APPENDIX E

In the Matter of Cherry Orchard Recreation Ground as a Town or Village Green

OBJECTOR'S RESPONSE TO LEGAL SUBMISSIONS OF APPLICANT AND REPORT OF LANA WOOD.

1 INTRODUCTION.

1.1 In summary the submission is that the Registration Authority can and should follow the carefully reasoned and legally correct recommendation of the Inspector they appointed to hold the Inquiry and make recommendations.

1.2 The Applicants legal submissions are either irrelevant to the way the matter was reasoned in the Inspector's report or legally incorrect. It is interesting to note there is an implicit acceptance in those submissions that the vast majority of the Cherry Orchard Recreation Ground should not be registered as a village green, the only argument that remains of the applicant now is to register an undefined area not used for the playing fields use. That should not be registered for the reasons given by the Inspector.

1.3 I will deal with the Applicant's criticisms of the Inspector's report in the order they are made.

2 AS OF RIGHT

2.1 The conclusion of the Inspector on the "as of right" issue is set out where she applies the law to the facts at paragraph 10.6. This analysis is on the basis of the decision in ***Regina (Lewis) v. Redcar and Cleveland Borough Council*** [2009] EWCA Civ 3 and deference and was not an analysis that relied upon implied permission. The Inspector's conclusion is that the applicants have not been using the land as of right because the behaviour of the inhabitants has not been such as to communicate to a reasonable landowner that they are asserting a right. Paragraph 10.6 is in the following terms:

> ***"...as of right...***
>
> *10.6. The applicant must show that the application land has been used by the local inhabitants as of right. She has not succeeded in showing that use has been as of right. In my judgment the application must fail for this reason. During the whole of the relevant period the landowner marked out football and cricket pitches on the land, according to season, and let those pitches and the associated facilities to teams for organised games at a fee. The behaviour of the local inhabitants has been such as to communicate to a reasonable landowner that they understand and accept that the teams who have booked to play are entitled to exclusive use of the pitches and associated facilities at the times when they have booked them. The local inhabitants ensure that they conduct themselves at such times so as not to interfere with the matches, and adjust their own activities accordingly. A reasonable landowner would not therefore have apprehended that the local inhabitants were asserting a right to use the land at all times for recreation. In my judgment the use of the application land for recreational purposes by the local inhabitants has therefore not been as of right because it would not have had the appearance to a reasonable landowner of being as of right."*

2.2 This is a conclusion that is amply justified by reference to the Court of Appeal's judgment in ***Regina (Lewis) v. Redcar and Cleveland Borough Council*** [2009] EWCA Civ 3 and on the facts of the case. It reflects the judgment made by the inspector that there was deference by users to the owner's use which she summarised in paragraph 9.23 of her report.

"Again, this was clear evidence in my judgment of people adjusting their activities to ensure that they did not interfere with the game. The Applicant's witnesses' evidence in this regard was supported by the evidence on behalf of the Objector."[1]

2.3 The criticism of the Inspector made at paragraph 5 of the Applicant's further legal submissions is that the Inspector did not deal with a point that was summarised in 7.45 and 7.46 of her report. It is noticeable that this was a point made by the Applicant in connection with implied permission. It was not a matter raised by the Applicant under the heading of continuity and deference [see 7.69ff report where applicant's arguments on continuity and deference are summarised] The Inspector, correctly, analysed the matter in terms of deference and using the tests in ***Redcar.***

2.4 It is quite apparent that ***Beresford*** was not a case which involved competing uses of the owner and the village green uses. It was not a deference case. There is nothing in ***Beresford*** that casts doubt on the need to establish that user was sufficient to bring home to the reasonable landowner that the local inhabitants were asserting a right.[2]

2.5 Thus there was no need for the Inspector to deal with the observations of Lord Scott about whether encouragement of recreational user reinforced the "impression of members of the public that their use was as of right".[paragraph 50 Lord Scott in Beresford] This is for the following reasons.

i) It was not relevant to the main issue in this case which was whether the use was as of right or whether the deference was such that it would not bring home to the reasonable user that it was use as of right.

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[1] see paragraph 9.23

[2] see paragraph 38 of Redcar commenting on Lord Bingham's judgment in Beresford

ii) In ***Beresford*** it was a point that was relevant to analysis using implied licence which was not the way the Inspector analysed matters here. She was correct to prefer the analysis of the Court of Appeal in ***Redcar*** which was much more analogous on the facts .

iii) ***Beresford*** was not a competing use case.

2.6 In addition, if it were necessary to deal any further with the Applicant's point, which it is not, it would be dangerous to place any reliance on the point made for the following reasons. These comments relied upon by the Applicant are in the minority judgment of Lord Scott which was not agreed with by Lord Hutton, Lord Rodger or Lord Walker. It does not form part of the ratio of the majority. It is not relevant to this case and so it is not necessary to form a view as to whether it is correct. If it were the better view is that it is not. The logic at the end of paragraph 50 relates to reinforcing the impression of members of the public that their use was as of right which is contrary to the ratio of the House of Lords in ***Sunningwell*** where it was held the "question is how the matter would have appeared to the owner of the land[3]".

3 REGISTRATION OF PART ISSUE

3.1 The criticism made of the Inspector's approach at paragraph 7-13 is that the Inspector should have considered recommending that an undefined part of the Cherry Orchards playing field land should be registered where it was not used for football/ cricket.

[3] see Sunningwell 352H/353A

3.2 The approach of the Inspector exactly accorded with the law as laid down by the Court of Appeal in ***Redcar***. In ***Redcar*** the Court of Appeal held:

> *"has the user been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land. That will depend on an analysis of the manner and extent of the user"*[4]
>
> *The inconsistency will manifest itself where the recreational users adjust their behaviour to accommodate the competing activities of the owner (or his lessees or licensees). By adjusting their behaviour, they give the impression to the owner that they are not claiming a right to do what they are doing. That leads the owner not to regard the users as acting as of right.*[5]
>
> *47 .....Those who* always *defer to the owner whenever his competing use of the land threatens to interfere with their use of the land are not likely to convey to the reasonable owner the impression that they are claiming the right to use the land.*
>
> *49. As I have said, it was a question of fact and degree to be resolved by the decision-maker whether the local inhabitants did sufficient to bring home to the reasonable owner of the Application Site that they were asserting a right to use it.*

3.3 This last paragraph suggests that it is a perfectly proper approach to look at the Application site as a whole and to ask whether a reasonable owner would take the view that people were asserting a right to use it. In this case the Inspector dealt with exactly that question at paragraph 9.43 of her report. The thrust of the evidence was that people used the whole of the land but moved to accommodate organised games. It was very similar to the facts of Redcar[6] where the golf use did not take up the whole of the Report land and yet the parts not directly used for golf were not separately considered for registration. This is a point relied upon, correctly by the Inspector. In short the Inspector's approach at

[4] per Dyson LJ at para 40
[5] para 45 ibid
[6] see paragraph 8 Redcar

looking at the land as a whole is correct and it is not necessary for the landowner to use every last part. If there is always deference in the areas where conflict arises that is sufficient to let the landowner know that no-one is claiming a right.

3.4 It is not necessary to investigate which parts to register following the approach of the Inspector because she rightly dealt with the land as a whole. However if the Registration Authority was to accede to the Applicant's request to register a part of the land it would have to know which part. That is not at all easy and the Applicant has not answered that question in the further submissions or at all. There has of course been deference in a much wider area than just the marked out pitches, for example when the pitches get moved that covers a different area, there is the area for the linesman to the side of the pitch, there is the area for the spectators, there are occasions when the ball goes off the pitch, there is an area behind the goals to name but a few. A summary of such points is given at paragraph 6.17 of the report. There would also be the further point that the area that would be left that the Applicant seeks to register would be a nonsense and unworkable and not fit for registration as Mr Petchey has already advised the Registration Authority.[7]

3.5 Thus the Inspector's conclusion that she would not recommend registering part only of the fields is entirely consistent with the Court of Appeal authority in ***Redcar*** and should be followed. It would also be wrong to accede to the applicant's arguments for registration of a part because it is not possible to know which part to register and because it would be an unworkable area.

[7] see Report 6.19

4 LOCALITY ISSUE

4.1 The Applicant attacks the Inspector's conclusion that the locality had to exist for the 20 year period in order to be a qualifying area within the definition of Section 22 Commons Registration Act 1965 as amended.

4.2 The conclusion of the Inspector was:

> *"In my judgment the area now identified as the Civil Parish was not a qualifying locality during the period before it existed"*[8]

4.3 This arises directly from the definition in section 22 of Commons Registration Act 1965 as amended:

> *"...land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either (a) continue to do so, or (b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions."*

4.4 It is a simple matter of construction that the definition needs to be satisfied for twenty years. It could not be satisfied if between 1984 and 1996 it was not used by the inhabitants of a locality because the locality relied upon did not exist.

4.5 The alleged purposive construction of the applicant at paragraph 18 completely rewrites the statute. It means that there is no need to be any locality apart from on the day of the application. The purpose of the statute is not to allow a village green to be created because people from anywhere use it but rather they must be from a locality or a neighbourhood within a locality. If Parliament had have intended otherwise they could have said so.

4.6 The drafting change of inserting the words "or any neighbourhood within a locality" which is relied upon does not help the applicant. The way Parliament decided to change the test was to introduce the looser concept of neighbourhood. It was not to get rid of the concept of locality which had a fixed meaning. However the Applicant cannot even show a neighbourhood as the Inspector found at 9.39 of her report.

4.7 Neither of the two cases have a bearing on the definition under the Commons Registration Act 1965. ***Bremner v Hull*** (1866) LR 1CP 748 concerned the appointment of churchwardens. In that case in the leading judgment Erle CJ found that ***"the custom of appointing churchwardens in the parish of Prestwich is wholly unaffected by the circumstance of one of the hamlets being taken out of it"***.[9] There had already there been a custom created and this was not affected by a small change in the boundaries. However in the instant case the Applicant wants to create the village green rights on the basis of a locality that simply did not exist at the time they seek to create the village green. The ***Bremner*** case has no parallels to the current situation.

4.8 Similarly ***R v Hundred of Oswestry*** (1817) 6 M and S 361 the issue was whether the Hundred of Oswestry which was liable to pay for the repair of a bridge could cease to be because of a boundary change. In particular it was argued that it would be an unfairness to Abertanah who had recently been annexed to the Hundred to make them pay. However the ratio of the case was that the provisions of the statute that annexed Abertanah expressly provided that the:

[8] 9.38 Report
[9] page 759

"the inhabitants thereof shall do every thing with the inhabitants of the hundred as the inhabitants do or be bound to do" per Lord Ellenborough CJ

4.9 It was not to do with the creation of a right to use land by virtue of a non-existent locality. The ratio of the Hundred of Oswestry was connected with the statute that created the boundary change. It has no bearing on the current situation.

5 RES JUDICATA

5.1 The conclusion of the Inspector on res judicata is contained at 9.32 - 9.35 of the Report. If it had have been necessary to rely on this she would have concluded that it would not be open to the authority to re-open the matter. This was a finding that is open to the Inspector and the Registration Authority.

5.2 Paragraph 26 of the Applicant's submissions misunderstands the report at 7.49. The Applicant's submissions fear that the Inspector when she said a "planning decision" at the beginning of this paragraph was referring to a decision to grant planning permission. In fact the Inspector qualifies 'planning decision' in the same sentence as:

"whether it be through an appeal against an enforcement notice on ground (b) to (e) or the obtaining of what is now a CLEUD.."

5.3 Thus the Inspector has not misunderstood the applicant's submission but correctly repeated them. The second paragraph[10] of the Applicant's closing submission was in the following terms:

"But, it[11] is also not akin to a 'one way or another decision' concerning the legal status of alleged development, whether it be through an appeal against an enforcement notice on grounds (b) – (e) or the obtaining of what is now a CLEUD and was then an established use certificate, which is final."

[10] although the paragraphs were not numbered
[11] a village green decision this is my addition

5.4 The conclusion on res judicata that the Inspector made is entirely supportable on the facts of this case. The paragraph that in ***Thrasyvoulou v Secretary of State for the Environment***[12] that is directly applicable to village green applications is as follows:

> *"The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro una et eadem causa." These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law. In relation to adjudications subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of res judicata applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."*

5.5 This is the view shared by Vivian Chapman QC.[13]

5.6 In fact a previous decision on an identical application[14] by the identical body is even more deserving of a finding of res judicata.

5.7 The basis of the decision is set out in the opinion of Mr Petchey at page 60 of the Objector's bundle and was that the use was not as of right because of the basis it was held under and because of the hirings of the fields. Nothing has changed in the law or fact to disturb either finding. Neither ***Beresford*** nor the ***Trap Grounds*** case changes that sound decision. The Applicants further submissions do not suggest a change in the law or facts that has occurred since 2002 that would mean there should be a different decision on the "as of right issue" than previously.

5.8 The criticism of the Inspector that she has not expressly referred back to Thrasyvoulou at 9.32 ff is not justified. She has referred to the

[12] [1990] 2AC 273 at p 289
[13] See page 639 Objector Bundle
[14] That was the applicant's case in examination in chief

objector's submission at 9.32 which she set out in detail at 6.3ff of her report. The test that can be derived from ***Thrasyvoulou*** which the Inspector set out at 9.32 was that the authority should not re-open matters fundamental to the decision to reject the first application to register the land. This is certainly applicable when in the submissions there had been no material change of fact or law. This was the précis adopted by Chapman QC at page 639 of the objectors bundle. It is also very similar to the words of Lord Bridge at 297 F. When the Inspector refers to the finality of litigation in 9.34 this is drawing from Lord Bridge in Thrasyvoulou where it explains the basis for the rule at page 289 C.

5.9 The point the Applicant's further submission makes at paragraph 33 that judicial review would be an inadequate remedy for the changes in the law does not arise because the appellant does point to any changes in the law that are relevant. Paragraph 34 concerns a res judicata argument in a different case that was not dealt with in the judgment it does not add anything to this case which should be decided on its facts.

5.10 Thus the Inspector is correct that, if it were necessary to rely on it the Registration Authority could rely on res judicata. There have not been a any changes in fact or law that are relevant to the Registration and point to a different decision on the "as of right question" which was a matter fundamental to the disposal of the first application.

6 CONCLUSION

6.1 The Registration Authority can and should follow the recommendation of their Inspector who has written a careful and legally correct report

which does not suffer from any of the defects that the Applicant's now allege.

Richard Ground

6 November 2009

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