In the Matter of

A Third Application to Register

Burley House Field, Burley-in-Wharfedale

As a New Village Green

REPORT

of Mr. VIVIAN CHAPMAN Q.C.

1st. July 2009

City of Bradford Metropolitan District Council,

Legal and Democratic Services,

Development and Regulatory Law Team,

City Hall,

Bradford BD1 1HY

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EXECUTIVE SUMMARY

The Report concludes that the third application is successful and that Burley House Field ought to be registered as a new green.

1. Introduction

[1] This is the third time that Burley Community Council ("BCC") has applied to register Burley House Field, Burley-in-Wharfedale as a new green. The first two applications were unsuccessful, but there have been substantial changes in the law since the disposal of those applications. The third application raises some interesting but difficult questions on the statutory requirement of user "as of right".

2. The three applications

The first application

[2] BCC first applied to register the Field as a new green on 9th. March 2000. That application was made under s. 13 of the Commons Registration Act 1965 ("CRA 1965") before that Act was amended by s. 98 of the Countryside and Rights of Way Act 2000 ("CRoW 2000"). Under the CRA 1965 (before amendment) the relevant part of the definition of a new green was:

"land...on which the inhabitants of any locality have indulged in [lawful] sports and pastimes as of right for not less than twenty years."

[3] I refer to my Revised Report[1] dated 22nd. March 2004 for the full history of the first application. After a public inquiry, I found that the inhabitants of the locality of the ecclesiastical parish of Burley had indulged in lawful sports and pastimes on the Field for not less than 20 years. However, I recommended that the application failed because user had not been "as of right" throughout any relevant 20 year period. The landowner's graziers had used the Field to make hay in the early 1980s and I considered that the application failed because of the guidance given by Sullivan J. in the *Laing Homes* case[2] to the effect that haymaking was inconsistent with recreational user "as of right" by local people. I recommended to the commons registration authority ("CRA") that the application should be rejected on that ground and my recommendation was accepted. However, grave doubt has since been cast on the correctness of the *Laing Homes* case by Lord Hoffmann in the House of Lords in the *Oxfordshire* case[3].

The second application

[4] On 19th. December 2003, BCC made a second application to register the Field as a new village green. This time the application was made under the CRA 1965 as amended by s. 98 of CRoW 2000. The relevant part of the amended definition of a new green was:

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1 3A/1B/27 (i.e. 3rd Application 1st. Blue Bundle at page 27)

2 *R (Laing Homes Ltd.) v Buckinghamshire CC* [2004] 1 P&CR 573

3 *Oxfordshire County Council v Oxford City Council & Robinson* [2006] 2 AC 674 at para. 57

"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...continue to do so."

[5] I refer to my Report[4] dated 18th. May 2005 for the full history of the second application. After a second public inquiry, I found that the Field was land on which for not less than twenty years a significant number of the inhabitants of the locality of the ecclesiastical parish of Burley had indulged in lawful sports and pastimes. However, I recommended that the application should be rejected for the following reasons:

- User had not been "as of right" throughout any relevant 20 year period because it had been interrupted by haymaking in accordance with the *Laing Homes* case
- User "as of right" did not "continue" because (a) user was contentious from at least December 2003 to March 2004 and (b) user was permissive from March 2004 when the landowner erected permissive signs on the Field.

[6] My recommendation was accepted. At that time the *Oxfordshire* case had not yet reached the House of Lords so that (a) the *Laing Homes* case was still considered to be good law and (b) the decision of the Court of Appeal[5] in *Oxfordshire* was to the effect that the requirement of continuing user meant that qualifying user had to continue down to the date of registration and not merely to the date of the application. Thus the March 2004 signs were regarded as relevant although erected after the date of the second application.

The third application

[7] BCC made its third application[6] to register the Field as a new green on 19th. February 2008. The application was made under s. 15(4) of the Commons Act 2006 ("CA 2006"). The relevant statutory provisions are as follows:

"15(1) 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... (4) applies...

(4) This subsection applies (subject to subsection (5)) where-

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

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

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4 2A/1B/64
5 [2006] Ch. 43
6 3A/1R/2

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

(6) In determining the period of 20 years referred to in subsections...4(a) there is to be disregarded any period during which access to the land was prohibited to members of the public by reason of any enactment."

The Field is land to which Part 1 of the CA 2006 applies by virtue of CA 2006 s. 5.

[8] The application stated that user as of right ceased on 6th. August 2003 (the date of the letter sending to BCC the objection to the first application) or 7th. August 2003 (the date of receipt of that letter) and that the period from February to July 2001 fell to be disregarded under s. 15(6) as a period of statutory closure for foot and mouth disease. The relevant 20 year period was therefore March 1983 to August 2003.

[9] There was one objection[7]. It was from the City of Bradford Metropolitan District Council ("Bradford MDC") as landowner. The principal ground of objection was that recreational user by local people was not "as of right" (a) because of the haymaking on the Field in the early 1980s and (b) because local people were aware during the relevant 20 year period that the landowner opposed registration of the Field as a new green.

[10] Both the applicant and the objector initially took the position that no further public inquiry was necessary. Both contended that all or most material issues were *res judicata*. The objector subsequently changed its position and requested a further public inquiry in order to introduce further evidence. After inviting written submissions from the parties, I wrote an Opinion dated 28th. December 2008 in which I concluded that none of the issues in the third application were *res judicata* and that a third public inquiry was necessary. On 7th. February 2009 I gave written Directions as to the conduct of the third public inquiry. In particular, I directed that all evidence, legal submissions and authorities placed before the first and second public inquiries should stand as evidence and submissions before the third public inquiry.

[11] The third public inquiry was held in Burley on 20th. and 21st. April 2009. As at the previous two inquiries, Mr. Nigel Clayton of counsel appeared for the applicant and Mr. David Partington of counsel appeared for the objector. I am very grateful to them for their clear and detailed submissions. As before, all administrative arrangements were made with exemplary efficiency by Mrs. Carole Barrott on behalf of the CRA.

[12] At the third public inquiry, the issues were helpfully narrowed by agreement. It was accepted by the landowner that a significant number of the inhabitants of the locality of the ecclesiastical parish of Burley had indulged in lawful sports and pastimes on the Field for a period of at least 20 years before 19th. February 2003 (even allowing for any interruption on

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7 3A/1B/1

account of foot and mouth restrictions). Despite the cessation date specified in the application, it was accepted by the landowner that the applicant was entitled to succeed if it could show qualifying user until 19th. February 2003 (i.e. five years before the date of the application). It was common ground between the parties that the only issue in the case is whether user "as of right" continued until 19th. February 2003. The landowner contended that recreational user of the Field by local people was not as of right before 19th. February 2003 because:

- User by local people was by permission of the landowner until 1999,
- From 1999 user by local people was contentious,
- Alternatively, the use of the Field for haymaking in the early 1980s fell within the relevant 20 year period and was inconsistent with user "as of right".

2. The documentary framework

[13] At the third public inquiry, a number of important new documents were produced and closer scrutiny than at the first two public inquiries was focused on the documentary history and, in particular, on the correspondence passing between BCC and Bradford MDC (as landowner) and the extent to which the contents of that correspondence was made known to the inhabitants of Burley. I therefore consider that, before dealing with the witness evidence given to the third public inquiry, it is desirable to trace the undisputed documentary framework which underlies the critical issues in the case. Inevitably, there is some repetition of material already discussed in my earlier Reports.

[14] It will be recalled that the Field was purchased by Ilkley UDC in 1974. The background to the purchase was that the Field had been designated partly as educational land, partly as public open space and partly for road widening in the 1962 Ilkley Town Map as approved in 1973[8]. An application was made by the landowners of the Field for planning permission to develop the Field together with land to the S which was designated as public open space. Ilkley UDC granted planning permission for the land to the S on the basis that the part of the Field designated as educational land would be redesignated as public open space[9]. Ilkley UDC refused planning permission for development of the Field on the ground that it was required for public open space purposes[10]. The landowners offered the Field to Ilkley UDC as being incapable of reasonably beneficial use because of the planning restriction[11]. Ilkley UDC purchased the land on the basis of DV valuations which stated that the land was acquired "for purposes of amenity and open

8 1A/1B/4.6.1
9 1A/1B/4.1.1
10 1A/1B/4.5.1
11 1A/1B/4.5.2

space"[12]. Ilkley UDC unsuccessfully applied for a grant under s. 8 of the LGA 1966 on the ground that the Field was purchased for use as a public open space[13].

[15] The Field vested in Bradford MDC on 1st. April 1974 on local government reorganisation[14].

[16] BCC was established in 1976 to "sustain and enhance the community life and the environment of Burley"[15]. At that time, Burley lay within the civil parish of Ilkley and so had no statutory representative body dedicated to the concerns of Burley.

[17] BCC made an unsuccessful application to Bradford MDC for Community Programme funding for the development of a kick-about area on the Field. In a letter[16] dated 27th. April 1983 from the City Recreation Officer of Bradford MDC to Ilkley Parish Council the City Recreation Officer referred to the unsuccessful application and wrote:

"However, this Council's Planning Section has assured me that they have designated the area as open space and its future, in that sense, should be secured."

It appears to me that this was a reference to the planning designation of the Field and not to any public right of access.

[18] In 1984, there was an approach by the owner of Burley House (which lies immediately to the N of the Field) to Bradford MDC to purchase or lease the Field with the object of incorporating part of the Field into the grounds of Burley House and using the rest for informal recreation. In a letter[17] dated 6th. February 1984, the City Recreation Officer wrote to the ward councillor (Mrs. Clavering) to say that the Field was bought for the purposes of open space and that officers of the Recreational Division were concerned that the land should be retained for open space and informal recreation. They opposed outright sale but proposed negotiations for a joint venture for the provision of appropriate facilities. The BCC were clearly well aware of these proposals because on 9th. February 1984 BCC submitted a memorandum[18] to the Leisure Services Sub-Committee opposing outright sale and requesting that any negotiations should ensure that recreational facilities were open to the public and that access to the Field from the public footpath and from Langford Lane should be maintained. BCC also circulated a flyer[19] encouraging local people to attend a public meeting on the topic. In the event, Bradford MDC decided to postpone consideration of the matter until the route of the Burley Relief Road had

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12 1A/1B/4.2.1 & 4.2.2
13 1A/1B/4.5.3
14 3A/1R/39b
15 1A/1R/5
16 1A/1R/16
17 1A/2R/278
18 1A/2R/279
19 1A/2R/280

been determined[20]. This correspondence appears to have proceeded on the assumption that there was no existing public right of access to the Field.

[19] In 1992, the owner of Burley House erected a double gate on the W boundary of the Field. On 14th. April 1992, Mr. Fryer (the landowner's grazier) wrote[21] to Bradford MDC to complain that the gates gave very convenient access to the Field for amenity purposes but made it very difficult to restrain cattle on the land. He also complained of damage to the land caused by cyclists and motor-cyclists. He wrote:

"I feel that unless I am allowed to restrict this misuse, the land will lose both its amenity and agricultural value. I would stress that the majority of people using this land are dog walking etc and not difficult and I am sure would back any attempt to protect their local amenity land."

Mr. Jagger of Bradford MDC replied by telephone. According to his notes[22], he told Mr. Fryer to lock the gates to exclude bike riders and the general public. There is no evidence that this exchange came to the attention of BCC or local people. It does however suggest that the grazier saw no conflict between agricultural use of the Field and its use for dog walking and perceived the Field as combined agricultural and amenity land.

[20] Later in 1992, the Field was being considered for allocation for residential development in the Unitary Development Plan. On 15th. October 1992, the Bradford MDC Directorate of Community & Environmental Services faxed[23] the Bradford MDC Conveyancing Manager to enquire whether there were any restrictions on its development. On 16th. October 1992, the Conveyancing Unit replied in a Memorandum[24] to the effect that the land was "used for public open space". This memorandum came to the attention of Mr. Jagger, who annotated it with some robust comments to the effect that the Field was used for agriculture and not public open space. There is no evidence that these documents came to the attention of the BCC or local people.

[21] However, BCC did become involved in a discussion of the status of the Field in the context of UDP proposals in early 1993. According to an internal Bradford MDC memorandum[25] of 28th. January 1993 the planning department asked the property department for its comments on BCC's claim that the Field was public open space. The memorandum was passed on to the estates department[26]. On 11th. February 1993, Mr. Jagger replied that "No way Jose is this used as POS". On 2nd. March 1993, BCC (Mr. Gundry) wrote[27] to the planning department pressing

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20 1A/2R/281
21 1A/1B/2.3.1
22 1A/1B/2.3.2
23 1A/1B/4.5.9
24 1A/1B/4.5.10
25 1A/1B/4.5.11
26 1A/1B/4.5.12
27 1A/1B/4.5.13

the claim that the Field had been recognised as public open space. On 5th. March 1993, Bradford MDC planning department wrote[28] to the BCC that it had been advised that:

"There is a public footpath over the land but there is no general public right of access to the land"

This seems to be the first time that Bradford MDC specifically told BCC that it considered that there was no public right of access over the Field, except for the public footpath. However, the letter did not suggest that local people should not continue to use the Field for informal recreation. The letter seems to be typical of the landowner's position throughout, i.e. that it denied the existence of any legal right of access to the Field except for the public footpath but had no objection to informal recreational use of the land by local people. Subsequently, on 12th March 1993[29], Mr Gundry's letter of 2nd. March 1993 was passed by the planning department to the property department. On 22nd. March 1993, Mr. Jagger replied in an internal memorandum[30] that

"I have no record of the land being utilised or laid out as a public open space. It has, unofficially, become popular with the good residents of Burley as a dog exercise area and a glorified dog loo."

Although there is no evidence that local people were aware of this memorandum, it illustrates the landowner's position. When Mr. Jagger said that the Field was not a public open space it seems clear that he meant that the public had no legal right of access to the Field and not that the Field was not used in practice for informal recreation.

[22] On 14th. June 1993, Mr Gaunt (who gave evidence to the first public inquiry) wrote[31] to Mr. Jagger complaining about the locking of the gate in the W boundary of the Field and contending that the Field was public open space. He suggested a scheme for allowing public access on the W boundary which would be stock-proof. Mr. Jagger replied in a letter[32] dated 2nd. August 1993 to the effect that there was no record that the Field was utilised or designated as public open space. He said:

"I am very conscious of the unofficial use of the land by residents and dog owners but again can find no official sanction for this."

Mr. Jagger promised to look into the question of suitable access "whether it be on a legal or permissive basis". On the same day, Mr. Jagger sent a memorandum[33] to the Bradford MDC

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28 1A/1B/4.5.14
29 1A/1B/4.5.15
30 1A/1B/4.5.16
31 1A/1B/2.3.6
32 1A/1B/4.5.17
33 1A/1B/4.5.18

rights of way department asking to be informed of any definitive rights of way over the Field. Mr. Miller of the City Engineer's department replied by memorandum[34] dated 13th. August 1993 to say that he was aware of public usage over the northern area of the land but had not received a formal claim for public rights gained through usage. "It sounds as though such a claim may be imminent!". Mr. Jagger and Mr. Miller were clearly thinking in terms of public rights of way rather than recreational rights under the CRA 1965.

[23] On 25th. August 1993, the BCC (Mr. Gundry) wrote[35] to Mr. Jagger. It appears that Mr. Gaunt had passed to the BCC a copy of Mr. Jagger's[36] letter of 2nd. August 1993. The letter pursued the complaint about the locking of the gate in the W boundary and the argument that the Field was public open space. The letter concluded by asking for Mr. Jagger's help in preserving public access to the Field. It seems that Mr. Jagger replied on 9th. September 1993[37] but no copy was included in the inquiry bundles. It appears from BCC's letter[38] of 8th. April 1995 that the debate was not continued because the stock were removed from the Field and the gate left unlocked.

[24] Bradford MDC again gave consideration to the legal status of the Field in 1995 in connection with the UDP. A memorandum[39] of 18th. January 1995 from Mr. Kilner of the Legal Department to Mr Fellows of the Planning Department advised that although the Field was purchased for public open spaces purposes, the acquisition was under s. 8 of the West Riding County Council (General Powers) Act 1951 s. 8 and not under the Open Spaces Act 1906 and so there was no restriction on sale of the land. The issue seems to have been raised by an inquiry from a Mrs. Brown of Burley, a former parish councillor[40]. It appears to have been implicit in the advice that there were no public access rights over the Field which would affect sale of the land.

[25] On 8th. April 1995, BCC (Mr Gundry) wrote[41] once more to Mr. Jagger to complain that the gate in the W boundary was again locked, although there were no cattle in the Field. Mr. Gundry argued that the Field was purchased for public open space purposes and that "the public's right of access should now be regularised". There was no substantive reply to this letter and the BCC (Mr. Gundry) wrote[42] again to Mr. Jagger on 20th. July 1995 pressing for a reply. He wrote that:

> *"...the rights of public access need to be established."*

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34 1A/1B/4.5.19
35 1A/1B/2.3.7
36 For some reason not clear to me it is described as a letter from Mr. Finnerty
37 See letter of 8th. April 1995 at 1A/1B/2.3.8
38 1A/1B/2.3.8
39 1A/2R/291
40 See the contemporaneous letter to Mrs. Brown at 1A/2R/293
41 1A/1B/2.3.8
42 1A/1B/4.5.20

Mr. Jagger replied by a letter[43] dated 9th. August 1995. He wrote that the Field was let for grazing and that it was crossed by a public footpath. As for public access, he wrote:

"I have been unable to trace any definitive documents granting general public rights of way over the site, although I am aware that a number of residents use the land for exercising their dogs."

The BCC (Mr. Gundry) replied by a letter[44] dated 22nd August 1995 reiterating that the Field was acquired as public open space and requesting restoration of access to the Field from the village at the NW corner.

[26] This correspondence led to the site meeting on 16th. November 1995 between Mr. Jagger, Mr. Gundry, Mr. Gaunt and Mr. Sumner at which it was agreed that the access from Langford Lane (on the W boundary of the Field) would be re-opened. In my Revised Report into the first application, I found that Mr. Jagger said that that access through the Langford Lane gate would be on a "permissive basis". The quoted words appear in his contemporaneous note[45]. It is true that, in a memorandum[46] of 27th. June 1996, Mr. Jagger wrote that it had been agreed at the meeting that dog walkers could use the Field on a permissive basis only on the understanding that the Council were not acknowledging any public rights other than the existing public right of way. However, I consider that what was said at the meeting was that access through the Langford Lane gate would be on a permissive basis. This view is supported by the action subsequently taken by Bradford MDC by erecting signs on that gate. I do not think that Mr. Gundry and his colleagues would have agreed that access to the Field generally was permissive. The effect of this meeting was reported to an Open Forum Meeting of the BCC of 17th. October 1996. According to the minutes[47]:

"Burley House Field footpath: letter from Melvin Jagger awaited. John Gundry advised that it was understood that the padlocked gate (at present unlocked) will be replaced by a farm gate and unlocked pedestrian gate."

The report therefore said nothing about the legal nature of public rights over the field or in relation to the gate.

[27] BCC (Mr. Gundry) wrote[48] again to Mr. Jagger on 3rd. January 1997 asking for a progress report on the new entrance from Langford Lane and seeking some arrangement for improvements to that part of the Field which was designated as Village Greenspace under the UDP in order to "make that part of the Field more attractive and more usable by the village as a

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43 1A/1B/4.5.21
44 1A/1B/2.3.9.
45 1A/1B/2.3.17
46 1A/1B/2.3.10
47 3A/B/25A
48 1A/2R/318

whole". On 13th. January 1997, BCC (Mr. Gundry) wrote[49] to the Planning Department of Bradford MDC seeking assurances that the part of the Field designated as Village Greenspace under the UDP would remain so designated and not be reallocated for housing. There seems to have been no written reply from Mr Jagger although there is evidence[50] that he had a site meeting with Mr Gundry in February 1997. There is no clear evidence of what was discussed at that meeting. The Planning Department replied[51] on 3rd. February 1997 deferring a substantive reply pending further progress on the UDP. After a chasing letter, the Planning Department replied[52] on 14th. July 1997 effectively passing the ball to Mr. Jagger. It seems to have been agreed over the telephone in July 1997 that BCC would contribute one third of the cost of a kissing gate at the Langford Lane entrance[53]. There appears to have been a telephone conversation between Mr. Gundry and Mr. Jagger on 11th. September 1997[54] which was reported to a committee meeting of the BCC on the same day. According to the minutes[55] Mr. Jagger wanted to advertise the Field to let and did not want BCC to plant trees on it. There were inconclusive discussions about whether BCC should seek possession, take a formal lease or seek to purchase the land. It seems therefore that Mr. Jagger must have been maintaining his position that there were no public rights of access on the Field (barring the public right of way).

[28] On 17th. September 1997, BCC (Mr Gundry) wrote[56] to Mr. Jagger expressing dismay at the telephone conversation of 11th. September 1997 and pressing Mr. Jagger to agree to BCC's plan to plant trees on the part of the Field designated by the UDC as Village Greenspace. Mr. Jagger replied by a letter[57] dated 22nd September 1997 refusing to recommend a planting scheme on the Field. He wrote:

"My information is that works are progressing satisfactorily in the provision of kissing gates to allow ***permissive access*** *only to the fields*."

Turning to the UDP designation of the northern part of the Field as Village Greenspace, he wrote:

"In planning terms the latter classification does not mean that it is a village green or public open space. The significance of the designation is that the area of land is not developed and remains "green". There is no presumption that it is available or open for use by the general public."

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49 1A/2R/320
50 1A/2R/323
51 1A/2R/321
52 1A/2R/325
53 1A.2R/326
54 1A/2R/329
55 3A/1R/
56 1A/2R/329
57 1A/2R/331

BCC (Mr. Gundry) replied[58] on 8th. October 1997 reiterating that the Field was purchased as public open space, requesting that it be declared public open space and concluding:

"...we believe the right of usage of the field has been established by custom over many years and is not merely permissive".

Mr. Jagger's letter was discussed at a committee meeting of the BCC on 9th. October 1997. According to the minutes[59], Mr. Gundry had talked to Mr. Jagger after receipt of his letter and the BCC were considering an offer to purchase the Village Greenspace part of the Field. Thus the position as between the landowner and BCC was that BCC were claiming a public right of access to the Field but the landowner was denying the existence of such a right. There was no question of preventing public access but the parties were in disagreement as to whether access was permissive or by right.

[29] A Neighbourhood Forum Open Forum Meeting was held by the BCC in Burley on 16th. October 1997. According to the minutes[60] it was attended by over 200 residents and interested persons. It was reported to the meeting by Mr. Gundry that the kissing gate had been installed at the Langford Lane access to the Field but that Bradford MDC were not in agreement with BCC plans that the Village Greenspace should not be assigned to housing and should be laid out with trees, paths etc. It appears to me that it was implicit in the report that the landowner was not accepting the existence of any public right of general access to the Field. It was at about this time that there was a petition[61] signed by some 70 residents of Burley objecting to residential development of the Field and asking for it to be retained as public open space under the UDP.

[30] At about the same time, the landowner turned its attention to the question of local residents with gates opening onto the Field. At a site inspection on 14th. October 1997, it was noted[62] that Nos. 5 & & St. Philip's Drive had back gates opening onto the Field. On 23rd. December 1997, the landowner wrote[63] to the occupiers of 7, St. Philip's Drive asserting that they had no right of access onto the Field and demanding removal of the gate. The owner of 7, St. Philip's Drive (Mrs. Ambler) instructed solicitors who wrote to Bradford MDC asserting a legal right of way through the gate by prescription and the matter seems to have been let drop after an inconclusive exchange of letters[64].

[31] The UDP was adopted in January 1998, and the N part of the Field was designated as Village Greenspace. On 18th. February 1998, BCC (Mr. Gundry) wrote[65] to Mr Jagger (a)

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58 1A/2R/332A
59 3A/1R/50
60 3A/1R/52
6161 1A/1R/88 1
62 1A/1B/4.5.26
63 1A/1B/4.5.27
64 1A/1B/4.5.28, 29, 30 & 33
65 1A/2R/337

pressing for the landowner's agreement to BCC's proposals to enhance the part of the Field now designated as Village Greenspace, (b) complaining that cattle on the Field had trampled parts of the Field into a quagmire, and (c) asking Bradford MDC to desist from attempting to procure the removal of private gates onto the Field. It appears, therefore, that the correspondence with Mrs. Ambler's solicitors had come to the attention of the BCC. Mr. Jagger replied by a letter[66] dated 2nd. March 1998. He wrote that:

"Village green space does not equate with public open space. In planning terms, village green space is designated to allow the penetration of the countryside into the village. This purpose is much better served by having an agricultural user on the land rather than having another formal village green...The adjoining property owners have no legal access onto the land and steps will be taken to abate the trespass."

BCC (Mr. Gundry) replied in a letter[67] dated 27th. March 1998. The letter asserted that:

"...the public right to recreational access has long been established by usage."

Mr. Gundry repeated his arguments that the Field had been purchased as public open space and that Bradford MDC officers had given assurances that it was recreational open space, assurances from which the landowner could not resile. As for the gates from back gardens onto the Field, he argued that prescriptive rights of access were established before Bradford MDC acquired the Field. The letter was accompanied by some photographs[68] showing the poached state of parts of the Field. Clearly, the effect of this correspondence was that BCC and Bradford MDC were in dispute as to whether the public or the adjoining landowners had any right of access to the Field (other than on the public footpath). However, there was no question of forbidding or restricting general public access to the Field for recreation.

[32] Also on 27th. March 1998, BCC (Mr. Gundry) wrote[69] to the planning and housing departments of Bradford MDC requesting that the Field should be designated in such manner as to ensure public access. Mr. Haigh of the Transportation and Planning Division replied by letter[70] dated 14th. May 1998. He referred to previous correspondence between the BCC and Mr. Jagger and wrote that:

"He has also explained that the only legitimate public access on the site is the use of the public footpath that crosses the grazing land"

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66 1A.2R/341
67 1A/2R/343
68 1A/1B/2.3.14
69 1A/2R/349 & 350
70 1A/2R/351

BCC (Mr. Gundry) replied by letter[71] dated 21st May 1998 re-asserting his contention that public rights were not restricted to the public footpath.

[33] It appears that, in the summer of 1998, a meeting was held between representatives of the various relevant departments of Bradford MDC to agree a policy in relation to the Field. This led to a letter[72] dated 19th. August 1998 from Ms. Flecknoe of Bradford MDC to Mr. Gundry of the BCC. She wrote that the Field was designated as Village Greenspace in the UDP and that this meant that the Field could not be built on unless the designation was changed.

"A Village Greenspace designation does not imply that the land becomes a Recreation Open Space. The Village Greenspace designation does not mean that Burley House field is available freely for public recreation...The status quo with regards to permissive public access will continue."

Accordingly, Ms. Flecknoe explained, Bradford MDC could not agree to BCC's plans for environmental enhancement of the Field. BCC (Mr. Gundry) replied by letter [73]dated 24th. August 1998 rehearsing BCC's previous arguments and reasserting:

"our belief that this access is not permissive but an established right through usage over many years."

The gist of this exchange of correspondence was reported to the BCC committee meeting of 10th. September 1998 and minuted[74] accordingly. The minute records that:

"It would not be freely available for public recreation beyond permissive access as now."

BCC held a Neighbourhood Forum Meeting in Burley on 15th. October 1998. The minutes[75] record that it was attended by Ms. Flecknoe and approximately 70 residents and interested persons. The minutes briefly record that Bradford MDC had refused to accede to BCC's plans for improvements to the Field. However, a newspaper clip[76] from the Bradford Telegraph and Argus for 28th. October 1998 gives a rather fuller account of the debate concerning the Field. Ms. Flecknoe stated to the meeting that although there was a commitment to maintain public access to the Field during the life of the current UDP, Bradford MDC was unable to approve the BCC's plans for environmental enhancement of the Field. The newspaper clip contained the following passage:

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71 1A/2R/353
72 1A/1R/60
73 1A/2R/358
74 3A/B/25B-C
75 3A/B/25D
76 3A/1R/57

"Bradford Council's property services section has told Mr. Gundry that Village Greenspace does not mean village green. The significance of the designation is that the area of land is not developed and remains green. There is no presumption that it is available or open for use by the general public"

There was a similar report[77] in the Ilkley Gazette on 29th. October 1998. It therefore appears that the substance of Ms. Flecknoe's letter of 19th. August 1998 was communicated to the Open Forum and thence to readers of the Bradford Telegraph and Argus and of the Ilkley Gazette. Those attending the Neighbourhood Forum and those reading the local newspaper were aware that Bradford MDC did not accept that there was any general public right of access to the Field for recreational purposes although it did not propose to take any immediate steps to prevent that access.

[34] BCC continued its campaign in 1999. On 9th. February 1999, BCC (Mr. Gundry) wrote to Ms. Long of the Bradford MDC Forestry Department complaining about the council's resistance to BCC's scheme for tree planting on the Field. The BCC committee meeting minutes[78] of 11th. March 1999 recorded discussion about the difficulties being experienced with Bradford MDC property department in achieving the aim of retaining the Field as accessible Village Greenspace. A report[79] of the meeting was carried in the Ilkley Gazette on 18th. March 1999. It described the anxiety of BCC to preserve from development that part of the Field which was designated as Village Greenspace. That designation did not mean that it was available for projects such as the village green[80]. Councillor Greenwood, who attended the meeting, promised to assist. As a result, Councillor Greenwood wrote[81] to the Bradford MDC Exchequer and Property Department on 15th. March 1999 pressing for the Field to be designated as open green space in perpetuity. Meanwhile, Ms. Long had a meeting with Mr, Jagger and reported back to Mr Gundry of BCC by letter[82] dated 17th. May 1999 that the whole area was designated for housing and that Bradford MDC "flatly refuse to have any tress planted there".

[35] It was in the autumn of 1999 that BCC first considered a proposal to apply to register the Field as a new green. There was a BCC Neighbourhood Forum Meeting on 21st. October 1999. The meeting was advertised by the circulation in Burley of the "Burley Bulletin"[83]. The Bulletin explained that attempts to get agreement from Bradford MDC to establish that part of the Field not allocated to housing as an area dedicated to recreational use by residents had failed, but that

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77 3A/B/23

78 3A/1R/38

79 3A/1R/58

80 This was a reference to another piece of Bradford MDC land in Burley near the Malt Shovel PH which was enhanced by BCC for use by villagers and was known as a "village green" although it was not registered as such under the CRA 1965.

81 3A/1R/59

82 1A/2R/367

83 3A/1R/60

protection could be achieved by registration of the area as a new green. According to the minutes[84] the meeting was attended by more than 86 residents and interested persons. Mr. Gundry explained to the meeting that Bradford Property Services had consistently refused to accept that the N part of the Field would remain in recreational use but that if 20 years of continuous recreational use could be demonstrated it might be possible to have the area registered as a village green which would give a greater measure of protection against development. He urged residents to supply evidence.

[36] On 8th. November 1999, BCC (Mr. Gundry) wrote to Mr. Jagger and Mr. Haigh of Bradford MDC to notify the council of BCC's intention to apply to register the Field as a new green. It seems to have been these letters which prompted Bradford MDC to erect signs reading "Permissive Access Only" on both sides of the Langford Lane field gate (although not on the kissing gate). There are photographs which give a good impression of the signs[85]. BCC (Mr. Gundry wrote a letter[86] dated 28th. December 1999 to Mr. Jagger asserting:

"that open access to the field was established by use and custom many years ago and has been maintained by frequent and unimpeded public usage as of right ever since, so we regard the notice as invalid and unhelpful"

[37] There was a campaign to collect supporting user evidence which received extensive coverage in the local press[87] . BCC made its first application[88] to register the Field as a new green in March 2000. For reasons that are unclear, Bradford MDC (in its capacity as CRA) did not start the procedure for considering the application until 19th. February 2003[89]. That, by chance, was the date five years before the third application.

[38] Thus, the position on the documents was that during the 20 year period before the closing date on 19th. February 2003:

- BCC contended but Bradford MDC (as landowner) denied that there was any public right of access to the Field except for the public footpath.
- This conflict of views was made known to those local people who read the relevant BCC minutes, attended the relevant meeting of the Neighbourhood Forum or read the relevant edition of the local paper

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84 3A/1R/62
85 1A/2R/418, 1A/1B/1.3
86 1A/2R/372
87 See clippings from Ilkley Target of 6th. January 2000 at 3A/B/24 and from Bradford Telegraph & Argus of 31st January 2000 at 1A/1R/79
88 1A/1R/1
89 See letter of 14th. February 2003 at 3A/1R/69

- Bradford MDC contended and BCC denied in correspondence that public access to the Field (except on the public footpath) was "permissive access".

- This conflict of views would have been known to those local people who read the relevant BCC committee meeting minutes

- Bradford MDC (as landowner) never attempted to prevent actual general recreational use of the Field by local people except, for a while, by way of access from Langford Lane or from rear garden gates.

3. Witness evidence for applicant at third public inquiry

[39] I now turn to deal with the new witness evidence presented by the applicant to the third public inquiry. I will deal first with the witnesses who gave oral evidence. For convenience, I will deal with these witnesses in alphabetical order rather than in the order in which they gave evidence.

Mr. James Michael Bryan

[40] Mr. Bryan did not produce any written evidence but appeared at the public inquiry to support the application. He lives in Elm Grove, Burley. He moved into the village in 1985. Since then, the Field has always been a public amenity and he has used the Field to exercise his dogs. He is not very familiar with village affairs since he uses the village as a dormitory and usually walks his dog early in the morning or late at night. He was not aware of the publicity surrounding the first public inquiry. So far I accept Mr. Bryan's evidence. He thought that there was a very weak attempt to take hay off the Field in 2004. This is out of line with the evidence of all other witnesses on the point and I think that Mr. Bryan was probably mistaking topping or thistle-cutting for taking a hay crop. He thought that it was in 2004 that the village first knew that Bradford MDC opposed the registration of the Field as a new green. However, this must be wrong since the first public inquiry was in December 2003.

Mrs. Janet Cade

[41] Mrs. Cade did not produce any written evidence but appeared at the public inquiry to give evidence in support of the application. She lives in Endor Crescent in Burley and has lived in the village for four years. The Field is a perfect place to walk her dog. I accept Mrs. Cade's evidence.

Mr. John Brian Gundry

[42] Mr. Gundry produced a written witness statement[90] dated 26th. March 2009. He gave evidence to the first public inquiry. To a large extent, his new evidence was a reiteration of his previous evidence.

[43] Cross-examined about the site meeting of 16th. November 1995, he maintained that Mr. Jagger had not referred to "permissive access". However, he said that Mr. Jagger was a bit of a character. He did try to use the word "permission" frequently but at the time, Mr. Gundry did not notice this. Mr. Gundry's focus at the time was on the UDP. Mr. Jagger did not seem to understand and accept that designation of the N end of the Field as Village Greenspace precluded development of that part of the Field. However, I adhere to the view expressed in my Revised Report into the first application that the probability is that Mr. Jagger did use the words "permissive access" in relation to the Langford Lane entrance. I think that, at the time, Mr. Jagger probably had a better grasp of the distinction between planning designation and legal rights of access than did Mr. Gundry and his colleagues.

[44] Cross-examined about Mr. Jagger's letter[91] of 22nd September 1997, Mr. Gundry commented that Mr. Jagger did not seem to understand that that he had put evidence before the UDP public inquiry that the land designated as Village Greenspace would be available for public recreational use. Re-examined about the letter, Mr. Gundry said that Mr. Jagger never stated that the public were not allowed to use the Field.

[45] Questioned about his letter[92] to Mr. Jagger of 8th. October 1997, Mr. Gundry said that he never received any reply to the letter.

[46] Cross-examined about Mr. Jagger's letter[93] dated 2nd. March 1998, Mr. Gundry said that the reference to "another formal village green" was a reference to land near the Malt Shovel PH which had been laid out by BCC for recreation but which was not formally registered a village green under the CRA 1965 since it had not been in use for 20 years. He said that Mr. Jagger was wrong to say that designation as Village Greenspace is to allow the penetration of the countryside into the village. The UDP says nothing of the sort.

[47] Cross-examined about Mr. Jagger's letter[94] dated 19th. August 1998, Mr. Gundry said that the letter was about environmental enhancement of the Field and not about registration as a new village green.

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90 3A/1R/19
91 1A/2R/331
92 1A/2R/332A
93 1A/2R/341
94 1A/2R/356

[48] Cross-examined about the BCC committee minutes[95] of 10th. September 1998, Mr. Gundry accepted that the contents of the letters that he received from Mr. Jagger were being relayed to the BCC committee.

[49] Cross-examined about the Bradford Telegraph and Argus clipping[96] of 28th. October 1998, Mr. Gundry said that nobody stopped them from using the Field as a recreational area. "We were not concerned with precise definitions".

[50] Cross-examined about his letter to Mr. Jagger of 8th. November 1999[97], Mr. Gundry said that Mr. Jagger had thrown out the suggestion that BCC might try to register the Field as a new village green. Re-examined, Mr. Gundry could not remember exactly how the point came up. However, he was sure that Mr. Jagger did not say that, if such an application were made, it would be opposed by Bradford MDC. Mr. Gundry now thought that it was in reaction to that letter that Mr. Jagger arranged for the "Permissive Access Only" signs to be erected on the Langford Lane gate. Mr. Gundry received no reply to this letter and had no more contact with Mr. Jagger until the public inquiry into the first application. I consider it improbable that Mr. Jagger positively suggested that BCC might try to register the Field as a new green. However, I accept that he may well have said something about village green registration which triggered the idea in Mr. Gundry's mind of making such an application. I do not think that Mr. Gundry would have written in the terms that he did, if Mr. Jagger had expressly told him that Bradford MDC would oppose any application to register the Field as a new green. Asked about the signs, Mr. Gundry said that the BCC was not particularly interested in the signs and that they did not create much concern. At the time, he did not link the signs to the proposed village green application.

[51] Subject only to the qualifications expressed above, I accept Mr. Gundry's evidence.

Mr. Michael John Harris

[52] Mr. Harris produced a written witness statement[98] dated 29th. March 2009. He had not given evidence to the previous public inquiries. Mr. Harris was a committee member of the BCC from 1987 to 2007. For certain years, he was minute secretary. Every inhabitant of Burley is a member of the BCC. A committee is elected at the AGM each June. BCC holds monthly committee meetings. Notice of the committee meetings is not circulated generally in the village but the proceedings of each meeting are minuted. The BCC also organised quarterly Neighbourhood Forums in conjunction with the Bradford MDC Shipley Area Panel. Notice of the Neighbourhood Forums is circulated by hand to each household in the village. Typically, a Neighbourhood Forum is attended by over 100 people. The proceedings of each Neighbourhood Forum are minuted. The minutes of committee meetings and of Neighbourhood Forums are

95 3A/B/25C
96 3A/1R/57
97 1A/2R/368
98 3A/1R/77

published on public noticeboards in four locations in Burley and, more recently, on the village website. Committee members and certain other stakeholders are sent minutes by post or email.

[53] Mr. Harris thought that the substance of Mr. Gundry's correspondence with Bradford MDC concerning the Field was reported to the BCC committee. He was aware during the 1990s that Bradford MDC took the position that there was no public right of access to the Field except on the public footpath and that Bradford MDC opposed BCC plans for enhancement of the Field because it hoped to develop the Field in the future. He was not aware whether Bradford MDC intended to oppose the BCC application to register the Field as a new green until after 19th. February 2003. He thought that there was general awareness in the village before 19th. February 2003 of Bradford MDC's proposals to develop the Field and general opposition to those proposals. However, he did not consider that there was any concern amongst Burley residents about the actual use of the Field for recreational purposes. By this evidence, I understood Mr. Harris to be saying that there was no general awareness in the village about the debate between BCC and Bradford MDC as to whether there was any existing legal right of general access for recreation.

[54] Mr. Harris was not able to give any useful evidence about actual use of the Field because he has lived about a mile away from the Field since the early 1980s. Since then, he has not regularly used the Field. He did not recall seeing the "Permissive Access Only" signs on the Langford Lane gate.

[55] I accept Mr. Harris's evidence.

Mr. John Horton

[56] Mr. Horton produced a written witness statement[99] dated 26th. March 2009. He gave evidence to the first public inquiry. Mr. Horton has lived in Burley all his life, since 1991 in Norwood Terrace. His house is a short walk from the Langford Lane entrance to the Field. He has been a BCC committee member since 2002 and a Burley Parish Councillor since 2006. He uses the Field only occasionally but was unaware of any change in the use of the Field since the early 1970s or of any material attempt by the landowner to limit usage of the Field. He knew that in the 1970s the Field was intended and used as public open space. The BCC attempted to enhance the Field for village use but were frustrated by Bradford MDC and decided to apply to register the Field as a new green. He did not know that Bradford MDC actively opposed registration as a new green until shortly before the first public inquiry in December 2003. Mr. Horton's evidence was not challenged in cross-examination and I accept it.

Mrs. Karen Rose

[99] 3A/1R/86

[57] Mrs. Rose produced a written witness statement[100] dated 26th. March 2009. She gave evidence to the first and second public inquiries. She was not a member of the BCC committee although she occasionally attended the Neighbourhood Forum meetings. She was aware that there was a continuing discussion between the BCC and Bradford MDC about the future of the Field. BCC hoped to secure recreational use of the Field for the future. Usually, Mr. Gundry would stand up and say what had happened. However, there was no mention of opposition to the existing recreational use of the Field. She gave a witness statement in support of the first application to register the Field as a new green because she thought that it would help achieve the objective of keeping the Field available for recreation. She did not know that Bradford MDC had objected to the application until two or three months before the first public inquiry in December 2003. I accept Mrs. Rose's evidence.

Miss Mabeth Sharp

[58] Miss Sharp produced a written witness statement[101] dated 25th. March 2009. Miss Sharp gave written evidence in support of the first and second applications. Miss Sharp was a member of the committee of BCC from 1980 until 1986. After 1986, she attended Neighbourhood Forum meetings as regularly as she could. She wrote a letter[102] dated 28th. May 2003 in support of the first application. It is apparent from that letter that, at that date, she did not know whether or not Bradford MDC intended to oppose the application. I accept Miss Sharp's evidence.

Mr. Andrew Mackenzie Sherris

[59] Mr. Sherris produced a written witness statement[103] dated 29th. March 2009. He gave evidence to the first two public inquiries. He corrected my summary of his evidence to the second public inquiry by saying that it not June 2003 but the autumn of 2003 when he first knew of the landowner's objection to the first application. I have rechecked my notes of the second public inquiry and I have noted his evidence as June 2003. However, since Bradford MDC did not lodge its objection until July 2003, I think that this must have been a mistake either by Mr. Sherris or myself and I accept the revised evidence.

Mrs. Kathleen Mary Smith

[60] Mrs. Smith did not produce any written evidence but appeared at the public inquiry to give evidence in support of the application. Her late husband, Mr. George Gerard Smith, gave evidence to the first public inquiry. He was disabled and found the Field very useful for walking the dog, which gave him great pleasure. I accept Mrs. Smith's evidence.

Mr. John Stanley Sparshatt

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100 3A/1R/90
101 3A/1R/96
102 3A/1R/99
103 3A/1R/102

[61] Mr. Sparshatt produced a written witness statement[104] dated 24th. March 2009. He gave evidence at the first and second public inquiries. He was elected to the BCC committee in 2002. Previously, he had read the Burley Bulletin which was periodically put through his letter box. He was aware that there were discussions between the BCC and Bradford MDC about the future of the Field. He occasionally discussed the future of the Field with other users. He knew that the issue was whether the Field was going to be built upon. When the kissing gate was installed at the Langford Lane entrance in 1997, that seemed to indicate that the Field was available to the public at will. He supported the first application to register the Field as a new green by giving a statement because he believed that it would help preserve the Field as a recreational space. He was not aware that Bradford MDC opposed the first application until the autumn of 2003. I accept Mr. Sparshatt's evidence.

Mr. John William Sparshatt

[62] Mr. Sparshatt produced a written witness statement[105] dated 27th. March 2009. He gave evidence at the first and second public inquiries. He does not attend Neighbourhood Forum meetings or often read the local newspapers. He thought that he learned of Bradford MDC's opposition to the first village green application from his father, Mr. JS Sparshatt. This was just before the first public inquiry in December 2003. I accept Mr. Sparshatt's evidence.

Mr. Bruce Donald Speed

[63] Mr. Speed produced a written witness statement[106] dated 24th. March 2009. He did not give any evidence to the first two public inquiries although he attended one of them as a member of the public. Although he has lived in the village for many years, he worked in the Midlands and was away during the week. Mr. Speed chaired the Village Design Statement ("VDS") from 1997 until its publication in 1999.He joined the BCC committee in 1999, became deputy chairman in 2000 and became chairman in 2001. When Burley Parish Council was formed in 2006, BCC passed most of its functions to the new parish council or to the Burley-in-Wharfedale Community Trust but retained responsibility for trying to resolve the dispute over the Field. The VDS was concerned with the planning status of the Field. He understood that the designation of the N part of the Field as Village Greenspace gave protection to the land during the life of the revised UDP. Mr. Speed admitted to some confusion between the planning designation of Village Greenspace and the legal status of village green. He never met Mr. Jagger. He knew that the BCC wanted to improve that part of the Field which was designated as Village Greenspace and that Bradford MDC would not allow it to do so. He was not aware that Bradford MDC intended to deny general access to the field. He supported the first application to register the Field as a new green because he understood that village green status would give permanent

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104 3A/1R/111
105 3A/1R/117
106 A3/1R/123

protection to the Field whereas the planning designation as Village Greenspace might be changed on further review of the UDP. It was unlikely that Bradford MDC's objection to the application became generally know in the village until the Neighbourhood Forum meeting on 19th. October 2003. I accept the evidence of Mr. Speed.

Mr. Thomas Sumner

[64] Mr. Sumner produced a written witness statement[107] dated 26th. March 2009. He gave evidence to the first and second public inquiries. He was a BCC committee member from 1981 to 1986 and again from 1991 to the present. During those periods, he attended most committee meetings and Neighbourhood Forum meetings. He was aware of the long running dispute between BCC and Bradford MDC about BCC's proposals to enhance recreational use of the Field. He attended the site meeting of 16th. November 1995 with Mr. Jagger. He reiterated his previous evidence that Mr. Jagger did not refer at that meeting to "permissive access" but I see no reason to change my previous views on that point. It was likely that he saw the letter[108] of 22nd. September 1997 from Mr. Jagger to Mr. Gundry. He accepted that there was an issue between BCC and Bradford MDC as to whether the public had a general right of access to the Field. It was because there was no progress in resolving that issue that the first application was made to register the Field as a new green. He did not know that Bradford MDC were objecting to the application until October or November 2003. Other than the evidence that Mr. Jagger did not use the expression "permissive access" at the 1995 site meeting, I accept Mr. Sumner's evidence.

Councillor Sylvia Tilford

[65] Councillor Tilford produced a written witness statement[109] dated 26th. March 2009. She did not give evidence to the first two public inquiries. She has been secretary of the BCC since 2001 and was minutes secretary of the Neighbourhood Forums from 2001 to 2006. She has been a councillor of Burley Parish Council since 2006 and is currently chair. She has never made much personal use of the Field and, although she attended the occasional Neighbourhood Forum meeting, she was not familiar with the issues concerning the Field before 2001.When she became involved with the BCC, the first application to register the Field as a new green had already been made and was awaiting disposal by Bradford MDC as CRA. Between 2001 and the summer of 2003, the BCC was concerned with the planning designation of the Field under the UDP rather than the pending village green application. It was not until the summer of 2003 that the BCC were informed that Bradford MDC had objected to the application. I accept the evidence of Councillor Tilford.

Mrs. Hilary Walsh

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107 3A/1R/133
108 A1/2R/331
109 3A/1R/141

[66] Mrs. Walsh produced a written witness statement[110] dated 28th. March 2009. She gave evidence to the first public inquiry. Since the Field was acquired in 1974, there was gossip in the village about the need to hold on to the Field. The first she knew of the first village green application was when she received and completed an evidence questionnaire form in 1999 or 2000. She did not know that Bradford MDC was objecting to the application until a Neighbourhood Forum notice (Burley Bulletin) in the autumn of 2003. I do not think that Mrs Walsh's recollection can be quite correct since the autumn 2003 Burley Bulletin[111] did not identify the objector. However, I accept that she did not learn of the Bradford MDC objection until after it was sent to BCC in the summer of 2003 and hence came into the public domain.

Mr. Dennis Warwick

[67] Mr. Warwick produced a written witness statement[112] dated 24th. March 2009. He had not given evidence to the first two public inquiries. Mr. Warwick was a founder member of the BCC in 1976. It was funded by voluntary giving. He was a committee member for some years. He was chairman from 1995 to 2001. All adult residents of Burley-in-Wharfedale were members of the BCC. There were annual elections for its officers and committee. Monthly committee meetings were held and the proceedings were minuted and published around the village. There were village meetings at which all residents were invited to hear and vote on committee proposals. In the early 1990s, Bradford MDC began to promote the ideal of Neighbourhood Forum meetings and BCC took up the invitation to hold such a Forum regularly in Burley. Forum meetings are held about three times a year. Before each Forum, BCC , with the cooperation of the Area Committee, composed and distributed to every household in Burley a Burley Bulletin setting out matters to be discussed at the Forum meeting. The chairing of the Forum meetings was shared between the chairman of the BCC and the Coordinator of the Shipley Area Committee. Minutes of each Forum meeting were posted on BCC notice boards, in the Library and, since 2000, on the village website.

[68] Mr. Warwick was involved as chairman of the BCC in the 1995 public inquiry into the UDP proposals when the BCC argued for the Field to be designated for recreational purposes rather than housing. The UDP inspector recommended that the S part of the Field should be designated for housing and the N part as Village Greenspace. The BCC was involved in lengthy correspondence with Bradford MDC (as landowner) in which the landowner could not be persuaded that at least the N part of the Field should be safeguarded as recreational land. In 1999, Bradford MDC rejected BCC Millennium proposals to tidy up and enhance the N part of the Field for recreational purposes. It was frustration at rejection of these proposals which gave rise to the 1st application to register the Field as a new village green. Evidence was gathered in support of the application. Although there was support for the application from two councillors,

110 3A/1R/163
111 3A/1R/72
112 3A/1R/167

Councillors Greenwood and Whiteman, Bradford MDC expressed neither approval or opposition to the application before Mr. Warwick ceased to the chairman. Mr. Warwick had no dealings with Mr. Jagger. Mr. Warwick was unaware that Bradford MDC opposed the application until after the BCC were notified on the objection in August 2003. He did not think that there was any general awareness in the village that Bradford MDC objected to the application until after that date.

[69] I accept the evidence of Mr. Warwick.

Written evidence in support of application

[70] There was also written evidence in support of the application:

- Mr. AJ Benjamin[113], who said that he did not learn of the Bradford MDC objection to the first application until a few weeks before the December 2003 public inquiry.
- RW & M Biddle[114], who say that they have lived in Burley and used the Field for recreation for 10 years. They have seen no haymaking.
- Mr. Harvey Bosomworth[115], who wrote expressing general support for the third application.
- Mr. Philip Davies MP[116], who wrote expressing general support for the third application
- Mrs Pamela Leach[117], who says that she and her children have used the Field for recreation.
- Councillor Matt Palmer[118], who wrote expressing general support for the third application
- Mr. G. Slight[119], who said that he did not learn of the Bradford MDC objection to the first application until the late summer of 2003
- Councillor Dale Smith[120], expressing support for the third application and saying that he did not know of the Bradford MDC objection to the first application until the autumn of 2003.

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113 3A/1R/190
114 3A/1R/200
115 3A/1R/205
116 3A/1R/196
117 3A/1R/207
118 3A/1R/197
119 3A/1R/193 & 201
120 3A/1R/198

- Mr. Nick Turnbull[121], who says that he is the third generation of people who have lived in the village and enjoyed the Field. He now takes his own children there.

5. Witness evidence for the objector at third public inquiry

[71] The objector called one witness to give oral evidence at the third public inquiry and relied upon one written statement.

Mr. Martyn Baldwin

[72] Mr. Baldwin produced a written witness statement[122] dated 27th. March 2009. Mr. Baldwin has been a Property Services Officer employed by Bradford MDC since 1987. He is a MRICS. He has not been involved with the management of the Field. His task has been to organise, in conjunction with the council's legal department, the opposition to the three applications to register the Field as a new green. It is Mr. Jagger who has been dealing with management of the Field. In gathering evidence for the previous public inquiries, Mr. Baldwin relied primarily on Mr. Jagger. Mr. Jagger has not given any further evidence to the third public inquiry. Mr. Baldwin's evidence consists principally of relevant documents extracted from the council's files. I have mentioned all these documents above. The effect of the documents is a matter for argument rather than evidence. The only personal evidence given by Mr. Baldwin was that he had spoken to Mr. Gundry and ascertained that the Burley Bulletin, containing notice of each Neighbourhood Forum meeting, was circulated to each house in the village. This was not in dispute.

Mr. Mike Bell

[73] There was produced to the public inquiry a witness statement[123] of Mr. Bell. He is Assistant Director of Asset Management at Bradford MDC and has lived in Burley since 1964. He had received the Burley Bulletin about four times a year containing items of interest to the village and an invitation to attend the Neighbourhood Forum meetings. The applicant's evidence suggested that the Neighbourhood Forum meetings were three times a year, but I do not see that anything turns on this.

6. Findings of fact

[74] I now turn to make findings of fact based on the evidence submitted to all three public inquiries. I confine myself to findings of fact which are relevant to the only outstanding issue, i.e. whether recreational user of the Field by inhabitants of Burley was "as of right" before 19th. February 2003.

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121 3A/1R/204
122 3A/B/19
123 3A/B/26

Legal right of access to Field

[75] I find that the internal position of Bradford MDC from at least 1992 (when Mr. Jagger instructed Mr. Fryer to lock the Langford Lane gate to exclude the general public) was that, whatever the planning designation of the Field, there was no legal right of public access to the Field except on the public footpath. The principal architect of this position was Mr. Melvyn Jagger, who had had day to day management of the Field since 1986.

[76] I find that the BCC committee were aware of the council's position on this point from at least March 1993, when Bradford MDC wrote to BCC specifically saying as much. This position was repeated numerous times in later letters to the BCC.

[77] However, I consider that the evidence that the position of Bradford MDC on this issue was known generally to the inhabitants of Burley who used the Field for informal recreation is weak. Subject only to the "Permissive Access Only" signs of 1999 on the Langford Lane gate, Bradford MDC took no steps before February 2003 to notify users by signs on the Field or otherwise that they had no right to use the Field except for the public footpath. For the reasons given in my 2004 Revised Report, I do not consider that the "Permissive Access Only" signs adequately signified to recreational users of the Field that there was no legal right to use the Field except for the public footpath. It is true that the local resident who diligently read the minutes of the BCC committee (e.g. the minutes of the committee meeting of 10th. September 1998) or diligently attended the Neighbourhood Forum meetings (e.g. the meeting of 16th. October 1997) or diligently read the local paper (e.g. the Bradford Telegraph & Argus for 28th. October 1998[124]) would have been aware of the position of Bradford MDC that there was no legal right of general access to the Field. However, although the Neighbourhood Forum was quite well attended, it was only by a small minority of the residents of Burley and it seems to me unrealistic to think that many local residents studied the minutes of BCC committees or Neighbourhood Forum meetings or read the local newspaper in such detail as to pick up the landowner's denial of legal rights of access. In my view, what mainly concerned local people was whether the Field was going to be built on and this was logically and practically a different issue from the issue whether there was an existing public right of access. I therefore find that, in general, recreational users of the Field before February 2003 were not aware that Bradford MDC took the position that there was no existing right of access to the Field except on the public footpath.

Permission

[78] There is no evidence of any positive decision by Bradford MDC or its officers, e.g. by resolution or any other formal document, to grant to the public, or to the inhabitants of Burley, permission to use the Field generally for recreation.

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[124] 3A/1R/57

[79] At the site meeting of 16th. November 1995, I find that Mr. Jagger said that access by the Langford Lane gate would be on a "permissive basis" although I consider that the remark was directed to use of the Langford Lane access rather than use of the Field generally.

[80] I find that Bradford MDC did make it clear to the BCC committee in correspondence that it considered that general access to the Field was "permissive":

- The exchange of correspondence of 22nd. September 1997[125] and 8th. October 1997[126]
- The letter of 19th. August 1998[127].

[81] There was reference to "permissive access" in the minutes[128] of the BCC committee meeting of 10th. September 1998 and so the position of Bradford MDC that general access to the Field was permissive would have been known to anyone who diligently read those minutes, which were publicly circulated. There is no evidence that the issue of permissive access was raised at a Neighbourhood Forum meeting or in the local press. It seems to me most improbable that the generality of local recreational users of the Field would have been aware that Bradford MDC took the view that their user was "permissive".

[82] In 1999, Bradford MDC placed "Permissive Access Only" notices on each side of the Langford Land field gate (although not the kissing gate). For the reasons given in my 2004 Revised Report, I do not consider that the "Permissive Access Only" signs adequately signified to recreational users of the Field that general access to the Field was permissive.

Knowledge of objection to first application

[83] Although the first application to register the Field as a new green was made in March 2000, it was not until July 2003 that Bradford MDC (as landowner) lodged an objection to the application and not until August 2003 that the identity of the objector was disclosed to the BCC committee. I find that it was not until shortly before the public inquiry of December 2003, when the BCC was preparing for the public inquiry, that it was generally known in the village that Bradford MDC had objected to the first application. As at 19th. February 2003, Bradford MDC had not lodged any objection or notified anyone that it intended to object.

Challenge to recreational use of Field

[84] Over the years, Bradford MDC only made two attempts to restrict physical access to the Field. The first was the locking of the Langford Lane gate in 1992 and the second was the correspondence with the owner of 7, St. Philip's Drive in 1997-1998. However, no attempt was

125 1A/2R/331
126 1A/2R/332A
127 1A/1R/60
128 3A/B/25B-C

ever made to prevent local people from accessing the Field for recreational purposes from the public footpath.

Agricultural use of Field

[85] There was minimal additional evidence at the third public inquiry concerning the agricultural use of the Field. I see no reason to alter the findings of fact on this issue made in my Reports into the first and second applications.

[86] As a result of legal developments since those Reports, it is also necessary to make a finding as to whether the agricultural use of the Field materially conflicted with its use for recreation by local people. There was evidence that dog faeces interfered with haymaking on the Field, although the graziers never had a right to make hay under their grazing agreements. The BCC complained that the Field was poached by cattle but the supporting photographs suggest that this was limited to relatively small areas where the cattle were fed. I find that there was no material conflict between the agricultural use of the Field and its use for recreational purposes by local people. It appears to me that Mr. Fryer's letter[129] of 14th. April 1992 perceived the Field as combined agricultural and amenity land and saw no conflict between his agricultural use of the Field and its use on foot by local people for informal recreation such as dog walking.

7. "As of right"

[87] I now turn to consider what is meant by the statutory requirement that use of the Field for lawful sports and pastimes must be "as of right"

[88] The starting point is the seminal speech of Lord Hoffmann in the *Sunningwell* case[130]. He explained that the expression "as of right" is borrowed from the law relating to the prescriptive acquisition of (a) easements and (b) public rights of way. The law would infer or presume the grant of an easement or the dedication of a public right of way from long acquiescence by the landowner in the exercise of the right claimed. However, the exercise of the claimed right had to be "as of right", i.e. of such a character that it would be reasonable to treat the landowner as acquiescing in the assertion of a right. The exercise would not be "as of right" if it was by force, in secrecy or by permission. In the ancient Latin expression, the exercise had to be *nec vi, nec clam, nec precario*. It did not matter whether the user believed that he had the right claimed. The key issue was whether the user appeared to the reasonable landowner to be the exercise of a claimed right. Although the registration of a new green does not depend on any inferred or presumed grant or dedication, the quality of user required by statute is user "as of right", i.e. user which appears to the reasonable landowner as the exercise of a claimed right to indulge in lawful sports and pastimes on the relevant land. It is important to note that Lord Hoffmann did not say

129 1A/1B/2.3.1

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

that "as of right" was a synonym of *nec vi, nec clam, nec precario* but rather that user was not as of right if it was by force, in secret or by permission.

[89] This last point is illustrated by the decision of the House of Lords in the *Beresford* case[131]. The main issue in that case was whether the user relied upon was permissive. However, the House of Lords also discussed the position where the user was pursuant to a statutory right, e.g. land subject to the statutory trust created by s. 10 of the Open Spaces Act 1906. Those members of the House who discussed the point were agreed that such user would be "of right" or "by right" but not "as of right". If user were pursuant to a statutory right, it followed that (a) the landowner could not stop it and (b) the landowner would have no reason to think that it was other than the exercise of the statutory right. Thus user pursuant to a statutory right would be *nec vi, nec clam, nec precario* but would not be user "as of right". In the present case, however, the landowner has expressly disclaimed reliance on any argument that the Field was held on a statutory trust precluding user "as of right".

[90] The same point is also illustrated by the decision of the Court of Appeal in the *Redcar* case[132]. In that case, the Court of Appeal held that for user to be "as of right" it had to be *nec vi nec clam nec precario*. However it is not a sufficient condition for user to be "as of right" that it is *nec vi nec clam nec precario*. The overarching requirement is that user is such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right. In the *Redcar* case, land was used both as a golf course and as a place for informal recreation by local people. Those uses conflicted and, in case of conflict, the local people deferred to the golfers. The Court of Appeal held that user by local people was not "as of right" because it did not give the outward appearance to the reasonable landowner that the informal recreational user was being asserted and claimed as of right.

[91] It is against this legal background that I have to consider the three alternative arguments of the landowner that recreational user of the Field was not "as of right" in the present case because (a) it was permissive (*precario*), (b) it was contentious (*vi*) or (c) the user deferred to the agricultural use of the Field.

8. Permissive user

[92] In considering the argument that recreational user of the Field by local people was not "as of right" because it was permissive, it is first necessary to identify what, in law, amounts to permissive user negativing user as of right.

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131 *R (on the application of Beresford) v Sunderland City Council* [2004] 1 AC 889

132 *R (on the application of Lewis) v Redcar & Cleveland Borough Council & anor* [2009] EWCA Civ 3

[93] First, it has recently been established that there is no requirement that permission should be solicited. It can be granted unilaterally by the landowner: *Odey v Barber*[133] .

[94] Second, permission can be granted expressly or impliedly. The leading authority is the *Beresford* case. That was a case where the respondent council owned an area of land which members of the public used for recreation. The council constructed wooden seats around the perimeter, laid out a hard-surface cricket pitch and mowed the grass regularly. There was no express grant of permission to local people to use the land for recreation. The House of Lords held that there could be an implied grant of permission, but that it could not be inferred from inaction or acts which encouraged or facilitated the user. So there was no implied permission in the *Beresford* case. An example of a case where permission could be implied was said to be where the landowner excluded the inhabitants when the landowner wished to use the land for his own purposes or on occasional days.

[95] Third, permission must be revocable or limited in time. A permanent permission is dedicatory in effect and user pursuant to such a permission is "as of right". See the analysis of Lord Scott in the *Beresford* case.

[96] Fourth, there is the question whether permission must be communicated to the users. This calls for consideration of the *Billson* case[134]. This was a case in which the issue was whether public rights of way had been acquired over common land by prescription pursuant to Highways Act 1980 s. 31. In 1929, the landowner had executed a revocable deed under s. 193 of the Law of Property Act 1925 which had the effect of conferring on the public a right of access to the land for air and exercise. Users were generally unaware of the deed. Two points arose under s. 31. First, was user as of right if the users had a right of access under LPA 1925 s. 193? Second, was the deed sufficient evidence of the landowner's intention not to dedicate notwithstanding that users were unaware of the deed? The judge held that user was not as of right and that the deed was sufficient evidence of intention not to dedicate. On the second point, the judge was overruled by the decision of the House of Lords in the *Godmanchester* case[135]. On the first point, the judgement was delivered before the law was clarified by the *Sunningwell* and *Beresford* cases. The judge analysed the first point as one where the public were using the common by permission conferred by the 1929 deed. However, in the light of the *Beresford* case it seems to me that this was not really a case of permission but one where the public had, during the currency of the revocable deeds, a statutory right of access to the land for air and exercise. It seems to me that it would be very odd if user could be permissive in circumstances where permission was neither sought by nor communicated to the user. In the *Beresford* case, it is clear

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133 [2007] 3 All ER 543

134 *R v Secretary of State for the Environment ex parte Billson* [1999] QB 374

135 *R (on the application of Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] 4 All ER 273

that Lord Walker[136] considered that permission had to be communicated. User pursuant to an uncommunicated permission has the appearance to the reasonable landowner of the exercise of a claimed right. I think, therefore, that user is not permissive unless permission is not only granted but is communicated to the users.

[97] I am prepared to accept that when Bradford MDC wrote to the BCC that access was "permissive" it was implicit that such permission was revocable rather than permanent, bearing in mind the landowner's known intention to develop the Field in the future. However, for the reasons explained in my findings of fact, I do not consider that this permission was communicated to the generality of local recreational users of the Field. I think that, if the landowner wished to render user permissive it was not enough simply to say so to the BCC committee and trust that the message would be disseminated to users of the Field. I think that the landowner needed to do something positively to bring the permission to the attention of ordinary users, for example by erecting clear signs to that effect as it did in 2004. The only action taken by the landowner on site before 19th. February 2003 to render user permissive was the erection of the 1999 "Permissive Access Only" signs on both sides of the Langford Lane field gate and, for the reasons explained in my earlier reports, I do not consider that there were enough to render permissive general recreational use of the Field by the inhabitants of Burley.

[98] Mr. Partington did not argue that there were circumstances giving rise to an implied permission within the reasoning in the *Beresford* case. I therefore conclude that the user relied upon before 19th. February was not permissive so as to negative user "as of right".

9. Contentious user

[99] It is established that user is forcible or *vi* not only where the users employ force to enjoy recreation on the claimed land, e.g. by breaking down fences, but also where the user is contentious. However, on examining the cases in which it has been considered whether contentious user is *vi* and hence not "as of right", they all concern factual situations where the landowner takes some active steps to try to prevent the user, either physically or by protests. By contrast, in the present case, the landowner has never taken steps to stop general access to the Field for recreation and has never protested against general recreational use of the Field.

[100] In *Eaton v The Swansea Waterworks Company*[137] the plaintiff claimed a prescriptive easement to draw water from the defendant's watercourse. The defendant tendered evidence that the defendant had obstructed the plaintiff's drawing of water by closing a trench, that the plaintiff's servant had, on the orders of the plaintiff, opened the trench and drawn water and that the plaintiff's servant had been convicted of wrongfully drawing water from the defendant's waterworks. The trial judge excluded the evidence of the conviction. The Queen's Bench ordered

136 Para. [79]
137 (1851) 17 QB 267

a new trial for wrongly excluding the evidence. The excluded evidence was material to the question whether the plaintiff's user was "as of right".

[101] In *Dalton v Angus*[138] the issue was whether the plaintiffs had acquired by prescription a right of lateral support to their factory. The case was argued twice before the House of Lords. At the second hearing there were not only five law lords but in addition seven judges attended to give their opinions. In these circumstances, it is not easy to summarise the reasoning for the decision in favour of the plaintiffs. However, one of the judges mentioned the present issue. At p. 786, Bowen J. said:

"The neighbour, without actual interruption of the user, ought, perhaps, on principle, to be enabled by continuous and unmistakable protests to destroy its peaceable character, and so to annul one of the conditions upon which the presumption of right is raised: Eaton v Swansea Waterworks Company."

[102] In *Lyell v Lord Hothfield*[139] the plaintiff claimed a right of common of pasture by 60 years' prescription over part of a common. There was a dispute as to whether the servient land lay within the plaintiff's manor or the defendant's manor. There were arguments between the shepherds and a solicitor's letter was written, but the parties did not come to blows or start legal proceedings because there was enough grass to go round whatever the strict legal position. Shearman J held that:

"...there was not for sixty years an enjoyment by or on behalf of the plaintiff which could be described as a non-contentious user: see Eaton v Swansea Waterworks Co, which is referred to with approval by Bowen J. in Dalton v Angus."

[103] In *Newnham v Willison*[140] the plaintiff had a right of way over the defendant's land. The right of way had a bend. The plaintiff contended that it was a swept curve. The defendant contended that it was a right angle bend. In the spring of 1983, the defendant erected a post to obstruct the swept curve. In June 1983, the plaintiff's solicitors wrote to protest. In August 1983, the defendant erected a fence obstructing the swept curve. In June 1984, the plaintiff started an action claiming a right to the swept curve based on 20 years' user under the Prescription Act 1832. The Court of Appeal allowed the defendant's appeal and held that there was no user as of right after the spring of 1983.Having referred to *Eaton v Swansea Waterworks Company, Dalton v Angus* and *Lyell v Lord Hothfield*, Kerr LJ said:

"In my view, what the authorities show is that there may be "vi" – a forcible exercise of the user – in contrast to a user as of right once there is knowledge on the part of the person

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138 (1881) 6 App. Cas. 740
139 [1914] 3 KB 911
140 (1988) 56 P&CR 8

seeking to establish prescription that his user is being objected to and that the user which he claims has become contentious."

[104] In *Smith v Brudenell-Bruce*[141] the claimant had used a track over the defendant's land since 1975. In the autumn of 1998, the parties fell out and the defendant told the claimant to stop using the track. The claimant stopped using the track while he unsuccessfully sought to agree a compromise. In February 2000, the claimant started proceedings claiming a right of way by prescription under the Prescription Act 1832 or alternatively by lost modern grant. The claim under the 1832 Act failed for lack of 20 years' user next before action. However the claim based on lost modern grant succeeded on user before autumn 1998. Having reviewed the cases on user "as of right", Pumfrey J said:

"It seems to me that a user ceases to be user "as of right" if the circumstances are such as to indicate to the dominant owner, or to a reasonable man with the dominant owner's knowledge of the circumstances, that the servient owner actually objects and continues to object and will back his objection either by physical obstruction or by legal action. A user is contentious when the servient owner is doing everything, consistent with his means and proportionately to the user, to contest and to endeavour to interrupt the user."

The judge may well may have put the test rather high in the light of the authorities, but it is clear that he perceived that it was a requirement of user's being contentious and hence *vi* that the servient owner should object to the exercise of the right claimed.

[105] In *R (on the application of Cheltenham Builders Limited) v South Gloucestershire District Council*[142] Sullivan J. summarised the legal position thus at para 64:

"The landowner does not have to meet force with force. He can achieve the same effect by making non-forcible objections or protests directed towards the users of the land."

[106] The principle that user under protest is not user as of right was also applied in *Dennis v Ministry of Defence*[143] and *Field Common Ltd v Elmbridge Borough Council*[144].

[107] There is therefore a long line of authority to the effect that user is *vi* and not as of right not only if the user is physically forcible but also if the landowner tries to prevent the user either by physical action or by protest. In the present case, the only evidence that could be raised to argue that user was *vi* is (a) the 1992 locking of the Langford Lane gate and (b) the 1997-1998 correspondence with the owner of No 7, St. Philip's Drive concerning the gate from the garden onto the Field. I cannot see that these matters either individually or collectively render *vi* recreational use of the Field accessed by the public footpath. As far as I can see, the landowner

141 [2002] 2 P&CR 4
142 [2003] EWHC 2803 (Admin)
143 [2003] EWHC 793 (QB)
144 [2005] EWHC 2933 (Ch)

never sought to prevent or to protest against recreational use of the Field by the many local inhabitants who entered the Field by the public footpath. I therefore conclude that such recreational use of the Field was not forcible or *vi*, even in the extended meaning of that expression. Even if I were wrong in my finding that it was not generally known to users of the Field that the landowner denied that there was a legal right of access other than use of the public footpath, it does not seem to me that this would render recreational user contentious. Persons acquiring prescriptive rights are usually trespassers and it does not matter whether they know that they are trespassers or not. It seems to me that the key issue is not whether the landowner denies the existence of a legal right of access but whether the landowner seeks by physical steps or by protests to stop the actual exercise of the access.

[108] In my Report into the second application I expressed the view that user was not as of right at least from December 2003 when Bradford MDC's objection to the first application became generally known. Whether I was right or wrong about that, it does not seem to me that this point arises on the present application since I have found that Bradford MDC's objection to the first application was not generally known until after 19th. February 2003.

10. Interaction with agricultural user

[109] The first application failed solely on the ground that I felt obliged by the *Laing Homes* case to find that the agricultural user of the Field for haymaking precluded recreational user "as of right" by local people. However, the law on this topic has moved on and it is necessary to consider the present legal position.

[110] In the *Sunningwell* case, the glebe was used both for recreation by local people and for rough grazing by horses. There was no suggestion that the agricultural use precluded recreational user as of right by local people.

[111] In the *Laing Homes* case, the application land had been used for low-key grazing and for taking a hay crop most years. Sullivan J. held that the taking of hay crops precluded recreational user as of right by local people. There were two interwoven threads in his reasoning. One was that hay making would be in breach of the Victorian statutes[145] governing village greens. The other was that user by local people deferred to the agricultural user and so did not carry the appearance of the exercise of a right.

[112] In the *Oxfordshire* case, Lord Hoffmann pointed out[146] that registration of land as a green

"does not mean that the owner is altogether excluded from the land. He still has the right to use it in any way which does not interfere with the recreational rights of the inhabitants. There has to be give and take on both sides..."

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145 Inclosure Act 1857 s. 12 & Commons Act 1876 s. 29

146 Para. 51

Turning to the Victorian statutes, he said[147]:

"I do not think that either Act was intended to prevent the owner from using the land consistently with the rights of the inhabitants...This was accepted by Sullivan J. in [the Laing Homes case]... In that case the land was used for "low-level agricultural activities" such as taking a hay crop at the same time as it was being used by inhabitants for sports and pastimes. No doubt the use of the land by the owner may be relevant to the question of whether he would have regarded persons using it for sports and pastimes as doing so "as of right". But, with respect to the judge, I do not agree that low-level agricultural activities must be regarded as having been inconsistent with use for sports and pastimes for the purposes of s. 22 if in practice they were not. Nor do I follow how the fact that, upon registration, the land would become subject to the 1857 and 1876 Acts can be relevant to the question of whether there has been the requisite use by local inhabitants for upwards of 20 years before the date of the application."

[113] In the *Redcar* case, the Court of Appeal considered the effect of the *Laing Homes* and *Oxfordshire* cases on a case where the application land was used both as a golf course and for informal recreation by local people. As I understand the judgment of the Court of Appeal, the following principles emerged:

- The overarching requirement of user "as of right" is that the user is such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right.

- Recreational user is not necessarily deprived of its character of being "as of right" simply because the landowner also uses the land

- However, if the use by the landowner and by local people materially conflicts and the user by local people defers to the landowner's use, that is evidence from which the decision maker may find as a fact that the user by local people is not such as to give the outward appearance to the reasonable landowner that the user is being asserted and claimed as of right.

[114] I consider that the CRA must approach the third application on the basis that the guidance of Sullivan J. in the *Laing Homes* case has been overtaken by the guidance of Lord Hoffmann in the *Oxfordshire* case and of the Court of Appeal in the *Redcar* case. I apply the new guidance as follows:

- The question whether the agricultural activities on the Field would be in breach of the Victorian statutes if the Field were a registered green is irrelevant.

- The first relevant question is whether the use of the Field for informal recreation materially conflicted with its use for agriculture. I do not think so. For the reasons set out in my Revised

147 Para. 57

Report into the first application, I see no material conflict between use for informal recreation and (a) use for grazing cattle or (b) essential low-key maintenance of the Field by fertilizing, muck-spreading, cross-harrowing or thistle-cutting. As for the hay-making in the early 1980s, it is unclear whether the crop was taken during the relevant extended 20 year period. There has been no further evidence to fix the date with more precision. However, even assuming that it was, I do not consider that it materially conflicted with recreational use. This is for the reasons given on pages 34 & 35 of my Revised Report into the first application, reasons which I then considered to be overborne by the *Laing Homes* case. Looking at the evidence in the round, I consider that the interaction between agricultural use and recreational use was one of "give and take" not giving rise to any material conflict.

- It follows that the issue of deference does not arise. Even if it did, it seems to me that the balance of deference was probably in favour of local people. There is no evidence that local people were inconvenienced by the agricultural use of the Field, except for the poaching of small parts of the Field in the winter. By contrast, it seems clear that the use of the Field for hay-making was effectively precluded by the amount of dog faeces on the Field. Thus, even if there had been a material conflict between recreational and agricultural use of the Field, I would not have found that there was such deference by local people as to negative the outward appearance to the reasonable landowner that user was being asserted and claimed as a right.

[115] Mr. Partington submitted that recreational user of the Field did not give the appearance of exercise of a public right because it did not interrupt the lawful agricultural use of the land. I do not accept this submission. If there is no material conflict between agricultural and recreational user, there is no reason why the recreational user should not have the appearance to the landowner of the exercise of a right.

11. Conclusion and recommendation

[116] I conclude that the applicant has established that recreational user of the Field by local people before 19th. February 2003 was "as of right". In view of the landowner's concession that this is the only live issue in the application, I consider that the applicant has successfully established that the Field ought to be registered as a new green and I recommend that Bradford MDC as CRA should register it accordingly.

Vivian Chapman QC
1st. July 2009
9, Stone Buildings,
Lincoln's Inn,
London WC2A 3NN