AGENDA ITEM .....7b.....

DR/44/12

committee DEVELOPMENT AND REGULATION

date 23 November 2012

VILLAGE GREEN APPLICATION

Application to register land known as Kent View Road recreation ground, Kent View Road, Vange, Basildon as a town or village green

Report by County Solicitor

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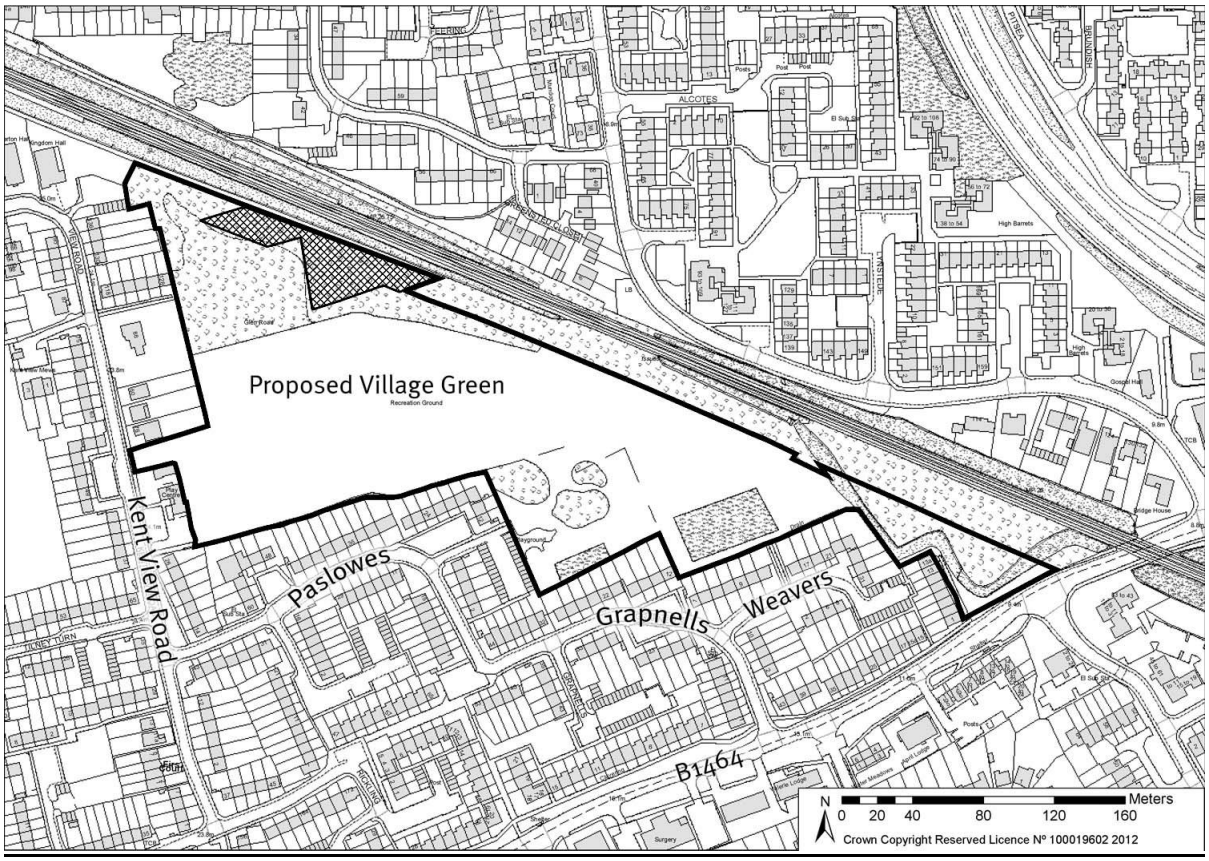

1. PURPOSE OF REPORT

To consider an application made on by Mr N E Hart of 88 Kent View Road, Vange, Basildon under Section 15 of the Commons Act 2006 ("the 2006 Act") , to register land at Kent View Road Recreation Ground, Vange as a town or village green**.**

2. BACKGROUND TO THE APPLICATION

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

The County Council as Registration Authority has received an application made by local resident Mr Hart to register the application site 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 19 July 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. This is in fact disputed by the applicant who says that substantial objection was made to the appropriation. However the objector does not consider that this affects the validity of the objection.

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 Hart'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 one month.

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 28th 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 Kent View Road Recreation Ground, which was acquired by the Borough Council on various dates between 1976 and 1998 from the former Basildon Development Corporation, and then the Commission for New Towns, and laid out since that time as a public open space, and for recreation, under the Open Spaces Act 1906, and/or Section 164 of the Public Health Act 1875, as amended. They stated that because the power of a local authority to acquire land as public open space is and was Section 9 of the Open Spaces Act 1906, that by virtue of Section 10 of that Act**,** any land acquired is held by them "… in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act…"

They stated that the land concerned has also, since no later than March 1997, been expressly subject to byelaws made by them as to Pleasure Grounds and Open Spaces, made under Section 164 of the Public Health Act 1875 and Sections 12 and 15 of the Open Spaces Act 1906, which byelaws were confirmed on behalf of the Home Secretary on 24th February 1997. They stated that prior to that date the land concerned was subject to earlier byelaws of a similar nature.

They asserted by way of objection that in these circumstances members of the public generally have had a right to use the said land as public open space and that such use 'of right' by the public is inconsistent with the establishment of a town or village green claim by 20 years' use 'as of right' (i.e. without permission), as provided for by Section 15 of the Commons Act 2006

In summary they argued that it follows that it will not have 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. They therefore requested that the application for registration made by Mr Hart should therefore be rejected without the need for further consideration of evidence.

They also confirmed that on 20th July 2010 the land concerned was appropriated to planning purposes by the Borough Council, following the procedure laid down by Section 122 of the Local Government Act 1972 (in particular Section 122(2A)).

Planning permission for 73 residential units on the application land was granted on 11 January 2011.

In the case of Village Green applications the County Council 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 Civ. 951 (para 29), a 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 Registration Authority which is at Appendix 1.

3. THE APPLICATION LAND

The application land is a roughly triangular area of some 11 hectares in extent. To the west it is bounded (on the northern part of this boundary) by the rear gardens of houses in Kent View Road and (on the southern part of this boundary) by a rectangular area of land off Kent View Road on which stand two single storey community buildings and their associated land. To the north of the northern of the two buildings a finger of the application land extends up to Kent View Road itself. To the south the application land is bounded by the rear gardens of houses in the streets of Paslowes, Grapnells and Weavers. In its far south east corner a narrow stretch of the application land extends through to High Road, Vange. The eastern boundary of the application land is marked by a railway line. The boundaries of the application land are, on the whole, characterised by extensive vegetation in the form of hedges and trees. The eastern boundary to the railway line is formed also by a steel palisade fence.

The application land is broadly level in its northern part but slopes perceptibly down toward the south or south east in its southern part. The major part of the application land consists of a grassed field. There is a full size football pitch in roughly the middle of the application land which is oriented on a west-east basis to the north of, and roughly parallel with, the line of the rear gardens in Paslowes. The goal posts were in place on the inspector's site visits. To the north of the football pitch, in the north west part of the application land and alongside the railway boundary, there is an area which is wooded in character. The narrow stretch of the application land in its far south east corner extending through to High Road, Vange is also wooded. There are also some areas in the southern part of the application land to the rear gardens of houses in Paslowes and Grapnells where there are smaller groups of trees and bushes. In the right-angled corner of the application land formed by the rear gardens of houses on Paslowes and Grapnells there is a children's play area which has a slide, swings and a bench. There is another bench about half way along the eastern, railway line, boundary.

Access to the application land is available in several places. There is an access from Kent View Road. From a spur of Paslowes there is access next to the children's play area. There is then an access which leads through from Weavers. The south east corner of the application land is accessible from High Road, Vange. Here there is a set of steps just off the High Road which leads up to a path through the wooded area in this location before the path descends by another set of steps on to the `grassed part of the application land. There is also, apart from the formal access points, a well-worn path into the application land in its very north west tip from a garage court at the point where, at the northern part of Kent View Road, the street turns to the west into Bardfield. This access point involved going over, or through, a fence consisting of two metal bars between concrete posts.

There were no signs or notices on the application land at the time of the inquiry in July 2012 save for two Borough Council signs on a single pole at the Kent View Road access; one in relation to the offence of dog fouling and the other in relation

to the offence of littering. There was a pole in the grassed area at the bottom of the steps in the south east part of the application land but there was no sign on it.

There are no footpath or bridleway rights across the application site or in the immediate vicinity but the linking routes to the surrounding development are adopted highways.

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

Mr Hart’s application is stated to be made for the Vange Community Group (as authorised by the Meeting on 18th August of the group) and was supported by evidence questionnaires demonstrating use for a wide variety of activities over a period of twenty years or more up to 2010 when the forms were completed in a format supplied by the Open Spaces Society.

The applicant’s definition of locality was not accepted by the objector when the application was advertised. At the inquiry the applicant presented his case on the basis of the ‘neighbourhood within a locality’ limb of section 15(2). The neighbourhood was identified as an area which was referred to in the inquiry as ‘the Triangle’, its three sides formed by Clay Hill Road to the west, High Road, Vange to the south the railway line to the east. This is shown on Appendix 2. Most of the forms are accompanied by a map on which they have marked their residence within the locality area. In the evidence forms the users say that there is a cohesiveness to the locality because it has a school catchment area, a local church or place of worship, sports facility local shops, area policeman, chiropodist/podiatrist, community activities and a scout hut. The locality was identified as Vange Ward. This is also shown on Appendix 2.

Uses stated in his supporting evidence included children playing including play school; various ball games including rounders, football, cricket, rugby, french

bowls, golf and tennis by teams and individuals; community celebrations; group activities with the guides, scouts and cubs; winter activities including snowboarding; jogging, frisbee throwing; bird watching and nature observation; picknicking, fetes, people walking or using it as a shortcut; dog walking and dog training; carnival preparations; bonfire parties and fireworks; caravan club rally; bicycle riding and use on electric wheelchair; picking and eating several varieties of fruit; sponsored walks; watching trains and wedding photographs.

As well as written material submitted with the application and exchanged in bundles in advance of the inquiry, 22 witnesses gave evidence at the hearing. That evidence is set out in paragraphs 21 to 43 of the inspector's report at Appendix 1 (pages 7 to 16). There were a further 15 witness statements and a total of 120 evidence questionnaires, 85 in respect of those who had used the application land for 20 years or more and 35 who had used it under 20 years. The applicant's bundle also included letters of support, photographs, press clippings and a submission in support of an application to register a village green at The Downs, Herne Bay.

One person spoke in support of the application, Borough Councillor Byron Taylor, a Borough Councillor for the Vange Ward. He stated that the Borough Council had not notified the existence of nor enforced, the bye laws and could not therefore, he argued, rely on the claim that use had not been 'as of right'. He also stated that was a clear natural community in and around Kent View Road which relied on the application land and for whom the application land was integral to quality of life. He made the point that before local government re-organisation the High Road had not formed a boundary and the community he spoke of extended to the south of this road.

After the evidence had been given at the inquiry the applicant made the submissions set out in paragraphs 88 to 96 of the inspector's report, at pages 36 to 38 of Appendix 1.

6. EVIDENCE IN SUPPORT OF THE OBJECTION TO THE APPLICATION

Basildon Borough Council's objection letter of 28 January 2011 objected to the application on the basis that the land had been acquired and used as public open space. They called two witnesses at the inquiry whose evidence is set out in paragraphs 45 to 71 of the inspector's report, at pages 17 to 28 of Appendix 1.

Basildon Borough Council had acquired the application land on various dates between 1976 and 1998. There is an area to which they had no documentary title which is cross-hatched on a plan appended to Mr Topsfield's witness statement and marked on the map at the front of this report. Mr Topsfield was the Principal Estate Surveyor.

The application land was acquired by the Borough Council (then Basildon District Council) on various dates between 1976 and 1998. The main part was acquired in 1976 from the former Basildon Development Corporation with the remainder having been acquired from Commission for the New Towns between 1994 and 1998. The application land had been laid out since 1976 as a public open space

and for recreation. The detail of the acquisitions is set out in paragraphs 55 to 61 (pages 19 to 22) of the inspector's report in Appendix 1.

Mr Topsfield also produced an extract from the relevant page of the Borough Council's Terrier record. It records in respect of "Land at Kent View Road" that: the contents upon acquisition were 11.67 hectares approximately; the date of acquisition was 21st June 1976; the purpose involved was open space; the statute was Physical Training and Recreation Act 1937; the price was £20,600; and The vendor was Basildon Development Corporation.

The objector's barrister made detailed submissions on the effect of the acquisition of the land in relation to the grounds to be established under s15(2) Commons Act 2006 which are set out at paragraphs 73 – 87 (pages 28 to 26) of the inspector's report at Appendix 1. He also submitted that the same view should be taken of the cross hatched land as no-one else had claimed the land and so far as it had needed managing it had been managed by the Borough Council and was indistinguishable from the remainder of the open space land which the Borough Council had provided for public use.

The inspector accepted that even before the land was acquired by Basildon Borough Council it was laid out as open space or a recreation ground. So the land subject to the 1976 Conveyance and 1976 Transfer would have met the definition of 'open space' in section 20 of the Open Spaces Act 1906. He accepted that the pre-acquisition material makes it clear that the transaction which was then in contemplation between Basildon Development Corporation and the Borough Council was regarded by both sides as a proposed purchase of open space for open space purposes and that, while the transaction did not go through until 1976, it is clear that it was the same transaction as previously contemplated. He also accepted as undeniably correct that the 1976 Conveyance contained (as did the 1976 Transfer) the clearest possible covenant not to use the land other than for purposes of public open space and recreation. He considered that these matters provide a compelling inference that the land which was the subject of the 1976 Conveyance (which was the vast bulk of the application land) and the 1976 Transfer was acquired as open space under the 1906 Act.

Evidence was also given by the Manager of Parks and Grounds Maintenance who set out the maintenance of the application land to reflect the activities. It included pitch marking, cutting and reinstatement, general amenity grass cutting, pruning of hedges and shrubs on an annual basis, tree pruning when required, litter picking and general inspections. Since 2010, when a contract was entered into, formal hedges were cut twice a year and informal once a year. He also set out the history of byelaw coverage of the application land since 1978.

7. INSPECTOR'S FINDINGS

The inspector's findings and analysis are set out in paragraphs 97 – 152 (pages 39 to 63) 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, and the one which was so treated as the key issue by both parties, is whether use of the application land has been "as of right".

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

The inspector had no doubt that 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 clearly establishes as much. The Borough Council has not advanced any evidence which suggests otherwise and has not sought to dispute that lawful sports and pastimes have taken place there for 20 years because that is exactly what would be expected on land which has been provided as a recreation ground.

In relation to the impact of the byelaws on such use, the inspector took the view that, if one were to discount activities which were in breach of bye-laws, the abundance of other activities which were not in breach (such as walking, dog walking, football, cricket, rounders, kite flying and general play) is amply sufficient to establish use of the application land for lawful sports and pastimes for the relevant 20 year period.

The 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 i.e. the area set out on the map at the front of this report. In making that finding he had borne in mind the observation of Sullivan J in ***Cheltenham Builders Limited v South Gloucestershire District Council*** and adopted the approach there suggested. 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."* It is no doubt true that some parts of the application land, such as the football pitch area, have been used more than others but that is as is to be expected. It is also true that a number of witnesses spoke of no, or limited, use of the southern part of the application land owing to waterlogging after wet conditions but others were more emphatic in their use of the whole of the application land and some pointed to the seasonal nature of the problem with the southern part of the application land (in autumn and winter). A good number of witnesses specifically referred to use of the wooded areas.

On a common sense approach to the evidence in this case he considered that it is sensible to say that it establishes that the whole of the application land has been used in the requisite qualifying way for 20 years. No contrary submission has ever been put forward by the Borough Council.

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

This matter was ultimately not contentious at the inquiry. The objector accepted that the Triangle described by the applicant and shown on Appendix 2 was capable of being a neighbourhood and that, whatever reservations there might be about Vange Ward as a locality, those reservations could be assuaged by regarding the borough of Basildon as the locality. The objector also made it clear that the Borough Council did not dispute that significant numbers of people from the neighbourhood had used the land recreationally for at least the relevant period of 20 years. The inspector considered the objector's acceptance of these matters was well-founded.

He looked at whether the Triangle falls to be considered as a neighbourhood. Neighbourhood is undefined in the 2006 Act as was also the case under section 22 of the Commons Registration Act 1965 Act 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 and which he set out in paragraphs 103 - 109 (pages 41 to 44) of his report at Appendix 1.

Taking those issues into account he was of the view that the Triangle is properly to be regarded as a neighbourhood in this case. It is an area which is meaningfully described as such and one which has clear and strong boundaries, formed on two sides by main roads (Clay Hill Road and High Road, Vange) and on the other by a railway, which mark it off from elsewhere. It is an area in which there is a cohesiveness arising from its inter-connected streets and overall similarity of housing stock. It could not fairly be described as a disparate collection of pieces of residential development cobbled together for the purposes of the claim. It is also an area where people might reasonably regard themselves as living in the same portion or district of town. On a more impressionistic level, some of the evidence also provided a flavour of community identity in the Triangle.

As to the issue of whether Vange Ward constitutes an appropriate locality, it is correct that there has been judicial recognition of the proposition that a ward may constitute a locality for the purposes of town or village green registration. Older dicta pointing the other way can be found in the case of ***Laing Homes Limited v Buckinghamshire County Council*** where Sullivan J said that the objectors there would have had a good prospect of persuading an inspector that there was no qualifying locality if the case had been advanced on the basis of electoral wards *"either because electoral wards are not localities or, if they are, because the wards constituted two localities and the inhabitants of one would not be the inhabitants of the other."*

In the light of the more relaxed view that is now being taken by the courts as to what constitutes a "neighbourhood within a locality" and the emphasis which has been placed on the loosening of the links with historic forms of green which this phraseology was intended to achieve, the inspector saw no real reason why a ward could not be a locality for the purposes of establishing a claim on the basis of a "neighbourhood within a locality". As to issue of the present boundaries of the ward being the product of relatively recent boundary change, again he was not sure why any such change should matter for the purposes of a claim for registration on the basis of a neighbourhood within a locality. The neighbourhood has remained the same over the 20 year qualifying period and thus there is certainty as to those local inhabitants who would enjoy the right to recreate on the green were it to be registered. He did not consider that it mattered whether he was right or wrong on that because the borough of Basildon itself would serve as the requisite locality within which to locate the neighbourhood. There is no evidence of any change in the borough boundaries over the relevant 20 year period. If authority were needed for the proposition that the borough could be the relevant locality it can be found in a passage from the judgment of HHJ Behrens in ***Leeds Group plc*** at first instance. The judge 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."*

In relation to the issue of "significant number", this again was not a matter in contention, the Borough Council not disputing that significant numbers of people from the neighbourhood had used the application land recreationally for at least the relevant period of 20 years. Sullivan J dealt with the issue of "significant number" in ***McAlpine Homes Ltd v Staffordshire County Council*** 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".* On the evidence he found that this test is met in the present case.

He concluded therefore that the application land has been used by a significant number of the inhabitants of a neighbourhood within a locality for lawful sports and pastimes for a period of at least 20 years and went on to consider the key issue, whether that use 'as of right'.

<u>Has the user by inhabitants been as of right?</u>

Although no challenge to specific types of use has been indicated Basildon Borough Council confirmed that the land had been used for " open space" since its transfer to them and its use restricted with byelaws to ensure effective management of this and other Basildon park areas. They claim that none of the use cannot 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 agreed with the proposition that, if express identification of the relevant statutory power is absent from the resolution authorising the acquisition in question or the conveyance effecting that acquisition, the task of identification of that power becomes a matter of inference in all the circumstances of the case.

The history of the Borough Council's acquisition of the application land in this case starts with the 1976 Conveyance, the 1976 Transfer and the documentary material from 1973-74 pre-dating these documents. It is clear that the 1976 Conveyance and the 1976 Transfer represented the completion of the transaction which had been proposed in, and was the subject of, the dealings between Basildon Development Corporation and the Borough Council in 1973-74. This follows not just from the correspondence between the final 1976 documents and the earlier documentary material of 1973-74 in terms of the subject matter (land at Kent View Road) and the price of £20,600 but also from the fact that the covenants embodied in the 1976 documents ("not to use the land hereby conveyed/transferred or any part thereof other than for the purposes of a public open space and for recreation") match the fact that (as is reflected throughout the 1973-74 documentary material) the proposed purchase of the land was as open space. The 1973-74 documentary material is therefore to be read in conjunction with the 1976 Conveyance and the 1976 Transfer and properly to be considered as pre-acquisition material. However, neither the 1973-74 documentary material nor the 1976 Conveyance/1976 Transfer contains any express identification of statutory powers. The question then becomes one of inference from all the circumstances of the case.

The inspector accepted that even before the Borough Council acquired the land which was the subject of the 1976 Conveyance and the 1976 Transfer, this land was laid out as open space or a recreation ground by Basildon Development Corporation which was consistent with the evidence of some of the witnesses called on behalf of the applicant who spoke of the application land being essentially unchanged from the days of the Development Corporation.

The inspector considered that the land subject to the 1976 Conveyance and 1976 Transfer would have met the definition of "open space" in section 20 of the Open Spaces Act 1906 ("the 1906 Act"), which so far as relevant, 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".*

He accepted that the whole of the pre-acquisition material from 1973-74 makes it clear that the transaction which was then in contemplation between Basildon Development Corporation and the Borough Council was regarded by both sides as a proposed purchase of open space for open space purposes and that, while the transaction did not go through until 1976, it is clear that it was the same transaction as previously contemplated. It is undeniably correct that the 1976 Conveyance contained (as did the 1976 Transfer) the clearest possible covenant not to use the land other than for purposes of public open space and recreation. He considered that these matters provide a compelling inference that the land which was the subject of the 1976 Conveyance (which was the vast bulk of the application land) and the 1976 Transfer was acquired as open space under the 1906 Act and he did not consider that this inference is displaced by other matters which he set out in paragraph 120 of his report on page 49 of Appendix 1.

He also considered the impact of the 1979 and 1997 Bye-laws. He had no doubt that it was intended that both the 1979 and the 1997 Bye-laws should apply to the application land. He accepted the objector's submission that the selection of the combined section 12 and 15 bye-law making power in the 1979 Bye-laws and in form BYE 5/3 should not deflect from the conclusion that the land which was the subject of the 1976 Conveyance and 1976 Transfer was acquired under the 1906 Act. He agreed that it would be simple prudence to refer to both sections 12 and 15 in circumstances where, despite the public open space covenants, there was no express reference to the 1906 Act in the 1976 Conveyance and 1976 Transfer and where the Terrier referred to the purpose of open space but also to the 1937 Act. The choice of the bye-law making power is explicable as a cautious "belt and braces" approach by those responsible for the bye-laws and need not have involved any implicit rejection by them of the proposition that the land was acquired under the 1906 Act.

Given that the land which was acquired under the 1976 Conveyance and the 1976 Transfer was acquired under the 1906 Act, this means that this land was subject to the statutory trust for public enjoyment found in section 10 of the 1906 Act.

He also considered those areas of land which formed the subject of the CRA Transfers. The Borough Council had produced the relevant documentary material of two "community related assets" transfers which took place between Commission for the New Towns and Basildon District Council. The first such transfer took place on 31st January 1994 and the second on 12th February 1998 ("the 1994 CRA Transfer" and the 1998 CRA Transfer", or, collectively, "the CRA Transfers").

The Objector's evidence was the areas subject to these transfers had been maintained as one with the rest of the land in the Borough Council's ownership before the transfers took place and the inspector had no hesitation in accepting that. There is no evidence to contradict it and, indeed, all the evidence is consistent with these areas long having formed undifferentiated parts of a wider whole. The memorandum of 18th October 1976 refers to the parcel of land which became the subject of the 1994 CRA Transfer as a piece of remaining land at the Kent View Road Open Space which was then available for purchase by the

Borough Council from Basildon Development Corporation. He had no doubt that this land satisfied the definition of open space in section 20 of the 1906 Act when it was acquired by the Borough Council in 1994. The same would have applied to the parcel of land which was the subject of the 1998 CRA Transfer.

The objector submitted that in respect of the plots of land which were the subject of the CRA Transfers, in spite of the somewhat widely worded covenants in the transfer documents, there was nothing inconsistent with the Borough Council's acquiring this land in reality to add to the public open space. The areas were already de facto part of the same public open space, managed as such and then, in the 1990s, fully added in ownership terms as well. It would be absurd to treat them differently and the inspector agreed with and accept that submission. Neither the 1994 CRA Transfer nor the 1998 CRA Transfer identifies any specific statutory provision which bears on the purpose of the Borough Council's acquisition. The 1994 CRA Transfer was made under the aegis of an agreement between Commission for the New Towns and Basildon District Council which dealt with the transfer of various areas of land, including the plot of land subject to the 1994 CRA Transfer. The agreement recited that the transfer to the Borough Council was pursuant to section 120 of the Local Government Act 1972 and to the powers contained in the New Towns Act 1981. Of those two powers, the one which relates to the Borough Council's acquisition is section 120 of the Local Government Act 1972 ("the 1972 Act"). Section 120 provides a wide power for councils to acquire land by agreement for the purposes of any of their functions under the 1972 Act or any other enactment or for the benefit, improvement or development of their area. It would seem probable that this wide general power was selected because the transfer was of various areas of land and different areas might be used for different purposes. That point also serves to explain the width of the covenant in the 1994 CRA Transfer extending to use for "landscape area highway or for the provision of amenity and recreation areas for the use of the public including (without limitation) housing access parking and garden areas and any other uses which in the reasonable opinion of the .. Council... are required in order to allow full public use and enjoyment of the land".

It seemed to the inspector that, in strict terms, the land which was the subject of the 1994 CRA Transfer was acquired under section 120 of the 1972 Act rather than under the 1906 Act. In those circumstances it is probably not possible to say that section 10 of the 1906 Act applies as such because the land was not acquired "under" the 1906 Act although Lord Scott envisaged in ***Beresford*** that there might be some flexibility in approaching the question of when section 10 of the 1906 Act was engaged. He said *"that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27)."* Lord Scott acknowledged, however, that no concluded view could be expressed given the concession that had been made that the acquisition had not been "under" the 1906 Act. It is also

to be noted that the present case is not simply one where the relevant documents are silent on the acquisition power but one where they contain specific reference to a power other than one found in the 1906 Act. For present purposes, he proceeded therefore on the basis that section 10 of the 1906 Act was not directly engaged as such.

However, the reality of the present case is that in 1994 the Borough Council was adding to its ownership for open space purposes another smaller piece of open space to a much larger area of adjoining open space, which had been acquired under the 1906 Act, where the larger composite area had all along been managed in the same way and was all already used for the purposes of public recreation. Moreover, while the direct acquisition power was section 120 of the 1972 Act, the purpose of the acquisition was the provision of open space to the public as a function of the Borough Council under the 1906 Act. In those circumstances it would indeed be absurd to think that any different consequences should follow in law from any inability to say that the added land was subject to a statutory trust for public enjoyment in the strict sense for want of direct acquisition under the 1906 Act. The inspector considered that this reasoning fits entirely with the observations of Lord Walker in ***Beresford*** in which he envisaged that there would be situations where, although there might not be a statutory trust in the strict sense, the legal position would be equivalent thereto. He concluded therefore that from 1994 the land subject to the 1994 CRA Transfer should be regarded as in such position. He also considered that the reality of the acquisition of the land which was acquired under the 1998 CRA Transfer is no different from the reality of the acquisition of the land which was the subject of the 1994 Transfer. This was another case where the Borough Council was adding to its ownership for open space purposes a further small area of open space to a much larger area of adjoining open space, which had been acquired under the 1906 Act, where the larger composite area had all along been managed in the same way and was all already used for the purposes of public recreation. In his view it too is therefore to be approached on the basis that its legal position from acquisition in 1998 is equivalent to land subject to a statutory trust for public enjoyment in the strict sense.

In relation to the cross-hatched area shown on the map at the front of this report the objector accepted that it had not been acquired under any local government statute. However, they invited the inference that, as no-one else claimed it and the Borough Council had been managing it for a long time, the Borough Council had acquired title through adverse possession, had effectively added it to its landholding and made it available, in common with the rest, as public open space. The cross-hatched area was an indistinguishable part of a wider publicly provided recreational area. The inspector did not accept this submission for the simple reason that there is no evidence which establishes that the Borough Council has carried out any significant management of the cross-hatched area or has otherwise occupied or controlled it. Their witness Mr Reynolds himself confirmed that the cross-hatched area was a wooded or scrubland area within which there was probably no maintenance. The inspector did not consider that the evidence establishes that the Borough Council has ever been in factual possession of the cross-hatched area. The Borough Council could not therefore have been in the position where it was making that particular piece of land

available to the public as open space. It was not theirs to make available. Whether the cross-hatched area is or is not physically distinguishable from the wider adjoining area does not seem to me to affect the matter. He also noted that the Borough Council has not taken any formal steps to obtain a possessory title to the cross-hatched area.

Having concluded that the land which was the subject of the 1976 Conveyance and the 1976 Transfer was land which was acquired under the 1906 Act and thus subject to the statutory trust for public enjoyment in section 10 of the 1906 Act and that the land acquired in 1994 and 1998 under the CRA Transfers is to be treated as being in an equivalent position from the dates of the transfers the inspector had no doubt that the use of this land (which comprises the whole of the application land save for the cross-hatched area) cannot have been "as of right" from the dates on which the various parts of it were acquired until the eventual appropriation of the application land for planning purposes in July 2010. This is therefore fatal to the application (save in respect of the cross-hatched area). The position is made clear in a series of dicta in Beresford which are of the highest persuasive force and clearly correct in principle.

The inspector also considered the position if his finding that the land which was the subject of the 1976 Conveyance and 1976 Transfer was acquired under section 9 of the 1906 Act were wrong and this land were in fact acquired, as recorded in the Borough Council's Terrier record, under the Physical Training and Recreation Act 1937. He did not consider that this would alter the position. If the land had been acquired and laid out under the 1937 Act and made available thereunder to the public for the purposes of recreation, he considered that the land would still have been used "by right" rather than "as of right"

In the same context the inspector considered the effect of the byelaws. Assuming activities carried on in breach of bye-laws were not lawful and so fall to be discounted, the abundance of other activities which were not in breach was amply sufficient to establish use of the application land for lawful sports and pastimes for the relevant 20 year period. The 1979 and 1997 Bye-laws were intended to apply to the application land. The bye-law making power utilised did not deflect from the conclusion that acquisition had been under the 1906 Act. There were two other issues on the byelaws in relation to the legal nature of the use of the application land. The first issue relates to the central plank of the applicant's case in this regard, namely, that as there had never been any bye-law signs or notice boards at the application land, that was fatal to the contention that use of the application had been with the permission of the Borough Council. The second issue is the applicant's further contention that activities carried out in breach of bye-laws were trespassory and therefore to be regarded as taking place "as of right". In considering this issue he considered whether activities carried out in breach of bye-laws can qualify as <u>lawful</u> sports and pastimes. The inspector found that no bye-law sign or notice ever was displayed at the application land during the relevant period. On this point he regarded the direct evidence of all witnesses in support of the application that no such sign or notice ever was displayed as plainly preferable to the hearsay evidence provided by the objector's witness who could speak only of the recollection of an unidentified officer of the Borough Council unsupported by any documentary evidence.

Communication of the existence of bye-laws 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." [emphasis added].*

However, that is not the case which is made by the Borough Council here against use "as of right". The Borough Council was not contending that by putting up bye-law signs or notices it was saying to the public that they were permitted to come on to the application land. The Borough Council was contending that, because of the status of the application land, the public had a right to be on it. The inspector did not therefore accept the applicant's submission that absence of communication defeats the Borough Council's argument. Part of the applicant's case was that, by failing to publicise the existence of bye-laws and by not enforcing them, the Borough Council had not fulfilled its legal requirements. He did see how this argument, whether it be right or wrong, assists the applicant's case. Assuming it were right (which he did not decide) and it could be said, for example, that the Borough Council had not fulfilled its trust duty under section 10 of the 1906 Act to hold and administer the open space under proper control and regulation. That would mean that the Borough Council were in breach of that duty. It would not mean that the Borough Council's trustee status was removed nor would it mean that the trust for public enjoyment ceased to be applicable. And so its relevance to the 'as of right' issue.

The applicant further contended that activities carried out in breach of bye-laws were trespassory and therefore to be regarded as taking place "as of right". This contention is defeated by the judgment of Ouseley J in ***Newhaven Ports and Properties***. *"[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"* and further: *"[b]yelaws, albeit unannounced and unenforced, are relevant to a prior aspect on which the Inspector concluded in 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."* The inspector considered that he should follow this very clear guidance from the High Court.

The final consideration is the cross-hatched area. The inspector did not see that there is any legal basis left to say that local inhabitants' use of this area has not been "as of right" even if access thereto had been from the rest of the application land, the use of which was enjoyed "by right". No other impediment to registration of the cross-hatched area is suggested by the Borough Council and none was apparent to the inspector. In finding that the whole of the application had been used for lawful sports and pastimes for at least 20 years I noted (in paragraph 100 above) that a good number of witnesses specifically referred to use of the wooded areas on the application land. The cross-hatched area is a wooded area. No suggestion was made that there would be any future issue of access to the cross-hatched area were it to be registered in isolation, let alone that any such issue should bar registration. Any such suggestion would have fallen foul of Ouseley J's finding in ***Newhaven Port and Properties*** that *"[i]t would be wrong*

for rights which on the evidence have been proved to exist not to be registered as required by the statute, simply because they could not be exercised."

8 INSPECTOR'S CONCLUSION AND RECOMMENDATION

The inspector's overall conclusion is that all requirements for the application to succeed are made out except for use "as of right" but, for that reason, the application must fail, save for the cross-hatched area, where all requirements for the application to succeed, including use "as of right", are made out. As a matter of procedure the Registration Authority is entitled to register only that part of the application land in respect of which the case has been proved.

He therefore recommend that the application should be rejected save for the cross-hatched area, in respect of which it should be accepted.

9 REPRESENTATIONS FOLLOWING INSPECTOR'S REPORT

The inspector's report was circulated to applicant and objector. The applicant has indicated that he intended to approach Basildon Borough Council to see if they would be willing to enlarge the area that has been recommended to be registered as a village green. Basildon Council confirmed it did not wish to make any comments in relation to the Inspector's Report.

10. LOCAL MEMBER NOTIFICATION

The local county councillors for Pitsea Ward, Councillors Abrahall and Hillier were notified of the inspector's recommendation on 10th October. Any comments will be reported.

11. RECOMMENDATION

It is RECOMMENDED

1. That, with the exception of the cross hatched area on the map at the front of this report, the application is rejected as the land has a legal status which defeats the acquisition of village green rights over it.
2. The part of the application land shown with cross hatching on the map at the front of this report is registered as town or village green.

BACKGROUND PAPERS

Application by Mr N Hart dated 19 August 2010
Inspector's report

Local Members Pitsea: Councillors Abrahall and Hillier

Ref: Jacqueline Millward CAVG/57

APPENDIX 1

APPLICATION TO REGISTER LAND KNOWN AS KENT VIEW ROAD RECREATION GROUND, KENT VIEW ROAD, VANGE, BASILDON, ESSEX AS A TOWN OR VILLAGE GREEN

REPORT

By

Alan Evans

Kings Chambers

36 Young Street

Manchester

M3 3FT

CONTENTS

Recommendation: the Application should be rejected save for the Cross-Hatched Area, in respect of which it should be accepted.

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 Kent View Road Recreation Ground, Kent View Road, Vange, Basildon, Essex ("the Application Land") as a town or village green.

2. The Application is dated 19th August 2010 and was made by Mr Neil Edmund Hart ("the Applicant") of 88 Kent View Road, Vange, Basildon, Essex, SS16 4JX on behalf of the Vange Community Group.

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, SS11 7JZ on 24th to 26th July 2012.

5. At the inquiry the Applicant represented himself and the objector, Basildon Borough Council, was represented by Mr Alun Alesbury of counsel. I thank the Applicant and Mr Alesbury for the valuable assistance of their advocacy 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 24 July 2012 to familiarise myself with it before the inquiry began. I made a further unaccompanied visit on 25th July 2012 after the inquiry had finished for the day. With the agreement of the parties I did not hold an accompanied site visit. I familiarised myself with the surrounding area by driving round it on the occasions of my two site visits.

7. The Council was formerly Basildon District Council and before that again, pre-1974, Basildon Urban District Council. References in this report to "the Council" should be taken to include, where appropriate, 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. At the inquiry the Application was presented on the basis of the "neighbourhood within a locality" limb of section 15(2). The neighbourhood was identified as an area which was referred to in the inquiry as "the Triangle" and I will use that term in this report. The Triangle is an area which is indeed of triangular shape. Its three sides are formed by Clay Hill Road to the west, High Road, Vange to the south and a railway line to the east. The locality was identified as Vange Ward.

12. The Application was supported by, inter alia, over 100 completed evidence questionnaires.

13. 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 for public open space and for recreation. The Council's objection was later supplemented by a "submission of factual

position" (my copy being undated) in which the Council explained the history of its acquisition of the Application Land and the statutory basis for it.

14. The Applicant responded on 20th June 2011.

The Application Land

15. The Application Land is a roughly triangular area of some 11 hectares in extent. To the west it is bounded (on the northern part of this boundary) by the rear gardens of houses in Kent View Road and (on the southern part of this boundary) by a rectangular area of land off Kent View Road on which stand two single storey community buildings and their associated land. To the north of the northern of the two buildings a finger of the Application Land extends up to Kent View Road itself. To the south the Application Land is bounded by (respectively from west to east) the rear gardens of houses in the streets of Paslowes, Grapnells and Weavers. In its far south east corner a narrow stretch of the Application Land extends through to High Road, Vange. The eastern boundary of the Application land is marked by a railway line. The boundaries of the Application Land are, on the whole, characterised by extensive vegetation in the form of hedges and trees. The eastern boundary to the railway line is formed not just by a hedge and trees but also by a steel palisade fence.

16. The Application Land is broadly level in its northern part but slopes perceptibly down toward the south or south east in its southern part. The major part of the Application Land consists of a grassed field. There is a full size football pitch in roughly the middle of the Application Land which is oriented on an west-east basis to the north of, and roughly parallel with, the line of the rear gardens in Paslowes. The goal posts were in place on my site visits. To the north of the football pitch, in the north west part of the Application Land and alongside the railway boundary, there is an area which is wooded in character. The narrow stretch of the Application Land in its far south east corner extending through to High Road, Vange is also wooded. There also some areas in the southern part of the Application Land to the rear gardens of houses in Paslowes and Grapnells where there are smaller groups of trees and bushes. In the right-angled corner of the Application Land formed by the rear gardens of houses on Paslowes and

Grapnells there is a children's play area which has a slide, swings and a bench. There is another bench about half way along the eastern, railway line boundary.

17. Access to the Application Land is available in several places. There is an access from Kent View Road to the south of the southern of the two buildings I mentioned in paragraph 15 above. From a spur of Paslowes there is access next to the children's play area described in the previous paragraph. There is then an access which leads through from Weavers. The south east corner of the Application Land is accessible from High Road, Vange. Here there is a set of steps just off the High Road which leads up to a path through the wooded area in this location before the path descends by another set of steps on to the grassed part of the Application Land. The area at the bottom of these latter steps was noticeably wet when I visited. I also noticed, apart from the formal access points, a well-worn path into the Application Land in its very north west tip from a garage court at the point where, at the northern part of Kent View Road, the street turns to the west into Bardfield. This access point involved going over, or through, a fence consisting of two metal bars between concrete posts.

18. On the occasions of my site visits there were no signs or notices on the Application Land save for two Council signs on a single pole at the Kent View Road access, one in relation to the offence of dog fouling and the other in relation to the offence of littering. There was a pole in the grassed area at the bottom of the steps in the south east part of the Application Land referred to in the previous paragraph but there was no sign on it.

19. 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.

20. For the sake of narrative completeness there is, however, one other matter which I mention here. On 19th July 2010 the Council appropriated the Application Land for planning purposes under section 122(2A) of the Local Government Act 1972 and, following that, outline planning permission for the residential development of the Application Land for up to 73 units was granted on 11th January 2011. These actions were part of a wider strategy by the Council to raise funds for the development of a new "Sporting Village" within the borough, a strategy which has not been without

opposition and controversy. Nevertheless, 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 one month 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.

The evidence in support of the Application

21. 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 22 "live" witnesses.

22. **Barry Burman** of 56 Paslowes said that he had lived at that address for 36 years from 1975 to 2012. His family had used the Application Land all this time. His two boys had played football for Vange United, he had played football, cricket and golf and walked the dogs with his family and he had flown model aircraft with his grandchildren. His grandchildren also climbed trees. He was now too old to play sport himself and used the Application Land for walking and taking his dogs out. He had used all parts of the Application Land over the years but the football pitch area was the area used more frequently. He had seen others flying kites and playing cricket and golf. Mr Burman had never seen any signs indicating that he had permission to use the land or displaying bye-laws.

23. **Dennis Wilson** of 58 Bardfield said that he had lived at that address for 34 years. He and his wife had used the Application Land regularly over that time, including use with their daughter, who was now 33. Activities which they had taken part in five times a week were walking the dog, flying kites, climbing trees, meeting neighbours, picnicking, playing games like football, taking photographs, snowball fights and so on. It was mainly the south side which was used. He never used the bottom bit because it got very wet. He had a job getting the dog out of the wooded bit. He had seen others flying aeroplanes and playing cricket and golf. Mr Wilson had never seen any signs indicating that he had permission to use the Application Land.

24. **Tim Pink-Gyett** of 65 Kent View Road said that he had lived in the Kent View Road area for over 36 years. He had used the Application Land constantly since moving to

Vange in 1975. As a child he would go over there most days, playing sports on the field or in the woods at the side. As a teenager, he would use it as a place to sit and chat with friends. He now used the Application Land and play area with his own children. As far as concerned activities which he had seen others taking part in, Mr Pink-Gyett said that there had been a lot of people having picnics recently, he had seen rounders being played and golf had taken place occasionally, although not recently. In all the time Mr Pink-Gyett had used the Application Land he had never seen or been aware of any signs relating to its use. It was only when the Council cut the grass (which was three or four times a year but once or twice a year on the bottom half which flooded in winter) that he was aware that the Council was doing anything to maintain the area. The Application Land now was very similar to how it had been in 1975 but there had previously been more play equipment in the play area.

25. **Leonard Spenner** of 55 Kent View Road said that he lived there with his wife. They had moved to that address in 1976 with their two children, having previously lived at 17 Wendene when they first moved to Vange in 1971. They had used the Application Land regularly since moving to Vange for playing games with their children including kite flying, football, blackberrying, camping, building snowmen, snowball fights and generally socialising with other users. They had also used the Application Land almost daily over the past 25 years for exercising and training various dogs and had started using it for playing with their two young grandchildren when they came to visit. They used pretty much all the Application Land, including the wooded area. Until recently they had had springer spaniels which required a great deal of exercise and had been let off their leads. Mr Spenner said that he had seen golf being played on the Application Land, usually youngsters whacking a ball up and down the middle of the field. There had been a spate of motorcycles recently which had been annoying. There was also quite a selection of birds in the area for bird watching. Mr Spenner said that he and his wife had never seen or heard of any bye-laws relating to the Application Land. The Application Land was virtually unchanged from how it had been in 1971 when in the hands of Basildon Development Corporation.

26. **Joyce Backham** of 34 Paslowes said that she had lived at that address since August 1962 and had used the Application Land on a regular basis since that time. She used it roughly twice a week. Over the years she had used the Application Land for pleasure,

games, relaxation, walking, dog walking and had also cycled there. She picked litter from the Application Land, something she had never seen Council workmen doing and tried to get over there when she could. She had covered every inch of the Application Land but her main usage was of the top half which was virtually level. Mrs Backham's daughter took her disabled daughter on to the Application Land. Mrs Backham had seen scouts using the Application Land and picnics, football training and rounders taking place there. There had been parties there for Prince William's wedding and the Queen's Diamond Jubilee which had brought the community closer together. Mrs Backham said that she had never been challenged by any official notices.

27. **Jennifer Rogers** of 32 Paslowes said that she had lived at that address for 40 years. She had used the Application Land every day to take her dog out, meeting other dog walkers when she did. She had been on all parts of the Application Land with her dog, including the wooded area, and had twice been down to the bottom, swampy area with her dog but the bit she liked most was the little park area near Kent View Road. The Application Land was used by footballers and by children playing. Mrs Rogers said that she had never been challenged by any official notices. The Application Land contributed to the cohesion of the community, which extended to all the roads in Vange.

28. **Kim Moffat** of 30 Grapnells said that she had lived there since 1974 when her family moved from London. As a young girl she spent all her free time on the Application Land with her brothers and sister and their friends. They played rounders and football, picked blackberries, walked dogs, had picnics, climbed trees and made camps. There had been a little wooden fort in the woods next to the field. The former play centre organised fetes, fun days, competitions, parties and firework evenings which were all held on the Application Land. She now had two sons, aged 14 and 11. They played football and rounders there, had picnics, flew kites, erected tents, had snowball fights or sometimes just accompanied her on one of her early morning jogs. The Application Land was a wonderful haven for wildlife and was used avidly by bird watchers and RSPB members. Older members of the community used it for dog walking or simply taking in some fresh air. Vange United played on the Application Land. The area that she had mostly used was the square, straight field. She had not used the swampy end because it was not fit for purpose. Children came to the Application Land from more

widely than just the Triangle and people also came from other areas but the majority of the use of the Application Land came from within the Triangle. She agreed with the proposition that the name of the Triangle had probably come into being in the context of the present dispute. In the 38 years that she had lived here, Mrs Moffat had never seen any sign indicating that there was permission to use the Application Land or any bye-law notices.

29. **Reginald Maginn** of 28 Grapnells said that he and his wife had lived at that address since moving from London in 1964. They became involved with the parent association which helped with the play leadership scheme which the Council had set up. It held fete days. The association drew from more or less within the Triangle. It had ceased to exist before the 20 year period relevant to the Application. Apart from the association's activities, together with friends and neighbours they had had football matches on the Application Land and they even cut the grass to make their own cricket strip at one time. Barbeques were also held with friends and neighbours. The Application Land produced blackberries and damsons. Mr Maginn's grandchildren and great grandchildren were excited by the wildlife on the Application Land. He had used all the Application Land apart from the bottom end which was a quagmire. He had seen youngsters practising golf on the Application Land and many a time had come back with a golf ball. The Council had marked out a football pitch and the goalposts used to be taken down when the season was over. Local inhabitants used the pitch when teams did not play. The Application Land now was more or less the same as when Basildon Development Corporation had it. Mr Maginn said that the only notices which were displayed were in relation to litter and dog fouling.

30. **Alan Backham** of 34 Paslowes said that he had moved to that address in 1962. The Application Land had been well used by his children, the boys playing football, cricket and rounders and the girls playing rounders, picnicking and walking the dogs. He had used virtually all of the Application Land during the time he had lived here but had not used the boggy or marshy area so much and tended to steer clear of that. Bye-law notices had never been displayed. Mr Backham was not able to give any particular name to the part of Vange where he lived.

31. **Ted French** of 45 Tilney Turn said that he had lived at that address for 25 years and, before that, for 19 years in Clay Hill Road. For the last eight years he had been taking his dog over to the Application Land three or four times a day. He had also picked blackberries on the Application Land. He had used every bit of the Application Land. His dog had got covered in sewage in the wooded area. He had never seen any notices giving permission to use the Application Land. Mr French said that he knew for a fact that people from areas other than the Triangle used the Application Land. There was no name for this part of Vange.

32. **Phil Jacobs** of 32 Grapnells said that he had lived at that address for 28 years. He and his family had used the Application Land for a whole variety of leisure activities and continued to do so. He had taught his son how to play rugby union and football, had taught his son and daughter how to interact with nature and fly a kite and had taught his daughter how to serve at tennis there. He had arranged through his children local fun football matches and rounders games with 30 plus children taking part. He had had family picnics there, played frisbee, cricket, picked fruit, exercised dogs and trained one of them to become a successful show dog. He had also used the Application Land to keep fit, for jogging and for nature and bird watching. He was one of the local residents who kept the Application Land tidy and free from litter, having done this for a number of years. He had used every part of the Application Land. The football pitch area was the area mainly used. Kids ran through and made camps in the wooded areas. He had seen all kinds of leisure activities on the Application Land. The downward sloping part of the Application Land always got very boggy and muddy in prolonged wet weather, especially in the autumn and winter months. The football posts had not been taken down this year at the end of the season as in previous years. There had previously been two football pitches; the other one had been slightly down the slope but it had been too wet and had gone about six, seven or eight years ago he guessed. In the northern part of the Application Land it was also possible to see water bubbling up in wet weather. He called the Application Land "the Rec" but it used to be known as "Campbell's Field". Adults came from outside the Triangle to use the Application Land. There were some 600 residents in the Triangle. Mr Jacobs had never seen any signs indicating that there was permission to use the Application Land nor had he seen any bye-law notice boards.

33. **Neil Hart**, the Applicant, of 88 Kent View Road said that he had lived in Kent View Road since 1973, having lived at his present address since 1999 and, before that, at 87 Kent View Road. He had used the Application Land continuously for all those 39 years for all manner of activities: walking, playing with his children and grandchildren, watching wildlife, relaxing, picking fruit and meeting neighbours. Mr Hart also referred to bicycle riding, playing games, his daughter having erected a tent on the Application Land and taking photographs. While his use had changed over time, in the past having been on the flatter area around the football pitch, Mr Hart had used pretty much all of the Application Land. The first thing that he did each morning when he got up was to look out at the Application Land from his bedroom window to enjoy the scenery and watch the early morning dog walkers. There were not many activities that he had seen on the Application Land which had not already been mentioned by others. Mr Hart did, however, make reference to golf, stating that his house had become a target for the driving of golf balls. If the Council's bye-laws applied, they could have stopped this. There had never been any signs on the Application Land which had indicated that there was permission to use it nor had there ever been any bye-law boards. He knew that the Application Land was a recreation ground but it had different names: Kent View Recreation Ground; Kent View Park; Campbell's Field. He did not dispute that it was a recreation ground but said that it was not regulated. The Council occasionally mowed the grass and pruned the hedges. The wooded area in the north east had been pruned for the first time this year as far as he was aware. The Triangle was a name he had used for the area for very many years. Most users of the Application Land came from that area.

34. **Mick Pink-Gyett** of 15 Clavering said that he had lived at that address for nearly 37 years. Over the years he had watched his children enjoy many a game of football and other sports on the Application Land. Now he went to the Application Land with his grandchildren and pet dogs. He used the Application Land at least twice a day to walk his dogs. He used all of the Application Land in the summer; in the winter the bottom end was a "no go" area. Mr Pink-Gyett had never seen any signs or notices about the use of the Application Land.

35. **Karen Jacobs** of 32 Grapnells said that she had lived at that address for 28 years. For all of that time she had used the Application Land both on her own and with her family.

They had used it for playing rounders, rugby, frisbee, shuttlecock, kite flying and football matches with their children, their friends and others. They had had many happy family picnics on the Application Land in the summer and had had snowball fights and built snowmen in the winter. She had picked fruit and watched and surveyed birds there. She had also used it for jogging and keeping fit as well as dog walking and training one of their dogs to become a successful show competitor. She had used all of the Application Land over the years but for the most part used the top area; her jogging route was around the perimeter. She had used the tracks in the wooded area and children played hide and seek, climbed trees and watched nature there. Mrs Jacobs had regularly seen golf being played on the Application Land and had had a near miss with a golf ball about ten years ago. She had never seen any signage or bye-law boards informing of any restrictions. There had only been two small notices in relation to litter and dog fouling.

36. **Lawrence West** of 75 Kent View Road said that he had lived at that address from 1991 to 1998 and then from 2008 to the present. Since living there he had used the Application Land for exercise and walking the dog nearly every day. When his children were younger he and they were always on the Application Land, playing football, cricket, kiting and bike riding along with other local people. This was mainly on the football pitch area but he had been all over the Application Land. Mr West had never seen any sign indicating that he had permission to use the Application Land.

37. **Peter Stanley** of 21 Paslowes said that he had lived at that address for 14 years since 1998. He and his family had used the Application Land almost every other week other than when they had been on holiday. They mainly gained access from the Paslowes entrance. They had walked dogs around the whole perimeter of the Application Land. He had played cricket and football on the Application Land, jogged on it and picked blackberries and small plums there. Both his girls had learnt to ride bikes on the Application Land and he had pulled his children on sledges in the snow there several times. He had used all the Application Land including the woods and the whole of it was used by others, including the trees, where children loved to climb. Mr Stanley had never noticed or been aware of any boards or signs at the entrance to the Application Land or on it indicating that there were bye-laws or that he might have permission to use the Application Land.

38. **Sheila Painter** of 12 Kent View Road said that she moved to 58 Paslowes with her parents and older brother in 1962 when the estate was first built. She married at 18 and moved to 15 Wendene where she lived for six years before moving to her present address where she had lived for over 30 years. She and her brother had spent many years on the Application Land in the 1960s playing football and rounders, climbing trees, flying kites and running around with their dog. Her two own children, who were both now in their 30s, had also spent many happy years playing on the Application Land and had been taught to ride their bikes there. She now had four grandchildren who she and her husband took to the Application Land. Mrs Painter had never seen any signs indicating that she had permission to use the Application Land. Over the years she had used every single piece of the Application Land. She and her family and friends called the Application Land "Campbell's Field".

39. **Amanda Hart** of 265 Timberlog Lane said that she had lived in Kent View Road for 33 years, from 1978 to 2011, first at No. 87 from 1978 to 1999 and then at No. 88 from 1999 to 2011. All her life she had used the Application Land on a regular basis, several times a week in the summer but less so in the winter. She had played games, climbed trees, ridden her bike and made camps in the woods with her friends when she was a child. She had also used it for walking, meeting friends, picnics, snowball fights, building snowmen and giant snowballs, watching wildlife and many other activities. She still used it on a regular basis when she visited her parents and also took her daughter to play there. She also went with her husband and family and had picnics when the weather was fine. Over the years she had used all of the Application Land. Miss Hart had never seen any signs indicating that there was permission to use the Application Land or that bye-laws applied. She called the Application Land simply "the Field" but her friends called it "the Rec".

40. **Anne Dowling** of 525 Clay Hill Road said that she had lived at that address for the last 37 years. Every day she walked through the Application Land, unless it was too wet, and she took her grandchildren there to run around and play as it was a wonderful space for bashing a ball about, playing chase, climbing trees, flying kites and so on. In the winter it was great for building snowmen and sledge rides. Her own children had spent a lot of time there playing with their friends. She had seen varied wildlife on the

Application Land (foxes, squirrels, herons and woodpeckers, etc.) and there was fruit which could be picked there, including blackberries, sloes, rose hips and wild plums. She used different bits of the Application Land at different times of the year but had used pretty much all of it although the bottom south east corner was a low point and got very wet. Her grandchildren climbed trees and went through the woods. She knew the Application Land as "the Field". Mrs Dowling said that there had never been any signage indicating that permission was needed to use the Application Land or that there were any rules and regulations for its use.

41. **Angela King** of 21 Paslowes said that she had lived at that address for 26 years. She and her family had used the Application Land on a regular basis over that time. She played with her daughters there and taught her youngest daughter to ride a bike there. They loved climbing trees on the Application Land and running around there. She walked dogs there around the perimeter of the whole field. In the winter it was used for building snowmen and having snowball fights. Mrs King also used the Application Land to keep fit by jogging around its perimeter. She used it to relax and spend time with her family and they had also picked blackberries there. She had used all the Application Land but the marshy bit did get really wet. She had never seen any signs indicating that there was permission to use the Application Land or any bye-law boards.

42. **Jill Pink-Gyett** of 65 Kent View Road said that she had lived at that address for 13 years. For all that time she had regularly used the Application Land for exercise and for meeting neighbours. Since starting a family she had taken her children to play there as well. The children loved going into the woods. She had taught her little girl to ride a bike on the Application Land. She had used all the Application Land but the parts used most were the football area, the little playground and the area where the willows were. Mrs Pink-Gyett had never seen any signs giving her permission to use the Application Land.

43. **Norman Dowling** of 525 Clay Hill Road said that he had lived at that address for 37 years. He had used the Application Land with his children when they were younger and now used it with his grandchildren. All of the Application Land was used. Mr Dowling had never seen any signs on the Application Land.

44. In addition to calling 22 witnesses, the Applicant submitted a further 15 witness statements. The statements paint a similar picture to that which emerges from the evidence given by those witnesses who were called. The Applicant also submitted a total of 120 completed evidence questionnaires, 85 in respect of those who had used the Application Land for 20 years or more and 35 in respect of those who had used the Application Land for under 20 years. Almost all the witnesses who produced witness statements, whether called or not, had also completed evidence questionnaires as well so that the figures for the number of witnesses are subsumed within the figures for the evidence questionnaires. I should finally mention that the Applicant's bundle produced for the purposes of the inquiry contained a body of documentary material which included letters of support, photographs, press clippings and a submission put forward in support of an application to register a village green at The Downs, Herne Bay. I have taken everything referred to in this paragraph into account in writing this report and coming to my recommendation.

The evidence called by the Council

45. Mr Alesbury called two witnesses on behalf of the Council as objector to the Application, Andrew Roger Topsfield and Hugh David Reynolds.

46. **Andrew Roger Topsfield** said that he was employed as a Principal Estate Surveyor at Basildon Borough Council. He had started work with the Council in 1973. Basildon District Council had come into being in 1974. Before that it was Basildon Urban District Council and Mr Topsfield had worked for the District Council since its original "shadow" year. In the course of his duties Mr Topsfield had been involved in the acquisition, management and disposal of property. Part of this work was the acquisition of a number of areas of land from Basildon Development Corporation, including the Application Land. He said that his involvement would have been in valuation, negotiation, verification of boundaries and assistance in the conveyancing process. The operational management of open space was, however, a function of the Council's Parks Section.

47. Mr Topsfield said that the Application Land was acquired by the Council (then Basildon District Council) on various dates between 1976 and 1998. The main part was acquired in 1976 from the former Basildon Development Corporation with the remainder having been acquired from Commission for the New Towns between 1994 and 1998. The Application Land had been laid out since 1976 as a public open space and for recreation.

48. The Council's Estates Section acquisition file (as distinct from the primary land acquisition documents themselves) could not be traced (a not unusual occurrence as lots of old files had been destroyed) but copies of some documentary material giving some background to the Council's acquisition had been located. Mr Topsfield said that there were a number of areas of open space, including the Application Land, proposed to be acquired from Basildon Development Corporation in the early 1970s and these were referred to in the documents which had been found. All the areas were open space, intended for use by the public of Basildon. Mr Topsfield produced by way of exhibit to his witness statement the documents he referred to as providing the background to the Council's acquisition and it is helpful if I next describe these.

49. The documents begin with a letter dated 12th September 1973 from the Chief Estates Officer of Basildon Development Corporation to the Town Manager, Basildon Urban District Council. The letter is headed "Proposed Sale of Land for Open Space" and refers to a meeting to take place with the District Valuer on the question of valuation of land for open space purposes, following which it was hoped that the Development Corporation would be able to write to the Council with detailed proposals for the various parcels of land which the Council wished to purchase from the Development Corporation. The letter further stated that its author was prepared to recommend to the Development Corporation that it sell its freehold interests in a number of sites, which the letter then went on to list, at a price to be agreed with the District Valuer. One of the sites was "Kent View Road Open Space". Mr Topsfield said that, while he did not have personal recollection of the 1970s, a large part of the Application Land had been laid out as open space by the Development Corporation even before the Council acquired it.

50. The next document in chronological order is a letter dated 28th November 1973 from the Council to the District Valuer and bears the heading "Proposed Purchase of Open Space from Basildon Development Corporation". The letter refers to a meeting held between the District Valuer, the Development Corporation and the Council and states that its author was prepared to recommend to the Council that it acquire a number of areas of open space which were then identified. The second identified area was "Kent View Road Open Space area 11.67 acres".

51. There is then a letter dated 7th December 1973 from the Chief Estates Officer of the Development Corporation to the Council which is headed "Proposed Sale of Open Spaces". The letter stated that the Chief Estates Officer had asked the District Valuer to give his consideration to the proposed sales listed in the letter with a view to his issuing formal reports. The first listed sale was that of "Kent View Road Open Space".

52. Following this is an internal memorandum dated 18th February 1974 from the Council's Town Manager to the Chairman of the Council's Executive Committee concerning the topic of "Purchase of Open Space from Basildon Development Corporation". The memorandum states that the District Valuer's reports had now been received for the purchase of the areas of open space in question, which included "Kent View Road open space, area 11.67 acres, purchase price £20,600." The memorandum recommended approval of the purchase on that basis and invited the formal approval of the Chairman. The memorandum itself does not record the giving of approval but the subsequent requisitioning of a cheque for the purchase and the later conveyance of the land in question means that it can readily be inferred that any necessary approval was given.

53. On 19th March 1974 a requisition form was completed by an officer of the Council (it is not clear from the form which particular one, save that the officer was a Departmental Chief Officer) which was addressed to the Treasurer and asked for a cheque payable to the Development Corporation for the purchase of seven open space areas. One of the seven areas was "Open Space – Kent View Road" where the purchase price, in accordance with the earlier memorandum, is given as £20,600. Mr Topsfield added that this was a document which would have been produced by the Urban District Council in the last month of its existence.

54. Having described the background documents available from 1973-1974, it is next convenient if I turn to the primary land acquisition documents themselves which Mr Topsfield went on to produce as exhibits to his witness statement.

55. The first of these documents is a conveyance of 21st June 1976 ("the 1976 Conveyance") between Basildon Development Corporation and Basildon District Council. By this document the Development Corporation conveyed to the Council the vast bulk of what is now the Application Land for the price of £20,599. The 1976 Conveyance also included an area fronting Kent View Road, on which stand the buildings mentioned in paragraph 15 above, but which is not part of the Application Land. The 1976 Conveyance recites an earlier agreement of 28th March 1974. The agreement of 28th March 1974 is not in evidence but it is reasonable to infer that it represented the culmination of the sale negotiations between the Development Corporation and the Council which find expression in the background documents for 1973-1974 which I have already described. The date of the agreement follows shortly after the cheque requisition of 19th March 1974. It will be recalled that the purchase price referred to in the background documents was £20,600 rather than £20,599. The 1976 Conveyance refers to an apportionment of the total purchase price. The apportionment in question is explained when reference is made to the next land acquisition document produced by Mr Topsfield, which is a transfer document bearing the same date as the 1976 Conveyance, that is, 21st June 1976 ("the 1976 Transfer"). By this document the Development Corporation transferred to the Council a very thin sliver of land in the south west part of the Application Land for the sum of £1. Thus the total purchase price in respect of the combined area of land which was the subject of the 1976 Conveyance and the 1976 Transfer was indeed £20,600. Mr Topsfield was not able to explain why there should have been such apportionment but nothing turns on this for present purposes. What can be said is that the land transactions of 21st June 1976, the 1976 Conveyance and 1976 Transfer, represent the final execution of the matters which had been the subject of the earlier dealings between the Development Corporation and the Council in 1973-74. Mr Topsfield was not able to say why matters were not completed until 1976 other than to suggest it was possible that money may not have been available sooner but, again, I do not think that anything turns on this.

56. Returning to the 1976 Conveyance, Mr Topsfield drew attention to clause 3 thereof. By that clause the Council covenanted with the Development Corporation that the Council and its successors in title should not "use the land hereby conveyed or any part thereof other than for the purposes of a public open space and for recreation".

57. While not matters highlighted by Mr Topsfield in relation to the 1976 Conveyance, it is worth recording two other points before leaving it. The first is that the one of the schedules to the document refers to earlier conveyances to the Development Corporation of parts of the land from persons named Campbell. I mention this as it echoes the evidence of some of the witnesses called on behalf of the Applicant who mentioned the name "Campbell's Field".[1] The second is that the plan which accompanies the 1976 Conveyance labels the land as "recreation ground" and shows a playground on the land off Paslowes. Again, this is consistent with the evidence of some of the witnesses called on behalf of the Applicant who spoke of the Application Land's being essentially unchanged from the days of the Development Corporation's ownership.[2]

58. I have already referred in paragraph 55 above to the 1976 Transfer. I return to it at this point to note that, as Mr Topsfield pointed out, it contained a covenant (in clause 2) on the part of the Council which was in the same terms as the covenant given by the Council in the 1976 Conveyance. Thus, the Council covenanted that the Council and its successors in title should not "use the land hereby transferred or any part thereof other than for the purpose of a public open space and for recreation."

59. Mr Topsfield next referred to two "community related assets" transfers which took place between Commission for the New Towns and Basildon District Council. The first such transfer took place on 31st January 1994 and the second on 12th February 1998 ("the 1994 CRA Transfer" and the 1998 CRA Transfer", or, collectively, "the CRA Transfers"). Mr Topsfield produced the relevant documentary material in relation to the CRA Transfers. I turn therefore to provide a description of what those documents reveal.

[1] Mr Jacobs (paragraph 32); Mr Hart (paragraph 33); Mrs Painter (paragraph 38). (Report paragraph numbers).
[2] Mr T Pink-Gyett (paragraph 24); Mr Spenner (paragraph 25); Mr Maginn (paragraph 29).

60. The 1994 CRA Transfer took place under the aegis of an agreement of the same date between Commission for the New Towns and Basildon District Council which recited that the Commission and the Council had "agreed proposals for the transfer to the .. Council .. pursuant to section 120 of the Local Government Act 1972 and to the powers contained in the New Towns Act 1981" of various areas of land. The areas of land which were the subject of the 1994 CRA Transfer, which were all transferred for a global consideration of £1, included, so far as relevant for present purposes, a strip of land which runs west to east across the northern part of the Application Land. The strip appears to represent the footprint of a former road, Glen Road, and a small rectangular plot of land to its north. There is no evidence that Glen Road ever existed as a physical feature on the ground during the 20 period relevant to the Application. Mr Topsfield drew attention to the covenant on the part of the Council which was contained in the fourth schedule to the 1994 CRA Transfer. The covenant applies to all the land which was the subject of the transfer and thus applies to so much of the Application Land as was transferred to the Council at this time. The Council covenanted, during the period of 17 years from the date of the transfer, not to use or occupy the land transferred or any part or parts thereof other than "as landscape area highway or for the provision of amenity and recreation areas for the use of the public including (without limitation) housing access parking and garden areas and any other uses which in the reasonable opinion of the .. [Council] .. are required in order to allow full public use and enjoyment of the Land."

61. The 1998 CRA Transfer between Commission for the New Towns and Basildon District Council was a second phase of transfers. It again related to a number of areas of land within Basildon which were transferred from the Commission to the Council for a consideration of £1. So far as relevant for present purposes, the 1998 CRA Transfer included a small plot of land which forms the northern tip of the Application Land. Mr Topsfield again drew attention to the covenant on the part of the Council contained in the fourth schedule. The covenant applies to all the land which was the subject of the transfer and thus applies to that part of the Application Land transferred to the Council at this time. The covenant was in the same terms as the covenant in the fourth schedule to the 1994 CRA Transfer. The Council thus covenanted, during the period of 17 years from the date of the transfer, not to use or occupy the land transferred or any part or parts thereof other than "as landscape area highway or for the

provision of amenity and recreation areas for the use of the public including (without limitation) housing access parking and garden areas and any other uses which in the reasonable opinion of the .. [Council] .. are required in order to allow full public use and enjoyment of the Land."

62. Mr Topsfield said that there was an area within the Application Land to which the Council had no documentary title and which was unregistered. The area in question is cross-hatched on a plan which was appended to Mr Topsfield's witness statement as exhibit ART9 (found at page 89 of the Council's bundle of documents). For convenience I will call it "the Cross-Hatched Area". The Cross-Hatched Area is a small area in the northern part of the Application Land which takes the form of an irregularly shaped strip next to the railway boundary. Mr Topsfield said that the Council was not aware that anyone claimed title to the Cross-Hatched Area. He also said that, notwithstanding that the Cross-Hatched Area was mostly vegetation, it had been laid out, made available and maintained in the same way as the Council's adjacent land at Kent View Road, that was, as open space.

63. Mr Topsfield also produced an extract from the relevant page of the Council's Terrier. It records in respect of "Land at Kent View Road" that:
    - the contents upon acquisition were 11.67 hectares approximately
    - the date of acquisition was 21st June 1976
    - the purpose involved was open space
    - the statute was Physical Training and Recreation Act 1937
    - the price was £20,600
    - the vendor was Basildon Development Corporation.

    Two title numbers are written on the bottom of the relevant page. They correspond with the two separate title numbers in respect of the land which was the subject of (i) the 1976 Conveyance and (ii) the 1976 Transfer.

64. Mr Topsfield did not know why the Terrier referred to the Physical Training and Recreation Act 1937. That entry would have been made by a clerk in the legal section, fairly soon after the conveyance had taken place when all the deeds had been packaged up.

65. Mr Topsfield was asked in cross examination why it was that the area of the Kent View Recreation Ground recorded as 11.36 acres in the Council's "Parks and Grounds Maintenance Services – Land Book Register" (produced by Mr Reynolds as his exhibit HDR1 and found at page 108 of the Council's bundle) was less than the 11.67 acres which had been acquired in 1976 and which had been added to subsequently. Mr Topsfield said that the 11.36 acres might just be the recreation area excluding the area fronting Kent View Road (outside the Application Land but part of the 1976 acquisition) or it might be the grassed area rather than the wooded area. It was correct that the Council did not know who owned the Cross-Hatched Area and Mr Topsfield was not aware of the Council's having done anything to get a possessory title to it. Mr Topsfield was also asked about another document produced by Mr Reynolds, namely form BYE 5/3, which was submitted by the Council to the Home Office in 1991 seeking approval to revised bye-laws for pleasure grounds and open spaces. The form asked how the Council held its legal interest and, in respect of Kent View Road Recreation Ground, it was put to Mr Topsfield that a tick had been placed in the box on the form which related to "donation of the freehold". Mr Topsfield disagreed; his reading was that the tick was in the box which related to "purchase of the freehold". That is my reading too.

66. **Hugh David Reynolds** said that he was employed by Basildon Borough Council as the Manager of Parks and Grounds Maintenance. He had started work in Basildon in 1989. His involvement had been with the operational management and maintenance of the Application Land. The Application Land had been managed by the Council as an area where formal sports and amenities were provided adjacent to much more informal activities. The formal activities had included an adult sized football pitch and changing facilities which had been the home pitch for Vange United for many years and, in the past, junior football pitches. The amenities had included an equipped play area and benches. The type of informal inactivity which took place was dog walking and, on occasion, the Application Land was used for local events.

67. The maintenance of the Application Land reflected the activities which took place there. It included pitch marking, cutting and reinstatement, general amenity grass cutting, pruning of hedges and shrubs on an annual basis, tree pruning when required,

litter picking and general inspections. Mr Reynolds said that, although parts of the Application Land had not been in the direct control of the Council before the CRA Transfers, it had always been maintained as one since at least the early 1990s when compulsory competitive tendering was introduced. That included the Cross-Hatched Area.

68. Mr Reynolds produced as an exhibit to his witness statement an extract from the Council's "Parks and Grounds Maintenance Services – Land Book Register" relating to the Application Land under the heading "Open Space Details – Kent View Recreation Ground". The Land Book Register was used only in the Parks Service. It had been compiled by a former officer in that service in the 1990s simply on the basis of the officer's local knowledge and not in co-operation with the Council's legal service. The relevant entry in respect of the Application Land contains various pieces of information of which I note the following. The area of the land is given as 4.733 hectares or 11.36 acres. Mr Reynolds did not know why this figure differed from other figures. The land is described as general open space with games facilities, parking and play leadership (since deleted). Some acquisition details are also given. These include some extra information in respect of that part of the Application Land which was the subject of the 1994 CRA Transfer which was dealt with in Mr Topsfield's evidence. In this connection there is reference in the Land Book Register to the area of the soil of Glen Road which is described as an old plotland road acquired by Basildon Development Corporation. It is stated that this area was purchased by the Council in the financial year 1976/77. This piece of information is incorrect because it is apparent from Mr Topsfield's evidence, and the documents he produced, that this part of the Application Land was not transferred to the Council until 31st January 1994 and then by Commission for the New Towns and not the Development Corporation. The Land Book Register also refers to a memorandum of 18th October 1976 in respect of this part of the Application Land and that memorandum was produced by Mr Reynolds. The memorandum is from the Manager of Administrative and Legal Services at the Council to the Manager of Recreation and Leisure Services and is accompanied by a plan which identifies the land referred to as that which was later to form the subject of the 1994 CRA Transfer. It refers to a notification from the Development Corporation that its compulsory purchase order in respect of the remaining land at the Kent View Road Open Space had been confirmed and that the land was available for purchase by the

Council. The memorandum asks the Manager of Recreation and Leisure Services whether the land was required in the current financial year or whether it should be programmed for the next year. The Land Book Register also makes reference to the "Act/Authority" applicable to the Application Land, recording in this respect "Physical Training & Recreation Act 1937, Open Spaces Act 1906".

69. Mr Reynolds said that the Application Land had been covered by Pleasure Grounds and Open Spaces bye-laws since 1978. He produced a copy of the "Basildon District Council Bye-laws Pleasure Grounds 1979" ("the 1979 Bye-laws") and the "Basildon District Council Byelaws Pleasure Grounds and Open Spaces 1997" ("the 1997 Bye-laws"). The 1979 Bye-laws identify the pleasure grounds to which they apply in Schedule 1. Schedule 1 is divided into three parts, listing the pleasure grounds by reference to the enabling power for the bye-laws. The three parts are: part 1 which lists the grounds for which bye-laws were made under section 164 of the Public Health Act 1875; part 2 which lists the grounds for which bye-laws were made under section 15 of the Open Spaces Act 1906; and Part 3 which lists the grounds for which bye-laws were made under sections 12 and 15 of the Open Spaces Act 1906. Under Part 3 there is listed "Kent View Park". Mr Reynolds said that this was the Application Land. "Kent View Park" was one of the names by which it was known in the past. The reference could not conceivably be to anywhere else. The 1997 Bye-laws simply state that they are bye-laws made by the Council under section 164 of the Public Health Act 1875, section 15 of the Open Spaces Act 1906 and sections 12 and 15 of the Open Spaces Act 1906 with respect to pleasure grounds and open spaces. The 1997 Bye-laws do not identify which bye-law making power was thought to be applicable in the case of any particular pleasure ground or open space. Schedule 1 to the 1997 Bye-laws categorises the areas to which they apply as being either in Basildon or in Billericay. Under the heading of Basildon there is found "Kent View Drive Recreation Ground (formerly Kent View Park"). Mr Reynolds said, with reference to a suggestion which had been made by Mr Hart on the basis of the listing of "Kent View Drive Recreation Ground", that there was no doubt that the 1997 Bye-laws related to the Application Land. He could not explain why "Kent View Drive" had been referred to because there was no such street. However, there was no requirement for bye-laws to be accompanied by any plan of the land to which they related. Mr Reynolds also produced a copy of the form BYE 5/3 submitted by the Council to the Home Office in 1991 when seeking approval

for revision of the bye-laws. The form correctly referred to "Kent View Road Recreation Ground" and also gave the correct area of 11.36 acres. Mr Reynolds further said that the Application Land was quite commonly referred to simply as Kent View Recreation Ground. Although it was not a matter that Mr Reynolds himself noted, it is to be observed that, in answer to the question in the form relating to what bye-law making power was appropriate for regulating the ground, the Council completed the form by referring to sections 12 and 15 of the Open Spaces Act 1906.

70. Mr Reynolds said that, after 1997, when the 1997 Bye-laws were adopted, a current parks officer of the Council could remember a sign being installed on the Application Land displaying the bye-laws. This was done as part of a larger programme to display the updated bye-laws in the parks to which they applied.

71. When cross-examined by Mr Hart, Mr Reynolds accepted that there was no grass to be cut in the Cross-Hatched Area because it was wooded or scrubland. Mr Reynolds told me that he thought the trees here would be self-set; there was no evidence that they had been planted. Vegetation would be "faced back" where it encroached over the grass but, within the area itself, there was probably no maintenance. More generally, since 2010 when the maintenance went out to contract, formal hedges were cut twice a year and informal once a year. Formerly, all had been cut twice a year. Mr Reynolds did not accept, as Mr Hart put to him, that contractors had cut off fruit at the Application Land but accepted that he did not visit the Application Land himself as often as he would like, his visits being twice a year. In relation to the enforcement of bye-laws, Mr Reynolds said the Application Land was not a manned site and the bye-laws would be hard to enforce. The Council would also have to consider the public interest in enforcement and might choose only to take action if there was a nuisance rather than curtail legitimate activities. The bye-laws were there as a back-up. If Mr Hart had been told by the Council that nothing could be done about incidents when golf balls were aimed at his house from the Application Land, that was wrong. I interpolate here that the reason that Mr Reynolds gave this answer was because golf is contrary to bye-law 16 of the 1979 Bye-laws and bye-law 28 of the 1997 Bye-laws. When asked why a bye-law board had not been erected, Mr Reynolds said that one of the officers did recall that one was erected at the High Road end of the Application Land; the employee in question had purchased it and had had it installed. Mr Reynolds could give no

further details as to how long the board was there or why it was not replaced and did not know why the officer in question had not been called as a witness. Mr Reynolds told me that bye-law boards were usually put up along with information boards at the major parks. There was no information board at the Application Land and it was not a major park.

Evidence given by members of the public

72. One person spoke when I extended an invitation to any member of the public present to contribute to the inquiry, namely, Councillor Byron Taylor, a Borough Councillor for the Vange Ward. So far as relevant for present purposes Councillor Taylor made two points. The first was that the Council had not notified the existence of, nor enforced, the bye-laws and had thereby not asserted its ownership of the Application Land. It could not therefore, he argued, rely on the claim that use of the Application Land had not been "as of right". Secondly, there was a clear, natural community in and around Kent View Road which relied on the Application Land and for whom the Application Land was integral to quality of life. Councillor Taylor did make the point, however, that before local government re-organisation the High Road had not formed a boundary and the community he spoke of extended to the south of this road.

The submissions

(a) The Council

73. Mr Alesbury first accepted on behalf of the Council that the Triangle was capable of being regarded as neighbourhood. He submitted that, while the courts had appeared to accept wards as entities which might be "localities", the chosen locality in this case, Vange Ward, was not very satisfactory as such given its relative ephemerality and the fact that Councillor Taylor had referred to a recent boundary change. This was not, however, the Council's main point. Mr Alesbury accepted in response to my intervention that there would be nothing to stop the borough of Basildon being regarded as the relevant locality.

74. Mr Alesbury next made it clear that the Council did not dispute that significant numbers of people from the neighbourhood (but also from a wider area) had used the Application Land recreationally for at least the relevant period of 20 years. That was exactly what one would expect on land which had been deliberately provided as a recreation ground/open space. Further, and for the same reason, the Council did not dispute that lawful sports and pastimes would have taken place on the Application Land over 20 plus years. However, the Council did very strongly dispute the suggestion that unlawful activities on the Application Land (in the sense of being contrary to the applicable bye-laws although the same would apply to any other unlawfulness) could count towards a prescriptive period of 20 years. The Applicant's point seemed to be that the unlawfulness made the users trespassers so that such use (if it continued throughout) was "as of right". This argument was self-evidently wrong and untenable but, happily, the same view had been very clearly expressed by Ouseley J at paragraph 93 of his judgment in *Newhaven Port and Properties Ltd v East Sussex County Council.*[3] In that paragraph Ouseley J said that the *"making of bye-laws can have the effect of making some sports and pastimes unlawful, or unlawful at certain times or in a part of a potentially registrable village green. Any activities carried on in breach of the bye-laws, whether the bye-laws are enforced against them or not, are unlawful and have to be discounted..."*.

75. Mr Alesbury then made submissions directed to the question of whether use was "as of right" which he characterised as the key issue in the case. The Council's essential point was that the Application Land could not have been used "as of right" (that is, in a trespassory way) as for the vast bulk of any relevant period it was made available for use "by right" as a public open space/recreation ground.

76. In terms of the history of the matter, it was clear that, regardless of ownership, the Application Land was in fact laid out as open space or a recreation ground by Basildon Development Corporation even before Basildon District Council formally acquired any of it in 1976. In respect of the land which was bought in 1976, which was the vast bulk of the Application Land, the whole of the pre-acquisition correspondence which was traceable – conducted in the dying days of the Council's predecessor – made it crystal

[3] [2012] EWHC 647 (Admin).

clear that the transaction was regarded by both sides as a proposed purchase of open space for open space purposes. Although the transaction did not go through until 1976 it was clear that it was the same transaction previously contemplated for exactly the same price of £20,600. The 1976 Conveyance contained the clearest possible covenant not to use the land other than for purposes of public open space and recreation. Thus the available documents leading up to the acquisition by the Council showed that the land was to be acquired as open space and the conveyance directly contemporaneous with the acquisition showed that the land was specifically acquired as public open space. As a matter of necessary inference this must mean open space under the Open Spaces Act 1906; there was no other sensible inference from the preparatory documents and the conveyance itself.

77. In support of his argument Mr Alesbury referred to an opinion of 15th October 2008 provided by Mr Vivian Chapman QC to Oldham Metropolitan Borough Council in the case of an application to register the Oak Colliery Site, Hollingwood, Oldham as a new green. The opinion (which is found at page 193 of the Council's bundle) provides confirmation of the report of an inspector who had previously considered the application and thus provides in practice a second inspector's report for the case in question. Mr Alesbury said that he wholly adopted Mr Chapman's reasoning which was self-evidently correct and in accordance with the underlying law. In the opinion Mr Chapman began from the proposition that a local authority created by statute could only acquire land under some statutory power. If neither the conveyance nor the resolution authorising the purchase expressly identified the relevant statutory power, then the identification of the relevant statutory power had to be a matter of inference in all the circumstances. Mr Chapman then identified the candidate statutory powers available and considered which provided the "closest fit" with the facts of the case before him. On the particular facts of that case Mr Chapman concluded that the closest fit was with the acquisition power in respect of open space found in section 9 of the Open Spaces Act 1906 given the repeated use of the words "open space" in the relevant minutes of the local authority and in the relevant conveyance. Mr Chapman then pointed out that the land had been held on the statutory trust found in section 10 of the Open Spaces Act 1906 which provides that a *"local authority who have acquired any estate or interest in or control over any open space … under this Act shall, subject to any conditions under which the estate, interest or control was so acquired – (a) hold*

and administer the open space … in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose". Mr Chapman further opined that it would make no material difference to the position if the site had been purchased under section 164 of the Public Health Act 1875 (or under a similar provision in a Local Act of Parliament). That was because of *"the long line of authority"* which Mr Chapman identified which was *"to the effect that (subject to any bye-laws properly made under the section) the public have a legal right of access to land acquired and made available to the public under s. 164 PHA 1875."*[4] Mr Chapman was thus of the view that, whether the acquisition was under section 9 of the Open Spaces Act 1906 or section 164 of the Public Health Act 1875 (or under a similar provision in a Local Act of Parliament), the public would have had a legal right of access to the land. Finally, Mr Chapman advised that, in such circumstances, relying on dicta *"of great persuasive force"* of the House of Lords in *Beresford v Sunderland City Council*,[5] use could not have been as of right: *"[i]f the public have a legal right of access to land for recreation, their user of the land is explained by the existence of that right and there is no reason to regard that user as amounting to the prescriptive acquisition of a different legal right under CA 2006 s. 15."*

78. Mr Alesbury then dealt with the Terrier. He pointed out that the Terrier, compiled at some uncertain date after the acquisition, stated that the "purpose" of the acquisition was for "open space". It was for no very obvious reason that it then referred to the Physical Training and Recreation Act 1937. No present member of the Council's staff knew why this was entered or exactly when but it was known that it would have been done by a legal clerk. The entry had nothing to do with anything in the conveyance, the pre-acquisition correspondence or the authorisation for the purchase being sought. The inference had to be that it was a quirky insertion by a legal clerk with no apparent or inferable justification. The only conceivably relevant power in the Physical Training and Recreation Act 1937 (which had been repealed in late 1976) was that contained in section 4(1). That provided that a local authority might, inter alia, acquire, lay out and maintain lands for the purpose of playing fields. Mr Alesbury submitted that this was a

[4] The authorities cited by Mr Chapman include the well-known decisions of Finnemore J in *Hall v Beckenham Corporation* [1949] 1 K.B. 716 and of the Court of Appeal in *Blake v Hendon Corporation* [1962] 1 Q.B. 283.
[5] [2003] UKHL 60.

completely inappropriate power to refer to for justifying the purchase of land such as that at Kent View Road, especially with the covenant in the 1976 conveyance expressly mentioning "public open space". However, even if the land was acquired under the Physical Training and Recreation Act 1937 and made freely available thereunder, it would still have been used "by right" rather than "as of right". Mr Alesbury submitted that this conclusion would follow from the court's endorsement in the case of *Barkas v North Yorkshire County Council*[6] of the approach which had been taken by the inspector in that case (again, Vivian Chapman QC) which had been to proceed on the basis that *"where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it."*[7]

79. In relation to the bye-laws, Mr Alesbury submitted that the Applicant was labouring under a misapprehension as to the significance of the bye-laws to the Council's case. The Council's case was that the existence of the Open Spaces Act 1906 bye-laws tended to be yet further corroboration of the point, evident from other material anyway, that the land was held and made available to the public as public open space and so used by the public "by right", not by trespass "as [if] of right". The Council was not contending that by putting up bye-law notices it was saying to the public that they were permitted to come on to the Application Land. The Council was contending that, because of the status of the Application Land, the public had a right to be on it. It was entirely accepted that the evidence was less than clear cut about the existence of any bye-law notices and how long they might have lasted although the Council's case was that there was at least one notice for a time. However, the situation in the present case was different from that in *Newhaven Port and Properties* in that visibility of the bye-laws was not particularly relevant here as it was the status of the land which conferred the right, not a notice giving a revocable permission. This was recognised by Ouseley J in paragraph 85 of the judgment. In that paragraph Ouseley J 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."*

80. In dealing with the question of what the use of the particular bye-law making powers said about the power under which the Council acquired and held the Application Land,

[6] [2011] EWHC 3653 (Admin).
[7] See paragraph 11 of the judgment, quoting the inspector's report.

Mr Alesbury's submissions were as follows. Section 15 of the Open Space Act 1906 (*"A local authority may, with reference to any open space ... in or over which they have acquired any estate, interest, or control under this Act, make byelaws for the regulation thereof"*) was only appropriate to land where, at the time of bye-law making, the officers advising the Council were certain that the land was specifically acquired under the 1906 Act. Section 12 (*"A local authority may exercise all the powers given to them by this Act respecting open spaces ... transferred to them in pursuance of this Act in respect of any open spaces ... of a similar nature which may be vested in them in pursuance of any other statute, or of which they are otherwise the owners"*) was appropriately referred to as well where there was an element of less than total clarity about the situation. In this case, although the 1976 Conveyance mentioned "public open space", it did not specifically mention the 1906 Act. Any officer who had happened to have seen the Terrier would quite justifiably have thought that it was better to refer to section 12 as well as section 15 in preparing or advising on what should be said in the 1979 Bye-laws. Accordingly, nothing adverse to a conclusion that the land was acquired as 1906 Act public open space could be derived from the reference to sections 12 and 15 in the 1979 Bye-laws and in the 1991 form BYE 5/3. Interestingly, the 1997 Bye-laws no longer made clear which power was thought to apply to which individual piece of land.

81. So far as concerned nomenclature, the 1979 Bye-laws referred to "Kent View Park". It was clear from Mr Reynolds's undisputed evidence that the Application Land used to be called that,[8] and that this was the land those bye-laws were meant to refer to. It was clear that the 1997 Bye-laws mistakenly said "Kent View Drive Recreation Ground" but equally clear that that meant the same area which used to be called "Kent View Park". There was no Kent View Drive. It was clear that the 1997 Bye-laws should have said, and were meant to relate to, Kent View Road Recreation Ground. The case was not about a bye-law prosecution and it mattered not how the Council would fare in such a prosecution with that inaccurate nomenclature. The important point was that the bye-laws were meant to refer to the Application Land and were treating it as appropriately included in the Council's "Pleasure Grounds and Open Spaces."

[8] Paragraph 69 above.

82. The Applicant's own questionnaire fillers had named or described the Application Land as follows. There were 84 answers and the names given were: "Kent View Road Recreation Ground" 55; "Playing Field" 5; "Kent View" 5; "The Field" 1; "Kent View Field" 6; "Kent View Play Area" 2; "Recreation Ground Playing Field" 4; "Kent View Rec" 3; and "Kent View Playing Field" 3. In answer to the question whether the Application Land had other names, 73 said "no". Of those who said "yes": 1 gave the other name as "Nursery Field"; 2 as "Kent View Recreation Ground"; 1 as "Recreation"; 1 as "The Field"; 2 as "Campbell's Field"; and 4 left the answer blank. It was known from evidence in the inquiry (for example, from Amanda Hart)[9] that the Application Land was commonly referred to as "the Rec", or the Recreation Ground, by people in the surrounding area. This was not in the least surprising and was exactly what one would expect. In sum, there was in reality overwhelming public recognition that the Application Land was a recreation ground available for the public to use. Even the Applicant used that terminology in the Application. This was all totally consistent with the Application Land being publicly provided, publicly available land, used "by right" and, in fact, public open space.

83. As to the areas of the Application Land not included in the 1976 Conveyance, it was clear that these areas were provided and managed, and made available, in exactly the same way, even before they came into Council ownership. Mr Reynolds's direct personal evidence was that this had been so since at least 1990.[10] Mr Alesbury asked for it to be inferred from the evidence that this would also have been so since well before then (though this might not matter under the Commons Act 2006 test because the relevant period was from 1990-2010). There were really two distinct elements:
    (a) the two areas transferred under the 1994 CRA Transfer and the 1998 CRA Transfer;
    (b) the Cross-Hatched Area.

84. In spite of the somewhat widely worded covenants in the CRA Transfers, there was nothing inconsistent with the Council's acquiring this land in reality to add to the public open space. The areas were already de facto part of the same public open space and managed as such. They were then, in the 1990s, fully added in ownership terms as well. In the spirit of *Barkas*, it would be absurd to regard the (local) public as having

[9] Paragraph 39 above.
[10] Paragraph 67 above.

been trespassers on this land, forming an indistinguishable part of the publicly provided recreational area.

85. Mr Alesbury submitted further that the same view should be taken of the Cross-Hatched Area which he called the "adverse possession" land. It was clear that this area was not acquired under some local government-related statute. But no-one else claimed it. The Council had been managing it (so far as it needed managing) for a long time. It was indistinguishable from the remainder of the open space land which the Council provided here for public use. The reasonable inference was that the Council had acquired title through adverse possession, had effectively added it to its landholding, and made it available, in common with the rest, as public open space. It would not therefore have been used "as of right" by local people, at least during the period when it could reasonably be inferred that the Council would have acquired ownership. There was no basis on the evidence for concluding that this "adverse possession" ownership by the Council would only have come about during the last two years since the Application was made. Therefore the Applicant could not have established, on the balance of probabilities, 20 years' "as of right" use even on this area.

86. Contrary to the reliance placed thereon by the Applicant, the remarks of Lord Bach, Parliamentary Under-Secretary of State, DEFRA, made in debate in the House of Lords during the passage of the Commons Bill in 2006 in relation to the "as of right" issue, were not relevant. The same was true of the rights of way decision letter which the Applicant relied on. The Applicant's submissions in respect of which these submissions of Mr Alesbury were a response are reported in, respectively, paragraph 94 and paragraph 92 below.

87. The overall conclusion was that the Applicant had not established his case on any of the Application Land. None of it had been used "as of right". The Application Land was a public park, recreation ground or open space, which had been provided for, and in fact used "by right" by, local people (and others) over the relevant period, most probably (as a matter of inference from all the documentation) under the Open Space Act 1906, but, in any event, not in circumstances where an "as of right" claim could lawfully be generated by prescription.

(b) The Applicant

88. The Applicant submitted that the Council had failed to provide sufficient evidence to establish under which statute or statutes the Application Land had been acquired. Moreover, whichever statute or statute applied, it was up to the Council overtly to give permission to use the Application Land if it was to defeat the claim that use had been "as of right". This was the case whether the relevant statute was the Public Health Act 1875, the Open Spaces Act 1906, the Physical Training and Recreation Act 1937 or the Local Government (Miscellaneous Provisions) Act 1976.

89. The Council had failed to submit evidence of ownership of the Cross-Hatched Area and the Council had not actively maintained that area.

90. It had not been confirmed that the Council had included the Kent View Road Recreation Ground on the list of parks and open spaces that it submitted to the Secretary of State for approval.

91. The Council had provided no evidence that it had ever erected any bye-law boards or other signs overtly to indicate to the public that they had permission to use the Application Land or that there would have been conditions attaching to the permission. The Council had never prevented the public from undertaking any of their legal sports and activities that would otherwise have been prevented under the Council's standard bye-laws. Therefore, even if the Council could provide proof as to the statute(s) under which the Application Land was acquired, and that the bye-laws were applicable thereto, the Council had never fulfilled its legal requirements under whatever were the relevant statute(s) to regulate the use of the Application Land by erecting bye-law boards or communicating to the public that they had permission to use the Application Land and that conditions were attached. Further, the Council had never enforced any of its bye-laws during the relevant 20 year period. In fact, the public had been allowed to do as they pleased on the Application Land for many more years than the 20 year period required to gain village green status. The Council could at any time have taken steps to alert the public to the fact that they had only a temporary licence to use the Application Land but the Council chose not to do so.

92. The Council could not argue that the Application Land had been used by force or in secret. What was disputed was the Council's claim that the public had been given permission to use the Application Land. However, that permission was limited to activities which the Council allowed and the public could not possibly know which activities were or were not allowed if the Council had not informed them of that. That is why a bye-law board or some other permission sign was so important. It would overtly let the public know what they could and could not do and also protect the Council against the acquisition of prescriptive rights by the public. The Council had never regulated the use of the Application Land in this way because it had never erected any bye-law boards nor had it enforced the bye-laws. The Applicant asked that there be taken into account a decision of the Planning Inspectorate dated 8th February 2010 in relation to a definitive map modification order (Order Ref: FPS/Z1585/7/43) about a footpath at Basildon Golf Course, which he said bore on the issue of the effect of the lack of signs.

93. The Applicant next submitted that members of the public whose lawful activities fell outside the scope of the limited permission which was granted would be trespassers, their use would therefore be "as of right" and the Council had acquiesced in such use of the Application Land. In this connection, what was said in *Newhaven* notwithstanding, reliance was placed on the decision of the House of Lords in *Tomlinson v Congleton Borough Council,*[11] a personal injury case, in which a person who dived into a lake in contravention of a notice forbidding swimming, was treated as a trespasser.
94. Moreover, the Applicant submitted that the Council was wrong that acquisition of the Application Land under a particular statute could automatically confer on the public permission to use the land. In the making of 2006 Act there had been 41 years (since 1965) to consider what should and what should not be included. Cases such as *Beresford, Hall v Beckenham Corporation* and *Blake v Hendon Corporation* would all have been relevant to the consideration of matters. They all pre-dated the 2006 Act. In those circumstances the words of Lord Bach, Parliamentary Under-Secretary of State, DEFRA, made in debate in the House of Lords during the passage of the Commons Bill in 2006 were important. He said that *"what matters when local inhabitants use land owned or managed by a body that has recreational functions, such as a local*

[11] [2003] UKHL 47.

authority, is the nature of that use and whether the actions of the landowner during the period relied upon would have made them aware that their use took place by permission rather than 'as of right'." The Council in the present case should therefore have taken overt action to let the public know that they had permission to use the Application Land and what they could and could not do on it. It had not done that and the Council's case had to fail.

95. In consequence, a significant number of local inhabitants had been using the Application Land for lawful sports and pastimes without force, without secrecy and without permission during the required 20 year period. The use had been "as of right".

96. Finally the Applicant submitted that there should be taken into account the discrepancies in areas which had been raised previously with the Council's witnesses.

Findings and analysis

(a) Introduction

97. The key issue in this case, and the one which was so treated as the key issue by both parties, is 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 that particular issue. However, before turning to that issue it is convenient to deal with other matters first.

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

98. To begin with, I have no doubt that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period and I so find. The evidence in support of the Application clearly establishes as much. The Council has not advanced any evidence which suggests otherwise and has not sought to dispute that lawful sports and pastimes have taken place there for 20 years because that is exactly what would be expected on land which has been provided as a recreation ground.

99. In finding that the Application Land has been used for lawful sports and pastimes for the relevant 20 year period, I do not intend at this point to discuss the question whether

recreational activities carried on in breach of the 1979 or 1997 Bye-laws (assuming at this point that they were intended to apply to the Application Land) were or were not lawful. Some activities which have been described in the evidence would have contravened those bye-laws. The most obvious example of that, and one which received some emphasis in the evidence in support of the Application, would be golf[12] as that was prohibited by bye-law 16 of the 1979 Bye-laws and by bye-law 28 of the 1997 Bye-laws. The finding I make at this stage is simply that, if one were to discount activities which were in breach of bye-laws, the abundance of other activities which were not in breach (such as walking, dog walking, football, cricket, rounders, kite flying and general play) is amply sufficient to establish use of the Application Land for lawful sports and pastimes for the relevant 20 year period. I return to the question of whether activities in breach of bye-laws are in fact to be discounted in paragraph 148 below.

100. 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*[13] and adopted the approach there suggested. 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."* It is no doubt true that some parts of the Application Land, such as the football pitch area, have been used more than others[14] but that is as is to be expected. It is also true that a number of witnesses spoke of no, or limited, use of the southern part of the Application Land owing to waterlogging after wet conditions[15] but others were more emphatic in

[12] Referred to specifically by: Mr Burman (paragraph 22); Mr Wilson (paragraph 23); Mr T Pink-Gyett (paragraph 24); Mr Spenner (paragraph 25); Mr Maginn (paragraph 29); Mr Hart (paragraph 33); Mrs Jacobs (paragraph 35).
[13] [2003] EWHC 2803 (Admin) at paragraph 29.
[14] The following spoke of greater use of the football pitch area: Mr Burman (paragraph 22); Mrs Moffat (paragraph 28); Mr Jacobs (paragraph 32); Mr West (paragraph 36); Mrs Pink-Gyett (paragraph 42).
[15] Mrs Rogers (paragraph 27); Mrs Moffat (paragraph 28); Mr Maginn (paragraph 29); Mr Backham (paragraph 30); Mr Dowling (paragraph 40).

their use of the whole of the Application Land[16] and some pointed to the seasonal nature of the problem with the southern part of the Application Land (in autumn and winter).[17] A good number of witnesses specifically referred to use of the wooded areas.[18] On a common sense approach to the evidence in this case I consider that it is sensible to say that it establishes that the whole of the Application Land has been used in the requisite qualifying way for 20 years. No contrary submission has ever been put forward by the Council.

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

101. I next turn to the question whether the use of the Application Land for lawful sports and pastimes for at least 20 years has been by a significant number of the inhabitants of any neighbourhood within a locality, the basis on which the case was put. This matter was ultimately not contentious at the inquiry. Mr Alesbury accepted on behalf of the Council that the Triangle was capable of being a neighbourhood and that, whatever reservations there might be about Vange Ward as a locality, those reservations could be assuaged by regarding the borough of Basildon as the locality. He also made it clear that the Council did not dispute that significant numbers of people from the neighbourhood had used the land recreationally for at least the relevant period of 20 years. For my part I consider that Mr Alesbury's acceptance of these matters was well-founded for the reasons which follow.

102. I consider first whether the Triangle falls to be considered as a neighbourhood. Neighbourhood is undefined in the 2006 Act as was also the case under section 22 of the Commons Registration Act 1965 Act 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.

[16] Mr Burman (paragraph 22); Mr Spenner (paragraph 25); Mrs Backham (paragraph 26); Mr French (paragraph 31); Mr Jacobs (paragraph 32); Mr Hart (paragraph 33); Mrs Jacobs (paragraph 35); Mrs Painter (paragraph 38); Miss Hart (paragraph39); Mrs King (paragraph 41); Mrs Pink-Gyett (paragraph 42); Mr Dowling (paragraph 43).
[17] Mr T Pink-Gyett (paragraph 24); Mr Jacobs (paragraph 32); Mr M Pink-Gyett (paragraph 34).
[18] Mr Spenner (paragraph 25); Mrs Rogers (paragraph 27); Mr Jacobs (paragraph 32); Mrs Jacobs (paragraph 35); Mr Stanley (paragraph 37); Miss Hart (paragraph 39); Mrs Dowling (paragraph 40); Mrs Pink-Gyett (paragraph 42).

103. In *Cheltenham Builders v South Gloucestershire District Council*[19] 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."*[20]

104. Lord Hoffman in *Oxfordshire County Council v Oxford City Council*[21] 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."*[22]

105. In *Oxfordshire and Buckinghamshire Mental Health Trust v Oxfordshire County Council*[23] 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 locality."*[24] 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*

[19] [2003] EWHC 2803 (Admin).
[20] At paragraph 85.
[21] [2006] UKHL 25.
[22] At paragraph 27.
[23] [2010] EWHC 530 (Admin).

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."[25]

106. In *Leeds Group plc v Leeds City Council*[26] 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."*[27]

107. The words of the judge which I have quoted in the previous paragraph seem to me to be a reflection of the views of the inspector in the case who had said that it seemed to him *"that the 'cohesiveness' point cannot in reality mean much more, in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of making a town or village green claim."*[28]

108. In relation to the question of the need for a neighbourhood to have boundaries, HHJ Behrens said *"I agree with Miss Ellis QC that boundaries of districts are often not logical and that it is not necessary to look too hard for reasons for the boundaries."*[29]

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[24] At paragraph 69.
[25] At paragraph 79.
[26] [2010] EWHC 810 (Ch).
[27] At paragraph 103.
[28] Paragraph 13.32 of the inspector's report quoted at paragraph 36 of the case report.

109. When the 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 2 or more neighbourhoods. The Court of Appeal upheld the judge on this point (by a majority)[30] but, for present purposes I need note only that, in the course of so doing, Sullivan and Arden LJJ endorsed[31] Lord Hoffman's dicta, which I quote in paragraph 104 above, in *Oxfordshire County Council v Oxford City 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.[32] In *Adamson v Paddico (267) Limited*[33] 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'".*[34]

110. In the light of the above I am of the view that the Triangle is properly to be regarded as a neighbourhood in this case. The Triangle is, to my mind, an area which is meaningfully described as such and one which has clear and strong boundaries, formed on two sides by main roads (Clay Hill Road and High Road, Vange) and on the other by a railway, which mark it off from elsewhere. It is an area in which, I find, there is a cohesiveness arising from its inter-connected streets and overall similarity of housing stock (which I saw on my site visits). I do not consider it could fairly be described as a disparate collection of pieces of residential development cobbled together for the purposes of the claim. It is also, I find, an area where people might reasonably regard themselves a living in the same portion or district of town. On a more impressionistic level, some of the evidence also provided (as I perceived it) a flavour of community identity in the Triangle.

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[29] At paragraph 105.
[30] Sullivan and Arden LJJ, Tomlinson LJ dissenting.
[31] See paragraphs 26 and 52.
[32] See, for example, paragraphs 24, 25, 26, 44 and 52.
[33] [2012] EWCA Civ 262.

111. As to the issue of whether Vange Ward constitutes an appropriate locality, it is correct, as Mr Alesbury observed, that there has been judicial recognition of the proposition that a ward may constitute a locality for the purposes of town or village green registration. I refer to the first quoted passage from *Oxfordshire and Buckinghamshire Mental Health Trust* in paragraph 105 above. Older dicta pointing the other way can be found in the case of *Laing Homes Limited v Buckinghamshire County Council*[35] where Sullivan J said that the objectors there would have had a good prospect of persuading an inspector that there was no qualifying locality if the case had been advanced on the basis of electoral wards *"either because electoral wards are not localities or, if they are, because the wards constituted two localities and the inhabitants of one would not be the inhabitants of the other."*[36]

112. In the light of the more relaxed view that is now being taken by the courts as to what constitutes a "neighbourhood within a locality" and the emphasis which has been placed on the loosening of the links with historic forms of green which this phraseology was intended to achieve, I see no real reason why a ward could not be a locality for the purposes of establishing a claim on the basis of a "neighbourhood within a locality". As to issue of the present boundaries of the ward being the product of relatively recent boundary change, again I am not sure why any such change should matter for the purposes of a claim for registration on the basis of a neighbourhood within a locality. The neighbourhood has remained the same over the 20 year qualifying period and thus there is certainty as to those local inhabitants who would enjoy the right to recreate on the green were it to be registered. It matters not, however, whether I am right or wrong on that because, as Mr Alesbury accepted, the borough of Basildon itself would serve as the requisite locality within which to locate the neighbourhood. There is no evidence of any change in the borough boundaries over the relevant 20 year period. If authority were needed for the proposition that the borough could be the relevant locality, I consider that it can be found in a passage from the judgment of HHJ Behrens in *Leeds Group plc* at first instance. The judge stated that *"if … Yeadon cannot be a locality for the purpose of limb (ii), I would hold that the parish*

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[34] At paragraph 27.
[35] [2003] EWHC 1578 (Admin).
[36] At paragraph 138.

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."*[37]

113. In relation to the issue of "significant number", this again was not a matter in contention, the Council not disputing that significant numbers of people from the neighbourhood had used the Application Land recreationally for at least the relevant period of 20 years. Sullivan J dealt with the issue of "significant number" in *McAlpine Homes Ltd v Staffordshire County Council*[38] 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".*[39] On the evidence I have considered I find that this test is met in the present case.

114. I am able to conclude at this point therefore that the Application Land has been used by a significant number of the inhabitants of a neighbourhood within a locality for lawful sports and pastimes for a period of at least 20 years.

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

115. I turn therefore to the key issue of whether such use has been "as of right".

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

[37] At paragraph 90. This passage was not the subject of later treatment by the Court of Appeal.
[38] [2002] EWHC 76 (Admin).

116. 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, as Mr Chapman reminded himself in the opinion commended to me by Mr Alesbury, only acquire land under some statutory power. I further agree with the proposition put forward in that opinion that, if express identification of the relevant statutory power is absent from the resolution authorising the acquisition in question or the conveyance effecting that acquisition, the task of identification of that power becomes a matter of inference in all the circumstances of the case.

117. The history of the Council's acquisition of the Application Land in this case starts with the 1976 Conveyance, the 1976 Transfer and the documentary material from 1973-74 pre-dating these documents. It is clear that the 1976 Conveyance and the 1976 Transfer represented the completion of the transaction which had been proposed in, and was the subject of, the dealings between Basildon Development Corporation and the Council in 1973-74. This follows not just from the correspondence between the final 1976 documents and the earlier documentary material of 1973-74 in terms of the subject matter (land at Kent View Road) and the price of £20,600 but also from the fact that the covenants embodied in the 1976 documents ("not to use the land hereby conveyed/transferred or any part thereof other than for the purposes of a public open space and for recreation") match the fact that, as is reflected throughout the 1973-74 documentary material, the proposed purchase of the land was as open space. The 1973-74 documentary material is therefore to be read in conjunction with the 1976 Conveyance and the 1976 Transfer and properly to be considered as pre-acquisition material. However, neither the 1973-74 documentary material nor the 1976 Conveyance/1976 Transfer contains any express identification of statutory powers. The question then becomes one of inference from all the circumstances of the case.

118. In considering those circumstances I consider that Mr Alesbury was correct to submit that it is clear that, even before the Council acquired the land which was the subject of the 1976 Conveyance and the 1976 Transfer, this land was laid out as open space or a recreation ground by Basildon Development Corporation. This land is

[39] At paragraph 71.

referred to as open space throughout the 1973-74 documentary material. The plan which accompanies the 1976 Conveyance labels the land as "recreation ground" and shows a playground on the land off Paslowes.[40] These matters are consistent with the evidence of some of the witnesses called on behalf of the Applicant who spoke of the Application Land being essentially unchanged from the days of the Development Corporation.[41] In the light of this I consider that the land subject to the 1976 Conveyance and 1976 Transfer would have met the definition of "open space" in section 20 of the Open Spaces Act 1906 ("the 1906 Act"), which so far as relevant, 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".*

119. I also agree with Mr Alesbury that the whole of the pre-acquisition material from 1973-74 makes it clear that the transaction which was then in contemplation between Basildon Development Corporation and the Council was regarded by both sides as a proposed purchase of open space for open space purposes and that, while the transaction did not go through until 1976, it is clear that it was the same transaction as previously contemplated. It further seems to me to be undeniably correct, as Mr Alesbury also argued, that the 1976 Conveyance contained (as did the 1976 Transfer) the clearest possible covenant not to use the land other than for purposes of public open space and recreation. I consider that these matters provide a compelling inference that the land which was the subject of the 1976 Conveyance (which was the vast bulk of the Application Land) and the 1976 Transfer was acquired as open space under the 1906 Act.

120. I do not consider that this inference is displaced by other matters. I consider first the Terrier. The Terrier states that the purpose of the 1976 land acquisition was "open space" but the statutory power then referred to is the Physical Training and Recreation Act 1937 ("the 1937 Act"). The only potentially relevant power in the 1937 Act is that which is found in section 4(1) which provides that a local authority might, inter alia, acquire, lay out and maintain lands for the purpose of playing fields. Section 4 of the 1937 Act was repealed by the Local Government (Miscellaneous Provisions) Act 1976

[40] See paragraph 57 above.
[41] See paragraph 57 above again and footnote 2 above.

("the 1976 Act") with effect from 14th February 1997[42] and replaced by a different power (to provide recreational facilities) in section 19 of the 1976 Act. Section 4(1) of the 1937 Act remained in force at the time of the 1976 land acquisitions. I consider that the Terrier must be given some weight because it is a formal record of the Council's landholdings and, according to Mr Topsfield, the relevant section in this case would have been completed soon after the 1976 land acquisitions.[43] I also consider that Mr Alesbury's submission that the power contained in section 4(1) of the 1937 Act would have been completely inappropriate goes too far given the football pitch provision which has existed on at least part of that part of the Application Land here under consideration. Nevertheless, there is a mismatch between the purpose of the land acquisition identified in the Terrier - "open space" – and the identified statutory power of the 1937 Act. Moreover, the identification of that power as the relevant one reflects neither the pre-acquisition documentary material from 1973-74 nor the express terms of the covenanted restriction for the purposes of "public open space and recreation" found in both the 1976 Conveyance and the 1976 Transfer. I consider that the 1976 Conveyance and the 1976 Transfer provide a surer guide to the question of the applicable statutory power than the subsequent assessment of that question by the Council in the Terrier. The power contained in section 9 of the 1906 Act is a significantly closer fit with the terms of the 1976 Conveyance and 1976 Transfer than the power contained in section 4(1) of the 1937 Act.

121. I next consider the 1979 and 1997 Bye-laws. I deal with them at this point only to the extent, if any, to which they cast light on the question of the relevant statutory power under which the Application Land was acquired and held. I have no doubt that it was intended that both the 1979 and the 1997 Bye-laws should apply to the Application Land. The 1979 Bye-laws applied to "Kent View Park". Mr Reynolds's evidence, which was uncontested on this point, was that this was one of the names by which the Application Land used to be known in the past.[44] I agree with his observation that the reference to "Kent View Park" could not conceivably be to anywhere other than the Application Land.[45] The 1997 Bye-laws applied to "Kent View Drive Recreation

[42] See section 81 of, and Schedule 2 to, the Local Government (Miscellaneous Provisions) Act 1976 and article 2 of The Local Government (Miscellaneous Provisions) Act 1976 (Commencement) Order 1997.
[43] See paragraph 64 above.
[44] Paragraph 69 above.
[45] Ibid.

Ground". It is clear that the reference to "Kent View Drive Recreation Ground" was simply an error of nomenclature and that the intention was that these bye-laws should apply to Kent View Road Recreation Ground and thus to the Application Land. The recreation ground referred to in the 1997 Bye-laws was also identified as "formerly Kent View Park" and that undoubtedly was the Application Land, there is no Kent View Drive and form BYE 5/3, completed in 1991 to seek approval from the Home Office for revised bye-laws, had correctly referred to "Kent View Road Recreation Ground".[46]

122. So far as concerns the statutory powers identified in the 1979 and 1997 Bye-laws, the 1979 Bye-laws, as I have already described in paragraph 69 above, placed Kent View Park in part 3 of the schedule which listed those grounds where the applicable statutory bye-law making powers were derived from sections 12 and 15 of the 1906 Act rather than section 15 alone or section 164 of the Public Health Act 1875. As I have also already mentioned in paragraph 69 above, the 1997 Bye-laws do not identify which bye-law making power was thought to be applicable in the case of any particular pleasure ground or open space to which these bye-laws applied although the form BYE 5/3 had identified that the appropriate bye-law making power for regulating Kent View Road Recreation Ground was, again, the combination of sections 12 and 15 of the 1906 Act. Section 15 of the 1906 Act (set out at paragraph 80 above) is the power applicable to open space which has been acquired under the 1906 Act. Section 12 of the 1906 Act (also set out in paragraph 80 above) extends that power to cases of open spaces of a similar nature which might be vested in a local authority in pursuance of any other statute or of which they are otherwise the owners. There is therefore no need to rely on section 12 as well as section 15 when open space has been acquired under the 1906 Act.

123. However, I accept Mr Alesbury's submission that the selection of the combined section 12 and 15 bye-law making power in the 1979 Bye-laws and in form BYE 5/3 should not deflect from the conclusion that the land which was the subject of the 1976 Conveyance and 1976 Transfer was acquired under the 1906 Act. I agree that it would be simple prudence to refer to both sections 12 and 15 in circumstances where, despite the public open space covenants, there was no express reference to the 1906 Act in the

[46] Ibid.

1976 Conveyance and 1976 Transfer and where the Terrier referred to the purpose of open space but also to the 1937 Act. In those circumstances an element of doubt or uncertainty might arise as to how the land which was the subject of the bye-laws had been acquired. Seen in that way the choice of the bye-law making power is explicable as a cautious "belt and braces" approach by those responsible for the bye-laws and need not have involved any implicit rejection by them of the proposition that the land was acquired under the 1906 Act.

124. Given that the land which was acquired under the 1976 Conveyance and the 1976 Transfer was acquired under the 1906 Act, this means that this land was subject to the statutory trust for public enjoyment found in section 10 of the 1906 Act. I have already set out section 10 in paragraph 77 above so I need not repeat that at this point.

125. I turn next to consider those areas of land which formed the subject of the CRA Transfers. Mr Reynolds's evidence was the areas subject to these transfers had been maintained as one with the rest of the land in the Council's ownership before the transfers took place.[47] I have no hesitation in accepting that. There is no evidence to contradict it and, indeed, all the evidence is consistent with these areas long having formed undifferentiated parts of a wider whole. The memorandum of 18th October 1976, which I refer to in paragraph 68 above, refers to the parcel of land which became the subject of the 1994 CRA Transfer as a piece of remaining land at the Kent View Road Open Space which was then available for purchase by the Council from Basildon Development Corporation. I have no doubt that this land satisfied the definition of open space in section 20 of the 1906 Act when it was acquired by the Council in 1994. The same would have applied to the parcel of land which was the subject of the 1998 CRA Transfer.

126. Mr Alesbury's submission in respect of the plots of land which were the subject of the CRA Transfers was that, in spite of the somewhat widely worded covenants in the transfer documents (see paragraphs 60 and 61 above), there was nothing inconsistent with the Council's acquiring this land in reality to add to the public open space. The areas were already de facto part of the same public open space, managed as

[47] Paragraph 67 above.

such and then, in the 1990s, fully added in ownership terms as well. It would be absurd to treat them differently. I agree with and accept that submission for reasons which I explain below.

127. Neither the 1994 CRA Transfer nor the 1998 CRA Transfer identifies any specific statutory provision which bears on the purpose of the Council's acquisition. The 1994 CRA Transfer was, as I note in paragraph 60 above, made under the aegis of an agreement between Commission for the New Towns and Basildon District Council which dealt with the transfer of various areas of land, including the plot of land subject to the 1994 CRA Transfer. The agreement recited, as I also set out in paragraph 60 above, that the transfer to the Council was pursuant to section 120 of the Local Government Act 1972 and to the powers contained in the New Towns Act 1981. Of those two powers, the one which relates to the Council's acquisition is section 120 of the Local Government Act 1972 ("the 1972 Act"). Section 120 provides a wide power for councils to acquire land by agreement for the purposes of any of their functions under the 1972 Act or any other enactment or for the benefit, improvement or development of their area. It would seem probable that this wide general power was selected because the transfer was of various areas of land and different areas might be used for different purposes. That point also serves to explain the width of the covenant in the 1994 CRA Transfer extending to use for "landscape area highway or for the provision of amenity and recreation areas for the use of the public including (without limitation) housing access parking and garden areas and any other uses which in the reasonable opinion of the .. Council .. are required in order to allow full public use and enjoyment of the land".

128. It seems to me that, in strict terms, the land which was the subject of the 1994 CRA Transfer was acquired under section 120 of the 1972 Act rather than under the 1906 Act. In those circumstances it is probably not possible to say that section 10 of the 1906 Act applies as such because the land was not acquired "under" the 1906 Act although Lord Scott envisaged in *Beresford* that there might be some flexibility in approaching the question of when section 10 of the 1906 Act was engaged. He said *"that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable*

proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27).”[48] Lord Scott acknowledged, however, that no concluded view could be expressed given the concession that had been made that the acquisition had not been “under” the 1906 Act. It is also to be noted that the present case is not simply one where the relevant documents are silent on the acquisition power but one where they contain specific reference to a power other than one found in the 1906 Act. For present purposes, I proceed therefore on the basis that section 10 of the 1906 Act was not directly engaged as such.

129. However, the reality of the present case is as Mr Alesbury described it. In 1994 the Council was adding to its ownership for open space purposes another smaller piece of open space to a much larger area of adjoining open space, which had been acquired under the 1906 Act, where the larger composite area had all along been managed in the same way and was all already used for the purposes of public recreation. Moreover, while the direct acquisition power was section 120 of the 1972 Act, the purpose of the acquisition was the provision of open space to the public as a function of the Council under the 1906 Act. In those circumstances it would indeed be absurd to think that any different consequences should follow in law from any inability to say that the added land was subject to a statutory trust for public enjoyment in the strict sense for want of direct acquisition under the 1906 Act. I consider that this reasoning fits entirely with the observations of Lord Walker in *Beresford* in which he envisaged that there would be situations where, although there might not be a statutory trust in the strict sense, the legal position would be equivalent thereto.[49] I conclude therefore that from 1994 the land subject to the 1994 CRA Transfer should be regarded as in such position. I also consider that the reality of the acquisition of the land which was acquired under the 1998 CRA Transfer is no different from the reality of the acquisition of the land which

[48] At paragraph 30.
[49] See paragraph 87, set out in this report at paragraph 136 below.

was the subject of the 1994 Transfer.[50] This was another case where the Council was adding to its ownership for open space purposes a further small area of open space to a much larger area of adjoining open space, which had been acquired under the 1906 Act, where the larger composite area had all along been managed in the same way and was all already used for the purposes of public recreation. In my view it too is therefore to be approached on the basis that its legal position from acquisition in 1998 is equivalent to land subject to a statutory trust for public enjoyment in the strict sense.

130. In relation to the Cross-Hatched Area Mr Alesbury accepted that it had not been acquired under any local government statute. However, he invited me to infer that, as no-one else claimed it and the Council had been managing it (so far as it needed managing) for a long time, the Council had acquired title through adverse possession, had effectively added it to its landholding and made it available, in common with the rest, as public open space. In making this submission he also placed reliance on the fact that Cross-Hatched Area was an indistinguishable part of a wider publicly provided recreational area. I cannot accept this submission for the simple reason that there is no evidence which establishes that the Council has carried out any significant management of the Cross-Hatched Area or has otherwise occupied or controlled it. Mr Reynolds himself confirmed that the Cross-Hatched Area was a wooded or scrubland area within which there was probably no maintenance.[51] I do not consider that the evidence establishes that the Council has ever been in factual possession of the Cross-Hatched Area. The Council could not therefore have been in the position where it was making that particular piece of land available to the public as open space. It was not theirs to make available. Whether the Cross-Hatched Area is or is not physically distinguishable from the wider adjoining area does not seem to me to affect the matter. I also note that the Council has not taken any formal steps to obtain a possessory title to the Cross-Hatched Area.[52]

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

[50] The agreement between Commission for the New Towns and the Council underlying the 1998 CRA Transfer is not in evidence but I have no reason to think that it would have been in any different terms from the agreement underlying the 1994 CRA Transfer. The transfers themselves are in all but identical terms.
[51] Paragraph 71 above.
[52] Paragraph 65 above.

131. 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". I have already concluded that the land which was the subject of the 1976 Conveyance and the 1976 Transfer was land which was acquired under the 1906 Act and thus subject to the statutory trust for public enjoyment in section 10 of the 1906 Act. I have also already concluded that the land acquired in 1994 and 1998 under the CRA Transfers is to be treated as being in an equivalent position from the dates of the transfers. I will therefore deal with all this land (which comprises the whole of the Application Land save for the Cross-Hatched Area) together. I have no doubt that the use of this land cannot have been "as of right" from the dates on which the various parts of it were acquired until the eventual appropriation of the Application Land for planning purposes in July 2010. This is therefore fatal to the Application (save in respect of the Cross-Hatched Area). The position is made clear in a series of dicta in *Beresford* which are of the highest persuasive force and, to my mind, are clearly correct in principle.

132. Lord Bingham began by explaining in *Beresford* 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 one by user for a stipulated period."*[53] 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."*[54]

133. Lord Scott was more specific. 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'"*.[55]

[53] At paragraph 3.
[54] At paragraph 9.
[55] At paragraph 30.

134. 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".*[56]

135. 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 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."*

136. In paragraph 87 Lord Walker made comments which were directly related to section 10 of the 1906 Act. 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."*[57]

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[56] At paragraph 62.

[57] 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*

137. The speeches of their Lordships in *Beresford* thus clearly establish the distinction between use "as of right" and use pursuant to a statutory right or, to express the same idea in other ways, use which is "of right" or "by right". Lord Walker's remarks in relation to trespassers illuminate the fact that a person who is not a trespasser will have a legal right to use land and that such a person cannot sensibly be regarded as using land "as of right" if in fact he has an actual right to do so. The distinction is plainly correct in principle. As Mr Chapman put it in the opinion to which I have been referred (see paragraph 77 above), *"[i]f the public have a legal right of access to land for recreation, their user of the land is explained by the existence of that right and there is no reason to regard that user as amounting to the prescriptive acquisition of a different legal right under CA 2006 s.15."*

138. The speeches of their Lordships, in particular those of Lord Scott and Lord Walker, also make it clear that the paradigm case of a statutory conferment of a right to use land for public recreation is where land is subject to the statutory trust under section 10 of the 1906 Act. That is the case here. Use has been "by right".

139. It is also worth recording that the view I express above that open space land subject to the trust for public enjoyment under section 10 of the 1906 Act cannot be used "as of right" for the purposes of the establishment of a new green is a view held by many experienced practitioners in this field. The same view is commonly also held in relation to land acquired under section 164 of the Public Health Act 1875. Mr Vivian Chapman QC's views to this effect are exemplified in the opinion of his which I deal with in paragraph 77 above. The same view is also exemplified by the fact that in the recent case of *Malpass v Durham County Council*[58] two leading practitioners in the field[59] were able to agree as common ground that if the application land there in question *"had indeed been held for the purposes of s 10 of the Open Spaces Act 1906 or under s 164 of the Public Health Act 1875, then the land was held on statutory trusts for public recreation resulting in the public's use of the land being by right and not 'as*

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."

[58] [2012] EWHC 1934 (Admin).

[59] Charles George QC and George Lawrence QC.

of right' and in those circumstances the CRA would have been correct in refusing registration".[60] It is all of a piece with this that in *Barkas* the court dismissed a challenge to a registration decision founded on an inspector's conclusion that use of a recreation ground originally provided under section 80 of the Housing Act 1936 and latterly maintained under section 12 of the Housing Act 1985 had not been used "as of right". The inspector[61] had proceeded on the basis (see paragraph 78 above) that the case was covered by the principle that *"where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it."*[62]

(iii)The relevance of the 1979 and 1997 Bye-laws to use "as of right"

140. The next question I deal with is how the 1979 and 1997 Bye-laws 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 99 above that, assuming activities carried on in breach of bye-laws were not lawful and so fall to be discounted, the abundance of other activities which were not in breach was amply sufficient to establish use of the Application Land for lawful sports and pastimes for the relevant 20 year period. I have also already found, in paragraph 121 above, that the 1979 and 1997 Bye-laws were intended to apply to the Application Land. I discussed at that point the issue of the extent, if any, to which the selection of the power to make the 1979 and 1997 Bye-laws cast light on the question of the relevant statutory power under which the Application Land was acquired and held. I found that the bye-law making power utilised did not deflect from the conclusion that acquisition had been under the 1906 Act. There are two other issues which I now need to address in connection with the 1979 and 1999 Bye-laws in relation to the issue of whether use of the Application Land was "as of right". The first issue relates to the central plank of the Applicant's case in this regard, namely, that as there had never been any bye-law signs or notice boards at the Application Land, that was fatal to the contention that use of the Application had been with the permission of the Council. The second issue is the Applicant's further contention that activities carried out in breach of bye-laws were trespassory and therefore to be regarded as taking place "as of right". In considering this issue I return to the issue I deferred in

[60] At paragraph 41. In the case a registration authority's decision foundered on an inspector's approach to the issue of appropriation. No appropriation issue arises in the present case.
[61] Again, Mr Vivian Chapman QC.

paragraph 99 above whether activities carried out in breach of bye-laws can qualify as lawful sports and pastimes.

141. Turning to the first of these issues, it is necessary to begin by reaching a finding on the question of whether there ever was any bye-law sign or notice at the Application Land during the relevant period. I find that no bye-law sign or notice ever was displayed at the Application Land during the relevant period. On this point I regard the direct evidence of all witnesses in support of the Application that no such sign or notice ever was displayed as plainly preferable to the hearsay evidence provided by Mr Reynolds who could speak only of the recollection of an unidentified officer of the Council unsupported by any documentary evidence.[63]

142. I also make it plain that I accept that communication of the existence of bye-laws 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."*[64] [My emphasis].

143. However, that is not the case which is made by the Council here against use "as of right". I consider that Mr Alesbury was right to submit that the Applicant was labouring under a misapprehension as to the significance of the bye-laws to the Council's case. As Mr Alesbury put it, the Council was not contending that by putting up bye-law signs or notices it was saying to the public that they were permitted to come on to the Application Land. The Council was contending that, because of the status of the Application Land, the public had a right to be on it. This point is clearly recognised in another passage (already referred to in paragraph 79 above) in the judgment of Ouseley J in *Newhaven Port and Properties* in which he 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."*[65] Thus it is the status of land attracting a regulatory bye-lawing making power (as well as the fact of being held under the 1906 Act) which is important for present purposes, not the

[62] Quote from the inspector's report at paragraph 11 of the judgment.
[63] At paragraph 70.
[64] At paragraph 96.

question of whether the bye-laws were ever communicated. I cannot therefore accept the Applicant's submission that absence of communication defeats the Council's argument.

144. I do not derive assistance from the words of Lord Bach when the Commons Bill was passing through the House of Lords, on which reliance is placed by the Applicant. The meaning of the words "as of right" did not change with the passing of the 2006 Act and my guide to that meaning must be found in judicial interpretation of the phrase both before and after 2006. I also consider that Lord Bach's words appear in any event to have been focused on communication of permission, which this case is not about for reasons I have just explained, and do not appear to have given full consideration to the speeches in *Beresford.* The Planning Inspectorate decision dated 8th February 2010 in relation to a definitive map modification order (Order Ref: FPS/Z1585/7/43) about a footpath at Basildon Golf Course, which the Applicant also asked me to take into account in relation to the absence of signs or notices, is irrelevant.

145. Before leaving the first issue I identified in paragraph 140 above (the effect of the absence of communication of bye-laws on the question of whether use was "as of right") I turn to one final matter. I record in paragraph 91 above that part of the Applicant's case was that, by failing to publicise the existence of bye-laws and by not enforcing them, the Council had not fulfilled its legal requirements. I do not see how this argument, whether it be right or wrong, assists the Applicant's case. Assuming it were right (which I do not decide) and it could be said, for example, that the Council had not fulfilled its trust duty under section 10 of the 1906 Act to hold and administer the open space under proper control and regulation, that would mean that the Council were in breach of that duty. It would not mean that the Council's trustee status was removed nor would it mean that the trust for public enjoyment ceased to be applicable.

146. I turn next to the second issue I identified in paragraph 140 above, namely, the Applicant's further contention that activities carried out in breach of bye-laws were trespassory and therefore to be regarded as taking place "as of right".

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[65] At paragraph 85.

147. This contention is defeated by the judgment of Ouseley J in *Newhaven Ports and Properties.* In paragraph 93 of the judgment Ouseley J stated (in a passage which I quote more fully at paragraph 74 above) 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".* In paragraph 103, Ouseley J went further: *"[b]yelaws, albeit unannounced and unenforced, are relevant to a prior aspect on which the Inspector concluded in 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."*

148. I consider that I should follow this very clear guidance from the High Court. I do not find any help in decision of the House of Lords in *Tomlinson v Congleton Borough Council*,[66] which was referred to by the Applicant. That was not a village green case, arose in a quite different context (personal injury) and did not involve bye-laws (but simply notices erected by a local authority as landowner). The answer to the question whether it is appropriate to discount activities which were in breach of bye-laws (which I left over from paragraph 99 above) is therefore that it is. I should add here that, if that were wrong, and if it were the case that all other activities were carried out "by right" (as I have found), with the consequence that the only activities carried out "as of right" were those in breach of bye-laws, those activities in themselves would not be sufficient to sustain the case for registration.

(iv) The Cross-Hatched Area

149. At this point I need to return to the Cross-Hatched Area. Mr Alesbury accepted that the Cross-Hatched Area had not been acquired under any local government statute. Further, I have rejected Mr Alesbury's submission that this area was made available to the public as open space by the Council after it had acquired title thereto on the basis of adverse possession. In these circumstances I simply do not see that there is any legal basis left to say that local inhabitants' use of this area has not been "as of right" even if access thereto had been from the rest of the Application Land, the use of which was

[66] [2003] UKHL 47.

enjoyed "by right". No other impediment to registration of the Cross-Hatched Area is suggested by the Council and none exists to my mind. In finding that the whole of the Application had been used for lawful sports and pastimes for at least 20 years I noted (in paragraph 100 above) that a good number of witnesses specifically referred to use of the wooded areas on the Application Land. The Cross-Hatched Area is a wooded area. No suggestion was made that there would be any future issue of access to the Cross-Hatched Area were it to be registered in isolation, let alone that any such issue should bar registration. Any such suggestion would have fallen foul of Ouseley J's finding in *Newhaven Port and Properties* that *"[i]t would be wrong for rights which on the evidence have been proved to exist not to be registered as required by the statute, simply because they could not be exercised."*[67]

(e) Other matters

150. Finally, I deal with three other matters. First, I consider what the position would be if my finding that the land which was the subject of the 1976 Conveyance and 1976 Transfer was acquired under section 9 of the 1906 Act were wrong and this land were in fact acquired, as recorded in the Terrier, under the 1937 Act. I do consider that this would alter the position. If the land had been acquired and laid out under the 1937 Act and made available thereunder to the public for the purposes of recreation, I consider that the land would still have been used "by right" rather than "as of right" on the basis of the general principle identified by Mr Chapman in the case which formed the subject of the litigation in *Barkas*, which I have already twice made reference to (in paragraphs 78 and 139 above) that "*where a statute empowers a local authority to acquire and lay out land for public recreation, the public have a legal right to use it."*[68] It is my view both that such a principle exists and that it would apply in the case of playing fields acquired and laid out under the 1937 Act and made available to the public for recreation thereunder. The fact that section 4(1) of the 1937 Act does not use the expression "public playing fields" does not defeat this argument if the playing fields were in fact (as they were here) made available to the public for recreation. The inspector's reasoning in *Barkas* was not found flawed by the absence of reference in

[67] At paragraph 173.
[68] See paragraph 11 of the judgment, quoting the inspector's report.

section 80 of the Housing Act 1936 to "public recreation grounds" given that the recreation ground there was made available to the public for recreation.

151. Secondly, one of the matters which I mentioned in paragraph 44 above when describing the documentary material submitted by the Applicant in support of the Application was a submission put forward in support of an application to register a village green at The Downs, Herne Bay. That submission deals with the issue of use "as of right". In the course of my consideration of that issue above I have already dealt with those matters which the Applicant chose to highlight from the Downs submission. For the rest I need say no more than, if and to the extent that arguments in that submission do not concur with the reasoning I have followed in my treatment of the issue of "as of right", I do not regard those arguments as correct.

152. Finally, the Applicant submitted that I take into account the discrepancies in areas which he had raised with the Council's witnesses. I have considered this but my conclusion is that nothing turns on it.

Overall conclusion and recommendation

153. My overall conclusion is that all requirements for the Application to succeed are made out except for use "as of right" but, for that reason, the Application must fail, save for the Cross-Hatched Area, where all requirements for the Application to succeed, including use "as of right", are made out.

154. As a matter of procedure the Registration Authority is entitled to register only that part of the Application Land in respect of which the case has been proved.[69]

155. I therefore recommend that the Application should be rejected save for the Cross-Hatched Area, in respect of which it should be accepted.

21st September 2012 Alan Evans

[69] Oxfordshire County Council v Oxford City Council [2006] UKHL 25 at paragraphs 62, 111, 114, 124 and 147.

Appendix 2 Locality and Neighbourhood