IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT CHALVEY, SLOUGH, AS A TOWN OR VILLAGE GREEN

REPORT

OF BARRY DENYER-GREEN, BARRISTER

6th MAY 2016

TO

SLOUGH BOROUGH COUNCIL

Application Number: VG2014/01

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT CHALVEY, SLOUGH, AS A TOWN OR VILLAGE GREEN

REPORT

INTRODUCTION

1. This Report relates to an application ("the Application") made by Chalvey Community Forum ("the Applicant") under section 15(2) of the Commons Act 2006 ("the 2006 Act") to register land adjoining Tower House and Ashbourne House, Chalvey, Slough ("the Land") as a town or village green.

2. Slough Borough Council ("the Council") is both the registration authority under the 2006 Act and the owner of the Land. As the owner, the Council made an objection ("the Objection") to the Application. I shall therefore refer to the Council as either the Registration Authority or the Objector, as the case may be, in order to distinguish the separate roles of the Council.

3. I was instructed by the Registration Authority to hold a public local inquiry, and prepare a report with my conclusions and recommendations in relation to the Application. I held such an inquiry on the 9th and 10th March 2016. I made an unaccompanied visit and an accompanied visit to the land on the 9th March. On both occasions I was driven around several of the streets shown on the "A to Z" type map submitted with the Application. This is in the page-numbered bundle at [B/21].

4. Mrs Joan Horton appeared on behalf of the Applicant, gave evidence herself as a witness, and called Mrs Diana Susan Charlton and Mrs Margaret Trimble as witnesses.

5. Jeremy Pike, of Counsel, appeared for the Objector, and called Mr Ian Coventry, Mr Suhil Thobani, and Mr Peter Bird. Mr Thobani also spoke to Miss Lisa Rank's Witness Statement.

6. The Application was supported by a Statement of Justification ([B/12-15]), photographic evidence with comments ((B/16-17]) a form described as verification of long term usage containing names, addresses, period lived in Chalvey, and signatures and dates ([B/18]), a handwritten document headed "Users of the green" – 19th May 2014 for 4.30pm and 7pm, handwritten with names and addresses ([B/22]), plus a map at [B/19] identifying the addresses, a form "Using the green area today", with the dates of the 25th May and the 25th June 2014, with names and addresses ([B/24]), further photographs at [B/26] and a further "Verification of Long Term Usage" with names and addresses, being long-standing members of Ledger Road Methodist Church, whether lived in Chalvey and signatures and dates at [B/27-28].

7. The Objection, which I believe was lodged in about January 2015, consisted of a written statement, documents concerning the acquisition of the Land in 1961-62, and copies of Law Reports ([B/29-139]).

8. The Applicant served a response to the Objections dated the 30th January 2015 ("the Response") ([B/149]).

9. In consequence of directions for any further statements, which I had advised, the Applicant lodged copies of emails and correspondence at [B/284-302]. The Objector put in the Witness Statements of Ms Lisa Rank, Peter Bird, Ian Coventry and Suhil Thobhani [B/141-283]. I was also provided with a "Presentation" on behalf of the Applicant, a Skeleton Legal Argument on behalf of the Objector, and Closing Submissions from both parties. Finally, and in consequence of further directions I made at the Inquiry, the Objector provided a further statement dated the 16th March 2016 concerning the issue of any evidence of ministerial consent for the laying out and use of the Land for recreational purposes, in terms of section 93 of the Housing Act 1957, to which the Applicant made a Reply dated the 8th April 2016.

10. I have read all these documents, and I have taken their contents into account in the preparation of this Report. In this Report I have set out certain findings of fact, conclusions and recommendations, in relation to the Application. It is for the Registration Authority itself to make the decision on the Application, and it is for that Authority to accept or reject my recommendations provided it does so lawfully and fairly.

THE APPLICATION

11. The Application was made under section 15(1) and (2) of the 2006 Act:

> "*(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 sub-section (2), (3) or (4) applies.*
>
> *(2) This sub-section applies where –*
>
> *(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
>
> *(b) they continue to do so at the time of the application.*"

12. The Land is defined by reference to the red edging on the plan at exhibit A to the Application: see [B/11]. From my Inspections, the Land lies to the immediate south of the internal access road and footpaths to Tower House and Ashbourne House. Save for the children's playground area, the Land is grassed with a few trees and crossed by a concrete footpath at a diagonal from the north east corner in "Chalvey Park" to the south west corner in "The Crescent", the path having a pronounced dip about halfway along its length in which, at the time of my inspection, there was a large puddle of water. The Land falls away from the north towards the south,

particularly from the south of the internal access road to Tower House. In the south east corner, and bounded by a low iron fence, is the children's play area with slides and other apparatus of interest to young children.

13. I heard evidence that Tower House and Ashbourne House contain flats occupied by residential tenants. It was clear from my Inspections that, to the east and south east of the Land there were a number of streets wholly or partially fronted by residential dwellings, to the south and west of the Land, but east of the railway line, "The Crescent" and Chalvey Road East contained a large number of residential dwellings. I also observed a large number of residential dwellings in the streets on the west of the railway line, which were accessible under the railway bridge by Chalvey Road East. All these areas were within the map at [B/21].

14. In outline, the case made by the Applicant is set out at paragraph (1), box 7, on the Application Form at [B/5] to the effect that "For well over 20 years the area has been continually used 'as of right' by local residents, for recreation, leisure and informal sport. It continues to be so today". Whilst the Application and the accompanying Statement of Justification raised points about the merits of the Land having village green status, these points were quite properly not pressed before me at the Inquiry. The merits, advantages or policy considerations as to whether or not the Land should be a town or village green are not matters that I was instructed to report on, and are not matters that the Registration Authority shall have regard to in reaching its decision on the Application under the 2006 Act. The Registration Authority is limited to a consideration of whether or not the Application satisfies the requirements of section 15(1) and (2) of the 2006 Act.

THE OBJECTION

15. The Objector's case, in outline, was that the testimony of individuals said to be inhabitants was minimal in relation to the qualifying use, that the requirement of a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, was not shown to be satisfied on the material before the Inquiry, that as to lawful sports and pastimes, the use of a concrete path would not qualify as a user, that, in any event, use of the Land by the public was not as of right as the land had been laid out for recreational

purposes in terms of section 93(1) of the Housing Act 1957, and that byelaws had been in force for the whole of the relevant 20-year period such that use by the public was by way of deemed permission. Finally, that there had been extensive car parking on a substantial part of the Land for a period which would have prevented any lawful sports and pastimes from being carried out continuously for the full 20-year period.

16. I shall deal with the Applicant's answers to the points raised in the Objection in more detail below, but in outline Mrs Horton submitted that there was evidence of use of the land by a significant number of the inhabitants of the "neighbourhood" for the requisite 20-year period, that the byelaws governed use of the Land by the tenants of Tower House and Ashbourne House, but not others, so that use of the Land was "by right" by such tenants and use by others was therefore "as of right", and that the car parking was not for a long period, and was curtailed at the request of the Applicant. I shall explain the phrases "by right" and "as of right" below.

THE LEGAL FRAMEWORK

17. In consequence of section 15(2) of the 2006 Act, the Application can only succeed, in relation to the Land, if the following are established:

(1) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality;
(2) have indulged … in lawful sports and pastimes;
(3) as of right;
(4) for a period of at least 20 years and continue to do so at the time of the application.

18. In R (Beresford) v Sunderland City Council [2004] 1 AC 889, Lord Bingham said at [2]:

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

> *properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years' indulgence or more is met*".

I now consider the legal framework in relation to each of the four requirements for a town or village green set out in the preceding paragraph above.

(1) Significant number of the inhabitants of a locality or a neighbourhood within a locality

19. In R v Staffordshire County Council, ex p Alfred McAlpine Homes Limited [2002] EWHC 76 (Admin), Sullivan J (as he then was), dealing with the statutory predecessor provisions to the 2006 Act in the Commons Registration Act 1965 ("the 1965 Act") said at [71]:

> "*... I do not accept the proposition that significant in the context of [the section] ... means a considerable or a substantial number. A neighbourhood may have a very limited population and a significant number of the inhabitants of such a neighbourhood might not be so great as to be properly described as a considerable number. ... the inspector approached the matter correctly ... whether the evidence showed that a significant number of the inhabitants of any locality or of any neighbourhood within a locality had used the [land] for informal recreation was very much a matter of impression. It is necessary to ask the question: significant for what purpose? In my judgment the correct answer is ... what matters is that the number of people using the land in question has to be sufficient to indicate what their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers*".

20. A "locality" must be an area the boundaries of which are "legally significant": see Oxfordshire County Council v Oxford City Council [2006] UKHL 25; [2006] 2 AC 674, per Lord Hoffmann at [27].

21. As to a "neighbourhood", in Cheltenham Builders Limited v South Gloucester District Council [2003] EWHC 2803 (Admin) [2003] 4 PLR 95, Sullivan J (as he then was) said at [85]:

> "*It is common ground that a neighbourhood need not be a recognised administrative unit. A housing estate might well be described in ordinary language as a neighbourhood. … I do not accept … that a neighbourhood is any area of land that an applicant for registration chooses to delineate upon a plan. The registration authority has to be satisfied that the area alleged to be a neighbourhood has a sufficient degree of cohesiveness, otherwise the word 'neighbourhood' would be stripped of any real meaning. If Parliament had wished to enable the inhabitants of any area (as defined on a plan accompanying the application) to apply to registered land as a village green, it would have said so*".

22. In Leeds Group v Leeds City Council [2010] EWHC 810 (Ch), at first instance (not affected by the decision of the Court of Appeal [2011] EWCA Civ 1447; [2012] 1 WLR 1561), HH Judge Behrens, sitting as a Judge of the High Court, noted the approach of the inspector, whose decision was before him, which he approved at [99, 102-104], and set out what the inspector said at [36]:

> "*It seems to me that the 'cohesiveness' point cannot in reality mean much more, in an urban context, than that a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town, as opposed (say) to a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of making a town or village green claim*".

(2) Indulged … in lawful sports and pastimes

23. In R (Oxfordshire and Buckinghamshire Mental Health NHS Trust) v Oxfordshire County Council [2010] EWHC 530 (Admin), Waksman J said at [90]:

> "*The adjective here [in the statutory provision] was meant to exclude sports and pastimes that were themselves unlawful or*

> *'illegal' because they amounted to criminal offences, which today might include joy-riding in or on stolen vehicles or recreational use of proscribed drugs*".

24. The use of a defined path, where that use would appear to the reasonable landowner to be referable to the use of existing or potential rights of way, rather than a wider recreational claim, cannot found a recreation use: see per Lightman J (as he then was) Oxfordshire CC v Oxford City Council and an [2004] Ch 253 at paras 102-105.

(3) As of right

25. The meaning of "as of right" was carefully analysed by Lord Hoffmann in R v Oxfordshire County Council, ex p Sunningwell Parish Council [2000] 1 AC 335. His analysis commenced with a consideration of the position in respect of the acquisition of private rights in relation to the law of prescription, and public rights of way acquired by long user, before he concluded that, in relation to the position of town or village greens, as defined in section 22(1) of the Commons Registration Act 1965 (the statutory predecessor to section 15(2) of the 2006 Act), there was no reason to believe that "as of right" was intended to mean anything different from what those words meant in the Prescription Act 1832 and the Rights of Way Act 1932: see p.354A. Lord Hoffmann had earlier said (at p.350H – 351A) that:

> "*… user had to be, in the Latin phrase, nec vi, nec clam, nec precario: not by force, nor stealth, nor the licence of the owner … the unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period so in Dalton v Angus & Co (1881) 6 App Cas 740, 773, Fry J (advising the House of Lords) was able to rationalise the law of prescription as follows:*
>
> > *'The whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the*

> *judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that the acquiescence and nothing else is the principle upon which these expedients rest'.*"

26. The Objector submits here that the Council laid out and maintained the Land as public open space. The Land, and other land in the vicinity, was acquired by the Council for the purpose of building housing in 1962, and a compulsory purchase order ("the CPO") was made under Part V of the Housing Act 1957 ("the 1957 Act"), and confirmed by the Minister of Housing. The Land was laid out for public recreation, and the Council has maintained the land for public recreation continuously since that time. Byelaws were made by the Corporation's predecessor in 1952 to regulate the use of open space. The current byelaws were made in 2004: see the Witness Statement of Ian Coventry, exhibit "IC3" at [B251-261]. As the Land has been owned and controlled by the Council, and expressly regulated through byelaws, and through the presence of employees or sub-contractors of the Council, for public and recreational use, the Land was available for public recreation conferring a right on persons to use the Land for that purpose: the Objector submitted that such user could not have been "as of right"; the use was "by right".

27. In R (Barkas) v North Yorkshire County Council [2015] AC 195; [2014] UKSC 31, the Supreme Court was concerned with the same issue, namely, where land is available for public use, whether this gives rise to user "as of right". The land in issue in Barkas had been acquired pursuant to section 80(1) of the Housing Act 1936, the provisions of which were repealed and substantially re-enacted in the 1957 Act, which in turn was re-enacted in section 12(1) of the Housing Act 1985. Section 93(1) of the 1957 Act, which the Objector submitted applies to the Land, provided that:

> "*The powers of a local authority under this Part of this Act to provide housing accommodation shall include a power … to provide and maintain with the consent of the Minister in connection with any such housing accommodation …, any recreation grounds, or other buildings or land which in the*

> *opinion of the Minister will serve a beneficial purpose in connection with the requirements of the persons for whom the housing accommodation is provided*".

28. In Barkas, and after referring to the meaning of "as of right", as discussed by Lord Hoffmann in the Sunningwell Parish Council case, Lord Neuberger PSC, in considering the respondent council's argument that it had acquired and has always held the subject land pursuant to a provision in the same form as section 93(1) of the 1957 Act, said at [21]:

> "*In my judgment, this argument is as compelling as it is simple. So long as land is held under a provision such as section 12(1) of the 1985 Act, it appears to me that members of the public have a statutory right to use the land for recreational purposes, and therefore they use the land "by right" and not as trespassers, so that no question of user "as of right" can arise. In Sunningwell at p.352H – 353A, Lord Hoffmann indicated that whether user was "as of right" should be judged by "how the matter would have appeared to the owner of the land", a question which must, I should add, be assessed objectively. In the present case, it is, I think, plain that a reasonable local authority in the position of the Council would have regarded the presence of members of the public on [the land in question], walking with or without dogs, taking part in sports, or letting their children play, as being pursuant to their statutory right to be on the land and to use it for these activities, given that [the land in question] was being held and maintained by the Council for public recreation pursuant to section 12(1) of the 1985 Act and its statutory predecessors.*"

29. Lord Neuberger then continued at [23]:

> "*Section 12(1) of the 1985 Act and its statutory predecessors bestow a power on a local (housing) authority to devote land such as [the land in question] for public recreational use (albeit subject to the consent of the Minister or Secretary of State), at any rate until the land is removed from the ambit of that section. Where land is held for that purpose, and members of the public then use the land for that purpose, the obvious and natural conclusion is that they enjoy a public right, or a publicly based licence, to do so. If that were not so, members*

> *of the public using for recreation land held by the local authority and for the statutory purpose of public recreation will be trespassing on the land, which cannot be correct.*"

Lord Neuberger then said at [24]:

> "*I agree with Lord Carnwath that, where the owner of the land is a local, or other public, authority which has lawfully allocated the land for public use …, it is impossible to see how, at least in the absence of unusual additional facts, it could be appropriate to infer that members of the public had been using the land "as of right", simply because the authority has not objected to their using the land. It seems very unlikely that, in such a case, the legislature could have intended that such land would become a village green after the public had used it for 20 years. It would not merely be understandable why the local authority had not objected to the public use: it would be positively inconsistent with their allocation decision if they had done so.*"

30. Finally, Lord Neuberger drew support from observations in Hall v Beckenham Corpn [1949] 1 KB 716, a case concerning land held by the local authority under section 164 of the Public Health Act 1875. Under section 164, land may be held and used for "public walks or pleasure grounds", and byelaws may be made to regulate behaviour. It was observed in that case that provided a member of the public behaves himself, the local authority cannot stop him doing what he likes.

31. Lord Carnwath JSC, with whom Lady Hale, Lord Reed and Lord Hughes JJSC agreed, agreed that the appeal should be dismissed for the reasons given by Lord Neuberger. I understand that acceptance of the reasoning of Lord Neuberger to include the necessity for a consent in terms of section 12 of the 1985 Act, and therefore its statutory predecessor, section 93(1) of the 1957 Act. That is because Lord Carnwath then proceeds his analysis on matters of principle where land is dedicated to public recreation by a local or public authority. He therefore says at [64]:

> "*Where land is owned by a public authority with power to dedicate it for public recreation, and is laid out as such, there*

> *may be no reason to attribute subsequent public use to the assertion of a distinct village green right*".

He then said at [65]:

> "*… it follows that, in cases of possible ambiguity, the conduct must bring home to the owner, not merely that a "right" is being asserted, but that it is a village green right. Where the owner is a public authority, no adverse inference can sensibly be drawn from its failure to 'warn off' the users as trespassers, if it has validly and visibly committed the land for public recreation, under powers that have nothing to do with the acquisition of the village green rights.*"

32. In relation to the relevance of the acts of "encouragement" by a public authority owner of land, as considered by the House of Lords in R (Beresford) v Sunderland City Council [2004] 1 AC 889, Lord Carnwath said in Barkas at [82]:

> "*If the inference is to be of a notional public right during the period of user, it is easy to see why acts of encouragement may be seen as lending weight to that inference. But the same thinking cannot readily be applied in the context of the creation of a modern village green. There is no basis for inferring a prior public right, real or notional, and therefore no reason for the owner's acts of encouragement to be treated as lending force to such an inference. On the contrary, where they are acts of a public authority, they lend force to the alternative inference that they are done under other statutory powers*".

33. In R (Newhaven Port & Properties Limited) v East Sussex County Council [2015] AC 1547, the Supreme Court was concerned with the issue as to whether user of land regulated by or in breach of byelaws was capable of being "as of right". As indicated above, the Land here is regulated by byelaws. It appeared to be common ground in the Newhaven case that a byelaw can, as a matter of principle, permit an activity which would otherwise be unlawful: see per Lord Neuberger PSC at [54]. The Court was therefore concerned with the question as to whether, on their true

construction, the byelaws there in issue permitted members of the public to use a beach for leisure activities: see [57]. Lord Neuberger said at [58]:

> "*A prohibition can be expressed in such a way as to imply a permission. For instance, it is hard to argue against the proposition that a byelaw which states that dogs must be kept on a lead in a public park implies a permission to bring dogs into the park, provided that they are kept on a lead …*".

34. Lord Neuberger, expressing the view of the Court, said that, in relation to the byelaws in question in that case, that:

> "*A normal speaker of English who reading the byelaws would assume that he or she was permitted to bathe or play provided the activity did not fall foul of the restrictions in the two byelaws …*".

35. In the Newhaven case, the enabling Act, under which the byelaws in question were made, required that they should be displayed. Lord Neuberger said at [66]:

> "*The fact that it may be necessary to show that the Byelaws were appropriately displayed before a prosecution for their infringement could proceed does not justify the contention that they are of no effect generally unless they are displayed. Accordingly, we conclude that the Byelaws were effective as byelaws … even though they were not displayed in required by section 88 of the 1847 Clauses Act …*".

36. Lord Neuberger then referred to the decision in Barkas, and the need to an appropriate ministerial consent for land to be used as "recreational grounds", before saying at [71]:

> "*In our judgment, the position in the present case is indistinguishable from that in Barkas for the purpose of deciding whether the use of the land in question by members of the public was "as of right". In this case, as in Barkas, the legal position, binding on both landowner and users of the land, was that there was a public law right, derived from statute, for the public to go onto the land and to use it for*

> *recreational purposes, and therefore, in this case, as in Barkas, the recreational use of the land in question by inhabitants of the locality was "by right" and not "as of right". The fact that the right arose from an act of the landowner (in Barkas, acquiring the land and then electing to obtain ministerial consent to put it to recreational use; in this case, to make the byelaws which implicitly permit recreational use) does not alter the fact that the ultimate right of the public is a public right derived from statute ...*".

(4) for a period of at least 20 years and continue to the time of the application

37. The Objector submitted that the 20-year period of continuous user was not satisfied by reason of a period of interruption by car parking on the Land. I consider the evidence and submissions on this below. The issue of competing users was considered by the Supreme Court in R (Lewis) v Redcar and Cleveland Borough Council (No.2) [2010] UKSC 11; [2010] 2 AC 70, where Lord Walker JSC accepted that the taking of a single hay crop from a field would not be inconsistent with or in practice prevent recreational use of that field by local inhabitants: see [26-28], and by Lord Hope JSC, who was dealing with the deference to the landowner's use of his land, said at [75] that:

> "*The question is whether the user by the public was of such amount and in such manner as would reasonably be regarded as being the assertion of a public right. Deference by the public to what the owner does on his own land may be taken as an indication that the two uses cannot in practice coexist*".

38. Neither the Redcar case nor the decision of Sullivan J, as he then was, in R (Laing Homes Limited) v Buckinghamshire County Council [2004] 1 P&CR 36 (concerning use by a farmer), provide any direct guidance to circumstances where recreational user is interrupted by the parking of cars without the landowner's consent for a period of time. It seems to me that the matter is fact sensitive, it is a question of fact and degree, and that the guiding legal principle, as explained by Lord Hoffmann in Sunningwell, at pp352H to 353A, must be how the matter looks to the reasonable landowner in terms of whether there remains a continuation of an assertion by the public

to the right to pursue recreational activities, or whether there is a deference, to the intervening user.

(5) Other matters

39. The burden of proof lies on the Applicant and the standard of proof is a balance of probability.

THE EVIDENCE ON BEHALF OF THE APPLICANT

40. I treated the material, with the Statement of Justification in support of the Application, as part of the evidence of the Applicant. However, to the extent that any parts of it was not addressed or supported by witnesses called on behalf of the Applicant, I can give little weight to the evidence in these documents as to use by any persons of the Land, or the periods of that user, or whether or not they were local inhabitants of any particular area. The documents at [B/12-17] refer to recreation, leisure, and informal sport, and of the activities mentioned there of ball games, cycling, scootering, dog exercising, of young people "larking around", and of adults simply sitting and enjoying being out. But, except in relation to the testimony of the three witnesses who appeared for the Applicant at the Inquiry, I do not know from these documents where the young people lived, for what periods any such people carried out the claimed activities, or how it is said that these young people were "inhabitants" of a "locality" or a "neighbourhood". The same points can be said of the adults, with the additional difficulty that there is no evidence in these documents as to why adults simply "sitting and enjoying being out" were pursuing "lawful sports and pastimes". I accept that the photograph at [B/16] shows young people on the Land, but I can give that photograph very little weight as showing that that is evidence of recreational activities for a continuous period of 20 years ending with the Application.

41. Similarly, save in respect of Mrs Horton and Mrs Trimble, who did appear before me as witnesses, I can give very little weight to the document at [B/18] said to be a verification by the persons named on it of continuous use since before May 1994 for lawful pastimes, leisure and sport; I do not know from this documents what the actual activities were, who carried them out, where they lived and why they can be said to be "inhabitants" of a "locality" or of a "neighbourhood". The document headed "Users of the green", as at 19th May 2004 at [B/22] listing mothers with children, and later

on the same day adults relaxing, contains merely names and addresses of eight people, two of whom gave addresses in Tower House and Ashbourne House, respectively. None of these people appeared before me as witnesses, I do not know what they were doing on that day, and this document does not assist me in finding as a fact continuity of recreational use since 21st May 1994, and what uses these people were enjoying.

42. There is then a document at [B/24] sub-headed "Using the green area today" containing, by reference to the 25th May and the 25th June 2014, names and addresses of eight, or possibly nine people, three of whom gave addresses in Tower House and/or Ashbourne House, and two gave addresses in the High Street, Slough. Again, I can give no weight to this document as it fails to state what recreational activities were taking place on the days identified, and for how long those persons had been exercising whatever recreational activities, if any, they had enjoyed on the Land; in any event, the dates on it are after the date of the Application. I am prepared to accept that the two photographs at [B/26] do show children on the Land, one showing children tobogganing and a further photograph said to have been taken in about 1978 showing three young boys with a petition. I am prepared to accept the photograph of the tobogganing children, said to have been taken in 1975, as evidence of a recreational activity then taking place. But it does not assist in reaching any findings of fact in relation to the 20 years prior to the Application, so I cannot make any further findings of fact based on this photograph. Finally, in this part of the Bundle there is a further "verification of the above area's long-term usage" at [B/28]. This contains names, addresses, whether lived in Chalvey, and signatures and dates to the effect that the signatories witness and confirm that the Land "has been in continuous use since before May 1994, and continues to be so, by significant numbers of local inhabitants, as of right, for lawful pastimes, leisure and sport". There are eleven signatories of various addresses, but none of these signatories appeared before me as witnesses, the assertions they signed could not therefore have been tested by cross-examination, I do not know what recreational activities they observed, and in the case of the addresses given of "The Spinney", Goodman (or Goodmond) Park, and Conecar Court, these addresses do not appear to be on the map at [B/21], and therefore whether their respective addresses fall within whatever "locality" or "neighbourhood

within a locality" that the Applicant relied on. I give this document very little weight.

43. I now turn to the Applicant's Response to Objection, contained in a letter dated the 30th January 2015 at [B/140-141]. This document consists of a letter written by Mrs Horton. Mrs Horton writes that the photographs and user signatories were indeed a "snapshot" of some sample days, but that the photographs especially demonstrate typical usage of the green area which can be, and has been, frequently seen for over 20 years. She says that the photographs show the carrying out of a range of "lawful sports and pastimes" activities of users, and to corroborate the photographs, accompanying the application was a list of signatures testifying the Land had been in continuous use for such activities since at least May 1994. It adds that most of the green area's users have been and remain children, teenagers and youths, that most of the green area's users from years ago have long since moved away, and that longstanding local residents can testify to their personal observation that the Land had been in continuous use for lawful sports and pastimes for the previous 20 years. Again, I can give this document very little weight as evidence of recreational user, continuous since May 1994. To say, only in writing, that the Land was used for lawful sports and pastimes does not tell the Registration Authority what those uses were, who the users were, whether they were "inhabitants" of any particular area, and what area.

44. I now turn to the witness evidence on behalf of the Applicant.

Mrs Diana Susan Charlton

45. Mrs Charlton said she had lived at 116 The Crescent since 1971, her daughter returned with her child in 1977 and used the Land with her children for 11 years. She used the Land most days to walk through, and said the Land was used by many people throughout the year. Under cross-examination she said her daughter lived with her until 1989, and then lived at No.114 The Crescent from 1996 to 2005, and her children and her grandchildren used the park, her son moving out before 1994. She went to the Land most days walking through, and had used it with her children and grandchildren. She saw football, cricket, golf (toy/childrens), croquet, and tennis balls. The play area had swings when they arrived there, and newer

equipment now, which she assumed the Council had put in. She thought the Council maintained the land and cut the grass. At one time there was alcohol drinking, but she was not aware of antisocial behaviour. In answer to questions put by me, she walked dogs on the Land, took books to read there, talked to people there, and had visited the Land since before 1994.

46. She accepted that cars were parked on the top of the slope of the Land for about 2 years, although at no time was the area closed off completely, although the car parking did build up over time. She thought about 30 cars.

Mrs Joan Audrey Horton

47. She gave evidence that she lived at 22 The Crescent, she did not seek advice when the Applicant was considering making a town or village green application, but had downloaded Form 44 from the Government website.

48. In relation to the map at [B/21] she explained that West Chalvey was west of the railway, that the expression "locality or neighbourhood within a locality" was the same thing. She accepted there were no boundaries on this map, although she explained that East Chalvey Ward goes to Windsor Road and to the railway to the west and Ragstone Road to the south and then to the A4, in common usage East Chalvey goes north to Burlington Road. In relation to West Chalvey, this goes to the bottom of the map with the northern boundary to the A4. She had not discussed the locality, East and West Chalvey, with Mrs Charlton. She accepted under cross-examination that a reasonable estimation of people living in East and West Chalvey was 12,400.

49. As to her use of the Land, she would go through it two to three times a week to the High Street, or going somewhere else. Once a week she went to the station. She stopped working in 1981 full time, and was then part time to 1987, and walked or cycled three or four times a week thorough the Land, and when going through or past it she would see people using the Land. She went through the Land when going shopping and at the weekends. She said that no-one had told her to leave, but she had never carried out any of the recreational activities other than walking through the Land which she had spoken to. She accepted that the Council maintained the Land.

50. As to the car parking, she accepted that cars were parked on the Land at a point marked red on the plan, and she felt her indication of their position was the correct one in preference to that of Mrs Charlton.

51. She accepted that there has been anti-social behaviour, but never so much that the Land was closed off.

52. In answer to questions put by me she said there was a Chalvey Ward, which was larger than the area shown on the plan at [B/21]. She did not play games on the Land, and no one has asked her to leave it.

Mrs Margaret Trimble

53. She said that she has lived at 22 Darvill's Lane for 51 years, she had worked at Tesco in Slough and walked continuously to and back home for 21 years. She spoke to the use of the play park and the swings, and children playing football and said there was always someone there, on the Land. She walked on the footpath through the Land frequently since her retirement in 2009, although she did not go on the grass. When her grandchild came and stayed, they would then stop and go on the swings or the slides, at least four to five times per month, but her 10-year old grandchild lives on the other side of the Bath Road since he was born.

54. As to the car parking, she accepted there was a problem with parked cars, she was uncertain of the number but it was more than a couple of cars although not fifty or a hundred.

EVIDENCE ON BEHALF OF THE OBJECTOR

Ian Coventry

55. Mr Coventry spoke to a written Witness Statement at [B/248-262]. He gave evidence of the management of the Land by, and on behalf of, the Objector and produced a copy of the maintenance programme issued to Slough Enterprise Limited, who were and still are the primary contractors who carried out grounds maintenance across the Borough. He also produced a copy of the Council's byelaws, which apply to parks and open spaces in the Borough, and were adopted in 2004. The Byelaws apply to the areas listed in Schedule 1, unless otherwise stated: see Byelaw 2. These areas include "Tower House open space, The Crescent". Byelaw 3(2) provides that:

> "*No person shall walk on or ride, drive or station a horse or any vehicle over:*
> *(a) any flowerbed, shrub or plant;*
> *(b) any ground in the course of preparation as a flowerbed or for the growth of any tree, shrub or plant; or*
> *(c) any part of the ground set aside by the Council for the renovation of turf or for other landscaping purposes and indicated by a notice conspicuously displayed*".

56. Byelaw 21(1) provides that no person shall throw or strike with a bat a cricket ball except in a designated area for playing cricket; this byelaw applies to the Land: see byelaw 21(2) and Schedule 4 to the Byelaws. Byelaws 22, 23 and 24 contain certain restrictions on archery, certain types of field sports and prohibit the driving, chipping or pitching of a hard golf ball.

57. Mr Coventry accepted that the Byelaws were not currently displayed, and he was not aware of any prosecutions. He remembers byelaws being displayed in other areas, but had no recollection of byelaws being displayed here.

58. As to the car parking, he said he reported this back to the housing department.

59. I accept Mr Coventry's evidence that the Land was maintained by or on behalf of the Objector since the commencement of his employment in 2010, and for a considerable period before then.

Mr Sushil Thobhani

60. Mr Thobhani, a solicitor employed by the Council, spoke to his Witness Statement dated the 5th February 2016 [B/263], and also to the written statement of Ms Lisa Rank, of the same date [B/142-144]. Mr Thobhani produced copies of the registered Title No.BK310151, which includes the Land, as well as Tower House: see [B/267-271]. This title contains under the Charges Register a Schedule of seven leases of what are described as flats of which six were granted on various dates from November 1983 and to before May 2014 for terms of 125 years from the 5th November

1983, or more recently from later dates. He also produced a copy of a lease dated the 23rd March 2015 of Flat 3 in Tower House, the demise of which included "the Common Parts": see the Second Schedule. The expression "the Common Parts" includes "the … gardens and any other areas … outside the Managed Buildings but within the Estate which are not intended to remain private and which are to be enjoyed or used by the Tenant and occupiers of the Premises in common with the occupiers of the other flats in the Managed Buildings". Exhibit "ST4" to his witness statement was a copy of the registered title No.BK310999 to Ashbourne House, also owned by the Council. The Charges Register noted some eight leases of flats granted on long terms on various dates from October 1986 to before May 2014. I was shown a further lease dated 1st September 2014 of a flat at 24 Ashbourne House in similar terms to the lease dated 23rd March 2015.

61. Mr Thobhani produced a number of photographs. The photograph marked "LR3" at [B/147] shows a sign at position marked "X1" on the plan on the preceding page at [B/146]. Mr Thobhani spoke of two other signs, the photographs of which are at [B/148 and 149] at positions X2 and X3 on the plan; the first directs that birds should not be fed, and the second identifies "Tower House play area".

62. Mr Thobhani spoke to Ms Rank's Witness Statement in which a number of other photographs of the Land were taken from a variety of directions: see paragraph 8 and photographs (1) to (12) [B/151-162]. Again, I understand that these photographs were snapshots taken at a particular time on particular days, but, save for photograph 6, where a person is seen walking along the concrete path, none of the photographs show anyone on the Land at all. Ms Rank's exhibit "LR9" at [B/228-245] sets out a profile of Chalvey Ward, within which the Land is situated. The population of the ward is 12,499; although the date is not given it appears to be post-2013/14: see [B/230].

63. Finally, at paragraph 13 of her statement, Ms Rank says that during her time managing these blocks (the last 6 years) she witnessed only limited use of the playground area by parents and their young children, predominantly in the summer months. However, she also witnessed numbers of persons using the area to sit in whilst intoxicated and general antisocial

behaviour by youths, using foul abusive language and substance misuse in the form of smoking what she believed to be cannabis, due to the pungent smell. As Ms Rank did not appear before me, and her evidence was not tested by cross-examination, I cannot give very great weight to paragraph 13 of her statement regarding the use of the Land. In any event, because the Applicant is not relying on antisocial behaviour, as I understand its submissions, by youths as "lawful sports and pastimes", I shall disregard the evidence of antisocial behaviour in Ms Rank's statement.

Peter Bird

64. Mr Bird spoke to his written statement dated the 3rd February 2016 at [B/246-247]. He has been employed in various roles in the Council's housing department since 2002, and during 2006 and 2007 he was the housing officer for the residents of Tower and Ashbourne Houses. His statement explains the car parking problem and at paragraph 5 of his statement he said that on average there would be about a hundred cars double parked on this land, which was a source of a great number of complaints from residents of the blocks. In evidence, he said that of the 100 cars, 70 were on the Land and 30 on the residential parking areas, with typically 35-40 cars in a single row.

65. He then explained that the problem was resolved by the Council erecting a knee-high fence along the frontage of "The Crescent" and along the southern side of the access road lying to the south of Tower and Ashbourne Houses. In evidence he said that the car parking had ceased by September 2006, the car parking took up two-thirds of the Land, excluding the children's play area, and the cars were parked over the diagonal path, or they used the Land at that point to get in or out. Mr Bird accepted, under cross-examination, that the majority of cars were removed when people returned from work, that there were a lot less in the evenings, and that notwithstanding the handful of cars in the evenings, there was plenty of space for recreational use.

SUBMISSIONS ON BEHALF OF THE OBJECTOR

66. Mr Pike submitted that the period of time relied upon by the Applicant was from the 21st May 1994 to the 21st May 2014, and that registration of land as a town or village green is an onerous and burdensome matter for a

landowner and a registration authority should be careful to ensure it is satisfied that all the requirements of section 15 of the 2006 are clearly demonstrated, the burden of proving in evidence that the requirements for registration are met, lies with the Applicant. I accept those submissions.

67. Mr Pike then submitted that, as the Land was acquired with other land for the purposes of building housing in 1962, and the CPO was made under Part V of the 1957 Act, the land had been laid out for public recreation. The land had been maintained since for that purpose continuously, and byelaws made by the Corporation, the Council's predecessor, in 1952 to regulate the use of the open space in its ownership, and that the byelaws were updated in 1968 and again in 2004 and applied to the land throughout the 20-year period, which was relevant for the purposes of the Application. Mr Pike submitted that at all material times the Land had been owned and controlled by the Council, expressly regulated through byelaws and through the presence of Council employees or contractors, maintained, and expressly made available, for public recreational use. He said it was difficult to envisage a more obvious case of a public authority making land available for public recreation and conferring a right on persons to use the land for that purpose: user could not have been 'as of right'. In the course of his submissions I raised the difficulty he faced of the lack of evidence of an express consent in terms of section 93(1) of the 1957 Act. In the face of the clear legislative direction, requiring consent to use land acquired for housing purposes for providing recreational grounds, and the emphasis given to the requirement of a consent by Lord Neuberger in the Barkas case, I gave directions that the Objector would make further enquiries as to whether or not a consent could be found, and allowed the Applicant to make representations on the results of any such enquiry. I consider these further below.

68. As to the Applicant's evidence of user, Mr Pike pointed out that Mrs Horton confirmed in oral evidence that she had not used the Land for recreation, although she had walked through it several times a week as part of longer-distance journeys to work or for shopping, whereas Mr Charlton had used the Land for recreation, she said, on her own and with her children and grandchild. But the evidence of Mrs Horton and Mrs Charlton did not identify any other inhabitants of the claimed locality who had used the Land

regularly for recreation. Mrs Trimble, a resident of Chalvey, and said to be within the claimed neighbourhood, had walked the path, but not on the grass, every day between 1994 and 2009 on her way to and from work. She had used the Land, not for recreation, but as part of a longer walking route for work and for shopping trips. Mr Pike submitted that, beyond the oral evidence of Mrs Charlton and Mrs Trimble, there was no other evidence which even purported to demonstrate that inhabitants of the locality or the neighbourhood had used all of the Land for recreation continuously throughout the 20-year period, and that, on the basis of this evidence, user of the Land could be not be found to have been "significant" user by inhabitants of an identified locality or neighbourhood.

69. As to Mr Pike's submissions on the requirements of "locality" and "significant user", he relied upon judgments of Sullivan J in R v Staffordshire County Council ex p Alfred McAlpine Homes Limited [2002] EWHC 76 (Admin) per Sullivan J at paragraph 71, and of Lord Hoffmann in the Sunningwell case [2001] 1 AC 335 at 357: the user must not be occasional use by individuals as trespassers, or so trivial and sporadic as not carry the outward appearance of user as of right. Mr Pike submitted that "significant" user must be assessed by reference to the nature of the claimed neighbourhood or locality, and referred to the decisions in the Oxford County Council case [2006] UKHL 25, Cheltenham Builders [2003] EWHC 2803 (Admin) and Leeds [2010] EWHC 810 (Ch). He then submitted, that in relation to the area identified in the Application of "East and West Chalvey", this could only be a neighbourhood rather than a locality. On the basis of the evidence put forward on behalf of the Applicant, Mr Pike submitted that the Registration Authority could not be satisfied that there is a neighbourhood within a locality capable of satisfying section 15(2), that the evidence of recreational user of the land given only by Mrs Charlton and Mrs Trimble could not be sufficient for the purposes of section 15 to demonstrate significant user by inhabitants of a relevant locality or neighbourhood, and that the Registration Authority could not rationally conclude that there had been such significant user.

70. Mr Pike then submitted that use of the concrete path through the Land, by members of the public crossing the Land only, must be discounted. Mrs Charlton had used it, and indeed it was Mrs Horton's only use of the Land,

Mrs Trimble's predominant use was of the path walking to and from work or shopping.

71. Mr Pike then made submissions as to the lawfulness of sports and pastimes, relying upon R (Oxfordshire and Buckinghamshire) Mental Health NHS Trust v Oxfordshire County Council [2010] EWHC 530 (Admin) per Waxman J at paragraph 90.

72. Mr Pike then made submissions about the interruption of the use of the Land by unauthorised car parking. He referred to the evidence that there had been car parking for a period of many months ending in late 2006, and that according to Mrs Charlton, the period was up to 12 months rather than 18 months. Mr Pike submitted that the parking use by members of the public prevented use of that part of the Land in which the cars were parked for lawful sports and pastimes whilst the parking occurred. The parked cars entirely obstructed the surface of the Land and parking occurred during the daytime on weekdays and Saturdays, for many months: the unauthorised parking constituted an interruption in the claimed 20-year period of use on that part of the Land which was subject to that parking. Mr Pike accepted that the issue is fact-sensitive.

73. As part of his submissions on the "as of right" issue, Mr Pike abandoned the Objector's reliance upon the sign at position X1 but maintained reliance upon the two signs at positions X2 and X3, although he accepted they had no separate effect of making the land available for public recreational use.

74. In relation to the terms of the residential leases of Tower House and Ashbourne House, Mr Pike submitted that the leases conferred a right on the tenants to use the common parts, including the Land, which was within the same title number of the tower blocks.

75. I now consider the letter dated the 16th March 2016 from the Objector setting out the results of a search of the County Archives in Reading concerning the acquisition of the Land under section 93 of the 1957 Act. The letter states that nothing in the minute books for the years 1962 – 1966 has

been found which discloses that specific ministerial consent was sought or granted for the laying out of the Land as recreation grounds. The letter therefore contains a submission that, the absence of any specific ministerial consent for the laying out of the Land as recreation grounds does not mean that such consent was required and was not obtained, with the consequence that in the five decades since Tower House and Ashbourne House were erected, the Council has not *lawfully* laid out and maintained the Land for public recreation. I understand the primary submission to be that the Land was lawfully laid out and since maintained for public recreation. Three alternative submissions are made in support of the primary submission.

76. First, that in the light of the decision of the Supreme Court in Barkas there is in any event no need to identify a specific act under a specific statutory power, if the local authority has clearly allocated the land for public open space/recreational uses, as was the case here. I cannot accept that that was the effect of the decision in Barkas, in relation to land acquired under section 93(1) of the 1957 Act. Lord Neuberger emphasised the requirement of a consent under the statutory powers that were a re-enactment of section 93(1) of the 1957 Act, and Lord Carnwath accepted as correct Lord Neuberger's reasoning. I do not find anything in Lord Carnwath's judgment to show that a specific and express statutory requirement of consent is dispensed with.

77. Second, the Objector submits that separate ministerial consent for the laying out of the Land as recreation grounds was not needed, because the Minister for Housing confirmed the CPO, which itself was expressly made pursuant to Part V of the 1957 Act, which included both sections 93 and 96, and not merely section 96 alone. Accordingly, the Objector says, the minister had thereby given his consent for both the acquisition of the land for the provision of housing accommodation (section 96) and any other exercise of powers within Part V, including those matters in section 93(1) – the provision of any recreation grounds. The CPO states, at clause 1, that "the Corporation are, under Part V of the Housing Act, 1957, hereby authorised to purchase compulsorily for the purpose of the provision of housing accommodation, the land which is described in the Schedule hereto …". I cannot read those words as saying anything other than authorising the

compulsory purchase, the power to acquire being in section 96, and in Part V of the 1957 Act. I therefore cannot accept this submission.

78. Third, the Objector then relies upon the presumption of regularity, given the fact that the CPO was confirmed in 1962, the Land has been laid out and maintained for the last five decades as recreation grounds or open space with no suggestion that the Council had acted unlawfully in doing so, and there is no evidence which suggests that the Council did not obtain a specific ministerial consent. The Objector relies upon the presumption of regularity as explained in Naylor v Essex County Council [2014] EWHC 2560 (Admin) at [27] and R (Goodman) v Secretary of State [2015] EWHC 2576 (Admin) at [20-25]. In the Naylor case the Court cited Calder Gravel Limited v Kirklees MBC (1989) 60 P&CR 322 at 338-339, where Sir Nicholas Browne-Wilkinson V.-C. said:

> "*… it seems to me desirable that we should call [the presumption] by English words, and I propose to call it 'the presumption of regularity'. The presumption is that when there has been a long-term enjoyment of a right which can only have come into existence by virtue of a grant or some other legal act, then the law presumes, in the absence of proof to the contrary, that there was a lawful origin. … the same presumption of regularity can arise where the validity of an act done by a public authority depends on the existence of a state of facts which cannot, with the passage of time, be proved; the presumption is that the statutory authority has acted lawfully and in accordance with its duty*".

Further, in R (Archway) Sheet Metal Works Trustees v Secretary of State for Communities and Local Government [2015] EWHC 794 (Admin), Dove J explained at [44]:

> "*A question has arisen in the case as to whether what is commonly referred to as the presumption of regularity in public law applies to the Council's resolution to make the compulsory purchase order. The presumption of regularity is the principle that public law acts stand and are to be regarded and relied upon as lawful unless and until quashed as being unlawful by the Court*".

He continued at [48]:

> "*In my view it is clear, on the highest authority, that this principle [of regularity] applies to all administrative acts, including the internal resolution of local authorities, and there is no justification, either in principle or on the basis of the jurisprudence, for distinguishing those kinds of decision.*"

The Judge had earlier set out further legal authority in support of the presumption of regularity at [47].

79. I set out my conclusions on this third submission of the Objector in the final section of this Report, below.

SUBMISSIONS ON BEHALF OF THE APPLICANT

80. I have three documents put before me on behalf of the Applicant. First, a "Presentation to public enquiry re Chalvey Village Green" ("the Presentation"), which was accompanied by a plan, minutes of the Chalvey Community Forum of the 14th September 2005, minutes agreed for the 2nd November 2005, minutes for the 26th April 2006, and minutes for the 13th September 2006: see [B/303-313]. The Presentation, which was supported by an opening statement from Mrs Horton, says that the Land has been used by children, teenagers and adults for play, games and general leisure, and that there are many local residents who have lived in The Crescent and nearby for over 40 years who can testify to the facts, that the users that Mrs Horton has seen must add up to thousands. The Presentation contains comments on Ms Lisa Rank's Witness Statement, particularly relating to persons drinking on the green. In the case of the incident forms in [B/176, 178, 180, 191, 193, and 197], which Mrs Horton correctly pointed out post-dated the Application, the Presentation draws attention to individuals being required to leave and being informed that the property was private, the suspect was not a resident, the area was a private residential area, persons are trespassing, as the case may be. The Presentation then submits that these incident Reports support the Applicant's contention that the Land is not and was not actually designated for the general public use, but reserved for the residents of Tower and Ashbourne Houses, and supports the Applicant's contention that user by

persons other than those residents would have been "as of right" over the required period.

81. The Presentation then addresses Mr Bird's Witness Statement regarding the problem of parking, setting out certain details and dimensions, but then submitting that the Applicant refutes entirely the contention that this temporary parking problem amounted to closure of the "green" such as to negate the 20-year continuity of use by the general public, as the area continued to be used as users, children especially, had nowhere else to go that was easily accessible. What the accompanying minutes of meetings of the Applicant clearly show is that the Applicant had been pressing the Council to deal with the problem of parking on the Land during some 12 months prior to September 2006.

82. Second, a Concluding Statement, which I shall treat as closing submissions. Although this was in manuscript, and not typed, Mrs Horton's writing is perfectly clear, and readable. The closing submissions include submissions under specific topic headings.

83. As to the neighbourhood/locality issue, the submission is that Chalvey people regard "Chalvey" to constitute the area bounded by Windsor Road, Bath Road (A4), Tuns Lane and the M4, with the part to the east of the rail bridge being locally considered as "East Chalvey" and the main route through it as "Chalvey Road East". The part to the west of the rail bridge was locally considered as "West Chalvey". Both are mentioned in the application form, and leave no doubt that the "green's" users came from all over Chalvey, not just the eastern section where the Land is situated. It is said that Chalvey existed historically in its own right long before Slough existed, the A4 boundary had existed for centuries as the Bath Road, as had Windsor Road, which along with the river to the south form natural boundaries. Westwards, Old Chalvey ended roughly where Tuns Lane is today. The submission says that the description "East and West Chalvey" is clear as to the area intended, the map annotated and explained exactly the area served by "the green", and that it is clear that it is a specific cohesive area enclosed by major A roads and the M4, and that the Applicant is the "Chalvey Community Forum", indicative of the social cohesiveness of local people, which has been in existence for many years.

84. As to the evidence, and to the Objector's submission that the Land's users have not been proved to be from the local area, it is said that this implies that such users must have deliberately travelled in from some distance beyond the area whilst Chalvey people have not used it, and that flies in the face of common sense. The submission relies upon the evidence of Mrs Charlton and Mrs Trimble, who referred to their grandchildren, and to the map at [B/19] giving actual addresses of users taken on a snapshot survey, with the submission that a similar survey of users on any other day would have produced similar results. To the suggestion that the Applicant's witnesses did not use the Land personally themselves, reference is made to the photograph at [B/16] of a spring afternoon on the green submitted as a typical scene to be found on fair weather days and the use to which the Land is put. It is submitted and confirmed that the Land's long term use has been by long-standing local residents who can testify their personal observations of the Land's use over the requisite 20 years, the three oral witnesses were long term residents, and that between them they have over the years personally observed many thousands of recreational users of the Land. It is said that first hand eye witness evidence is accepted daily in the Courts, and unless the witnesses are proved to lack credibility or are lying, such is good and valid evidence.

85. In relation to Lisa Rank's Witness Statement, reference is made to a number of incident reports citing alcohol related antisocial behaviour and nuisance and attention is drawn to the Applicant's opening statement which collectively confirm that the Land is intended only for use by the residents of Tower and Ashbourne Houses, the residential lease of a flat in Tower House dated the 23rd March 2015 confirms the right of tenants to use the Land, which use would indeed be "by right", that although the Land could also have been made available for the general public, Ms Rank's evidence, it is said, shows that it was actually designated for use by Tower and Ashbourne Houses residents only.

86. In relation to Mr Bird's Witness Statement, submissions are first made in relation to the Redcar & Cleveland case to the effect that if local inhabitants had "overwhelmingly deferred" to extensive use of the land by others, this would indeed disqualify them, but if they asserted their rights to

use the land it was a question of whether their efforts were sufficient to bring home to the landowner, here the Council, that they were asserting their right to use the Land. The submission then refers to the efforts by the Applicant from the 14th September 2005, when there were only a few vehicles (seven untaxed and four for sale, plus others), and a series of letters to the Council requesting action and suggesting remedies. The submission concludes, on this point, by saying that even when the offending vehicles were at their height, the play area was completely accessible and there was sufficient space remaining of the Land generally for ball games etc pointing out that Mr Bird admitted in evidence that commuters removed their cars in early evening, thus freeing up space for recreational users.

87. In conclusion, the submission then draws attention to the incidents exhibited to Ms Rank's statement, the incidents she cites all post-date the date of the Application. The submission says that local residents have been trying to assert their right to use the Land by asking the Council to curtail issue of alcohol licences in Chalvey, that use of the green has reduced due to alcohol related problems, for which the Council itself is to some extent responsible, and it is not for want of trying on the part of residents to retain their unfettered use of the Land. It is then submitted that the Applicant meets the 20-year use of the Land as of right for all foregoing reasons.

88. Third, I have the response dated 8th April 2016 of the Applicant to the Objector's submission dated the 16th March 2016. This Response deals with two matters.

89. First, which relates to Mr Thobhani's first point in the letter of the 16th March, that the permission of the Minister to the laying out of the land as a recreation ground fell within the scope of the approval of the CPO itself, the Applicant submits that the Minister's office was not advised of any intention to lay out recreation grounds, and consent for such was neither sought not give during the process of obtaining the CPO. I accept the submission that the consent of the Minister to a CPO is not a consent to the use of land acquired under section 93(1) of the 1957 Act for recreational grounds. In any event, I have not accepted the submission on behalf of the Objector that approval of the CPO carried with it the requisite consent of the laying of the Land as a recreation ground, for the reasons set out above.

90. Second, submissions are made concerning the Barkas case, and reference is made to the report of the case at [B/39] at [5], and the words "*the section did not require the use of 'buildings', 'recreation grounds' or 'other buildings or land' to be restricted to 'the persons for whom the housing accommodation is provided', and that the use could also validly extend to other members of the public*". The Applicant submits that the word "could" does not mean "categorically does" extend to other members of the public, only that there is a potential for such extension. It is submitted that the Housing Act, as quoted by Mr Thobhani, sets the initial status of the grounds in question as being solely for the use of the residents of Tower and Ashbourne Houses, and not for use by the general public. This is said to be confirmed in [B/142], para 5 of the Witness Statement of Lisa Rank, which refers to the photograph of the sign erected in the 1960s which reads "private drive" and underneath "grounds for use of occupants of flats only". The submission is that this sign, which is still there today, although now behind some chicken wire, indicates a status of the Land, and that the Council has furnished no documents detailing any subsequent legal or declared change in "grounds for use of occupants only" status; that status thus remains unchanged to this day. The submission sets out Ms Rank's snapshot of recent occasions when various people were officially required to leave the grounds by reference to the incident reports at [B/176, 178, 180, 191, 193 and 197]. It is then submitted that it is only on "restricted-use private property that trespass and lack of entitlement to be present will be employed as a reason (although not necessarily the only reason) to order away an undesirable person", that the Barkas case allows for the possibility that the use of the ground in question *could* have validly extended to members of the public, but that in this case there is no valid extension. It is submitted the grounds were clearly and publically labelled at the outset as being for the use of the occupants of the flats only, and continue to be so labelled today. It is submitted that on multiple recent occasions the reason given to require people to leave the grounds has been that they are reserved for the occupants of the flats, and that this exclusive status has therefore been the Council's publically declared position all along. It is submitted that there have never been any events on the grounds in question requiring the public to obtain a ticket or permit for access, that over the 20-year period prior to the Application there has collectively been many thousands of individual uses of

the grounds by the general public of Chalvey for recreation and lawful sports, that witness testimony from longstanding residents has been supplied. It is therefore submitted that the public's use has been "without force, stealth or by licence of the owner", and reference is made to a photograph depicting a typical afternoon's viewable use. It is therefore said that the public's use has been in the face of the Council's declared reservation of the grounds for the use of the occupants of the flats and that such usage therefore has been "as of right" thereby fulfilling the requirements necessary for registration as a village green.

91. Although the Applicant makes no separate submissions as to the potential application of the presumption of regularity, I understand its final submissions to amount to, in effect, a submission that, whilst use of the Land by residential occupants of Tower and Ashbourne Houses may have been "by right", use by inhabitants of East and West Chalvey has been "as of right" because the Council's position over the years has been that the Land was provided for, and reserved to, the residents of the aforesaid Houses.

92. Save for the Applicant, and its witnesses, no members of the public appeared at the Inquiry or made any submissions.

CONCLUSIONS

93. I found all the witnesses, for both the Applicant and the Objector, honest and helpful. The evidence was not taken under oath.

94. The evidence and the respective Submissions raised a number of issues in relation to the requirements under section 15(2) of the 2006 Act.

(1) Whether use of the concrete path to pass and repass across the Land can be relied on as part of any "lawful sports and pastimes"

95. I accept the Objector's submission that such use cannot be relied on: see per Lightman J (as he then was) Oxfordshire CC v Oxford City Council and an [2004] Ch 253 at paras 102-105. That is because use of the concrete path merely to cross the Land would appear to the landowner as exercising or asserting a right of way only. I therefore disregard that part of the evidence of Mrs Charlton, and Mrs Trimble, regarding their use of the concrete path to merely pass over the Land, and I disregard Mrs Horton's use of the Land,

which was limited to use of the concrete path, to walk over the Land going somewhere else.

(2) The relevance of the evidence of the antisocial behaviour to "lawful sports and pastimes"

96. The evidence of this is rather limited to what is said in Ms Rank's witness statement at para 13, and the accompanying incident report forms, all dated after the date of the Application. Some antisocial behaviour by young people was accepted by Mrs Horton and Mrs Trimble, but not by Mrs Charlton. Whilst I accept the general submission by the Objector that no account should be taken of unlawful acts, I do not find that the Applicant relied upon unlawful activities, that is activities actually proscribed by the law in some way. I do not understand the Applicant's reliance upon young people "larking about" as necessarily involving an unlawful activity. Further, it is not clear to me that drinking alcohol would necessarily be unlawful in these terms. As the Applicant did not rely on drinking or the activity of taking drugs as constituting "lawful sports and pastimes", I shall ignore this behaviour.

(3) Whether the 20-year period of continuity of "lawful sports and pastimes" broken by car parking

97. I accept the evidence of Mr Bird that there was car parking on the Land that built up to at worst about 70 cars. I also find that, at the height of the parking, cars were parked on the norther part of the Land up to the concrete path, and cars crossed it to enter and leave the area. But that when most of the cars left by about 5pm or 5:30pm, I accept the evidence of the Applicant's witnesses that there was then space for recreational activities on the Land, and that the children's play area was always available. Both parties agreed that the car parking problem had been resolved by the erection of low metal fences in about September 2006. Mrs Charlton said the parking problem lasted for between two years and 18 months. Mr Bird seemed unsure as to precisely when it started. The witnesses appeared to agree that it started with a few cars and then the numbers increased over a number of months. I find that the parking commenced about 18 months before September 2006, beginning with a few cars, and then increasing in number until it ceased in September 2006.

98. I do not accept the Objector's submission that the period of car parking, and its extent, broke the 20-year period during which the Applicant must show continuity of "lawful sports and pastimes" for the following reasons. First, there was no question here of those using the Land during the relevant parking problem period deferring to a use of the Land, or part of it, by or permitted by the Objector. On the contrary, the Applicant made representations to the Council requesting action to end the parking: see minutes and other references of the Applicant at [B/309C, 311 and 313]. Second, the steps taken by the Applicant at the time would have given an appearance to the Objector, as the landowner, that if rights were being asserted "as of right", the Applicant was positively asserting rights to free the Land of obstructions to its use for recreational purposes: see the Sunningwell case, per Lord Hoffmann at pp352H-353A. Third, that in any event, and as a matter of fact and degree, the parking did not last long enough or was extensive enough, as to prevent recreational use of the Land for the period of months prior to September 2006.

(4) Whether "lawful sports and pastimes" were indulged in for 20 years to the date of the Application

99. I now come to the first of the more substantive issues. The Applicant's evidence as to the precise activities that took place on the Land is limited to three sources. First, the statements in the "Statement of Justification" that speak of "recreation, leisure and informal sport", and the activities listed on page 2 at [B/13] of ball games, cycling, scootering, dog exercising, snow-balling and sledging. I accept that these activities would amount to "lawful sports and pastimes", and I do not understand that the Objector says otherwise. But I am not persuaded that "larking about" or adults simply sitting and enjoying being out would amount to "lawful sports and pastimes" in the absence of more precise explanations of what these activities amounted to. Second, as to the documents at [B/18, 22, 24 and 28], I can give very little weigh to these documents as they do not specify what activities were carried out on the Land, and in the case of [B/28] the versification statements of 11 people do not even say that the signatories carried out sports and pastimes themselves. Third, the testimony of the Applicant's witnesses. Mrs Horton said she had not used the Land for recreation, apart from using the concrete path to cross it. Mrs Charlton had used the Land for walking dogs and built a snowman, and she and her children and grandchildren had used it for

walking, for exercise every year since 1994. Mrs Trimble had seen children play in the playground area and other children playing football.

100. I do not understand that the Objector submits that no "lawful sports and pastimes" took place during the whole of the requisite 20-year period to the 21st May 2014. I find, on the evidence, that the Land was at least used by young persons and children for the recreational activities associated with ball games, and in the case of young children, for activities associated with the use of the slides and swings, and for a period commencing prior to May 1994 and continuing to the date of the Application. I also accept that dog walking took place by at least one person (Mrs Charlton). There is also the probability that the other claimed activities of cycling, scootering, snow-balling and sledging took place from time to time, but I heard no evidence as to when, and for what periods these activities took place during the 20-year period to 21st May 2014, or as to whether the activities took place by local inhabitants of any particular area. I cannot accept the evidence, relied by the Applicant, or the Applicant's submissions, to the effect only that there has been use of the Land for "lawful sports and pastimes continuously for 20 years". Save for the testimony of its witnesses, I can give very little weight to the material in the written documents relied on by the Applicant, which refer only to use for 20 years for "lawful sports and pastimes". I do not know from these documents what those activities were, how long they were enjoyed, or by whom.

(5) Whether the "lawful sports and pastimes" were indulged in by a "significant number of the inhabitants of any locality, or a neighbourhood within a locality"

101. In respect of this issue, as with the other issues, of course, the Registration Authority is limited to a consideration of the evidence put before it. The area identified by the Applicant on the map at [B/21], and as explained by Mrs Horton at the Inquiry, does not appear to have any coherent boundary. It cannot be a "locality", as it does not equate with a local authority administrative boundary of any kind. If it is anything, it can only be a "neighbourhood". It was unclear how the area was chosen by the Applicant. Mrs Horton had not discussed the area chosen with Mrs Charlton, as she did not think it was relevant. Mrs Charlton had not heard of the concept of a locality or a neighbourhood in relation to an application for a

town or village green, and Mrs Trimble gave no evidence on the point. I heard no testimony as to why the chosen area satisfied the tests of having a sufficient degree of cohesiveness, as indicated in Cheltenham Builders Limited v South Gloucester District Council [2003] EWHC 2803 (Admin), at [85], and even allowing for the nuanced position referred to in the Inspector's report quoted in Leeds Group v Leeds City Council [2010] EWHC 810 (Ch) at [36], that "*in an urban context, a neighbourhood would normally be an area where people might reasonably regard themselves as living in the same portion or district of the town".* Save for Mrs Horton's and Mrs Charlton's evidence, I heard, and read, no testimony or evidence that explained why the people who engaged in "lawful sports and pastimes" regarded themselves as living in the same portion or district of the town of Slough, such as could reasonably be called a neighbourhood. Indeed, as the addresses of four of the 11 persons who signed the Verification Statement at [B/28] appear to be outside the area of the map at [B/21], that rather shows that certainly some of those persons would not regard themselves as part of the "neighbourhood" identified by the Applicant.

102. I have taken into account that the Applicant itself is the Chalvey Community Forum, but that alone does not assist me as to the identity of the area sought to be said to be a neighbourhood for the purposes of the Application. The evidence is wholly inadequate to show that a "neighbourhood" had been identified that satisfies the guidance in Cheltenham Builders Limited v South Gloucester District Council [2003] EWHC 2803 (Admin) [2003] 4 PLR 95, per Sullivan J at [85], as to a sufficient degree of cohesiveness. I do not know why the area on the Map at [B/21] has such cohesiveness on the material put forward by the Applicant. Nor did I hear from a sufficient number of purported inhabitants that the area was an "*area where people might reasonably regard themselves as living in the same portion or district of the town*", as considered in the Leeds case. I only heard from three witnesses for the Applicant, and only Mrs Horton said anything of any substance about the identification of the "neighbourhood". It seems to me that, in the terms expressed in the Leeds case, there is here, on the description of the area on map [B/21] by Mrs Horton of what she says is East and West Chalvey, "*... a disparate collection of pieces of residential development which had been 'cobbled together' just for the purposes of*

making a town or village green claim". That is not good enough to satisfy the statutory requirement.

103. Although that disposes of the need to consider whether "a significant number of the inhabitants" of a locality or neighbourhood indulged in the claimed sports and pastimes, I consider this further requirement in case the Registration Authority declines to accept my conclusions on the locality or neighbourhood point. As pointed out above, the Registration Authority is limited to the evidence adduced by the Applicant. The signed use and verification statements at [B/18 and 28] say only that "significant numbers of local inhabitants" used the Land for lawful sports and pastimes since before May 1994, but gave no actual numbers for any period or periods or at all. Those statements were signed by six people ([B/18]) and in the case of [B/28] eight people with addresses within the map [B/21] area. None of the Applicant's witnesses gave any actual or estimates of numbers. The documents at [B/22 and 24] list users of the Land on the 19th May 2014 (four in the morning and four in the afternoon), and 25th May (five) and 25th June (three) 2014. But the material in those documents, and the testimony I heard, does not convince me at all that, if the "neighbourhood" is the area identified on the map at [B/21], that a significant number of the inhabitants of that neighbourhood indulged in the claimed activities throughout the requisite 20-year period to 21st May 2014. I appreciate that the Chalvey Ward is more extensive than the area on Map [B/21], and that, having regard to the Ward's population of about 12,400, the population of the area on the map may be smaller. But I neither read nor heard any evidence as to what that population might be, how many persons who were said to be "local inhabitants" used the Land, or what periods, other than the evidence of Mrs Horton, Mrs Charlton and Mrs Trimble, and "snapshots" of users I mentioned above. This is a totally inadequate basis upon which I can make any findings as to whether a significant number of local inhabitants of the area on the map at [B/21] used the Land continuously for 20 years.

104. There is the further point that the claimed user, by the local inhabitants, must be "as of right", an issue I deal with below. But, as the submissions of the Applicant are that any user by tenants of Town and Ashbourne Houses was by permission, and therefore not "as of right", then, save for the few examples I identified above, no evidence was put before me

as to the numbers of local inhabitants, who indulged in the claimed sports and pastimes, were other than tenants of those Houses. I therefore can make no finding that all, or a certain proportion of, the local inhabitants who might have indulged "as of right" were non-tenants.

105. In conclusion, the evidence is wholly inadequate to satisfy the requirement that, if there were "lawful sports and pastimes", indulged for the relevant 20-year period "as of right", they were indulged in by a "significant number of the inhabitants of any locality, or a neighbourhood within a locality". I conclude that this requirement is not shown to be satisfied by the Applicant.

(6) Whether the claimed user was "as of right"

106. If the Registration Authority does not accept my findings and conclusions on the issue of "significant number of the inhabitants of any locality, or a neighbourhood within a locality", then the Authority will need to consider the "as of right" issue. The Applicant's submissions on this issue identify some important points, and reveal an understanding of the difference between a user "by right" from one "as of right".

107. First, the Applicant says that although the Land could also have been made available for the general public, Ms Rank's evidence shows that it was actually designated for use by Tower and Ashbourne Houses residents only, which is said to be "by right". So that other non-residents' user would have been "as of right". Reliance is also placed on the sign at position "X1". Apart from the material in Ms Ranks witness statement, there is very little material that shows that the tenants of Town and Ashbourne Houses had permission to use the Land. The tenancies that I was shown were both dated after the date of the Application. If the leases that are noted in the Charges Register of the two registered titles confer on the tenants rights in a form similar to the sample leases provided to me, then I would accept that such tenants would be entitled to use the Land "by right" rather than "as of right". But, whatever the true position, there is no real difference between the parties in the sense that the Applicant says that the Land was available to be used by the residents of the House by permission, and the Objector is not contending otherwise.

108. The Applicant's essential point is that Ms Rank's evidence shows that the alleged miscreants on the Land were regarded as trespassers, and the Applicant relies on the material in the incident reports at [B/164-197]. The Applicant therefore says that the Objector was treating non-residents as not having permission to be on the Land, and therefore non-residents were there "as of right". The first difficulty that the Applicant faces is that the incident reports only deal with a period after the date of the Application. There is no evidence supporting the Applicant's submission that non-residents were treated as trespassers at all times during the 20-year period prior to the Application. In any event, treating non-residents as trespassers would have been incompatible with the position explained below in consequence of laying out recreation grounds, and making byelaws, plainly available to non-residents as well as residents.

109. Second, the Applicant submits that the Barkas case, and the reference to the words in para [5] of the report of the case at [B/39], relating to section 93 of the 1957 Act, "*that the [recreational] use could also validly extend to other members of the public*", the word "could" does not mean "categorically does" extend to other members of the public, only that there is a potential for such extension. The Applicant says, in effect, that there was no such extension here.

110. The answers to these submissions are as follows.

111. First, as to the failure of the Objector to find and produce the requisite consent in terms of section 93(1) of the 1957 Act, I accept the Objector's submission, that the presumption of regularity falls to be applied here. Although the Applicant points to the evidence that the Council, in regard to the anti-social behaviour, dealt with the suspects on the basis that they were trespassers as it was said that the Land was reserved to the residents of Town and Ashbourne Houses, I am not of the opinion that that evidence, as to events after the Application, rebuts the presumption. Indeed, it is not inconsistent with it as a presumed regularity would be required even if the Land was to be laid out and maintained only for the residents of the Houses. There was no other evidence before me that rebuts the presumption. It is quite clear that the Land has been laid out and maintained for recreational purposes for some considerable time.

112. Second, as to the sign at position "X1", this is not on the Land, and to read it, one backs the Land and faces the area of grass immediate abutting one of the Houses, and this grass is separated from the Land by an internal path, drive or walkway. I do not accept that that sign would have been treated over the years as making it clear that non-residents would be trespassing on the Land.

Third, in the absence of any signs or fences on or around the Land that would have made clear that the Land was only available to residents of the two Houses, it seems to me that the public, local inhabitants or otherwise, would have understood the provision of the Land for recreational purposes as being available to non-residents of the two Houses. The two signs at positions "X2" and "X3" on the plan at [B/146], which are clearly not directed only towards residents of the two House, are entirely consistent with this. It seems to me that the Land was made available to the public in the exercise of the powers to provide recreation grounds pursuant to section 93(1) of the 1957 Act. The requirements for showing that user of the Land was "by right", as explained in the Barkas case, are satisfied here. There are no unusual facts here for the purposes of the comment of Lord Neuberger at [24] in that case.

113. Fourth, the byelaws that regulate the use of the Land were made under section 164 of the Public Health Act 1875, section 15 of the Open Spaces Act 1906 and sections 12 and 15 of the 1906 Act in respect of pleasure grounds, public walks and open spaces: see the preamble to the Byelaws at [B/252]. Section 164 of the 1875 Act refers to *public* walks or pleasure grounds; as to sections 12 and 15 of the 1906 Act, whilst the expression "open spaces" is not characterised as *public* open spaces, section 15 provides that the byelaws may regulate admission and the preservation of order. I find nothing in those enabling powers, or the Byelaws themselves, as restrict the use of the Land to the inhabitants of Town and Ashbourne Houses. In my view they regulate the use of the Land by the public, and not only the residents of those Houses. Further, the limitations, restrictions and prohibitions on certain specified activities carry the very strong implication of a permission to the public to be on the land: see Byelaws 3(2) (restrictions on walking), 21(1) (restrictions on cricket balls), 23 (restrictions on certain types of field sports) and 24 (restrictions on the use of a hard golf ball).These restrictions are predicated

on the basis that the public has permission to be on the Land, to walk and to play sports, but subject to the restrictions. I conclude that the principles in the Newhaven case are satisfied here. Even if the use of the Land is not with permission by virtue of the exercise of powers under section 93(1) of the 1957 Act, there has been an implied permission pursuant to the Byelaws.

114. According, I reject the Applicant's submissions on the "as of right" issue, and accept those of the Objector that the use of the Land, whether by local inhabitants or others, was "by right" and not "as of right".

(7) Recommendations

115. I therefore recommend that the Registration Authority should reject the Application on the grounds that all the requirements of section 15(2) of the 2006 Act are not satisfied for the reasons in this Report.

Falcon Chambers **BARRY DENYER-GREEN**

Falcon Court

London EC4Y 1AA **6th May 2016**

IN THE MATTER OF AN APPLICATION TO REGISTER LAND AT CHALVEY, SLOUGH, AS A TOWN OR VILLAGE GREEN

REPORT

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