IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN OF LAND KNOWN AS "BELLE VUE PLAYING FIELDS" AT BELLE VUE, CONSETT, COUNTY DURHAM

INSPECTOR'S REPORT

The legislative background

1. The Commons Act 2006 ("the 2006 Act") requires the County Council of Durham as a commons registration authority (and which I shall refer to in this capacity as "the CRA"[1]) to maintain a register of town or village greens. On 20 November 2009 an application was made[2] to the CRA pursuant to section 15(2) of the 2006 Act ("the Application") claiming that land known as Belle Vue Playing Fields ("the Application Land") should be registered as a town or village green ("a TVG").

2. Section 15(2) 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. There is no formal requirement for an oral hearing as part of the process of

---

[1] The County Council is also the Objector to this application, as freehold owner of the land to which it relates: see further paragraph 6 below.

[2] Certain elements of the Application were received before this date (Form 44 itself, for example, is dated 15 October 2009), but it was not until 20 November 2009 that the Application became complete. The Applicant reserved its position at the Inquiry should there be any significance in the different dates, but as will become clear below nothing concerning the outcome of the Application would be affected if the earlier date were used instead as the date that the Application was made.

determination of the Application by the CRA. However, this has been found unsatisfactory, particularly in cases where there are material disputes of fact and/or in cases where (as in this one) the CRA is also the owner of the land in question. A practice in such cases has accordingly developed, and received implicit support from the Courts, of appointing an independent inspector to conduct a non-statutory inquiry and report to the CRA on the evidence and the law, with a recommendation as to how it should determine the application. The decision, however, remains the CRA's to make. It is the duty of the CRA to assess the submitted evidence and to consider the arguments on both sides for itself when performing the duty to determine the application. It is not, however, under any "*investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties*".[3] I return to these matters at paragraphs 9, 10 and 127 below.

The Application

4. In accordance with that practice, I have been asked by the CRA to consider the Application and to advise whether or not the requirements of the 2006 Act are satisfied. In order to hear the relevant evidence and to provide an opportunity for that evidence to be tested I held a non-statutory Public Inquiry in the old Council Chamber in the former Derwentside District Council Offices on Medomsley Road in Consett from 12 to 15th July 2010 (the building has now been taken over by the County Council of Durham since local government reorganisation in 2009).

5. The Application, which was made as prescribed on Form 44, was accompanied by the necessary supporting statutory declaration, signed by Mr John Campbell and dated 15 October 2009 on behalf of the Consett Green Spaces Group, an unincorporated association which is the Applicant in this case. The Application Land is described in Form 44 as lying between Villa Real Road, Medomsley

[3] Lord Hoffmann in *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674 at [61].

Road, Ashdale Road and Consett Junior School, and is defined more precisely by reference to a plan. Its limits are well-defined and there was no dispute before me as to its precise extent and boundaries. I shall describe the Application Land in more detail below at paragraphs 7 and 8 of this Report. Consett Green Spaces Group was represented at the Inquiry by Cain Ormondroyd of Counsel, instructed by Irwin Mitchell, Solicitors.

The Objection

6. The Application Land is owned by the County Council of Durham. A Statement of Objection was received from the Asset Management Service of the County Council of Durham, dated 2 February 2010 (I shall refer to the County Council as "the Objector" in this capacity[4]). The Objector was represented at the Inquiry by Charles Mynors of Counsel.

The Application Land

7. As I have already described, the Application was accompanied by a plan identifying the Application Land, and there was no dispute before me as to its location and its boundaries. At the Inquiry itself a large format, annotated (and coloured) aerial photograph was provided by Anna Wills, an Asset Planning Officer at Durham County Council, who gave evidence on behalf of the Objector. It was used during the Inquiry to identify locations on the ground, and I propose to refer to it throughout this Report. I shall call it "the Aerial Plan". It was the first document attached to the Proof of Evidence of Mrs Wills, but for convenience a copy of it is attached to this Report as Appendix 1[5]. I was told that the actual aerial photograph used to prepare the Aerial Plan was taken in 2001, but that the annotated lines and so forth were intended to represent the position on the ground (i.e. the location of fences, football pitches and so forth) more or less at the time that the Application was made, i.e. towards the end of 2009. It became clear from my own observations of the Application Land that

[4] See note 1 above: the County Council of Durham, in its capacity as Commons Registration Authority, is described in this Report as "the CRA".

[5] The CRA will of course have access to all of the material that was made available to me at the Inquiry. However, for convenience, I have appended 8 documents that are of particular assistance in understanding

its configuration had changed very little between that date and the holding of the Inquiry (i.e. in July 2010). Various lettered points are identified on the Aerial Plan (from A to N), which are helpful in identifying specific parts of the Application Land. It also usefully shows such features, outside the Application Land itself, as the "Number One" Roundabout,[6] the Consett Junior School, the Consett Fire Station and the Villa Real Estate; and I was able to mark on my copy of it the addresses of a good number of those who gave user-evidence in support of the Application at the Inquiry. At the Inquiry I was also helpfully provided with a further plan (this time on a map base, rather than an aerial photograph) covering a larger area, and with the addresses marked in red of all of the people who had given user-evidence in support of the Application at the Inquiry (both orally and in writing). I shall call this "the User Addresses Plan", and it is attached to this Report as Appendix 2.

8. I visited the Application Land (which was located very close to the former Derwentside District Council Offices in which the Inquiry was held) on two occasions. The first visit, made on my own, earlier in the morning before opening the Inquiry; the second, after the evidence had been heard but before closing submissions were made, a more formal site visit accompanied by participants at the Inquiry from the various parties concerned. There are large numbers of photographs of the Application Land contained in the evidence, and it will no doubt be well-known to those to whom this Report is addressed. It consists of a single space (i.e. there are no internal fences, hedges or other boundaries). Once access is made to a part of it, one has access to it all. There are trodden paths in the ground at various locations, marked by white dotted lines on the Aerial Plan. The yellow line on the Aerial Plan marks the boundary of the Application Land; the blue line marks the fence that exists around two grass rugby pitches and one smaller all weather rugby pitch to the West of the Application Land. The red lines on the Aerial Plan give an indication of the

this Report. A list of all 8 Appendices appears at the very end of the Report.
[6] A reference I was told to the former "Number One" quarry.

location of various football[7] pitches as laid out on the Application Land from time to time. They are numbered from 1 to 4, although, as will be established by the evidence set out below, it is clear that their exact location has varied to some extent. There are trees along much of the Northern boundary of the Application Land (next to Villa Real Road), and a further area of scrub and trees along its Eastern boundary (between Villa Real Estate and Oakdale Road). On the occasions when I visited the Application Land, access could be made to it at point B, at point D (and in fact anywhere along the tree line to the West of point D on Villa Real Road),[8] at point F, to the South of point G (from Ashdale Road), at point H and at point J.

Procedural matters

9. There is no suggestion of any failure by the CRA to comply with the prescribed procedures in relation to the application. As I have already outlined, the CRA has a discretion whether to hold an oral hearing before confirming or rejecting the application before it. In this case the CRA determined that a public hearing should be held, and appointed me to act as Inspector and to write this Report.

10. Whilst it is to be expected that the Registration Authority will consider carefully and attach weight to my recommendation, I am not an independent adjudicator, and at all times the duty of reaching a fair decision upon the application remains with the CRA. It is not a duty that CRA can delegate to an outsider. Thus the CRA will remain free to seek other legal advice once my Report has been received, and it will have to reach its own determination on the various matters of fact and law which arise. I nevertheless hope that my Report (which I anticipate the CRA will make available to the parties before they come to a final determination) will materially assist their consideration and ultimate disposal of the Application.

Burden and Standard of Proof

[7] I have sought in this Report to use the word "football" to refer to both soccer and rugby; and have used one or other more specific term where only one is meant.

11. The burden of proving that the Application Land has become a TVG rests with the Applicant. The standard of proof required is the balance of probabilities, and that is the test that I have applied to the matters which I consider below.

12. In considering these matters it is also helpful to bear in mind the guidance given by Lord Bingham in *R v Sunderland City Council ex parte Beresford* [2004] 1 AC 889:

> *"As Pill LJ rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102,111 "it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...". It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limits of 20 years' indulgence or more is met."*

All of the elements required to establish that land has become a TVG must accordingly be properly and strictly proved by the Applicant on a balance of probabilities.

User evidence in support of the Application

13. I shall begin by considering the evidence of user produced at the Inquiry on behalf of those supporting the Application. I should make clear at the outset that none of the oral evidence at the Inquiry was taken under oath. I would also like to record, however, that every witness at the Inquiry (whether supporting or objecting to the Application) presented their evidence in a straightforward and open way. I have found no reason to doubt the truth of any of that evidence; instead I found all of the witnesses to be reliable and credible.

14. I heard oral evidence in support of the Application from the following witnesses, and in the following order:

[8] There are bus stops on both sides of Villa Real Road near points B and D.

John Campbell, 81 Villa Real Road, Consett
Ann Hall, Glenesk, 4 Villa Real Estate, Consett
David Stobbs, 7 Chartwell Place, Consett
Pamela Lister, 7 Ashdale Road, Consett
Margaret Nealis, 35 Villa Real Road, Consett
Andrew McDonald, 216 Medomsley Road, Consett
Barbara Lynn, 11 Oakdale Road, Consett
James Guy, 234 Medomsley Road, Consett
Mary Westgarth, 17 Fairways, Consett
John O'Connor, 26 Woodlands Road, Shotley Bridge
Helen Clarke, 13 Villa Real Estate, Consett
David Clarke, 13 Villa real Estate, Consett
Gilbert Green, 6 Allison Street, Consett
Owen Temple, 300 Medomsley Road, Consett
Bridget McWilliams, 60 Ashdale Road, Consett
Danny Inglis, 93 Sherburn Terrace, Consett
Lee Weaver, 45 Romany Drive, Consett
Maureen Hurson, 45 Villa Real Road, Consett
Karen Brown, 40 New Bell Court, Consett

15. Written Witness Statements were provided by each of these witnesses except for John O'Connor, who attended the Inquiry principally to tell me about the Rugby Club, David Clarke, who confirmed the truth of the Statement of his wife (Helen Clarke), and the last five persons mentioned in the list. These five witnesses were not called as witnesses on behalf of the Applicant, but they nevertheless spoke in support of the Application. Karen Brown (the last name in the list) did not in the end give oral evidence, but handed in some photographs of use of the Application Land which I have taken into account in reaching my decision.

16. In addition to the evidence from those who appeared at the Inquiry I have been able to consider a substantial body of other written evidence in support of the

Application. The following people provided full Witness Statements, although were not in the end called to give evidence at the Inquiry:

Stephen McDonald, 6 Walton Terrace, Consett
Helen Robertson, 30 Fairways, Consett
Marjorie Little, 21 Oakdale, Consett
Maureen Davison, 5 Villa Real Estate, Consett
Reginald Evans, 22 Villa Real Road, Consett

I have taken their evidence into account, although I have not given it as much weight as I would have been able to do had it been tested by cross-examination at the Inquiry.

17. Copies of all of the Written Statements submitted at the Inquiry are contained in a bundle provided by the Applicant ("the Applicant's Bundle"). A number of them exhibit photographs of the Application Land. I have also seen and considered all of the evidence supplied with the original Application, which is contained in a separate Bundle of material put together by the CRA (which also includes Form 44, the supporting Statutory Declaration, the Statement of Objection from the Objector and so forth); and which I shall call "the Core Bundle". This material includes a large amount of further evidence in support of the Application (described as "Personal Testimonials", and which are numbered from 1 to 62), together with "Other Supporting Information".

18. The evidence as to general user of the Application Land was remarkably consistent. The witnesses certainly did not depart in any significant respect in their oral evidence, or under cross-examination, from the evidence contained in their Statements. I do not propose to set out in full the oral evidence of the witnesses who appeared at the Inquiry because, in his written Closing Submissions (which were supplemented orally on the final afternoon of the Inquiry), Mr Mynors stated on behalf of the Objector that "*it is accepted that there has been a sufficient amount of qualifying lawful sports and pastimes on*

the Application Land in this case - in particular, walking, exercising dogs, cycling, playing with children, flying kites, picnics, and snowmen and sledging."[9]

19. This is an important concession,[10] but it is not conclusive of the matters which the CRA must determine, because the Objector does not accept that such user, which it is accepted took place as a matter of fact, was user "as of right". Nevertheless it does simplify matters somewhat because the Objector, having had the opportunity to hear the oral evidence led on behalf of the Applicants, accepted the *fact* of such user over the necessary 20 year period ending at the date of the Application (i.e. 20 November 2009[11])

20. Given the need for the Applicant strictly to prove its case (to which I have referred at paragraph 12 above of this Report) I should make clear that I have no doubt whatsoever that this concession was properly made. I have reviewed all of the written evidence in support of the Application, and I heard the oral evidence given by the witnesses who appeared in support of the Application at the Inquiry. That evidence clearly demonstrated that the Application Land has been used throughout the period from 20 November 1989 to 20 November 2009, by those who gave evidence and by others, for a considerable range of lawful sports and pastimes. The witnesses refer to informal games of football, to dogwalking (both between access and egress points, and more generally throughout the Application Land, sometimes with dogs on leads, often with the dogs allowed to roam free), to riding bicycles, kite flying, playing with children, sledging, building snowmen and so forth. Of course these activities were not all taking

[9] I should make clear that the Objector does not accept that all of the user that has taken place on the Application Land has been qualifying use. For reasons which will become clear below the Objector does not accept, for example, that organised football matches are qualifying use (because permitted), nor the playing of golf (because of a notice to which I shall refer below), nor the lighting of the occasional bonfire to which there was reference (because unlawful); but the Objector does accept that, leaving such non-qualifying user out of account, there has nevertheless been sufficient qualifying use throughout the period.

[10] Particularly bearing in mind the dictum of Lord Hoffmann in the *Sunningwell* case to which I have already referred at paragraph 3 above, that the CRA is not under any "*investigative duty which requires it to find evidence or reformulate the applicant's case. It is entitled to deal with the application and the evidence as presented by the parties*".

[11] See note 2 above.

place at all times – some were very obviously seasonal. But I have no doubt whatsoever that the user was of the kind and quantity to have alerted a reasonable landowner to the fact that it was taking place. Had Mr Mynors not made the concession that he does, I would in any case have advised the CRA to come to the same conclusion. There was sufficient qualifying user of the Application Land throughout the relevant 20 year period for the purposes of section 15(2) of the 2006 Act. Any other conclusion would in any event have been remarkable given the size and attractiveness of the Application Land, the fact that football pitches are laid out on it, and the fact that totally unimpeded access is available to it from so many points, and has been so available throughout the relevant 20 year period.

21. I will refer specifically to the evidence of six witnesses who appeared at the Inquiry, by way of example of the use which the Objector accepts amounts to sufficient qualifying user.

22. Mr Campbell gave evidence of use of the Application Land since 1985, when he began to play organised football for Consett Juniors.[12] But he also used the field to walk his dog, Rommel, every morning and evening around the Land, usually letting him off the lead to play with the other dogs that were being walked at the same time; and he also practised golf on the Land. He moved away from the area in 1991, and his use of the field reduced (although did not stop); but he returned to the area in 2005 and resumed his use of the Land. Now, however, he would play with his two young children on the Land, who learned to kick a football and to ride a bicycle on the Land. Mr Campbell also continued to practise his golf shots. Since October 2008 he has had another dog, which is exercised regularly on the field. His children are now old enough to play football, ride their bikes and generally run around on the Land on their own (where they can be observed from Mr Campbell's current address). Mr Campbell has also witnessed many other people using the Application Land in the same sorts of ways. Dog walking is particularly prevalent, but children

[12] I will say more about organised football when I consider the evidence given on behalf of the Objector.

(often with accompanying parents) also play all over the Application Land, with footballs, bicycles, kites and so forth. There are also good places on the Land (particularly at its South-Eastern end) to build dens in and amongst the trees. In Winter, the Application Land is used for sledging, building snow men and so forth. It would not be unusual to see 50 people on the Application Land at such times.

23. Similarly, by way of example, Mrs Hall gave evidence of using the Application Land both as a child and as an adult. In her Witness Statement she states (and she confirmed this in oral evidence) that, between 1961 and 1965, in addition to walking to and from school across the Land she "[a]s a child also played cricket, football, rounders, practised for school sports days, flew kites, played tally-ho and rode my bike along with other children on a daily basis." During the Summer months in the same period she would camp out on the Land with friends and have picnics; in Winter they would have snowball fights, build snowmen and so forth. The period of Mrs Hall's childhood of course falls outside the 20 year period to which the CRA must direct its attention, but nevertheless her evidence is indicative of the pattern of use of the Application Land that had already begun to take place. In any event, Mrs Hall's use has continued into adulthood and into – indeed throughout - the relevant 20 year period. From 1971 to the present day she has used the Land regularly. She used to run, but now walks, around the field regularly for exercise. Between 1972 and 1984 (again before the relevant 20 year period) she would play with her children on the Land, teaching them how to ride their bikes, to play football, tennis, cricket and to fly kites. Between 1984 and 1998 (now including a substantial tranche of the relevant 20 year period) Mrs Hall walked her dog Rebel - a dog who would fetch a stone but not a ball – around the Application Land, often several times a day. Throughout the time she has known the Land she has seen a similar pattern of use by a large number of other local people. Adults walking dogs, practising golf, playing and picnicking with their children. Children playing informal games of football, riding bicycles, making dens, flying kites, building snowmen, collecting dock leaves and the like for pets.

24. Mr Stobbs has walked his dog Buster four or five times a week around the Application Land since 2002. They go all over the Land, and meet friends who walk their dogs at similar times (Mr Stobbs described this as a sort of informal 'group' of friends/dog-walking acquaintances who meet and walk their dogs at the same time each day.) Prior to that (and before a car accident which had affected his mobility) he used the Land for jogging and practising golf. Like many of the users who gave evidence, Mr Stobbs had used the Land for formal organised soccer matches in his younger days. But he would also go to the Land on his own or with friends to play football, practise golf and so forth. He saw lots of others – adults and children – doing very much the same things.

25. Mrs Lister has lived at the same address in Ashdale Road for the last 47 years. Her children were born in 1969 and 1979, and she has grandchildren born in 1998 and 1999 who live off Villa Real Road. She sees them daily. Her grandson is now 12 years old, and he plays on the Application Land with his friends and on his bike. Mrs Lister has three other grandchildren who live at Castleford (2 or 3 miles away). Her grandchildren have all attended the Beechdale Nursery (just to the East of the Application Land). She would frequently pick them up and take them to play on the Land. She saw organised football taking place on the pitches at weekends, but there was always plenty of space to go with children to play. She did not feel that the pattern of use had changed much over all of the years she had known the Application Land. There would always be someone there using the Land for informal recreation.

26. Finally in this set of examples of user evidence, I will refer to the evidence given to me orally by Danny Inglis and Lee Weaver, both of whom are 17 years old. They were not called as witnesses by the Applicant (and had not prepared written statements); but they had heard that there was an Inquiry taking place concerning the Application Land and wished to tell me about their use. They have been playing soccer on the Land for the past ten years or so. They said that it kept them occupied and "out of trouble". They do not play for any of the

formal teams, such as Consett Juniors; they simply meet their friends for a kick-about, making use of the goal posts when they are there during the season (and when, as is often the case, they are left up out of season). They play all year round, in the evenings and at weekends, usually in the areas of pitches 2, 3 and 4 as shown on the Aerial Plan. They have never been stopped from doing so, and they have never sought anyone's permission to do so or been granted such permission. Often there would just be four or five of them, playing around one goal mouth; but sometimes there would be as many as 20 of them, and they would use a full pitch. If there are organised matches taking place, they simply use a different pitch or goalmouth. While they are playing soccer there are always other people on the land walking dogs, going for a run, practising golf shots and the like; and there are other children playing and riding bikes.

27. I have summarised the evidence of these six witnesses so that the CRA can gain an immediate impression of the use that has been taking place.[13] As I have already indicated, the Objector, having read and heard the totality of the evidence available to the Inquiry itself accepted that there was sufficient qualifying use taking place on the Application Land throughout the relevant 20 year period; and I have indicated that I have no doubt that the Objector was right so to conclude.

28. The Objector also does not contest that those persons who have made use of the Application Land for the necessary 20 year period belong to a neighbourhood within a locality. In the light of the law as it stands following the *Warneford* case,[14] the CRA must be satisfied that users include a significant number of the inhabitants of at least one neighbourhood or locality. In this case those supporting the Application point to a neighbourhood which they describe as "Consett North-East (the Belle Vue Area)". The precise boundaries of this

[13] Although of course it will also have access to all of the written evidence, which, as I have indicated, was confirmed by the evidence given orally by those who appeared at the Inquiry.
[14] *R (Oxfordshire and Buckinghamshire Mental Health NHS Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin). The Objector however wished to reserve the right to make further submissions on this issue should the Court of Appeal relevantly change the law on appeal from the *Warneford* case before the CRA reaches its decision in this matter.

claimed neighbourhood are defined in evidence provided by Mr Temple. He has provided a map ("The Neighbourhood Map") with a red line surrounding the claimed area, together with a detailed written description. This Map and its accompanying description are attached to this Report as Appendix 3. I was also driven around the boundaries of this claimed neighbourhood as part of my accompanied site visit.

29. Mr Mynors on behalf of the Objector accepts at paragraph 3 of his Closing Submissions that this area, as defined by Mr Temple, has sufficient cohesiveness to count as a neighbourhood, and that it is self-evidently "within a locality" – either the ecclesiastical Parish of Christ Church, Consett, or the District of Derwentside, or indeed County Durham as a whole.

30. Again, I agree with the pragmatic view taken by the Objector. It is important that the relevant neighbourhood is identified clearly (because it defines the identity of those entitled to any user rights which may be established as a result of this process), and my advice to the CRA is that this has been done in this case. North-East Consett – or perhaps better "the Belle Vue Area" – is clearly a coherent and acknowledged area of Consett. Many of the witnesses told me that they came from "Belle Vue", and Mr Temple has been meticulous in defining precisely which properties fall within the neighbourhood and which do not.

The remaining issues: user "as of right"

31. I turn next to advise the CRA on the remaining issues which it must consider in determining whether or not to accede to the Application. In the terms of section 15(2), and given the material already considered in this Report, I can clearly advise the CRA that it can be satisfied that "*a significant number of the inhabitants of [a] ... neighbourhood within a locality, have indulged ... in lawful sports and pastimes on the land for a period of at least 20 years; and that they continue to do so at the time of the application*" - which leaves only the crucial question of whether that use has been "*as of right*".

32. For use to be "as of right" it must not be by permission, by force or by stealth. In this case there is no suggestion that user has been by force or by stealth. It has not involved (by way of example) breaking down fences; and it has not (again, by way of example) all taken place at night, under the cover of darkness.

33. It is, however, argued on behalf of the Objector that the use was by permission, because it was sufficiently clear (it is argued) that the Objector "sought to control the use of the land at all times" (see paragraph 34 of Mr Mynors' Closing Submissions). In particular, the Objector "allowed football (and rugby) to be played, thereby preventing access to the pitches by others", and "from time to time changed the location of those pitches, and thus the extent of the land that could be used by others".

34. Mr Mynors called 9 witnesses in support of the case for the Objector:

Anna Wills, Asset Planning Officer, Durham County Council

Gerard Darby, Planning and Investment Manager, Durham County Council

David Burgess, Neighbourhood Services, Durham County Council

Colin McBride, Cultural Services Manager, Derwentshire Trust for Sports (trading as "Leisureworks")

David Pyke, Secretary, Consett AFC and Consett AFC Juniors

John Snailham, Clean and Green Area Supervisor, Durham County Council

Justin Emmerson, Grosvenor Investigations and Security Services Ltd

Peter Crinnion, Public Rights of Way Officer, Durham County Council

David Theobald, Project Director, Building Schools for the Future Programme, Durham County Council

35. Again because of the concessions made on behalf of the Objector, it will not be necessary for me to set out the evidence given by all of these witnesses in full. The written evidence put forward by Mr Theobald (concerning the proposed Consett Academy and Leisure Centre which the Objector wishes to develop on the Application Land) is also not relevant to the matters the CRA must decide,

and for that reason was not subjected to cross examination by Mr Ormondroyd. Mr Ormondroyd does not accept that everything said in Mr Theobald's evidence, concerning the desirability of the proposed development, is correct, but he does submit that it is irrelevant; and I agree with him. The desirability of possible future uses of the Application Land is entirely irrelevant to the matters the CRA must determine under the 2006 Act, a point I shall reemphasize at the very conclusion of this Report at paragraph 127.

The evidence concerning the layout and use of the football pitches

36. The evidence in support of both the Applicant's case and the Objector's case makes it clear that there have been football pitches of various sizes laid out on the Application Land throughout the 20 year period from 1989 to 2009. I heard evidence about these pitches from users generally, and from a number of witnesses who had been directly involved in organising football matches.

37. Mr O'Connor, who gave evidence in support of the Application, was the Chairman of the Rugby Club from 1993 to 2006, and was the project manager of a National Lottery bid that led to the Club's redevelopment between 2002 and 2004. The planning for this project had begun in 1996, but the redevelopment was actually implemented on the ground between 2002 and 2004. One element of the redevelopment was the erection of the fence (marked by a blue line on the Aerial Plan) around the two main grass rugby pitches and a smaller all-weather rugby pitch. Mr O'Connor told me that the fence had been erected at the end of 2002, which accorded with the recollections of other witnesses.

38. It is apparent that this redevelopment gave rise to some controversy at the time. Before it took place, the area now enclosed by the fence represented by the blue line on the Aerial Plan was physically as accessible to ordinary users as the Application Land itself; as indeed was the land to the North West of the fenced area (towards the Number One Roundabout, around the points A and N on the Aerial Plan) - which small area is still accessible, but which no longer gives such ready access to the formerly open area (including the Application Land) as a

whole.

39. The redevelopment was the subject of a planning application, and a number of witnesses recalled a meeting in the same Council Chamber in which this Inquiry was being held, in 2002, at which that application was considered and objections to it heard. Mr O'Connor explained that the lottery money would not have been forthcoming to provide for an all weather pitch, lighting and so forth, unless the site was securely fenced to protect the investment. The lottery project also required the support of the District Council, because lottery funding could not be secured without the support of the local authority. In the end planning permission was obtained, and the redevelopment went ahead, but there were various elements of compromise. First, an access route was retained to the Application Land between L and J; and, secondly, the height of the fencing represented by the blue line on the Aerial Plan was significantly lowered from that originally intended.

40. Mr O'Connor also explained that Pitch 4 as shown on the Aerial Plan (i.e. the Westernmost football pitch on the Application Land itself) was changed to a rugby pitch as a consequence of the redevelopment. While the redevelopment was going on (i.e. between 2002 and 2004), the two rugby pitches now enclosed by the fence line shown in blue on the Aerial Plan were unavailable for use. The Rugby Club accordingly agreed with the District Council that Pitch 4 would be laid out on the Application Land as a rugby pitch, and it was used extensively during those seasons. It is in fact still laid out as a rugby pitch, although Mr O'Connor's evidence (which was entirely in accord with the evidence from other users of the Application Land) was that it has been used very much less for organized rugby matches since 2004, when the two main (and now fenced and floodlit pitches) became available again. Mr O'Connor estimated that Pitch 4 has, since 2004, been used for organized rugby matches no more than 3 or 4 times a season, although the Club has maintained a formal license agreement with first Derwentside District Council and now the CRA entitling the Club to use Pitch 4 at weekends.

41. Evidence was also presented to me concerning the layout and use of the soccer pitches. I shall consider in due course evidence given on these questions by those supporting the Application,[15] but I shall begin by considering the evidence of Mr Burgess, Mr Pyke, Mr Snailham, Mr Crinnion and Mr Emmerson, who were all called as witnesses in support of the Objector's case.

42. Mr Burgess, who is currently employed by Durham County Council in Neighbourhood Services, has been involved in the Sunday League since 1965 (see paragraph 2 of his Proof of Evidence). He was a League Official and involved in running the League from 1978 to 1996. He worked for Derwentside District Council prior to 2009 (when Durham became a Unitary Authority and staff and resources were transferred to the County Council). From 1999 to 2004 (when he worked for the District Council) he was responsible for managing sports pitches, including those on the Application Land.

43. Mr Burgess (as various witnesses supporting the Application had done) explained to me that the Application Land is a reclamation site, having been previously used as a site for the tipping of quarry waste.[16] That use had ceased, and the site had been levelled and landscaped at the end of the 1950s, long before the 20 year period with which the CRA is now concerned. The pitches were erected in the early 1960s, and he was personally aware that Sunday League matches began on the Application Land in 1965. During the period when he managed the site, i.e. from 1999 to 2004, there were at first three soccer pitches laid out, on the areas numbered as Pitches 2, 3 and 4 on the Aerial Plan. (Mr Burgess explained that Pitch 4 used to be used for soccer before it was taken over by the Rugby Club as a consequence of their redevelopment works). On Saturday mornings during his time, organised matches were held on Pitch 3; and on Saturday afternoons on Pitch 2. On a normal Sunday morning during the season there would be two organised matches on the Application Land, but that

[15] See paragraph 54 *et seq.* below.
[16] The detailed early history of the Application Land is set out in the evidence of Anna Wills, who gave

number would vary. There were four Sunday morning teams who used these pitches, but they would, of course, have away as well as home matches. There would also be cup games (there were up to 5 cup competitions), but the number of games would depend upon how good a cup run a particular team had in any particular season. So the exact number of matches on any particular Sunday would vary, but a fair average would be two. Mr Burgess thought that the pattern of use would be very similar today, and indeed would have been similar for a good number of years before 1999. If the weather had been poor and there was a backlog of fixtures there might also have been mid-week games organised on the Application Land towards the end of the season.

44. Mr Burgess thought that Pitch 1 as shown on the Aerial Plan was created in about 1990. Prior to that, pitches 2 and 3 would sometimes be turned around by 90 degrees to relieve the inevitable wear and tear around the goalmouths. Pitch 1, when created, was a smaller pitch designed for junior teams.

45. Mr Burgess was also able to explain that (at any rate during his time) the District Council put up the posts at the start of the season and marked out the white lines, after which the clubs would repaint the white lines as and when required during the season. The grass was cut by a contractor on behalf of the District Council.

46. In terms of the allocation of the pitches for the Sunday matches he would hand out application forms by early June, which would then be returned by a set date. By the end of June the teams wishing to use the Application Land would have had a particular pitch at a particular time at the weekend allocated to them for the season, which they would then use for home games as required. They would pay a fee for the allocation of the pitch for the season.

47. Mr Pyke was also able to tell me a good deal about the organisation of soccer fixtures, and he produced a number of receipts for pitch allocation fees dating

from the 2009 season.[17] He is Secretary of Consett Association Football Club (AFC) and Consett AFC Juniors. He has been involved in managing teams and club administration for the last 15 years, and had played for Consett boys club under 16s on the Application Land in 1968. He recalled, as Mr Burgess had done, the time when there were only three pitches (roughly in the location of Pitches 2, 3 and 4 on the Aerial Plan, but with 2 and 3 rotated by 90 degrees). He thought that this was the arrangement when he had played there in 1968. Pitch 1 (the junior pitch) was a more recent creation, which he thought dated from the mid-1990s (Mr Burgess had suggested that it might have been created a few seasons earlier than that).

48. Mr Pyke thought that the amount of use for organised soccer matches over the relevant 20 year period had been broadly constant. Of course it was seasonal; and of course it varied from week to week. But the pattern was similar. The main change was that there was now considerably more junior football being played, and less adult football. He thought that this reflected a more general social change across the country. During his involvement over the last 15 years the number of junior teams (from Under 12s to Under 18s) had increased from 4 to 16; and there have been mini-soccer teams (for younger children, starting at Under 7s) too since 2002. There is also now at least one girls team, which began in 2009. This increase led to the need for Pitch 1, which in his view was now considerably the most used of the pitches. Junior matches were shorter in duration, but they had more practice sessions on weekday evenings, particularly on Fridays. These Friday evening sessions had in recent years continued throughout the year, but took place indoors in the Winter (in the adjacent Leisure Centre). In total Consett now had as many as 30 teams; but these did not all play on the Application Land (use was also made of pitches at Crookhall and Delves Lane, and the girls now trained at Consett St Patrick's School). Nevertheless the pitches on the Application Land had been favoured by the Junior Teams in recent years, because of the proximity of the Leisure Centre, and the facility that there is on site to store temporary goals, cones and other training equipment.

[17] There are also a number of pitch allocation sheets contained in the Core Bundle at pages 104-108.

49. Mr Snailham was also able to give me relevant evidence concerning the organised football because he had been employed by the District Council before reoganisation as a Horticultural Manager. Since 1997 he had overseen the maintenance of the Application Land. He was able to confirm the evidence given by Mr Burgess to the effect that the District Council put up the posts at the start of the season and marked out the white lines, after which the clubs would repaint the white lines as and when required during the season. The grass is cut between April and October, and the whole area of the Application Land is cut (rather than just the pitches). Pitch 4 is left a little longer than the other pitches because it is used for rugby rather than soccer.

50. Mr Crinnion, who is employed by Durham County Council in the Council's Rights of Way Section had also played football for Consett from 1991 to 2004. His team had not always used the Application Land (they had also played at Crookhall), but he very much confirmed the pattern of use described by Mr Burgess and Mr Pyke. When his team had been allocated the Application Land (he thought that this had been the case from 1996 until 2000) they paid a hire fee as Mr Burgess had described, and used Pitch 4 on the Aerial Plan (which was then a football pitch). Typically, they would have a home match every other week, but the total number of matches would depend upon their runs in the cup competitions. The matches would typically kick off at 10.30 a.m. on a Saturday morning, and the players would be there in total for about 2 hours. In addition to the two teams there might be half a dozen or a dozen supporters, and a referee (there would not be linesmen): a total of around 30 people. Other people might also pass by and stop to watch for varying lengths of time.

51. Finally in this context I should mention the evidence of Mr Emmerson. He is employed by Grosvenor Investigations and Security Services Ltd, and was instructed by the Objector to undertake a number of surveys of use of the Application Land, on Wednesday 30 December 2009, Thursday 21 January 2010, Saturday 1 May 2010 and Sunday 2 May 2010.

52. These four dates of course fall after the relevant 20 year period (which ended on 20 November 2009); but the surveys nevertheless in my opinion give a useful indication of the modern user of the Application Land. They need to be approached with some caution, however, not least because on 30 December 2009 Mr Emmerson explained that it was snowing hard on the Application Land, and, on 21 January 2010, although it was not actually snowing at the time of the survey, there was snow on the ground. The surveys undertaken across the May weekend, however, record organised football activity which is entirely in accord with that described by the various witnesses to whose evidence I have referred, and is supported by photographic evidence included with Mr Emmerson's Proof of Evidence.

53. Mr Emmerson's evidence of course not only records the organised football use, but also use by dogwalkers, picnickers, playing children and so forth; i.e. use of the kind which, during the relevant 20 year period, led to the concession by Mr Mynors that I have already set out at paragraph 18 above of this Report.

54. I have set out in some detail the evidence of these five witnesses, who gave evidence on behalf of the Objector, on the pattern of organised (and clearly permitted) football on the Application Land; but I should make clear that the evidence from those supporting the Application as to the pattern and extent of such non-qualifying user was entirely consistent with it. There is accordingly no significant dispute of fact about the extent of that user.[18]

The significance of the organised football

55. The Objector accepts, as I have already indicated, that there has been sufficient general public use of the Application Land for lawful sports and pastimes throughout the twenty year period. It is not suggested that the organised football matches were so extensive as to have prevented sufficient qualifying use from

[18] At the start of the Inquiry, based on how the parties set out their cases in opening, it appeared possible that there might be dispute about the extent of the organised football use; but by the close of the Inquiry

taking place. Nevertheless, the Objector maintains, as outlined at paragraph 33 above, that it "sought to control the use of the land at all times". In particular, it is said, the Objector "allowed football (and rugby) to be played, thereby preventing access to the pitches by others", and "from time to time changed the location of those pitches, and thus the extent of the land that could be used by others".

56. I will begin by advising the CRA as to the findings of fact which are in my view justified by the evidence concerning the organised football use.

57. I find that there have on the balance of probabilities been organised, licensed (i.e. subject to a permission, and so not "as of right") football matches taking place on the Application Land, on pitches laid out for the purpose, throughout the relevant 20 year period from 1989 to 2009. These matches have taken place more or less on the sites of the four pitches as shown on the Aerial Plan, although Pitch 1 (the smaller junior pitch) only came into existence somewhere between 1990 (Mr Burgess's evidence) and 1995 (Mr Pyke's evidence). Pitches 2 and 3 represent the site of the two main 'adult' soccer pitches, although they have in some seasons (or for some parts of seasons) been laid out at 90 degrees to their alignment in the Aerial Plan. Pitch 4 was a soccer pitch during the relevant 20 year period prior to 2002. It has since been a rugby pitch which will have been intensively used as such between 2002 and 2004, but has been much more lightly used for organised rugby matches (although still used on occasion each season) since.

58. I find that these matches were confined to the football season (i.e. from about August to May) and almost all took place at weekends, although there will have been occasional matches, especially towards the end of the season when a backlog of fixtures had occurred, on a weekday evening. An 'average' weekend in the middle of the season will have involved two matches on each of Saturday and Sunday taking place on the Application Land. Although this will have been

---

both sets of Closing Submissions summarised the position in very similar terms.

the average picture, there will certainly have been Saturdays and Sundays, even during the season, when there were no games at all. And there will have been weekends when more (although not many more) than four organised matches will have taken place.

59. I find as a fact that the amount of junior football (i.e. Under 11s to Under 18s), and mini-soccer (down to Under 7s) has considerably increased during and since the 1990s; and that this has been concentrated on (although not exclusively confined to) Pitch 1. The number of junior Consett teams has increased over this period (which is considerable testimony to the hard work put in by Mr Burgess, Mr Pyke and no doubt others), at a time when the popularity of adult weekend football has been in decline; but the junior Consett teams do not train and play only on the Application Land. These trends may therefore more or less have cancelled one another out in terms of overall usage of the pitches. Adult matches last longer than junior ones; but, on the other hand, I was told that juniors are more inclined to train on a weekday evening. There may well now be a larger *number* of people using the field for organised football than was the case, say, 15 years ago; but many of these people will be youngsters playing and training for shorter periods.

60. I should add that these findings take into account, and are in accordance with, the evidence from the non-football playing users and observers of the Application Land who gave evidence in support of the Application and whose general impression was that organised football took place for a few hours on Saturday and Sunday, and occasionally on a weekday evening (perhaps with some recognition that this had been increasing over the last two or three seasons, particularly on a Friday evening); coupled nevertheless with the conviction that any recent change was slight and that there had been little change in the overall intensity of use for organised football over the relevant 20 year period. Some such witnesses had observed that there had been more junior soccer in recent years; others had not noticed that change.

61. I find that the evidence taken as a whole suggests that the detail (in terms of the age of the players, which pitches they were using, and how frequently they could be persuaded to train), may have changed somewhat over the years; but the general pattern of organised football use is clear, and has remained broadly constant throughout the relevant 20 year period.

62. As I have already indicated, the Objector does not argue that this licensed use physically prevented qualifying use (qualifying use was not "crowded out" by it). Rather the Objector argues that the fact of regular, licensed use, coupled with the periodic relocation and reorientation of the pitches, communicated to other, qualifying users of the Application Land, that access to it was regulated, and that their use was therefore not as of right but permissive.

63. It is clear from *R v Sunderland City Council v Beresford* [2004] 1 AC 889 that an implied permission can arise where a landowner's conduct has been such as to make clear to users that their use was pursuant to a permission. However, permission cannot be implied from the mere inaction of a landowner. Instead, the landowner has to do something positive to make users aware that their use of the land takes place with permission and so is not as of right. Conduct amounting to positive encouragement to use the land is not in itself sufficient to amount to an implied permission. Instead, examples given in *Beresford* of circumstances where an implied consent may arise include where a landowner makes a charge for entry to the land, or occasionally closes the land to all-comers (for example on one day a year), or where appropriately worded signs are erected.

64. The Objector has been able to point to only one potentially relevant sign in this case,[19] which I was able to view because it was in existence when I visited the Application Land, located on the West outside wall of the changing room next to

[19] There was also some suggestion of signs having being erected by the Rugby Club in or around 1990-1992 discouraging dog fouling and the making of tracks on the main rugby pitches (i.e. relating to the area of land now surrounded by fencing and to the West of the Application Land). These signs, which were not erected by the landowner and did not speak to the Application Land, can clearly not be relied upon to

point H on the Aerial Plan (i.e. the small grey building, clearly visible on the Aerial Plan). The sign is worded as follows (there is a photograph of it in the Core Bundle at page 108A):

> "DERWENTSIDE DISTRICT COUNCIL
>
> NOTICE
>
> Please do not drive vehicles, ride horses, practise golf or play hard ball games on these pitches.
>
> DO NOT let your dog foul on mown areas.
> Remember that dog dirt spreads diseases.
>
> No organised event is to take place on this land without the prior permission of the: -
>
> Leisure Services Department,
> Derwentside District Council."

65. It is in my view quite impossible to argue that this sign alone rendered qualifying user permissive. To begin with, there was only one such sign, and it was in a pretty inconspicuous location. Certainly it would have been possible for very large numbers of users of the Application Land to have entered and left without seeing the sign at all – and that indeed was the evidence of all the users who appeared before me: none of them was aware even of the sign's existence prior to the Inquiry. But in any event its wording is not appropriate to render qualifying user (i.e. *non*-organised use, to use the terminology of the sign's last sentence) permissive. The sign does state that a certain kind of use (i.e. "organised events") requires permission; but it is quite impossible to construe from that, or from the sign's other terms, that permission is being granted for qualifying use.

66. It was argued more forcibly on behalf of the Objector that the regular, licensed use for football, coupled with the periodic relocation and reorientation of the pitches, communicated to qualifying users that access to it was regulated, and

---

establish that use of the Application Land was permitted.

that their use was therefore not as of right but permissive.

67. This argument faces the formidable obstacle of the decision of the Supreme Court in *R (Lewis) v Redcar and Cleveland BC (No 2)* [2010] 2 WLR 653. That case concerned a golf course which was also used by local inhabitants for (other) lawful sports and pastimes. The practice of the local inhabitants (or at any rate the vast majority of them) was to "defer" to members of the golf club, in the sense that they would not (for example) walk across the fairway when shots were being taken, or otherwise act so as to inconvenience those playing golf. Until the case reached the Supreme Court this "deference" was held by the lower Courts to be fatal to any claim that the use by local inhabitants was "as of right". It was said not to be as of right because the inhabitants were acknowledging the superior right of the members of the club to play golf.

68. But the Supreme Court rejected any such argument, reasoning that where there was no inherent incompatibility between the two uses, i.e. where the two uses were able successfully to co-exist, taking one thing with another, then that was no reason for TVG rights not to accrue. The right that would accrue would be subject to the right of the owner to continue their *ex-hypothesi* not-inconsistent use of the land (i.e., in *Lewis*, the playing of golf), but the fact that the inhabitants deferred to that use did not prevent the acquisition of rights at all.

69. Mr Mynors sought to persuade me that the facts concerning the Application Land are materially different from *Lewis*, such that this case can be distinguished from the reasoning of the Supreme Court. His argument is that, in this case, the local inhabitants did not defer to the landowner; they simply stopped their general recreational use altogether. He says that there was no "give and take" between the two types of use: there has *either* been organised football, with the permission of the landowner, in a particular location on the Application Land, *or* general recreation – but not both; and the latter has in practice been interrupted for substantial periods, the length and duration of which were entirely at the control of the Objector. This, he says, demonstrates that the use of the whole of

the Application Land was subject to the landowner's permission, which permission was clearly revocable, and indeed (he says) was revoked regularly in respect of the pitches.

70. Mr Ormondroyd for the Applicant argues that this is a distinction without a difference. The use by the inhabitants in *Lewis* could be said to have been "interrupted" each time a shot was played; but this is just another way of saying that the inhabitants "deferred" to the golfers. There was, he said, no fundamental incompatibility between the general recreational user in this case and the organised football matches, any more than there was between the general recreational user and the golf in the *Lewis* case. Mr Ormondroyd argued that, just as in *Lewis*, should the Application Land come to be registered as a TVG, there would be no practical difficulty in the Objector continuing to allocate football pitches at certain times and on certain days during the season following registration – there would always remain enough time and space for local inhabitants also to exercise their rights of recreation. There is therefore no incompatibility between the two uses; they can co-exist.

71. My advice to the CRA is that the Applicant is right on this point. Although this case concerns football rather than golf, I cannot see that the Objector can escape from the logic of the recent decision of the Supreme Court in *Lewis*. If anything the facts of the *Lewis* case are *stronger* (from a landowner's point of view) than are the facts of this case, when considered in terms of interruption. Lord Walker's summary of the facts in Lewis shows that the golf links in that case were well used by golfers on nearly every day of the year, whereas it is clear that the organised football in this case was a very much less frequent inconvenience to recreational users. It might be said that organised football, when it was being played on one or other pitch, would have been a more pronounced intrusion on general recreational user than would the occasional passing golfer, because of the defined area of the pitch which recreational users would have needed to avoid. But, as the Aerial Plan shows, even if all four of the pitches were in use at once (which the evidence is clear they almost never were) there still remained

plenty of space for recreational users to have embarked upon lawful sports and pastimes. And for all of the hours when the pitches were not being used at all (by far the majority of the time each week) recreational user was entirely unimpeded.

72. It is noteworthy in this context to observe that Lord Walker in *Lewis*, at paragraph [28], was prepared to contemplate that land used for a hay crop could in principle be registered.[20] If that is correct, then I cannot see that Mr Mynors can succeed in attempting to devise an argument on the facts of this case based on "interruption" as somehow a separate point from the deference argument rejected by the Supreme Court in *Lewis*. The fact is that in this case, just as in *Lewis*, the two uses have co-existed for many years, and there is no reason why they should not do so following registration. I also cannot see that the fact that the precise location and alignment of the football pitches has been altered from time to time advances the Objector's argument any further. Co-existence has remained possible; and such relocation and realignment – at any rate so long as it allows sufficient space for casual recreational user to continue – would remain possible should the Application Land be registered as a TVG.[21]

73. I therefore advise the CRA to conclude that the use by the local inhabitants has not been subject to any form of implied permission, but has been - subject at any rate to the point to which I will now turn - "as of right".

Has the user been "by right" rather than "as of right"?

74. The last issue that I must consider concerns the effect of a Deed dated 4 February 1964 and made by the Urban District Council of Consett,[22] a copy of which is contained in the Core Bundle at page 103 and is attached to this Report as Appendix 4.

---

[20] See generally his consideration of the *Laing Homes* case [2004] 1 P&CR 573 and *Fitch v Fitch* (1797) 2 Esp 543 at paragraphs [21] to [28].

[21] I note that it appears from the judgments in *Lewis* that "the precise configuration of the course changed somewhat over the years. The club house, tees, fairways, greens and practice ground did not, however, take up the whole of the report land and there were substantial areas of rough ground beside and between these features": see Lord Walker at paragraph [9], setting out a passage from the Inspector's Report.

75. Its recitals and operative terms are as follows:

"*WHEREAS there is vested in the Council for its statutory purposes certain lands short particulars of which are set forth in the Schedule hereto*

AND WHEREAS the Council have been requested to put on record the purposes for which the lands are to be used and the Council have decided so to do by this Deed

NOW IT IS DECLARED that the lands and any buildings thereon which are described in the Schedule hereto are held by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds or as Public Quarries or for the general use of the Public by way of provision of an Omnibus Station and as a Market as the case may be"

76. The Schedule referred to describes five plots of land as follows:

"*(a) 1,160 square yards of land situate and known as The Market Square Consett TOGETHER with the Buildings thereon used as an Omnibus Station*

(b) 10 acres or thereabouts of land situate and known as Shurburn Park Consett aforesaid
TOGETHER with the buildings thereon
TOGETHER ALSO with an additional 1,200 square yards
TOGETHER ALSO with the Stable Workshop and other Buildings erected a thereon in Back Medomsley Road Consett aforesaid

(c) 44 acres or thereabouts of land situate and known as Number One Consett aforesaid

(d) 2,570 square yards or thereabouts of land in Medomsley Road Consett aforesaid being an addition to the before mentioned lands at Number One

(e) Black Dyke Common Quarry
Berry Edge Common Quarry
West Carr House Common Quarry"

77. The first issue that arises in determining the significance of this Deed concerns the correct identification of the various parcels of land referred to. Evidence was given on this question on behalf of the Objector by Anna Wills, an Asset

[22] The Deed is a deed poll, with no other parties.

Planning Officer of Durham County Council. She provided a Proof of Evidence with various documents attached; and gave evidence orally to the Inquiry, and adduced further documentation at that stage.

78. It is clear that the parcel of land referred to in paragraph (a) of the Schedule to the 1964 Deed is of no direct relevance to the matters the CRA must now determine. It is located some distance away in the centre of Consett and forms no part of the Application Land.

79. It appears also to be the case that the Deed operates in different terms in respect of the particular paragraphs (a) to (e) contained in the Schedule (this would seem to be the effect of the Deed's final operative words "as the case may be"). So, for example, the Deed declares that the land parcel described by paragraph (a) is "held by the Council under its statutory powers ... for the general use of the Public by way of provision of an Omnibus Station and as a Market", and that the land parcels described by paragraph (e) are "held by the Council under its statutory powers ... as Public Quarries.

80. The cross-referencing between these two paragraphs of the Schedule and the operative provisions of the Deed is relatively straightforward (because of the references in the Schedule as well as in the operative provisions to a Market, an Omnibus Station, and certain Quarries). The conclusion that this is the proper construction of the Deed would have been more straightforward still if its operative provisions had been more precisely cross-referenced to its Schedule (or indeed if they had simply been in the same order, which they are not); but nevertheless I am confident that this is the correct construction of deed, and no one suggested otherwise to me at the Inquiry.

81. But the real question that arises is whether the parcels of land to which paragraphs (b), (c), and (d) of the Schedule refer relate in any way to the Application Land. It does not seem that paragraph (b) is directly relevant – Sherburn Park, Consett is to the South of Ashdale Road (and is visible, for

example on the Plan at Appendix 2 to this Report).

82. Paragraph (c), however, refers to "44 acres or thereabouts of land situate and known as Number One Consett"; and paragraph (d) to "2,570 square yards or thereabouts of land in Medomsley Road Consett aforesaid being an addition to the before mentioned lands at Number One".

83. The Proof of Evidence of Anna Wills sets out in detail how the Application Land was acquired by the CRA (and, more importantly, by its predecessors), by reference in particular to her Plan 2 (which is attached to this Report as Appendix 5). Copies of the relevant Conveyances are also attached to her Proof of Evidence. Her evidence shows (and no one sought to argue otherwise before me) that paragraph (c) of the Schedule to the 1964 Deed refers to a large parcel of land which was conveyed to the Urban District Council on 9th May 1936 and is edged in red on the Plan at Appendix 5. Her evidence similarly indicates that paragraph (d) refers to a very much smaller parcel of land acquired by the Urban District Council on 6 June 1955, which is edged in blue on the Plan at Appendix 5.

84. The area identified by the red line includes the vast majority of the Application Land, and indeed extends beyond it to the South East to include Oakdale Road and Elmdale Road and beyond, and to the North West to include land between the Application Land and the Number One Roundabout (including the two fenced Rugby Club pitches). The small parcel of land identified by the blue line lies at the South end of Number One Roundabout (and indeed in part beneath it). At any event, it lies outside the Application Land.

85. Although the land identified by the red line in the Plan at Appendix 5 extends in certain respects beyond the Application Land, it at the same time does not encompass all of the Application Land. The Plan at Appendix 5 shows two further parcels of land, edged respectively in yellow and in green, which lie within the Northern boundary of the Application Land alongside, and to the

South of, Villa Real Road. The land edged in yellow was acquired by the Urban District Council on 21 December 1922; and the land edged in green by the Urban District Council on 9 November 1979. It is clear that these small parcels, although part of the Application Land, are not within the land described in paragraphs (c) and (d) of the Schedule to the 1964 Deed.

86. However, it appears from the plan attached to the Conveyance of 9 November 1979 that the land edged in green on the Plan at Appendix 5 may be affected by those terms of the 1964 Deed that apply to paragraph (e) of its Schedule. The plan to the 1979 Conveyance is attached as Appendix 6 to this Report. It shows the location of the three quarries that are referred to in paragraph (e) of the Schedule to the 1964 Deed, i.e. Black Dyke Common Quarry (to the North, on what is now Villa Real Road), "Berry Edge Common Quarry" (to the West, on what is now Medomsley Road), and West Carr House Common Quarry (to the South East, near West Carr House).

87. West Carr House Common Quarry would seem to have very little relevance to the matters the CRA must decide. It lies some distance away from the Application Land to the South East. The location of Berry Edge Common Quarry will be returned to at paragraph 94 below. The site of Black Dyke Common Quarry, however, is shown by the land edged green on the Plan at Appendix 5 to this Report, i.e. it is the Westernmost of the two small parcels of land at the Northern edge of the Application Land which are outside the "44 acre" parcel dealt with by the 1936 Conveyance.

88. To bring the chain of Conveyances right up to date, Mrs Wills explains in her Proof of Evidence that, since 1 April 2009, the Objector has been the owner of all of the Application Land as successor authority to Derwentside District Council, which was itself the successor to the Urban District Council of Consett following local government reorganisation in 1974.

89. In addition to the material contained with her Proof of Evidence, Mrs Wills

produced three further small bundles of documents at the Inquiry relating to certain sales and appropriations which she thought could be of possible relevance to the Application Land.

90. The first concerns a consent dated 24 June 1936 from the Minister of Health under the Local Government Act 1933 to the sale by the Urban District Council of a thin strip of land with an area of 192 yards and identified by a plan. This date is only a little more than a month after the conveyance of the parcel of land of 44 acres or thereabouts (i.e. that edged in red on the Plan at Appendix 5) to the Urban District Council.

91. The plan attached to this consent refers to the "North Eastern Electricity Supply Co Ltd", and it is clear from the modern maps that the same strip of land still contains an electricity substation (see, for example, the User Addresses Plan at Appendix 2). It therefore appears that this was a consent by the Minister of Health to a sale of land by the Urban District Council for the purpose of providing an electricity substation. Such consent was required because the land is described as presently "vesting in [the] Council for purposes of public walks and pleasure grounds".

92. It is a little less clear whether this thin strip of land was in fact a part of the large parcel of land conveyed on 9 May 1936 and edged in red on the Plan at Appendix 5 (i.e. the 44 acres or thereabouts). The plan at Appendix 5 (which is of course a modern composite plan, produced only for the purposes of this Inquiry) suggests that the electricity sub-station (which is there shown, although not described as such - it is identified as such on the Plan at Appendix 2) lies *outside* (although immediately adjacent to) the 44 acre parcel conveyed in 1936. However, it is not clear how accurately the red line has been transcribed on to the Plan at Appendix 5. The key plan is that actually attached to the 9 May 1936 Conveyance, which Mrs Wills also produced, and which is attached to this report as Appendix 7. I have studied these various plans carefully, and to my eye it is tolerably clear (and clear enough to satisfy a test on the balance of probabilities)

that the thin strip of land conveyed to the electricity company shortly after the 9 May 1936 Conveyance in fact *was* a part of the 44 acre parcel (it appears to lie directly underneath the relatively thick red line shown on the plan at Appendix 7, but that line is drawn *inside* the boundary of the defined land. I accordingly find, on the balance of probabilities, that this strip (which was described in the 24 June 1936 consent as, at that time, "vesting in [the] Council for purposes of public walks and pleasure grounds") *was* a part of the larger 44 acre parcel. Of course, it does not follow from this that the whole of the 44 acre parcel was then vested in the Council for such purposes, but certainly this part of it was.

93. The second bundle of documents produced at the Inquiry by Mrs Wills concerns a consent by the Minister of Health dated 21 November 1938 pursuant to the Housing Act 1936 to an appropriation of land now comprising the wheel-shaped development to the South East of the Application Land consisting of Oakdale and Elmdale Roads. The land concerned, which lies outside the Application Land but was clearly within the parcel of land affected by the 9 May 1936 Conveyance, is described simply as "vested in [the] Council". It can be observed that this was a consent to an appropriation, rather than to a sale, and so may well have prefigured a housing development undertaken by the Council itself.

94. The third bundle of documents produced at the Inquiry by Mrs Wills concerns a consent by the Minister of Health dated 31 March 1949 pursuant to section 163 of the Local Government Act 1933 to a further appropriation of land, this time for the erection of Council Offices on the very site in which the Public Inquiry into this matter was held; i.e. an area of 4882 square yards on the East side of Medomsley Road. This parcel of land also lies outside the Application Land, and is described in the consent as "vesting in the said Council for purposes of public walks and pleasure grounds". Intriguingly, this parcel of land, although the boundaries are not identical, is in the same location as the land described as "Berry Edge Common Quarry" in the 1979 Conveyance, and shown as such in the Plan at Appendix 6 (see also the modern composite Plan at Appendix 5).

95. Returning to the Deed of 1964 it seems, on the basis of all of the evidence adduced before me, possible to conclude on the balance of probabilities as follows.

96. First, that paragraph (c) of the Schedule to the 1964 Deed relates to the land subject to the Conveyance of 9 May 1936 (i.e. the land shown edged in red on the Plan at Appendix 5). The Application Land consists almost entirely of land that was subject to this Conveyance, with the addition of two small parcels of land to the North as described above at paragraph 85 of this Report. (The Application does not however apply to the whole of the land subject to the Conveyance of 9 May 1936).

97. Secondly, that paragraph (d) of the Schedule to the 1964 Deed relates to the land subject to the Conveyance of 6 June 1955 (i.e. the land shown edged in blue on the Plan at Appendix 5). This land lies outside the Application Land.

98. The possible legal significance of this conveyancing material to the matters the CRA must determine lies in the fact that user of land cannot be "as of right" if it is instead "by right". I have already concluded that the use by the local inhabitants in this case is not otherwise prevented from being "as of right". It was not forceful, it was not secret, and it was not subject to a permission. But can it be said to have been "by right", because users were in fact *entitled* by right to have access to the land for recreational purposes, such that there can be no question of their access having been of the necessary trespassory nature to acquire TVG rights?

99. Lord Walker said this in *R(Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889:

> *"[86.] The City Council as a local authority is in relation to this land in a different position from a private landowner, however benevolent, who happens to own the site of a traditional village green. The land is held by the City Council, and was held by its*

predecessors, for public law purposes. A local resident who takes a walk in a park owned by a local authority might indignantly reject any suggestion that he was a trespasser unless he obtained the local authority's consent to enter. He might say that it was the community's park, and that the local authority as its legal owner was (in a loose sense) in the position of a trustee with a duty to let him in. (Indeed that is how Finnemore J put the position in Hall v Beckenham Corporation [1949] 1 KB 716, 728, which was concerned with a claim in nuisance against a local authority, the owner of a public park, in which members of the public flew noisy model aircraft)...

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

100. Lord Scott said this in the same case:

"[29.] Finally I should refer to section 10 of the Open Spaces Act 1906. Section 10 provides that:

"A local authority who have acquired any estate or interest in or control over any open space ... under this Act shall, subject to any conditions under which the estate, interest, or control was so acquired—

(a) hold and administer the open space ... in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose; and

(b) maintain and keep the open space ... in a good and decent state ..."

"open space", as defined in section 20, includes "land ... which ... is used for purposes of recreation ..."

Section 123(2B)(b) of the Local Government Act 1972 enables open space land held under a 1906 Act trust to be disposed of freed from that trust.

[30.] It is, I think, accepted that if the respondent council acquired the Sports Arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. The use would have been subject to regulation by the council and would not have been a use "as of right" for the purposes of class c of section 22(1) of the Commons Registration Act 1965. But Mr Petchey accepted that Mr Laurence QC was correct in contending that the Sports Arena had not been acquired "under the [1906] Act" and that section 10 did not, therefore, apply. Here, too, although your Lordships cannot, in view of this concession, conclude that Mr Laurence's contention is wrong, I do not, for myself regard the point as clear. Is it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney-General v Poole Corporation [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation

"in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use."

There was no express reference in the Conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found. It would be, in my view, an arguable proposition that if the current use of land acquired by a local authority were use for the purposes of recreation and if the land had not been purchased for some other inconsistent use and the local authority had the intention that the land should continue to be used for the purposes of recreation, the provisions of section 10 would apply (c/f counsel's argument in the Poole Corporation case, at p 27). But your Lordships cannot take the argument to a conclusion in the present case.

101. The 1964 Deed in this case does not refer in terms to the 1906 Act. It recites

that "there is vested in the Council for its statutory purposes certain lands ...; and that "the Council have been requested to put on record the purposes for which the lands are to be used" and that "the Council have decided so to do by this Deed".

102. Leaving aside the descriptions of statutory purposes that can be ascribed to the Omnibus Station, Market and Public Quarries (as to which see paragraph 79 of this Report above), the Deed declares that the parcels of land defined by paragraphs (b), (c) and (d) of its Schedule (i.e. Sherburn Park to the South of the Application Land: see paragraph 81 above; the vast majority of the Application Land, as well as further land to its North West and South East: see paragraphs 83 and 84 above; and the land edged in blue in the Plan at Appendix 5: see paragraphs 83 and 84 above) are held "by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds ...".

103. It is also noteworthy (see paragraphs 90 to 92 and 94 above) that the consent to a sale of a small strip of the 44 acres of land described in paragraph (c) of the Schedule to the 1964 Conveyance in June 1936 stated that the land in question had previously been vested in the Council "for purposes of public walks and pleasure grounds". Further there is a similar statement in respect of the 4882 square yards appropriated in 1949 for the purposes of building Council offices, which was stated also to be vested in the Council "for purposes of public walks and pleasure grounds".[23]

104. I have already set out the relevant provisions of the Open Spaces Act 1906 in the

[23] The precise chain of conveyances is difficult to tie up in respect of this 4882 square yards of land. Part of it appears to have been within the parcel of land conveyed in 1936 (i.e. part of the 44 acres, and so subject to the 1964 Deed); the rest of it to have been the subject of a conveyance to the District Council from "Park Ground Rents Ltd" on 9 November 1979 (see the parcel of land edged in green on the Plan at Appendix 5 to the South West of the Application Land), and which is described as "Berry Edge Common Quarry" in the 1979 Conveyance Plan attached to this Report as Appendix 6. It appears in fact from the First Schedule to this 1979 Conveyance that the Urban District Council of Consett may have had the benefit of a long lease of premises on this land prior to this date, dating from 10 September 1906, which may explain how it came to be part of the development of Council Offices (following the Minister's consent given in 1949) on the site on which this Inquiry was held.

passage cited in paragraph 100 of this Report above from Lord Scott's judgment in the *Beresford* case. There is a further statutory provision that is relevant in this case, however, and that is section 164 of the Public Health Act 1875, which is in the following terms:

> "*164. Any local 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.*
>
> *Any local authority may make byelaws for the regulation of any such* ***public walk or pleasure ground****, and may by such byelaws provide for the removal from such* ***public walk or pleasure ground*** *of any person infringing any such byelaw by any officer of the local authority or constable.*" **[Emphasis added]**

105. Unlike section 10 of the Open Spaces Act 1906, section 164 of the 1875 Act does not, in terms, speak of land so held being subjected to a statutory trust. Nevertheless there are indications in the case law, and indeed in statute, that the position is identical. In *Hall v Beckenham Corporation* (one of the cases referred to by Lord Walker in the passage set out above at paragraph 99 of this Report), an authority holding land under section 164 is described as "a trustee" (as indeed Lord Walker reiterates in the passage set out above).[24]

106. As far as legislation is concerned, sections 122 and 123 of the Local Government Act 1972 prescribe special procedures that an authority must follow if certain land is to be appropriated to some other purpose, or disposed of (as the case may be).[25] (The procedures include advertising the council's intention, allowing time for objections from members of the public and the giving of due consideration to any objections.) Section 122(2B) (and there is an equivalent provision as far as disposals are concerned contained in section 123(2B)) provides:

---

[24] See too *A-G v Sunderland Corporation* (1876) 2 Ch D 634; *Blake v Hendon Corporation* [1962] 1 Q.B. 283.

[25] See generally Lord Scott at [27] in the *Beresford* case.

"(2B)Where land appropriated by virtue of subsection (2A) above is held—

(a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or

(b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

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

107. Sections 122(2B) and 123(2B) of the 1972 Act clearly both contemplate that land subject to section 164 of the 1875 Act is subject to a statutory trust in favour of the public as well as land subject to section 10 of the 1906 Act.

108. Finally, section 76 of the Public Health Acts Amendment Act 1907 gives authorities various specific powers in connection with "any public park or pleasure ground provided by them or under their management and control". I do not propose to set out the full list here, but these powers include the following:

> *"(a) To enclose during time of frost any part of the park or ground for the purpose of protecting ice for skating, and charge admission to the part inclosed, but only on condition that at least three-quarters of the ice available for the purpose of skating is open to the use of the public free of charge*"; and
>
> *"(b) To set apart any such part of the park or ground as may be fixed by the local authority, and may be described in a notice board affixed set up in some conspicuous position in the park or ground for the purpose of cricket, football, or any other game or recreation, and to exclude the public from the part set apart while it is in actual use for that purpose*";

109. Again it is clear that these powers presuppose that, in their absence, an authority would not have the power "to enclose" parts of land held as public parks or pleasure grounds, or to "set apart" certain areas and to exclude the public. The reason is the same: i.e. that such land is subject to a trust to allow the enjoyment thereof by the public.

Conclusions on the significance of the 1964 Deed

110. It follows from the case law and statutes to which I have just referred that if user by the local inhabitants of the Application Land was referable to a statutory trust in favour of the public arising under section 164 of the 1875 Act or under section 10 of the 1906 Act that such user will have been "by right" rather than "as of right", and so will not have been effective to acquire TVG status.

111. I accept – as did both Mr Mynors and Mr Ormondroyd - that the 1964 Deed is not the most straightforward document to interpret. The position would be a good deal clearer if the Application Land had been straightforwardly "acquired" under the 1906 Act (see the opening words of section 10); or if there were a Council minute of some sort recording an appropriation of the Application Land for that purpose (or for the purposes of section 164 of the 1875 Act). Instead of which the CRA must construe a Deed, dating from 1964 (i.e. before the relevant 20 year period), the relevant provisions of which state that the land to which it refers is held "by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds …".

112. The effect properly to be given to this part of the 1964 Deed is in my opinion critically affected by four in particular of the matters that I have just set out.

- The first is that section 20 of the 1906 Act defines "open space" for the purposes of that Act as including "*land … which … is used for purposes of recreation …*".

- The second is that the 1875 Act provides that an authority may "*maintain lands for the purpose of being used as public walks or pleasure grounds*".

- The third is that Lord Walker stated (within the fuller passage from his speech in *Beresford* that I have already set out in paragraph 99 of this Report)

that:

> *"Where land is vested in a local authority on a statutory trust under section 10 of the Open Spaces Act 1906, inhabitants of the locality are beneficiaries of a statutory trust of a public nature, and it would be very difficult to regard those who use the park or other open space as trespassers (even if that expression is toned down to tolerated trespassers). The position would be the same if there were no statutory trust in the strict sense, but land had been appropriated for the purpose of public recreation."*

- And the fourth is that Lord Scott stated (within the fuller passage from his speech in *Beresford* that I have already set out in paragraph 100 of this Report) that:

> *"It is, I think, accepted that if the respondent council acquired the Sports Arena "under the 1906 Act", the local inhabitants' use of the land for recreation would have been a use under the trust imposed by section 10 of the Act. ... But ...[i]s it necessary in order for open space land to have been acquired under the Act, for it to be expressly so stated, whether in the deed of transfer or in some council minute? Attorney-General v Poole Corporation [1938] Ch 23 is interesting on this point. The open space land in question had been conveyed to Poole Corporation*
>
> *"in fee simple to the intent that the same may for ever hereafter be preserved and used as an open space or as a pleasure or recreation ground for the public use."*
>
> *There was no express reference in the Conveyance to the 1906 Act but the Court of Appeal thought it plain that the Act applied. Indeed counsel on both sides argued the case on the footing that that was so (see Sir Wilfrid Greene MR, at p 30). It seems to me, therefore, that the 1906 Act should not have been set to one side in the present case simply on the ground that in the documents relating to the transfer to the council no express reference to the 1906 Act can be found."*

113. Taking the concluding words of the third of those bullet points first, it will be enough to render use "by right" rather than "as of right" if the Application Land in this case has been appropriated "for the purpose of public recreation".

114. Taking next the first and second bullet points, it would seem that the terms of the

1964 Deed reflect both the language of the 1906 Act (i.e. "Open Spaces"), and the language of the 1875 Act (i.e. "Public Walks Parks and Pleasure Grounds"). It may be that one of these phrases in the Deed is intended to refer to the land defined by paragraph (b) of its Schedule, and that the other is intended to refer to the land defined by paragraphs (c) and (d) of the Schedule (the second of which is described in the Schedule as "an addition" to the other). If that is right then it may be more likely that the "Public Walks Parks and Pleasure Grounds" element of the operative part of the Deed refers to the land defined by paragraph (b) of the Schedule (which is stated to be "Sherburn Park"); and that the "Open Spaces" element therefore applies to the land defined by paragraphs (c) and (d) of the Schedule (which includes the Application Land). I.e., on that hypothesis, the Sherburn Park land would be subject to the 1875 Act regime, and the Application Land to the provisions of the 1906 Act.

115. But for the purposes of the matters the CRA must now determine, whether that hypothesis is right simply does not matter. Unless the 1964 Deed is to be said to have no relevant effect at all, it is clear that the parcels of land described by paragraphs (b), (c) and (d) of the Schedule to the 1964 Deed are held "by the Council under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds ..." In other words, between them they are subjected to the regime of either the 1875 Act or of the 1906 Act; and it is clear from the material considered above in this Report, at paragraphs 104 to 109, that there is no material difference between those two regimes for the purposes the CRA must now consider – i.e. both are sufficient to make user "by right" (i.e. pursuant to a statutory trust), rather than "as of right".

116. Mr Ormondroyd sought to impress upon me the difficulties of interpreting the 1964 Deed at all, and I have already indicated that I agree that it is not a perfectly drafted document. But the third and fourth bullet points in paragraph 112 above make clear, first, that land does not need strictly to have been vested in an authority on a statutory trust under section 10 of the 1906 Act: it is enough "that

land ha[s] been appropriated for the purpose of public recreation"; and, secondly, that for open space land to have been acquired under the Act it may not be necessary "for it to be expressly so stated, whether in the deed of transfer or in some council minute".

117. Given the approach to the 1906 Act indicated[26] by the House of Lords in the *Beresford* case (and I can see no reason why similar reasoning should not apply to the 1875 Act) I find it difficult to see good reason why the 1964 Deed should not be given its obvious effect. It is not as if "appropriation" to a particular statutory purpose is a highly technical process. It is true that sections 122(2B) and 123(2B) of the Local Government Act 1972 require certain mechanisms to be carried out if land is to be appropriated to a new purpose and freed from an already-existing 1875/1906 statutory trust. But, assuming that there is nothing inconsistent in the terms of the original acquisition, appropriation generally is an internal process designed to allow an authority flexibility in its use of land. Under local government legislation, an authority must acquire land under statutory powers, but appropriation allows such an authority to use land that has been acquired for one purpose for a different purpose if it is no longer required for the former purpose.

118. In 1964 the Urban District Council went to the length of setting out in a Deed (apparently following a request that it put the position on record) that land, including almost all of the Application Land, was held "under its statutory powers for the benefit or interest of the Public as Open Spaces for the recreation of the Public or for Public Walks Parks and Pleasure Grounds". It may be that the entering into this Deed reflected earlier appropriations, which have since been lost. It is in any event clear that such appropriations would not have been inconsistent with the purposes for which the relevant parcels of land were acquired (the 44 acres acquired in 1936 were, for example, acquired "for purposes for which [the Council is] authorised by statute to acquire land"; and

[26] No doubt these indications were strictly *obiter*; but they are nevertheless highly persuasive authority as far as the CRA is concerned.

there are no other such restrictions apparent in respect of any of the land). But in any event, and bearing in mind the dicta of the House of Lords in the *Beresford* case, I cannot see why the terms of the Deed itself are not enough. Accordingly I find that the effect of the 1964 Deed was to impress upon almost the whole of the Application Land a statutory trust entitling the public to use it for the purposes of recreation.

119. It follows that the use that has been made of the vast bulk of the Application Land by local inhabitants since at least 1964 has been pursuant to that statutory trust, and so "by right" rather than "as of right".

120. I will only add in conclusion that this analysis of the position fits convincingly with the history of the Application Land and the way that it has in fact been used since 1964. It is noteworthy that the Deed dates from just the time when organised football matches were beginning to be played on the Application Land. It is also an aspect of this case that has puzzled me that such a large area of land has been left so very obviously open to the public for such a very long time, with open access from all directions, without any apparent attempt whatsoever being taken to prevent general access (save for one obscurely-worded, and relatively recent, sign on a changing room). Of course, that apparent mystery entirely disappears if the true position is that the public were entitled to a statutory trust of the land in their favour, whether as an open space for recreation or as a public park or pleasure ground. I should also make clear that it cannot affect the proper analysis of the position that many of the users of the Application Land in recent years have been entirely unaware of their rights under the 1964 Deed. It was clear at the Inquiry that many of the users who gave evidence had only become aware of the existence of the Deed very recently, in the time immediately leading up to the Inquiry. But that does not prevent their use from nevertheless being referable to the statutory trust.

Ought the area of the Application Land not a part of paragraphs (c) and (d) of the Schedule to the 1964 Deed be registered as a TVG?

121. There are two small parcels of land at the Northern edge of the Application Land that are not part of the "44 acres" or the "2570 square yards" referred to in paragraphs (c) and (d) of the Schedule to the 1964 Deed. The Westernmost of these parcels (edged in green in the Plan at Appendix 5) is already identified as the site of the "Black Dyke Common Quarry" (see the Plan at Appendix 6); and so there will it seems have been some common rights of access to it under the 1964 Deed, pursuant to paragraph (e) of its Schedule. But a plan attached to the 1922 Conveyance (which plan is attached to this Report as Appendix 8) by which the Council acquired the other and neighbouring small parcel of land at the Northern edge of the Application Land indicates that it too was part of the same Common Quarry.

122. Given the history of access to the whole of the Application Land since the time of the 1964 Deed, and the reference in that Deed to the Common Quarries, it may be that the statutory trust extends to the entirety of the Application Land (although I can see that access to a common quarry may not easily be said to be a recreational right). But even if it does not, and if these two small parcels (which now constitute the wooded area along the edge of Villa Real Road) are free of any statutory trust I cannot recommend to the CRA that these two parcels alone can properly be found to be subject to TVG rights.

123. It is certainly the case that Lord Hoffmann made clear in the *Oxfordshire* case[27] that a CRA is "entitled, without any amendment of the application, to register only that part of the subject premises which the applicant has proved to have been used for the necessary period", and that "there is no rule that the lesser area must be substantially the same or bear any particular relationship to the area originally claimed"; but I do not think that this reasoning requires the CRA to register these two small parcels in the particular circumstances of this case. Taking the Application Land as a whole it is clear that there has been sufficient qualifying user of it – as a whole - throughout the relevant 20 year period. But it is equally clear from the *Oxfordshire* case that it does not follow from that that

[27] *Oxfordshire CC v Oxford City Council* [2006] 2 AC 674 at [62].

there has been sufficient qualifying user of every part of the Application Land (for example, in the *Oxfordshire* case, certain areas of the land were inaccessible). Had an application been made simply for registration of these two parcels I cannot see that it could have succeeded. This is perhaps the least used area of the Application Land. I was not told of people walking their dogs through these trees; it is not suitable for recreational football, flying kites, riding bicycles, sledging or building snowmen. Whilst it falls squarely within the boundaries of the Application Land, and can properly be considered a part of it when the Application Land is considered as a whole, it cannot, in my view, satisfy the requirements of section 15(2) of the 2006 Act when considered on its own. My advice to the CRA is accordingly that none of the Application Land falls properly to be registered as a TVG.

Recommendation

124. In accordance with my factual conclusions and the reasoning set out above, and on the basis of the law now contained in the 2006 Act, as interpreted by the Courts, I recommend that the Registration Authority should refuse the Application.

125. In summary, although there has been user of the Application Land by a significant number of inhabitants of the neighbourhood of North East Consett - Belle Vue Area for lawful sports and pastimes throughout the period of 20 years from November 1989 to November 2009, that user has not been "as of right" but has been "by right". The 1964 Deed provides sufficient evidence for the CRA to conclude on the balance of probabilities that the vast bulk of the Application Land (excluding two small parcels along its Northern edge) has throughout those 20 years been subject to a statutory trust "to allow the enjoyment thereof by the public". User by the local inhabitants has accordingly been pursuant to this trust, and so "by right" rather than "as of right".

126. In my view it is also not open to the CRA to register the two small parcels of land that fall within the Application Land but are outwith the "44 acres" referred

to in paragraph (c) of the Schedule to the 1964 Deed. This area was one of the Common Quarries referred to in the 1964 Deed; but, in any event, considered alone, this area does not satisfy the user requirements of section 15(2) of the 2006 Act.

127. As I have already indicated at paragraphs 3, and 9 - 10, above, the Registration Authority must make its own decision and is in law free to follow or not follow my recommendations as it thinks right, applying the correct legal principles and after due consideration of the evidence. It is also free to take further legal advice should it wish to do so before making a determination. As I have also already indicated I anticipate that this Report will be made available to the Applicant and to the Objector, and an opportunity given to them to make any comments on it that they may wish to before the CRA proceeds to its determination. In making its determination, the CRA must, of course, leave out of account, as being wholly irrelevant to the statutory questions which it has to decide (i.e. whether the Application Land or any part of it is land which satisfies the definition of a TVG), all considerations of the desirability of the Application Land being registered as a TVG or of it being put to other uses.

List of Appendices

Appendix 1: the Aerial Plan
Appendix 2: the User Addresses Plan
Appendix 3: the Neighbourhood Plan
Appendix 4: the 1964 Deed
Appendix 5: the Composite Conveyances Plan
Appendix 6: the 1979 Conveyance Plan
Appendix 7: the 1936 Conveyance Plan
Appendix 8: the 1922 Conveyance Plan

Edwin Simpson

New Square Chambers

Lincoln's Inn

11 October 2010

IN THE MATTER OF AN APPLICATION FOR THE REGISTRATION AS A TOWN OR VILLAGE GREEN OF LAND KNOWN AS "BELLE VUE PLAYING FIELD" AT BELLE VUE, CONSETT, COUNTY DURHAM

INSPECTOR'S REPORT

Chris Simmonds
Solicitor
Durham County Council
County Hall
Durham
DH1 5UL