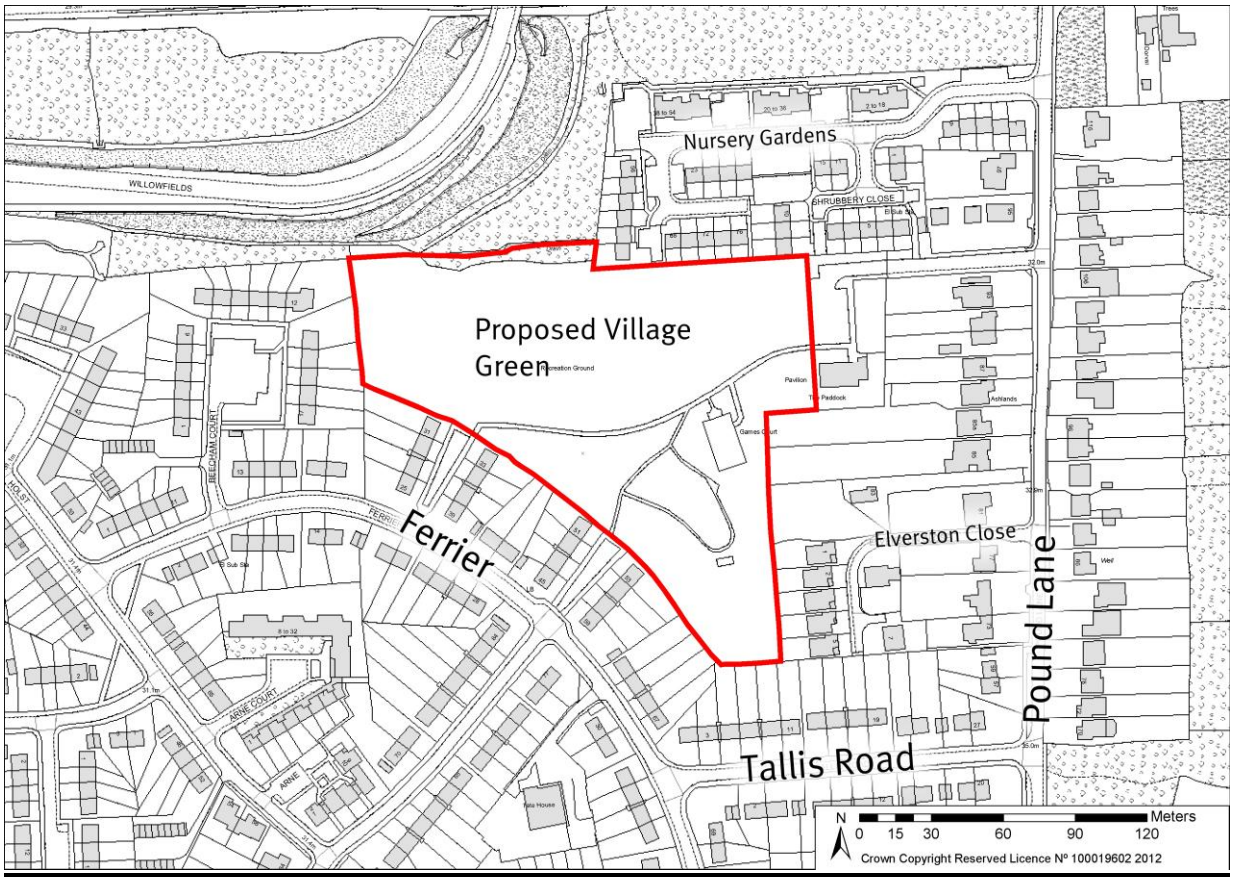

1. PURPOSE OF REPORT

To consider an application made on by Mr T B Adams of 7 Elverston Close, Laindon, Basildon dated 23 August 2010 under Section 15 of the Commons Act 2006 ("the 2006 Act"), to register land at Pound Lane Recreation Ground, Laindon as a town or village green. In evidence the land was also referred to as 'The Paddocks' or 'Pounders'.

2. BACKGROUND TO THE APPLICATION

The County Council has a duty to maintain the Register of Commons and Town and Village Greens. Under Section 15 of the 2006 Act applications can be made to the County Council as commons registration authority to amend the Register to add new town or village greens.

The County Council has received an application made by local resident Mr Adams to register the application land as a Town or Village Green under the provisions of Section 15(2) of the 2006 Act. The twenty year period for the application is 1990 to 2010.

The application was advertised in the local press and on site. Notice was also served on landowners. The County Council received objections to the application from the landowner, Basildon Borough Council.

Prior to the advertisement the landowner had made representations that it had 'appropriated' the land from open space so that it could obtain planning permission and dispose of the land. The appropriation took place on 25 June 2010 for planning purposes under section 122(2A) Local Government Act 1972, including the prescribed publicity in the local press, in response to which no objections were received.

They argued that this would effectively prevent the land having village green status. The Registration Authority took counsel's advice on this issue and was advised that this was not the case so the formal advertisement of Mr Adam's village green application took place. As the appropriation came at the very end of the relevant twenty year period it does not bear on the situation for all but two months.

The application was advertised on site and in the local press in December 2010 with objections to be made no later than 28 January 2011. Direct notification was sent to the landowner identified by the applicant.

Basildon Borough Council objected on 27 January 2011. They indicated that they would in any event require the applicant to be put to proof as to the level, nature and duration of the use of the land which is claimed in his application and supporting documents to have been made and as to the proper identification of a "locality or neighbourhood within a locality" from which the users of the said land are said to have come.

The main thrust of their objection was however that the land constitutes the Pound Lane Recreation Ground, which was acquired by the Borough Council's predecessor

(Billericay Urban District Council) on various dates between 1938 and 1952, and laid out since that time, as a public park or pleasure ground under section 164 of the Public Health Act 1875, as amended.

Their objection stated that it has not been legally possible on this particular land for use 'as of right' by local inhabitants to generate by 'prescription' (i.e. 20 years use without permission) the status of town or village green. The application for registration as such should therefore be rejected.

They stated that the land concerned has also been expressly subject to byelaws.

The objection was supplemented on 25 May 2011 by a 'submission of factual position' in which the objector explained the history of the acquisition of the application land and the statutory basis for it.

In the case of village green applications the County Council as commons registration authority has a discretion whether to hold an oral hearing before confirming or rejecting the application as there is no prescribed procedure in the relevant legislation. Where there is a dispute which "is serious in nature", to use the phrase of Arden LJ in *The Queen (Whitmey) v The Commons Commissioners* [2004] EWCA Cov.951 (para 29), a commons registration authority "should proceed only after receiving the report of an independent expert (by which I mean a legal expert) who has at the registration authority's request held a non-statutory public inquiry". A non-statutory public inquiry was held before Mr Alan Evans, barrister at law, between 24 and 26 July 2012. He made a report with a recommendation to be considered by the County Council as registration authority which is at Appendix 1.

3. THE APPLICATION LAND

The boundaries of the application land on the plan submitted with the application do not match the boundaries shown on the aerial photograph accompanying the required applicant's statutory declaration in support of the application. At the north east corner the boundaries on the application plan take in an area which is a tarmac surfaced car park, a community building (known as the Paddocks Community Hall) and children's play area. The applicant confirmed the boundaries on the aerial photograph were to be taken as the correct boundaries of the application land i.e. the lesser area.

It is accessible from the car park off Pound Lane. There is a tarmac surfaced path from Kathleen Ferrier Crescent. There is an informal and unsurfaced path from Willowfield. There is a passageway for foot access to Nursery Gardens. There is lighting on some of the paths across the application land and benches and bins for litter and dog waste are provided.

The area is an irregular shape, mainly grassed and has the appearance of a modest public park. It is bounded by adjacent residential properties. The boundaries are largely marked by mature trees and vegetation although less so on the south west boundary. There are trees along the line of the east-west footpath and small groups of trees inside the western boundary and in its north east and south east corners.

On the eastern side of the application land there is a small multi use games area ("MUGA"), hard surfaced and enclosed by a mesh fence with unrestricted access points. The MUGA is equipped with goal posts and basketball hoops. In the eastern half of the application land there is a pair of football goalposts.

At the time of the inspector's unaccompanied site visit there were no notices on the application land but workmen were in the process of installing a byelaws notice where the east-west footpath leads off from the car park and a metal bollard preventing vehicular access.

4. DEFINITION OF A TOWN OR VILLAGE GREEN

The grounds for the registration of greens are now contained in the Commons Act 2006, section 15. Section 15 provides that any person may apply to the Registration Authority to register land as a town or village green in a case where the following requirements 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. It is for the applicant to establish that these criteria are satisfied in relation to the area claimed in their application.

In determining the period of 20 years referred to there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment and the use is to be regarded as continuing and in appropriate cases where permission is granted in respect of use of the land for the purposes of lawful sports and pastimes, the permission is to be disregarded in determining whether persons continue to indulge in lawful sports and pastimes on the land "as of right".

5. THE APPLICATION AND EVIDENCE IN SUPPORT OF THE APPLICATION

The evidence in support of the application is summarised at paragraphs 27-37 at pages 9 – 12 of the inspector's report in Appendix 1.

Evidence was given at the inquiry by five witnesses: Valerie Kingsley (paragraph 27), Frances Livesey (paragraph 28), Christine Finch (paragraph 29), Jeanette Overy (paragraph 30) and Michael Marchant (paragraphs 31 – 34).

User evidence included Brownies/Guides events, playing ball games, picnics, with dogs including dog walking, rounders, cricket, football. There had been two ponds on the application land which had been filled in. The Kathleen Ferrier estate had been built from the early 1960s and use of the application land increased as the estate was built up. The grass had been cut. The witnesses didn't identify any byelaw signs.

One witness, Mr Marchant, produced some additional material. There was a map accompanying the Basildon Town (Designation) Order 1949 and a large scale map of Laindon dating from 1978 on which the legend 'recreation ground' appears in the

location of the application land. Mr Marchant also explained how the MUGA came about in 2006 (see paragraph 32 of the inspector's report).

Additional material was included in the applicant's inquiry bundle; 16 completed evidence questionnaires, five witness statements, various photographs, and extracts from Basildon District Council PPG17 Open Space Assessment 2010.

The applicant made submissions that land held by local authorities for open space or recreational purposes was not exempt from registration as a village green and the objector had produced no evidence to demonstrate residents had been informed of the status of the application land or its regulation by byelaws. In the 2010 Open Space Assessment the application land was classified as 'amenity green space' of which the example was 'village greens and ponds'.

6. EVIDENCE IN SUPPORT OF THE OBJECTION TO THE APPLICATION

Basildon Borough Council called two witnesses at the inquiry.

Mr Topsfield's evidence is dealt with in paragraphs 39-46 of the inspector's report and Mr Reynolds' evidence at paragraphs 47-50 of the inspector's report.

Mr Topsfield confirmed the land had been acquired by the Urban District Council of Billericay on various dates between 1938 and 1952. The main part was acquired in 1938. The purpose of the acquisitions was for open space and recreation and the intention was that the acquired land be used by the public as an amenity. Reference was made to a minute of the Urban District Council to acquire land under 'section 69 of the Public Health Act, 1925' although the recommendation provided that 'the section under which the land is to be acquired be determined on the merits of each particular case'.

Five plots acquired in 1938 and 1939 were recorded in the Borough Council's terrier record as being for the purpose of 'Pound Lane Public Open Space' and the statute stated was 'Public Health Act 1875-1925. The last acquisition of a small part of the application land in its south east corner in 1952 was stated to be for 'housing' and the statute stated was 'Housing Act 1936'.

The application land has been laid out for recreation since approximately the 1960s and it was believed use commenced shortly after the development of the adjoining Council housing estate which was in the late 1950s and early 1960s.

Mr Reynolds gave evidence of the operational management of the land and confirmed that it was an area for informal activities and various amenities had been provided. Grass cutting, pruning and litter picking had been carried out. Byelaws had been made in 1997 under section 164 Public Health Act 1875, section 15 Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906 with respect to pleasure grounds and open spaces. A previous set of byelaws in 1979 did not appear to apply to the application land.

The objector made submissions that the applicant's plans of the claimed locality and claimed neighbourhood were hopelessly inappropriate to meet the statutory criteria.

Laindon Park Ward had been suggested but not relied on and was in any event too large to be neighbourhood and had only existed since 2001 so was not suitable as a locality. The objector considered the plan of the locality with the original application would represent a potential neighbourhood but there had been no exercise to match this area to the evidence of use.

The objector accepted that there had been 20 years use from 1990 to 2010 but the key issue was whether use had been 'as of right' or 'by right' and that the application land could not have been used 'as of right' as it was made available 'by right' as a public park or recreation ground for the whole of the relevant twenty year period. The making of byelaws corroborates the nature of the use as being by virtue of a statutory right. Use in breach of byelaws could not be lawful use in accordance with the decision in the *Newhaven Port and Properties* case in 2012.

Whilst the Borough Council would expect to argue that these were 1906 Act public open space acquisitions the proper inference of the evidence at the time of the acquisitions was that the acquisitions were under section 164 Public Heath Act 1875. If that were the case, the public's use of the land had undoubtedly been 'by right' ever since. In relation to the one acquisition under the Housing Act 1936, the statutory housing power included a power to provide and maintain a recreation ground and the land in fact been laid out as part of the park/open space to the extent it fell within the boundary of the application land. This had also been the position in the 2011 case of *Barkas v North Yorkshire County Council* where it was held that use by local people was 'by right' and not 'as of right'.

7. INSPECTOR'S FINDINGS

The inspector's findings and analysis are set out in paragraphs 62-114 (pages 21 to 44) of the inspector's report at Appendix 1. The relevant issues for consideration are:

a. Has the use been for lawful sports and pastimes?
b. Has there been 20 years of such use?
c. Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes or is there a neighbourhood within a locality of which a significant number of the inhabitants have so indulged?
d. Has the user by inhabitants been as of right?

The key issue in this case as raised by the objector is whether use of the application land has been 'as of right'.

<u>Has the use of the application land been for lawful sports and pastimes for at least 20 years?</u>

The inspector considered that the whole of the application land has been used for lawful sports and pastimes for the relevant 20 year period and he so found. The evidence in support of the application, both oral and written, is sufficient to establish as much. The Borough Council as landowner and objector had not sought to suggest otherwise.

Has there been use by a significant number of inhabitants of any neighbourhood within a locality?

The applicant had framed his application on the basis of limb (ii) that is, use is by a significant number of the inhabitants of any neighbourhood within a locality rather than under limb (i), that the use is by a significant number of the inhabitants of any locality. The neighbourhood put forward by the applicant at the inquiry is the truncated area on the map at Appendix 2. The locality put forward by the applicant at the inquiry is the larger area delineated on the map at Appendix 2.

The inspector considered the nature of a neighbourhood from the relevant case law in paragraphs 66 to 72 of his report at Appendix 1 and considered how the case law applied to this application at paragraphs 73 to 80 of his report.

The inspector did not find that the neighbourhood identified by the applicant constitutes a neighbourhood for the purposes of the 2006 Act as it was no more than an area which the applicant and Mr Marchant had chosen to delineate on the plan. There was no evidence on necessary cohesiveness. Nor was it demonstrated that there had been use of the application land by a significant number of inhabitants of the area identified as the neighbourhood. The addresses of those who provided evidence of use was restricted to seven or so streets close to the application land. It was not therefore possible to make any reliable assumptions or reach property conclusions about use of the application land by other users from elsewhere in the absence of evidence to demonstrate the same, a principle which had received judicial interpretation in *McAlpine Homes Ltd v Staffordshire County Council* [2002] where Sullivan J said 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". In the *McAlpine Homes* case the inspector found that users had come from all parts of the relevant locality.

The inspector also considered it a matter of principle, so as to not render the relevance of neighbourhood meaningless, that users came from all over the relevant locality/neighbourhood. It might well be that one would expect to see most users of the claimed green coming from those houses closest to it and that one would not expect to see an equal spread from all over the area, however he considered that if users are confined to a limited part and there is an absence of evidence of use by inhabitants of large parts of the qualifying area, the requirement is not made out. He found that this is the situation in relation to Mr Adams' application. That being the case, the application must fail on the basis that the applicant had not put forward a neighbourhood which can be relied on for the purposes of the 2006 Act and, even if that were wrong, it had not been demonstrated that use of the application land has been by a significant number of the inhabitants of the neighbourhood.

Whilst the inspector did not consider that it was for the registration authority to make out the applicant's case he did not consider in any event that the application was sustainable on treating the wider area on Appendix 2 as a neighbourhood with a wider unspecified locality. This was because the argument on spread of users would equally fail. He also considered whether the applicant could succeed under limb (i) instead of limb (ii), but this also fell foul of the requirements as a limb (i) case would

need to be an area known to the law or with legally significant boundaries, which this was not.

Has the user by inhabitants been as of right?

Given the focus of the objector's case, although the inspector had found that the application was fatally flawed in relation to the necessary locality and neighbourhood criteria, he considered the question of the nature of the rights established by the use that had taken place. The objector claims that none of the use can be 'as of right' because it has been 'by right'.

The inspector considered that the issue of whether use has been 'as of right' is inextricably bound up with the question of the power under which the application land was acquired and held. As a local authority is a creature of statute it can only acquire land under some statutory power. He considered the relevant documentary material in relation to the main part of the application land acquired in 1938-39 in paragraphs 84 to 90 (pages 31 to 34) of his report and in relation to the parcel in the south east corner acquired in 1952 in paragraphs 91 to 92 (pages 34 to 35) of his report at Appendix 1.

He found that the main part of the application land acquired in 1938-39 was acquired under section 164 of the Public Health Act 1875 and the remainder of the land acquired in 1952 under section 79(1)(a) of the Housing Act 1936.

Well established case law determined that the public have a right to the use of land which a local authority has acquired and made available to the public under section 164 of the Public Health Act 1875. This would apply to the major part of the site. The recent decision of *Barkas v North Yorkshire County Council and Scarborough Borough Council* [2012] established beyond doubt that use by the public for lawful sports and pastimes of land provided under section 164 of the Public Health Act 1875 is 'by right' not 'as of right'. The Court of Appeal decision establishes the following three principles: (a) that there is a distinction between a use of land 'by right' and a use of land 'as of right', (b) that if a statute properly construed confers a right on the public to use the land for recreational purposes, the public's use of that land will be 'by right' and not 'as of right', and (c) that section 10 of the Open Spaces Act 1906 (with which *Barkas* was specifically concerned) is an example of land which is provided by a local authority as open space which the public use for recreational purposes 'by right'.

Use by local residents under section 164 Public Health Act 1875 was another example of the application of 'by right' use and the inspector concluded that the use of the major part of the application land was not 'as of right' at any relevant point before the appropriation for planning purposes on 25 June 2010. In relation to the remainder subsequently acquired he considered that use of this part had also been 'as of right'. In *Barkas* the Court of Appeal held that the position when a recreation ground was provided under section 80 of the Housing Act 1936 was no different to the position when land was provided for recreational purposes under section 10 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875. The inspector considered that there was no reason why the position should be any different when the acquisition was under section 789(1)(a) of the Housing Act 1936.

He therefore concluded overall that no part of the application land was used 'as of right' for any part of the relevant period of twenty years expiring on 25 June 2010. The fact that byelaws had been made but no communication of the byelaws had taken place would have affected a case based on implied, revocable permission but that was not the objector's case and it did not affect his conclusion on this issue.

8. INSPECTOR'S CONCLUSION AND RECOMMENDATION

The inspector's overall conclusion is that the requirements for the application to succeed are not made out.

This is because (a) the applicant did not provide a qualifying neighbourhood or locality or, in the alternative, (b) the applicant failed to prove use by a significant number of inhabitants of any qualifying neighbourhood or locality, and (c) use of the application land could not have been and was not 'as of right' at any relevant time before the appropriation of the application land for planning purposes on 25 June 2010.

He therefore recommends that the application should be rejected.

9. REPRESENTATIONS FOLLOWING INSPECTOR'S REPORT

The inspector's report was circulated to applicant and objector. No further representations were received.

10. LOCAL MEMBER NOTIFICATION

The two local county councillors Councillor Terri Sargent and Councillor John Dornan have been consulted.

Councillor Dornan responded supporting the inspector's finding. He is aware of the location of the application land having moved near to it over fifty years ago. He said that so far as he is concerned local members have saved the land from the proposed housing development and the previously derelict hall has been brought back into service with a new group running it under a lease.

11. RECOMMENDATION

It is **RECOMMENDED**

That the application is rejected as the application land has a legal status which defeats the acquisition of village green rights over it.

BACKGROUND PAPERS

Application by Mr N Adams dated 23 August 2010 with supporting papers.
Local Members Laindon Park and Fryerns

Ref: Jacqueline Millward CAVG/56

APPENDIX 1

APPLICATION TO REGISTER LAND KNOWN AS POUND LANE RECREATION GROUND, POUND LANE, LAINDON, BASILDON, ESSEX AS A TOWN OR VILLAGE GREEN: ESSEX COUNTY COUNCIL APPLICATION NO. 49

REPORT

By

Alan Evans

Kings Chambers

36 Young Street

Manchester

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Recommendation: the Application should be rejected.

Introduction

1. I am instructed in this case by Essex County Council in its capacity as registration authority for town or village greens ("the Registration Authority") in order to assist it in determining an application ("the Application") to register land known as Pound Lane Recreation Ground, Laindon, Basildon, Essex ("the Application Land") as a town or village green.

2. The Application is dated 23rd August 2010 and was made by Mr Terence Brian Adams ("the Applicant") of 7 Elverston Close, Laindon, Basildon, Essex, SS15 5TY.

3. My instructions were to hold a public inquiry to hear the evidence and submissions both for and against the Application and, after holding the inquiry, to prepare a written report to the Registration Authority containing my recommendation for the determination of the Application.

4. I held the inquiry at the Wickford Centre, Alderney Gardens, Wickford, Essex on 21st and 22nd August 2012.

5. At the inquiry the Applicant represented himself with assistance from Mr Michael Marchant and the objector, Basildon Borough Council, was represented by Mr Alun Alesbury of counsel. I thank the Applicant, Mr Marchant and Mr Alesbury for their assistance at the inquiry. I also thank the Registration Authority for arranging the inquiry and its administrative support.

6. I made an unaccompanied visit to the Application Land on the morning of 21st August 2012 and familiarised myself thoroughly with it before the inquiry began. On the same occasion I familiarised myself with the surrounding area by driving round it. With the agreement of the parties I did not hold an accompanied site visit.

7. The Council was formerly Basildon District Council and before that again, pre-1974, Basildon Urban District Council. The Council is also a statutory successor to Billericay Urban District Council which is referred to later in this report. Where appropriate to do so, references in this report to "the Council" should be taken to include its statutory predecessor authorities.

The Application

8. The Application sought the registration of the Application Land under section 15(1) of the Commons Act 2006 ("the 2006 Act") on the basis that section 15(2) applied.

9. Section 15(2) of the 2006 Act 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."

10. The relevant 20 year period for the Application in this case is 1990-2010.

11. The Application was supported by 14 completed evidence questionnaires.

12. The Application was objected to by the Council on 28th January 2011 in its capacity as owner of the Application Land. The main ground of the objection was on the basis that use of the Application Land had not been, and could not be, "as of right" because the Application Land had been acquired and laid out as a public park or pleasure ground by the Council's predecessor, Billericay Urban District Council, under section 164 of the Public Health Act 1875 ("the 1875 Act"). The Council's objection was later supplemented on 25th May 2011 by a "submission of factual position" in which the Council explained the history of the acquisition of the Application Land and the statutory basis for it.

13. The Applicant responded on 26th June 2011 and the Council provided comments on that response on 17th July 2011.

14. The matter has thereafter proceeded to the inquiry which is the subject of this report.

The Application Land

15. The boundaries of the Application Land shown on the plan which was submitted with the Application (as "Map (A)") do not match the boundaries shown on the aerial photograph of the Application Land and surrounding area which accompanied the statutory declaration of 23rd August 2010 sworn by the Applicant in support of the Application. The discrepancy relates to the north east part of the Application Land. The boundaries of the Application Land shown on Map (A) extend further to the east than the boundaries shown on the aerial photograph accompanying the statutory declaration and take in an area of land which is occupied by a tarmac-surfaced car park, a single storey community building (marked on Map (A) as "pavilion") and a children's play area bounded by railings and equipped with swings and a slide. It was confirmed by the Applicant at the inquiry that the boundaries shown on the aerial photograph accompanying the statutory declaration were to be taken as the correct boundaries of the Application Land. Accordingly I proceed on the basis that the car park, community building and children's play area do not form part of the Application Land.

16. The Application Land is an irregularly shaped area, mainly grassed, which has every appearance of a modest public park. Its general location is to the west of Pound Lane and to the north of Kathleen Ferrier Crescent. The boundaries of the Application Land are more particularly as follows. The eastern boundary of the Application Land in its northern section lies immediately to the west of the tarmac-surfaced car park and community building which I refer to in the preceding paragraph. The southern section of the eastern boundary of the Application Land runs along a line marked by the rear of backland plots off Pound Lane and the back gardens of properties on Elverston Close. The short southern boundary of the Application Land lies to the north of the rear gardens of properties on Tallis Road. The longer, gently curving south west boundary of the Application Land is formed by a line described by the northern extent of property curtilages on Kathleen Ferrier Crescent. The short western boundary of the Application Land lies along the line of

the eastern edge of the gardens of properties in Beecham Court. The northern boundary of the Application Land follows a roughly straight line which, in the east, is marked by the southern extent of property curtilages in Shrubbery Close and Nursery Gardens and, in the west, by the southern edge of a densely wooded area lying outside the Application Land and to the west of Nursery Gardens and south of Willowfield.

17. The Application Land is freely accessible from the car park which itself is accessed by a short section of road leading off Pound Lane. From the car park a tarmac-surfaced path runs across roughly the middle of the Application Land to the west where it joins an access from Kathleen Ferrier Crescent. Another tarmac-surfaced path branches off the east-west path and strikes off in a south westerly direction, again meeting an access from Kathleen Ferrier Crescent. This second access from Kathleen Ferrier Crescent lies to the east of the first access from Kathleen Ferrier Crescent and is opposite the point where that street meets Basildon Drive. In the north west corner of the Application Land an informal and unsurfaced but well-worn path leads into the Application Land from Willowfield. On the eastern section of the northern boundary of the Application Land there is a passageway which gives access on foot to the Application Land from Nursery Gardens.

18. I describe next the features of the Application Land. I have already mentioned the east-west footpath across roughly the middle of the Application Land. This footpath is lit and is also provided with benches and bins for both litter and dog waste. I have also already mentioned the second footpath which branches off from the east-west footpath in a south westerly direction. A further tarmac-surfaced loop of footpath leads off the second footpath in a roughly easterly direction to a small patch of tarmac towards the south east corner of the Application Land. The evidence established that this patch of tarmac was once the site of a children's roundabout and, after that, a basketball hoop. On the eastern side of the Application Land south of the east-west footpath and north of the loop I have just described is a small MUGA (or MUSA).[1] The MUGA is hard-surfaced and enclosed by a mesh fence but has unrestricted access points. It is equipped with goalposts and basketball

[1] Multi-use games area (or multi-use sports area).

hoops. In the eastern half of the Application Land to the north of the east-west footpath there is a pair of football goalposts. There are some low grassed mounds along the western part of the northern boundary of the Application Land. The boundaries of the Application Land are largely marked by mature trees and vegetation (although this is less the case on the south west boundary with Kathleen Ferrier Crescent). There are a number of trees along the line of the east-west footpath and there are small groups of trees just inside the western boundary of the Application Land and in its north east and south east corners.

19. I did not see any notices on the Application Land on the occasion of my site visit save that workmen were in the process of installing a byelaws notice at the beginning of the east-west footpath where it leads off from the car park. It also appeared to be the case that a metal bollard (of the type which would prevent vehicular access to the footpath) was being installed at this point.

20. The evidence establishes that the Application Land, apart from being called Pound Lane Recreation Ground, is also known, variously, as "The Paddocks" or "Pounders". The community building just to the east of the Application Land is called "The Paddocks Community Hall".

21. The history of the Council's acquisition of the Application Land is set out later in this report as part of the account of the evidence of one of the Council's witnesses, Mr Topsfield. I do not therefore deal with that at this point.

22. For the sake of narrative completeness there is, however, one other matter which I mention here. On 25th June 2010 the Council appropriated the Application Land for planning purposes under section 122(2A) of the Local Government Act 1972. This action was part of a wider strategy by the Council to raise funds for the development of a new "Sporting Village" within the borough. As the appropriation came at the very end of the relevant 20 year period, it does not bear on the situation which pertained for all but two months of that period and, in consequence, it did not feature in the inquiry save as a piece of background information. I refer to it here for no other purpose.

Neighbourhood and locality

23. In answer to question 6 on the application form (form 44) asking for there to be shown the locality or the neighbourhood within the locality to which the claimed green related, the Applicant referred to the area which he had marked on Map (A). The area so marked constituted a roughly rectangular area of limited extent surrounding the Application Land. Its boundaries were marked, to the east, by the eastern side of Pound Lane and, to the north, by the northern extent of the development on Nursery Gardens (on the eastern half of the northern boundary) and the northern extent of the Application Land (on the western half of the northern boundary). The western and southern boundaries appeared as arbitrary straight lines cutting through plots in the general housing area.

24. The directions which were issued by the Registration Authority on 12th June 2012 required the Applicant's bundle to contain both a large scale OS map on which the boundaries of any area relied upon by the Applicant as a "locality" for the purposes of the Application were clearly marked and a similar map on which the boundaries of any area relied upon by the Applicant as a "neighbourhood" for the purposes of the Application were clearly marked. In response to these directions the bundle prepared by the Applicant for the inquiry contained a "locality" plan which had the same boundaries as those which had been marked on Map (A) and which I have described in the preceding paragraph. I will call this "Plan (C)" to reflect the sub-paragraph of the directions which required its production. The Applicant's inquiry bundle also contained a "neighbourhood" plan in response to the directions. I will call this "Plan (D)" again to reflect the sub-paragraph of the directions which required its production. Plan (D) plan showed a considerably larger neighbourhood area than the locality area shown on Plan (C). The area so shown constituted a large, roughly rectangular, area extending well beyond the boundaries shown on Plan (C) and taking in, inter alia, an area to the south of St Nicholas Lane.

25. Eventually the Applicant and Mr Marchant put the case at the inquiry on the basis of revised plans which I will call Revised Plan (C) and Revised Plan (D). I deal with the detail of how this matter unfolded at the inquiry in paragraphs 34-36 below. Mr Marchant explained that these plans were the wrong way round in terms

of the directions in that Revised Plan (C), which the directions contemplated as the locality plan, was to be understood as the neighbourhood plan and Revised Plan (D), which the directions contemplated as the neighbourhood plan, was to be understood as the locality plan. Revised Plan (C) shows a claimed neighbourhood bounded by St Nicholas Lane in the south, High Road in the west and the A127 Southend Arterial Road in the north. The eastern boundary is drawn to follow a line which runs to the east of Pound Lane from the A127 in the north through the grounds of St Nicholas Church to meet St Nicholas Lane in the south. Revised Plan (D) shows a claimed locality which has the same boundaries as the claimed neighbourhood on Revised Plan (C) save that the eastern boundary extends further east and is drawn along Upper Mayne.

The evidence in support of the Application

26. In the succeeding paragraphs under this section I set out a brief summary of the evidence given by the witnesses called by the Applicant in support of the Application. I heard from 5 "live" witnesses.

27. **Valerie Jean Kingsley** of 35 Basildon Drive, Laindon said that she had lived in the area for 51 years and knew it extremely well. In the 1970s and 1980s she had used the Application Land with the Brownies/Guides which she ran. The Application Land then was very similar to how it was now although the tree growth was now greater. She now used the Application Land with her six grandchildren for a kick-about with a ball or picnics. She assumed the Application Land was owned by the Council but had never seen any signs restricting what could be done. She never felt that permission had to be asked in order to use the Application Land.

28. **Frances Livesey** of 98 Pound Lane said that she grew up in Laindon and had lived on King Edward Road but her friends were from the area around the Application Land which was how she had got to know of it. She had moved away later but had come to live in Pound Lane about 19-20 years ago. She used the Application Land with her grandchildren. She had never felt that she needed to get permission to use the Application Land and her use of it was open.

29. **Christine Finch** of 9 Shrubbery Close said that she had lived at that address for 19-20 years. She took her dog on to the Application Land five times a day every single day. Her great grandchildren played on the Application Land and, before that, her grandchildren had played there. There had never been any indication that byelaws applied to the Application Land and she had never seen any signage. She did not feel that she had to ask anyone to go on to the Application Land and that, although it was Council-owned, it was publicly available.

30. **Jeanette Overy** of 116 Pound Lane said that she had lived at that address for 20 years and, ever since moving there, she had used the Application Land as a park. She took her grandchildren there. They played rounders, cricket and football. Other youngsters did the same. She regularly walked the dogs there. There were so many dog walkers, there was quite a fraternity of them. She had never seen any evidence of byelaws.

31. **Michael Marchant** of 108 Pound Lane provided some historical information. He said that he was born in Laindon and had had relations, most of whom were farmers, in the Pound Lane area. His earliest recollection of use of the Application Land went back to the early 1950s when he was a child, from when he could remember a lot of grassland. The grass was rarely cut then and, when it was, it was with field cutting equipment. To the best of his recollection, the building of the Kathleen Ferrier estate began in the early 1960s. The Application Land then got used more and more and, as the estate was built up, the grass was cut more regularly. There had later on been Council nurseries in the vicinity where plant and equipment was kept. Nursery Gardens and Shrubbery Close were built in the late 1980s and early 1990s so that that part of the former field became housing. There had previously been two ponds on the Application Land which were filled in because they were dangerous. The mounds in the northern part of the Application Land had been formed by the deposit of excess spoil.

32. Mr Marchant produced two maps. One was an extract (showing the Laindon area) of a map accompanying the Basildon New Town (Designation) Order 1949; the other was a large scale Ordnance Survey Map of Laindon which Mr Marchant thought was from 1978. On the latter the legend “recreation ground” appears in the

location of the Application Land. Mr Marchant also submitted an indexed street plan leaflet of Basildon, Billericay and Wickford, produced by Essex County Council in 2010 which, he pointed out, did not identify the Application Land as a leisure facility either on the relevant street plan or in the relevant index. Mr Marchant further explained, by reference to e-mails and a press clipping, how the MUGA at the Application Land had come about. It was originally destined for another site at South Green in Billericay but was not wanted there by local residents. It then came to be installed on the Application Land in 2006 by way of a follow-up to a request to the Council for better children's play facilities on the Application Land made in 2005 by a schoolgirl from Tallis Road. The patch of tarmac in the south east of the Application Land had previously hosted a basketball hoop and, before that, a children's roundabout which had been taken out for safety reasons.

33. Mr Marchant said that he had never seen any notices to explain the use of the Application Land or that there were byelaws applying to it. 95% of the parks he went to had such notices. He expressed the view that the 1875 Act had often been used by councils to buy land as the easiest way later to convert to building land. He further made reference to a document produced by the Council entitled "Basildon District Council PPG17 Open Space Assessment 2010" and pointed out that the Application Land was classified therein in the Council's typology as "amenity green space", which was exampled by "village greens and ponds" rather than a recreation ground.

34. When I asked Mr Marchant about Plans (C) and (D) he explained, initially, that the Application was to be considered on the basis of the qualifying area being taken to be that marked on Plan (D) which he suggested was a locality and represented the ward of Laindon Park. When cross-examined on these matters, Mr Marchant accepted, in relation to Plan (C), that, apart from the northern boundary marked on that plan, the other boundaries had just been drawn down grid lines on the plan. He said that the plan was probably a bit of a misunderstanding. In relation to Plan (D), he was not able to counter the suggestion put to him that some of the boundaries on this plan were simply arbitrarily drawn along grid lines on the plan, cutting through properties in places, nor was he able to offer any explanation to deal with the issue

of why what appeared to be a significant but arbitrary chunk of territory south of St Nicholas Lane had been included. He accepted that the boundaries shown on Plan (D) did not, in fact, represent the ward of Laindon Park.

35. In the light of the above I allowed, without objection from the Council, the Applicant and Mr Marchant the opportunity to reconsider how they wished to present the Application in terms of the relevant qualifying area which they relied on to support the Application and to produce revisions of Plans (C) and (D) as they saw fit. In the meantime, I also allowed Mr James Groves, the Council's Legal Manager for Property, Regeneration and Contracts, to confirm to the inquiry that which Mr Marchant had accepted, namely, that the boundaries of the Laindon Park ward were not those shown on Plan (D). Mr Groves explained that Laindon Park ward was a very much larger area, which had come into being in 2001, and that the area shown on Plan (D) had formerly been part of Lee Chapel ward.

36. The final upshot of these matters was that the Applicant and Mr Marchant produced two amended plans on the morning of the second inquiry day, 22nd August 2012, which I have already referred to in paragraph 25 above as Revised Plan (C) and Revised Plan (D). I have also already described what is shown by Revised Plan (C) and Revised Plan (D) in paragraph 25 above and it is not necessary to repeat that description here. These were the plans finally relied upon in support of the Application.

37. There are two final matters which I mention for the purposes of my summary of the evidence in support of the Application. The first is to record that the Applicant himself chose not to give any oral evidence at the inquiry. The second is to confirm that I have taken into account in writing my report all the material contained in the Applicant's inquiry bundle, including: 16 completed evidence questionnaires (being made up of the 14 completed evidence questionnaires submitted with the Application plus a further two); five witness statements; various photographs; and extracts from "Basildon District Council PPG17 Open Space Assessment 2010".

The evidence called by the Council

38. Mr Alesbury called two witnesses on behalf of the Council, Andrew Roger Topsfield and Hugh David Reynolds.

39. **Andrew Roger Topsfield** said that he was employed as a Principal Estate Surveyor at Basildon Borough Council. In the course of his duties Mr Topsfield had been involved in the acquisition, management and disposal of property, including valuation, negotiation, verification of boundaries and assistance in the conveyancing process. The operational management of open space was a function of the Council's Parks Section. The Application Land constituted the Pound Lane Recreation Ground which had been acquired by the Urban District Council of Billericay on various dates between 1938 and 1952. The main part was acquired through several transactions in 1938.

40. No file papers relating to the acquisitions could be traced. These would have comprised the surrounding correspondence. Nothing, however, was missing from the deed packet. The purpose of the acquisitions was for open space and recreation and the intention was that the acquired land be used by the public as an amenity. Mr Topsfield referred to, and produced, a minute, number 338, of the Billericay Urban District Council's Recreation Grounds and Open Spaces Committee's meeting held on 14th February 1938. This was all that could be found. The minute refers to three sites, one of which is described as "Land, Pound Lane, Laindon". It then records that the advice of the Clerk in respect of "the proposed acquisition by the Council of the above lands" was that the sites "might be acquired as 'playing fields,' as distinct from 'open spaces,' under section 69 of the Public Health Act, 1925, in which case the County Council might be asked for a contribution towards expenses incurred in acquisition, lay-out, equipage and maintenance." The recommendation of the Committee was that the three sites "be acquired by the Council under section 69 of the Public Health Act, 1925, and that application be made to the County Council for grant under that Section." A further recommendation was also made, which was that "the Section under which land is to be acquired be determined on the merits of each particular case."

41. Mr Topsfield then referred to, and produced extracts from, the Council's Terrier. There are six relevant extracts (all headed up "Urban District Council of Basildon Terrier of Property") which record a number of acquisitions in respect of land at Pound Lane, Laindon which, taken together, include all of the area which now comprises the Application Land. The conveyances also included other areas around the Application Land which now have housing built on them. In chronological order the acquisitions recorded are:
    (i) an acquisition at a price of £150 from J.H. Rawley on 1st December 1938;
    (ii) an acquisition at a price of £30 from H.J. Poulter and another, also on 1st December 1938;
    (iii) an acquisition at a price of £115 from May L. Ralph on 13th December 1938;[2]
    (iv) an acquisition at a price of £235 from Harry Ralph on 30th December 1938;
    (v) an acquisition at a price of £100 from M.J. Barrett on 23rd January 1939;
    (vi) an acquisition at a price of £150 from Mrs E. McClellan on 11th January 1952.

42. In respect of the first five acquisitions ((i) – (v)) noted in the previous paragraph the Terrier extract in each case bears the same site and deed number (No. 47) and records that the purpose of the acquisition was "Pound Lane Public Open Space" and that the statute in question was "Public Health Act 1875 – 1925". The last acquisition ((vi) above) bears a different site and deed number (No. 199) and records that the purpose of the acquisition was "housing" and the statute in question was "Housing Act 1936". This extract also has a heading of "Pound Lane Housing Site".

43. Mr Topsfield produced an official copy of the Land Registry's register of title, showing that the Council is the owner of the whole of the Application Land and then copies of the conveyances relating to each of the parcels of land in the Terrier itemised in paragraph 41 above. The conveyances in respect of the first five acquisitions itemised in paragraph 41 above ((i) – (v)) are each to the Urban District Council of Billericay, each recites that the Urban District Council wished to make the acquisition "for purposes mentioned in the Public Health Acts 1875 to 1925" and each is accompanied by a plan which is headed "Proposed Open Space

Laindon". The conveyance in respect of the last acquisition itemised in paragraph 41 above ((vi)) was also to the Urban District Council of Billericay. The conveyance does not refer to any statutory acquisition power. The back sheet of the conveyance states that the land conveyed was "to form part of Pound Lane, Laindon Permanent Housing Site". Mr Topsfield also produced a plan relating the Application Land to the various conveyances and showing which parts of the Application Land were acquired under which conveyances. For present purposes I need note only that the five conveyances in 1938-39 ((i)-(v) above) cover the vast majority of the Application Land and that the last conveyance of 11th January 1952 ((vi) above) covers a small part of the Application Land in its south east corner.

44. Mr Topsfield said that the Application land had, since approximately the 1960s, been laid out as open space and for recreation. It was so marked on Ordnance Survey maps. In this connection Mr Topsfield produced two plans which he said dated from the late 1960s and early 1970s. Each plan has the legend "recreation ground" on it in the location of the Application Land.[3] Mr Topsfield said that it was not clear when the recreation ground use commenced but it was believed to be shortly after the development of the adjoining Council housing estate which was in the late 1950s and early 1960s.

45. Mr Topsfield confirmed that the Application Land had recently been appropriated for planning purposes and produced the relevant decision record which shows that this took place on 25th June 2010.

46. Mr Topsfield told Mr Marchant in cross examination that he was pretty sure that there had not been any need for any later acquisitions of land forming back gardens to properties on Pound Lane in order to put in the car park and the community centre. The New Town had been designated in 1949 and acquisition for its purposes

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[2] The reference in the Terrier to 13th December 1938 appears to be an error. The relevant conveyance is dated 30th December 1938.

[3] One of the plans is that which would have accompanied the sale of 59 Kathleen Ferrier Crescent. This plot of land had been included in the 11th January 1952 conveyance to the Urban District Council of Billericay. Its later conveyance from the Urban District Council of Basildon to the purchasers of the plot is endorsed on the 11th January 1952 conveyance as part of a "memorandum of sales". The date of the conveyance by the Urban District Council of Basildon was 14th April 1980 so the plan must, it would seem to follow, have a base date at some point before then. Mr Topsfield said that he thought the plan would have a 1950s-1960s base.

then started but local authority schemes which were already under way were left to continue separately. He was not able to comment on the suggestion put to him that the land on which Nursery Gardens and Shrubbery Close now stood had once been part of a wider open space area but stated that this area was outside the Application Land. Mr Topsfield told me that there was no record of any formal appropriation of land within the parcel acquired on 11th January 1952 (acquisition (vi)) from housing purposes to public open space; had there been such appropriation, it would have been noted on the Terrrier.

47. **Hugh David Reynolds** said that he was employed by the Council as the Manager of Parks and Grounds Maintenance. His involvement with the Application Land had been with its operational management and maintenance as a park. It had been managed by the Council as an area where informal activities took place. The amenities included an equipped play area, a multi-use sports area, a kick-about football pitch, benches and car parking. There was also the Paddocks Community Centre which was managed by the trustees of the community association. On occasions more organised activities took place, as an example of which Mr Reynolds referred to the lighting of a beacon for the Queen's Diamond Jubilee.

48. The maintenance of the Application Land had reflected the activities which took place there. The maintenance included general amenity grass cutting, pruning of hedges and shrubs on an annual basis, tree pruning when required, litter picking and general inspections.

49. The Application Land was covered by byelaws and Mr Reynolds produced a copy of the Council's "Byelaws" for "Pleasure Grounds and Open Spaces" 1997 ("the 1997 Byelaws"). The 1997 Byelaws are stated to be made under section 164 of the 1875 Act, section 15 of the Open Spaces Act 1906 ("the 1906 Act") and sections 12 and 15 of the 1906 Act "with respect to pleasure grounds and open spaces". The Application Land is identified in the Schedule to the 1997 Byelaws as "Pound Lane Recreation Ground, Laindon". I note by way of interpolation here that a previous set of byelaws ("Basildon District Council Bye-laws Pleasure Grounds 1979" ("the

1979 Byelaws")) did not include the Application Land as one of the relevant pleasure grounds.[4]

50. When cross examined by Mr Marchant, Mr Reynolds was not able to say why byelaws had not been displayed at the Application Land other than to suggest it was because of the small size of the park and its much more local function. He accepted the point that the grass cutting on the Application Land had fallen behind this year. Mr Reynolds confirmed to me that he thought that there had formerly been a roundabout on the Application Land which would have been replaced by a basketball hoop. The football pitch on the Application Land was for informal use only and was just provided with a pair of goalposts. Grass cutting was planned to be on a 15 day cycle in the summer.

The Submissions

(a) The Council

51. On behalf of the Council, Mr Alesbury first dealt with the issue of neighbourhood and locality. He submitted that both Plan (C) and Plan (D) were hopelessly inappropriate to meet the statutory criteria. Although the Laindon Park ward had been raised in the course of the inquiry, it was not in fact eventually relied upon. In any event, it was not really suitable under either statutory heading. It was much too large to be a sensible neighbourhood in relation to any of the evidence given and it was not really suitable as a locality, having only existed in its present form since 2001. As to Revised Plan (C), Mr Alesbury submitted that the area shown thereon could be a neighbourhood and it avoided the obvious defects of the original Plan (C). However, no exercise had been done to match the area to the evidence of use. Revised Plan (D) was appropriate neither as a locality or a neighbourhood.

52. Mr Alesbury did not dispute that the Application Land had been used for 20 years (from 1990-2010) for lawful sports and pastimes. The Application Land was, after all, a public park or recreation ground.

[4] These byelaws did refer to "Pound Lane Park" but this was a reference to a different piece of land, namely,

53. Mr Alesbury submitted that the key issue was whether use of the Application Land had been "as of right" or "by right". He commended to me an opinion from 2008 by Mr Vivian Chapman QC in relation to an application to register a new green at the Oak Colliery Site in Oldham as an extremely useful summary of the law as it then stood. The Council's essential point was that the Application Land could not have been used "as of right" in a trespassory way because, for effectively the whole of the relevant period, it was made available "by right" as a public park or recreation ground.

54. The case of *Malpass v Durham County Council*[5] showed that, in a case which potentially concerned a public park or public open space, it was important for a conclusion to be reached, on the balance of probabilities in the light of the evidence, as to the statutory purpose for which the owning authority (or its predecessor) came to own or hold the land concerned. It was not acceptable just to say, for example, that it was not quite clear what the land was acquired for but that it came to be thought of as a park or public open space.

55. In respect of the evidence in the present case, Mr Alesbury submitted that, while the 1938 recommendation of the Recreation Grounds and Open Spaces Committee of Billericay Urban District Council referred to section 69 of the Public Health Act 1925 ("the 1925 Act"), it was not a purchase resolution and, even as a recommendation that that section be used, it was accompanied by a further recommendation that "the Section under which land is to be acquired be determined on the merits of each particular case." As for the actual documents relating to the purchases in 1938-1939 ((i)-(v) in paragraph 41 above), the conveyances stated that the land was acquired for purposes mentioned in the Public Health Acts 1875 to 1925 generally and the conveyance plans were very clearly labelled "Proposed Open Space Laindon". Also, in each of these cases the old Basildon Urban District Council Terrier recorded the "purpose" of the acquisition as "Pound Lane Public Open Space" and the statutory reference was the same as in the conveyances.

Pound Lane Park, Bowers Gifford as referred to in the Schedule to the 1997 Byelaws.

[5] [2012] EWHC 1934 (Admin).

56. Mr Alesbury said that, were it not for the statutory references, he would be arguing that the probability was that these were 1906 Act public open space acquisitions. As it was, his submission was that the proper inference was that the acquisitions must have been seen as straightforward acquisitions under section 164 of the 1875 Act. This was the normal power by which parks and open areas intended to be made available to the public would be acquired. "Public Open Space" in the Terrier and in the conveyance plans was a reasonable term to describe this sort of land as the statutory consequences of such an acquisition were virtually the same as for "public open space" acquisitions under the 1906 Act. There was nothing at all about the actual conveyances and Terrier entries which suggested that any of the land acquired in 1938-39 was in the event acquired for the rather more specific "laying out for cricket or football" sort of use contemplated by section 69 of the 1925 Act. Nor, incidentally, did any evidence as to what actually happened on the ground suggest that the old Billericay Urban District Council ever thought that it had acquired the land for the specific purpose of section 69 of the 1925 Act. Section 164 of the 1875 Act was the obviously appropriate power to be inferred and was wholly consistent with the conveyances and the Terrier and, indeed, the 1938 recommendation which had referred to the acquisition section being "determined on the merits of each particular case."

57. If that were the case, the public's use of the land had undoubtedly been "by right" ever since.

58. Mr Alesbury then dealt with the 1952 acquisition ((vi) in paragraph 41 above) which was under the Housing Act 1936 ("the 1936 Act"). So much of this plot of land as fell within the Application Land had been laid out as part of the park/open space. In this respect the case was an exact factual parallel with what had happened in the case of *Barkas v North Yorkshire County Council.*[6] For exactly the same reasons found by the inspector in that case, and upheld by the court, Mr Alesbury submitted that it should be concluded that this part of the Application Land had also been used by local people "by right" and not "as of right". The housing power in section 80 of the 1936 Act included a power to provide and maintain a recreation

ground. The utilisation of that power would therefore make it unnecessary for there to be any later appropriation of the land from housing to recreational purposes.

59. In respect of the byelaws, Mr Alesbury submitted that their relevance was that they were corroborative of the point that the Application Land was seen as being held under section 164 of the 1875 Act. The Council did not argue that, because it put byelaw notices up, it gave people permission to use the Application Land (the evidence as to whether there might ever have been any notices being inconclusive). The point was that the status of the Application Land in fact gave people the right to be there. In this connection Mr Alesbury relied on the judgment of Ouseley J in *Newhaven Port and Properties Limited v East Sussex County Council.*[7] This case was not like (for example) a piece of land within a port where it might have been necessary to erect byelaw (or other) notices telling people they had permission to use the piece of land when otherwise they might not have expected to have such a right. Incidentally, it seemed fairly obvious from the oral evidence called in support of the Application that, in this case, in spite of the apparent lack of notices, people did know the Application Land as the "park", knew that it had been provided by the Council and understood that they had a right to be on there, using it.

60. Mr Alesbury's final detailed submission was that the fact that some activities indulged in on the Application Land might have been in breach of the applicable byelaws was irrelevant. Even if that had been the case, it could never generate a claim under the 2006 Act based on "lawful" sports and pastimes. In this respect Mr Alesbury referred again to the judgment of Ouseley J in *Newhaven Port and Properties,* this time at paragraphs 93 and 103.

(b) The Applicant

61. The material points made by Mr Marchant by way of closing submissions on behalf of the Applicant were as follows. Mr Marchant submitted that all the necessary requirements for village green status had been made out and that the Application

[6] [2011] EWHC 3653 (Admin). I provide the reference to the first instance decision here. After the close of the inquiry the decision was upheld in the Court of Appeal. See paragraphs 98, 104-106 and 108 below.
[7] [2012] EWHC 647 (Admin) at paragraph 85.

should therefore be accepted. Contrary to the Council's case, which could not be substantiated, use of the Application Land had been "as of right" and not "by right". Land held by local authorities for open space or recreational purposes was not exempt from registration under the 2006 Act. No evidence had been produced by the Council which showed either that local residents had been informed of the status of the Application Land nor had byelaws ever been displayed on any notice boards or made the subject of any other written or oral communication from the Council. Essex County Council's 2010 street plan leaflet did not even identify Pound Lane Recreation Ground as a leisure facility. Moreover, in "Basildon District Council PPG17 Open Space Assessment 2010" the Application Land was classified in the Council's typology as "amenity green space", of which the example was "village greens and ponds".

Findings and analysis

(a) Introduction

62. The key issues in this case relate to the question of neighbourhood and locality and whether use of the Application Land has been "as of right". It is necessary therefore to devote most of the analysis in this section to these particular issues. Before doing so I consider, first, whether the Application Land has been used for lawful sports and pastimes for at least 20 years.

(b) Use of the Application Land for lawful sports and pastimes for at least 20 years

63. I find that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period. The oral and written evidence presented in support of the Application is sufficient to establish as much and the Council has never sought to suggest otherwise or to dispute that the Application Land has been so used. I am able to place weight on the written evidence in support of the Application in this case albeit that it has not been tested by cross examination. This follows both from the fact that the Council does not challenge evidence of use of the Application Land over the relevant period for lawful sports and pastimes and from the fact that such

use is entirely consistent with the provision of the Application Land as a recreation ground where such use is only to be expected.

64. My finding that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period is a finding that the whole of the Application Land has been so used. In making that finding I have borne in mind the observation of Sullivan J in *Cheltenham Builders Limited v South Gloucestershire District Council*.[8] What was said in that case was that *"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 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."* There are no reasons in this case, relating to the features of the Application Land or otherwise, to think that there are any areas of it which would not have been used. Again, it has been no part of the Council's case to make any contrary submission.

(c) Use by a significant number of the inhabitants of any locality or any neighbourhood within a locality

65. I next turn to the question whether the use of the Application Land for lawful sports and pastimes for the relevant 20 year period has been by a significant number of the inhabitants of any locality or of any neighbourhood within a locality. In considering this question I will adopt the conventional, shorthand terminology and refer to a limb (i) case and a limb (ii) case. A limb (i) case is one which is put on the basis of use by a significant number of the inhabitants of any locality. A limb (ii) case is one which is put on the basis of use by a significant number of the inhabitants of any neighbourhood within a locality. As I have already explained, the Application was eventually put forward at the inquiry by the Applicant and Mr Marchant on the basis that the neighbourhood relied upon was that identified on Revised Plan (C) with the locality within which that neighbourhood lay being that identified on Revised Plan (D). The Application was therefore finally put as a limb (ii) case.

[8] [2003] EWHC 2803 (Admin) at paragraph 29.

66. Accordingly, it is necessary first to consider what constitutes a neighbourhood for the purposes of a claim for registration of a new green under the 2006 Act. Neighbourhood is undefined in the 2006 Act as was also the case under section 22 of the Commons Registration Act 1965 as amended by section 98 of the Countryside and Rights of Way Act 2000. However, there are various judicial observations which need to be considered.

67. In *Cheltenham Builders* Sullivan J said that *"[i]t is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. For the reasons set out above under 'locality', I do not accept the defendant's submission that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of <u>any</u> area (as defined on a plan accompanying the application) to apply to register land as a village green, it would have said so."*[9]

68. Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[10] pointed out that the expression *"any neighbourhood within a locality"* was *"obviously drafted with a deliberate degree of imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries."*[11]

69. In *Oxfordshire and Buckinghamshire Mental Health Trust v Oxfordshire County Council*[12] HHJ Waksman QC said that *"[t]he area from which users must come now includes a neighbourhood as well as a locality. On any view that makes qualification much easier because it was accepted that a locality had to be some form of administrative unit, like a town or parish or ward. Neighbourhood is on any view a more fluid concept and connotes an area that may be much smaller than a*

[9] At paragraph 85.
[10] [2006] UKHL 25.
[11] At paragraph 27.

locality."[13] In the same case HHJ Waksman QC also made the following observations: "*[w]hile Lord Hoffman said that the expression* [sc., neighbourhood within a locality] *was drafted with deliberate imprecision, that was to be contrasted with the locality whose boundaries had to be legally significant – see paragraph 27 of his judgment in Oxfordshire (supra). He was not saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality … but, as Sullivan J stated in R (Cheltenham Builders Ltd) v South Gloucestershire Council [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way."*[14]

70. In *Leeds Group plc v Leeds City Council*[15] HHJ Behrens said that *"I shall not myself attempt a definition of the word 'neighbourhood'. It is, as the inspector said an ordinary English word and I have set out part of the Oxford English Dictionary definition.* [Sc., "A district or portion of a town; a small but relatively self-contained sector of a larger urban area; the nearby or surrounding area, the vicinity"]. *I take into account the guidance given by Lord Hoffman in paragraph 27 of the judgment in the Oxfordshire case. The word neighbourhood is deliberately imprecise. As a number of judges have said it was the clear intention of Parliament to make easier the registration of Class C TVGs. In my view Sullivan J's references to cohesiveness have to be read in the light of these considerations."*[16]

71. In relation to the question of the need for a neighbourhood to have boundaries, I have already quoted in paragraph 69 above the observation of HHJ Waksman QC in *Oxfordshire and Buckinghamshire Mental Health Trust* that Lord Hoffman in *Oxfordshire County Council* was *"not saying that a neighbourhood need have no boundaries at all."* In *Leeds Group plc* HHJ Behrens said, in relation to the issue of boundaries, *"I agree with Miss Ellis QC that boundaries of districts are often not*

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[12] [2010] EWHC 530 (Admin).
[13] At paragraph 69.
[14] At paragraph 79.
[15] [2010] EWHC 810 (Ch).
[16] At paragraph 103.

logical and that it is not necessary to look too hard for reasons for the boundaries."[17]

72. When the latter case reached the Court of Appeal the issue in relation to neighbourhood that was considered was whether HHJ Behrens was right to uphold the inspector's view that neighbourhood did not have to be limited to a single neighbourhood and could include two or more neighbourhoods. The Court of Appeal upheld the judge on this point (by a majority)[18] but, for present purposes (as no issue in respect of two neighbourhoods arises here), I need note only that, in the course of so doing, Sullivan and Arden LJJ endorsed[19] Lord Hoffman's dicta, which I quote in paragraph 68 above, in *Oxfordshire County Council* in relation to the "*deliberate degree of imprecision"* in the drafting of the expression *"any neighbourhood within a locality"*. All the judges in the Court of Appeal also recognised that Parliament's intention in enacting the neighbourhood amendment (which was originally introduced by section 98 of the Countryside and Rights of Way Act 2000 and is now incorporated in section 15 of the 2006 Act) was to make easier the task of those seeking to register new greens and to avoid technicality by loosening the links with historic forms of greens.[20] In *Adamson v Paddico (267) Limited*[21] Sullivan LJ stated again that in the *Oxfordshire case "Lord Hoffman clearly considered that the new 'neighbourhood' limb had materially relaxed the previous restrictions relating to 'locality'".*[22]

73. In applying the law as described above to this case I make every allowance for the fact that the introduction of the neighbourhood criterion is intended to ease the task of applicants who seek to rely on limb (ii) to register a new green and I approach matters with that important consideration firmly in mind. I also remind myself that Mr Alesbury accepted that the area shown on Revised Plan (C) "could" amount to a neighbourhood. Notwithstanding these matters, I am nevertheless unable to find that the area shown on Revised Plan (C) constitutes a neighbourhood for the purposes of the 2006 Act. In reality, the area shown on Revised Plan (C) is no more

[17] At paragraph 105.
[18] Sullivan and Arden LJJ, Tomlinson LJ dissenting.
[19] See paragraphs 26 and 52.
[20] See, for example, paragraphs 24, 25, 26, 44 and 52.
[21] [2012] EWCA Civ 262.

than an area which the Applicant and Mr Marchant have chosen to delineate upon that plan. Even taking an undemanding approach to the issue of cohesiveness, there is simply no evidence before the inquiry which demonstrates that the area shown on Revised Plan (C) has any degree of cohesiveness. The circumstances in which Revised Plan (C) came to be put forward, which I have set out in paragraphs 34-36 above, tend to my mind to highlight that the area marked on it is simply an artificial construct created for the purposes of overcoming deficiencies in the original plans without addressing or understanding what a neighbourhood should entail. The boundaries shown on Revised Plan (C) may be considered to avoid arbitrariness in the sense of not cutting through properties but that does not avoid the problem that the area enclosed by the boundaries has not been shown to have any reasoned claim to be considered a neighbourhood; nor has any meaningful description of the area been proffered.

74. Even if I were wrong on the question of whether the area shown on Revised Plan (C) constitutes a neighbourhood, I do not consider that it has been demonstrated that there has been use of the Application Land by a significant number of inhabitants of the area shown on Revised Plan (C). I reach this conclusion because I do not think there has been shown a proper or adequate spread (or distribution) of users over the area shown on Revised Plan (C). The factual basis for this conclusion is that the addresses of those who provide evidence of their use of the Application Land are restricted to seven or so streets close to the Application Land, making up only a limited part of the area shown on Revised Plan (C), with no evidence of any users drawn from large parts of that area. While it might be said that there would have been use of the Application Land (as a public recreation ground) by residents drawn more widely from the area shown on Revised Plan (C) than the pattern of addresses revealed by the evidence in support of the Application, it is nevertheless not possible to make any reliable assumptions or reach proper conclusions about use of the Application Land by other users from elsewhere in the absence of evidence to demonstrate the same.

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[22] At paragraph 27.

75. As to the legal question of whether there is any requirement for a proper or adequate spread of users over the qualifying area in question, I consider that there is as an aspect of the requirement that use must be by a significant number of inhabitants. Sullivan J dealt with the issue of "significant number" in *McAlpine Homes Ltd v Staffordshire County Council*[23] where, in a well-known passage, he said 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"*.[24] If the local community is taken to be that making up the locality or neighbourhood in question then *general* use by the local community is not established if that use comes from only part of that locality or neighbourhood. On the facts of *McAlpine Homes* it is notable that the inspector had found that users had come from all parts of the relevant locality.[25]

76. I also consider that the requirement for a proper or adequate spread of users over the qualifying area in question is more generally justified as a matter of principle. It is, in my view, necessary that users come from all over the relevant locality/neighbourhood because, if it were sufficient that users came from just one part of the locality/neighbourhood, the locality/neighbourhood requirement would be rendered meaningless. In substance, one might just as well draw an arbitrary red line on a plan around the area from which users came. This is just what Sullivan J in *Cheltenham Builders* held a locality or neighbourhood not to be.[26] Moreover, such an approach would create a mismatch between the persons whose use led to the acquisition of rights and the persons who enjoyed the benefit of them, which would be contrary to general prescriptive principles and would impose a much greater burden on the land than the landowner had acquiesced in. It would thus infringe the principle of equivalence referred to by Lord Hope in *Lewis v Redcar and Cleveland Borough Council*[27] where he said that *"the theme that runs through all of the law on private and public rights of way and other similar rights is that of an*

[23] [2002] EWHC 76 (Admin).
[24] At paragraph 71.
[25] See paragraph 38 of the judgment. The locality in question was the town of Leek.
[26] See paragraph 67 above quoting Sullivan J's rejection (at paragraph 85 of the judgment) of the proposition that a neighbourhood could be any area that an applicant for registration chose to delineate upon a plan. See also paragraph 43 of the judgment where the judge made the same point in relation to a locality.
[27] [2010] UKSC 11.

equivalence between the user that is relied on to establish the right on the one hand and the way the right may be exercised once it has been established on the other."[28]

77. Some assistance may also be derived from a passage in the judgment of HHJ Behrens in *Leeds Group plc* at first instance in which he stated that *"if … Yeadon cannot be a locality for the purpose of limb (ii), I would hold that the parish of St Andrew is the relevant locality. I see no reason to limit the meaning of 'locality' in limb (ii) in the manner suggested in paragraph 37 of Mr Laurence QC's skeleton argument* [which had contended that in limb (ii) a locality had to be of a size and situation such that, given the particular activities which had in fact taken place, it might reasonably have been capable of accommodating a proper spread of qualifying users undertaking activities of that type]. *There is nothing in the wording of the 2000 Act which refers to the size of the 'locality'. Furthermore one of the main purposes of the amendment, as it seems to me, was to allow inhabitants in a neighbourhood to qualify in a situation where the locality itself was too big. It cannot, in my view, have been the intention of Parliament that both the neighbourhood and the locality had to be small enough to accommodate a proper spread of qualifying users."*[29] In rejecting the submission that, in a limb (ii) case, the locality within which the relevant neighbourhood lay had to be small enough to accommodate a proper spread of qualifying users, HHJ Behrens appears to have accepted that there was such a requirement in respect of the neighbourhood itself.

78. Before leaving this topic it is finally necessary to make reference to certain remarks of Vos J in *Paddico* at first instance.[30] In paragraph 106 i) of the judgment Vos J said that he *"was not impressed with Mr Laurence's suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives to me such an illogical and unfair conclusion."* These observations were made in the context of consideration of the un-amended definition of a town or village green in section 22(1) of the Commons

[28] At paragraph 71.
[29] At paragraph 90. This passage was not the subject of later treatment by the Court of Appeal.
[30] Again, these remarks were not the subject of later treatment by the Court of Appeal.

Registration Act 1965. Vos J returned to the matter in paragraph 111 where, in the context of considering the amended definition in section 22(1A), he said again that he did *"not accept Mr Laurence's spread or distribution point."* It is not wholly clear whether Vos J was rejecting the principle that some kind of spread was required or whether he was simply rejecting the submission made to him on the facts that the particular spread was inadequate but I consider that the more natural reading of what he was saying suggests the latter rather than the former.

79. The next question is how the requirement for a proper or adequate spread of users is to be interpreted. It is submitted that it is here that the remarks of Vos J are particularly helpful. They point to the fact that the requirement should be interpreted in the light of the pattern of residence of the users one would expect to see. That might well be that one would expect to see most users of the claimed green coming from those houses closest to it and that one would not expect to see an equal spread or distribution of users from all over the qualifying area. However, I consider that the requirement for a proper or adequate spread of users must involve the proposition that if, on the evidence, users are confined to a limited part of the qualifying area and there is simply an absence of evidence of use by inhabitants of large parts of the qualifying area, the requirement is not made out. That case is this case.

80. In the light of those conclusions it is unnecessary for me to express a concluded view as to whether the area marked on Revised Plan (D) could constitute a locality for the purposes of the limb (ii) case which is made although I doubt that it could because no evidence or submission has been advanced as to the basis on which it might be so considered and no such basis is otherwise evident.

81. I have now dealt with the Applicant's case on neighbourhood/locality and significant number on the basis on which it was eventually put forward. The Application must fail on this basis because it has not been demonstrated that the area relied upon is a neighbourhood for the purposes of the 2006 Act, and, even if that were wrong and the area relied upon were a neighbourhood, it has not been demonstrated that use of the Application Land has been by a significant number of the inhabitants of that neighbourhood.

82. A registration authority, and an inspector reporting to such an authority, does not have a duty to reformulate an applicant's case; it is entitled to deal with the application and evidence as presented.[31] Be that as it may, I am in any event satisfied that the Applicant's case could not be sustained on any other permutation of neighbourhood/locality which might be considered to have arisen on the evidence at the inquiry. Thus, the Application could not succeed on the basis of treating the area shown on Revised Plan (D) as a neighbourhood within some wider, unspecified locality. The reasons for concluding that the area shown on Revised Plan (C) is not a neighbourhood, and that use would not have been by a significant number of its inhabitants even if it were, would apply equally, if not more strongly, in respect of the larger area shown on Revised Plan (D). The Application could not be sustained as a limb (i) case either on the basis of the area shown on Revised Plan (C) being treated as a locality or on the basis of the area shown on Revised Plan (D) being treated as a locality. Neither of these areas is an area known to the law or with legally significant boundaries.[32] The original Plan (C) and Plan (D), which were not in the event pursued at the inquiry, would not have enabled the case for registration to be made. The areas marked on these plans were simply arbitrary areas which the Applicant had chosen to delineate upon plans and neither area could justifiably be considered a neighbourhood for the purposes of the 2006 Act. It is also the case that neither area would have been a locality for the purposes of a claim on the basis of limb (i); neither is an area known to the law or with legally significant boundaries. Finally, the Laindon Park ward was mentioned at the inquiry but it too was not pursued. This ward might have been regarded as a locality but it only came into being in 2001.[33] Moreover, there could in any event be no conceivable evidential basis for any conclusion that use had been by a significant number of the inhabitants of such ward.

(d) *"***As of right"**

[31] See Lord Hoffman in *Oxfordshire County Council* at paragraph 61.
[32] A requirement well established in case law and re-affirmed by the Court of Appeal both in *Leeds Group plc* and *Paddico* in respect of the amended definition of town or village green introduced into the Commons Registration Act 1965 (as section 22(1A)) by section 98 of the Countryside and Rights of Way Act 2000.
[33] On which point see *Paddico* at paragraphs 30 and 62 (in the Court of Appeal judgment).

83. The conclusions I have already reached are fatal to the case for registration but I turn next to the further issue of whether use of the Application Land has been "as of right" given the focus of the Council's case on this issue.

(i) Power under which Application Land was acquired and held

84. The issue of whether use has been "as of right" is inextricably bound up with the question of the power under which the Application Land was acquired and held. As a local authority is a creature of statute it can only acquire land under some statutory power. In order to identify the statutory power involved it is necessary to consider the available historical evidence. I will deal with the 1938-39 acquisitions first, which cover the vast majority of the Application Land, before turning to the 1952 acquisition which covers only a small part of the Application Land in its south east corner.

85. In respect of the 1938-39 acquisitions, the starting point is the February 1938 minute and recommendations of the Recreation Grounds and Open Spaces Committee of Billericay Urban District Council. There is no reason to doubt that the subject matter of this document concerned the Application Land. The initial recommendation was that the acquisition take place under section 69 of the 1925 Act. Section 69(1) of the 1925 Act provided that a local authority *"may acquire by purchase, gift or lease, and may lay out, equip and maintain lands, not being lands forming any part of a common, for the purpose of cricket, football or other games and recreations"*. Section 69(2) provided that a county council might contribute towards the expenses incurred under this section by any other council. This latter power would have been the source of that part of the recommendation which referred to application being made to the county council for grant and it seems clear from reading the minute and recommendations as a whole that it was the potential for a financial contribution from the county council that had influenced the selection of section 69 of the 1925 Act as the potential acquisition route as distinct from an acquisition of the lands as "open spaces".

86. While the February 1938 document is the starting point, I do not consider that it is determinative of the question of the particular power which was in fact used in the later acquisitions in December 1938 and January 1939. The February 1938

recommendation for the use of section 69 of the 1925 Act was not a purchase resolution and, even as a recommendation that section 69 be used, it was accompanied by a further recommendation that "the Section under which land is to be acquired be determined on the merits of each particular case." Moreover, the actual conveyances for the acquisitions made in 1938-39 refer more generally to the Council's desire to acquire "for purposes mentioned in the Public Health Acts 1875 to 1925" without any specific reference to section 69 of the 1925 Act. There also seems to me to be a more fundamental reason why section 69 of the 1925 Act could not have been the specific acquisition power which was utilised in 1938-39 because section 69 of the 1925 Act had by then been repealed by section 11(2) of, and the Schedule to, the Physical Training and Recreation Act 1937 (which received royal assent on 13th July 1937 and had no specific commencement provision) ("the 1937 Act"). It appears that this may not have been appreciated at the time of the February 1938 meeting of the Recreation Grounds and Open Spaces Committee. The replacement provision in the 1937 Act for section 69(1) of the 1925 Act was section 4(1) which provided power for a local authority, inter alia, to acquire, lay out and maintain lands for the purpose of playing fields. There is no reference to section 4(1) of the 1937 Act in the 1938-39 conveyances or in the Terrier.

87. While the February 1938 recommendation for the use of section 69 of the 1925 Act is not determinative of the question of the particular power which was used for the 1938-39 acquisitions, the recommendation does show that the Council was clearly contemplating the acquisitions for the purposes of general public recreation. It could hardly have been otherwise given that the matter was before the Recreation Grounds and Open Spaces Committee but it is worthy of note that section 69(1) of the 1925 Act as referred to in the recommendation specifically mentions not just cricket and football but also *"other games and recreations"*. It is also to be remembered that, had it not been for the prospect of a financial contribution from the county council, it appears that the recommendation would not have been for the use of section 69 of the 1925 Act but one for the acquisition of the lands as "open spaces". As it is, the notion that the acquisitions were for "open space" purposes returned to the picture in connection with the 1938-39 acquisitions in that each of the plans in the series of conveyances at this point was headed "Proposed Open Space Laindon". The Terrier entries which correspond to these conveyances also

each record the "purpose" of the acquisitions as "Pound Lane Public Open Space". These references to "open space" and "public open space" confirm, and I so find, that the acquisitions in 1938-1939 were for the purposes of general public recreation. The connection between open space and recreation is apparent from the definition of "open space" in section 20 of the 1906 Act, which is *"any land, whether inclosed or not, on which there are no buildings or which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which … is used for the purposes of recreation".* [Emphasis added].

88. What then would have been the specific statutory power under which the 1938-1939 acquisitions took place? I agree with Mr Alesbury that, notwithstanding the references to "open space" in the conveyance plans and to "public open space" in the Terrier, the specific statutory acquisition power is not to be located in the 1906 Act. This is because the 1906 Act is not mentioned in the 1938-1939 conveyances. Those conveyances refer to the Public Health Acts 1875 to 1925 as does the Terrier. The specific statutory power is therefore to be found in the Public Health Acts 1875 to 1925. If section 69 of the 1925 Act is discounted (as I have done) then I agree with Mr Alesbury that the proper and obvious inference, in circumstances such as the present where land is acquired for the purposes of general public recreation, is that the acquisitions would have taken place under section 164 of the 1875 Act. I so find. There is, indeed, no other obvious candidate acquisition power in the Public Health Acts 1875 to 1925. Section 164 of the 1875 Act provides a power to *"purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds*".[34] I consider that this power is apt for the provision of a public recreation ground. Section 164 also confers a byelaw making power.

89. Turning to the byelaws which were made in this case, the 1979 Byelaws do not take matters any further forward in terms of considering the statutory acquisition/holding power applicable to the Application Land because the Application Land was not included as one of the pleasure grounds regulated by those byelaws. The Application Land is included in the 1997 Byelaws, identified in the Schedule thereto as "Pound Lane Recreation Ground, Laindon". I have already mentioned in

paragraph 49 above that the 1997 Byelaws are stated to be made under section 164 of the 1875 Act, section 15 of the 1906 Act and sections 12 and 15 of the 1906 Act "with respect to pleasure grounds and open spaces". The 1997 Byelaws do not categorise the pleasure grounds and open spaces to which they apply by reference to the particular byelaw making power applicable thereto. However, the 1997 Byelaws necessarily show that, when they were made, the Council must have considered that the Application Land was either a pleasure ground or an open space and that it attracted a byelaw making power under either section 164 of the 1875 Act or the 1906 Act. This is entirely consistent with my finding that so much of the Application Land as is comprised in the 1938-39 acquisitions (i.e., the vast majority of the Application Land) was acquired under section 164 of the 1875 Act.

90. I only need to add in respect of that part of the Application Land which was comprised in the 1938-39 acquisitions that I find that it continued since acquisition to be held under section 164 of the 1875 Act and that it was made available to the public thereunder from at least the 1960s[35] until it was appropriated for planning purposes on 25th June 2010.

91. I turn next to consider that small part of the Application Land in its south east corner which formed part of the land which was acquired in 1952. The evidence in respect of the 1952 acquisition (see paragraphs 42 and 43 above) is that it was for the purpose of housing under the 1936 Act and I so find. What then was the statutory power which allowed part of the land acquired for the purpose of housing to come to be part of a recreation ground? There are two candidate powers in the 1936 Act. First, there is section 79(1) (a) which provided that *"[w]here a local authority have acquired or appropriated any land for the purposes of this Part of this Act then without prejudice to any of their other powers under this Act the authority may (a) lay out and construct public streets or roads and open spaces on the land."* The equivalent provision in the Housing Act 1957 was section 107 and, in the Housing Act 1985, section 13. Secondly, there is section 80(1) which provided that *"[t]he powers of a local authority under this Part of this Act to provide housing accommodation, shall include a power to provide and maintain*

[34] Section 164 originally applied to urban authorities. Billericay was an Urban District Council.

with the consent of the Minister and, if desired, jointly with any other person, in connection with any such housing accommodation, any building adapted for use as a shop, any recreation grounds or other buildings or land which in the opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided." The equivalent provision in the Housing Act 1957 was section 93(1) and, in the Housing Act 1985, section 13. Mr Alesbury relied on section 80(1) of the 1936 Act.

92. That part of the Application Land which was part of the 1952 acquisition could therefore have been laid out as open space under section 79(1)(a) or provided as a recreation ground under section 80(1) of the 1936 Act. It is to be noted that the exercise of the power under section 80(1) required ministerial consent but that the exercise of the power under section 79(1)(a) did not. There is no note on the Terrier extract in relation to the 1952 acquisition of any ministerial consent ever having been obtained. By contrast, some of the other extracts from the Terrier relating to the 1938-39 acquisitions do note ministry consents in the context of appropriation of some of the land so acquired (presumably from the purpose of "Pound Lane Public Open Space" to housing). There is therefore some evidence to suggest that ministry consents were recorded in the Terrier. In circumstances where there is no evidence of the ministerial consent necessary for one power to have been used (and some evidence that ministry consents, once obtained, were noted) but another power was available which would provide an adequate explanation for what was done without any requirement for such consent, I consider that the inference to be drawn as to which power was used should be that it was the latter power. I thus infer, and on the basis of that inference find, that the statutory power used in connection with that part of the Application Land which was part of the 1952 acquisition was the power in section 79(1)(a) of the 1936 Act to lay out open space. Thereafter, so I find, the land was so held as open space and made available to the public from at least the 1960s until it was appropriated for planning purposes on 25th June 2010. No issue of appropriation of the land acquired in 1952 from housing purposes to open space purposes arises because the power in section 79(1)(a) of the 1936 Act was to lay out open space.

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[35] A date which I take from Mr Topsfield's evidence which I accept on this point.

(ii) Effect of conclusions on land acquisition/holding power on use "as of right"

93. I turn next to consider the effect of my conclusions above on the issue of whether use of the Application Land has been "as of right". In considering this issue I deal first with the vast majority of the Application Land which formed part of the 1938-39 acquisitions. I deal secondly with the small part of the Application Land which was part of the 1952 acquisition.

94. I consider that use of the vast majority of the Application Land cannot have been, and was not, "as of right" at any relevant point before the appropriation for planning purposes on 25th June 2010.

95. There is well-established law that the public have a right to the use of land which a local authority has acquired and made available to the public under section 164 of the 1875 Act. *Hall v Beckenham Corporation*[36] concerned a failed action in nuisance against a local authority in respect of the flying of noisy model aircraft in a recreation ground which had been acquired under section 164 of the 1875 Act. In giving judgment for the defendant authority Finnemore J stated that he thought *"that the corporation are the trustees and guardians of the park, and that they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws."*[37]

96. In *Blake v Hendon Corporation*[38] the Court of Appeal dealt with the question of whether land acquired under section 164 of the 1875 Act, laid out as a public park and then opened to the public, was exempt from rating. In deciding that it was exempt the Court of Appeal applied the principle that the defendant authority was

[36] [1949] 1 KB 716.
[37] At 728.
[38] [1962] 1 QB 283.

not in rateable occupation because it was merely custodian and trustee of the park for the benefit of the public. In giving the judgment of the court Devlin LJ spoke in terms of *"the public right of free and unrestricted use"* of the land which he compared to *"the enjoyment of rights similar to those which they enjoy over the highway."*[39]

97. Section 164 of the 1875 Act does not in itself contain any statutory trust for public enjoyment but the position established in case law has gained later statutory recognition in sections 122(2B) and 123(2B) of the Local Government Act 1972 ("the 1972 Act") dealing respectively with the effect of appropriation and disposal of open space land under section 122(2A) and 123(2A). Sections 122(2B) and 123(2B) provide that where land is held for the purposes of section 164 of the 1875 Act the appropriation or disposal frees the land *"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"*.

98. The next question is how the law set out in the preceding paragraphs bears on the question of use "as of right" for the purposes of the 2006 Act. The general issue of the relationship between land provided by a local authority for the purposes of public recreation and the requirement that qualifying use for the purposes of the registration of a new green must be "as of right" was first explored in a series of dicta in *Beresford v Sunderland City Council*[40] which, although dicta and although not specifically mentioning section 164 of the 1875 Act, are of the highest persuasive force. More recently, the decision of the Court of Appeal in *Barkas v North Yorkshire County Council and Scarborough Borough Council*[41] establishes beyond doubt that use by the public for lawful sports and pastimes of land provided under section 164 of the 1875 Act is "by right" and not "as of right".

99. In *Beresford,* Lord Bingham stated that it was *"plain that 'as of right' does not require that the inhabitants should have a legal right since in this, as in other cases of prescription, the question is whether a party who lacks a legal right has acquired*

[39] At 299.
[40] [2003] UKHL 60.

one by user for a stipulated period."[42] He went on to explain that the concern of the House of Lords had been to explore the possibility that "*the local inhabitants might have indulged in lawful sports and pastimes for the qualifying period of 20 years or more not 'as of right' but pursuant to a statutory right to do so"* because *"[s]uch use would be inconsistent with use as of right."*[43]

100. Lord Scott dealt specifically with the 1906 Act, which is not engaged in the present case, but his remarks are nevertheless of more general relevance. He said that he thought that it was accepted that, if the council in that case had acquired the land in question *"under the 1906 Act"*, then *"the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use 'as of right'"*.[44]

101. For his part, Lord Roger recognised that, if any local authority statute had conferred on local inhabitants a right to use the land in question, the result would be *"that their use would be 'of right', as opposed to being 'as of right'"*.[45]

102. The most extensive treatment of matters was provided by Lord Walker. In paragraph 86 he stated that *"[t]he city council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the city council, and was held by its predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in Hall v Beckenham Corpn [1949] 1 KB 716, 728, which was concerned with a claim in nuisance*

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[41] [2012] EWCA Civ 1373. At the time of the inquiry only the first instance decision - [2011] EWHC 3653 (Admin) – was available. The Court of Appeal dismissed the appeal.
[42] At paragraph 3.
[43] At paragraph 9.
[44] At paragraph 30.
[45] At paragraph 62.

against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft). So the notion of an implied statutory licence has its attractions."

103. In paragraph 87 Lord Walker made additional observations which are relevant for present purposes. He there said that, after the approach reflected in his remarks above had been suggested, "*there was a further hearing of this appeal in order to consider the effect of various statutory provisions which were not referred to at the first hearing, including in particular section 10 of the Open Spaces Act 1906, sections 122 and 123 of the Local Government Act 1972 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976. Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."*[46]

104. In *Barkas* the Court of Appeal considered that the speeches of their Lordships in *Beresford* established the following propositions:

(a) that there is a distinction between a use of land "by right" and a use of land "as of right";

(b) that if a statute properly construed confers a right on the public to use land for recreational purposes, the public's use of that land will be "by right" and not "as of right";

(c) that section 10 of the 1906 Act is an example of land which is provided by a local authority as open space which the public use for recreational purposes "by right".[47]

[46] For the sake of completeness it is right to record that, in paragraph 88, Lord Walker also stated that the situations he had been considering *"would raise difficult issues but in my opinion they do not have to be decided by your Lordships on this appeal, and would be better left for another occasion. The undisputed evidence does not establish, or give grounds for inferring, any statutory trust of the land or any appropriation of the land as recreational open space."*

[47] At paragraph 26.

105. The Court of Appeal further considered, with particular reference to Lord Walker's speech in *Beresford*, that he had regarded the notion of appropriation for the purpose of public recreation as being of critical importance.[48] Delivering the judgment of the court, Sullivan LJ continued as follows: *"[w]hile they are not binding (see paragraph 88 of his opinion) Lord Walker's observations are highly persuasive, and I can see no sensible reason for drawing a distinction between land held under section 10 and land which has been appropriated for recreational purposes under some other enactment. Mr Edwards made it clear that it was no part of his submissions that Lord Walker was wrong in not distinguishing between land which is held on a statutory trust under section 10 and land which has been appropriated for the purpose of public recreation. 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. There is no suggestion that Lord Walker was using the word 'appropriated' in the narrow sense of appropriated for the purpose of public recreation under section 122 of the 1972 Act from some other statutory purpose. There is no practical distinction between land which is initially acquired for open space purposes and land which has been appropriated for open space purposes from some other use. Accordingly, I can see no basis for distinguishing between open space that is provided under section 10 of the 1906 Act and open space that is provided under section 164 of the 1875 Act. In both cases the public's use of that land for lawful sports and pastimes will be by right, and not as of right*."

106. Sullivan LJ also said *"local inhabitants can fairly be said to have a statutory right to use land which has been 'appropriated' for lawful sports and pastimes because the local authority, having exercised its statutory powers to make the land available to the public for that purpose, is under a public law duty to use the land for that purpose until such time as it is formally appropriated to some other statutory purpose."*[49]

107. I conclude therefore that use by the public for recreation of land made available to them after its acquisition by a local authority under section 164 of the

[48] At paragraph 33.

1875 Act is not use "as of right". It is use which is pursuant to a statutory right or use which is "of right" or "by right". Use in the present case has not therefore been "as of right" at any relevant point before the appropriation for planning purposes on 25th June 2010.

108. I turn next to deal with that small part of the Application Land which formed part of the 1952 acquisition. I consider that use of this part of the Application Land has also not been "as of right". In *Barkas* the Court of Appeal held that the position when a recreation ground was provided under section 80 of the 1936 Act was no different from the position when land was provided for recreational purposes under section 10 of the 1906 Act or section 164 of the 1875 Act. In such a case there was appropriation for the purpose of public recreation and use of the ground by the public for lawful sports and pastimes was therefore "by right" and not "as of right".[50] For my part, I cannot see why the position should differ when, as I have found here, the Council acquired the parcel of land in question under the 1936 Act and laid it out as open space under section 79(1)(a) of that act.

109. The 1936 Act does not define "open space" and does not therefore in terms embody the 1906 Act definition which (see paragraph 87 above) incorporates use for the purposes of recreation. Nevertheless it would seem to me that it would be odd if the power in section 79(1)(a) was not to be construed as a power to lay out "public" open space. The word "public" appears at the beginning of section 79(1)(a) before "streets or roads" and I would interpret the word "public" to govern both "streets or roads" and "open space". Were it otherwise the section would curiously be dealing with both public provision and non-public provision together. If my interpretation is correct, it seems to me that it would sensibly follow that, while provision of streets or roads for the public would be for a use of passage, the provision of open space for the public would be for their recreational use just as much as recreational use forms part of the definition of open space for the purposes

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[49] At paragraph 42.

[50] At paragraphs 37, 42 and 44 in particular. The Court of Appeal (at paragraph 41) left open as "unclear" the question of whether trespass was a necessary characteristic of use "as of right". The approach of Lord Walker in *Beresford* which focuses (in paragraphs 86 and 87 of his speech) on trespassory use is to be contrasted with the remark of Lord Scott (in paragraph 48) where he said that the users in that case were certainly not trespassers on the land in question, apparently on the basis of an implied consent to be there, but he nevertheless held that use was "as of right" because there was no sign that the permission was intended to be temporary or revocable (paragraph 49).

of the 1906 Act. There has thus been an appropriation for the purpose of public recreation in the sense envisaged in *Barkas*. I have considered the possible argument that construing section 79(1)(a) in this way might allow a local authority to do, in effect, what it could not do under section 80, that is, provide and maintain a recreation ground without the necessity for ministerial consent and the minister's making of a judgment of "beneficial purpose" as required by that section. I think that the answer to any such argument would be that section 80 contemplates the more formal provision of a recreation ground rather than simply laying out open space under section 79(1)(a) albeit that open space so laid out can be used by the public for recreational purposes.

110. I thus conclude overall that no part of the Application Land was used "as of right" for any part of the relevant period before the appropriation of the Application Land for planning purposes on 25th June 2010. Nothing in the submissions made on behalf of the Applicant deflects me from such a conclusion.

(iii)The relevance of the 1997 Byelaws to use "as of right"

111. The next question I deal with is how the 1997 Byelaws fit into the picture in terms of their relevance to the issue of use "as of right". I have already made the point in paragraph 89 above that the byelaw making powers identified in the 1997 document were entirely consistent with my finding that so much of the Application Land as is comprised in the 1938-39 acquisitions (i.e., the vast majority of the Application Land) was acquired under section 164 of the 1875 Act. The issue I turn to at this stage is that highlighted in the submissions made on behalf of the Applicant that byelaw notices have never been displayed at the Application Land.

112. I find as a fact that byelaw notices have, indeed, never been displayed at the Application Land. I have received direct evidence to this effect from the Applicant's witnesses and no evidence has been adduced by the Council that byelaw notices ever were displayed.

113. As a matter of law I consider that it is to be accepted that communication of the existence of byelaws would be necessary if the case against use "as of right"

were to be put on the basis of an implied, revocable permission. In *Newhaven Port and Properties* Ouseley J said that *"[t]he very existence of bye-laws communicated in some way, would have shown that the recreational use was by implied, revocable permission."*[51] [My emphasis]. However, that is not the case which is made by the Council here against use "as of right". As Mr Alesbury put it, the Council did not argue that, because it put byelaws notices up, it gave people permission to use the Application Land. The point was that the status of the Application Land in fact gave people the right to be there. In this connection Mr Alesbury relied on a further passage in the judgment of Ouseley J in *Newhaven Port and Properties* in which the judge said that *"[t]he status of the land, which attracts a regulatory power, may suffice to show that its use is by licence; this was so in the case of land held under the Open Spaces Act 1906."*[52] Thus it is the status of land in attracting a regulatory byelaw making power which is important for present purposes, not the question of whether the byelaws were ever communicated. My finding of absence of communication of the byelaws does not therefore affect my conclusion that use has not been "as of right".

114. Before leaving the issue of the relationship between the byelaws and the question of use "as of right" I mention briefly Mr Alesbury's submission that the fact that some activities indulged in on the Application Land might have been in breach of the applicable byelaws was irrelevant. That submission was really, so it seems to me, made out of an abundance of caution. Use in breach of the byelaws did not really feature in the evidence and it did not appear to me to be part of the case made on behalf of the Applicant to argue that such use had occurred and that it was trespassory in nature such that it could found a claim for registration under the 2006 Act. Had such a contention featured, I agree with Mr Alesbury that it would have been defeated by what Ouseley J had to say on the matter in *Newhaven Port and Properties.* Ouseley J stated that *"[a]ny activities carried on in breach of the byelaws, whether the byelaws are enforced against them or not, are unlawful and have to be discounted".*[53] He also stated that *"[b]yelaws, albeit unannounced and unenforced, are relevant to a prior aspect on which the Inspector concluded in*

[51] At paragraph 96.
[52] At paragraph 85.
[53] At paragraph 93.

favour of Newhaven Port. If they had prohibited all the activities relied on by the inhabitants to establish their recreational user rights, there would have been no lawful sports and pastimes. The issue of user as of right would not even have been reached."[54] I consider that this provides clear guidance on the matter which should be followed.

Overall conclusion and recommendation

115. The Application cannot succeed because:

(a) the Applicant has failed to prove a qualifying neighbourhood or locality; or

(b) in the alternative, if (a) is wrong, the Applicant has failed to prove use by a significant number of the inhabitants of any qualifying neighbourhood or locality; and

(c) use of the Application Land could not have been, and was not, "as of right" at any relevant time before the appropriation of the Application Land for planning purposes on 25th June 2010.

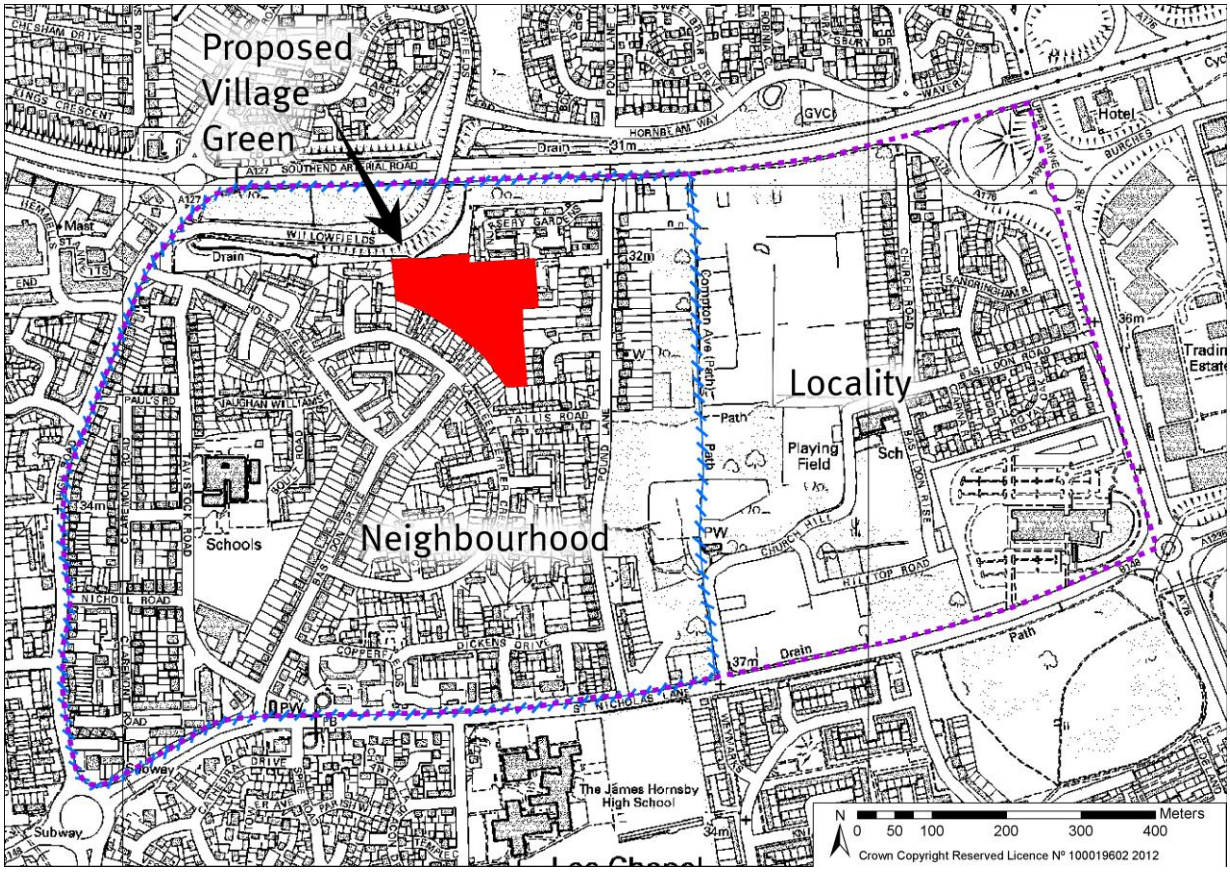
116. Accordingly, my recommendation to the Registration Authority is that the Application should be rejected.

Kings Chambers
36 Young Street
Manchester M3 3FT

Alan Evans
28th October 2012

[54] At paragraph 103.

Appendix 2


Proposed Village Green
Locality
Neighbourhood
Schools
Playing Field
The James Hornsby High School
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