In the matter of an application to register land behind 94 – 98 and 126 High Street, Beckenham as a town or village green

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INSPECTOR'S REPORT
FOR THE LONDON BOROUGH OF BROMLEY
31 October 2012

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INTRODUCTION

1. I have been appointed as an independent Inspector by the registration authority, the London Borough of Bromley, and asked to report with recommendations in respect of an application to register land behind 94 – 98 and 126 High Street, Beckenham (known by the applicant as Stables Green) as a new town or village green. Strictly were the site to be registered it would be a 'town green' rather than a 'village green' in my view, but the requirements for registration and the legal incidents of town and village greens are identical, and in this Report I shall simply refer to 'town or village green' or 'TVG'.

2. I heard evidence and submissions at a Public Inquiry held on 24 and 25 September 2012 at the Civic Centre, Stockwell Close, Bromley. I am grateful to Mr Greg Ullman of the registration authority for his efficient assistance with preparation for the inquiry and its smooth running.

3. Parties benefitted from the preparation by the registration authority of a joint bundle of inquiry documents. Where page numbers are cited in this Report, they refer to that bundle.

4. The application was made by the Central Beckenham Residents Trust and the registration authority has satisfied itself that the Trust has sufficient capacity to make a valid application (the declaration of trust is on p. 93 of the bundle). The application is dated 2 November 2011 and was registered by the authority on 3 November 2011. It was accompanied by 10 witness statements and one letter from local residents.

5. Nine letters in objection to the application were submitted in February and March 2012, principally on behalf or in connection with the owner of the site, a company called Reepen & Sons Ltd, who used to trade directly from the site until December 2008, and a response was also received from the applicant.

6. The registration authority made directions in respect of the inquiry on 30 August 2012. In accordance with those directions, further evidence was submitted by the applicant on 17 September 2012 including 10 witness statements and a number of plans and photographs. A witness statement in objection to the application was received from Leonard O'Connor dated 15 September 2012 and the objector submitted a plan and accompanying notes.

7. I was given a witness statement from Dinah Scudder in support of the application shortly before the start of the inquiry.

PROCEDURAL MATTERS

8. At the outset of the inquiry, Cllr Tickner, on behalf of the Central Beckenham Residents Trust, expressed concern that the objector was legally represented. I indicated that the registration authority's directions had expressly stated that each party may be legally represented if they choose (paragraph 15) and no application had been made by the CBRT to vary that direction (in accordance with paragraph 5). I stressed that this was a formal inquiry, but that I would take into account the fact that the applicant was not legally represented in the conduct of their case.

9. I had indicated to the applicant prior to the inquiry that they had failed to identify a valid locality or neighbourhood within a locality for the purposes of the test in s. 15 Commons Act 2006 in their application. Cllr Ticker confirmed that they proposed to reply on the ecclesiastical parish of St George's Beckenham and two different scale maps of its boundary were provided which had been downloaded from the 'A Church Near You' website. Mr Whale of counsel, on behalf of Reepen & Sons, indicated that there would be no prejudice to the objector in me allowing the application to be amended to substitute the neighbourhood / locality of the ecclesiastical parish of St George's Beckenham for the description originally provided in Section 6 of the application form. Accordingly I allowed the application to be so amended.

10. Mr Whale also drew to my attention that the plan that accompanied the application was small scale and not entirely clear as to the boundaries of the application land (p. 11). I agreed with him and suggested that the more recent larger plan that accompanied a number of the applicant's witness statements, e.g. on p. 36A, would be better. It was confirmed by the applicant that the land denoted pink on that plan represented the land that they were applying to register. I therefore further amended the application to substitute the plan on p. 36A for the plan on p. 11 (the application land being the land coloured pink (not green) on the p. 36A plan).

THE APPLICATION LAND

11. I made an informal site visit prior to the inquiry accompanied by Mr Ullman on 12 September 2012 to obtain an understanding of the topography of the site and surrounding area. As the site is at the present time inaccessible, Mr Croucher, Director of Reepen & Sons, let us in and directed us as to how best to get around the site. No evidence was given during the site visit.

12. I also made a formal site visit after hearing the evidence at the inquiry accompanied by Mr Ullman, Mr Quine on behalf of the applicant, and Mr Croucher. Again, no evidence was given, but I set out my personal observations insofar as they may be relevant in this Report below.

13. The application site is an area of now open land surrounded by the buildings on the High Street to the east and south; the rear gardens of Church Avenue properties and derelict area where the former warehouse at 86 – 90 High Street stood to the north; and the woodland surrounding the River Beck and, beyond that, properties along The Drive to the west.

14. The principal access is between 88 – 94 High Street, next to an Italian restaurant called 'Pierluigis'. There are also a number of alleyways that run from the surrounding roads to nearby the site, between 132 and 134 High Street, 158 and 162 High Street, 32 and 34 Church Avenue, 54 and 56 The Drive and 38 and 40 The Drive. These are marked in orange on a plan provided by the applicant on p. 56.

15. The 'front' part of the site (i.e. the area nearest the 'Pierluigis' entrance from the High Street) is tarmacked and used for carparking. The 'rear' part of the site, behind the footprint of the former Stables Door auction house, is vacant and now extremely overgrown. The remains of a hard standing surface are visible in the southern area of the rear part of the site. To the

north is a group of sycamore trees which are subject to a Tree Preservation Order (TPO 735) made in August 1991.

OPENING STATEMENTS

16. Both parties provided opening statements in writing. In summary, the applicant stated that they were perfectly clear that nearby residents and business people within the parish of St George's have been customarily using the Stables Green area lawfully as a recreational amenity for over 21 years. There was an absence of fencing before the TVG application was made, access was never blocked and the circulation of local people throughout the area was effectively encouraged. The applicant confirmed they do not dispute the existence of commercial activities, some authorised and some unauthorised, and also car parking on some of the area. However this did not prevent people in the neighbourhood accessing and using the whole area for recreation.

17. Reepen & Sons submitted that it was perfectly obvious that the TVG application is a naked attempt to stop development that has been granted planning permission, and that the applicant is seeking to rely upon sports and pastimes that have taken place other than on the application land (and in this regard particular mention was made of 'pooh sticks', viewing the Monk's Seat, activities relating to the River Beck, the bridge over it and its railings, summer barbeques, bonfire nights and fireworks as being incapable of having taken place on the application land). It was stated that there is no holly or mistletoe or carpets of bluebells on the application land. Instead, the objector stated that the application land was not a place for lawful sports and pastimes but rather in the main and for most of the requisite period a well-used car park for the commercial premises it served. Reference was made to the physical difficulties of accessing the land, in particular the former 'Stable Doors' building dividing the site in two, high Heras fencing, and padlocked gates. It was submitted that any user has been so trivial or sporadic that it is insufficient, both in terms of frequency and level of user. Further any user either entailed the removal of fencing or subsequent access through a broken opening or was in the face of signage (and as such was contentious) or was by stealth.

18. I made it plain to the parties that I was only concerned to hear evidence relating to the user of the land during the relevant period (2 November 1991 to 2 November 2011) and whether the tests in s. 15 of the Commons Act 2006 for registration of what was referred to as the 'pink' land were met. I was not concerned with, and would give no consideration to, use on neighbouring land (in particular the 'green' land), the merits of registering the pink land as a TVG, or any matters relating to the recent approval of planning permission for a housing development on the site.

THE EVIDENCE PRESENTED

19. I will now set out a summary of what I consider are the relevant parts of the evidence given at the inquiry and in the written documents. I set out the evidence in some detail, since this is a case which turns primarily on its facts rather than legal interpretation. Nevertheless, this Report does not, and is not intended to, reproduce the oral evidence given at the inquiry verbatim. Neither does it replicate the written evidence, which can and should be read in full in the joint bundle.

Applicant's Witnesses

Mrs Haq (Witness Statements ('WSs') on pp. 32 and 40)

20. Mrs Haq is the Chair of CBRT. She has lived at 39 The Drive for over 19 years. She described her use of the pink land as consisting of walking in the area and letting her children play there.

21. The applicant had helpfully provided a plan at my request for the inquiry (p. 56) showing the claimed access points to the application land. Mrs Haq stated that historically one could walk from the entrance to the green land between 38 – 42 The Drive, through the woods, over the bridge over the River Beck and into the pink area. She said it was 'all open land'. Her son would also go with his friend from school into the pink land via the alleyway on Church Avenue and enter where the sycamore trees are. If she was shopping on the High Street, she would enter the site by Pierluigis restaurant.

22. In cross-examination, Mrs Haq confirmed that a number of physical features and activities referred to in some of the written evidence and in the application form in fact took place on the green and not the pink land. I do not consider there is any dispute that the river is not on the pink land, one cannot play 'pooh sticks' or collect tadpoles, minnows, frogs etc. on it,

and barbeques and bonfires took place on the green land. Mrs Haq disputed two matters: that she was certain she had seen bluebells on the pink land and dog walking took place on both the pink and green land.

23. Mrs Haq expressed what I consider to be an honest and practical position that the users of the land when walking around didn't think to themselves, 'this is the green land, this is the pink land', because they are just doing a walk and it is not clear which piece of land they are on because it was all open. I accept that the references in the written evidence to activities that took place outside the pink land constituted a genuine misunderstanding on the part of certain residents as to the boundaries of the application land (perhaps compounded by the fact that since the rear part of the site is currently wholly inaccessible it would be impossible for residents to check on-site exactly where they recalled being). I do not believe that there has been any deliberate attempt to mislead the registration authority as to the nature of the user on the pink land.

24. I do not consider there can be any doubt as to which activities are incapable historically of having taken place on the pink land. There may however be some doubt as to whether certain more general activities such as dog walking and children playing referred to in the written evidence did in fact take place on the green rather than the pink land, since Mrs Haq confirmed that users would not always be aware which piece of land they were on, and those users were not at the inquiry to clarify the position for me.

25. Mrs Haq disputed that she and her children had stayed on the green land during their walks. She said that you could walk through from The Drive and come out by Pierluigis and there were no fences. She disputed recalling that there was an overgrown garden fence to the north side of the river to the west of the pond (which the objector alleges to be demarked by a diagonal line on the p. 56 plan). She also disputed that it was not possible to get round the back of the former Stables Door auction house

and recalled that one could access the rear part of the site behind the furthest right car shown on the photograph on p. 86.

26. She had never seen any notices or signs prohibiting entry. She had seen private car park notices in the car park nearest the High Street but did not consider that they prohibited access to the land for recreation.

27. In relation to the Heras fencing put up after the Stable Doors auction house burnt down, she stated that there was nothing secure and she could gain access where the Heras fencing was, without breaking or moving the fencing.

28. She accepted that the gate between 132 and 134 High Street has been locked in recent years. She did not remember seeing any sign near the gate saying 'Private Property No Fly Tipping'.

29. Mrs Haq added a new route into the site she had used historically in cross-examination, being through a 'huge gap' in a rickety fence next to the 132 and 134 High Street gate (which she didn't go through). She drew on a plan walking from the entrance between 158 and 162 High Street, along the path at the back of the shops, and in between 132 and 134 High Street next to the gate.

30. Mrs Haq confirmed that she really thought local people could use the land and did use the land.

Cllr Wells (WS p. 55)

31. Cllr Wells has lived at 89D Albermarle Road, which is in the parish of St George's although not particularly near the application land, since July 1997 (he has lived in Bromley for 25 years). He is the Bromley Borough Councillor for Copers Cope Ward, which includes Beckenham High Street, and has been since May 2006. His knowledge of the application land

therefore comes partly from living relatively nearby and using the High Street for shopping with his family, and partly from his activities as a Councillor in the area (in particular using the land to access dwellings to canvas).

32. He stated that he had personally witnessed persons enjoying leisure and recreational activities in the area, although he was not particularly specific about the frequency of those sightings and what was actually happening on the land.

33. Cllr Wells' daughter was born in 1991 and he stated he would play with her when she was a toddler (1992 – 1995) on the hard standing on the application land while his wife was shopping on the High Street (for approximately 15 minutes to an hour). He confirmed that at the weekends the car park was essentially empty. However, he appreciated that the hard standing was used as a car park, 'amongst other things'. He would either access the land by Pierluigis and go to the rear of the site via the north side of the Stables Door auction house, or (if going further down the High Street) he would enter the land through the footpath to the 'green' area via the alleyway between 38 – 40 The Drive.

34. In relation to the Heras fencing, he stated that it was temporary, not present or standing at all times and did not function as a barrier. He considered that the state of the fencing shown on the photograph (even there beginning to gap and not upright) on p. 143 was seldom present. Rather, it was possible to pass by the triangular roofed building.

35. When the Stables Door auction house was there, he would pass on the north side. After the fire, he stated that he and his daughter would walk in the area and she would play there along with other children.

36. In response to my question, Cllr Wells confirmed that he used the two car park areas and the green land. He did not mention using the area of sycamore trees.

Mr Z Sobolewski (no written statement)

37. Mr Sobolewski has lived at 28 Church Avenue since 2005. He has been to the application land approximately half a dozen times. He confirmed the reason for him going there was because he lived there and 'wanted to see it'. He witnessed the consequences of the dumping and fly tipping on the land, and went all around the wild area seeing lots of wild flowers. There were big gaps in the Heras fencing that enabled access from the High Street. He stated he could easily get through, describing that 'you could probably put a lorry through it'. In response to the question of whether he knew in his head that the reason the fence was there was to send a message to people that you cannot go through, he relied 'yes and no' and clarified this by saying there was no notice, there was a gap in the fence, people were using it, and in his mind he though he could go through because the fence was down.

Mrs Nicole Johnston (WSs pp. 12, 36 and 37)

38. Mrs Johnston spoke on behalf of herself and her husband, Mr Chris Johnston of 43 The Drive. The Johnstons have lived in The Drive since February 2011. They state that since moving to The Drive, they have regularly used the application land for recreational purposes, walking, enjoying wildlife, picking blackberries, and relaxing. They also helped clean up the area from litter on 29 October 2011. In oral evidence, Mrs Johnston stated that she has been to the area with other people and seen a stranger walking a dog.

39. Mrs Johnston stated that she could easily access the land through the Heras fencing from Pierluigis. There was a pole at the end of the fence and

it looked perfectly clear that one could get through. She explained that until recently she was two stone heavier, unfit, and certainly not the type of person to scale a fence. The gap was 'huge'. She considered the message sent by the Heras fencing was to denote land ownership and, had she thought she was prohibited from going there, she would never have used the area.

40. Mrs Johnston has herself never been on the 'green' land but her husband may have been and, as such, some of the written evidence given by him may relate to the 'green' land.

Cllr Mellor (WS p. 50)

41. Cllr Mellor lived in Central Beckenham for 30 years until 1993 at 42 Manor Road, which is in the parish of St George's. His knowledge of the application land therefore relates to the first 18 months of the relevant 20-year period from 2 November 1991. He has more recently used the application land for access from A to B, but not for recreational purposes.

42. In the early 1990s, he confirmed that antiques and ad hoc carpet markets were held on the application land in connection with the former Stables Door auction house. People would use the land for recreation and also browse the markets. The markets took place inside and outside the auction house. The outside markets were at the front of the building but 'they could well also have been behind'.

43. In relation to the photograph of the auction house on p. 86, he stated he had no recollection of a gate and there was open access to the rear of the auction house. He did not recall the wall behind the car on the right of the building in the photograph. He acknowledged in cross-examination that there is a remnant of this wall on site today, but pointed out that it is not clear that the wall extended right across the site in particular beyond the white kerbstone fence seen in the p. 86 photograph. He also acknowledged

that the bottom photograph on p. 134 shows a wall totally blocking access to the rear of the site from the other side of the auction house.

Dr Dalton (WS p. 42)

44. Dr Dalton is not a resident of the parish of St George's and has not been to the application land. She gave evidence as in respect of the Tree Preservation Orders on the site. There is one TPO (No 735) on the land itself (in respect of the group of sycamore trees) and another TPO on the adjacent 'green' land (No 740), both made in August 1991.

45. Her argument was in summary that the government's guidance on 'Tree Preservation Orders: A Guide to the Law and Good Practice' provides that local planning authorities may make a TPO if it appears to them to be expedient in the interests of amenity. That being so, she argues that since the surrounding buildings would prevent the public from seeing the preserved trees and prevent them from being enjoyed as an amenity, there must therefore in fact have been unimpeded public access into and through the area as is claimed by the applicant.

46. I asked for a copy of the guidance that was in force in 1991 when TPO No 735 was made. The applicant subsequently provided that (Circular 36/78). I can confirm that the guidance relied on by Dr Dalton was not in force at the time when the relevant TPO was made. The only comparable statement in Circular 36/78 is that: "local authorities are asked to make full use of their powers to protect and plant trees in their area to maintain and improve the appearance of … built up areas".

47. The guidance does not refer to amenity interests. And in any event, I do not consider that the assumption that the authority would have had regard to this guidance can shed any light on the actual recreational user of the land over the relevant period. Therefore, while the history of the TPOs on the site and on adjacent land is of interest, I do not propose giving their

existence, or the purported reasons for their making, any weight in my consideration of the application.

Mr Quine (WSs p. 34 and p. 41)

48. Mr Quine is the nearest resident to the application land, living at 42 Church Avenue since 1985.

49. He described that in the early days the woodland (by which he confirmed he meant the group of sycamore trees on the application land) had easy and open access from the High Street and the access road behind his property. Access was also available from the banks of the river Beck behind the houses in Church Avenue around the former pond (now infilled by the current owner but visible in outline) at the rear of 32 Church Avenue.

50. He himself used the application land mostly for access to the High Street for shopping but also for extended walks.

51. Mr Quine took the photographs on p. 82 and p. 83 of the bundle. Photograph number 1 was taken in 1991, photographs 2, 3 and 4 in the mid-1990s, and photograph 5 at the time of the amendment to the TPO around 2004 / 2007.

52. Mr Quine was friends with the former owner of 32 Church Avenue, an elderly lady called Vivian, who passed away c. 8-9 years ago. Vivian's garden included a raised square plot of land that borders the application land, and was laid out as a lawn with an apple tree (the north east part of the 'green' area as marked on the applicant's plan, p. 36A). Mr Quine would have many conversations and tea with her on that lawn. Vivian, as an elderly lady, could easily walk from that lawn area directly to the woodland part of the application land and then onto the hard standing and to the High Street. Mr Quine stated that she regarded the Stables Green

area as ‘an extension of her garden’. He confirmed in oral evidence that the way out of the site onto the High Street used by himself and Vivian was via the gate between 132 and 134 High Street which he never recalled being locked.

53. Mr Quine confirmed that he has not been to this square lawn area for 4 or 5 years, and certainly not since the current owner moved into 32 Church Avenue.

54. Mr Quine has over the years on many occasions witnessed the area being used by residents for playing football and throwing Frisbee, and for playing with toy radio controlled cars on the concrete area. He often saw two young girls, about 8 or 9 years old and other children, who would access the woods by the right of way through Vivian’s garden around the pond. It was not clear to me, however, whether the woods they were accessing through this route were in fact those in the ‘green’ area.

55. Some time after the TPO was made, Mr Quine witnessed fly tipping on the land and saw a red Vauxhall van. He considered that a vehicle must have entered the site at night through the 132 to 134 High Street gate in order to achieve this. He said in cross-examination that many other people came into the site during the mid-1990s to dump rubbish, and they must have been in vehicles. He considered that the 132 to 134 High Street gate would have to have been open at that time. He accepted that the gate has, however, been padlocked ‘for the last few years’. He had no idea about any notices near the gate prohibiting fly tipping.

56. Before the Stables Door auction house burnt down, there was always complete and open access to the land by three means:
    a. Directly from the garden of 32 Church Avenue down the slope into the wooded area;
    b. From the gate between 132 and 134 High Street, which he never recalled being locked;

c. From Pierluigis, along the drive that ran down the side of the warehouse that burnt down in 2008 and then down the wooden steps to access the body of the rear of the site (this access being used by warehouse staff themselves) (Mr Quine could not remember when the steps were put in). In response to my question, Mr Quine confirmed that he had gone down this route perhaps on three or four occasions, but it was an illogical journey and he would normally go to the High Street via the 132 – 134 High Street gate.

57. After the auction house burnt down, he could still go along the drive down the side of the warehouse and down the wooden steps. Mr Quine stated that later on a gate was put in place at the High Street end of this drive, but it was open during the days.

58. Since Reepen & Sons purchased the site in 1990 and began using the hard standing for carparking, Mr Quine stated that the recreational use nevertheless continued. People were always coming into the site but he stated 'no one goes down there now'. He had not witnessed any recreational activity 'in the last few years'. He did not have knowledge of area nearest the High Street in recent years (i.e. the front car park), but stated that, since the fire, the site was probably not used so much any more. In re-examination he said that this statement in relation to nobody going to the site anymore related to the area to the rear of 32 Church Avenue (i.e. nearest his property).

59. Mr Quine was part of the local residents' rubbish clean-up on 29 October 2011 and he confirmed that there was easy access onto the land between the Heras fencing and the white container.

60. As an aside, Mr Quine appeared to have had direct involvement in encouraging the Council to make TPO No 735 after small outbuildings on the land were set fire to (see the photographs on p. 135). He stated that the TPO was signed 'overnight'.

Cllr Tickner (WS p. 52)

61. Cllr Tickner does not live in the parish of St George's. He has limited knowledge of the application site, but was asked to make a statement by the CBRT. He is familiar with the area as a councillor and also as a member of the former Constitutional Club in the vicinity. Cllr Ticker's relevant evidence is primarily from observation. He confirmed he had not used the application land for recreation himself.

62. Cllr Tickner recalls seeing two boys playing radio controlled cars on the hard standing. He could not remember the date but it was after the fire in 2004. He could not remember whether it took place on the hard standing to the front or rear of the site.

63. Historically, Cllr Tickner recalled that when the antiques business was operating from the auction house the area was open to the public 'for business reasons'. People would go into the site to browse for carpets in the recreational sense i.e. not actually buying anything. In re-examination he said that there would be little point in holding an informal sale of carpet remnants unless people were in the area anyway.

64. In terms of the Heras fencing, Cllr Tickner stated that it was not fixed to the ground and was there to discourage car drivers. He considered it gave the impression of a temporary measure that would not withstand storms in the long term. He did however accept that one of the messages of the purpose of the fencing could be 'don't go behind it'. He stated that he had seen residents accessing the rear part of the site to the right of the Heras fencing. In relation to the photograph on p. 143, he said that residents could also have accessed the rear of the site between the two large white containers in the foreground.

65. In re-examination he stated that if the owners had really intended to keep people out, they could have provided proper fencing and no trespass signs. However, by not securing the fencing properly, people visited the site and were effectively encouraged.

66. Cllr Tickner gave an estimate of the population of the parish of St George's, but since I have subsequently received objective data on this issue, I will not consider Cllr Tickner's estimate.

67. In response to my questions, Cllr Tickner stated that the wooden steps started rotting 'fairly recently' and were certainly there after the Stables Door auction house burnt down in 2004. He himself walked once with police officers after the auction house fire along the upper driveway and down the wooden steps. He said there was no gate at the time.

Ms Ranu (no written statement)

68. Ms Robyn Ranu has lived at 3 Bromley Road in the parish of St George's since 2005. Previously she lived in Copes Cove Road, just outside the parish.

69. She is not particularly familiar with the application land but has walked past it. She went to the site in December 2009 after the warehouse fire and stated that there were no barriers at that time. She has seen a woman go down there with dogs c. 2009 / 2010 and took more of an interest after the fire occurred.

Local Residents

70. On the first day of the inquiry, I heard oral statements from Ms Anthea Cavell of 34 Church Avenue who described her evidence as neutral, Mrs Janette De Groote of 3 The Crescent, Ms Adele Radelat of 84 The Drive and Ms Betty Radelat of 104 The Drive, the latter three witnesses being in

support of the application (Ms B Radelat had submitted a letter with the application, p. 26).

71. Ms Cavell handed in a written statement. In summary, she has lived at 34 Church Avenue since August 1992. From 1992 until December 2008 the site was in constant use as a commercial business premises. Following the warehouse fire in December 2008, the site was left closed off whilst partial demolition occurred. This was completed some time during the summer of 2009. Since the summer of 2009 the site has remained vacant but fenced and gated with no access to the public.

72. Ms Cavell has never seen anyone, other than representatives of the landowners, within the boundaries of the site (apart from the occasional tramp). She has never seen a member of the public enjoying the land for any recreational purpose. Further, Ms Cavell had never witnessed Mr Quine having any conversations with Vivian on her lawn. She stated that this part of her garden had become totally overgrown and it was completely impassable for more than 15 years (Vivian having become very immobile and a virtual recluse).

73. Ms De Groote, Ms Adele Radelat and Ms Betty Radelat gave evidence that went to the merits of registering the land as a town green, rather than evidence of how it has been used during the relevant period.

Applicant's Written Evidence

74. It is apparent to me that at least some of the residents who completed written statements but did not attend the inquiry may have had a genuine misunderstanding as to the boundaries of the application land. Insofar as their evidence relates to activities that are incapable of having taking place on the pink land, I accord their evidence no weight. Insofar as their evidence relates to more general activities such as dog-walking and children playing, I accord their evidence limited weight, since Mrs Haq

expressed the common-sense and honest position that users would not always be aware which piece of land they were on, and since those users were not at the inquiry to clarify the position for me, I cannot be confident on the balance of probabilities that their user occurred on the pink land.

75. I apply the above reasoning in particular to Ms Townley's statement (p. 16), Daire Walsh's (p. 20), Barry Rogers' (p. 21), Emma Rogers' (p. 23 and p. 39), Eve Dixon's (p. 25), Debra Gallardo's (p. 27), Rosemary Blenkinsopp's (p. 28) and Pamela Notcutt's (p. 38) and Dinah Scudder's (p. 172). This is on account of the fact that their user either clearly took place on the green land (e.g. activities in relation to the river) or constituted use of the land as a route from A to B only. Potentially qualifying user may well in the circumstances of their other user have taken place on the green land (e.g. metal detecting, playing in the woods, observing nature, dog walking).

Objector's Witnesses

Mr Croucher

76. Mr Croucher is a Director of Reepen & Sons Ltd. He first viewed the application land in August 1989 when he attended the company as an auditor and accountant. He has known the application land ever since.

77. Between August 1989 and 1997 he would be present at Reepen & Sons' premises for four weeks during the summer for auditing and for one week at the beginning of April for stocktake. Since 1997, Mr Croucher has held a full-time position with the company (as a Director since 1998), and is at the premises five days a week from 7.30am until 6.30pm.

78. He described the application land when he first knew it in the following way. The access for vehicles was from 132 – 134 High Street and they entered an open yard car park area. There was a group of trees on the

north side of the area and on the south side was a hard standing concrete apron. On the east side was the rear of the Stables Door building. On the north side there was a brick wall and the land above was 3-4 foot higher and there was another wall 3-4 foot higher on top. On the west side, there was a wall running from the 132 – 134 entrance across the culvert up to the sycamore trees. Mid-way there was a fence covered in vegetation with chicken wire around it. The River Beck was culverted at this time. The land was in use for carparking by staff, visitors and occasionally other business premises and storage. Two companies occupied the site, Reepen & Sons Ltd and Kamar Flooring. Reepen were a kitchen supply and installation company (now a property developer), and Kamar were a flooring contractor. Staff worked in the warehouse at 86 – 90 High Street and the Stables Door building was in use as an auction house. From around 1992, Reepen's trading dwindled and the primary trading from the site was flooring.

79. The sycamore tree area has never been used for commercial purposes.

80. The Stables Door building stopped functioning as an auction house some time in 1992 (it had had 2-3 employees). Reepen acquired it and used it as excess storage for carpet remnant stock. On Saturdays, a couple of company workers would sell the stock to the public. This was an unauthorised practice, but the company turned a blind eye to it. Mr Croucher stated that these sales could only have taken place at the front of the Stables Door building since it would have been impossible to move stock behind as there were no windows or ground floor access at the rear of the building. This activity continued up until the auction house fire in 2004.

81. When the building was in situ, it was not possible to drive to the left of the building as there was an impenetrable boundary. On the right hand side, it was not possible to gain access to the rear of the site since there was a section of slightly raised plinth and a storage container. It was possible to

walk past the container but there was a wall blocking access to the rear (visible on the photograph on p. 91).

82. Some time before the building burnt down, there was also a scaffolding company occupying the land to the rear of Stables Doors (about 6m worth of land). This use lasted a few years, was only visible from the site itself, and was eventually enforced against by the council. When I asked how the council would have known about it if only visible from the site itself, Mr Croucher stated that he guessed Mr Quine had seen it (see e.g. his photograph no. 6 on p. 84).

83. In relation to the driveway that ran alongside the warehouse at 86 – 90 High Street (which burnt down in December 2008), Mr Croucher stated that there had been a gate across it since 1989 (although it might not be the current gate). The gate was open during business hours, and closed outside business hours (he added that it was locked). The warehouse was used for the carpet business and 30-40 people would work in it. These workers would park in the rear car park on a daily basis during the working week and access it from 132 – 134 High Street. He stated that the cars in the photographs on p. 134 would have been employees' cars. Initially, workers would have to walk from their cars, back around the High Street, and into the front of the site at Pierluigis in order to get from their cars to the warehouse building at 86 – 90 High Street. At some point, wooden steps were put in to enable access from the rear. From then on, it would have been possible for members of the public to go up to the warehouse from the 132 – 134 entrance, assuming it was open.

84. Mr Croucher described the pattern of movement of employees as follows: a driver or two would arrive at 6am, open up, and take a lorry from the premises; the warehouse staff would arrive from 8am; fitters would arrive from 5.30am; and office staff from 8-9am. The last person would leave at 6-6.30pm, but fitters may be later if paired up (i.e. car sharing).

85. The access gate at the 132 – 134 High Street entrance was there from 1989. Mr Croucher also stated that to his knowledge there had also always been a secure fence up to the gate since 1989 (and see in this respect the photographs on p. 84 (undated but taken from the roof of the warehouse building that burnt down in 2008), p. 144 (taken in April 2007) and p. 155 (undated but taken when the rear part of the site was no longer in use and heavily overgrown)). During the period of the warehouse's operation (i.e. from the early 1990s), the gate would be opened (and unlocked) between 6-7am. It remained open until 9am, when the last person to arrive on site would close it and lock it. If visitors were attending the site, they would go down the drive to the gate and 'toot' for someone to come and open the gate. When they left, it would be opened for them again. Reepen's secretary would leave at 4-4.30pm and she would open the gate. It would then stay open until the last man left. Mr Croucher stated in cross-examination that all 40 staff and contractors had keys to the padlock. The system of locking and unlocking was unwritten company policy, but Mr Croucher could not prove it was adhered to all the time.

86. The sign on the fence outside the gate stating 'Private Property No Fly Tipping' had been in place 'for a considerable number of years'. Mr Croucher could not remember if it was there in 1989, but he said it was certainly there in 2004 when the Stables Door auction house burnt down, as in the process of securing the site, the company ensured there was a sign on the rear access.

87. Immediately after the fire in 2004, there were (incorrect) reports that the Stables Door building was listed and a plan of action was instigated to have the building propped up, secured and fenced. This fencing stayed in place for 2-3 weeks. When it was taken down, the company purchased fencing to 'screen off' the rear part of the site. An extract from the company's accounts was produced to show the purchase of the fencing on 14 June 2004. With reference to the lower photograph on p. 143, Mr Croucher described that the Heras fencing was erected along the perimeter

of the former building and there were perpendicular sections to ensure it stayed up. He stated that the reason for putting up the fencing was to show that it was private land and to prevent access to the land unless a person moved or climbed over the fencing. The fencing remains the same today.

88. In March 2012, the fencing was made more secure in light of reports that people had been unbolting the fencing and there was evidence of clamps being left on the ground. In cross-examination, Mr Croucher stated that the extra secure fixing had been a direct response to information that people had been on the site between October and November 2011 (supposedly in connection with the 'clean-up'). Mr Croucher stated that a fence bracket had to be replaced around six times between 2004 and 2008. It was not possible to move the fencing without the use of tools. The photograph on p. 91 shows a sign on the fencing (illegible in the photograph) and the fencing can be seen on the photographs on p. 145 and p. 146. The sign on the fencing was a standard sign provided by a car clamping company (since 2004) which stated words to the effect: 'Private Property. No Parking. Any illegal parking will be clamped'. The photograph on p. 143 shows a number of similar signs around the front car park.

89. After the 2004 fire, the company changed its carparking arrangements and carparking began to be exclusively to the front of the site. The rear of the site was left vacant but gated and fenced and locked. The area became overgrown. Mr Croucher confirmed that the 132 – 134 High Street gate has been permanently padlocked since 2007. The key is in Mr Croucher's possession.

90. Since December 2008, there has been no trading activity on the site (the company has relocated to Swanley). The company's vigilance has naturally diminished (there is no one on site on a daily basis).

91. Mr Croucher has never seen anyone carrying out lawful sports and pastimes on the site and stated that there have been no reports of people using the site by employees. Mr Croucher had a good view of the rear part of the site from his office window in the upper storey of the 86 – 90 High Street warehouse. He once saw a member of the public who had gone into the site from Pierluigis and, when questioned, they said they were lost.

92. Mr Croucher confirmed that fly tipping has occurred on the site and still occurs to this year, despite it being properly fenced, locked and gated. In cross-examination, he stated he accepted that fly tipping occurred by throwing rubbish into the site, but not from vehicles entering and leaving the site.

Mr Clements

93. Mr Clements is a Director of Reepen & Sons and Kamar Flooring. He stated that the company purchased the 86 – 90 High Street warehouse in 1985 from Brewers Paint. From then, he spent 5-6 days on site a week, 9am – 6-7pm, sometimes later. Between October 1994 and September 1997 he lived in a flat above Pierluigis and was based on site 7 days a week. His work was all on-site with occasional off-site meetings.

94. In the 1980s, the car park was owned and used by a DIY shop at 126 High Street called 'Fads', and was known as 'Fads' Car Park'. He had never heard reference to the land being called 'Stables Green' until the TVG application.

95. Mr Clements had an office next to Mr Croucher's in the warehouse building and a view over the rear part of the site. From his flat, he had a view out over the High Street and back to the Stables Door auction house. At weekends, he would park his car immediately to the rear of the warehouse (at the upper level) as it was the safest place. During the week, he would park either in the front or rear car park on the site. He stated that

the gate on the driveway in front of the 86 – 90 High Street warehouse was always locked at weekends.

96. Mr Clements had never seen any member of the public using the land for lawful sports and pastimes and was not aware of any reports of such. Neither had he seen anyone crossing the land as a shortcut and that was also never reported.

97. He took issue with Mr Quine saying that he used the wooden steps. He said that on one occasion Mr Quine got from his garden onto the top of the containers to make a complaint, and Mr Clements said to him that if he got onto the land again he would call the police. He said in cross-examination that he was in no doubt that Mr Quine knew he was not allowed on the land. He noted that it would be just as quick for Mr Quine to get to his house by walking around the High Street as walking through the site. He also disputed that Cllr Wells could have gone to the rear of the former auction house from the front of the site with his young daughter before it burnt down. If he had used the wooden steps, that would have been very difficult with a buggy.

Mr Gary Penton

98. Mr Penton used 'Fads' on 126 High Street in the late 1970s to buy odd parts when he was a kitchen fitter and sometimes used the car park to the rear of the Stables Doors auction house. He would enter the car park through the 132-134 High Street gate, which did not appear to be shut or locked at that time. There was no rear entrance to Fads for the public and he would walk back round to the High Street after parking.

99. From 1985 when Reepen purchased the warehouse, Mr Penton would arrive at the office 8-8.30am every weekday, generally leave at 6pm and occasionally work at weekends. Around 2004, he would often stay late with Mr Clements as the industry was doing particularly well. Like the

other employees, he stopped coming to the site in 2008 and has since been only on a few occasions to repair the fence at the front. His office in the warehouse did not have a window, but he was always in and out of the warehouse and in and out of the car park checking trucks. He never saw anyone carrying out lawful sports and pastimes or using the land as a shortcut.

100. Reepen purchased 126 High Street (Fads) in 1988 and with that came the car park. They subsequently sold on the building.

101. He stated that the current Heras fencing is a security fence similar to one on any building site to keep people off. He confirmed in answer to my questions, that the company's suggestions of tampering to the fencing are speculation and there is no actual evidence of this taking place. There had been reports of damage but he did not know what the cause of damage to the fence was. He also agreed with me that another potential reason for erecting the fencing was to alert drivers parking in the front car park to the change in levels between the car park and the footprint of the former auction house, which might not otherwise be apparent, particularly if reversing. In re-examination, he stated that if a vehicle had crashed into the fence, it might buckle the fence, but if bolts were undone, that must have been done by someone deliberately with a tool.

102. I asked Mr Penton some additional questions about the system of locking and unlocking that gate at 132 – 134 High Street mentioned by Mr Croucher. He confirmed that this evidence had first been provided by Mr Croucher orally at the inquiry, and was not mentioned in any of the written evidence or letters provided by the objectors. He said there was 'no reason' why the practice / policy had not been mentioned previously. Mr Penton said the system was introduced in 1988 when Reepen purchased the car park and they wanted it to be more secure. Initially, for a couple of months, they gave surrounding flat owners a key but (despite strict instructions) they were not locking the gate, so this was stopped and the

padlock was changed. He agreed that it was 'always a drama' to have to unlock and lock the gate, e.g. if in a hurry or it was raining.

Objector's Written Evidence

103. A number of letters were submitted on behalf of the objector from former employees of Reepen / Kamar who worked at the site during the relevant period and from neighbouring businesses.

104. I have considered the following from former employees of Reepen / Kamar:

(1) Letter from Marc Hoad (p. 156), who was a subcontract floor layer of Kamar Flooring Ltd from the late 1990s until 2009. Mr Hoad would arrive on site between 6 and 9am and return between 5 and 6.30pm. He would also on occasion be on site at weekends. These weekend attendances would be ad hoc and at non-specific times. He could arrive as and when he felt like it using the keys to the padlocks that he had. Mr Hoad states that the land was always fenced and gated and there was no access for the general public. Mr Hoad never saw any evidence of sports or carrying out any recreational activity whatsoever.

(2) Letter from Tracey Clements (pp. 157 – 159), who was a former employee of Kamar Flooring Ltd from the early 1990s until the company's relocation in December 2008. Ms Clements states that use of the land for recreational purposes did not happen. The land was used for commercial purposes, the boundary fences were all in place and gates with padlocks prevented access from the general public. From time to time, Ms Clements would also be in Beckenham at the weekends and never witnessed any member of the public in the site boundaries.

(3) Letter from David Swansbury (p. 160), who was an employee of Kamar Flooring Ltd from the late 1980s until 2010, principally as a delivery driver. He would arrive on site before 6am Monday to Friday, and normally finish between 4.30pm and 6.30pm. All boundaries where access was available to the public highways were gated and fenced off. Mr Swansbury never saw anyone playing any sports or carrying out any recreational activity whatsoever.

(4) Letter from John Penton (p. 162) who was an employee of Reepen and Sons and Kamar Flooring from the mid-1980s until August 2005 as a warehouse manager. Mr Penton would arrive on site by 8am Monday to Friday, and normally finish between 5.30pm and 6.30pm. At busy times he would also work weekends. Mr Penton states that all boundaries where access was available to the public highways were gated and fenced off. He never saw anyone playing any sports or carrying out any recreational activity whatsoever.

(5) Letter from K Wozny (p. 163), who was employed by Kamar Flooring Ltd from May 2005 until 2007. He also confirmed that the site was fenced off and gated and he never saw anyone playing any sports or carrying out any recreational activity whatsoever.

105. I have considered the following from a former landowner:

(1) Letter from Mrs Diane Dentith on behalf of Barnard Property Holding Limited (pp. 165 – 166), the owner of one of the registry titles (SGL 282517) until December 2008. Mrs Dentith states that the site boundaries have been maintained by Kamar Ltd throughout the period since 2007, the site is securely fenced off with authorised access via locked gates only. She states that if members of the public have been accessing the land they have done so by illegal means of climbing fences, breaking locks or moving fencing, although this appears to be a speculative assumption, rather than actual evidence of such activity.

106. I have considered the following from local business operators:

(1) Letter from K Berrada (p. 161), who operates a small local coffee shop from the ground floor of 94 High Street since December 2009. He has never witnessed anyone participating in any recreational activity whatsoever in the application land which is "not easy to access and has become overgrown over the past two years with vegetation". Further the landowner will visit "on occasion" to clean up the area and ensure that all boundary fencing is suitably intact.

(2) Letter from A Graham (p. 164), who is the operator of Snappy Snaps at 96 – 98 High Street since November 2003. He has never witnessed anyone participating in any recreational activity whatsoever in the pink area. He states that "on occasion recently" there have been small local groups on the site that have moved the fencing to gain access where they have proceeded to pick up rubbish and put it in bin bags. The rear part of the site is "not easy to access" and has become overgrown over the past two years with vegetation.

107. I have considered the following from a local resident who objects to the application:

(1) Witness statement of Leonard O'Connor of 32 Church Avenue since October 2007. Mr O'Connor states that there is no access from his garden into the application land unless someone climbs over walls or fences. From October 2007 until December 2008 the site was in constant use as a commercial business premises. After the warehouse fire in December 2008, the site was left closed off whilst partial demolition occurred. This was completed some time during the summer of 2009. Since the summer of 2009, the site has remained vacant but fenced and gated with no access to the public. Mr O'Connor further states that he would check on the Heras fencing

himself and it would appear to have been tampered with. On more than one occasion he re-fixed a section. At some point during September / October 2011 he and his wife witnessed local residents on the site and in his garden. They told them it was private land; the residents said they had got lost. As they left the site via the Heras fencing, Mr O'Connor states they had obviously tampered with it in order to obtain access and climbed through and replaced the fencing as best they could. Mr O'Connor has never seen any member of the public on the site and enjoying the land for a recreational purpose.

108. I accord the objector's written evidence less weight than evidence given orally at the inquiry which benefited from testing under cross-examination. Nevertheless, with the exception of A Graham's and Mr O'Connor's statements about local residents tampering with the Heras fencing during the clean-up operation (which was disputed by the applicant's witnesses in oral evidence), I have no reason to doubt the accuracy of the salient parts of any of these statements and the remaining truth of their contents was not challenged by the applicant. Therefore, I propose to accord them significant weight.

My Observations On-Site

109. During the site visit, I made four observations of matters not mentioned in evidence, which may have relevance. They are:

(1) There is a very old gate next to the 132 to 134 entrance gate on the side facing the River Beck which corresponds to the one that can be seen on the bottom photograph on p. 135.

(2) The wooden fence that runs from the other side of the 132 to 134 High Street entrance (behind what was Fads) has changed position at some time, and the former fence footings can be seen on the ground.

(3) In relation to Mr Quine's photograph number 2, he pointed out that this was where the levels have changed at some point. The land was originally sloping from Vivian's garden into the site, and it is not a completely different level and inaccessible as it is today.

(4) When the Stables Door auction house was in existence, it might have been possible to get from the front to the rear of the site on the left side, but only by going through back-yard gates of the neighbouring properties.

Closing Submissions

110. The applicant and objector both made closing submissions in writing (and the objector submitted further written submissions with permission after the inquiry closed following the registration authority obtaining objective data to substantiate the population of the locality claimed).

111. In summary, Cllr Tickner on behalf of the CBRT that over at least the last 20 years many people have used Stables Green recreationally, as of right, without force or stealth, yet without the express permission of the landowner. Although much had been made during the inquiry of whether or not users were able to traverse the whole area from east to west both before and after the Stables Door building burnt down, that was not necessary in order to use the whole area for recreational purposes. So long as it is reasonably probable that the area could lawfully be accessed at any point, the area could be used and egress could be made from the same point. If part of the area were accessed from one point and another part from another point that would suffice to satisfy the usage criteria.

112. Cllr Tickner pointed to the absence of permanent fencing since 2004 which effectively condoned the land's continuing use as a town green

and he said that Mr Penton's evidence showed that the type of fencing used needed regular attention. Mr Quine's evidence of fly tipping at night using a vehicle demonstrates that there must have been access into the area with a vehicle at night.

113. Mrs Cavell's independence was questioned, as it was apparent from her statement that she had had sight of the applicant's statements or may have heard local gossip.

114. The applicant does not dispute the existence of commercial activities, some authorised and some, such as scaffolding storage, unauthorised and also car parking on some of the area. However this did not prevent people in the neighbourhood accessing and using the whole area for recreation. Indeed it helps prove that access was never blocked and the circulation of local people throughout the area was effectively encouraged.

115. In summary, Mr Whale on behalf of Reepen & Sons set out the following reasons why the application must be recommended for refusal, and then refused:

(1) The locality identified (St George's ecclesiastical parish) is accepted as being capable of being a 'locality' for the purposes of s. 15(2) of the Commons Act 2006. Subsequent to the inquiry, the registration authority obtained data from the Diocese that indicates that the population of St. George's is around 10,400. Even taking the applicant's case at its highest, 15 users out of a population of 10,400 is 0.14%. This is even smaller than the 1 out of 200 (0.5%) rejected in R (McAlpine Homes) v Staffs CC [2002] EWHC 76 (Admin) (referred to in Gadsden on Commons and Greens (2nd edition, Sweet & Maxwell, 2012) (hereafter 'Gadsden') p. 517).

(2) The user in this case (even assuming it occurred, which is denied), is clearly not of such an amount and manner as would reasonably be regarded as the assertion of a public right (Gadsden p. 517). The topography of the site counts against the claimed user.

(3) It is clear that people have wrongly elided the application land with the neighbouring 'green' land and some of the activities mentioned must have occurred on the 'green' land ('Pooh sticks', community bonfires, barbeques, fireworks displays, Mr Quine's tea with Vivian).

(4) In any event, the level of qualifying user (insofar as there has been any at all, which is denied) is in fact even less than the already insufficient amount claimed. The objector's three witnesses gave consistent and cogent evidence, drawing on their direct knowledge of the site, attesting to the fact that the claimed user has not occurred. There are no photographs of anyone undertaking recreational user, or indeed any contemporaneous documents to that effect. Community litter picking does not count (see Gadsden pp. 527-529, which does not instance it). Anthea Cavell is a direct neighbour to the site and spoke honesty and persuasively that, since living at 34 Church Avenue (since August 1992), she has never seen a member of the public enjoying the application land for any recreational purpose.

(5) Further, there has not been user of the application land as a whole throughout the 20 years. For large proportions of the period significant parts of the land were covered in buildings and, since 2008 in particular, much of the site has been covered in dense and impenetrable vegetation and detritus.

(6) The car park use and storage of scaffolding materials, containers and equipment, plus display of auction wares in front of the building, constituted interruption of the use.

(7) In any event, user has been contentious or by stealth. There have been signs by the 132 – 134 High Street gate and in the front car park stating that the land is private property. The 132 – 134 gate has been padlocked for many years. The site has been fenced throughout, and the Heras fencing only became penetrable because the bolts have been periodically removed by people with tools. Anyone entering through a broken fence opening did so in the knowledge that their entry was being contested (Gadsden p. 541). Claims of user outside working hours would be by stealth.

116. In relation to the data obtained from the Diocese by the registration authority of the population of the ecclesiastical parish of St George's (which indicated it was approximately 10,400), Mr Whale provided further written submissions on behalf of the objector dated 1 October 2012. He agreed the Diocese data was better evidence than that provided at the inquiry and better evidence than the electoral roll data also supplied by the Council, for the purposes of determining this application (since nearly all children will not be on the electoral roll). Mr Whale submitted that, taking the applicant's case at its highest, 15 users out of 10,400 (0.14%) is even smaller than the 1 out of 200 (0.5%) rejected in R (McAlpine Homes) v Staffs CC [2002] EWHC 76 (Admin) (Gadsden at p. 517). The user in this case, even assuming it occurred, is not of such an amount as would reasonably be regarded as the assertion of a public right (Gadsden at p. 517).

FINDINGS OF FACT

117. The site has a complicated and layered history. As such I consider it helpful to set out what I consider from the evidence to be the physical features of the site at the various points during the relevant period, in order to set against that the evidence of user claimed.

Period from 1991 until 2004

118. Reepen & Sons and Kamar Flooring Ltd occupied the application land at and prior to the beginning of the 20-year period. The main commercial activities took place from a warehouse building adjacent to the the north part of the application land at 86 – 90 High Street. The hard standing areas at the rear and front of the site were in use for car parking for the companies during the working day (see e.g. photographs on pp. 134 and 135). From around 1992, Reepen's trading dwindled and the primary trading from the site was flooring.

119. The Stables Door building divided the site and was in use as an auction house until some time in 1992 whereupon it was acquired by Reepen and used as excess storage for carpet remnant stock. Sales to the public periodically took place at weekends of excess stock, which was laid out in front of the Stables Door building (I consider that Cllr Mellor's recollection that they may have also taken place behind the building is incorrect given the considerable logistical difficulties in moving stock there).

120. In addition, for a period of a few years at some time before 2004, an area of approximately 6m behind the Stables Door building was used for the unauthorised storage of scaffolding material.

121. The wooded area made up principally of sycamore trees to the north west of the site has never been used for commercial purposes.

122. I accept Mr Quine's and Mrs Haq's evidence that before and at the very beginning of the 20 year period, it was possible to access the pink land from Church Avenue straight down through part of the garden of 32 Church Avenue and into the sycamore tree area (this was described by Mrs Haq as 'all open land' and Mr Quine set out the historical topography more specifically). I have no reason to doubt that the ground levels (in respect of which there has been significant engineering operations over the years in relation to tree felling etc.) may have been more sloping than at present, and Mr Quine's photograph number 1 (p. 82, taken in 1991) provides some support for this, although it is not entirely clear.

123. Reepen & Sons put in wooden steps to enable easy access from the rear car park to the warehouse at some point prior to 2004, but no one seems to be sure of exactly when. Prior to the erection of the wooden steps, all 30 – 40 workers, according to Mr Croucher, had to walk the circuitous route around the High Street from their cars in the rear car park to enter the warehouse from Pierluigis for a number of years. I find it somewhat difficult to believe that the company would not have taken any measures to facilitate their route had that been necessary in the early part of the period. It may therefore have been the case that the topography of the site enabled access from the rear car park up to the warehouse at the very beginning of the period, although there is no direct evidence of this. The wooden steps have now rotted away. Again, no one is certain as to when the steps started rotting but I accept Cllr Tickner's evidence that it was fairly recently.

124. I also accept that at some point there may have been a gap in a former fence next to the 132 – 134 High Street gate. Whilst there is no gap in the clapboard fence currently on site and visible in the photographs on p. 84 (undated but pre-1998), p. 144 (April 2007) and p. 155 (undated but I consider recent from the overgrown nature of the site), my observations on the site visit indicated that there was a previous fence in a slightly different

position. Although I do not have photographic evidence of this former fence, I have no reason to doubt residents' evidence that it was possible to access the land through a gap in it next to the gate in the early part of the relevant period.

125. However, I do not accept the recollection of Mrs Haq and Cllr Wells that it was possible to access the rear part of the site from in front of the Stables Door auction house. The remnant of a rear wall that would block access at the lower level is still on site today, and the photographs on p. 86 and p. 134 and p. 91 clearly show that there was a solid wall dividing the two parts of the site. It may, however, have been the case that residents are remembering being able to cross through the site via the upper driveway that ran alongside the warehouse that burnt down in 2008 and then go down the wooden steps.

126. There is a gate near the front of the site across the driveway that would prevent access alongside the former warehouse, which Mr Croucher says has been present in some form since 1989. Mr Quine recalls that the gate was put in after the auction house burnt down. Cllr Tickner also recalled walking along this route with police officers after the auction house fire and did not recall a gate. I accept that there was a gate throughout the 20-year period but the evidence is that it was often open (indeed Mr Croucher stated that it was always open during business hours), although I note Mr Clements' evidence, which I find credible, that the gate was locked at weekends at least during the period when he lived in a flat above Pierluigis (1994 – 1997). Cllr Mellor stated that he had no recollection of a gate and there was open access to the rear of the building, at least for the first 18 months of the relevant 20-year period, and I find his recollection of being able to access the rear of the site from the front car park at that time credible. Mr Quine also said that he was able to use this route, although he had only done so on three or four occasions as it was an illogical journey.

127. I also find that there has been a gate at the entrance to the rear car park at 132 - 134 High Street since the beginning of the 20-year period, however I have serious doubts that it was as regularly locked as was suggested by Reepen's witnesses in oral evidence. (The evidence from Mr Penton strongly suggests that it was not locked when the car park was formerly owned by Fad's.) Mr Croucher's evidence of the company's unwritten policy that all employees and fitters had keys to the gate's padlock and would individually unlock and lock the gate apart from during two periods at the beginning and end of the working day appears to me, however valid an intention, extremely cumbersome and unlikely to have been always effected in practice.

128. I consider it noteworthy that none of Reepen's witnesses referred to this system in their written evidence, and neither did any of the letters submitted in objection to the application, although I do accord weight to Mr Hoad's statement that he had keys to the padlocks on gates on the site (p. 156). Mr Quine said that in the early years he never recalled the gate being locked. Although Mr Quine may be recalling the period before 1991 and Reepen's occupation of the site, I consider it a reasonable assessment of the evidence that the gate was often left unlocked, even if it was the company's intention that should be locked. Evidence was given by Mr Quine of people being able to access the land during the mid-1990s for fly tipping at night, suggesting that Reepen's gate locking 'system' was not operating effectively at that point at the very least.

Period from 2004 until the TVG application (November 2011)

129. The Stables Door auction house building burnt down in a fire in May 2004.

130. After the 2004 fire, the company changed its car parking arrangements and car parking was exclusively to the front of the site. The rear of the site became overgrown.

131. Since well before 2004, the topography of the land has not enabled access into the site from the 'rectangle' part of the garden of 32 Church Avenue, as Mr Quine (and to some extent Mrs Haq) recalled was formerly the case. There has also not been access from the pond area, without climbing up a small wall / fence, at least since Mr O'Connor purchased 32 Church Avenue in October 2007.

132. After the fire in May, the building was 'propped up' by fencing before demolition and then Mr Croucher purchased the 'Heras' fencing on 14 June 2004, as shown on the accounts. This type of fencing is, in my view, a simple and cost-effective means of demarcating the front and rear parts of the site that may not initially have been intended to be in place long-term. It was positioned on the footprint of the former auction house and marked the change in ground levels between the front car park and the rear part of the site. I consider that its purpose was principally to stop people driving into the rear part of the site either deliberately or accidentally when parking, which may well have caused damage to their cars given the uneven ground levels.

133. It may also have had an ancillary purpose to prevent people walking into the rear part of the site, however I do not consider this is the type of fencing that one would expect if the landowner was needing to deal with a serious problem of people trespassing into the rear of the site. The fencing was not securely fixed into the ground, bent and bowed easily in inclement weather (see photograph on p. 143), came apart at one stage from the container to which it was tied on one side, according to residents (see photograph on p. 91), and needed, at least since 2008, fairly regular maintenance either as a result of persons unknown (not necessarily local residents) tampering with it, or because of damage. Further, there were no signs on the fencing telling people not to enter the rear part of the site or tamper with the fencing.

134. I accept local residents' evidence that they could in recent years access the rear of the site through gaps in this fencing and they did not have to climb over it or break it. In support of this, I note that the objector's evidence from the two local businesses (the coffee shop and Snappy Snaps) is that the site was "not easy to access". Neither have alleged that the site could not be accessed at all. The fencing has only been made wholly secure since March this year, after the submission of the TVG application.

135. I also find that the 132 – 134 High Street gate has been permanently padlocked since 2007. There has been a sign present near that gate for some time that states 'Private Property. No Fly Tipping'. The sign is currently substantially covered by vegetation. I accept the evidence of the local residents at the inquiry who said that they could not recall seeing that sign.

136. Kamar Flooring's warehouse at 86 – 90 High Street burnt down in December 2008. Since December 2008, there has been no trading activity on the site. The company has moved elsewhere. The gate in front of the former warehouse at the Pierluigis part of the site has been padlocked permanently since the company vacated the site.

137. The front car park has always been and remains accessible from the Pierluigis entrance to the High Street. Thus there can be no dispute that at least part of the application land has been fully accessible at all times during the relevant 20-year period.

138. There are signs in this front car park provided by a private clamping company that state words to the effect, 'Private Property. No Parking. Any illegal parking will be clamped' (see e.g. photograph on p. 143). Previous incarnations of these signs have said similar things. I accept that local residents understood those signs as prohibiting parking only and

did not communicate a prohibition on access by foot to the land (see e.g. Mrs Haq).

Evidence of User for LSP by Local Inhabitants

139. As I set out above, I accord very limited weight to the evidence of user provided in the applicant's written statements which were not subject to clarification orally at the inquiry, since the limited evidence of user that could in principle have taken place on the application land (as opposed to on the 'green' land), and that is capable of being use for LSP (as opposed to simply use of the land as a short-cut), may well, particularly in the circumstances of the user of the 'green' land identified, have in fact taken place on the green land.

140. In addition, I attach limited weight to Mr Quine's recollection of two young girls (and other children) accessing the woods via the right of way through the garden of 32 Church Avenue around the pond, since it was not clear whether the woods they were accessing via this route were in fact those on the 'green' land.

141. I do not consider that use of the land by members of the public during the earlier part of the 20-year period for attending markets at the former auction house (either of antiques or carpet remnants) could constitute qualifying LSP, since it was a use of the site by the general public at large (as opposed by the inhabitants of the locality) and was directly linked to the commercial activities on site.

142. I also do not consider that the one-off community clean-up of the rear part of the site that took place on 29 October 2011 (see photographs on pp. 29 – 31) constitutes a lawful pastime that is capable of giving rise to a prescriptive right (and see in this regard Gadsden at pp. 527 – 529 which does not instance it).

143. In respect of the evidence of user given orally, I found that the witnesses were credible. The total of the evidence of first-hand user claimed at the inquiry is as follows:

- Mrs Haq has walked in the area with her children.
- Cllr Wells would play with his daughter on the hard standing when she was a toddler (1992 – 1995) and, after the 2004 fire, he stated that he and his daughter would walk in the area and she would play there along with other children (using the car park areas and the 'green' land only).
- Mr Quine used the application land for extended walks.
- Since 2005, Mr Sobolewski has been to the site approximately six times and looked around it because he 'wanted to see it'.
- Mr and Mrs Johnston have regularly walked on the land since February 2011.

144. Evidence was also given by the applicant's witnesses at the inquiry of user of the land by other people. I accord this evidence of user less weight than evidence of first-hand user, not only because it is by its nature second-hand evidence, but, more importantly, because I have no way of knowing if the user was by inhabitants of the locality or by members of the public visiting the central Beckenham area from further afield. Therefore, I cannot be confident on the balance of probabilities that the applicant has shown that this user is qualifying user for the purposes of s. 15 of the Commons Act 2006.

145. The evidence of second-hand user consists of:

- Cllr Wells personally witnessed persons enjoying leisure and recreational activities in the area, although he was not particularly specific about the frequency of those sightings and what was actually happening on the land.
- Mr Quine witnessed the area being used by people for playing football and throwing Frisbee and the use of radio controlled cars on the concrete area. He stated that he had not witnessed any recreational

activity 'in the last few years', although he clarified this in re-examination by saying this was only in relation to the area to the rear of 32 Church Avenue (i.e. the group of sycamore trees).

- Ms Ranu once saw a woman go onto the site with dogs in 2009 / 2010.
- Mrs Johnston once saw a stranger walking a dog on the site some time after February 2011.

146. Against the applicant's evidence, all of the objector's witnesses and those who provided written objection letters (with the exception of Mrs Dentith on behalf of Barnard Property Holdings who appears to have spent little, if any, time on the site herself) state that they have never witnessed any lawful sports or pastimes being carried out on the land at any time during the relevant period. As well as being present on the site during the working week, many of these people were also periodically on site at weekends (Mr Croucher, Mr G Penton, Mr Hoad, Ms Clements (in the area), Mr J Penton, and in particular Mr Clements who lived in a flat above Pierluigis between October 1994 and September 1997 and Mr O'Connor who has lived at 32 Church Avenue since October 2007). I find their evidence credible on this issue.

147. In addition, Ms Cavell, who has lived at 34 Church Avenue since August 1992, provided evidence to the inquiry in her own right that she has never seen anyone, other than representatives of the landowners, within the boundaries of the site (apart from the occasional tramp). She has never seen a member of the public enjoying the land for any recreational purpose. I find her evidence credible.

148. In my view, the applicant's and objector's evidence of user is not inconsistent, given the seemingly very low frequency and solitary nature of the recreational user claimed to have been carried out by possibly no more than half a dozen to a dozen or so local inhabitants. It appears to me perfectly likely that such user would have gone by unnoticed by the

landowner and other local residents, particularly if it occurred at the weekends or in the evenings.

APPLICATION OF THE FACTS TO THE LAW

Relevant Statutory Provisions

149. Section 15(1) of the Commons Act 2006 provides that any person may apply to the commons registration authority to register land to which this Part applies as a town or village green in a case where subsection (2), (3) or (4) applies. The relevant subsection in the context of this application is (2).

150. 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.

Relevant Questions

151. The questions which then arise are:

(1) Has there been use of the land for lawful sports and pastimes for at least twenty years and continuing on 2 November 2011 (when the application was made)?

(2) If so, has such use been by a significant number of inhabitants of any locality or neighbourhood within a locality?

(3) If the answer to (1) and (2) is 'yes', has the use been 'as of right'?

Analysis

Has there been use of the site for lawful sports and pastimes for at least 20 years and continuing on 2 November 2011?

152. The range of recreational activities which can constitute lawful sports and pastimes (LSP) is very wide, and includes not merely organised sports, but also informal and solitary activities, such as dog-walking or

personal walks: R v Oxfordshire County Council ex p Sunningwell Parish Council [2001] 1 AC 335, 356-7. Precisely the same LSP need not take place throughout the 20-year period, nor need there be *some* LSP on every day, or even every week or month, during the 20-year period. However, there must be a sufficient continuance of sufficient intensity to bring home to a reasonable observer, and in particular to the owner, that LSP *of some sort* were taking place throughout the period. The key question is "how the matter would have appeared to the owner of the land": and is not at all concerned with "evidence of the individual states of mind of people using [the land]": Sunningwell 352-3 and 354-6.

153. I accept that the evidence of first-hand user that I have identified of playing with children and recreational walking (as opposed to using the land as a shortcut to walk from A to B) is capable of being a qualifying lawful sport or pastime. This is just the type of informal recreation which may be the main function of a TVG (see comments of Lord Hoffman in Sunningwell at 357D and acknowledged by Lord Hope in R (on the application of Lewis) v Redcar and Cleveland BC [2010] 2 AC 70 at [85]).

154. This then raises three questions. The first question is whether the LSP claimed was so occasional / sporadic so as not to carry the outward appearance of user as of right (see Sunningwell at 357D per Lord Hoffmann). The onus is of course on the applicant.

155. In Oxford City Council v Oxfordshire County Council [2006] 2 AC 674, Lord Hoffmann appeared to consider that a single pastime (the holding of a bonfire) carried out on one day a year during the qualifying period (each Guy Fawkes Day) was sufficient user for land to be registered as a TVG (at [49]), suggesting that the necessary frequency of user was low, although such an annual bonfire would have been a regular use of the land rather than an irregular, sporadic use.

156. This approach has not however found favour in the most recent Supreme Court authority dealing with TVGs, Lewis. There, Lord Hoffmann's position was expressly disapproved by Lord Walker who stated that "such a right [the annual bonfire] might have been established as a stand alone custom, but would to my mind be far too sporadic to amount to continuous use for lawful sports and pastimes" (at [47]). Unfortunately, Lord Walker did not go on to give any guidance as to his view of how frequent the use of the land for LSP must be. It will be a matter of fact and degree in the circumstances of any individual case. What matters is that the use of the land must be "of such amount and in such manner as would reasonably be regarded as being the assertion of a public right" (Lewis at [67] per Lord Hope and see also [36] per Lord Walker). In other words, as is expressed in Gadsden on Commons and Greens: "What matters is that the user should enable a reasonable landowner to know that local inhabitants are carrying out activities on his land. For if the user is so infrequent that it is hardly noticeable, local people cannot be said to be asserting any kind of right to use the land that is capable, should the landowner choose, of being resisted or licensed" (at 14-40, p. 530). This is a view I adopt.

157. I am conscious that the evidence not only on behalf of the landowner but also from two local residents, Mr O'Connor (not tested at the inquiry) and Ms Cavell (given at the inquiry) was that they have never seen anyone using the land for LSP. No photographs or other documentary evidence exists to support the finding of anyone carrying out any recreational activity on the land (the community clean-up does not count, as I have said above). Notwithstanding this, I do find the evidence from Mrs Haq, Mr Quine, Mr Sobolewski, Cllr Wells and Mrs Johnston (on behalf of herself and her husband) that they have used the land for LSP credible. I am also prepared to accept that there may have been other local inhabitants over the years who have used the land for LSP. I acknowledge that in cases of this kind it will be rare indeed to find anyone who has direct knowledge of what occurred every day on the land during

the 20-year period and that often at these sorts of inquiries an inspector is left with what Sullivan J (as he then was) described in R (Alfred McAlpine Homes Ltd) v Staffordshire CC [2002] EWHC 76 (Admin) as a "patchwork of evidence" (at [73]).

158. However, as a matter of impression, the number of occasions on which the land has actually been used for LSP, particularly in recent years given the hostile topography of the rear part of the site, would appear to me to be extremely small indeed. In my judgement, this is a case where the user has been so infrequent that it has been hardly noticeable to the landowner (or indeed not noticeable at all). Thus, I do not find that the applicants have proved on the balance of probabilities that the frequency of their user has been sufficient to expect a reasonable landowner to be in a position to realise that a right is being asserted.

159. The second question is whether there is sufficient evidence of LSP throughout the relevant 20-year period. I heard evidence from people who used the land for LSP from the very beginning of the 20-year period (e.g. Cllr Wells) and right up to the end of the period (e.g. Mr and Mrs Johnston). There was no indication that there was any point in between when the user was non-existent for a particular block of time. Thus, although I find the evidence is insufficient to prove continuity of use for LSP throughout the relevant 20-year period, I do so on the basis that it was too trivial and sporadic, rather than because there is no evidence of user for any one particular part of the period.

160. The third question is whether there is sufficient evidence of LSP on the whole of the application land throughout the relevant 20-year period. The applicant must prove on the balance of probabilities that the land in question in a green and thus that the whole, and not merely a part or parts, has been used for LSP for the relevant period (see R (Cheltenham Builders) v South Gloucestershire Council [2003] EWHC 2803 (Admin) at [29]).

161. It is clear that no LSP could have taken place on the part of the site occupied by the Stables Door auction house before it burnt down in May 2004 and also on the 6 metre area to its rear occupied by the unauthorised scaffolding storage which lasted 'a few years'. It is also apparent that LSP would have been very difficult to carry out on the rear part of the site in recent years due to its overgrown nature, although not impossible (and I consider the ability of local residents to carry out the community clean-up that took place in October 2011 relevant in this regard despite it not being LSP).

162. It is not necessary for local inhabitants to have carried out LSP on the entire area of land claimed for the whole of the period for the use to be considered to apply to the whole. The registration authority must adopt a common sense approach to whether or not the use is of the land as a whole or not, bearing in mind the physical condition of the site (Cheltenham Builders at [29]). I do not consider that the overgrown nature of part of the site in recent years would preclude the user being of the whole land (had it been otherwise sufficient). Further, although the footprint of the former auction house is of significant size and was present on the site for over half of the relevant period, had the user been sufficient, I would not have recommended refusal on this basis (and neither would I have done so on the basis of the scaffolding storage). Alternatively, I would have recommended that it is still open to the registration authority to find that the remaining parts of the site are a green and advise that the registration authority is entitled to register a smaller area of land than that applied for, without any amendment of the application (Oxfordshire at [62]).

163. I am also conscious that the hard standing at both the front and rear of the site has been (and is, in the case of the front part) used for carparking and the positioning of storage containers. However, there is nothing to suggest that the carparking and containers did, as a matter of

fact, interrupt any use that would otherwise have taken place. There has to be a measure of 'give and take' between various user-groups in circumstances such as these, and were I not otherwise of the view that the user were too trivial and sporadic, in my view it would be wrong to refuse registration on this narrow ground (and even more so in relation to the submitted 'interruption' by the display of auction wares to the front of the Stables Door building). The type of LSP claimed (recreational walking, playing with children) could in my view have co-existed happily with the commercial use of parts of the site: this is not a situation of something such as an organized game that requires a set area of land being interrupted by the landowner's use of his land.

164. Thus, my recommendation is that the application should be refused in whole on the basis that the use of the land for lawful sports and pastimes has not been of such an amount as would reasonably be regarded as the assertion of a public right.

165. In the event that the registration authority disagrees with me and for the sake of completeness, I will however proceed to address the other requirements of the statutory definition.

(2) Has the use been by a significant number of inhabitants of the locality?

166. The issue here is that, even if (1) above is met, whether the use by qualifying local inhabitants has been by merely a small and insignificant number, indicative of merely use by some households, or whether it can properly be categorised as use by a significant number of qualifying local inhabitants: R (Alfred McAlpine Homes Ltd) v Staffordshire County Council [2002] 2 PLR 1.

167. It is accepted by the objector, and I agree, that the parish of St George's, as a recognised administrative unit, is qualifying 'locality' for the purposes of s. 15(2) of the 2006 Act. I further note that, following the

recent decision of Paddico (267) Ltd v Kirklees MBC [2011] EWHC 1606 (Ch), there is no need for the distribution of users to be adequately spread over the claimed locality.

168. In Alfred McAlpine, Sullivan J held that whether the use had been by a significant number of local inhabitants is very much a matter of impression. The number might not be so great as to be properly described as considerable or substantial; rather he held that 'a significant number' meant a number that was anything more than de minimis and sufficient to indicate that the land is in general use by the local community rather than occasional use by individuals as trespassers (at [71]).

169. Although Sullivan J stressed that there was no 'absolute numbers' test for significance, he accepted on the facts of Alfred McAlpine that if the six witnesses who attested to carrying out LSP on the land throughout the relevant period had not seen others on the land, then it would be difficult to see how six out of 20,000 (the population of the locality in that case) or one out of 200 could be said to be significant (at [72]).

170. This statement appears to imply (although the matter is not addressed directly) that significance is relevant in the context of the overall population of the locality or neighbourhood within a locality claimed. In this regard, Mr Whale has drawn my attention to the fact that, even if the land were used by 15 people (the total of the applicant's written and oral evidence), that represents just 0.14% of the population of the parish of St George's (10,400), which is even smaller than the 1 out of 200 (0.5%) rejected in Alfred McAlpine.

171. I am conscious that the applicant was not legally represented and the issue of selecting a qualifying neighbourhood or locality was not one which they had properly understood when the application was submitted. By way of my directions and again prior to the inquiry, I raised the need to propose a qualifying locality or neighbourhood with the applicants and

ensured that they were provided with some legal guidance about what was expected. Consequently, they properly proposed a qualifying locality, but one which does have a rather large population.

172. It would have been open to the applicant in the alternative, had they chosen, to propose a smaller neighbourhood within the locality comprising the area more immediately surrounding the site (where it appears almost all of the residents who provided evidence actually come from). Such a neighbourhood, assuming it had sufficient cohesiveness and met the requirements in other respects, would necessarily have a smaller population and thus the percentage of users would be greater.

173. The registration authority has no duty to reformulate the applicant's case and is entitled to deal with the application and the evidence as presented by the parties (Oxfordshire at [61]). Nevertheless, the authority must act fairly. Accordingly, were it simply a matter of a percentage comparison between the number of users and the population of the locality in this case and the percentage in Alfred McAlpine, I would be reluctant to recommend refusal of the application on this ground as a matter of fairness, without further exploring whether there would be an appropriate neighbourhood within the locality.

174. However, having said that, I do not consider that user by what is most likely to be less than a dozen local inhabitants is significant in absolute terms in any event. Such use is in my view indicative of occasional use by individuals rather than general use by the local community. This conclusion is supported by my earlier finding that the user of the land was too trivial and sporadic to give rise to a public right. It is also supported by the fact that all of the applicant's evidence of first-hand user (with the exception of Cllr Wells) came from people living in the two roads immediately surrounding the site (Church Avenue and The Drive). This suggests that the use was by a very small handful of houses immediately adjoining the site, rather than by a greater number of people

overall in the locality, or even in a notional smaller neighbourhood. There are a number of arguably more salubrious open spaces elsewhere in Central Beckenham which are in use by the local population at large.

175. Thus, irrespective of the issue of the percentage of households using the land in the context of the population of the locality, I find that the there has not been use of the land for LSP by a 'significant number' of local inhabitants.

(3) If the answer to (1) and (2) is 'yes', has the use been 'as of right'?

176. Since I find that the applicant has failed to establish the required level user by a significant number of local inhabitants, the issue of whether qualifying user is 'as of right' is purely speculative. The corollary of my findings on user is that there was no use capable of being resisted or licensed by the landowner.

177. However, were the registration authority to disagree and find that the user was sufficient to assert a public right and carried on by a significant number of local inhabitants, I will address the 'as of right' arguments.

178. The objector argues that any use was either by force or by stealth. Mr Whale has pointed to the sign by the 132-134 High Street gate and the 'private car clamping signs' in the front car park which state that the land is private property. Notwithstanding the recent broad interpretation of the concept of *vi* (force) given by the Supreme Court in Lewis (it does not mean simply physical force), I note that there has been significant concern expressed previously by the courts as to the efficacy of prohibitory notices (see R (Beresford) v Sunderland City Council [2004] 1 AC 889 at [72] per Lord Walker and R (Godmanchester Town Council) v Secretary of State for the Environment and Rural Affairs [2008] 1 AC 221 at [24] per Lord Hoffmann). Further, even assuming that prohibitory signage can in

principle prevent user being as of right without further landowner acts, when considering the effectiveness of notices in rendering use of the land by force, "The key question is whether, given their wording, the notices erected on the land were prohibitory notices, i.e. whether they made sufficiently clear to local users that the defendant was not acquiescing in their use of its land for recreational purposes" (Lewis [2008] EWHC 1813 (Admin) per Sullivan J at [16]).

179. The words used will be relevant. In Oxfordshire County Council v Oxford City Council & Robinson, the Court of Appeal ([2006] Ch 43) held that the words "private property, access prohibited except with the consent of Oxford City Council" would be sufficient to preclude user as of right.

180. By contrast, in Lewis at first instance, a notice which told people that they were trespassers but did not tell them to stop trespassing (it stated: *Cleveland Golf Club Warning It is dangerous to trespass on the gold course*), was held not to be: "sufficient to make it clear to them that the defendant was not acquiescing in their recreational user of the land" (at [19] per Sullivan J). For the notice to be effective it would have needed to state: "Cleveland Golf Club. Private Property. Keep out." (at [22]).

181. By analogy with these cases, I do not consider that either of the types of signs on the application land are effective prohibitory notices. Although both indicate that the land is 'private property', neither tell a potential user of the land to 'keep out' or words to that effect. The signs in the front car park simply say not to park (and this is how those signs were interpreted by users, reasonably in my view). The sign by the 132 – 134 High Street gate simply says 'No Fly Tipping', which again does not communicate a prohibition on using the land for LSP. In any event, it is unclear whether the sign at the 132 – 134 High Street gate was sufficiently visible to communicate its message effectively to users, and further, users could well have entered the land by other means without seeing it.

182. In relation to the fencing and locking of gates, I am not of the view that the rear part of the application land was wholly inaccessible to members of the public for any significant length of time during the relevant period (the front car park part of the site has, and remains, fully accessible from the Pierluigis entrance to the High Street). Throughout the 20 years, there seems to have been one way or another of entering the rear part of the site, whether it be from the garden of 32 Church Avenue and down through the group of sycamore trees, through the often unlocked 132 – 134 High Street gate (prior to its permanent padlocking in 2007), through the often unlocked gate at the front of the warehouse, along the driveway, and down the wooden steps (prior to December 2008), or through gaps in the Heras fencing since June 2004. However, a mere physical ability to get into the site is not, in my view, enough to show that use has not been by force.

183. The relevant question is "not whether those using the land knew that their user was being objected to or had become contentious, but how the matter would have appeared to the owner of the land, since in cases of prescription the presumption arises from the latter's acquiescence" (Cheltenham Builders at [69] per Sullivan J). Another way of looking at it is whether the landowner has made "sufficiently clear to local users that [he] was not acquiescing in their use of [the] land for recreational purposes" (Lewis at first instance at [16]).

184. The test was summarised by Morgan J in Betterment Properties v Dorset CC & Taylor [2010] EWHC 3045 (Ch) as follows:

> *"Are the circumstances such as to indicate to the persons using the land, or to a reasonable person knowing the relevant circumstances, that the owner of the land actually objects and continues to object and will back his objection either by physical obstruction or by legal action? For this purpose, a user is contentious when the owner of the land is doing everything, consistent with his*

means and proportionately to the user, to contest and to endeavour to interrupt the user" (at [121]).

185. This is a difficult hypothetical question to address in the context of this application because, although I could criticize the objector for not having done more at an earlier stage to secure their land (it has only been since the TVG application that the site has been made properly secure, in March 2012), my view is that the reason why they did not do more was simply on account of there not being a perceived problem of a significant number of local inhabitants using the land. Perhaps, after the company moved elsewhere, they have not been as concerned with what may or may not have been going on on their site as others might expect; however, during the majority of the period when commercial activities were taking place, I would expected more to have been done in terms of securing the site, had use for LSP been a real problem for the owners that interfered with their commercial activities.

186. Having said this, it is clear that since December 2008, there has only been one possible way into the rear part of the site: through gaps in the Heras fencing on the footprint of the former Stables Door auction house. Whilst I accept that the local residents who gave evidence at the inquiry are not guilty of tampering with the fencing, breaking it, moving it, or climbing over it, it must nevertheless have been reasonably apparent to them that it had been broken or moved by other persons unknown, even if the gaps were 'huge'. Mr Croucher gave evidence that he would replace brackets found lying on the ground which were indicative of people breaking the fencing using tools. Those broken brackets and the process of repair and subsequent re-breaking would also have been apparent to a local person entering the land on a regular basis, in my view. Indeed Mr O'Connor's written statement says that he himself would carry out repairs to the Heras fence.

187. It is not always the case that users of land who enter via a broken opening do so with force. As is summarised in Gadsden on Commons and Greens (2nd edition) (at 14-55, p. 541):

> *"A person who crosses or breaks a fence undertakes an act which is forceful and thus any use he makes of the land will not be 'as of right'. Subsequent users of the land, who may themselves have entered without direct force through a broken opening, will nevertheless also enter forcibly to the extent that they have knowledge that their entry is contested. There will, however, come a time where their knowledge of the landowner's objection will fade, and thus the landowner could be expected to re-erect broken fencing regularly. Similarly, if the fencing has gaps, or is broken down, or gates and stiles have been erected, its message to users of the land may be equivocal, and thus fail adequately to contest the user."*

188. However, on balance, given the low level of user (even if I am wrong about its trivial and sporadic nature and the number of people being insignificant), I consider that the landowner has just about done enough since the end of 2008 to communicate to local people that they should not be using the rear part of the site. The Heras fencing had gaps at times that enabled entry and may well, as I suggested to Mr Penton, have been primarily put in place to stop people driving their cars into the rear of the site. Nevertheless, in the context of the evidence of tampering and repairs done by Mr Croucher – and bearing in mind the low level of user the landowner was dealing with – I do not consider that its message was equivocal to local inhabitants. Rather, I consider that at least one of its messages was that people should not be entering the rear part of the site, even if they in fact could. This was, in my view, tacitly accepted by Mr Sobolewski and Cllr Tickner on behalf of the applicant in their oral evidence.

189. In relation to stealth, I do not consider that there is evidence that the user was consciously carried out in a way to avoid the attention of the landowner. As is stated in Gadsden at 14-60 (p. 545), "In practice … any

significant use of the land by the local community would be very unlikely indeed to be carried out with sufficient secrecy to be *clam*" and I adopt that view here. I believe it to be the case that the landowner was not aware that users were asserting a right to use the application land for LSP on account of the user not being sufficiently frequent, rather than because it was by stealth.

190. In conclusion on 'as of right', I consider on the balance of probabilities that, even if questions (1) and (2) were met (which they are not), the applicant has failed to prove that user of the rear part of the site was 'as of right' for the whole 20-year period on the basis that it was not without force. This conclusion does not, however, relate to the front car park part of the site.

CONCLUSIONS AND RECOMMENDATIONS

191. My conclusions are:

(1) The application should be refused in whole on the basis that the use of the land for lawful sports and pastimes has not been of such an amount as would reasonably be regarded as the assertion of a public right.

(2) The application should be refused in whole on the basis that the there has not been use of the land for LSP by a 'significant number' of local inhabitants.

(3) Further, in relation to the part of the application land behind the Heras fencing, the applicant has failed to prove that user of the rear part of the site was 'as of right' for the whole 20-year period on the basis that it was not without force.

192. My recommendations are:

(1) That may Report should be made available to the applicant and to the objector, together with final confirmation of the date of the meeting at which the registration authority will reach its decision. The applicant and objector should be informed that this meeting does not present an opportunity for the parties to re-state their cases or seek to put in further evidence, unless truly exceptional circumstances are made out.

(2) That the decision on the application is for the registration authority which must exercise its own discretion, save that it must not take into account issues relating to any balance of advantage or disadvantage flowing from registration or non-registration of the land as a TVG.

(3) That in reaching its decision on the application it can properly have regard to my overall conclusions and reasoning, as well as any advice from officers.

(4) That subject to that advice and any late representations received, the application should be refused in respect of the entire site and for the reasons set out in this Report and summarised in my Conclusions above.

(5) This application is governed by the Commons (Registration of Town or Village Greens) (Interim Arrangements) (England) Regulations 2007 (since the registration authority is not one participating in the pilot scheme). Under Regulation 9(2), the registration authority is required to give written reasons for the rejection of an application. If the registration authority accepts my recommendations and reasons, its reasons should be stated to be "the reasons set out in the Independent Inspector's Report of 31 October 2012".

ANNABEL GRAHAM PAUL

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31 October 2012