The Planning Inspectorate

Application Decision

Inquiry opened on 18 September 2014 and resumed on 7 July 2015

by Alison Lea MA(Cantab) Solicitor

An Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs.

Decision date: 22 September 2015

Application Ref: COM 493

- The application, dated 9 February 2010, is made under section 15(2) and section 15(3) of the Commons Act 2006 ('the 2006 Act').
- The application is made by Janine Bebbington.
- The application is for land at Moorside Fields, Lancaster to be registered as a town or village green.

Decision

1. Consent is granted in part in accordance with the application dated 9 February 2010 and the plan submitted with it. The land hatched red and marked A, B, C and D on the plan shall be added to the register of town or village greens. The application is refused in respect of Area E. For the purposes of identification only a copy of the application plan is attached to this decision.

Preliminary Matters

2. The application to register Moorside Fields as a town or village green was made by Janine Bebbington. Lancashire County Council (LCC) owns the whole of the land which is the subject of the application and objected to the application on 30 April 2013.

3. The application was referred to the Planning Inspectorate in accordance with Regulation 27(3)(a) of the Commons Registration (England) Regulations 2008 (the 2008 Regulations). This provides for an application to be referred to the Planning Inspectorate where the registration authority has an interest in the outcome of the application such that there is unlikely to be confidence in the authority's ability impartially to determine it.

4. I opened and adjourned the inquiry on 18 September 2014. The inquiry resumed on 7 July 2015 and I heard evidence for 8 days. I closed the inquiry on 17 July 2015. I made unaccompanied site visits to Moorside Fields and the surrounding area on 17 September 2014 and 6 July 2015. I made a further site visit to Moorside Fields, accompanied by representatives from the applicant and LCC on 16 July 2015. On the same day I made an unaccompanied visit to the surrounding area, including the claimed neighbourhood and locality.

The statutory requirements

5. Paragraph 15(1) of the 2006 Act provides that any person may apply to the relevant commons authority to register land as a town or village green where subsection (2), (3) or (4) applies.

6. The application was made on the basis of section 15(2) of the 2006 Act which is satisfied if (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.

7. Prior to the start of the inquiry the applicant sought permission to rely, in the alternative, on Section 15(3) of the 2006 Act. That subsection is satisfied if (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).

8. LCC accepts that the application, having been made in February 2010, was made within the specified 2 year period and did not object to the amendment to the application. The relevant period was accepted by LCC as either 1990 to 2010 (under subsection (2)) or 1988 to 2008 (under subsection (3)). At the resumption of the inquiry I made it clear that I would hear evidence relating to both periods but in the event the applicant presented the case on the basis of the period of 1988 to 2008. LCC accepts that whichever of these periods is relied upon does not have a critical bearing on the issues in the case.

9. In *R v Suffolk County Council, ex parte Steed*[1], approved by Lord Bingham in *Beresford v Sunderland City Council*[2] it was noted that it was *"no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green"* and that each of the relevant criteria must be *"properly and strictly proved"*. Nevertheless the standard of proof is the normal civil one of the balance of probabilities.

Reasons

Introduction

10. Moorside Fields (the Application Land) consists of 5 parcels of land, which throughout the inquiry were referred to as Areas A, B, C, D and E and are shown as such on the plan which accompanied the application. Area A, referred to as the meadow was, until recently, an undeveloped plot of land. It is adjacent to Moorside Primary School (the School) and is currently being used to facilitate the construction of an extension at the rear of the School. Area B is a mowed field, referred to as the school playing field and both it and Area A are currently surrounded by fencing.

11. Areas C and D border Areas A and B. In the past they have been the subject of mowing tenancy agreements but these ceased in around 2001. They are separated from each other and from Areas A and B by hedges and in places are overgrown with brambles. Area E, also adjacent to the School, is currently overgrown and difficult to access. At some times of the year it contains a pond.

[1] (1998) 75 P P&CR 102 at 111
[2] [2003] UKHL 60 at paragraph 2

12. To the immediate west of Areas C and D and separated from them by a shallow watercourse known as Burrow Beck, is a further area of land within LCC's ownership known as the Barton Road Playing Field (the BRP Field). Areas C and D are accessible from the BRP Field by crossing a stone bridge or via stepping stones.

13. The definitive map and statement for the area do not show any rights of way on the Application Land. However, in 2009 an application was made to modify the definitive map and statement by adding a footpath route between Barton Road and Bowerham Road, crossing the BRP Field and Areas D and B (the DMMO Route). This application remains undetermined.

Locality and neighbourhood

14. The application as originally submitted relied on a locality of Scotforth East, Scotforth West and John O'Gaunt and on 4 neighbourhoods within the locality; namely Scotforth, between Barton Road and the A6, Bowerham, Hala and Newlands. However, prior to commencement of the inquiry the applicant requested that an amendment be allowed and at the opening of the inquiry on 18 September LCC confirmed that it had no objection to the proposed amendment.

15. Accordingly, following my acceptance of the amendment, the application relies upon the Scotforth East Ward of Lancaster City Council (Scotforth East Ward) as a qualifying locality or alternatively a neighbourhood within the City of Lancaster which is delineated on a map labelled 4.2 (the Claimed Neighbourhood). This is described by the applicant in its response to the objection from LCC as "Scotforth East, Scotforth West and John O'Gaunt" which "encompasses the postal areas/neighbourhoods of Scotforth between Barton Road and A6, Bowerham, Newlands and Hala".

16. Although a considerable amount of evidence was presented at the inquiry with regard to the Claimed Neighbourhood, in closing submissions the Applicant relies primarily on Scotforth East Ward. LCC accepts that an electoral ward can be a locality for the purposes of an application under section 15 of the 2006 Act. However, reference is made to the obiter remarks of Sullivan and Carnwath LJJ in *Adamson v Paddico (267) Limited (Paddico)*[3] both of whom were of the opinion that the locality had to have been in existence for the whole of the 20 year period relied upon. LCC claims that Scotforth East Ward in the form relied upon by the Applicant has not.

17. This is because, prior to 2001, Scotforth East Ward extended to the south and incorporated the University of Lancaster. Article 2 of the City of Lancaster (Electoral Changes) Order 2001 (the 2001 Order) abolished the existing City Council wards and created new wards in their place, including a ward called Scotforth East which excluded the University. Although the 2001 Order uses the structure of abolishing existing wards and creating new ones, the abolition and creation were simultaneous when the Order came into effect and there is no time within the relevant period when a locality known as Scotforth East Ward did not exist. The question therefore is whether the changes to the boundaries of the electoral ward have the effect that it cannot be relied upon for the purposes of section 15 of the 2006 Act.

[3] [2012] EWCA Civ 262

18. The judges' comments in *Paddico* related to a submission that a conservation area could qualify as a locality. Although not accepting the conservation area as a locality for other reasons, both Sullivan and Carnwath LJJ clearly considered that the fact that it had not been formally designated as such at the beginning of the 20 year period relied upon meant that it could not be relied upon for the purposes of the section.

19. Carnwarth LJ stated that the *"suggestion of the Conservation Area seems wholly implausible, since it is not a description of a community, and in any event it was not in being for the whole of the relevant period. I accept that, where one has a historic district to which rights have long become attached, it may not matter if subsequently the boundaries are affected by local government reorganisation, so long as it remains an identifiable community. However, where the relevant locality does not come into existence in any legal form until after the beginning of the relevant twenty year period, it seems to me impossible to show the necessary link".*

20. LCC submits that there are "no rights in existence in the present case far be it any historic rights". In particular it is submitted that Carnwath LJ was not suggesting that the only circumstance in which an application may be defeated by boundary changes was where a relevant locality was not in existence in any legal form for part of the qualifying period. Rather the implication was that an area must remain constant over the qualifying period to be able to consider sensibly whether use has been by a significant number of inhabitants.

21. I do not find LCCs analysis of Carnwath LJs words convincing. Indeed it seems to me that a change in the boundary of an electoral ward is precisely the situation envisaged by Carnwath LJ where a change in boundaries "may not matter". Scotforth East Ward has been in existence throughout the relevant period and the change in boundary of the ward to remove the University, does not seem to me to have altered the identifiable community of Scotforth East.

22. LCC also submits that as a matter of first principle it must be necessary to demonstrate a spread of users across the whole of the locality. This, it states, is because if it were sufficient that users came from just one part of the locality then, in its opinion, the requirement for a locality would be rendered meaningless. It points out that there are areas of Scotforth East Ward from which no users are drawn, in particular south of the east-west section of Whinfell Drive, south of Hala Hill or south of Redcar Road.

23. The 2006 Act contains no requirement to demonstrate a spread of users. LCC refers to the words of Sullivan J in *The Queen on the application of Alfred Mc Alpine Homes Ltd v Staffordshire County Council*[4] *(McAlpine)* where he stated *"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".* LCC submit that *"general use by the local community"* is not established if that use comes from only part of the locality.

[4] [2002]EWHC 76 (Admin) Para 71

24. I find no support for this in the quoted words and agree with the applicant that in requiring that use is by a "significant number" of the inhabitants of the locality, the statute ensures that the use is general use by that community. The applicant submits that if an ill fitted locality such as the whole of the County of Lancashire had been chosen then it would not be possible to demonstrate use by a significant number of inhabitants in the context of that locality. I agree with this and do not accept that without a spread of users the requirement for a locality is rendered meaningless.

25. Furthermore, both the applicant and LCC refer to the obiter dictum of Vos J in *Paddico (267) Ltd v Kirklees Metropolitan Council* [5] at first instance, which passages were not questioned by the later Court of Appeal or Supreme Court decisions. Vos J said *"I was not impressed with Mr Laurence's suggestion that the distribution of residents was inadequately spread over either Edgerton or Birkby. Not surprisingly, the majority of the users making declarations lived closest to Clayton Fields with a scattering of users further away. That is precisely what one would expect and would not, in my judgment, be an appropriate reason for rejecting registration. None of the authorities drives me to such an illogical and unfair conclusion."*[6]

26. LCC point out that the remarks were made in the context of Section 22(1) of the 1965 Act, in which there was no requirement to demonstrate a "significant number". In the context of considering the amended definition which brought in the requirement to demonstrate use by a "significant number" Vos J said he did *"not accept Mr Laurence's spread or distribution point".* LCC submits that the natural reading of these words is that Vos J was rejecting the submission made to him that the particular spread was inadequate rather than the principle and that if he had wished to do the latter he could have said so in terms.

27. There is nothing in the words of Vos J which suggest to me that he considered it necessary to demonstrate a spread of users across a locality. Indeed I consider that the natural reading of his words leads to the opposite conclusion. In particular I note his robustly expressed opinion that rejecting registration because the majority of declarations were from people living closest to the claimed green would be "illogical" and "unfair".

28. LCC also submits that without a requirement for a "proper spread of users" there would be a mismatch between the persons whose use led to the acquisition of rights and the persons who enjoyed the benefit of them. It is suggested that this would be contrary to general prescriptive principles and infringe the principle of equivalence. However, it is difficult to see how there could ever be exact equivalence between the people whose use led to registration and those who use it after registration. I agree with the applicant that there will always be some differences, particularly as time passes, and that this will be the case whether or not a "proper spread of users" is demonstrated at the time of registration.

29. Finally on this point, reference has been made to a passage in the judgment of HHJ Behrens in *Leeds Group plc v Leeds City Council* [7] at first instance. That case relied upon a qualifying neighbourhood, but the judge was faced with a

[5] [2011] EWHC 1606 (Ch)
[6] Para 106 i
[7] [2010] EWHC 810 (Ch)

submission that the locality had to be of such a size and situation to be "capable of accommodating a proper spread of users". He rejected the submission, stating "*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 the 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".*

30. LCC submit that in rejecting the submission that the locality within which the relevant neighbourhood lay had to be small enough to accommodate a proper spread of qualifying users, the judge appears to have accepted that there was such a requirement in respect of the neighbourhood itself. Although I accept that it is perhaps possible to read the words of HJJ Behrens in that way, it is not a point which he was required to determine. Furthermore, there is no suggestion that, where the area relied upon is a locality, it is necessary to show a "proper spread of qualifying users".

31. I therefore conclude that Scotforth East Ward is a qualifying locality for the purposes of Section 15 of the 2006 Act, and that the fact that I have heard no evidence from the inhabitants of some areas of that ward is not fatal to the application. Given this conclusion it is not necessary for me to consider the evidence and submissions which have been made with regard to the Claimed Neighbourhood.

32. I will therefore now consider whether the Application Land has been used for lawful sports and pastimes by a significant number of the inhabitants of Scotforth East Ward for the relevant period.

Use of the land for lawful sports and pastimes by a significant number of the inhabitants of the locality for twenty years

33. The application was accompanied by 51 evidence of use forms. These were completed by people encountered on the land in the period from December 2009 to February 2010. I note that that there was no knocking on doors or leafleting of houses or other attempt to publicise the application. All of the signatories live within the Claimed Neighbourhood but I note that a small minority do not live within the locality of Scotforth East Ward and must therefore be discounted.

34. I agree with LCC that the evidence of use forms do not allow an assessment to be made of the extent or frequency of activities in respect of each of the parcels of land which make up the Application Land or, indeed, for how long the recorded activities endured. Nevertheless they required a person completing the form to list activities they had indulged in themselves and activities they had observed others engaging in and show a wide diversity of activities taking place on the Application Land as a whole.

35. Subsequently many of those who had completed evidence of use forms provided signed statements, some of which were in the form of Statutory Declarations. Although I agree with LCC that in many cases the declarations fail to incorporate the requisite wording under the Statutory Declarations Act 1835 and provide no record that they were declared before a properly qualified person, some of those

making the statements gave oral evidence at the inquiry. Furthermore, as Sullivan J made clear in *McAlpine,* although evidence not subject to cross-examination has to be treated with caution, I am entitled to look at the totality of the evidence before me and consider the extent to which it is consistent with and supportive of the oral evidence.

36. A petition dated November 2010 was also submitted. On the face of it, it states that it consists of 710 names and addresses, although a map showing the location of signatories refers to 590 people having signed the petition. Again, some of the signatories, whilst living within the Claimed Neighbourhood, do not live within the locality of Scotforth East Ward. In any event, the wording of the petition, although referring to ensuring the "continued enjoyment of the fields for recreational purposes for members of the local community", does not require a signatory to provide any information with regard to their own usage. It is therefore of little weight.

37. At the inquiry 17 witnesses gave oral evidence on behalf of the applicant. All of these lived for at least part of the relevant period within the locality of Scotforth East Ward[8]. LCC submits that the evidence shows that the predominant use of the land was walking, mainly with dogs, and that use of the Claimed Footpath should be discounted, as should use of any other defined routes, the use of which bears the hallmark of footpath type use. Many of the witnesses referred to use of the Application Land for walking, either with or without dogs, and it is clear that some use, for example taking children to school, involved a linear walk. However, I also heard evidence of many other uses of the Application Land which I shall now assess.

Evidence of Use – Areas A and B

38. It does not seem to be disputed that dog walking on Areas A and B was not confined to certain routes. Louise Rogers gave evidence of dog walkers congregating in Area A because it "was sheltered and warm". Sue Conway referred to a group of dog walkers who met up most mornings and became known as the Barton Barkers. In relation to Field B she stated "we would stand about chatting, everyone throwing balls for the dogs". Evidence was also given of dog training on Field B (Janine Bebbington) and of dog training classes run by Gill Aitken for which a charge was made (Sue Conway). Gill Aitken did not provide oral evidence but states in her written evidence that she is a dog behaviourist/trainer based in Lancaster and that she held classes over 2 summers on Area B, which involved basic training and fun agility, "I used to take a selection of jumps, hoops etc".

39. The evidence of general dog walking all over Area B is borne out by the evidence of some of LCC's witnesses who referred to problems of dog excrement on Area B which interfered with children's games. For example, Kay Whiteway stated that she found excrement "all over Field B" and Len Guest referred to children using the football pitch on Field B being "smeared with excrement".

[8] The applicant's map showing the addresses of witnesses appears to suggest that Kerry Mason lived within the Claimed Neighbourhood but outside the locality of Scotforth East Ward. I note that she has lived at 2 addresses on Bowerham Road, which road forms the boundary of the ward. It is therefore unclear whether she lived for all or part of the period within the Locality and therefore whether evidence of her own use of the Application Land should be discounted in terms of assessing whether there has been significant use by inhabitants of the locality.

40. Witnesses also gave oral evidence of many other activities which they had engaged in or seen others involved in on Areas A and B. In relation to Area A I heard evidence of "just sitting" (Gail Holl, Neil Clarke), having picnics (Nadine Wilson), looking at butterflies or the variety of grasses (Chris Henig, Sue Rennie), sunbathing (Kerry Mason), photography and sketching (Denise Nardone), fruit picking and foraging (Louise Rogers, Brenda Milston), playing with children including "roly-poly" or biking down the bank (Gail Holl, Nadine Wilson, Neil Clarke), cross country running training (Anne Hutchinson), revising for exams (Kerry Mason), camping (Brenda Milston, Janet Harris, Sue Conway), and throwing snowballs and building snowmen (Brenda Milston).

41. In relation to Area B I heard evidence of playing informal games of cricket, rounders and football (Gail Holl, Anne Hutchinson, Chris Henig, Louise Rogers, Kerry Mason, Janet Harris, Sue Conway), kite flying and frisbee throwing (Brenda Milston, Nadine Wilson), picnics (Nadine Wilson, who specifically recalled her son meeting a group of about 10 friends for a picnic when he was 14, Kerry Mason, Janet Harris), building tree houses (Janet Harris, Denise Nardone), cross country running (Anne Hutchinson), camping (Janet Harris), photography (Denise Nardone) and throwing snowballs and building snowmen (Brenda Milston).

42. In respect of Areas C and D, LCC referred to aerial photographs on which a number of worn tracks are apparent. These include the DMMO Route, a diagonal track across Area C from Bishopsgate and paths which broadly follow the perimeters of the fields. It is clear that walkers must have used these routes in order for the tracks to have become worn, and the evidence is supportive of this.

43. Some witnesses, for example Nadine Wilson and Anne Hutchinson, stated that they had crossed Areas C and D in a direct line to take children to school. However, they also stated that once they had taken the children to school in the morning, the walk home would be a more leisurely dog walk and that similarly the walk home with the children in the evening would involve various games and activities. Nadine Wilson recalled her children chasing each other through the long grass on Areas C and D. Anne Hutchinson recalled taking different routes on the way home from school with her children playing hide and seek and climbing trees.

44. A number of witnesses (Nadine Wilson, Revd Robert Canham, Janet Harris, Kerry Mason) stated that when dog walking they tended to keep to the perimeters of Areas C and D or to worn paths, particularly if their dogs were on leads. However, when the dogs were off lead, they would leave the paths to follow their dogs to clean up after them or collect thrown balls. Other witnesses (Brenda Milston, Linda Rose Fisher, Gail Holl, Anne Hutchinson, Chris Henig, Neil Clarke, Mike Worth, Louise Rogers) said that they followed their dogs all over Areas C and D. Chris Henig stated that most of the time she did not stick to paths, but meandered, "just enjoying being on the field". Janine Bebbington described training her gun dog by making use of the rough ground in Areas C and D.

45. It was clear at my site visit that there are numerous worn tracks within Areas C and D and, as described by Revd Robert Canham, they form "networks of paths". I agree with LCC that the worn tracks offer plenty of scope for

completing circuits and incorporating variety in recreational walking or dog walking without the need to leave them. Indeed the evidence shows that some people who used Areas C and D rarely left the worn tracks. However, the evidence also shows that others did not stay on the worn tracks and in any event I agree with the applicant that the pattern of walking shown by the tracks is strongly suggestive of general recreational use of the whole of Areas C and D rather than of linear, footpath type use.

46. There is also some evidence that the tracks may have varied in visibility and position depending on the condition of the ground and whether mowing had taken place. For example, Anne Hutchinson stated that the paths she recalled were not as shown on the aerial photographs and Janine Bebbington stated that there used to be 2 paths across Area D, parallel to each other. Brenda Milston said that the worn tracks moved and changed and Nadine Wilson said that the paths were "caused by the different seasons". Gail Holl stated that when the grass was short she rode her horse "anywhere" on Areas C and D but that when the grass grew long there were worn tracks which she would stick to. Neil Clarke described a "sort of pathway" around the perimeter of Areas C and D, part of which might need to be avoided if it was wet due to boggy conditions.

47. Evidence was given of many other activities on Areas C and D, either engaged in by those who gave oral evidence or witnessed by them. I heard evidence of fruit picking in the hedges surrounding and dividing those fields and in copse areas (Brenda Milston, Linda Rose Fisher, Gail Holl, Anne Hutchinson, Chris Henig, Louise Rogers, Janet Harris), horse riding (Brenda Milston, Linda Rose Fisher, Gail Holl), mountain biking (Neil Clarke), bird watching, butterfly spotting, looking at flowers and communing with nature (Linda Rose Fisher, Revd Robert Canham, Sue Rennie, Neil Clarke, Louise Rogers, Chris Henig), watching the sunset (Chris Henig), playing hide and seek (Gail Holl, Anne Hutchinson), cross country running (Anne Hutchinson, Denise Nardone) and camping (Sue Conway, Brenda Milston).

48. It is clear that many of these activities were not confined to the worn tracks. Anne Hutchinson stated that children do not stick to pathways, particularly when playing hide and seek. Linda Rose Fisher, when asked if she stayed on the pathways, stated "quite the opposite" and referred to picking buttercups in Area D with her mother and sketching and taking photographs away from the paths. On the basis of the evidence before me I do not accept LCC's submission that a reasonable landowner would have understood the use of Areas C and D to be referable to a footpath type use rather than a more general recreational use.

49. It is agreed that areas C and D were mowed by a local farmer from the beginning of the relevant period until 2001 and that the grass crop taken was to be used as animal feed. LCC accept that there is an absence of evidence that the mowing operation itself interfered with any recreational use in a way which was significant enough to have any impact with legal consequences for the registration of these areas. I agree.

Frequency and period of use of Areas A, B, C and D

50. The use claimed was in most cases frequent and quite often at least daily. Many of the people who gave evidence of dog walking stated that they used the fields every day, some twice or three times a day, and that they always met other

people. Anne Hutchinson stated that it was "nigh on impossible" not to see anyone else.

51. Linda Rose Fisher said that she sometimes walked her dogs 4 times per day and that if it was between about 9am and 6pm she would always see other people and that it was not unusual to see others outside those times. Nadine Wilson stated that she would always see other people, even in torrential rain. Gail Holl stated that in the summer in the daytime she would generally see about half a dozen other people walking their dogs and on a summer evening would see about 20 people, including children playing games, whereas in the winter she would see considerably less. Sue Rennie said she couldn't think of a single time she had been when there was no-one else there.

52. Eileen Blamire, the leader of Lancaster City Council, stated that, although she has not used the Application Land herself for many years, she could see Fields C and D from her bedroom window and that she "often stood watching people there, it is surprising how many people you see".

53. 8 of the witnesses who gave oral evidence claimed use of Fields A, B, C and D for the entire twenty year period (Brenda Milston, Gail Holl, Anne Hutchinson, Chris Henig, Neil Clarke, Janine Bebbington[9], Mike Worth, Kerry Mason) and most claimed use for more than half of the period. 25 of the people who submitted statements claimed use for over 40 years.

Evidence of use – Area E

54. It is not disputed that there were allotments in Area E and that this use continued into the early 1990s albeit on a modest scale, with the allotment association being wound up in 1995. Since that time Area E has become overgrown. Although some dog walkers, such as Chris Henig and Kerry Mason, referred to venturing into Area E, it was clear from the evidence that use of this area was in most cases occasional. Brenda Milston, who had walked dogs on the Application Land throughout the relevant period, stated that Area E was difficult to access and that she had only been in half a dozen times. Anne Hutchinson stated that she didn't often venture into Area E.

55. Revd Robert Canham, who has lived within the Locality since October 2001, said that on a warm day he would go to Area E without his dogs and follow the butterflies. He stated that in season it was so overgrown that it was nearly impenetrable and that he rarely saw anyone else in Area E. Neil Clarke, although not generally walking his dogs in Area E, said that his children, who were born in 1992, 1993 and 2003, liked exploring in that area and enjoyed the boggy part of it which iced up in winter. He also stated that it was rather overgrown for many years and that he didn't see many other people in Area E.

56. Denise Nardone said that her grandchildren knew Area E as Narnia and that ever since they could walk, she would take them there whenever they visited. Due to the age of the grandchildren the earliest this use could have commenced was 2006. Sue Rennie, who started visiting the Application Land in late 2004, stated that she enjoyed visiting Area E for the flora and fauna and the pond which dries up in the summer. She stated that she had occasionally seen other

[9] Janine Bebbington, although living within the Claimed Neighbourhood throughout the relevant period, lived outside the Locality for part of the period.

people in Area E, including some boys playing in a tree, but that it was the least well used area of the Application Land. Kerry Mason recalled seeing a tent pitched in the clearing in Area E on one occasion.

57. Linda Rose Fisher and Chris Henig both had allotments in the early 1990s. They paid a small rent to the allotment association and I agree with LCC that their use was permissive. Both said that they did not recall seeing anyone, either an allotment holder or otherwise, in area E at the time they had allotments. This is consistent with the fact that most of the evidence of use of Field E relates to the latter part of the twenty year period.

Conclusions on Use

58. In *McAlpine*, Sullivan J stated that "significant", although "imprecise" is *"an ordinary word in the English language and little help is to be gained from trying to define it in other language".* He endorsed both the Inspector's conclusion that whether the evidence showed that a significant number of inhabitants had used land for informal recreation was *"very much a matter of impression"* and the submission of counsel that *"what matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers".*

59. The evidence before me in respect of Areas A, B, C and D is compelling. Not only do I have the oral evidence of the witnesses own use of these areas but all of the witnesses gave detailed accounts of the considerable numbers of other people they often saw there. I am satisfied that far from being use by individuals as trespassers, this is a case of general use by the community and I conclude that the use was by a significant number of inhabitants throughout the relevant period.

60. However, in relation to Area E I agree with LCC that there is an absence of qualifying use for the first years of the relevant period. Furthermore, it is clear that Area E became difficult to enter and that many users of other parts of the Application Land either did not venture, or very rarely ventured, into this area. I agree with LCC that it has not been shown that use of Area E was by a significant number of inhabitants throughout the relevant period. Accordingly registration of Area E must fail for this reason and I shall not consider it further.

Whether use has been as of right

61. To satisfy the test in section 15(3) of the 2006 Act, use of the Application Land must have been "as of right". In *R(Oxfordshire & Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v Oxfordshire County Council*[10] (*the NHS case*), Judge Waksman QC set out the law as *""as of right" means not "by right" but "as if by right". In order to be as of right a user must be nec vi nec clam nec precario, not by force, stealth or licence from the owner. User by force is not confined to physical force. It includes use which is "contentious". A landowner may render use contentious by, among other things, erecting prohibitory signs or notices in relation to the use in question."*

[10] [2010] EWHC 530 (Admin)

Use by force - signs

62. There are 5 main access points to the Application Land, 3 of which involve crossing Burrow Beck from the BRP Field, either via stepping stones into Area C, stepping stones into Area D or a stone bridge into Area D. There is also access from the end of Bishopsgate onto Area C and from the cycle path on to Area B. Apart from in relation to the latter, it is not claimed that there has ever been a sign at any of these points of access.

63. With regard to the access from the cycle path it is common ground that in late 2008 a new gate giving access to Areas A and B from the cycle path was locked and a sign erected next to the gate. This point is shown on a plan and referred to as S4. However, LCC claim that there was a sign in the vicinity of S4 prior to 2008 and a number of teachers at the School gave evidence about this.

64. Michelle Dent states that she recalls there being a sign at S4 when she started teaching at the School in 1995. She could not recall the wording but said that it was old fashioned, metal, and was blue with embossed white raised lettering. It identified the land as belonging to LCC and that it was a school playing field. She could not recall when the sign disappeared.

65. In her statement Michelle Chapman said that she recalled a standard county council sign at S4 in 2004/2005. Although she could not recall the exact wording she states that it said that the land was LCC land and that dogs were prohibited. At the inquiry she stated that she first noticed the sign when, as a placement student prior to starting as a teacher at the School in September 2004, she did a risk assessment before taking lessons outside. She recalled noticing a blue sign which was about A4 in size with white lettering. She could not recall how long it was there but thought that at some stage it was vandalised.

66. In his statement Mark Cheal also recalls that there was a sign at S4 in 2004/2005. He describes it in exactly the same terms as Michelle Chapman and at the inquiry confirmed that they were interviewed together by a representative of LCC who produced the statements. In his oral evidence he stated that he believed that there was a sign at S4 when he started teaching at the School in 2002 as he recalled bouncing a ball off it while he waited on the field for the next group of children to arrive. However, he confirmed that he only started waiting on the field for classes when he took over responsibility for PE lessons from other teachers, and that that did not happen until 2008.

67. Len Guest, who was the headmaster at the School between 2002 and 2011 stated that he became aware of a sign at S4 soon after his appointment. He said that it was a cast metal sign in black and white. He could not remember the wording, or when the sign disappeared.

68. Jonathan Godfrey, who was employed as a PE co-ordinator at the School from 1991 to 2004 did not give oral evidence but in his witness statement said "for all those years a sign at the bottom of the school path leading onto the field (*identified in the statement as S4*) asked dog owners to refrain from bringing their dogs onto the sports field". However, Richard Wood, who mowed Areas A and B a couple of times per year from 1985 or 1986 for a period of 3 to 4 years

and thereafter managed the mowing of those areas throughout the relevant period, said that, although he thought that there had always been a post in the vicinity of S4, he didn't recall any signs at S4 before the 2008 sign.

69. Cara Richmond said that she recalled a sign in the vicinity of S4 which said "something about dogs".

70. None of the applicant's witnesses recalled a sign in the vicinity of S4 prior to the 2008 sign, although many said that they could not positively say that there was not. For example Neil Clarke said that he walked there regularly but did not recall a sign prior to the gate being erected in 2008 and Revd Robert Canham who walked past S4 regularly to visit parishioners said "as certain as I can be, I would say there wasn't one". Janine Bebbington said that when she lived in Newlands between 1972 and 1994 her access to the Application Land was via Bowerham Road and S4 and that there was never a sign.

71. A number of photographs have been produced of sports day on Area B in July 2006. No sign is discernible on these photographs or indeed on any other photographs produced in evidence. Although I accept the view expressed by a number of LCC's witnesses that it is possible that a sign could be located behind the heads of groups of people watching sports day, in my opinion it is more likely that it is not possible to see a sign on the photographs because none was there, rather than that it is obscured.

72. There has also been a suggestion that the gate at S4 which was locked in 2008 replaced an earlier gate. However, none of the applicant's witnesses recalled a gate. Kerry Mason recalled "swinging on ropes across from banking opposite S4 towards S4", which would have resulted in injury if there had been a gate or fence in that location.

73. The evidence before me is contradictory but from the recollections of members of staff at the School it seems likely that there was a sign at S4 at some time prior to 2008. However, it is far from clear for how long any such sign or signs may have been in place or indeed what the sign said. Witnesses who recalled a sign have suggested a range of wording including that the land belonged to LCC, that it was a school playing field and that dogs were prohibited. The most such a sign could have achieved is to render the walking of dogs on Area B, and perhaps on Area A, contentious. It would have had no effect with regard to the other activities which were taking place on Areas A and B or any activities, including the walking of dogs, on the remainder of the Application Land.

74. LCC also refer to signs on the Barton Road Community Centre which appear to have been in place throughout the period. This building is some distance from the Application Land but situated at the Barton Road frontage to the BRP Field from where access can be gained to the Application Land via stepping stones or a stone bridge. The signs read *"Lancashire County Council. These premises/grounds are private and for the use only of authorised persons connected therewith. Persons trespassing or otherwise causing a nuisance or disturbance, including the playing or practising of games or sport, and the exercising of animals on these premises are committing an offence and may be liable to prosecution".*

75. The signs are positioned above eye level on the front and side of the building and some witnesses stated that they had not seen the notices. Those who had, said that they thought that they referred to the building and its car park and fenced off area at the back, or to the BRP Field. Apart from Angus and Lucy McCulloch who stated that they considered that the notices also applied to Areas A, B C, D and E, no witnesses thought that they applied to any of the Application Land.

76. It is also common ground that in 2005 other signs, in identical terms to those on the Barton Road Community Centre, were erected at entrances to the BRP Field as a result of an incident regarding a golf ball breaking the window of a property on Barton Road. The incident was well publicised and many witnesses associated the erection of the signs with the incident. LCC state that 3 signs were erected along Barton Road with another at the entrance to the BRP field from Letchworth Drive. The Applicant states that there were only 2 along Barton Road. What appears to be agreed is that one was almost immediately vandalised and removed and that the only one that remained for a significant period of time was the one at Letchworth Drive.

77. The question of whether particular signs rendered the use of land contentious was considered in detail in the *NHS case* in which the judge derived a number of principles from case law. He stated that the fundamental question is "*what the notice conveyed to the user. If the user knew or ought to have known that the owner was objecting to and contesting his use of the land, the notice is effective to render it contentious; absence of actual knowledge is therefore no answer if the reasonable user standing in the position of the actual user, and with his* information*, would have so known".*

78. He also stated that *"if it is suggested that the owner should have done something more than erect the actual notice, whether in terms of a different notice or some other act, the Court should consider whether anything more would be proportionate to the user in question…..The aim is to let the reasonable user know that the owner objects to and contests his user. Accordingly if a sign does not obviously contest the user in question or is ambiguous a relevant question will always be why the owner did not erect a sign or signs which did".*

79. I accept that a reasonable user would not understand signs erected on the Barton Road Community Centre, even if they were easily visible, to apply to the Application Land. Indeed, although some of the activities referred to in the notice were more likely to take place on a field than within the curtilage of a building, given their location on the building, I consider that a reasonable user could consider that the signs applied only to the building and the adjacent hardstanding and not to the BRP Field. I also consider that a reasonable user would have understood the signs erected on the BRP Field as a result of the golf ball incident as applying to the BRP Field only.

80. LCC submits that the signs on the BRP Field rendered use of the Application Land contentious because crossing the BRP Field to reach that land was in itself contentious. The applicant disagrees and submits that, as the signs referred to "use" of the land and to "causing a nuisance or disturbance", a reasonable reader would not understand these signs as preventing them from crossing the BRP Field to reach the Application Land.

81. I consider that "use" of the land could include walking across it to reach other land and that the signs could have had the effect that crossing the BRP Field to reach the Application Land was an act of trespass. However, there were no signs at the access points to the Application Land and at all times it remained possible to access the Application Land from Bishopsgate without passing any sign at all. Furthermore the signs on Barton Road were only there for a short period, and were never replaced and the gaps in the hedges which give access to the BRP Field were not stopped up.

82. LCC refers to the Court of Appeal decision in *Taylor v Betterment Properties (Weymouth) Ltd* [11] and submits that it doesn't matter if the signs were soon torn down. In that case the evidence was that *"inhabitants of the locality who were seeking to obtain registration of the land as a town or village green had seen the signs; had understood what their meaning and purpose was; and for that reason, had removed them".* The Court of Appeal found that *"the landowners had therefore made their opposition known to the local inhabitants even though, by the actions of some members of that class, the signs may have disappeared within a few days of being erected and may not therefore have been seen by many users of the land".*

83. In that case the landowner was found to have demonstrated *"clear and repeated"* opposition to the use of the land and the court found that *"there is a world of difference between the case where the landowner simply fails to put up enough signs or puts them in the wrong place and a case such as this one where perfectly reasonable attempts to advertise his opposition to the use of the land is met with acts of criminal damage and theft. The judge has found that if left in place, the signs were sufficient in number and location; and were clearly enough worded, so as to bring to the actual knowledge of any reasonable user of the land that there use of it was contentious".*

84. This is far from the situation in the present case. Even if it is accepted that there was a sign at S4 in addition to the signs on the BRP Field, I consider that these signs were not sufficient in number and location and were not clearly enough worded to bring to the actual knowledge of any reasonable user that use of the Application Land was contentious. No notices were ever erected on the Application Land itself or, apart from S4, at any of the access points to it. Even if at some stage there was a notice at Point S4, it appears that it may have referred only to dog walking and it was not replaced. Nothing was done to stop up the gaps in the hedges leading from Area B to Areas C and D. Len Guest stated that "travel across the field followed no pattern or regular direction as the access and leaving points were through many different breaks in the hedging and fencing as well as through the open gate space".

85. The signs on the BRP Field, erected following the "golf ball incident" were also not replaced and no attempt was made to stop up the gaps in the hedges which gave access to the BRP Field. Even if they were sufficient to render crossing the BRP Field to reach the Application Land contentious, they had no effect on access to the Application Land from Bishopsgate or S4. In my opinion this is a clear case where the actions of the landowner were not proportionate to the user and a reasonable user would not have known that the owner objected to

[11] [2012] EWCA Civ 250

and contested use of the Application Land. Accordingly the signs did not render use of the land "vi".

Use by force - challenges

86. Evidence has also been given of members of staff at the School challenging use of Area B. I note that in its closing submissions LCC relies on the evidence of challenges to support a submission that the use was "precario", rather than "vi". Nevertheless, challenges could render use of the land contentious and I shall therefore consider the evidence in relation to both aspects. The evidence of challenges is as follows.

87. Michelle Chapman, who has been a teacher at the School since 2004, stated that she had frequently asked people who were walking dogs or just gathering on the land and sometime having picnics, to leave Area B. Most would leave, but on about 8-10 occasions they had not. On such occasions she would either take the children back to the school or would ask another member of staff to assist. She recalled one particular incident involving teenagers on quad bikes. A couple of times when she had had to abandon lessons or had felt at risk she had "jotted down what had happened and passed it to the head". However, she was not aware if anything happened as a result of that and stated that there was no formal policy about recording incidents. She also stated that she recalls teachers asking people to leave from the time when she was a pupil at the School.

88. Michelle Dent, who has been a teacher at the School since 1995, recalled telling about a dozen people during the relevant period that she was taking a lesson and asking them if they would mind walking their dogs elsewhere or put their dogs on leads. This was also within Area B. She also stated that when she first started at the school she felt vulnerable if people were on Area B when she was taking a lesson. The advice of the head teacher was not to approach people but to gather up the children and go back to the School if they felt unsafe. She also recalled that the head teacher made mobile phones available to staff to take to Area B in around 1999-2000. Len Guest stated that when he became head master in 2002 only 2 mobile phones were being used and the remainder were in a cupboard.

89. Mark Cheal, who has been a teacher at the School since 2002, stated that he asked people to leave Area B most weeks. Often they would acknowledge his presence with a wave and move onto Areas C and D. He also recalled turning round to leave Area B to take the children back to the School and then noticing that the people had left, in which case he would return. On about 10 or 11 occasions other members of staff had asked him to assist in a group approach to ask people to leave.

90. Len Guest, who was the head teacher of the School from 2002 – 2011 states that between about 2003 and 2007/8 he personally asked about 10 people to leave Area B and that generally they moved onto the cycle path or into Areas C and D.

91. Mrs Whiteway, a teaching assistant at the School since 1999 stated that she had encountered dog walkers about 10 or 11 times and asked them if they minded leaving Area B or putting their dog on a lead. Generally they left or walked around the perimeter but on the 3 or 4 occasions that they did not she waited

until they moved away and then started her lesson again. She stated that staff used to discuss the incidents amongst themselves but there was no system of reporting.

92. Lyn Dewar was treasurer and later Chair of the Parent Teachers Association at the School for about 25 years ending in 2009. She also had 3 children at the School from 1984 until 1998. Although she had witnessed people walking dogs on Area B when activities were taking place on Area B, she stated that she had never seen anyone being approached. However, she did recall that during a health and safety meeting a dog was running around and barking at people and Mr Cheal approached the owner and asked him to leave, which he did. However, she was not aware of any policy about public access to the field.

93. Brenda Milston was a teacher at the School from 1969 until 1998 and appeared for the Applicant. As a teacher she recalled using Area B at least once a week in the summer to play rounders. She stated that she would see members of the public on the field. They would walk around the game and she never asked anyone to leave.

94. Eileen Blamire was a governor at the School in the late 1980s/early 1990s and stated that during that time the playing fields were never discussed at meetings as it was taken for granted that members of the public could use them. She was a frequent user of the Application Land including Area B throughout the relevant period and when asked if she had ever been asked to leave stated that she couldn't "imagine why" anyone would ask her to leave. Gill Aitken who ran dog training classes on Area B says in her statement "I understood at the time that the field was for public use so didn't seek permission and was never asked to leave".

95. All the witnesses who gave oral evidence of use at the inquiry confirmed that they had never been challenged when using any part of the Application Land[12].

96. I have no reason to doubt the evidence provided by the School that during the relevant period some members of the public were asked by staff at the School either to leave Area B, to keep to the perimeter, or to put their dogs on leads. However, there was no policy of challenging users and the majority of the evidence, rather than amounting to a challenge to the use of the land, appears to demonstrate users of the field showing courtesy to each other, with members of the public avoiding walking through children's games and activities.

97. Even when courtesy was not shown and, for example a dog was disrupting a lesson or activity, people were not always asked to leave. For example, Kay Whiteway recalls in her statement " We had to stop the games, telling children to stand still until the dogs went away or we convinced the owners to put the dogs on a lead". The evidence of occasions when there has been a major conflict is sparse and I note that in their statements 3 members of staff recalled the same incident which concerned teenagers on quad bikes, "around 2005-2009". In such situations the approach of staff at the School has often been to leave the area rather than to challenge – indeed Michelle Dent stated that this was the instruction of the headmaster.

[12] Michelle Dent stated that she challenged Janine Bebbington on one occasion, although this was denied by Janine Bebbington.

98. I conclude that the landowner's actions would not have conveyed to a reasonable user that their use of Area B was contentious. There is no evidence of any challenges being made in respect of Areas A, C, or D. Accordingly I conclude that use of the Application Land was not by force.

Precario – implied permission

99. LCC submits that the use was *precario* in that the users had implied permission to use the land and states that this is founded on the evidence of exclusion of users by challenge to them and asking them to leave. In B*eresford* Lord Bingham said " *A landowner may so conduct himself as to make clear, even in the absence of any express statement, notice or record, that the inhabitants' use of the land is pursuant to his permission. This may be done, for example, by excluding the inhabitants when the landowner wishes to use the land for his own purposes, or by excluding the inhabitants on occasional days: the landowner in this way asserts his right to exclude, and so makes plain that the inhabitants' use on other occasions occurs because he does not choose on those occasions to exercise his right to exclude and so permits such use".*

100. LCC states that the evidence of challenges should be set in the context of the use made by the School of Areas A and B and submits that a fair representation is that the School made a significant amount of use of both areas. A number of members of staff referred to extensive use of Area B for outdoor teaching, including science lessons and literacy, as well as physical education, and stated that they used the area in all weathers throughout the year. Although it was accepted that, prior to drainage works which took place after the relevant period, Field B could be wet in places, reference was made to children having wellington boots and waterproofs. Michelle Dent stated that it was not waterlogged and she didn't have to abandon any lessons.

101. However, Len Guest, the headmaster during part of the relevant period, stated that until the drainage works took place and the fencing was put up, far less use was made of both Areas A and B than he would have liked. He stated that in the winter it was not possible to get onto the fields for weeks at a time and that Area B could be "6 inches deep in water". He stated that the condition of Area B was not inviting and he had to try to encourage children and staff to make better use of the fields. The drainage and fencing made the facility better and safer.

102. A number of witness statements refer to the School having given permission to the Lancaster Giants to use Area B in an evening and at weekends for football practice and for matches. However, it is clear that this use did not commence until after the fence was erected and it is therefore outside the relevant period.

103. There is little evidence before me of use of Area A by the School during the relevant period. However, it is clear that some use was made of Area B during the relevant period. Sports pitches were marked out and I heard evidence of various sporting activities, including sports day, lunchtime football clubs and the taking of a variety of outdoor lessons. However, the use of Area B clearly increased after the end of the relevant period and it is difficult to reconcile the evidence of some members of staff with the evidence of the headmaster and the condition of the field. On the evidence before me, I consider that, although

Area B was clearly used by the School for various activities during the relevant period, use of it was not as extensive as suggested by some members of staff.

104. LCC submits that the apparently different accounts with regard to challenges are reconcilable as many of the witnesses stated that if they saw activities taking place on Area B, such as ball games or school lessons, they would keep to the perimeter of the field as a courtesy. Accordingly these witnesses would not have been challenged, but others, who had perhaps not been so courteous, had been challenged. LCC therefore states that those who were asked to leave clearly knew that their presence was unwelcome and not acquiesced in by the School. However, when the School was not using the land, no conflict would arise and people where therefore not asked to leave. LCC submit that this is exactly the situation which was described in *Beresford*; namely that the inhabitants were excluded when the landowner wished to use the land for his own purposes.

105. I do not agree with this submission. There is no evidence that the School had a policy of excluding users on a systematic basis and there is no evidence that the occasional challenge by a member of staff, to , for example, teenagers on quad bikes, demonstrated to members of the public that access depended upon the School's or anyone else's permission. To the contrary, I agree with the Applicant that the general impression is one of peaceful co-existence. Furthermore, on the occasions when there was a conflict between use by the School and by members of the public, there is evidence that rather than asking people to leave, staff asked people to put their dogs on leads or keep to the perimeter, or even abandoned lessons.

106. As a supplementary point LCC also refers to the annual School fairs and submits that charging for various activities on Areas A and B had the effect of excluding those who had not paid. In *Mann v Somerset County Council*[13] (*Mann*) Owen J held that use was precario as a result of a landowner charging for a beer festival and fun fair. In that case Owen J found that the owners *"demonstrated by positive acts from time to time that, as owners, they were exercising and retaining their rights over their land by excluding all comers, subject to payment of an entrance charge"*.

107. The evidence with regard to whether or not a charge was made for entrance to the School fairs is contradictory but what is clear is that, if a charge was made, payment was taken at the front entrance to the school, that no ticket was given, and there was nothing to prevent members of the public who had not paid from entering Areas A and B. It is also clear that most of the activities and stalls were located within the School rather than on Areas A and B. However, evidence was provided of a variety of activities which had taken place on Areas A and B including pony rides, fairground rides, a climbing tower and having photographs taken with birds of prey. These events did not take place every year[14] but on the occasions they happened it is not disputed that those who wished to participate had to pay to do so.

108. In my opinion this is very different from charging to enter part of the land. No-one was excluded from the land and it is difficult to see how the fact that it was necessary to pay for a pony ride or to have a photograph taken with a bird of

[13] Unreported judgement dated 11 May 2012
[14] Gail Holl, who provided the pony rides, stated that they took place around 1990 for about 5 years. The climbing tower was at only one summer fair and, it appears, may have been outside the relevant period.

prey would have demonstrated to a local inhabitant that the landowner was exercising a right to exclude them from the land. Indeed I note that a member of the public held occasional dog training classes on Area B for which a charge was made.

109. Owen J stated in *Mann* that *"the law does expect an owner to resist that which appears to be use of his land by others and the assertion of a right to do so. In those circumstances the owner is expected "to do something". In this case the owner "did something", as owner, which showed to the reasonable onlooker that the right to exclude was being exercised. The significance of the owner's use of the land could not reasonably have been mistaken by the local inhabitants at the time".*

110. In this case the landowner has failed to "do something". The evidence of occasional challenge and the need to pay for various activities at a School fair are insufficient to show to the reasonable onlooker that a right to exclude was being exercised. The presence of a dog waste bin on Area B and the occasional laminated notice made by children at the school indicating that people should clean up after their dogs do not take matters any further. I conclude that this is not a case where the landowner had given the inhabitants implied permission to use the land and accordingly, use of the Application Land was not precario.

Statutory Incompatibility

111. LCC refers to the Supreme Court decision in *R (on the application of Newhaven Port and Properties Limited v East Sussex County Council and another (Newhaven)*[15] and submits that the Application Land is held by LCC for educational purposes and that that is inconsistent with its registration as a town or village green. In *Newhaven*, Lord Neuberger and Lord Hodge said that *"where Parliament has conferred on a statutory undertaker powers to acquire land compulsorily and to hold and use that land for defined statutory purposes, the 2006 Act does not enable the public to acquire rights which are incompatible with the continuing use of the land for those statutory purposes".* I accept that the phrase "statutory undertaker" simply reflects the fact that that case involved a port operator which acted under statutory powers and that the principle could, in certain circumstances, be applied to land held by a local authority. I also accept that the fact that in this case the land was not acquired compulsorily is not fatal to the application of the principle.

112. However, in *Newhaven* it was made explicit by Lord Neuberger and Lord Hodge at paragraph 101 that *"the ownership of land by a public body, such as a local authority, which has statutory powers that it can apply in future to develop land, is not in itself sufficient to create a statutory incompatibility".* It is therefore necessary to examine the purposes for which LCC acquired and hold the Application Land, and, if held for a specific statutory purpose, then to consider whether registration of the land as a town or village green would be incompatible with the continuing use of the land for those purposes.

113. LCC has provided Land Registry Official copies of the register of title which show that LCC is the registered proprietor of the Application Land. Areas A, B and E were the subject of a conveyance dated 29 June 1948, a copy of which has been provided. It makes no mention of the purposes for which the land was acquired

[15] [2015] UKSC 7

but is endorsed with the words "Recorded in the books of the Ministry of Education under section 87(3) of the Education Act 1944". The endorsement is dated 12 August 1948.

114. Areas C and D were the subject of a conveyance dated 25 August 1961. Again the conveyance makes no mention of the purposes for which the land was acquired but the copy provided has a faint manuscript endorsement as follows "Education Lancaster Greaves County Secondary School".

115. In addition LCC provided an Instrument dated 23 February 1925 and a letter from LCC to the School dated 1991. The Instrument records that the Council of the Borough of Lancaster has applied to the Minister of Health for consent to the appropriation for the purposes of the Education Act 1921 of land acquired by the Council otherwise than in their capacity as Local Education Authority. The land shown on the plan is the BRP Fields. An acknowledgement and undertaking dated March 1949 refers to the transfer to the County Council of the education functions of the City of Lancaster and lists deeds and documents relating to school premises and other land and premises held by the corporation. It lists the BRP Fields. The 1991 letter encloses a note from Lancashire Education Committee outlining a proposal to declare land surplus to educational requirements. This relates to the land adjacent to Area C which was subsequently developed for housing. As none of this documentation relates directly to the Application Land I do not find it of particular assistance.

116. At the inquiry LCC provided a print out of an electronic document headed "Lancashire County Council – Property Asset Management Information" which in relation to "Moorside Primary School" records the committee as "E". I accept that it is likely that this stands for "Education". An LCC plan showing land owned by "CYP education" shows Areas A, B and E as Moorside Primary School and Areas C and D as "Replacement School Site". In relation to Areas C and D the terrier was produced, and under "committee" is the word "education". The whole page has a line drawn through it, the reason for which is unexplained.[16]

117. LCC submits that the documentation provides clear evidence that the Application Land is held for educational purposes and that no further proof is necessary. However, no Council resolution authorising the purchase of the land for educational purposes or appropriating the land to educational purposes has been provided. The conveyances themselves do not show for what purpose the Council acquired the land, and although the endorsements on those documents make reference to education, the authority for them is unknown. Lynn MacDonald, a School Planning Manager for Lancashire County Council, confirmed that the Application Land was identified as land which may need to be brought into education provision, but was unable to express an opinion about the detail of LCC's ownership of the land.

118. The information with regard to the purposes for which the Application Land is held by LCC is unsatisfactory. Although there is no evidence to suggest that it is held other than for educational purposes, it is not possible to be sure that LCC's statement that *"the Application Land was acquired and is held for educational*

[16] LCC suggested that it may be the case that pages were crossed out once they had been uploaded onto the electronic system. However, no electronic version was available and there is therefore no evidence that the page has been uploaded.

purposes and was so held throughout the 20 year period relevant to the Application" accurately reflects the legal position.

119. Furthermore, even if the land is held for "educational purposes", I agree with the applicant that that could cover a range of actual uses. LCC states that the landholding is associated with a specific statutory duty to secure a sufficiency of schools and that if LCC needed to provide a new school or extra school accommodation in Lancaster in order to enable it to fulfil its statutory duty, it would not be able to do so on the Application Land were it to be registered as a town or village green. However, Areas A and B are marked on LCC's plan as Moorside Primary School. The School is currently being extended on other land and will, according to Lynn MacDonald, provide 210 places which will meet current needs. There is no evidence to suggest that the School wishes to use these areas other than for outdoor activities and sports and such use is not necessarily incompatible with use by the inhabitants of the locality for lawful sports and pastimes.

120. Areas C and D are marked on LCC's plan as "Replacement School Site". However, there is no evidence that a new school or extra school accommodation is required on this site, or indeed anywhere in Lancaster. Lynn MacDonald stated that the Application Land may need to be brought into education provision at some time but confirmed that there were no plans for the Application Land within her 5 year planning phase.

121. Nevertheless, she pointed out there is a rising birth rate and increased housing provision in Lancaster, and that although there are surplus school places to the north of the river, no other land is reserved for school use to the south of Lancaster. Assets are reviewed on an annual basis and if not needed land can be released for other purposes. However there was no prospect that this would happen in relation to the Application Land in the immediate future.

122. I do not agree with LCC's submission that the evidence of Lynn MacDonald demonstrates the necessity of keeping the Application Land available to guarantee adequate future school provision in order to meet LCC's statutory duty. Even if at some stage in the future there becomes a requirement for a new school or for additional school places within Lancaster, it is not necessarily the case that LCC would wish or need to make that provision on the Application Land.

123. In *Newhaven*, it was held that *"it is not necessary for the parties to lead evidence as to NPP's plans for the future of the Harbour in order to ascertain whether there is an incompatibility between the registration of the Beach as a town or village green and the use of the Harbour for the statutory purposes to which we have referred. Such registration would clearly impede the use of the adjoining quay to moor vessels. It would prevent the Harbour Authority from dredging the harbour in a way which affected the enjoyment of the Beach. It might also restrict NPP's ability to alter the existing breakwater. All this is apparent without the leading of further evidence".* Although evidence of other consequences which may occur was presented the judges stated that "*we do not need to consider such matters in order to determine that there is a clear incompatibility between NPP's statutory functions in relation to the Harbour, which it continues to operate as a working harbour, and the registration of the Beach as a town or village green".*

124. It seems to me that, in the absence of further evidence, the situation in the present case is not comparable to the statutory function of continuing to operate a working harbour where the consequences of registration as a town or village green on the working harbour were clear to their Lordships. Even if it is accepted that LCC hold the land for "educational purposes", there is no *"clear incompatibility"* between LCC's statutory functions and registration of the Application Land as a town or village green. Accordingly I do not accept that the application should fail due to statutory incompatibility.

Conclusion

125. Having regard to these and all other matters raised both at the inquiry and in written representations, I conclude that the application should be granted in respect of Areas A, B, C and D but should fail in respect of Area E.

Alison Lea

INSPECTOR

APPEARANCES

FOR THE APPLICANT:
Janine Bebbington and Sue Rennie

They called

Brenda Milston	Local Resident
Linda Rose Fisher	Local Resident
Gail Holl	Local Resident
Nadine Wilson	Local Resident
Reverend Robert Canham	Local Resident
Anne Hutchinson	Local Resident
Christine Henig	Local Resident and County Councillor
Neil Clarke	Local Resident
Sue Rennie	Local Resident
Janine Bebbington	Local Resident
Michael Worth	Local Resident
Louise Rogers	Local Resident
Kerry Mason	Local Resident
Janet Harris	Local Resident
Denise Nardine	Local Resident
Sue Conway	Local Resident
Eileen Blamire	Local Resident and Councillor

Cain Ormondroyd of Counsel appeared on the final day of the inquiry and closing submissions were delivered jointly

FOR LANCASHIRE COUNTY COUNCIL (OBJECTOR):

Mr A Evans of Counsel
He called

Lyn Dewar	Former Treasurer and Chair of Parent Teachers Association, Moorside Primary School
Angus MacCulloch	Local Resident
Lucy MacCulloch	Local Resident
Sarah Dodd	Governor, Moorside Primary School
Michelle Chapman	Teacher, Moorside Primary School
Michelle Dent	Teacher, Moorside Primary School
Mark Cheal	Teacher, Moorside Primary School
Len Guest	Former Headmaster, Moorside Primary School
Kay Whiteway	Teaching Assistant, Moorside Primary School
Lynn MacDonald	Asset Management Team, Lancashire County Council
Nick Bower	Estates Surveyor, Lancashire County Council
Richard Wood	Former Grounds Maintenance manager, Lancaster City Council and Area Support Officer for grounds, Lancashire County Council

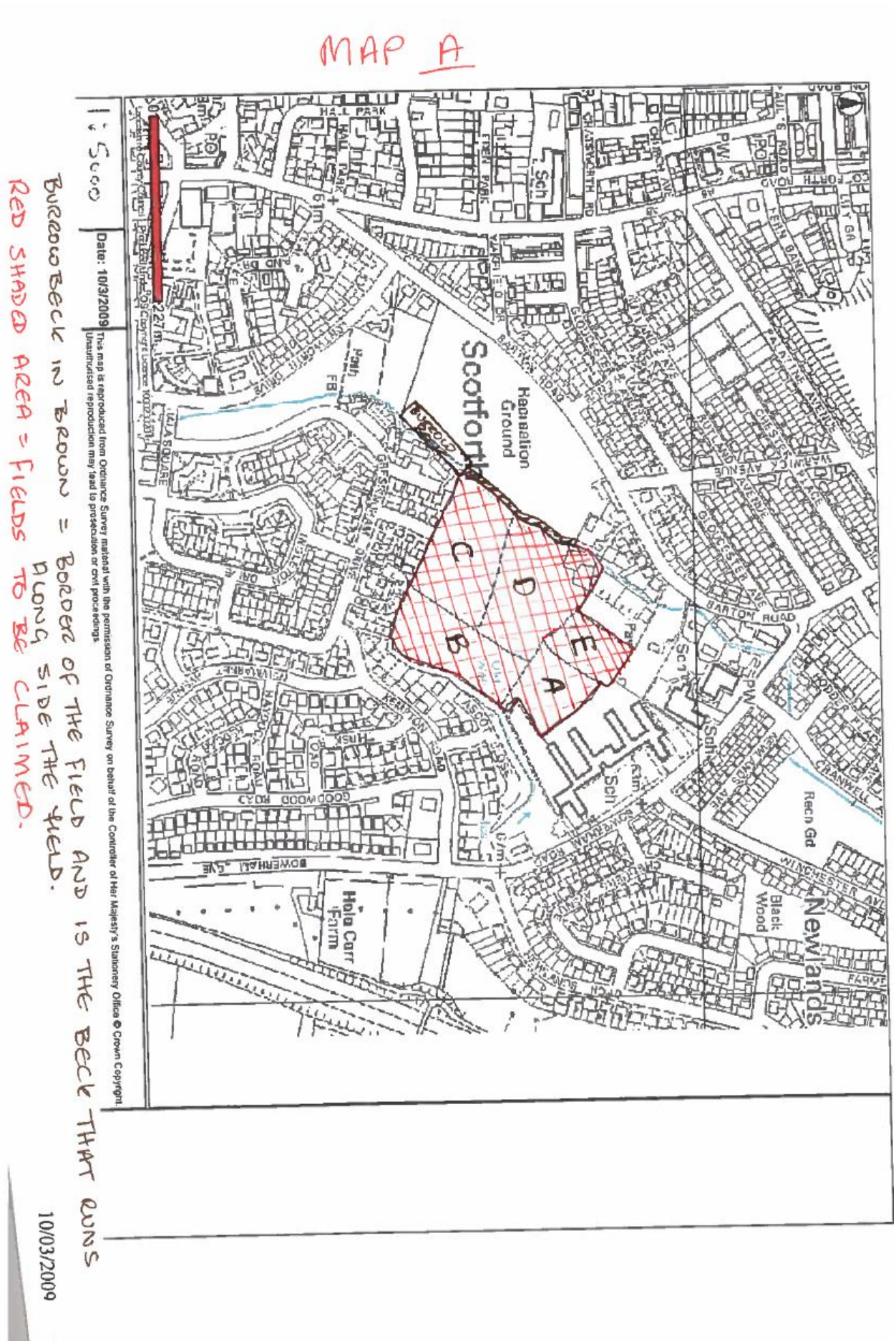
ADDITIONAL OBJECTORS:

Tim Ripley	Local Resident
Cara Richmond	Local Resident

DOCUMENTS SUBMITTED AT INQUIRY

1 City of Lancaster (Electoral Changes) Order 2001
2 Your Councillors by Division (Lancashire County Council)
3 Local Government Boundary Commission – electoral review of Lancaster
4 LCC Property Asset Management Information
5 Extract from terrier with plan
6 Section 87 Education Act 1944
7 Extracts from Education Acts relating to provision of Schools
8 Sections 507A and 507B, Education and Inspections Act 2006
9 R(on the application of Newhaven Port and Properties Limited) v East Sussex County Council and another [2015] UKSC 7
10 Abercromby v Town Commissioners of Fermoy 91) (1898. No 566)
11 Regulatory Committee Report relating to Claimed public footpath from Barton Road to Bowerham Road
12 Statement of Brenda Milston
13 Statement of Janine Bebbington
14 Statement of Christine Henig
15 Statement of Lynn MacDonald
16 LCC Plan showing land owned by CYP education
17 Plan showing witness addresses between 1988 and 2008
18 Colour copies of sports day photographs
19 Laminated copies of photographs of Area B and of various signs

MAP A



BURROWBECK IN BROWN = BORDER OF THE FIELD AND IS THE BECK THAT RUNS ALONG SIDE THE FIELD.

RED SHADED AREA = FIELDS TO BE CLAIMED.

10/03/2009