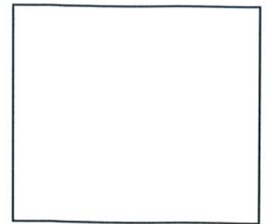

SHEFFIELD CITY COUNCIL
Committee Report

Report of: DIRECTOR OF LEGAL SERVICES

Date: 29th MARCH 2012

Subject: Applications for village green registration- Kings Croft and Totley Brook playing fields

Author of Report: Julian Ward 0114 273 4001

Summary: To seek decisions on applications for registration of land as village greens

Recommendations: As contained in the report

Background Papers: As referred to in the report

Category of Report: OPEN

Report of the Director of Legal Services to Licensing Board (Commons Registration)

Application for the registration of Kings Croft and Totley Brook Playing Fields by Dore Village Society

1. Background

1.1 Members will recall that on 19th January they deferred consideration of applications for the registration of Kings Croft and Totley Brook playing fields pending further investigations. Attached is a copy of the report to that Board which sets out the background and the legal position on both applications at paragraphs 1 – 5.

1.2 Following discussions with the applicant, it was agreed that it would be appropriate to seek Counsel's opinion on the various legal issues that arose. A copy of his opinion is attached; it has been disclosed to the applicants.

1.3 His opinion can basically be considered as addressing three separate issues:

(i) General comments on the legislation and the legal duties imposed on a Council acting as registration authority (basically paragraphs 1-33).

(ii) Specific comments on the evidence supplied to him (paragraphs 34 – 74).

(iii) His general conclusions (paragraphs 75 – 79).

1.4 The applicant has been afforded the opportunity (as have the landowning departments) of commenting on the opinion. No comments have been received from the landowning departments but comments have been received from the applicant's solicitors in the attached letter dated 14 March.

1.5 These comments have been considered. Points 1 and 2 are largely covered in paragraphs 2 and 3 of this report, although it is agreed that any reference to the 1957 lease should be disregarded.

1.6 Point 3 is considered to be a misrepresentation both of the January report and the legal position. Paragraphs 4.3 and 6.9 of that report made it clear that the Council "would be obliged to consider whether or not the registration should be made if there are outstanding objections" and that if the view were taken that the applications were legally valid "a further report will be

brought to Board at a later stage summarising the application and representations received and recommending how it should be dealt with". The report did not offer any views on the evidence, objections or the weight to be attached to them or any recommendations on whether the application should be granted. In any event to make such a determination without considering the evidence and especially the objections would in my view be unlawful. Paragraph 3 of this report deals in more detail with this.

1.7 The remainder of this report considers in detail the position regarding the two applications, and because they raise separate legal and evidential issues it is important that they are considered separately.

2. Totley Brook Playing Fields

2.1 The land the subject of the application was the subject of two conveyances, one in 1964 (referred to in paragraphs 43 – 45 of Counsel's opinion) and one in 1965 (referred to in paragraphs 49 – 51 of Counsel's opinion).

2.2 Counsel's general view was that both the 1964 and the 1965 conveyance were not acquired under any specific recreational powers (paragraphs 45 and 51).

2.3 He dealt with the question of appropriation in paragraphs 55 -60 and concluded (paragraph 60) that whilst it might well be possible to show that there had been a valid appropriation he had no evidence in front of him to indicate that there had been such an appropriation..

2.4 He made clear (at paragraph 67) that if there was sufficient evidence of a valid appropriation the use would be "by right" rather than "as of right" with the effect that the application would then fail to satisfy the statutory criterion that the use must be "as of right".

2.5 Following receipt of this opinion, a further search of the Council's records was carried out to ascertain whether any such evidence existed.

2.6 Attached to this report are copies of

(i) minutes of the Recreation Committee dated 9th February 1978 which refer to "an appropriation of 2.61 hectares of land in Totley Brook Road from the Housing Committee".

(ii) an internal report of the former Estates Surveyor's Department dated 27th June 1977 setting out the proposed terms for the appropriation and making it clear that the area in question was 2.61 hectares. A file note also attached makes it

clear that the transfer was for the purpose of open space

(iii)appropriation details (file notes dated 20th December 1983 and 21st February 1984) in respect of 780 sq metres of land at the rear of 22 Old Hay Close. The history in the file note makes it clear that the area of land was omitted from the original appropriation, and this was simply being rectified. Members' attention is also drawn to the statement that "authority has been given by both Education and Recreation Departments" to the appropriation.

(iv) a plan showing the area of land comprised in the two appropriations (and taken from the original file) coloured pink and blue

2.7 This evidence needs to be considered against the comments in Counsel's opinion on appropriation (paragraphs 27-33 and 55-67). He considered that it could be implied as well as express and would be sufficient if it referred to recreational purposes generally- there was no need to make a specific reference to the Open Spaces Act.

2.8 In my view, it is clear that the evidence outlined in 2.6 is sufficient to comply with the statutory tests for appropriation and with Counsel's opinion. It demonstrates that

- there has been an express and authorised appropriation
- of all the land shown on the plan referred to in 2.6
- for recreational (Open Spaces Act 1906) purposes

2.9 It therefore follows that any use of the land shown on this plan by the public was "by right" rather than "as of right". The application therefore fails to meet the statutory criteria required and the Council as registration authority cannot take any further action on the application- no question of discretion arises.

2.10 There is no appeal against a decision that the application fails to meet the statutory criteria- the sole remedy is judicial review.

3. Kings Croft

3.1 The land the subject of this application is basically comprised in three conveyances, of which Counsel has had copies and which are referred to in his opinion

3.1.1 "the 1963 conveyance" referred to in paragraphs 38-42 of his opinion

3.1.2 "The October 1964 conveyance" referred to in paragraphs 46-48 his opinion

3.1.3 "The 1971 conveyance" referred to in paragraphs 52 and 53 of his opinion.

3.2 In respect of these conveyances, Counsel's view is that use by the public has not been "by right" in the sense that they had a statutory legal right to do so.

3.3 Although Counsel makes it clear that, at least in respect of the 1971 conveyance, a study of the surrounding circumstances might provide additional information, it follows from his view that he considers that in principle the claimed uses by the public are "as of right" as required by the Commons Act..

3.4 This conclusion is accepted. It is therefore my recommendation that the Board determine that the application for registration at Kings Croft satisfies the criteria in the Commons Act and is therefore a legally valid application which will need to be determined by the Council.

3.5 If the Board accept this view, there are two ways in which such an application can be determined, given that there have been objections to the application.

3.5.1 The Board can itself hold a hearing to determine the application.

3.5.2 A non-statutory local inquiry can be held by an inspector (normally a barrister) appointed by the Council as registration authority. He would submit a report to the Board with his recommendations and it would then be for the Board to formally determine the application.

3.6 In both cases the procedure would be similar – witnesses called by the applicant and the objector department, cross-examination and any relevant legal submissions. Contested hearings of this land can (and frequently do) take several days to be completed.

3.7 Guidance is therefore sought as to which of the two methods is considered more appropriate to determine this application.

4. Recommendations

4.1 That the applicant be informed that its application for registration of Totley Brook playing fields is not valid because the uses claimed do not arise as of right.

4.2 That the applicant be informed that its application for registration of Kings Croft is valid and that arrangements will be made for its determination as required by the Act and regulations.

Lynne Bird
Director of Legal Services

SHEFFIELD CITY COUNCIL
Committee Report

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Report of:	**DIRECTOR OF LEGAL SERVICES**
Date:	**19TH JANUARY 2012**
Subject:	**Application for Village Green Registration – Kings Croft and Totley Brook Playing Fields**
Author of Report:	**Julian Ward 0114 273 4001**
Summary:	**To seek a decision on an application for registration of land as a Village Green**
Recommendations:	**As outlined in the report.**
Background Papers:	**As referred to in the report.**
Category of Report:	**OPEN**

Report of the Director of Legal Services to Licensing Board (Commons Registration)

Application for the registration of Kings Croft and Totley Brook playing fields by Dore Village Society

1. Background

1.1 The Council, at its meeting in January 2011, approved the creation of a Commons Registration Board, with full delegated powers, to exercise the powers and duties of the Council as commons registration authority.

1.2 Pending the setting up of a separate Board, the Licensing Board is exercising the power delegated by the Council.

2. The Law

2.1 Under the Commons Act 2006 and regulations made under it, applications may be made to the Council as the registration authority for the registration as a common or village green of any land in the Council's area.

2.2 The application needs to demonstrate that

- A significant number of the inhabitants of any locality or 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

2.3 If the application satisfies all these criteria then the Council is obliged to register the land as a common or village green. No question of discretion arises and the Council is, in effect, acting quasi-judicially in dealing with the application. If there are objections, or the Council is of a view that the evidence is unclear, then it is obliged to consider whether or not the registration should be made. The parties are entitled to appear before the Board, make representations and cross-examine opposing parties.

2.4 The Council must be able to demonstrate its transparency and show that it acted quasi-judicially. This may change in the future when new regulations under the Commons Act come fully into force.

2.5 There is no power to require a fee or payment from an applicant. The Council will carry the costs of any hearing.

2.6 Members must not allow the fact that the Council may own the land to influence their decision in any way.

3. The Application

3.1 Dore Village Society has made applications for the registration of three separate pieces of land as village greens. The applications related to

- Dore Recreation Ground itself
- Kings Croft (close to Dore School)
- Totley Brook Playing Fields

3.2 Although comprised in one application document they are legally three separate applications and must be dealt with individually.

3.3 This report deals with the applications for the registration of Kings Croft and Totley Brook playing fields (shown on the attached plans edged blue). The application for registration of Dore Recreation Ground is the subject of a separate report.

3.4 All the land the subject of the applications is owned by the Council, with the exception of (i) the land hatched black on the Totley Brook plan, which is leased to the Council for use as a public footpath and (ii) the footpath leading from the Kings Croft site to Furniss Avenue, which is not within the ownership of the Council.

3.5 The conveyances to the Council do not contain any reference to the powers under which the Council acquired the land, but it is clear that the Totley Brook land is held by Parks and Countryside and is used for school playing fields and the Kings Croft land is held by the Children and Young People's service and is within the school curtilage and again used for the purpose of school playing fields.

3.6 A small area of the Kings Croft land coloured red on the plan is actually a building used as a day nursery. It is not considered that this can validly be included in an application for registration as a village green, and the application should be treated as not including that land and the public footpath referred to.

3.7 The regulations made under the Act, and the Act itself, require the Council to register the application and advertise it. This has

3.8 The purposes claimed can generally be summarised as informal recreational activities, team games, community activities and galas. They are claimed to have been carried out for more than 40 years and to still be carried out.

4. The Legal Position on the Application

4.1 The applications comply with the formal requirements as to form and content contained in the Act and the regulations.

4.2 It is not in dispute that the applications show

(a) that a significant number of the inhabitants of the locality or the neighbourhood within it

(b) have indulged in lawful sports and pastimes

(c) for a period of more than twenty years before the date of the application

4.3 If the Council were satisfied that the application satisfied all the legal criteria set out in Section 2.2 above it would be obliged to consider whether or not the registration should be made if there were outstanding objections.

4.4 As in the application for Dore Recreation Ground, the Council is obliged to consider whether the use by the public is "as of right" as required by the legislation. Section 6 in this report deals in detail with this issue, but it must be made clear that if the user is not legally "as of right" then the application must be rejected and merits do not come into it.

5. Procedural Issues

5.1 In situations where the Council is both the registration authority and the owner of the land the subject of the application for registration, it is important to ensure that its internal processes separate those responsibilities

5.2 Arrangements have accordingly been put in place to ensure that the Council's functions as landowner are separated from its role as registration authority, and this report follows those arrangements.

6. "As of Right"

6.1 Where land held by a local authority is the subject of an application for registration as a common or village green, it is necessary to consider whether the powers under which the land is held preclude registration. This preliminary point needs to be determined before there can be any decision on the merits of the application.

6.2 Because of the importance of this issue, external legal advice has been taken, and the legal position set out below is confirmed by Leading Counsel.

6.3 The conveyances under which the Council acquired the land the subject of the applications are silent on the powers used, but since the Council can only acquire land if it has statutory power to do so, it is still necessary to consider the powers which would have been used to acquire the land.

6.4 The statutory powers available to the Council to acquire and hold playing fields, whether for educational or recreational purposes, are contained in section 4 of the Physical Training and Recreation Act 1937 and section 19 of the Local Government (Miscellaneous Provisions) Act 1976.

6.5 Members will recall that in the case of Dore Recreation Ground I advised that the fact that the land was held under implied statutory trusts meant that the use by the public was under those trusts and not "as of right". The question that the Board need to consider is whether these principles are valid for the two applications under consideration (there are no material differences between them).

6.6 It is fair to say that this is not a concluded issue, but it is considered that there are several reasons for coming to the view that similar considerations apply

(i) land forming part of the highway, and therefore subject to the public right to pass and repass has been held not to be capable of registration as a village green because the public use is under the Highways Act rights.

(ii) the powers in sections 4 and 19 contain implied limitations on their use; thus section 19 refers to "outdoor facilities consisting of pitches for team games" and section 4 refers to "use for the purposes of playing fields". General and unrestricted use by the public is not obviously within those powers

(iii) there is clearly a tension between the claimed unrestricted use by the public and the concerns that the school have about the risks to children that would arise from unrestricted use of the playing fields, as well as the conflict between such uses and the school's own use. It is not easy to see how any legitimate concerns that the school might have about the unrestricted use of land within their curtilage or used for playing fields could be addressed in the context of this application. Any restrictions that the school wished to impose, or which Ofsted considered should be imposed, would as a matter of law be overridden by the registered rights. In a situation where a conflict of this nature could arise, and where the law is not clear, there is a strong argument for saying that it would be more appropriate for a court to determine, as a matter of law, that school playing fields and playing fields within the curtilage of a school are capable of registration as village greens, with the legal consequences that that entails, rather than such a potentially far-reaching decision be made by a registration authority.

(iv) this principle of leaving it for a court to determine the legal principles that should guide a registration authority has already been acknowledged in a slightly different context in a case decided by the House of Lords a few years ago, where it decided that a registration authority could seek directions as to the legal principles on which it should determine an application

6.7 It is therefore my view that the uses claimed in the applications arise from the implied trusts and powers under which the lands are held and not"as of right". That means that both Kings Croft and Totley Brook are both precluded from being registered as village greens under the Commons Act 2006.

6.8 If the Board determine this preliminary point against the applicant there is no appeal against that decision. The decision is only subject to judicial review in the High Court, where the issue would basically be whether the Council had misdirected itself in law in determining the preliminary point against the applicant. Should a judicial review application be successful the Council would be obliged to re-determine the application – a successful application would not, of itself, determine that the land in the application was a village green.

6.9 If, however, the Board take the view that the application does satisfy the legal criteria that the use claimed is "as of right" then a further report will be brought to Board at a later stage

summarising the application and representations received and recommending how it should be dealt with.

7 Recommendations

7.1 That the applicant be informed that its applications for registration of Kings Court and Totley Brook playing fields are not valid because the uses claimed do not arise as of right.

Lynne Bird
Director of Legal Services

TOTLEY BROOK

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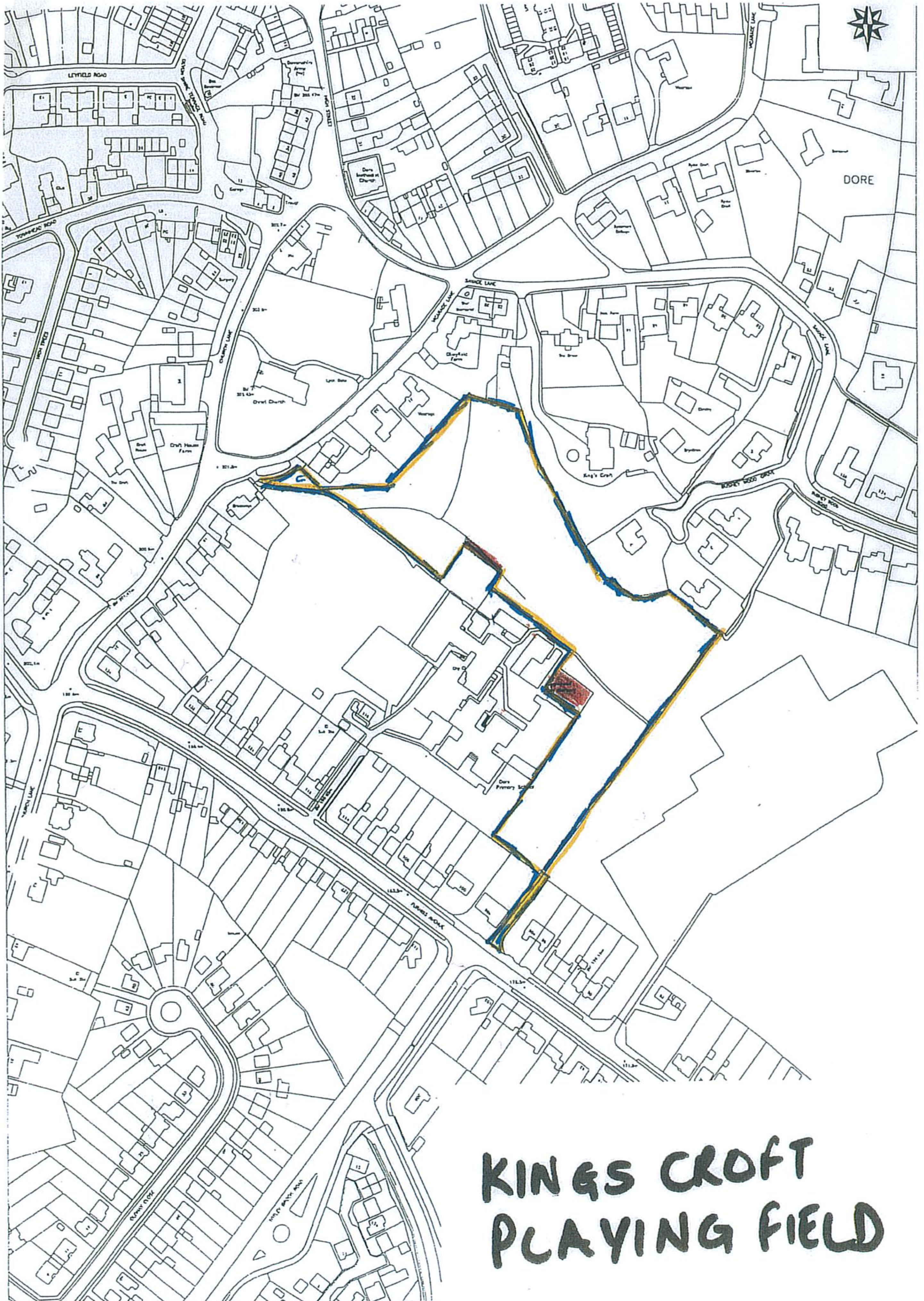
LEYFIELD ROAD
TOWNHEAD ROAD
HIGH STREET
CHURCH LANE
VICARAGE LANE
SAVAGE LANE
Christ Church
King's Croft
Dore Primary School
DORE
KINGS CROFT
PLAYING FIELD
Based upon the Ordnance Survey mapping with the permission of the Controller of Her Majesty's Stationery Office (C) C

In the Matter of

Applications to Register

Land at Dore School and Totley Brook

As New Town or Village Greens

OPINION

of Mr. VIVIAN CHAPMAN Q.C.

23rd February 2012

Lynne Bird,

Director of Legal Services,

Sheffield City Council

Ref Julian Ward/Gillian Duckworth

70177/VRC/12/13/wp/S4/Dore Totley Opinion

In the Matter of

Applications to Register

Land at Dore School and Totley Brook

As New Town or Village Greens

OPINION

of Mr. VIVIAN CHAPMAN Q.C.

23rd February 2012

Introduction

[1] I am instructed by Sheffield City Council in its capacity as commons registration authority (CRA). Applications have been made to the council, as CRA, to register two parcels as land as new town or village greens (TVGs) under s. 15 of the Commons Act 2006 (CA 2006). One is at Dore Primary School (otherwise known as Kings Croft Playing Field) and the other is at Totley Brook. The council is also the owner of the application land, but I do not advise the council in its capacity as landowner.

[2] I am instructed to advise the council only on one point of law, that is to say, whether the applications are bound to fail on the ground that recreational use of the application land by local people has been "by right" rather than "as of right" as required by s. 15.

[3] For the purpose of advising on this narrow point, I have been supplied with copies of the following material:

- A Lease dated 7th February 1957
- A Conveyance dated 20th December 1963
- A Conveyance dated 24th January 1964
- A Conveyance dated 1st October 1964
- A Conveyance dated 19th July 1965
- A Conveyance dated 18th March 1971
- A Report and Valuation dated 12th January 1984
- A Memorandum dated 21st February 1984
- A copy of the plan attached to the Dore School TVG application (entitled "Kings Croft Playing Field")
- An Advice No. 2 of Mr. DE Manley Q.C. dated 17th January 2012
- An email dated 16th February 2012 from Mr. David Cooper.

[4] I have not seen:

- copies of the TVG applications (save for the plan mentioned above)
- copies of the objection statements
- the advice of counsel who previously advised the CRA (mentioned in para. 1 of Mr. Manley's Advice No. 2)
- the officer report to the Licensing Sub-Committee meeting on 19th January 2012 (except for the parts set out in Mr. Manley's Advice No. 2.

The "by right/as of right" issue

[5] Before examining the evidence in detail, I think that it would be useful to set out my understanding of the legal nature of the "by right/as of right" issue, since that is the core issue on which I am instructed to advise.

[6] CA 2006 s. 15, which was brought into force on 6th April 2007, contains the following provisions for the registration of new greens:

*"**Registration of greens***

(1) Any person may apply to the commons registration authority to register land as a town or village green in a case where subsection (2), (3) or (4) applies.

(2) This subsection applies where –

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

(b) they continue to do so at the time of the application.

(3) This subsection applies where –

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

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

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

(4) This subsection applies where –

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

(b) they ceased to do so before the commencement of this section; and

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

[7] I do not know whether the applications in the present case were made under subsections (2), (3) or (4), but whichever limb of s. 15 is relied upon by the applicant, he must establish that recreational use of the application land was "as of right" throughout the relevant 20 year period. It was established by the House of Lords in the *Sunningwell* case[1] that the meaning of "as of right" is "without force, secrecy or permission" or in the time worn Latin expression "*nec vi nec clam nec precario*". However, in the *Beresford* case[2], the House of Lords introduced a further gloss on the expression "as of right". The House of Lords considered that if recreational use of the application land was authorised by some existing legal right, use was not "as of right" but rather "by right" or "of right".

[8] The principal point argued in the *Beresford* case was that recreational use of the application land was by implied permission of the landowner because it had maintained the land as land open to the public and had facilitated and encouraged public use. The House held that there was no implied permission. However, after the case had been first argued, the House invited further argument on the question whether user of the application land was pursuant to some statutory right and hence "by right" rather than "as of right". Counsel for the respondent in effect declined to take the point and therefore the comments of the House on the point are *obiter dicta* (i.e. remarks which do not form part of the reasoning that led to the actual decision). However, although not binding, the comments are plainly of great persuasive force since they come from what was then the highest court in the land.

[9] Before looking at the comments of the law lords, it is necessary to summarise the relevant facts, which are largely set out in the speeches of Lord Scott at paras. 17-19, Lord Rodger at para. 53 and Lord Walker at para. 89:

- In the early 1970s, the application land was acquired by the Washington Development Corporation (WDC) under powers in the New Towns Act 1965. Under that Act the WDC did not acquire the land for any specific purpose and was not obliged to appropriate it for any specific purpose.
- The 1973 Washington New Town Plan envisaged that the land should be used for a sports complex including facilities for which an entry fee would be payable.
- In 1974, the WDC, using excavated soil from another project, laid out and grassed over the land as a sports arena.
- In 1977, the WDC installed a double row of wooden benches around most of the perimeters of the land, sufficient to accommodate 1,100 people. This was to provide seating for the public on the occasion of a royal visit.

1 *R v Oxfordshire County Council ex parte Sunningwell Parish Council* [2000] 1 AC 335

2 *R (Beresford) v Sunderland City Council i[2004] 1 AC 889*

- The land was never fenced and from at least 1977 onwards the public used the land for various recreational activities. The landowner for the time being had always mowed the grass on the land.
- In 1979, the WDC installed a hard cricket pitch on the land.
- In 1989, the WDC transferred the land to the Commission for the New Towns (CNT) as part of a general disposal of the WDC's assets.
- In 1991, the CNT retained the land when other assets were transferred to the city council because it was regarded as having development potential.
- In 1996, the CNT transferred the land to the city council subject to a covenant restricting its use to magistrates' court and/or community health facilities and/or community leisure/recreation and/or other similar community related uses and developments.
- In 1998, the city council granted planning permission for the erection of a college of further education on the land.
- There was no evidence of any formal appropriation of the land as recreational open space by the city council or its predecessors.
- The TVG application was made in 1999.

[10] The members of the House of Lords dealt with the point as follows:

- Lord Bingham said at para. 3 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 was whether a party who lacks a legal right has acquired one by user for a stipulated period. At para. 9 he referred to the further argument heard by the House as to whether user was pursuant to a statutory right to do so. Lord Bingham said that such use would be inconsistent with use as of right.
- Lord Hutton agreed with the reasons of Lord Walker, Lord Bingham and Lord Rodger for allowing the appeal (para. 11). This must, I think, refer only to the implied permission point.
- Lord Scott said at para. 30 that it was accepted that if the council had acquired the sports arena under the Open Spaces Act 1906 (OSA 1906) the local inhabitants' use of the land for recreation would have been under the trust imposed by s. 10 of the 1906 Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class (c) of the Commons Registration Act 1965 s. 22(1) (the statutory predecessor of CA 2006 s. 15). I do not think that Lord Scott meant that use would not be "as of right" because it was subject to regulation but rather that the imposition of the statutory trust had two consequences, first, that user was subject to regulation and, second, that it was not user "as of right".
- Lord Rodger said at para. 62 that the resumed hearing was to consider whether any statute had conferred on the local residents and others a right to use the sports arena with the result that their use would be "of right" as opposed to being "as of right" in terms of CRA 1965 s. 22(1). He said that, on the evidence, there was no such statute.

- Lord Walker said at para. 71 that "as of right" does not mean "of right". It has sometimes been suggested that its meaning is closed to "as if of right". At para. 87 he said that where land is vested in a local authority on a statutory trust under OSA 1906 s. 10, it would be difficult to regard users as trespassers. At para. 88, he said that this was a difficult issue which did not have to be decided in the appeal.

Thus four members of the House in *Beresford* expressed, with varying degrees of conviction, the *obiter* view that recreational use of land pursuant to a statutory right is not use "as of right" for the purpose of establishing a prescriptive green. Although not strictly binding on the CRA in the present case, it seems to me that these views, emanating from the highest authority, ought to be followed. Further, it seems to me that the views are right in principle. The s. 15 new TVG is clearly envisaged by the legislation as based on some sort of prescription. The whole point of prescription is to create a legal basis for a user that has been enjoyed for a long time without any existing legal basis. If user is already under a legal right there is no scope for the operation of prescription.

[11] The only subsequent decided case of which I am aware which has dealt with the point is *R (Barkas) v North Yorkshire County Council*[3]. The court proceeded on the basis that recreational user of the application land under a statute which, so the court held, gave the public a right to use the application land for recreation was use "by right" and not "as of right". It is fair to say that the contrary was not argued. However, the judge expressed no doubts on the point.

[12] The views expressed in *Beresford* of the "as of right/by right" point are treated as correct in the leading modern textbook: *Gadsden on Commons and Greens 2nd. Ed. (2012).* See paras. 14-43 to 14-51.

[13] It is therefore my opinion that, in determining the Dore School and Totley Brook applications, the CRA should reject the applications if it is satisfied that recreational use by local people has been pursuant to a legal right conferred by statute, and, accordingly, is use "by right" and not use "as of right".

[14] Having established this point of principle, the next question is this. How do you decide whether a statute confers a legal right on the public to use land for recreation?

Open Spaces Act 1906

[15] The Open Spaces Act 1906 is an act designed to facilitate the provision of public open spaces by local authorities. "Open space" is defined by s. 20 of the 1906 Act. So far as material for present purposes it means land which is not built on and is used for recreation. Section 7 gives power to any landowner to sell any land (whether already an open space or not) to a local authority for use as a public open space. Section 9 gives power to a local authority to acquire any existing open space. Section 10 provides that a local authority that has acquired open space under the 1906 Act should:

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3 [2011] EWHC 3653 Admin

"...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 for no other purpose..."

Section 15 empowers a local authority which owns open space to make byelaws for its regulation.

[16] Thus, the clear effect of the 1906 Act is that where a local authority has acquired an open space under the Act, the public has a right under a statutory trust to use the open space for recreation subject to any applicable byelaws. In the *Beresford* case, Lord Scott was clearly of the view that if a local authority held land under the 1906 Act, the land would be held on a statutory trust by virtue of s. 10 and the public would not be using the land "as of right" for the purposes of the legislation relating to the registration of new TVGs (paras.29-30). Lord Walker said the same at para. 87. As originally passed, s. 122 of the Local Government Act 1972 (LGA 1972) defined land held in accordance with s. 10 of the OSA 1906 as "public trust" land and provided that the statutory trusts could be overridden by an appropriation of the land to new purposes provided that the proposed appropriation was publicised and objections considered. The LGA 1972 was amended by the Local Government, Planning and Land Act 1980 but provisions to similar effect are now to be found in the amended s. 122(2A). Although an Act of Parliament can no doubt be passed under a misapprehension as to the existing law, LGA 1972 s. 122 (both in its original and amended form) lends comfort to the view that land held in accordance with s. 10 of the OSA 1906 is held on a statutory trust under which the public have a legal right of access for recreation (subject to byelaws).

[17] Thus, if any part of the application land was held at any point during the relevant 20 year period under s. 10 of the OSA 1906, use of that part of the application land for recreation by members of the public (local or not) would be "by right" and not "as of right" for the purposes of the legislation relating to the registration of new greens.

Public Health Act 1875 s. 164

[18] The OSA 1906 is the only statute of which I am aware in which there is an express trust for public recreation. However, it is established that a statute may impliedly confer on the public a legal right to use land for recreation. The best example is s. 164 of the Public Health Act 1875.

[19] Section 164 of the PHA 1875 provides that:

"Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever."

The section goes on to authorize the local authority to make byelaws for the regulation of any such public walk or pleasure ground. The power conferred by s. 164 was extended to all local authorities by LGA 1972 Sched. 14 Part II para. 27.

[20] The 1875 Act does not contain an express statutory trust such as OSA 1906 s. 10, but the courts have construed s. 164 as conferring on the public a statutory right of access for recreation to land held under s. 164:

- *A-G v Loughborough Local Board* The Times 31st May 1881
- *Hall v Beckenham Corporation* [1949] 1 KB 716
- *Sheffield Corporation v Tranter* [1957] 1 WLR 843
- *Blake v Hendon Corporation* [1962] 1 QB 283

The section was not mentioned in the speeches in *Beresford* although *Hall v Beckenham Corporation* was cited in argument (page 892H). LGA 1972 s. 122 (in both its original and amended forms) assumes that land held for the purposes of s. 164 of the PHA 1875 is held on a statutory trust equivalent to that under s. 10 of the OSA 1906. *Gadsden* takes the same view at para. 13-14.

[21] Accordingly, if any part of the application land was held during any part of the relevant 20 year period for the purposes of s. 164 of the PHA 1875, that part would have been used for recreation by local people "by right" and not "as of right" and that part could not be registered as a new green.

Housing Acts

[22] In *Barkas* the court held that if a local authority, under holding powers conferred by s. 80 of the Housing Act 1936, set out a recreation ground open to the public, the public had an implied legal right to use it for recreation.

Other statutes

[23] There are many other statutes which confer on a local authority holding powers which empower a local authority to lay out land for public recreation. An example is s. 19 of the Local Government (Miscellaneous Provisions) Act 1976 (replacing s. 4 of the Physical Training and Recreation Act 1937). These sections have not yet been construed by the court and counsel have expressed different views on their effect. However, it seems to me that it must always be a matter of construction of the statute in question whether or not it impliedly grants the public (or some section of the public) a legal right to use the land for recreation.

[24] It therefore appears to me that a CRA which is considering whether to reject a TVG application on the "by right" ground has in each case to identify the statutory holding power under which the land is held and then to construe the statute to decide whether it grants the public (or a section of the public) a legal right of access to the land for recreation.

[25] However, identification of the relevant holding power is not always an easy exercise. As I see it, identification of the relevant holding power is a two stage process. First, it is necessary to identify the statutory power under which the land was originally acquired. Second, it is necessary to ascertain whether the land has subsequently been appropriated to a new statutory purpose.

Acquisition powers

[26] Sometimes it is easy to ascertain the statutory power under which land was acquired because it is expressly identified in the conveyance or transfer by which the land was acquired by the local authority. However, the conveyance or transfer is often silent on the issue. Since a local authority can only acquire land under some statutory power, it is necessary to consider the surrounding circumstances (including council minutes) in order to infer the identity of the relevant statutory power. See *A-G v Poole Corporation* [1938] 1 KB 716 at 728 and *Beresford* para.30.

Appropriation

[27] Appropriation is a rather esoteric concept of local government law. The origin of it was helpfully explained by Russell LJ in *Dowty v Wolverhampton Corporation*[4]. The underlying rationale is that a local authority is a creature of statute[5] and can only act in accordance with powers conferred upon it by statute. Thus, in *A-G v Hanwell UDC*[6] a local authority compulsorily acquired land for sewage purposes under powers conferred by PHA 1875 s. 175. Some of the land proved unsuitable for sewage use and the local authority wished to use it as a site for an isolation hospital. The court held that a local authority had no power to use land permanently for a purpose inconsistent with that for which it had originally been acquired. As Russell LJ explained, this was inconvenient since it meant that the land had be sold and re-acquired for the new purpose. Therefore parliament conferred on local authorities a power of appropriation, originally exercisable only with the consent of a minister, whereby land that had been acquired for one statutory purpose, but was no longer required for that purpose, could be appropriated to a new statutory purpose for which the land could have been acquired. The current general statutory power of appropriation is to be found in s. 122 LGA 1972 (formerly LGA 1933 s. 163). It includes re-appropriation of land that has already been appropriated to a new purpose.

[28] There have not, so far as I am aware, been many decided cases on appropriation:

- In the *Dowty* case, it was held that a local authority acting in good faith was the sole judge of fact of whether land could be appropriated under LGA 1933 s. 163.
- In *Third Greytown Properties Ltd. v Peterborough Corporation*[7] it was held that land held for the purposes of the OSA 1906 could be appropriated under s. 121(1) of the Town and Country Planning Act 1971 to planning purposes notwithstanding that the land had already been developed. Land remained held for the purpose for which it was acquired unless and until it was appropriated to a new purpose.

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4 [1976] 1 Ch 13 at page 24D

5 It is not necessary for present purposes to consider creation by charter.

6 [1900] 2 Ch 377

7 [1973] 3 All ER 731

- In *Thames Water Authority v. Elmbridge Borough Council*[8] it was held that land could not validly be appropriated under LGA 1933 s. 163 to a new statutory purpose if it was still in use for the purpose for which it was held. It could not be said in those circumstances that it was not required for that purpose.

- In *Oxy-Electric Ltd. v Zainuddin*[9] it was accepted by the judge that, in some circumstances (which did not in fact apply in that case), land could impliedly be appropriated from one statutory purpose to another.

[29] An appropriation is itself the exercise of a statutory power conferred upon a local authority and thus *prima facie* requires to be exercised by some resolution of the local authority or pursuant to some valid delegation by the local authority of statutory powers. However the *Oxy-Electric* case envisages that there can be an implied appropriation. In that case, the judge was faced with two rival arguments. Mr. Carnwath QC (as he then was) argued that appropriation was not a technical term. It merely means that the council applies the land for that purpose. Mr. Roots QC argued that, as an appropriation could only be carried out under a statutory power, it must be a conscious decision or an implicit step in a conscious decision. The judge said that he was *"quite prepared to accept that, if the local authority dealt with the land in such a manner that it could only have dealt with it lawfully if it had made an appropriation, then the resolution need not record such appropriation"*. On the facts, the judge held that there was no appropriation on any basis. The words of the judge are not free from ambiguity but I read his words as saying that there must be a resolution but that the resolution need not expressly record the appropriation if the resolution would only be lawful if it embodied an implied appropriation. If the argument of Mr. Carnwath were right, it would make a nonsense of the concept of appropriation since a local authority could always use land for any statutory purpose without any formal appropriation. In effect, a local authority's land holding powers would become unlimited.

[30] Lord Walker touched upon appropriation in paras. 87-88 of *Beresford*. I think that one must be cautious in putting too much weight on his remarks on appropriation since (a) his remarks were *obiter*, (b) he said that the situations raised difficult issues better left for another occasion and (c) the House was not referred to any authorities on appropriation. However, one can draw two points from his remarks:

- First, he thought that appropriation could be implied as well as express since he said that the evidence did not give grounds for inferring an appropriation of the land as recreational open space
- Second, he thought that there could be a valid appropriation although the precise statutory holding power was not spelt out. He thought it enough if the land were appropriated "for the purpose of public recreation".

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8 [1983] 1 All ER 836
9 22nd October 1990 (unreported)

[31] By s. 101 of the LGA 1972, a local authority can delegate its functions to committees. It appears that Sheffield City Council, in the usual way, did indeed have committees to which it delegated many of its functions. No doubt, the council has now adopted a cabinet structure under the LGA 2000 and many of the matters previously dealt with by committees are dealt with by newly formed departments which are perceived as successors of the relevant committees. However, the claimed appropriation in this case was before 2000.

[32] It was the practice with many local authorities to regard committees and departments as "owning" land. However, this is a metaphorical use of "ownership". All council land is owned by the council. What the metaphor means, as I understand it, is that the statutory functions of the local authority in relation to that land are principally exercised under delegated powers by that committee or department. Thus a park might be regarded as "owned" by a parks committee because it is that committee to which the council's statutory functions in relation to parks has been delegated.

[33] Where land is appropriated from one statutory purpose to another under LGA 1972 s. 122, it will often be the case that the council's statutory functions in relation to that land cease principally to be exercised by one committee and are thereafter exercised by another committee. Applying the metaphor, the "ownership" of the land has been transferred from one committee to another. However, this will not always be the case. For example, there might be an appropriation of land from public open space use to use as a public swimming pool. However "ownership" would be retained by a parks and baths committee whose delegated functions cover both parks and swimming pools. Equally, there might be a transfer of "ownership" of land from one committee to another without any appropriation under LGA 1972 s. 122 in circumstances where the remit of different committees was reorganised so that the statutory functions exercised by one committee were transferred to another committee. Historically, some officers of local authorities used the word "appropriation" to refer not only to appropriation under LGA 1972 s. 122 but also to the transfer of "ownership" of land from one committee to another. Thus, in many cases, including the present one, I have come across examples where it is said that land has been "appropriated" from one committee to another, or by one committee from another. I think that it is important to distinguish between these two uses of the word "appropriation".

The evidence

[34] I now turn to consider the evidence supplied to me. For the reasons explained above, it seems to me that the questions one has to ask when considering this evidence are:

- Under what statutory power was the land acquired?
- Has the land subsequently been appropriated to some new (and if so what) statutory holding power?

- Has the land been held during the relevant 20 year period[10] on a statutory holding power which confers upon the public (or some section of the public) a legal right to use the land for recreation?

1957 Lease

[35] Under the 1957 Lease, Mr. Dyson leased to the City of Sheffield 286 square yards of land forming a narrow strip of land leading from Newfield Crescent to the Dore Recreation Ground. The statutory power under which the lease was taken was not specified in the lease. Clause 2(6) contained a lessee's covenant to use the demised property only for the purpose of a public access footpath from Newfield Crescent to the Dore Recreation Ground.

[36] The 1957 Lease is not specified in my instructions as a title deed forming part of the title to the Dore School application land. I therefore infer that it forms part of the Totley Brook Playing Fields application land (for which I do not have the application plan).I see from Mr. Manley's Advice No. 2 that the Dore Recreation Ground was acquired from Norton RDC which had acquired the land pursuant to s. 164 of the PHA 1875. I do not follow Mr. Manley's reference to s. 12 of the OSA 1906, but it appears to me that, if the Dore Recreation Ground was held under s. 164 of the PHA 1875, the land subject to the 1957 Lease must have been acquired under the same section as being ancillary to the use of the Dore Recreation Ground as a public walk or pleasure ground.

[37] Thus the land subject to the 1957 Lease was held under a statute which did confer a right of public access for recreation. For that reason, it does not seem to me that it can be registered as a new green.

1963 Conveyance

[38] The 1963 Conveyance to the City of Sheffield was of some 7 acres of land. I understand that part of this land is within the Dore School application land. I can see the overlap on comparing the 1963 Conveyance plan with the Dore School TVG application plan (entitled Kings Croft Playing Field).

[39] Recital (2) to the 1963 Conveyance expressly states that the land was acquired for educational purposes under the Education Acts 1944-53. Sections 8 and 9 of the 1944 Act impose on local authorities a duty to provide sufficient schools and a power to establish them. This includes school playing fields (s. 53). There is a power of compulsory acquisition of land for educational purposes (s. 90) and so a local authority clearly had power under the Education Acts to buy land for use as school playing fields. I can see nothing in that legislation which gives the public (or any section of the public) a legal right of access for recreational purposes to land held under those Acts. Indeed, it is hard to see how such a right

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[10] As I do not have the applications I do not know the precise 20 year periods involved but it makes no practical difference in the present case. I understand that the applications were made in 2008. Since the last piece of evidence relied upon was in 1984, even if the applications were made under s. 15(4), the whole or most of the 20 year period must be after 1984.

would be consistent with use for educational purposes. It does not appear that the objector has identified any particular section in that legislation that it relies upon.

[40] It is said in Mr. Manley's Advice No. 2 that there is an internal officer report in which it is stated that the land was acquired under s. 4 of the Physical Training and Recreation Act 1937. If so, I think that the report is incorrect. It is clear from the terms of the 1963 Conveyance that the land was acquired under the Education Acts 1944-53.

[41] It is not suggested that this land has ever been appropriated to a new statutory purpose.

[42] It follows, in my opinion, that if local people have used this land for recreation they have not done so "by right" in the sense that they had a statutory legal right to do so.

January 1964 Conveyance

[43] The January 1964 Conveyance to the City of Sheffield was of some 12 ½ acres. This conveyance is not mentioned in my instructions as part of the title to the Dore School application land, and so I infer that it forms part of the Totley Brook Playing Fields application land (of which I do not have the application plan).

[44] Recital (3) to the January 1964 Conveyance expressly states that the land was acquired under powers conferred by the Education Acts 1944 and 1959 (and Acts incorporated therewith) for educational purposes.

[45] It seems to me that the January 1964 Conveyance is on all fours with the 1963 Conveyance. Subject to the issue of subsequent appropriation (which I deal with below), I consider that the holding power was not one which gave the public, or a section of the public, a legal right to use the land for recreation, so as to make that use "by right".

October 1964 Conveyance

[46] The October 1964 Conveyance to the City of Sheffield was of some 1.4 acres. I am instructed that the land is part of the Dore School application land.

[47] Recital (2) to the October 1964 Conveyance expressly states that the land was purchased in pursuance of powers conferred by the Education Acts 1944-53, the Acquisition of Land (Authorisation Procedure) Act 1946 and the Sheffield Education Authority (King Egbert Secondary Modern School) Compulsory Purchase Order 1962. The 1946 Act and the 1962 CPO simply deal with compulsory purchase, which, as I have noted above, was authorised by the 1944 Act. It seems to me clear that the land was purchased under and for the purposes of the Education Acts. The conveyance is on all fours with the 1963 and January 1964 Conveyances.

[48] It follows that the statutory holding powers conferred no legal right on local people (or any other members of the public) to use the land for recreation. It is not suggested that this land has been subject to any subsequent appropriation. It follows that recreational use of this land by local people has never been "by right".

1965 Conveyance

[49] The 1965 Conveyance to the City of Sheffield was of some 11.4 acres. My instructions are that this conveyance is not part of title to the Dore School application land. I therefore understand that it is part of the Totley Brook application land (of which I do not have the application plan).

[50] There is no clue in the conveyance as to the statutory power under which the land was acquired or was intended to be held. In order to identify the statutory power it would be necessary to research into the surrounding circumstances, including council minutes. It might, for example, have been purchased under the Education Acts for use as school playing fields.

[51] Subject to any subsequent appropriation (with which I deal below) all one can say on present evidence is that the objector has not demonstrated that the land was acquired under a statutory power that gave local people (or the public) a legal right of access to the land for recreation.

1971 Conveyance

[52] The 1971 Conveyance to the City of Sheffield was of some 4.5 acres. My instructions are that the 1971 Conveyance is part of the title to the Dore School application land. By contrast, in his Advice No. 2, Mr. Manley says that the 1971 Conveyance was the acquisition of the Totley Brook application land. Looking at the 1971 Conveyance plan and the Dore School TVG application plan (entitled Kings Croft Playing Field), it certainly seems to me that some of the 1971 Conveyance land is included within the Dore School application land. As I do not have the Totley Brook TVG application plan, it is, I suppose, possible that part of the 1971 Conveyance land also falls within the Totley Brook TVG application land.

[53] The 1971 Conveyance recites that the purchase was pursuant to a purchase notice served by the vendors on the City under s. 129 of the Town and Country Planning Act 1962. Section 129 is within Part VIII of the 1962 Act which entitled the vendors to require the City to purchase the land on the ground that the land had become incapable of reasonably beneficial use by reason of the refusal of planning permission or its grant subject to conditions. The scheme of Part VIII was that the acquiring authority was treated as compulsorily acquiring the land under a statute which conferred appropriate compulsory powers. The 1971 Conveyance contains no clues as to what that enactment was. It is therefore necessary to study the surrounding circumstances (including council minutes) to ascertain the statutory purpose for which the land was acquired. For example, it might have been purchased with a view to use as school playing fields and hence under the Education Acts. All that one can say, on present evidence, is that the objector has not proved that the land was acquired under statutory powers which conferred on local people (or the public) a statutory right to use the land for recreation.

Legal position before appropriation

[54] Pausing to take stock of the legal position before the 1984 appropriation, it appears to me that, on the available evidence, only the land subject to the 1957 Lease was subject to a

statutory right of public access for recreation with the consequence that recreational use by local people was "by right" rather than "as of right".

1984 Appropriation

[55] The evidence of an appropriation in 1984 is very unsatisfactory in three respects.

[56] First, there is no adequate identification of the land intended to be appropriated. The valuation refers to a plan, which is missing. The valuation and memorandum refer to a site area of 780 square metres and to a small irregular shaped grass covered site on a slight slope. The memorandum says that the land to be appropriated was acquired on 19th July 1965, but I understand from my instructions that title is also found in the 1957 Lease and the January 1964 Conveyance. As mentioned above, Mr. Manley thought that the title was based on the 1971 Conveyance. It seems to me that, if the objector is to rely on appropriation, it must produce some more cogent evidence to establish exactly what land was appropriated.

[57] Secondly, both the valuation and the memorandum betray some confusion between statutory appropriation under s. 122 of the LGA 1972 and the transfer of responsibility for land between committees. For example, the valuation refers to an appropriation from Education Committee to Recreation Committee and the memorandum refers to "holding committee/statutory purpose" as "Education Programme Committee (Education Acts 1944-81)" and the "transferee committee/statutory purpose" as "Recreation Programme Committee (Open Space Act 1906)". The memorandum refers to the "appropriation powers" as being "Open Spaces Act 1906" when the statutory power of appropriation was under s. 122 of the LGA 1972.

[58] Third, the objector has not produced any evidence of an actual statutory appropriation. As explained above, it seems to me that a statutory appropriation under s. 122 of the LGA 1972 requires a resolution or resolutions effecting the appropriation. There are, I think, three possibilities:

- There may be a resolution of the full council which expressly or impliedly effects an appropriation
- There may be a resolution of the full council which delegates the power of statutory appropriation to a named committee coupled with a resolution of that committee which expressly or impliedly effects an appropriation
- There may be a resolution of the full council which delegates the power of statutory appropriation to all committees in matters within their remit, coupled with a resolution by the relevant committee which expressly or impliedly effects an appropriation.

Any such resolutions are matters of public record and can be traced in the council archives. I do not think it would be safe to infer an appropriation from the unsatisfactory materials provided when it should be possible to produce the relevant resolution or resolutions.

[59] That said, it is perfectly possible that the objector could, with the necessary researches, establish that some of the application land was appropriated in 1984. The available evidence suggests that any appropriation was to the purposes of the OSA 1906, and, if so, that Act would confer on the public a legal right of access to the appropriated land for recreation and render subsequent public recreational use "by right" rather than "as of right"

[60] On the question of appropriation, I conclude that the objector may well be able to show an appropriation of some of the application land to the purposes of the OSA 1906 in 1984 with the result that use after appropriation was "by right" but it has not yet produced satisfactory evidence of that appropriation.

2012 email

[61] The email dated 16th February 2012 from Mr. David Cooper raises four points.

[62] The first point is that Totley Brook Open Space has been managed as public open space for at least 20 years up to 2008. I do not think that this is decisive for the purposes of a TVG application. The sports arena in *Beresford* was also managed as a public open space but that did not preclude registration as a new green. The critical question is whether the public had a legal right of access to the land for recreation at some point during the relevant 20 year period.

[63] The second point is that the Totley Brook Open Space is used mainly by dog walkers and for informal recreational use. It was established by the decision of the House of Lords in the *Sunningwell* case that informal recreation, such as walking, with or without dogs, and children's play amounts to lawful sports and pastimes within the meaning of what is now s. 15 of the CA 2006. There is no need for organised sports. Accordingly, the perceived recreational use of Totley Brook Open Space is not inconsistent with registration as a new green.

[64] The third point is that the Totley Brook Open Space has a site character of urban/rural edge leading into open countryside. It was established by the House of Lords in the *Trap Grounds* case[11] that there is no required site character for a new TVG. It need not correspond with the traditional perception of a village green. Rough urban fringe land is, in my experience, now the normal site character of a new TVG.

[65] The fourth point is that the Totley Green Open Space has been regularly maintained by the council, with grass cutting etc. However, it was established in the *Beresford* case that the fact that the landowner encourages and facilitates use of a claimed green by maintaining it does not preclude registration as a new green.

[66] I conclude that none of the points raised by Mr. Cooper constitute matters which militate against registration of land as a new green.

Conclusion on evidence

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[11] *Oxfordshire County Council v Oxford City Council & anor* [2006] 2 AC 674

[67] On review of the evidence, I conclude as follows:

- The land subject to the 1957 Lease is not registrable as a new green because it has at all material times been held for the purposes of s. 164 of the PHA 1875, which gives the public a legal right of access for recreation
- Such land as was appropriated to the purposes of the OSA 1906 in 1984 is not registrable as a new green because public recreational user after appropriation was "by right" but the objector has not yet adduced satisfactory evidence that there was such an appropriation or, if there was, exactly what land was subject to it.
- In relation to the rest of the application land, there is no evidence that the land was held on a statutory trust for public recreation so as to make recreational use "by right" instead of "as of right"

The specific questions

[68] I am asked four specific questions in paras. 9 & 11 of my instructions.

Question 9

[69] I do not consider that the powers referred to in the conveyances are sufficient to enable the council, as CRA, to take the view that the public uses claimed in the application for registration[12] arose "by right" rather than "as of right". All the powers expressly specified in the conveyances are educational and I do not see that the Education Acts confer on the public any statutory right of access for recreation to land held for educational purposes.

[70] I do however consider that the evidence supports the view that the land subject to the 1957 Lease is not registrable as a new green because, subject to the possible 1984 appropriation onto the OSA 1906, it has at all material times been held for the purposes of s. 164 of the PHA 1875, which gives the public a legal right of access for recreation. If there was a valid appropriation of this land in 1984, recreational user would have continued to be "by right" under the 1906 Act.

[71] I do not consider that evidence of actual use is relevant to the question whether user was "by right". The relevant question is not what use was made of the land but whether the public had a legal right to use it. This essentially turns on analysing the effect of the historical documents.

Question 11(i)

[72] The answer is "no". 780 square metres of the application land may have been appropriated to the purposes of the OSA 1906 in 1984 but the objector has not yet adduced satisfactory evidence that there was such an appropriation or, if there was, exactly what land was subject to it.

Question 11(ii)

[12] I have not seen the applications for registration but I infer that they allege recreational use of the application land by local people

[73] If there were satisfactory evidence of an appropriation in 1984 of some of the application land onto the purposes of OSA 1906, I consider that recreational use of that land would be "by right" after appropriation.

Question 11(iii)

[74] I do not consider that evidence of how the land was used by the council is relevant to the question whether recreational use by local people was "by right" unless, in unusual circumstances, it is evidence relevant to (a) deciding under what statutory power land was impliedly acquired or (b) deciding whether a resolution of the council or a relevant committee involved an implied appropriation. It is not possible to say in the abstract what types of evidence would be necessary. I do not consider that the contents of the 2012 email assist one way or the other

Action

[75] In my opinion, the Licensing Sub-Committee cannot reject the applications out of hand on the ground that recreational use by local people has been "by right"

[76] Mr. Manley suggests that Sheffield City Council should delegate the decision of the TVG applications to another local authority. This can be done under LGA 1972 s. 101 and, in my experience, is sometimes done where the CRA is also the landowner. Certainly, it is the safest way of avoiding any challenge to a decision on the ground of conflict of duty and interest. However, there have been many cases where a CRA has determined an application where it is also the landowner and I am not aware that such a decision has ever so far been challenged on the ground of conflict of duty and interest. Normally a CRA which is also the objecting landowner seeks to neutralise the decision-making process by appointing independent counsel to advise and, if necessary, to hold a non-statutory public inquiry.

[77] If Sheffield City Council decides not to delegate the determination of these TVG applications, the question arises of how it should deal with them.

[78] It appears to me that there are a number of imponderables in this case. Can the objector prove the 1984 appropriation? If the objector cannot rely on the "by right" point, are there other grounds of objection to the applications, and, if so, do they raise factual disputes which require resolution at a non-statutory public inquiry?

[79] Since Sheffield City Council as CRA is duty bound to act neutrally and in a quasi-judicial capacity, I consider that complete transparency is the best way forward. I recommend that a copy of this Opinion is supplied to the applicant and objector with an invitation to submit any further submissions and evidence within 28 days of receipt. In the light of the further submissions and evidence, Sheffield City Council (as CRA) can decide whether the applications can be disposed of on paper or whether a non-statutory public inquiry is required.

Vivian Chapman QC

23rd February 2012

9, Stone Buildings,

Lincoln's Inn,

London WC2A 3NN

SHEFFIELD CITY COUNCIL

RECREATION COMMITTEE

Meeting held 9th February, 1978

PRESENT: Councillors Watson (Chairman), Arnold, Barker, Cauldwell, Fisher, Mrs. Filter, Marshall, Moscrop, G. Roy Munn, Nicholls, Prince, Richardson, Mrs. Saddington and Verhaert.

....

1. MINUTES OF THE LAST MEETING

It was reported that the minutes of the meeting held on the 12th January, 1978, were confirmed by the City Council on the 1st February, 1978, with the exception of item 8 relating to a review of the classification and charges in respect of facilities for outdoor team games.

2. SHEFFIELD SHOW

Meeting of the Sheffield Show Sub-Committee

RESOLVED: That the following minutes be approved:-
(Minutes of the meeting of the Sheffield Show Sub-Committee held on the 16th January 1978.)

[illegible]

RESOLVED: That the [illegible] for the provision of seating for the Sheffield Show 1978, in accordance with the details now reported, for the sum of £[illegible],[illegible]62 including V.A.T. be accepted. (Revenue Budget - J3, Item 7).

3. JOINT SUB-COMMITTEE (EDUCATION, LIBRARIES AND ARTS AND RECREATION)

RESOLVED: That, subject to the concurrence of the Education and Libraries and Arts Committees, the following minutes be approved:- (Minutes of the meeting of the Joint Sub-Committee (Education, Libraries and Arts and Recreation) held on the [illegible] January, [illegible].)

4. [illegible]

The Committee received the [illegible] [illegible]

[illegible]

(b) [illegible] be given for the provision of [illegible] hospitality and transport on this occasion.

5. [illegible]

The Head of Administration and Legal Department submitted a petition received by the City Council, organised by the [illegible] Tenants' Association, containing [illegible] signatures and requesting [illegible]

[illegible] the City Council.

Recreation Committee Meeting 9.2.78

(i) .12 hectares of land off Beaver Hill Road, Woodhouse, from the Housing Committee;
(ii) 13.34 hectares of land at Fox Lane and Birley Lane from the Housing Committee;
(iii) 4,160 square metres of land between Tithe Barn Lane and Revill Lane, Woodhouse, from the Housing Committee;
(iv) 2.61 hectares of land in Totley Brook Road from the Housing Committee;
(v) 4.55 hectares of land at various sites in the Westfield Township, from the Housing Committee;
(vi) 1.36 hectares of land between Beaver Hill and Retford Road from the Education Committee and
(vii) 1.12 hectares of land between Beaver Hill and Retford Road from the Corporate Estate Committee; and

(b) the Estates Surveyor be authorised to negotiate with the Yorkshire Water Authority, compensation to be paid by that Authority in respect of sewers to be constructed in lands at (i) Ecclesfield Park (rear of Church Street) (ii) Chapeltown Park (Cowley Lane/Blackburn Brook) and (iii) Charltonbrook Open Space, High Green.

J Watson
CHAIRMAN
9.3.78

VS/DIJ/E.8564 AA

27th June, 1977

REPORT AND VALUATION

Circular 48/76 - Dorner Provisions
Land in Totley Brook Road
Proposed Appropriation

BORNER

(6)

Location: Land in Totley Brook Road.

Proposal: To appropriate the land from the Housing Committee to the Recreation Committee.

Area: 2.61 hectares.

Interest: Freehold.

Town Planning Zoning: White land on development plan, however, part of the land was included in an area granted residential planning permission on appeal against a Certificate of Alternative Development in 1964. The remainder of the land has a designated agricultural/open space user.

Details of Purchase: Part of large parcel of land acquired under the Education Acts from the Trustees of J. Tyzack. 11.41 acres in total, residentially zoned purchased at approximately £6,500 per acre, agricultural/open space at a nominal figure. Date of purchase 19th July, 1965.

Previous Appropriation: Part of 16.1 acres appropriated from Education to Housing in March, 1969. £12,000 per acre residential, £400 per acre agricultural.

Description: The site has an overall gentle slope to the south, although this slope is accentuated nearer Old Hay Brook before generally flattening out alongside the Brook which forms the Southern boundary of the site. Adjoining Totley Brook Road at its south eastern end, the site's other boundaries are formed by a stone wall and barbed wire fence on the western side and by post rail fencing on the eastern side separating the site from the Council's recent housing development. The site is generally overgrown, particularly near the Brook where there are large numbers of mature trees. Part of the site has been used for dumping earth, presumably from the Council's housing development. There is a footpath running from north to south down the site which is linked with a tarmac footpath at the northern end of the site running through to Totley Brook Road.
Plan No.: A/N 886

Valuation: A) Residential zoned land

Access available at the north end of the site. This land was specifically designated residential by the Minister of Housing and Local Government on appeal in 1964. It comprises an area of approximately .83 hectares (2.05 acres) and falls between the new estate and the public footpath stopping about 60m from the brook. The adjoining Council development was based on a density of 229 bedspaces/ha which would imply a density of approx. 190 bedspaces for this area. However, the relatively narrow elongated nature of the site may reduce the development density potential. The recently auctioned site in Totley Brook Road is almost directly comparable in that it also adjoins the Council's development. This site realised approx. £90,000 per hectare at auction in March, 1977. The auction site's regular shape and frontage onto Totley Brook Road would be likely to make development costs such as provision of access roads

and connection to services less costly than the subject area.

.83 ha at £90,000 per ha. £74,700

<u>Less</u>

Cost of construction of access road, 145m at £90 p.m. run (Verbal estimate of costs from Quantity Surveyors Section) <u>£13,050</u>

£61,650

B. <u>Agricultural/Open Space Zoned Land</u>

1.78 ha at £1,200 per ha. £2,136

Compare:

Auction sale of agricultural land by Siddall and Reynolds, 28th September, 1976. 18.51 acres in Baslow Road sold with vacant possession for £14,500 i.e. £783 per acre. The figure adopted in this instance for the subject area is approximately £500 per acre, the subject land being a much less viable agricultural unit - particularly with such close proximity to substantial residential development - than the comparable land.

Total transfer value £61,650 + £2,136
= £63,786

<u>Say £63,800</u>

VALUATION	APP'D BY	DATE
VALUER [illegible]	[illegible]	6/7
CH. ASSIST	[illegible]	6/7
AES. CHECKED	[illegible]	
AES. NOT CHECKED	[illegible]	4/10
SAES (V)		
E.S.		
OPEN NEGS	[illegible]	4/10

268

APPROPRIATIONS

(A) 0/F

COMMITTEE:	Housing	Date: 19th October, 1977.	Item No.	Report to
		File: E.8564.A.A.	11(P)	FEKS
NAME OF A/C.:	Statutory	From: D. I. Jamison	Valuer	Sect. Head	A.E.S.

Location:	Land in Totley Brook Road
From:	Housing Committee
To:	Recreation Committee
Area:	2.61 hectares
Interest:	Freehold
Transfer Value:	£63,800
Holding Committee/ Statutory Purpose:	Housing Committee, Statutory
Transferee Committee/ Statutory Purpose:	Recreation Committee, Open Space
Effective Date:	~~7th December, 1977~~ 1st March 1978
Financial Provision:	1977/78 Page ~~86~~ 54 Item ~~16~~ 13
Description:	Part grassed, part overgrown site which slopes gently towards the south before flattening out along Oldhay Brook
Date of original acquisition:	19th July, 1965
Appropriation Powers:	Sheffield Corporation (Consolidation) Act, 1918
Plan No.:	A/N886
Town Planning Zoning:	Part residential, part agricultural/open space user
Existing Use:	Overgrown and unused
Proposed Use:	Public open space
Details of easements/ covenants/rights/etc.:	N/A
Future fencing responsibilities:	Receiving Committee
*Valuation/Remarks Borner Valuation attached	Transfer Value say £63,800
	For valuation and comparables, see attached Borner Report and Valuation.

*Delete as appropriate

APPROVED BY COMMITTEE - 6 FEB 1978

DJB

2c/177/93322 Agenda copy sent for filing on 1.3.78 by D Jamison

REPORT AND VALUATION

Proposed Appropriation
Land at Totley Brook Open Space
Education Committee to Recreation Committee

Proposal: To appropriate the area of land coloured blue on the attached plan, to the rear of 22 Old Hay Close.

Transaction: Appropriation from Education Committee to Recreation Committee.

Site Area: 780 m^2 (0.078 hectares)

Interest: Freehold

Powers: Open Space Act 1906

Use: Amenity open space

Description: A small irregular shaped grass covered site on a slight slope.

History: The land described (marked blue) together with the adjoining land (marked pink) was originally acquired in 1965 by Education Committee. At the time the proposed Dore by-pass was to run immediately adjoining the southern boundary of the subject area (marked blue).

When the land was appropriated from Education Committee to Housing Committee in 1976 the subject area was not included. A further appropriation of the pink land from Housing Committee to Recreation Committee took place in 1977.

The proposed appropriation will transfer to the Recreation Committee the small area which has been previously omitted.

The adjoining land is situated within the recently designated "Green Belt" and subsequently Planning Department has indicated there is no development potential.

Valuation: Rental value

780 sq.m. @ 1.25p p.s.m. per annum = £9.75

say £10.00

Capitalised at 10 Y.P. 10

Capital value say £100

Compare: Land at Jordanthorpe Parkway

An area of grassland zoned for recreation/amenity open space use, similar to the subject site. Valued in January 1983 at £1,250 per hectare which devalues at 10 Y.P. to 1.25p per annum per metre squared.

Land off Hemsworth Road

An area of 653 m^2 of grassland/open space which has recently been valued on the basis of 1.25p per annum per metre squared. This land was grassland used for an extension to Lees Hall Golf course.
Both comparables are similar to the subject area being used for amenity open space.

VALUATION	APP'D BY	DATE
VALUER	[illegible]	23/12/83
CH. ASS[illegible]	[illegible]	23/12/83
BOR[illegible] COMM[illegible]	12 JAN 1984	
S.A.		
E.S.		
OPL[illegible]	12 JAN 1984	
[illegible]	1714	

Authority to Appropriate: Authority has been given by both Recreation and Education Departments.

LW

APPROPRIATIONS

(A) O F

COMMITTEE:	Building & Contracts Sub	Date: 21st February, 1984	Item No.	Report to MARCH
		File: E.8564 AA		
NAME OF A/C.:	Education	From: D. Fleming	Valuer	Sect. Head	A.E.S.

(7)

Location:	Land at Totley Brook Open Space
From:	Education Programme Committee
To:	Recreation Programme Committee
Area:	780 sq.m. (0.078 hectares) or thereabouts
Interest:	Freehold
Transfer Value:	£100
Holding Committee/ Statutory Purpose:	Education Programme Committee (Education Acts 1944-81)
Transferee Committee/ Statutory Purpose:	Recreation Programme Committee (Open Space Act 1906)
Effective Date:	4th April 1984
Financial Provision:	Subject to Budget Sub-Committee approval
Description:	A small irregular shaped grass covered site on a slight slope
Date of original acquisition:	19th July, 1965
Appropriation Powers:	Open Space Act, 1906
Plan No.:	A/W 6692
Town Planning Zoning:	Green Belt
Existing Use:	Public Open Space
Proposed Use:	Public Open Space
Details of easements/ covenants/rights/etc.:	-
Future fencing responsibilities:	Receiving Committee
*Valuation/Remarks Borner Valuation attached	See attached Borner Report and Valuation

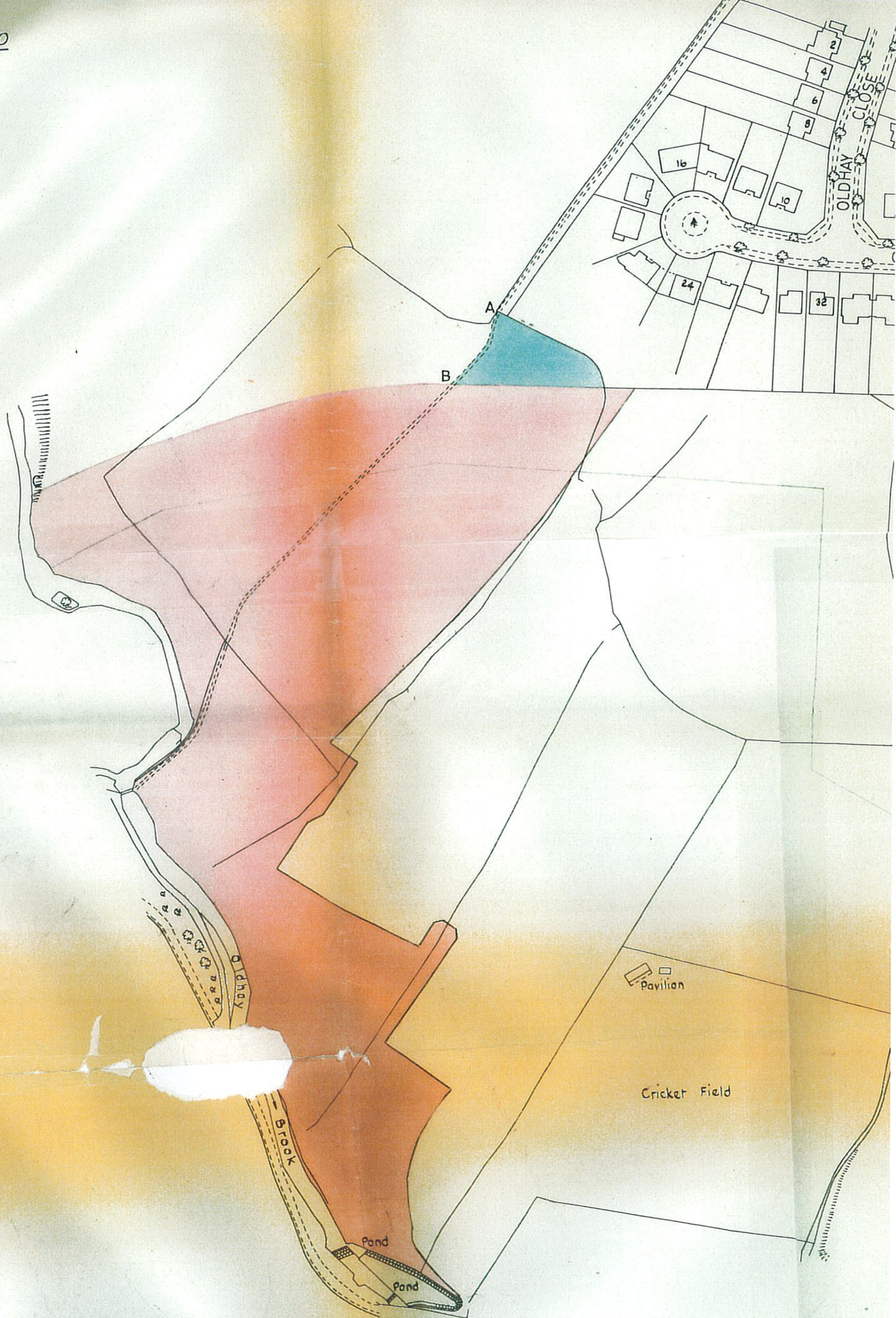
*Delete as appropriate

APPROVED BY
BUILD. & CONTRACTS
Panel/~~Sub.~~ Cttee 9.3.84

Programme Cttee ....

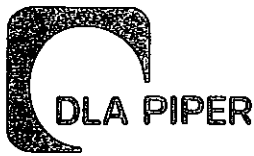
R6015 LW Agenda copy sent for filing on 30/4/84 by D Fleming

ERRED TO



EA COLOURED PINK 2·61 Ha
" " BLUE 780 SQ.Ms.(0·078 Ha)

SCALE - 104·16



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Your reference

Our reference
EKW/EKW/97593/120001
UKM/40424914.1

14 March 2012

Dear Sirs

COMMONS ACT 2006 SECTION 15
DORE VILLAGE SOCIETY
APPLICATIONS FOR REGISTRATION OF VILLAGE GREENS

We write following the receipt of Leading Counsel's opinion dated 23 February 2012 (**"Opinion"**) in respect of the King's Croft and the Totley Brook village green applications. We are invited to make comments/further submissions in respect of the Opinion which we set out below:

1. The Opinion undertakes a detailed analysis of the evidence submitted with the Instructions and concludes that such evidence is not sufficient to demonstrate that the land the subject of the applications was held on statutory trust for public recreation so as to make recreational use "by right" instead of "as of right".

   Therefore, we agree with statement at paragraph 75 of the Opinion that the applications cannot be rejected on grounds of legal invalidity.

2. We note that Leading Counsel had some difficulty in reconciling a 1957 lease with the sites as he had not been provided with the relevant plans which accompanied the applications. Leading Counsel therefore inferred that the 1957 Lease related to Totley Brook Playing Fields (see paragraph 36 of the Opinion). Whilst this was not an unreasonable inference given the matters upon which Leading Counsel was asked to advise we can confirm that the lease is not relevant to either application site as it relates to an piece of land just outside the Dore Recreation Ground application site.

   We would therefore ask that all references to the 1957 lease are disregarded.

3. The Opinion suggests that the Registration Authority can decide whether the applications can be disposed of on paper or whether a non-statutory public inquiry is required (paragraph 79). Should the Registration Authority agree that the applications cannot be rejected on the basis of legal invalidity then we submit that the applications should be granted on the basis that the evidence put forward meets the statutory tests. This point has already been expressly noted in the Registration Authority's report to the Licensing Board dated 19 January 2012 (see paragraph 4.2 of the enclosed report).

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INVESTOR IN PEOPLE

4. The Dore Village Society reserves its right to make further submissions should the Council in its capacity as landowner seek to put forward further evidence.

We look forward to receiving a copy of any further submissions made on behalf of the Council as landowner and a copy of the report to the 29 March Licensing Board meeting in due course.

Yours faithfully

DLA Piper UK LLP

DLA PIPER UK LLP